GENDER-BASED AFFIRMATIVE ACTION

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Affirmative (positive) action, reverse discrimination, or simply preferential treatment, to use a slightly more neutral expression, or, more bluntly, compensation for a past wrong, seems to be a somewhat quashed fashion in Europe, especially in the light of the recent judgment of the European Court of Justice handed down in the *Kalanke* case.[1] It must first be said that affirmative action is a process by which employers take steps to undo the present effects of past discrimination. The purpose of gender-based affirmative action is to redress the imbalance between men and women in working life, even to the point when a man or woman representing the underrepresented sex is the beneficiary at the so-called point of arrival (see below), i.e., for example, when an appointment or promotion is about to be made. However, positive action does not necessarily imply reverse discrimination.[2]

1. The legal framework of equal treatment in the European Communities and the Kalanke case

It seems apposite to restate the facts of the *Kalanke* case first. Some introductory remarks concerning the background are also necessary. In this case, the Court was faced for the first time ever with a quota system expressly benefitting women in the light of Article 2(4) and Article 2(1) of the Equal Treatment Directive.[3] The purpose of the equal treatment principle, as set out in Article 1(1) of the Directive, is to "put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security." Article 2(1) further

[1] Case C-450/93 *Eckhard Kalanke v. Freie Hansestadt Bremen*, n.y.r. The judgment was handed down on 17 October 1995. I would like to forward my thanks to Ms. Marion Ehmann (Master of European Law 1996, School of Law, Stockholm University) for many deeply rewarding discussions on the *Kalanke* judgment.

[2] For the terminology, see Gwyneth Pitt, *Can Reverse Discrimination Be Justified?*, in Discrimination: The Limits of Law. Eds. Bob Hepple & Erika M. Szyszczak (1992) p. 282.

[3] 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.

provides: "For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status." Some exceptions to the main rule are provided for. One such exception is stated in 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)" (emphasis added).[4]

The facts of the *Kalanke* case were as follows. The Bremen State, similarly to a few other States in the Federal Republic of Germany,[5] issued provisions stating that women who had qualifications equal to those of their male co-applicants should be given priority in sectors in which they were underrepresented. Under-representation was said to exist when the women did not represent at least one half of the persons in individual pay, remuneration or salary brackets in the relevant personnel group of an official body. There was a vacant post of a section manager in the Parks Department of the City of Bremen. There were two applicants for the post, Mr. Kalanke (a male) and Ms. Glissman (a female). Ms. Glissman was appointed with reference to the State legislation. Mr. Kalanke appealed the decision. The Federal Labour Court (Bundesarbeitsgericht) upheld the constitutionality of the Bremen legislation in the light of the German Constitution, but referred the question as to whether the State legislation was in conformity with the E.C. Directive to the European Court of Justice for a preliminary ruling under Article 177 of the E.C. Treaty.

Tesauro, the Advocate General (henceforth AG), presented an extensively elaborated and revealing opinion supported by references to various cases appearing in the U.S.[6] First of all, AG posed the following question: in what way could the *formal* aspect of equality (equal treatment, as between individuals belonging to different groups) be squared with the *substantive* aspect (equal treatment, as between groups)? In fact, this was equivalent to asking the following question: "must each individual's right not to be discriminated against on grounds of sex .... yield to the rights of the disadvantaged group, in this case women, in order to compensate for the discrimination suffered by that group in the past?"[7] From this

[4] Cf. also the Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women.

[5] See Josephine Shaw, *Positive Action for Women in Germany. The Use of Legally Binding Quota Systems*, in Discrimination: Limits of the law. Eds. Bob Hepple & Erika M. Szyszczak (1992) pp. 386-411 for a detailed account of the German experience.

[6] AG's opinion, paras. 8-9, see *infra* at 5.

[7] *Op.cit.*, para. 7.

point of view, AG further held that Article 2(4) allows for two ways of interpretation, i.e. that the concept of equal opportunities might mean equality either with respect to *starting points* or with respect to *points of arrival.* AG concluded: "To my mind, giving equal opportunities can only mean putting people in a position to attain equal results and hence restoring conditions of equality as between members of the two sexes as regards starting points."[8] AG continued to say that the existing inequality between men and women may be lifted by means of positive action, according to Article 2(4)

> "only so as to raise the starting threshold of the disadvantaged category in order to secure an effective situation of equal opportunity. Positive action must therefore be directed at removing the obstacles preventing women from having equal opportunities by tackling, for example, educational guidance and vocational training. In contrast, positive action may not be directed towards guaranteeing women equal results from occupying a job, that is to say, at points of arrival, by way of compensation for historical discrimination. In sum, positive action may not be regarded, even less employed, as a means of remedying, through discriminatory measures, a situation of impaired inequality in the past."[9]

Therefore, Article 2(4) could not be taken to stipulate any "pure and simple reverse discrimination, that is to say, through measures not in fact designed to remove the obstacles preventing women from pursuing the same results on equal terms, but to confer the results on them directly or, in any event, to grant them priority in attaining those results *simply because they are women.*"[10] AG found that the Bremen legislation had not removed the obstacles which brought about the actual situation, and at any rate, the Bremen legislation was "definitely disproportionate in relation to the aim pursued .... since that aim remains that of achieving equal opportunities for men and women and not of guaranteeing women the result where conditions are equal".[11]

In a rather narrowly designed opinion, the Court of Justice held that in the light of Article 2(1) of the Directive "a national rule that, where men and women who are candidates for the same promotion are equally qualified, women are automatically to be given priority in sectors where they are under-represented, involves discrimination on grounds of sex".[12] The Court said that Article 2(4) "permits national measures relating to access of employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on

[8] *Op.cit.*, para. 13.
[9] *Op.cit.*, para. 19.
[10] *Op.cit.*, para. 22. Emphasis in original.
[11] *Op.cit.*, para. 25.
[12] Judgment of the Court, para. 16.

the labour market and to pursue a career on an equal footing with men".[13] As a derogation from an individual right, Article 2(4) must be, however, interpreted in such a way as to strictly follow the proportionality principle.[14] The Court then concluded that national rules which guarantee women absolute and unconditional priority for appointment or promotion "go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive".[15] In its declaration, the Court found that the Directive precluded national rules 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....."* (emphasis added).

In comparison, it is worth saying that AG had declared that women could not be given automatic priority if they had the same qualifications as male applicants, "simply because they are under-represented ...., that is to say, where they do not account for one half of the personnel".[16] There does not seem to be any greater difference between the declarations of the Court and AG. The only difference is that the Court is not as generous as AG as regards the considerations constituting the basis of the judgment.[17]

It can easily be seen that *Kalanke* follows one of the two major lines of argument against preferential treatment. The first line of argument has

[13] *Op.cit.*, para. 19.

[14] *Op.cit.*, para. 21, with reference to Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulatory* [1986] ECR 1651, para. 36. Cf., however, Darmon AG in Case 184/83 *Hofman v. Barmer Ersatzkasse* [1984] ECR 3082 where it was held that "the exception [i.e. Article 2(4)] must be broadly construed". See also Case 312/86 *Commission v. France* [1988] ECR 6315 where the Court did not seem to have struck off compensatory treatment in favour of women though the special rights granted to women by French law were disapproved of in this case, because of the generality of the French legislation.

