POSITIVE ACTION IN THE EUROPEAN UNION: FROM KALANKE TO MARSCHALL

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"The law, in its majestic equality, forbids all men to sleep under bridges, to beg in the streets, and to steal bread—the rich as well as the poor."[1]

INTRODUCTION

It is no secret that eye-catching headlines and provocative stories sell newspapers. Even so, the newspaper headlines announcing the recent Marschall decision,[2] handed down by the European Court of Justice ("the ECJ") in November 1997,[3] can hardly be accused of understating the high emotion surrounding positive action.[4] The headlines give more than a hint of some of the issues that surround this controversial topic: namely, sexism, discrimination, and equality. "COURT ALLOWS JOBS FOR THE GIRLS"[5] announces one headline; "QUOTAS BY ANOTHER NAME"[6] declares another. We are reminded not only of the strong feelings that positive action and quota systems in particular evoke, but also that positive action has its strong opponents and critics. In inflammatory language, one editor writes that,

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[1] Anatole France, The Red Lily (Le Lys Rouge) 117 (1898) as quoted in Margaret Thorton, The Liberal Promise: Anti-Discrimination Legislation in Australia, 15 (1990).

[2] Case C-409/95, Marschall v. Land Nordrhein-Westfalen, All ER (EC) 865 (1997). This decision, and the previous decision of the ECJ in Case C-450/93, Eckhard Kalanke v. Freie Hansestadt-Bremen, All ER (EC) 66, 1 C.M.L.R. 175 (1996), set forth the European Union position on positive action.

[3] Its full title is the Court of Justice of the European Communities.

[4] "Positive action" is defined below. Note, however, that there is no real substantive difference between the concepts of positive action and affirmative action; *see* Christopher McCrudden, Rethinking Positive Action, 15 Indus. Lab. J. 219, 220-221 (1986).

[5] Court Allows Jobs for the Girls, Fin. Times, Nov. 25, 1997, at 20.

[6] Review & Outlook (Editorial), Quotas by Another Name, Wall St. J. Eur., Nov. 14, 1997, at 6.

"German men should no more be forced to pay for the sexist sins of their fathers than for their fathers' Nazi sins."[7] Evidently, gender equality is a topical issue and one that gives rise to extreme views. Other newspapers report that: "WOMEN WIN JOB RULING,"[8] "EU COURT BACKS MOVE FOR MORE FEMALE JOBS,"[9] and "COURT STRIKES BLOW FOR CAREER WOMEN."[10] The ECJ is described as having "struck a blow for women's right to jump the job queue, shattering glass ceilings in offices across the continent."[11] One journalist comments wryly that positive discrimination has been declared to be a "Good Thing."[12] It appears that women have won (and men lost) the latest battle in the war between the sexes.

Other headlines, more neutral in their coverage, inform the reader that "GERMAN GENDER-EQUALITY LAW IS UPHELD BY EUROPEAN COURT,"[13] "COURT BACKS JOBS AFFIRMATIVE ACTION"[14] and "COURT BACKS POSITIVE BIAS TO END GENDER IMBALANCE."[15] But even these "benign" headlines belie a deeper truth, which is worthy of comment. Each headline uses different terminology to express essentially one idea. The phrases "affirmative action," "positive bias," and "gender-equality law" are all used to refer to positive action. Yet, in practice, these terms cannot be regarded as meaning the same thing. The use of different words to convey one notion reminds us that language is powerful and not necessarily neutral. Words we use to express ideas carry connotations that go beyond the mere meaning of the words themselves. When the term "positive bias" is

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[7] *Id.*

[8] Ian Traynor & Stephen Bates, Women Win Job Ruling, Guardian (London), Nov. 12, 1997, at 12.

[9] Neil Buckley & Peter Norman, EU Court Backs Move for More Female Jobs, Fin. Times, Nov. 12, 1997, at 24.

[10] Imre Karacs, Court Strikes Blow for Career Women, Independent (London), Nov. 12, 1997, at 2.

[11] *Id.*

[12] *Id.*

[13] Christopher Bowe, German Gender-Equality Law is Upheld by European Court, Wall St. J. Eur., Nov. 12, 1997, at 2.

[14] Neil Buckley & Peter Norman, Court Backs Jobs Affirmative Action, Fin. Times, Nov. 12, 1997, at 2.