[15] *Op.cit.*, para. 22. Cf. also Case 111/86 *Delauche v. Commission* [1987] ECR 5345 where the Court dodged the principle of equal treatment as applied to a staff case. The plaintiff, Mrs. Delauche was held to be less qualified for the post than another male candidate. It was hence not necessary to examine the question of whether a candidate of the under-represented sex was entitled to preference when the applicants had equal qualifications.

[16] AG's opinion, para. 29.

[17] The German Bundesarbeitsgericht (BAG Urteil von 5. März 1996) decided, in the light of the judgment of the Court of Justice, that the female applicant could no longer be given priority with reference to the Bremen legislation, but, since both applicants were deemed to have had equal qualifications, Mr. Kalanke couldn't raise any claim to be awarded the position, neither was he entitled to damages. In the first German case coming in the wake of *Kalanke*, the Obserwaltungsgericht in Münster struck off the Northrhine–Westphalia State legislation on positive action, though no rigid quotas were laid down by the State statute, as in the case of Bremen, OVG Münster. Beschl. v. 19.12.1995–6 B 26/88/95. It may also be added here that another German case related to Article 2(4) of the Equal Treatment Directive is now pending before the ECJ, C-409/95. It concerns the Northrhine–Westphalia positive action legislation with regard to public servants, and was submitted to the Court by the Verwaltungsgericht Gelsenkirchen.

to do with the fact that the Bremen legislature has violated an individual right. The other major argument against preferential treatment is that it disregards the merits' issue, i.e. the fact that the one who is most qualified should be given priority. This is a utilitarian argument based on assumed efficiency. In line with this point of view it is often argued that a contrary policy may reinforce the feelings of inferiority in those who would benefit from reverse discrimination and cause others to feel that they are second rate. A third argument against preferential treatment is that it implies a thin end of the wedge, i.e. creation of a bad precedent.[18]

The advantages of preferential treatment are, in general, held to be: it has great symbolic significance, it provides role models, and it is a powerful and rapid means of integrating disadvantaged groups into society to redress past discrimination.[19] The literature shows, however, that the efficacy of quota systems is somewhat doubtful.[20]

The question arises now: to what extent does the *Kalanke* case affect the Swedish sex equality law as regards affirmative action.

2. *Gender-based affirmative action measures in Swedish law*

Affirmative action may include a plethora of measures that can be taken by the employer. First, however, to adhere strictly to the *Kalanke* case, it must be stated that Section 16(1) of the Swedish Sex Discrimination Act of 1991 provides that it is unlawful sex discrimination for an employer to engage someone in preference to someone else of the opposite sex, although the person passed over is objectively better qualified for the work. Section 16 is enforced by legal penalties – the disadvantaged applicant may claim damages but can never get the job.[21] However, an exception to the rule is provided for in Section 16(2) subs. 2, when the employer's "decision is part of the endeavours to promote equality in working life" – a rather open-ended exception in comparison with Bremen's legislation. If, in such a case, the Swedish employer gives priority to the under-represented sex, the employer is not guilty of having violated the sex discrimination ban in Section 16(1) even if the passed-over applicant is more qualified. Within this legal framework it is also meant that the employer may set up quotas to favour one of the sexes.

[18] See Bhikhu Parekh, *A Case for Positive Discrimination,* in Discrimination: The Limits of Law. Eds. Bob Hepple & Erika M. Szyszczak (1992) p. 272, more elaborate, Pitt, *op.cit.*, note 2 pp. 284-296.

[19] See Parekh, *op.cit.*, note 18 pp. 276-278, further Pitt, *op.cit.*, note 18. See also Michael Rosenfeld, *Affirmative Action and Justice* (1991) p. 95.

[20] Shaw, *op.cit.*, note 5 pp. 394, 406.

[21] A different situation applies to civil servants. These may appeal an appointment in an administrative order and, if the appeal is successful, be given the job.

The exception must be also considered in the context of another provision of the Swedish Act. Section 9(1) provides that

> "[w]hen at a workplace there is not, in the main, an even distribution of men and women in a certain type of work or within a certain category of employees, an employer shall make special efforts, when taking on new employees, to obtain applicants of the underrepresented sex and endeavour to see that the proportion of employees of that sex gradually increases."

Generally speaking, the provision quoted is aimed at encouraging a larger number of applicants of the underrepresented sex to apply for posts at a given workplace. This is one of the many ways in which the equality principle can be emphasized. If an employer is known to make such special efforts as mentioned before, the employer is commonly referred to as an "equal employment opportunities employer". Yet, an employer is not legally obligated to employ an applicant of the underrepresented sex with reference to Section 9.[22] An individual cannot raise any legal claim based on Section 9. This section is not enforced by legal penalties, unless the Equal Opportunities Ombudsman sentences the employer to a penalty or fine by means of Section 35 of the Act. Section 9 is one of the many provisions designed to enhance the principle of affirmative action in Swedish working life.

For the promotion of affirmative action other measures than quotas have been also envisaged in the Swedish Act, Sections 4–11.[23] A typical feature of these provisions is that they are clothed in terms such as "obligations", but that these "obligations" are nothing more than goal-oriented norms, or maybe "promotional" in character.[24] The number of such "obligations" in the 1991 Act had both increased and, above all, the obligations were made more specific in comparison with the equivalent ones in the former 1979 Act.

The affirmative action measures as envisaged by Sections 4–11 of the

[22] See Reidunn Laurén & Håkan Lavén, *Nya jämställdhetslagen (The New Sex Discrmination Act)* (1992) p. 105. It was once suggested in the government report, SOU 1990:41. *Tio år med jämställdhetslagen (Ten Years with the Sex Discrimination Act)* p. 311 that the employer should be compelled to employ an applicant of the underrepresented sex if the applicants of opposite sexes had equal merits. The suggestion was rejected in prop. (Government Bill) 1990/91:113 p. 73.

[23] Similar provisions were laid down in Section 6 of the 1979 Sex Discrimination Act. The core of these provisions was to combat the structural discrimination between men and women on the labour market, SOU 1993:7. *Löneskillnader och lönediskriminering (Wage Differences and Wage Discrimination)* p. 51. The 1979 Act represents the first step to sex equality legislation in Sweden, see prop. 1978/79:175.

[24] However, no rewards are due if the employer adopts such a scheme, cf. Vilhelm Aubert, *In Search of Law. Sociological Approaches to Law* (1983) pp. 152 et seq on the "promotional function of law". Further on punishment and reward, in Vilhelm Aubert, *Continuity and Development. In Law and Society* (1989) ch. 5 with a close analysis of Jeremy Bentham's views on rewards instead of punishment to make people act the way the legislator wants them to.

1991 Act should include: *goal-oriented equality work, working conditions, recruitment and related matters, questions concerning pay and a plan of action.* One important provision, for example, is that in accordance with Section 9a an employer is obliged each year to "make a review of the existence of pay differentials between men and women both in different types of work and for various categories of employees". This provision was inserted into the Act to ensure greater transparency concerning wage differentials between men and women.[25] Another equally important provision is found in Section 10 which provides that "[e]ach year an employer shall draw up a plan for her or his work aimed at promoting equality". In common parlance, one speaks here of *the equality plan.* The plan should include a summary of measures that are needed to attain equality at the workplace and even indicate which of those measures the employer intends to commence or implement during the coming year, as well as an account of how the measures from the previous year have been implemented. Sections 9a and 10 do not apply to employers with fewer than 10 employees on their payroll.

According to the Swedish Act, other provisions than those explicitly stated in Sections 4–11 may also be laid down by a collective agreement (Section 12), but such an agreement must now follow the standards as set out in the Act.[26] In fact, the nature of standards was once a hotly debated issue in the context of the coming into force of the former 1979 Act.[27] The basic idea – one of the foundations of the 1979 Act – was that it was the employer and the trade unions that should take action to promote equality in the first instance. The Equal Opportunities Ombudsman should only act as a second watchdog, thus making the Ombudsman a dog without teeth. The social partners argued, in the main, that it was a token of great mistrust to deny them the right to design their own equality provisions by means of collective agreements. The Government yielded. In fact, the scheme meant that the social partners were given a free ride out of the statutory affirmative action scheme in the former Section 6 of the 1979 Act. Notoriously, most of the collective agreements did not even meet the statutory standard of equality.

> In the Labour Court judgment AD 1990 No. 34 – the only case dealing so far with a collective agreement on equality matters – the Court could not find that the employer was under a legal obligation to hire a female building

[25] Prop. 1993/94:147 p. 49.

[26] See prop. 1993/94:147 p. 42. Semi-mandatory provisions of these kinds are frequently used in Swedish labour law. The meaning of them is that the social partners may adopt other provisions by means of a collective agreement than those laid down by the statute.

[27] See on the legislative history of the 1979 Act, SOU 1978:83. *Jämställdhet i arbetslivet (Sex Equality in Working Life)* p. 130, cf. prop. 1978/79:175 p. 137. See also the legislative history of the 1991 Act, SOU 1990:41 pp. 319-321, cf. prop. 1990/91:113 pp. 78, 104, 176.

> worker in order to increase the number of the underrepresented sex at the workplace. It is well known that female building workers constitute a clear minority in the entire building and construction industry. The Court could not find that the employer had violated any obligation in the said agreement. On the other hand, the Court could not abstain from adding, as *obiter dictum*, that it was questionable whether the employer had seriously tried to promote the recruitment of females in the light of the former Section 6 of the 1979 Act and one of the soft "obligations" as set out in the agreement, i.e. to seek to promote the recruitment of female workers. But since the Building Workers' Union had not sued the employer on this account, the Court was prevented to further dwell upon the issue.[28]

Not until the 1994 amendments of the Act saw the light of the day, a change has come about as regards the legal effect of such collective agreements.[29] It was found that the previous expectations laid upon the social partners to promote equality in working life had not been met. The former collective agreements related to the private sector concluded between the LO (Confederation of Swedish Trade unions), SAF (Confederation of Swedish Employers) and PTK (Cartel of Private Salaried Employees) and dated from 1977 (consolidated in 1983) had not even been modified in the light of the 1991 Act. Some other equality collective agreements had also lost effect.[30] As of 1995, it is now required that collective agreements on equality must meet the standard as laid down by the Act. If the agreement implies a lower standard, the agreement is to be disregarded and the Act's provision will apply.[31] Another change is that the Equal Opportunities Ombudsman will now supervise the whole of the Swedish labour market, and not only those few segments which were formerly not governed by collective agreements on equality.

3. Kalanke as applied to the Swedish Sex Discrimination Act

At this stage one is entitled to ask the question whether, and, if this is the case, in what way the *Kalanke* case could shed some light on the Swedish Sex Discrimination Act. From this point of view, it is in particular the exception provided for in Section 16(2) subs. 2 that must be examined

[28] See my critical account of the 1990 case, *Är jämställdhetsavtal värda papperet? (Are collective agreements on equality worth the piece of paper they are written on?)*, in Juridisk tidskrift No. 1/1990-91 pp. 105-108.

[29] Prop. 1993/94:147 pp. 40-41.

[30] SOU 1990:41 p. 295.

[31] Prop. 1993/94:147 p. 42, cf. SOU 1990:41 p. 320 where it was held that such a construct – something in between a mandatory and a quasi-mandatory provision – was unusual in Swedish labour law. However, it took only some few years until similar provisions saw the light of the day in connection with the implementation of E.C. Directives into Swedish labour law, see, for example, prop. 1994/95:102.

more closely. As said before, an employer may engage an applicant with lower qualifications than another comparitor, provided, however, that the employer has adopted an affirmative action programme entailing such a course of action,[32] or something which is similar to such a plan, so that it is possible to say that the decision has been taken as part of a systematic activity aimed at promoting equality.[33] *Ad hoc* measures are not sufficient to justify a departure from the sex discrimination ban in Section 16(1).[34] The Swedish Labour Court has not yet ruled on the status of such affirmative action plans. It is, for example, an open question whether an employer may institute such a plan unilaterally, or whether it should be done in agreement or in co-operation with the trade unions.[35]

In the light of *Kalanke,* a paradoxical situation now ensues. While, on the one hand, Section 16(2) subs. 2 of the Swedish Act presupposes a systematic activity or plan to promote equality, the same type of plan seems to have been bluntly rejected in the case of *Kalanke.* As we must recall, the judgment rejects the idea to give priority to a person simply because of sex. If, on the other hand, the Swedish employer does not engage in a systematic activity to promote the equality principle when taking in new personnel, the employer is prohibited to make use of the exception laid down in Section 16(2) subs. 2. The *Kalanke* case has, accordingly, inflicted a deep wound upon the minutely designed Swedish sex equality legislation.[36]

It would therefore seem that the only remaining option for the

[32] In court practice it has been said that such equality work must be related to the employer's workplace and must be restricted to the actual workforce, Labour Court judgment AD 1981 No 171. In this case it was also shown that the employer had not engaged so actively in equality work so as to justify a derogation from the sex discrimination ban in Section 16(1) of the 1991 Act, formerly Section 4 of the 1979 Act. See also AD 1982 No 102. In this case it was shown that the employer had initiated active equality work which partly justified the employer's decision to give preference to a certain applicant.

[33] Laurén & Lavén, *op.cit.,* note 22 pp. 107, 169.

[34] Prop. 1978/79:175 pp. 84, 124.

[35] Somewhat vague in SOU 1990:41 p. 220, Laurén & Lavén, *op.cit.,* note 22 p. 169. It is my view that an employer may unilaterally institute such a scheme. Otherwise, an employer who has not signed an agreement and has no union-members employed would be prevented from taking affirmative action. Such a point of view must be discarded.