[15] Patrick Smyth, Court Backs Positive Bias to End Gender Imbalance Flynn Welcomes Decisions on Public Service Appointments, Ir. Times, Nov. 12, 1997, at 3.

used, it does not come empty-handed but with negative connotations of bias and discrimination. "Affirmative action" is weighted down with the controversy and dispute surrounding it in the United States. In his article Rethinking Positive Action, McCrudden contends that groups arguing for or against a concept try to "capture" the terminology which defines it. Indeed, "affirmative action" has been "captured" to the degree that when it is used it conjures up images of discord and dispute. In 1986, when McCrudden wrote his article, he thought that the term "positive action" had appeal because it had not yet been "captured."[16] Over a decade later, while "positive action" may not carry quite the baggage of "affirmative action," it has become increasingly burdened.[17]

Affirmative action has been used as a tool to redress gender and racial imbalances and inequalities in the United States since the late 1960s. Its usage has been controversial throughout its history, yet affirmative action has never been under greater threat in the US than it is now.[18] It is only more recently, however, that positive action came to be extensively utilized in Europe. In his opinion in Eckhard Kalanke v. Freie Hansestadt Bremen (Heike Glißmann intervening) ("Kalanke"), Advocate-General Tesauro points out that,

> In 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 in a state of crisis in its country of origin.[19]

It was not until Kalanke in 1995, long after comparable cases came to the attention of US courts,[20] that the ECJ had to rule on the legitimacy of national positive action measures under the European Union (the "EU") non-discrimination laws. Kalanke generated considerable debate on the problematic nature of positive action. This controversial decision of the ECJ

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[16] McCrudden, *supra* note 4 at 221.

[17] *See* text accompanying note 25 for a discussion of the terms "positive action" and "affirmative action."

[18] For a discussion on the current state of affirmative action in the U.S., *see* Nicholas deB. Katzenbach & Burke Marshall, Not Color Blind: Just Blind, N.Y. Times Mag., Feb. 22, 1998, Section 6, at 42.

[19] Kalanke, 1 C.M.L.R. 175, at para. 9.

[20] *See, e.g.*, Regents of the University of California v. Bakke 483 U.S. 265 (1978), United Steelworkers of America AFL-CIO-CLC v. Weber 443 U.S. 193 (1979), City of Richmond v. Croson 488 U.S. 469 (1989).

was followed in 1997 with the ECJ's second ruling on positive action in Marschall v. Land Nordrhein-Westfalen ("Marschall").[21] It was this latter case that inspired the headlines discussed above.

In this paper I analyze Marschall and propose a more radical and far-reaching interpretation of the significance of the recent developments in positive action in the EU. In the first part of the paper I define "positive action" and discuss it in relation to the concept of equality. In Part II, because it is necessary for the reader to have some understanding of the EU's approach to equality and positive action, I begin by examining the extent to which positive action measures have been used and/or endorsed by the EU as a tool for addressing equality issues. I then undertake a detailed analysis of Kalanke,[22] in which the ECJ ruled on the legitimacy of positive action in the EU in light of the Equal Treatment Directive.[23] I also outline and evaluate some of the criticisms that were made of this decision. An in-depth discussion and critique of Kalanke is necessary as this decision forms an integral part of the background into which the subsequent case of Marschall fits. In order to properly understand the significance of the Marschall decision, it is necessary to understand the context in which it was decided. In Part III of this paper, I examine Marschall,[24] the most recent ECJ ruling on positive action measures, and analyze it in light of Kalanke. Finally, in Part IV, I discuss the outlook for positive action in the EU. I end with the observation that, while Marschall endorses the use of preferential schemes to address gender inequalities in some instances, the overall future development of positive action in Europe remains uncertain and unpredictable.

I. WHAT IS POSITIVE ACTION?

"Positive action" is a somewhat diffuse concept which does not easily lend itself to definition. It has been described as having "sufficient uncertainty of meaning for many diverse interest groups, once they have put

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[21] Marschall, All ER (EC) 865.

[22] Kalanke, 1 C.M.L.R. 175.

[23] Its full title is 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, [1976] OJ L39/40.

[24] Marschall, All ER (EC) 865.

their own construction on it, to weigh-in in its support."[25] Perhaps not surprisingly then, no precise definition of positive action exists at the EU level.[26] However, overlooking the difficulty of arriving at a precise definition, positive action may generally be thought to cover many different measures and strategies which are undertaken in order to compensate for past injustices suffered by women, by redressing current inequalities amongst men and women, primarily in an employment context. The Commission of the European Communities (the "Commission") has stated that:

> [T]he concept of positive action embraces all measures which aim to counter the effects of past discrimination, to eliminate existing discrimination and to promote equality of opportunity between women and men, particularly in relation to types or levels of jobs where members of one sex are significantly under-represented.[27]

It is worth noting at this point that there is no real substantive difference between the concepts of "positive action" and "affirmative action." The latter term originated in the United States and essentially refers to the same types of actions, designed to remedy the same kinds of inequalities, as described above.[28] It has been postulated that the term "positive action" was chosen by the UK government as an alternative to "affirmative action" in order for that government to distance itself from the controversy generated by affirmative action in the United States.[29] Regardless of the way in which the term came to prevail, it is now generally used throughout Europe and by the EU.