[36] Concurring, professor Anna Christensen, "Inte så enkelt med positiv sårbehandling" (Positive action is not so simple), in the daily Dagens Nyheter, November 9, 1995. On the other hand, the Swedish Equal Opportunities Ombudsman is of the opposite view with reference to the fact that the Swedish provisions appear to be (outwardly) sex-neutral and non-compulsory, as compared to Bremen's legislation. Source: written statement on five pages by the Ombudsman, submitted to the Ministry of Social Affairs, dated 31 January 1996. The Ombudsman pretends that *Kalanke* will have no impact upon the Swedish sex equality law, which is, in fact, no more than wishful thinking. The Equal Opportunities Ombudsman has failed to take into consideration the fact that there is a difference between the Swedish Act *as it stands,* and as regards its *application.* It is rather the application which runs contrary to the *Kalanke* doctrine. It is also the obligation of the Member State to

Swedish employer is to engage in preferential treatment when the applicants have equal qualifications.[37] It is an open question, however, whether the employer may act in this manner in a systematic way. It would seem that the employer is not allowed to state in advance that he intends to give preference to applicants of the under-represented sex, as if there was a "tacit" plan. Such elusive manoeuvres can be questioned in the penumbra of the *Kalanke* case. It is yet another question whether the aggregate of many *ad hoc* decisions, showing the one-sidedness of the employer's choice of applicants to the benefit of the underrepresented sex, would be acceptable. If, for example, in relation to Section 9 of the Swedish Act (see above), a collective agreement lays down binding guidelines applicable to the employer, providing that applicants of the underrepresented sex should be given priority up to – say – 40 % at the workplace,[38] such an agreement is of course subject to the *Kalanke* doctrine. Perhaps collective agreements phrased in terms of recommendations as far as preferential treatment is concerned, instead of binding clauses obligating the employer to act in a special way, are to be preferred, in order to get away from the shadow of *Kalanke*. It is fair to say that the same fate will meet an employer who, as an alternative to concluding a binding collective agreement, has unilaterally adopted an equality plan entailing unconditional preferential treatment for the underrepresented sex, in accordance with Section 10 of the Act.

The conclusion must therefore be that the *Kalanke* case has cast a long shadow over the construct and application of the Swedish affirmative provisions, as applied to employment of new personnel.

It is further questionable whether affirmative action plans may apply to *redundancies*. Section 20(2) of the 1991 Sex Discrimination Act seems to imply that such may be the case, i.e. that sex may be taken into regard in the context of redundancies. However, the main rule in Section 20(1) provides that terminating a contract of employment or laying off a person constitutes an act of sex discrimination if the step has a direct or indirect connection with the sex of the employee. But Section 20(2) provides, on the other hand, that "this does not apply when the conditions are of such a kind as are specified in Section 16(2), subs. 2 or 3". Subs. 2 provides that the employer may justify the sex-based preferential treatment with reference to the fact "that the decision is part of the

ensure that the application of the national laws is in compliance with the E.C. standards, see, e.g., the fate of collective agreements which were indirectly struck off by the European Court of Justice, in Case C-184/89 *Nimz v. Freie und Hansestadt Hamburg* ECR [1991] I-297.

[37] In such a case the employer is free to employ whomever the employer wishes, see, e.g., Labour Court judgment AD 1987 No. 35.

[38] 40 % is the figure used in the legislative history to set a standard for "an even distribution of men and women in a certain type of work or within a certain category of employees" (Section 6 para. 3 in the 1979 Act), see SOU 1978:83 p. 127, prop. 1978/79:175 p. 85.

endeavours to promote equality in working life". This seems to imply that sex should be a factor to pay regard to in the context of redundancies. It is, however, an open question whether this statutory logic is premeditated.

Redundancies also highlight the seniority aspect of working life. No provision in the Sex Discrimination Act, or anywhere else, takes cognizance of the fact that women have usually shorter employment periods and therefore lower seniority, and are, hence, more vulnerable as regards redundancies than men.[39] When seniority is decided upon according to the rules in Section 22 of the Swedish Employment Protection Act, women will be usually placed low down on the seniority roster if they have low seniority, even though commendable equality work may have been conducted at the workplace for quite some time to attain greater sex equality as far as numbers are concerned. A strict application of the "last-in-first-out" principle in such a context may nullify any past achievements gained through preferential treatment in job hiring.[40] This will perpetuate the effects of past discrimination. However, discrimination of women in the context of redundancies seems to be justified with respect to the applicable seniority rules of the Swedish Employment Protection Act, since those rules have no "connection with the sex of the employee concerned", as set out in Section 20(1) of the Sex Discrimination Act.[41]

[39] See, e.g., Universitetsläraren 17/1995. The number of the female dentistry lecturers would be reduced from 30 to 12 % of the total number of teachers at the Dentistry Faculty in Gothenburg in connection with forthcoming redundancies if the "last-in-first-out" principle was applied. See also SAF-Tidningen 36/1992. Volvo Penta in Gothenburg terminated the contracts of 2/3 of all female salaried employees in connection with redundancies applying the "last-in-first-out" principle. See also Lag & Avtal, No. 3/1996. A local municipality wanted to exempt a male day nursery teacher from the seniority roster, alleging that it was important to have male role models for the children. After central negotiations, no derogation from the statutory seniority rules as laid down in Swedish Employment Protection Act was made.

[40] The hypothetical case discussed here was in fact touched upon in SOU 1978:83 p. 165, but no suggestions were made. In some instances, however, such a hypothetical case may be looked upon as a case of indirect discrimination to be in violation of the case-law of the E.C. Court of Justice, see Ds 1993:77. *EG-domstolen och jämställdheten (The European Court of Justice and the Sex Equality Issue)* pp. 72-73. Cf., however, Case 109/88 *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening (Danfoss)* [1989] ECR 3199, para. 24 wherein the Court accepted seniority ("length of service") as a blank justification for treating men and women differently as regards wages. See also Tamara K. Hervey, *Justifications for Sex Discrimination in Employment* (1993), pp. 101, 190-192. According to Hervey, it seems that a blunt "last-in-first-out" policy is justified in redundancies in the United Kingdom. The same issue is also extensively discussed in the light of the U.S. law in Rosenfeld, *op.cit.*, note 19 pp. 176-189.

[41] From this point of view, it may therefore seem to be strange that the employer, with reference to an equality plan, may justify a termination of employment by redundancies, see the wording of Section 20(2) subs. 2 of the Sex Discrimination Act (discussed above). The legislative history voices no opinion as to the hypothetical case touched upon here, prop. 1990/91:113 pp. 112, 180.

4. Kalanke as applied to the Swedish university sector

In 1995, the Swedish Government issued new regulations related to the university sector. The purpose of the scheme was to enhance the recruitment of female university professors and research assistants. The Bill submitted to Parliament conveyed a rather gloomy view of the status quo, inasmuch as it was found that only some 7 % of all the professors were women.[42] The legal basis for the new regulations is to be found in the above-mentioned Section 16(2) subs. 2 of the Sex Discrimination Act of 1991. The crucial provision as applied to the universities is now to be found in Section 3(2) and (3) of the 1995 Ordinance on certain Appointments as a Professor and Research Assistant to Promote the Principle of Equality:

> "An applicant from an under-represented sex, having sufficient qualifications according to Chapter 4 Section 15 first paragraph in the Ordinance of the Universities, shall be appointed prior to an applicant of the opposite sex who should have been appointed, if it is deemed necessary in order to appoint an applicant of the under-represented sex (positive action).
>
> Positive action must not be put into practice if the difference in qualifications between the applicants is so large as to make positive action conflict with the objectivity requirement related to appointments [as provided for in Chapter 11 Section 9(2) of the Swedish Constitution]."[43]

The provision implies that, within a certain margin, the applicants of the under-represented sex will be unconditionally favoured by a quota system. It is obvious that the Swedish scheme goes much further than the disputed Bremen legislation in the *Kalanke* case. In the Swedish regulations, the applicant of the under-represented sex may even possess lower qualifications than the comparitor and still claim preference, whereas in Bremen the applicants must have at least equal qualifications. The Bremen legislation was rejected by the Court of Justice of the European Communities, and so must the Swedish regulations be.[44]

Certainly, it is true that the *procedure* adopted in the Swedish case is partly different from the one found in Bremen. According to the Ordinance on the Universities, Chapter 4 Section 15a, a university (act-

[42] Prop. 1994/95:164 p. 34, SFS 1995:936 (Ordinance on certain Appointments as a Professor and Research Assistant to Promote the Principle of Equality) and 1995:944 (Amendments in the Ordinance of the Universities).

[43] In Sweden, the constitutional guarantee provides that a civil servant may only be appointed on the basis of objective factors such as merits and competence. Aspects such as equality or labour market considerations may also be taken as objective factors.

[44] Even though admitting that preference given to an applicant of the under-represented sex is unconditional in the university context, the Swedish Equal Opportunities Ombudsman has said that since the provisions are sex-neutral of its face value and have a limited effect in time, they are not affected by the *Kalanke* case. Source: see note 36. It is to me quite evident that such arguments cannot be upheld.

ing as an employer) shall state officially if a posting and future appointment will be governed by positive action, which gives the university some leeway to adopt, or not to adopt, preferential treatment.[45] The procedure to be pursued under the special 1995 Ordinance related to the appointment of professors and research assistants is, however, different. The university has no option of refraining from taking positive action. This Ordinance is specifically aimed at redressing the numerical imbalance between men and women among professors and research assistants in a short-term perspective and applies only to a limited number of appointments.[46] Even when taking into consideration the slight differences outlined here, as compared to the Bremen legislation, the Swedish regulations seem to be as vulnerable as the Bremen scheme was under the Equal Treatment Directive.

Quite recently equality between men and women within the Swedish university sector has been the subject of another Government report with a strong feministic approach.[47] However, no proposals related to affirmative action can be found in the report. This is a great disappointment to all those who may be affected by affirmative action programmes at the Swedish universities. The report could have suggested that, where they are under-represented, female researchers should be given some advantages, at least for a certain period of time, e.g., a smaller teaching load.[48] In this context it is also worthwhile pointing out that parental leave can be considered as a qualifying factor in connection with promotions. In particular, it should be evident to pay due consideration to such a modality in view of the fact that in 1992 only 9 % of all the paid parental leave was used by fathers in Sweden.[49] If no consideration whatsoever is taken of such hard facts, men will continue racing past their female collegues

[45] If the university adopts such a scheme in a single case, it has in advance bound itself to treat an applicant of the under-represented sex more favourably than that of the comparitor applicants. One may question whether such a single action is vulnerable under the *Kalanke* ruling. It is my view that it is, since the basis for such an appointment is that an applicant from the under-represented sex is to be given priority automatically.

[46] In rather vague terms, AG in the *Kalanke* case held, in discussing the temporary albeit long-term nature of the Bremen legislation, that no priority of women could be accepted at the point of arrival because "it will not remove the obstacles which brought about that situation", see AG's opinion, para. 24.

[47] SOU 1995:110. *Viljan att veta och viljan att förstå (The Will to Know and the Will to Understand).*

[48] A feminist writer like Wendy W. Williams should reject such preferential treatment, see *The Equality Crises: Some Reflections on Culture, Courts, and Feminism,* in Feminist Legal Theory. Eds. Katherine Bartlett & Rosanne Kennedy (1991) pp. 15-34.

[49] RFV. Socialförsäkringsstatistik. Fakta 1993 p. 28 (National Insurance Board. Social Insurance Statistics. Facts). I have not found any statistics related to university male employees. It is, however, found that fathers with professional education make use of more days (15 %) than the father who has no graduate education, see the National Insurance Board Statistical Report 1993:3: Vilka pappor kom hem? (Which Fathers Came Home?).

in the future battle for promotion.[50] A more radical suggestion in this context would be to abandon the anomalous procedure surrounding academic appointments in Sweden. The fact is that the present procedure is counter-productive to its goals, and that it is also rather cumbersome to administer, which has led to a lot of criticism.[51] An alternative way in which to deal with academic appointments, based on genuine needs of the various departments, would be to introduce a call procedure in which competent scholars would be invited and scrutinized before a final appointment was made. In such a context, it would appear quite natural and appropriate to invite applicants of the under-represented sex. In this way one would create a platform through which the imbalance between men and women in Swedish academic life could be more quickly redressed if the alternative procedure was purposefully pursued. Perhaps an additional incentive in this context would be to economically reward equal opportunities employers,[52] which would be, however, to say nothing else, than that it is always money that makes the world go round.

5. Appraisal of the Kalanke case in the light of the U.S. law[53]

AG Tesauro said in *Kalanke* that "[i]n Europe, positive action has begun to take hold or, at any event, to become the object of attention at the very time when affirmative action seems to be [sic!] a state of crisis in its country of origin. Indeed, in the United States, recourse is now had to the criterion of strict scrutiny, whereby rules affecting a fundamental right can be justified only if they satisfy a compelling government interest ...."[54] It must be stated right at the outset, that the sex discrimination law on affirmative action in the U.S. is more complex than the AG opined. AG also held that the case-law in the U.S. is hostile to strict quotas, referring to three cases: *Bakke, Webster* and *Croson.*[55] The fatal mistake that AG

[50] Shaw, *op.cit.*, note 5 p. 398.

[51] See for a devastating critique, Torsten Nybom, *Det akademiska karriär- och tjänstetillsättningssystemet (The Academic Career and Appointment Procedure System),* in Universitetsläraren No. 2/1996. The same issue has also been the subject of a close study performed by a recently appointed Government Commission, Dir. 1996:3.

[52] See, *supra,* note 24.

[53] I owe many thanks to Attorney-at-law Leslie Kay, Portland, Oregon, a former master student of the School of Law, Stockholm University, for valuable comments on my American draft.

[54] AG opinion, para. 9, footnote 10.

[55] *Op.cit. Webster* should be *Weber.* The cases are: *University of California Regents v. Bakke,* 483 U.S. 265 (1978), *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979) and *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989).