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[25] McCrudden, *supra* note 4, at 219. McCrudden devotes a significant part of this article to a discussion on what "is contained under the umbrella of the concept of 'positive action.'" He identifies five types of action which might be included: (1) eradicating discrimination; (2) facially neutral but purposefully inclusionary policies; (3) outreach programs; (4) preferential treatment in employment; and (5) redefining "merit" (*see* 223-225).

[26] *See* Sacha Prechal, Case C-450/93, Kalanke v. Freie Hansestadt Bremen, [1995] ECR I-3051, 33 Common Mkt. L. Rev. 1245, 1251 (1996).

[27] Commission of the European Communities, Communication by the Commission to the Council and the European Parliament on the Interpretation of the Judgment of the European Court of Justice on 17 October 1995 in Case C-450/93, Kalanke v. Freie Hansestadt Bremen, COM (96) 88 final.

[28] *See* McCrudden, *supra* note 4, at 220-221.

[29] *Id.*

In addition to defining positive action in a general way, the Commission has identified three forms of the concept.[30] The first focuses on removing the disadvantages that characterize women's participation in the labor market. The causes of fewer employment and career opportunities for women are dealt with by using measures which are aimed at improving vocational training and career guidance.[31] The second form of positive action takes up the issue of combining and creating a favorable balance between family and professional life. Measures in this category should be aimed at creating a better distribution of responsibilities in these areas between men and women. Particular attention is given to measures which work on creating child-care infrastructure, modifying working hours, reintegrating women into the work force after they have taken time off to raise children, and developing fiscal and social security policies which contemplate family responsibilities.[32] The third, and final, form of positive action recognized by the Commission entails giving preferential treatment to the disadvantaged group. Such treatment is legitimized on the grounds that it compensates for past discrimination, the effects of which continue to exist. Generally, this form of positive action involves the use of quotas or targets which relate to recruitment, promotion, and sometimes to dismissal. The goal of such quotas is to achieve more equalized representation of the disadvantaged group within a particular category of the working population.[33]

Quotas aimed at restoring equal representation in the workplace may be either rigid or flexible. Rigid quotas do not take into account a particular individual's qualifications or skills but simply mandate that they reach a certain threshold or attain minimum requirements before appointment. In such a scheme there is no scope for considering the particular circumstances of a case. By contrast, flexible quotas only give preference to a candidate from a disadvantaged group if, in all other respects, the applicants for a position or promotion are equally qualified. Often, an "individual hardship rule" or

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[30] Advocate-General Tesauro identified three forms of positive action in his opinion in Kalanke which are similar to those later outlined by the Commission in its Communication. *See* Kalanke, 1 C.M.L.R. 175, at para. 9.

[31] Commission of the European Communities, Communication by the Commission to the Council and the European Parliament on the Interpretation of the Judgment of the European Court of Justice on 17 October 1995 in Case C-450/93, Kalanke v. Freie Hansestadt Bremen, COM (96) 88 final. *See also* Prechal, *supra* note 26, at 1251; Erika Szyszczak, Positive Action After Kalanke, 59 Mod. L.Rev. 876, 876 (1996).

[32] *Id.*

[33] *Id.*

"saving clause" will be included as part of a more flexible preferential positive action scheme. A saving clause (also known as a "safeguard clause") provides that even if the candidates are equally qualified, exceptional circumstances may still be taken into account before any preference is given to the candidate from the disadvantaged group.[34] In this way, a candidate who does not form part of a disadvantaged group does not suffer individual hardship due to the application of a preferential treatment system.

These three broad forms of positive action can and do encompass a seemingly endless array of proposals and programs that embody both general and specific measures addressing the many gender equality issues in the work place and labor market. Indeed, in Council recommendation of 13 December on the promotion of positive action for women (the "Positive Action Recommendation"), the Council of the European Communities (the "Council")[35] recommended that Member States ensure that positive action embrace numerous different measures, including the dissemination of information about gender issues, the performance of studies on the position of women in the labor market, the adaptation of working conditions, and encouragement of greater participation of women in decision-making bodies. Encouraging female candidates and recruiting and promoting women in employment sectors in which they are under-represented is, in the opinion of the Council, just one aspect of the concept of positive action.[36] However, it is the third type of positive action described by the Commission which is the focus of this paper. This is because in Kalanke and Marschall, preferential positive action schemes, using quotas to redress gender imbalances in employment and promotion, were at issue.

Positive Action and the Concept of Equality

It is not surprising that it was a preferential treatment scheme that came before the ECJ. Preferential treatment programs are among the most controversial form of positive action that can be implemented. This controversy stems from the fact that, at one level, it is difficult to reconcile the idea of preferential treatment with notions of equality and non-discrimination.

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[34] Szyszczak, *supra* note 31, at 876-880.

[35] Note that the Council is now formally known as the Council of the European Union.

[36] Commission of the European Communities, Council Recommendation of 13 December 1984 on the promotion of positive action for women, 84/635/EEC, [1984] OJ L331, Article 4.