Tesauro has made here, however, is that those cases deal with racially based discrimination.[56]

The gender-based discrimination standard is not "strict scrutiny". There is more to it than that. The U.S. case law uses two tests: "intermediate scrutiny" which is applied to gender-based discrimination, and where a classification must be "substantially related" to the achievement of "important governmental objectives";[57] and "strict scrutiny" which is applied to racial classifications, where it must then be shown that the challenged classification is "necessary" to serve a "compelling" state purpose.[58] The race-based test is, no doubt, much stricter than the gender-based discrimination test and requires closer scrutiny. No distinction of this kind is, however, found in the AG's opinion. His research – whoever is responsible for it – lacks accuracy. The approach discredits the cause of action which is utilized on a rather wide basis in the U.S. in connection with gender-based affirmative action programs, conveying to the reader of *Kalanke* a distorted picture of the U.S. law.

Therefore, a few words need to be said about affirmative action in the United States. As it stands today, it stems from Title VII of the Civil Rights Act and Executive Order No. 11246, promulgated in 1965 by President Lyndon B. Johnson.[59] Section 706(g) of Title VII provides:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful practice, and order such *affirmative action* as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ..... or any other equitable relief as the court deemes appropriate ..... " (emphasis added).

Executive Order No. 11246 (as amended) provides that federal contractors shall carry out the Equal Employment Opportunity Law and take affirmative action. Part II, which is called "Nondiscrimination in employment by Government contractors and subcontractors", Section 202(1), provides, *inter alia:*

[56] As said elsewhere: "There are significant differences between sex and race discrimination", Pitt, *op.cit.*, note 2 p. 283. See further Sandra Fredman & Erika M. Szyszczak, *The Interaction of Race and Gender*, in Discrimination: The Limits of Law. Eds. Bob Hepple & Erika M. Szyszczak (1992) pp. 217–221.

[57] See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976).

[58] See on the evolution of the standards, John Galotto, *Strict Scrutiny for Gender, via Croson*, 93 Col. L. Rev. pp. 508–545 (1993).

[59] However, affirmative action, as a means of effectuating a statutory policy, is much older in the U.S. It seems first to have been used in the 1935 Wagner Act (National Labor Relations Act), Section 10 c), giving the National Labor Relations Board power to prevent unfair labor practices, *inter alia*, "to take such *affirmative action* including reinstatement of employees with or without backpay, as will effectuate the policies of this Act" (emphasis added).

> "..... The contractor will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship....." (emphasis added).

The Office of Federal Contract Compliance (OFCC) has the power to enforce compliance with affirmative action plans by federal contractors. In various other federal administrative and legislative contexts, such as employment in Federal government, public works employment, or small businesses owned by women or minorities, equal opportunity and affirmative action policies also operate.

There is, however, no consensus in the U.S. on affirmative action; insted it is a highly controversial and hotly debated issue.[60] In this respect, AG's judgment in *Kalanke* was correct. As regards racial affirmative action, it would seem that the bottom-line is drawn along the line where the interests of Whites and Blacks clash. One commentator has said that "affirmative action programs designed to redress the effects of past societal discrimination create new *statutory* rights based on new social values that displace traditional *statutory* rights (or common law rights effective through legislative sufferance) based on traditional social values."[61] Such traditional values are, for example, seniority (in working life), low bid (in competitive bidding) and high scores (in admission to schools)[62] – all of which are values which have benefited Whites.[63]

The legislative history of the U.S. Civil Rights Act of 1964 also provides a fascinating account of the legislative process. Originally, the proposed legislation aimed at abolishing only racial and ethnic discrimination. In an attempt to quash Title VII (Employment Opportunity), the archfiend of civil rights Congressman Howard "Judge" Smith, Chairman of the House Rules Committee, suggested the insertion of the word "sex" into the Act after the words "race, color, national origin and religion" in the hope that it would scuttle the bill. The attempt to destroy the bill did not succeed.[64] Title VII also set up the Equal Employment Opportunity Commission – a federal agency responsible for the Act's enforcement.

[60] See for an extensive discussion, Rosenfeld, *op.cit.*, note 19.

[61] David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 Col. L. Rev. p. 811 (1991) (emphasis in original).

[62] Chang, *op.cit.*, note 61 p. 807.

[63] See further Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. pp. 1766 et seq (1993).

[64] See for an account of the legislative history of the 1964 Civil Rights Act, Charles & Barbara Whalen, *The Longest Debate. A legislative history of the 1964 Civil Rights Act* (1985), in particular with respect to sex discrimination, pp. 155-188, 234.

The U.S. Supreme Court has also said that the EEOC Sex Discrimination Guidelines, originally issued in 1965, are entitled "to great deference".[65] Title VII was amended in both 1972 (Equal Employment Opportunity Act of 1972) and 1991 (Civil Rights Act of 1991).

Prior to the mid 1960's, there was no such thing as a "sex discrimination law" in the U.S.[66] Not until 1971[67] did the Supreme Court decide upon a case in favour of a female appellant on the basis of the Equal Protection Clause of the 14th Amendment of the U.S. Constitution. The 14th Amendment states: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws". The 14th Amendment applies to the States and all subdivisions of a State (local government). Equal protection guarantees apply to the Federal government under the Due Process Clause of the 5th Amendment. Private employers are not bound by the U.S. Constitution, but are subjected instead to Title VII.

The heart of the matter in Title VII can be found in Section 703. Section 703(a) provides:

> "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affects his status as an employee, because of such individual's race, color, religion, sex or national origin."

Section 703(d) further provides:

> "It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."

The following leading cases concerning race-based and gender-based discrimination highlight the development of the "strict scrutiny" and the "intermediate scrutiny" tests.

> *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). A private employer (Kaiser Aluminum & Chemical Corp.) had adopted a voluntary affirmative action plan – collectively bargained – and the question was raised as to

[65] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[66] See, in general, E. Cary & K.W. Peratis, *Woman & The Law* (1977). For a short summary, see Williams, *op.cit.*, note 48 p. 17.

[67] *Reed v. Reed*, 404 U.S. 71 (1971). The case concerned the right to be nominated as administrator of a child's estate.

whether Title VII forbids a private employer from *voluntarily* adopting a racial quota to remedy a racial imbalance. The plan provided that 50 % of the new trainees were to be black until the percentage of black skilled craftworkers approximated the percentage of blacks in the local labour force. In accordance with the plan, the employer had selected black applicants over a white respondent (Weber). The U.S. Supreme Court upheld the affirmative action plan. The Court said that a literal construction of Section 703(a) and (d) was misplaced. Title VII must be read instead against the background of the legislative history and the historical content from which the Act arose. Title VII "cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges".[68] Such voluntary plans can instead play a crucial role in furthering Title VII's purpose of eliminating the effects of past discrimination.[69] The Court therefore found that the Kaiser-Steelworkers' plan "does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees..... Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance".[70]

Weber did not call for "strict scrutiny" under the Equal Protection Clause of the Federal Constitution's 14th Amendment – Kaiser was a private employer. However, affirmative action plans (racial quotas) as regards admission procedures to universities, layoffs in redundancy situations or set-aside programs (minority business enterprises) undertaken by public bodies are under heavy fire when subject to the U.S. Supreme Court's strict scrutiny test.[71] One commentator has said that these opinions are

[68] 443 U.S. 193, at 204.

[69] In fact, the Congress intended to encourage private efforts as a means of achieving compliance with Title VII. See, e.g., *Firefighters v. Cleveland*, 478 U.S. 501 (1986), at 515-516: "We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII..... This view is shared by the Equal Employment Opportunity Commission (EEOC), which has promulgated guidelines setting forth its understanding [according to which] voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII". See also *Alexander v. Gardner*, 415 U.S. 36 (1974), at 44: "Cooperation and voluntary compliance were selected as the preferred means for achieving [Title VII's] goal."

[70] 443 U.S. 193, at 208.

[71] It would require quite a lot of space to pin down this case-law in detail. I satisfy myself, therefore, to say that the first case in the U.S. Supreme Court as regards the constitutionality of affirmative action programs is the notorious *Bakke* case, *University of California Regents v. Bakke*, 438 U.S. 265 (1978). In this case a white male filed suit against the Regents alleging the invalidity of a special admissions program. The Supreme Court struck off the special admissions program for minority students – 16 out of 100 seats in each year's class were reserved exclusively for certain minority groups. Justice Powell, speaking for the majority, held, at 291: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination". In order to justify a suspect classification, firstly, there must be found a *compelling government interest*, i.e. the State must show that its

authored by self-processed judicial conservatives of the U.S. Supreme Court – advocates of judicial restraint – or, more rightly, political conservatives on the Supreme Court bench.[72]

In the following gender-based discrimination case no constitutional

purpose or interest is both constitutionally permissible and substantial, and, secondly, that its use of the classification is "necessary to the accomplishment" of its purpose or the safeguarding of its interest, i.e. *the classification must be narrowly tailored* to achieve the compelling interest, at 305. It is also interesting to note that Justice Powell addressed gender-based classifications which have never been subject to a strict scrutiny test. Justice Powell held, at 303: "In sum, the Court has never viewed such classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis". See also *Wygent v. Jackson Board of Education*, 476 U.S. 267 (1986). In this case the Supreme Court struck down a public employer affirmative action plan, based upon a collective bargaining agreement, protecting minority school teachers in layoffs with the result that non-minority teachers (whites) were laid off. The Court applied the strict scrutiny test, and held, at 276: "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy". The Court distinguished *Weber*, at 282-283: "Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job. Many of our cases involve union seniority plans with employees who are typically heavily dependent on wages for their day-to-day living. Even a temporary layoff may have adverse financial as well as psychological effects. A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority.... Layoffs disrupt these settled expectations in a way that general hiring goals do not." Similar arguments are also found in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), which is a case decided under Title VII Section 703 (h), protecting bona fide seniority systems. The strict scrutiny standard applied in *Wygent* was later consolidated in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). This case is a turning point in affirmative action history because the majority of the Supreme Court for the first time ever settled on a single standard. The Court struck down a city adopted ordinance on minority business utilization plan, requiring prime contractors that have been awarded city construction contracts to subcontract at least 30 % of the dollar amount (set-aside requirement) of each contract to one or more "Minority Business Enterprises". Justice O'Connor held, at 493: "Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." Finally, in *Adarand Constructors, Inc. v. Federeco Pena, Secretary of Transportation*, 115 S.Ct 2097 (1995), the most recent case, the strict scrutiny test was held to be the proper standard for the analysis of all racial classifications, whether imposed by a federal, state, or local actor. In this case, the petitioner Adarand claimed that the Federal Government violated the Equal Protection Clause of the 5th Amendment's Due Process Clause in giving general contractors on government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals", in particular, when race-based presumptions were used. Such classifications were held to be constitutional only if they "serve a compelling governmental interest and must be narrowly tailored to further that interest" (Lexis, Part III D p. 22). Justice O'Connor, speaking for the majority, added on p. 23: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it..... When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the narrow tailoring test this Court has set out in previous cases."

[72] See Chang, *op.cit.*, note 61 pp. 791, 810, 831. Neither is it difficult to agree with Rosenfeld, *op.cit.*, note 19 pp. 143-4: "In conclusion, in the case of the jurisprudence of the equal protection clause, neither arguments from the text [of the Constitution], the framer's

issue was raised, even though the employer was a county agency (public body).

Johnson v. Transportation Agency of Santa Clara County, California, 480 U.S. 616 (1987). In this case, the Supreme Court addressed for the first time the issue of the legitimacy of affirmative action in preferential treatment of women. Diane Joyce was promoted to the job of a road dispatcher before a male employee, Paul Johnson. Joyce was the only woman among 238 skilled craft workers. The issue was whether the promotion was in violation of Title VII of the Civil Rights Act, Section 703(a), (cited above). The agency had unilaterally promulgated an affirmative action plan, specifiying that sex could be considered as an important factor when evaluating candidates for jobs when females were significantly underrepresented in the group, not setting aside, however, any specific number of positions just for women. The plan was not designed to remedy past discrimination of women. Both Johnson and Joyce were rated as well qualified for the job. The U.S. Supreme Court held that the assessment of the legality of the Affirmative Action Plan in question must be guided by the *Weber* decision. As regards the "manifest imbalance test" (reflecting underrepresentation of women), the Court held that a "comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate .....".[73] If the Agency had been guided solely by the numbers, the plan's validity could be called into question, said the Court. However, the plan didn't authorize such blind hiring, or that personnel decisions should be made by reflexive adherence to a numerical standard. The Court said: "Given the obvious imbalance in the Skilled Craft category, and given the Agency's commitment to eliminating such imbalances, it was plainly not unreasonable for the Agency to determine that it was appropriate to consider as one factor the sex of Ms. Joyce in making its decision".[74] The next question to be answered was whether the Affirmative Action Plan unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement. The Court held that it did not. The plan did not set aside positions for women (quotas). No person was automatically excluded from consideration, not even Johnson, who did not possess any absolute right to the road dispatcher's position. Furthermore, the Court noted, the Agency's Plan intended to attain a balanced workforce, not to maintain one. The Court concluded that the Agency's Plan "represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force. Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace."[75] The voluntary approach taken by employers to redress the imbalance between majority and minority groups, was also taken up by Justice Stevens in a separate opinion: "The logic of antidiscrimination legislation requires that judicial constructions of Title VII leave 'breathing

intent, constitutional theory, nor from judicial precedent are likely to lead often to determinate results. This leaves much room for the value judgments in general and philosophical arguments in particular."

[73] 480 U.S. 616, at 632.

[74] At 637.

[75] At 642.

room' for employer initiatives to benefit members of minority groups".[76]

The distinction between "strict scrutiny" and "intermediate scrutiny" in race-based and gender-based discrimination cases respectively is most easily exemplified in the following Federal Court of Appeals case.