These latter two concepts are closely related such that non-discrimination may be regarded as a subset of equality. Accordingly, the ECJ, has declared that the "prohibition of discrimination in Community provisions is merely a specific enunciation of the general principle of equality."[37] The principle of equality, however, is also inextricably linked with positive action, and a discussion of the latter cannot be undertaken without acknowledging the relevance and applicability of the former. Indeed, the extent to which the principle of equal treatment can be derogated from is at the heart of the matter the ECJ grapples with in the two positive action cases discussed in this paper.

It is not within the scope of this paper to debate the pros and cons of positive action on a philosophical, social, or political level.[38] However, in order to understand the underlying problems that the ECJ had to deal with when tackling the issue, it is important to be aware of the varying ways in which equality can be measured. It is clear that in many respects measuring equality involves questions of perspective. Equality plays a prominent role in debates over positive action because both critics and supporters of positive action use the concept to bolster their arguments and justify their views. Critics of positive action argue that such measures engender greater inequalities, whilst proponents believe that positive action works towards attaining greater social equality.[39] Thus, equality can be measured from an individual or group perspective.[40] To make matters more confusing, "equality" can also be described in other ways, such that it is possible to speak about "equality of result" and "equality of opportunity," "equal chances" and "equal means," or "formal" versus "substantive" equality.

In an article dealing with the various meanings of equality under European Community law, Anne Peters identifies four "distinguishable

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[37] Prechal & Burrows, Gender Discrimination Law of the European Community 2 (1990).

[38] For an introductory discussion on some of philosophical, economic, and legal aspects of positive action *see* Faundez, Affirmative Action: International Perspectives 1-25 (ILO, 1994).

[39] *Id.*

[40] In Kalanke, the Advocate-General distinguishes between formal equality (in the sense of equal treatment as between individuals belonging to different groups) and substantive equality (in the sense of equal treatment as between groups) in his opinion. *See* Kalanke, 1 C.M.L.R. 175, at para. 7. Peters discusses the Advocate-General's treatment of the different concepts of equality in Anne Peters, The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law— A Conceptual Analysis, 2 Eur. L. J. 177, 192 (1996).

aspects" of equality which are recognized by EU institutions and in EU law. They are: (1) the prescription of equal treatment; (2) the offering of equal opportunities ; (3) the pursuit of equal representation of the sexes; and (4) the guarantee of equal effects of rules and measures for both men and women.[41] This last category embraces the notion that one rule applying to everybody (*i.e.*, formal or legal equality) may not necessarily ensure "equality in fact" (*i.e.*, substantive equality) because, in practice, the rule may affect different groups of people dissimilarly. Any of these four categories could be advanced through positive action, depending on how one chooses to define the term. At least one of McCrudden's five types of positive action could be applied to each of them.[42] Peters points out that, "[o]ne particularly controversial issue which is obfuscated by the variable meaning of equality is positive action in favour of women."[43] Clearly, the coexistence of different aspects of equality complicates any discussion of positive action.[44] This project is further complicated by the fact that each individual aspect of equality lends itself to a variety of interpretations. For example, equal opportunity is a particularly ambiguous idea: it may mean commencing at the same starting point or it could mean having an equal chance of reaching a particular goal.[45]

It is not the purpose of this paper to undertake an in-depth discussion of the various paradigms of equality. However, it is important to be aware and have an understanding of equality's different aspects because they are relevant to Kalanke and Marschall. Indeed, some of the reasoning, particularly that of Advocate-General Tesauro's opinion in Kalanke, makes reference to the ways in which the various aspects of equality conflict.[46] The most important thing to remember in this area is that equality can be measured in different ways. Thus, while a law may be inconsistent with one aspect of equality (by treating individuals differently), it may nonetheless implement or be consistent with other aspects of equality (by ensuring equal representation or equality in fact). Peters states that:

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[41] Peters, *supra* note 40 at 179-190.

[42] McCrudden, *supra* note 4.

[43] Peters, *supra* note 40 at 178.

[44] Faundez, *supra* note 38.

[45] *See* Peters' discussion of this point in Peters, *supra* note 40 at 181; *see also* D. Rae *et al.*, Equalities 65-66, 73 (1981); J. Rawls, A Theory of Justice 100 (1971); and A. H. Goldman, Justice and Reverse Discrimination 170-174 (1979).

[46] *See* Kalanke, 1 C.M.L.R. 175, at para. 7, 13, 14, & 17.