> *Coral Construction Co. v. King County*, 441 F.2d 910 (9th Cir. 1991). King County applied both a Minority and Women-Owned Business Enterprise set-aide program for public works contracts. The Court held that the MBE portion of the King County program was constitutionally defective, at least in part, since it did not satisfy the strict scrutiny standard. However, the gender-specific (WBE) aspect of the set-aside program was upheld by the Court that applied the *intermediate scrutiny test* under which gender classification must serve as an important governmental objective, and where there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. This implied, however, that a mere statement of a benign, compensatory purpose will not automatically shield a gender-specific program from constitutional scrutiny. Furthermore, it suggested that some degree of discrimination must be found to have occurred in a particular field before a gender-specific remedy may be instituted. Unlike the strict standard review applied to race-conscious programs, intermediate scrutiny does not require any proof of governmental involvement, active or passive, in the discrimination that it seeks to remedy.

The commentary on the U.S. case law in the preceeding cases is for the sole purpose of highlighting the fact that different tests are used in connection with race-conscious and gender-based classifications, contradicting the view which AG Tesauro tried to convey to the reader of the *Kalanke* case.

6. *Concluding remarks for the future*

It follows from what has been said above that the Swedish Equal Opportunities' Ombudsman has been engaging in wishful thinking when she suggested that the Swedish Sex Discrimination Act, as it stands, should be considered to be in conformity with the judgment passed in the *Kalanke* case, equivalent to a hide-and-seek exercise. At face value, the Ombudsman's view seems to be correct, but in application, i.e. when implementing the affirmative action measures allowed by Section 16(2) of the Act, the Swedish Act does not square with the *Kalanke* judgment of the European Court of Justice. It is also highly questionable whether Sweden could refer to the United Nations Convention of 18 December 1979 on the elimination of all forms of discrimination against women. Article 4 of the Convention permits States to adopt "temporary special

[76] At 645.

measures aimed at accelerating *de facto* equality between men and women" (emphasis in original); such measures "shall not be considered discrimination". The Convention was ratified by Sweden in 1980. It is highly dobtful whether in defence of her view to eventually set aside the *Kalanke* judgment Sweden could refer to the commitment under the 1979 Convention.[77]

It is equally remarkable that AG Tesauro has so grossly misapprehended the U.S. case law as regards gender-discrimination. The AG has highlighted the matter in a highly subtle way, by making use of a reference to the U.S. case-law in aseemingly innocent footnote where, at closer scrutiny, the cases referred to dealt with race-conscious classifications that have to meet the strict scrutiny standard which is not applied to gender-based affirmative action programs. The rest of his opinion is, based upon an equally strict and narrow interpretation of the Equal Treatment Directive, seemingly deriving its origin from the U.S. law. This does not prevent the AG from finally making a safe exit by reference to the E.C. proportionality principle in order to strike off the disputed Bremen legislation.

The Court's of Justice judgment is equally narrow, even if the Court has been wise enough not to refer to the U.S. case-law. But there is nothing in the Court's judgment which contradicts the AG's extensively reasoned opinion. It is my view that the Court places too much reliance on an individual's right in an affirmative action context.[78]

The Court's judgment caused considerable confusion, so that the Commission was forced to take immediate action in order to reverse the Court's *Kalanke* judgment.[79] When thinking of the fuss and controversy that the *Kalanke* judgment raised throughout Europe, it is a disappoint-

[77] See a similar case tried by the ECJ, Case C-13/93 *Office National de 'Emploi v. Minne* [1993] ECR I-371 which involved a Belgian commitment to abide by the ILO Convention as regards night work, which was seemingly contradictory to the E.C. Directive 76/207. The case was tried under Article 234 (1) of the E.C. Treaty. In remanding the case to the national court, the ECJ said that Article 5 of the Equal Treatment Directive "cannot apply to the extent to which those nationel provisions were adopted in order to ensure the performance by the Member State of obligations arising under an international agreement concluded with non- member countries before the entry into force of the E.C. Treaty". It is quite clear in this context that the positive action provisions stipulated in the Swedish Act did not come about as the result of the U.N. Convention, since Sweden ratified the 1979 convention after the coming into force of the first 1979 Sex Discrimination Act, see Bill 1979/80:147.

[78] Similar in the U.K. law, see Fredman & Szyszczak, *op.cit.*, note 56 p. 216.

[79] See the reactions of the Commission of the European Communities, as reported in the Swedish dailies, Svenska Dagbladet 24.11.1995, "Könskvotering inte förbjuden" (Gender Quotas not Forbidden), Dagens Nyheter 3.3.1996, "EU-utspel för jämställdhet" (Commission Initiative on Sex Equality) and Dagens Nyheter 28.3.1996, "JämO lättad efter EU-besked" (The Swedish Equal Opportunities Ombudsman Relieved after European Union Statement). See also European Voice. A Weekly View of the Union for the Union, 7–13

ment to note that the Commission's proposal, as it now stands, leaves the outcome of the *Kalanke* case unaltered.[80]

In order to restore past practice in many Member States, such as Germany and Sweden, it is my view that the Commission must resort to either more forceful amendments of the Equal Treatment Directive, or let the Member States make use of the subsidiarity principle in the Treaty of Rome (Article 3b). The latter path would be a kind of capitulation at the European level, due to the sharp stand taken by the Court of Justice in *Kalanke*. One may question the fact whether the Court should be the sole judge of affirmative action schemes. At the first glance, the Swedish Sex Discrimination Act does not seem to have been designed in the same way as the one in Bremen, since the Swedish employer is free to employ whomever he wishes when the job applicants have the same qualifications. Nevertheless, the Court of Justice showed that the Court held to the idea of achieving only formal, and not substantive justice.

The Court neglected other aspects, which have since long been penetrated when the issue of equal opportunities between men and women in working life was discussed. An American commentator has submitted the following remark: "Provided an affirmative action plan is precisely tailored to redress the losses in prospects of success attributable to racism or sexism, it only deprives innocent white males of the corresponding undeserved increases in their prospects of success."[81] It is a mystery why the Court of Justice of the European Communities chose to take a narrow view when thinking of the fact that the same Court has paved the way to the enforcement of the sex equality principle in other landmark decisions in the past. It is sometimes said that "hard cases make bad law".[82] One may hope that *Kalanke* will remain the only infamous exception of this kind.

March 1996. Vol. 2 No. 10 p. 1 where it is said that Commissioner Padraig Flynn had decided to call for "significant" amendments to the disputed Article 2(4) of the Equal Treatment Directive.

[80] See Communication by the Commission to the Council and the European Parliament on the interpretation of the judgement of the European Court of Justice on 17 October 1995 in Case C-450/93, Kalanke v. Freie Hansestadt Bremen and the Amendment of the Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions. Explanatory memorandum (n.y.r.). The proposed interpretative amendment of Article 2(4) reads: "This Directive shall be without prejudice to measures to promote equal opportunity for men and women in particular by removing existing inequalities which affect the opportunities of the *under-represented sex* in the areas referred to in Article 1(1). *Possible measures shall include the giving of preference, as regards access to employment or promotion, to a member of the under-represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case*" (amended text in italics).

[81] Rosenfeld, *op.cit.*, note 19 pp. 307-8.

[82] See, e.g. Chief Justice Burger in *United Steelworkers of America v. Weber*, 443 U.S. 193, at 218.