> 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. Second, it implies a collective, not individualistic vision of equality.[47]

It is only by taking into account all the coexisting aspects of equality and recognizing the innate tensions which exist amongst them that the equality and discrimination issues raised in the positive action context can be thoroughly and completely tackled.[48]

II. EQUALITY AND POSITIVE ACTION IN THE EUROPEAN UNION

The equal treatment of men and women is a fundamental right in European Community law,[49] and the promotion of equal opportunities for men and women has been declared by the Council as a "fundamental task" of the EU and Member States.[50] The Equal Treatment Directive, in place since 1976, has further entrenched the principle of equal treatment of men and women specifically with respect to employment.[51] This Directive prohibits discrimination on the grounds of sex in all occupational matters. It does not directly deal with positive action measures. Nonetheless, positive action has been openly endorsed by the EU as a legitimate tool to use in counteracting discrimination in the labor market and work place. In 1984 the Council passed a Positive Action Recommendation, in which it recognized that existing legal provisions on equal treatment were inadequate for the elimination of continuing inequalities and accordingly recommended that Member States

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[47] Peters, *supra* note 40 at 183 (footnotes omitted).

[48] *Id.* at 195.

[49] Case 149/77, Defrenne v. Sabena 1978 E.C.R 1365, 3 C.M.L.R. 312 (1978).

[50] Commission of the European Communities, Equal Treatment for Men and Women: 1996 Report on Equal Opportunities (1996). The Essen European Council made this declaration in December 1994.

[51] 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, [1976] OJ L39/40.

adopt positive action policies.[52] While Recommendations are not binding on Member States, they do provide clear statements of policy positions on certain issues. In line with this Recommendation the EU has actively encouraged Member States to adopt positive action programs and the Commission implemented its own positive action program in 1988.[53] The Commission has even published a guide on implementing positive action measures which supplements its Recommendation.[54]

In the Third Medium-Term Action Programme on Equal Opportunities (1991-95), the Council approved a new EU action program which involved promoting equal opportunities by positive action.[55] Similarly, the Fourth Medium-Term Action Program on Equal Opportunities (1996-2000)[56] envisions positive action programs, along with other measures, as having a role in the "sex desegregation of the labour market."[57] The Commission has now made equal opportunities a "mainstreaming" policy. "Mainstreaming" entails taking a "global approach" and integrating equal opportunities processes into all other Community policies.[58] In other words, equal opportunity is now a "mainstream policy" which is to be applied in all areas of government.[59] It has been made clear by the Commission that mainstreaming does not mean that the EU's positive action policy is now

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[52] Commission of the European Communities: Council Recommendation of 13 December 1984 on the promotion of positive action for women, 84/635/EEC, [1984] OJ L331, Preamble & Article 1.

[53] EC Commission, Positive Action at the Commission (1993).

[54] EC Commission, Positive Action: Equal Opportunities for Women in Employment—A Guide, V/587/91-EN 39; COM(88) 370 final.

[55] Approved by the Council Resolution of May 21, 1991, OJ C142/01 (May 31, 1991), Part B of the program. The adoption of the action program was followed in a resolution by the Commission: Commission of the European Communities, Resolution on the Commission Communication—Incorporating equal opportunities for women and men into all Community policies and activities—"mainstreaming" COM(96)0067 C4-0148/96.

[56] Commission of the European Communities: Council Decision of 22 December 1995 on a medium-term community action programme on equal opportunities for men and women, (1996-2000).

[57] Szyszczak, *supra* note 31 at 878.

[58] For a discussion of "mainstreaming" as a response to what she sees as the failure of positive action, *see* Szyszczak, *supra* note 31, at 882-883.

[59] Commission of the European Communities, Equal Opportunities for Women and Men in the European Union—1996 (1997).

defunct. The Commission emphasized, in its 1996 Annual Report on equal opportunities for women and men in the European Union, that positive action and mainstreaming "are complementary and should be used together."[60]

Overall, there can be no doubt that the EU has expressly and wholeheartedly embraced the concepts of equal treatment and equal opportunities. It is also clear that achieving factual equality (as opposed to formal equality) and equal representation is important within the EU. This concern is reflected in various Community documents, both binding and non-binding.[61] Furthermore, as a tool for addressing equality issues, positive action has been openly encouraged and developed within the EU system. However, preferential systems of employment and promotion, as one aspect of positive action, have been sanctioned to a lesser degree. Preferential treatment was not explicitly outlined as an exception to equal treatment principles mandated by the Equal Treatment Directive and there are no explicit directions on what constitutes a legitimate preferential system in the Positive Action Recommendation.[62] Thus, the status of preference schemes as a positive action tool remained uncertain until 1995 when, for the first time, the ECJ was asked to rule on the interpretation of Article 2(4) of the Equal Treatment Directive in relation to positive action measures in Kalanke. Before delving into Kalanke and the ECJ's later positive action case, Marschall, I will spend some time outlining the specific provisions of the Equal Treatment Directive. I will also examine what scope the Directive gives for derogation from the equal treatment rule.

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[60] Commission of the European Communities, 1996 Annual Report of 12 February, 1997 on equal opportunities for women and men in the European Union, COM(96) 650 final, discussed in Commission of the European Communities, Equal Treatment for Men and Women: 1996 Report on Equal Opportunities (1996). The creation of an Annual Report of equal opportunities was announced in the 1994 Commission White Paper (Commission of the European Communities, 1994 Commission White Paper, European Social Policy—A Way Forward for the Union, COM(94) 333) and is used as an method of monitoring equality policies at both the Member State and the EU level.

[61] Peters, *supra* note 40.

[62] Council Directive 76/207/EEC [1976] OJL 39/40 *supra* note 51; and Council Recommendation 84/635/EEC, [1984] OJ L331.

The Equal Treatment Directive[63]

Given that both Kalanke and Marschall are concerned with the interpretation of the Equal Treatment Directive, it is worth discussing the Directive in some detail. Council Directives are issued by the Council which is made up of representatives of all Member States. Article 189 of the European Community Treaty (the "EC Treaty")[64] provides that Directives only bind Member States as to the particular result to be achieved, not as to the form and method by which to attain it.[65] Thus, Directives tend to be concerned with setting forth general policy rather than spelling out the specific way in which such policy should be realized.

Broadly speaking, the purpose of the Equal Treatment Directive is to put the principle of equal treatment for men and women in employment into effect in Member States.[66] In this context, the principle of equal treatment embodies the principle of equal opportunity. Therefore, as well as being concerned with eliminating inequality of working conditions and treatment whilst "on the job," the Equal Treatment Directive deals with promoting equality of access to and promotion in employment. Article 2(1) of the Directive specifies that the principle of equal treatment means that there shall not be either indirect or direct discrimination on the grounds of sex.[67]

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[63] *Id.*

[64] Since the entry into force of the Treaty of European Union (the "EU Treaty") on November 1, 1993, which among other things, amended the EEC Treaty so as to replace the term "European Economic Community" with the term "European Community," it would appear that the European Economic Community Treaty (the "EEC Treaty") should be referred to as the European Community Treaty (the "EC Treaty"): *see* Lasok, The European Court of Justice: Practice and Procedure 1 (2nd ed, 1994).

[65] Berman *et al*, Cases and Materials on European Community Law 167 (1993).

[66] Council Directive 76/207/EEC [1976] OJL 39/40 *supra* note 51, at Article 1(1). The text of Article 1(1) reads as follows: [the purpose 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."

[67] *Id.*, Article 2(1). The text of Article 2(1) reads as follows: "[f]or 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."

There are three exceptions to the equal treatment principle, one of which is embodied in Article 2(4).[68] This Article authorizes Member States to adopt or retain any measures which promote equal opportunity for men and women. Measures which operate so as to remove existing inequalities which affect women's opportunities in the area of employment are specifically mentioned as being appropriate.[69] Article 2(4) thus envisions, at least to some degree, positive measures being taken to ensure that equality between men and women ensues. For the first two decades of its existence there was no occasion to test the scope of Article 2(4), or to what extent it could embrace positive action measures. Furthermore, while the Council adopted a Positive Action Recommendation[70] which indicates that positive action in some manner and form is desirable and supported by the Council, the types of positive action programs which are proposed in the Recommendation are, on the whole, fairly benign and "to a large extent...fall within the scope of the principle of equal treatment."[71]

In more recent times, however, the EU and some Member States have instigated positive action schemes involving "preferential treatment." Predictably, when more aggressive positive measures were adopted, which clearly ran contrary to the formal principle of equal treatment, the exact scope of Article 2(4) came into dispute.[72] Prior to Kalanke the ECJ had one occasion to rule on the scope of Article 2(4). In Re Protection of Women: EC Commission v. France ("EC Commission v. France") the ECJ construed Article 2(4) as having the "precise, limited object of authorising measures which, although discriminatory in appearance, actually aim to eliminate or reduce *de facto* inequalities which may exist in actual working life."[73] Measures designed to eliminate existing obstacles or barriers to equal opportunities (for example, educational and vocational programs aimed

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[68] The others are found in Article 2(2) & 2(3) of the Equal Treatment Directive and are not relevant to the present discussion.

[69] Council Directive 76/207/EEC [1976] OJL 39/40, *supra* note 51, at Article 2(4). The text of Article 2(4) reads as follows: "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)."

[70] Council Recommendation 84/635/EEC [1984] OJL 331, *supra* note 62.

[71] Prechal & Burrows, *supra* note 37, at 112.

[72] *Id.*

[73] Case 312/86, Re Protection of Women: EC Commission v. France, 1988 E.C.R. 6315, 1 C.M.L.R. 408 (1988), at para. 15.

specifically at women) would presumably be acceptable. The Court ruled, however, that the exception did not provide scope for the development of "special rights" for women, albeit to address particular difficulties faced primarily by women in the workplace. For example, Article 2(4) did not cover the creation of special rights relating to the rearing of children (such as granting additional days of annual leave in respect of each child, granting leave when a child is ill, or the payment of a child-care allowance).

Adopting a narrow interpretation of Article 2(4) was consistent with an earlier ECJ ruling on the Equal Treatment Directive in which the Court held that a derogation from the individual right to equal treatment had to be interpreted strictly (*i.e.*, narrowly) and subject to the principle of proportionality. This meant that a derogation could not exceed the bounds of what was appropriate and necessary to achieve a particular objective.[74] Before 1995, however, the ECJ had never determined the extent to which quota schemes (as opposed to special rights) could be embraced within Article 2(4). This changed when Kalanke came before the Court.

III. KALANKE V. FREIE HANSESTADT BREMEN[75]

The national legislation which came before the ECJ in this case was the *Gesetz zur Gleichstellung von Frau and Mann im offentlichen Dienst des Landes Bremen* ("the LGG") from Germany.[76] Section 4 of this Act provided that in the case of appointment or promotion to a higher wage bracket, if female and male applicants were equally qualified, female applicants were to be given priority if women were under-represented in a particular employment category.[77] Under-representation was deemed to occur where women made

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[74] Case 222/84, Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary, 1986 E.C.R. 1651, 1 C.M.L.R. 240 (1986), para. 36. This case concerned the derogation contained in Article 2(2) of the Equal Treatment Directive.

[75] Kalanke, 1 C.M.L.R. 175.

[76] Act on Equal Treatment of Men and Women in the Public Service in the Land of Bremen.

[77] *Id.* at Section 4(1): In the case of an appointment (including establishment of the status of official or judge) which is not made for training purposes, women who have qualifications equal to those of their male co-applicants shall be given priority in sectors where they are under-represented.

Id. at Section 4(2): In the case of an assignment of an activity in a higher pay, remuneration and salary bracket, women who have qualifications equal to those of their male co-applicants shall be give priority if they are under-represented. This shall also apply in the case of assignment of a different official post and promotion.

up less than one-half of a salary bracket within a relevant staff grouping of an official body.[78]

Mr. Kalanke, the plaintiff, was short-listed along with Ms. Glißmann, for a position of Section Manager in the Bremen Parks Department. Both Mr. Kalanke and Ms. Glißmann were employed by the Parks Department as horticultural employees, were in the same pay bracket within the Department, and were comparably qualified.[79] The Parks Department management proposed Mr. Kalanke for the promotion but the Staff Committee did not give its consent, presumably because of the preference. Consequent arbitration failed and the matter was referred to the Conciliation Board. The Board determined that Mr. Kalanke and Ms. Glißmann were equally qualified and that women were under-represented at the relevant career level. Thus, in accordance with Section 4 of the LGG, the Board held that priority should be given to Ms. Glißmann. Mr. Kalanke appealed to the *Arbeitsgericht* (Labor Court) and subsequently the *Landesarbeitsgericht* (Regional Labor Court). On both occasions his application was dismissed.

Mr. Kalanke ultimately applied to the First Chamber of the *Bundesarbeitsgericht* (Federal Labor Court) for a review on a matter of law. The *Bundesarbeitsgericht* determined that the resolution of the matter rested essentially on the applicability of the LGG. If Section 4 of the LGG was applicable then the Conciliation board was correct in appointing Ms. Glißmann, given that she and Mr. Kalanke were equally well qualified and women were under-represented in that bracket. If Section 4 was not applicable, then the Conciliation Board had erred in giving priority to Ms. Glißmann solely on the grounds of sex (*i.e.*, discrimination would have occurred). The Court considered that the LGG provisions were compatible with German constitutional and statutory provisions but sent the matter to the ECJ to determine whether Section 4 of the LGG was compatible with the Equal Treatment Directive. Thus, the ECJ had to determine whether Article 2(1) and (4) of the Directive precluded national positive action legislation.

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[78] *Id.* at Section 4(5): There is under-representation if women do not represent at least one-half of the persons in the individual pay, remuneration and salary brackets in the relevant personnel group of an official body. This also applies to the function levels provided for under the schedule of allocation of responsibilities.

[79] The Parks Department had employed Mr. Kalanke since 1973; it had employed Ms. Glißmann since 1975. Both held diplomas in landscape gardening.

Advocate-General Tesauro's Opinion

Each ruling by the ECJ is accompanied by the opinion of an Advocate-General. The Advocate-General acts as "independent counsel" in writing his or her opinion. He or she does not represent any particular Member State, but aims to represent the "public interest" in an independent and impartial manner. Opinions are written after the parties have made all their submissions and are intended as a further aid for the ECJ in making its determination. While such opinions are taken seriously by the Court, they are not binding, nor should they necessarily be regarded as indicative of the Court's reasoning. However, given the frequently sparse nature of ECJ rulings, which are often characterized by a conspicuous absence of detailed reasoning, the Advocate-General opinions can be valuable insofar as they provide a degree of insight into what the reasoning of the Court *may* have been. (This is assuming, of course, that the opinion and ruling come to the same conclusion.) As will become evident, the Court's ruling in Kalanke was not particularly forthcoming, whereas Advocate-General Tesauro's opinion exposed a much more elaborate reasoning process. The Advocate-General not only sets out the legal and factual context of the case but also makes expansive general remarks on the various forms of positive action and on the nature of formal, as opposed to substantive, equality. As his opinion is long, and at times convoluted, it is not helpful to give a detailed outline. However, I will give an overview of his arguments.

In summary, the Advocate-General expressed the opinion that Article 2(1) prohibits preferential treatment because it involved discrimination on the grounds of sex. Concerning the type of measures that are permissible as an exception to that general principle, he acknowledged that some forms of positive action are legitimate under Article 2(4). However, he confined such action to measures which worked towards guaranteeing equal starting points, and not those which attempted to secure equal results. The Advocate-General made this distinction based on his interpretation of the term "equal opportunities" within the context of Article 2(4). He defined "equal opportunities" to mean putting people in the position to obtain equal results by ensuring equal chances. Thus, he found that Article 2(4) embraced measures which put people in a position to achieve equal results, but not measures which guaranteed an equal result in itself. The Advocate-General acknowledged, however, that existing obstacles may sometimes impair people, even those who start from the same point, from reaching the same result.[80] To

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[80] Kalanke, 1 C.M.L.R. 175, at para. 14.

this degree he was of the opinion that measures may be taken which remove those barriers. Such action could be "discriminatory in appearance but designed in practice to remove existing obstacles standing in the way of equal opportunities for women."[81] The objective of such measures had to be substantive, as opposed to merely formal, equality.[82]

Advocate-General Tesauro did not think that a system of preferential treatment removed the obstacles barring the way to a particular result, but rather imposed a result without more. He argued that such numerical or formal equality is devoid of substantive equality and thus could not be encompassed by Article 2(4). He was of the opinion that the formal equality achieved by mandating quotas could not be used to remedy the effects of past discrimination, nor did it remove current obstacles to equality and equal representation. For this reason he concluded that positive action in the form of quotas did not come within Article 2(4) as an exception to the principle of equal treatment. In conclusion he stated:

> Formal, numerical equality is an objective which may salve some consciences, but it will remain illusory and devoid of all substance unless it goes together with measures which are genuinely destined to achieve equality.[83]

The Advocate-General's opinion has been criticized for leaving Article 2(4) devoid of content.[84] It is true that he did favor some forms of positive action, namely measures that address existing obstacles which bar the way for achieving equal opportunities for women. However, when his opinion is read in conjunction with EC Commission v. France (which ruled out measures which created special rights for women),[85] virtually no scope for preferential treatment in employment remains. It is worth noting that the Advocate-General believed EC Commission v. France was unduly severe in

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[81] Kalanke, 1 C.M.L.R. 175, at para. 15.

[82] Kalanke, 1 C.M.L.R. 175, at para. 7. Advocate-General Tesauro defines "substantive equality" as meaning equal treatment as between groups, and "formal equality" as meaning equal treatment as between individuals belonging to different groups.

[83] Kalanke, 1 C.M.L.R. 175, at para. 28.

[84] Eva Brems, Kalanke, 2 Colum. J. Eur. L. 172, 177 (1995/1996); Linda Senden, Positive Action in the EU Put to the Test. A Negative Score? (Case C-450/93, Kalanke v. Freie Hansestadt Bremen [1995] ECR I-3051), 3 Maastricht J. Eur. Comp. L. 146, 161 (1996).

[85] *See* discussion on EC Commission v. France at text accompanying note 73.

its ruling.[86] Nevertheless, Linda Senden has argued that if Tesauro's approach is accepted, Article 2(4) would be "further marginalized as it apparently only applies in respect of issues which, although important, do not seem to be at the heart of the problem anymore."[87]

Titia Leonen and Albertine Veldman agree with this analysis. They state:

> [O]ne could interpret the Kalanke judgment as if the Court had adopted the line of thought of the AG. This means that choosing the woman, when both candidates are equal pursuant to a policy which aims at equal representation, constitutes a measure which gives "absolute and unconditional priority" to women and, as such, oversteps the limits of the exception. This perspectives [sic] leads, however, to the unsatisfactory conclusion that, if one also adheres to the Commission v. France decision, no feasible measures are covered by Article 2 paragraph 4.[88]

The only forms of positive action possible might be in the nature of facially neutral training or outreach programs.

The Advocate-General's narrow interpretation of "equality of opportunity" has also been criticized.[89] This criticism is discussed in greater detail below.[90]

The ECJ's ruling

Kalanke, which as indicated above is not a particularly long or forthcoming judgment, was reasoned in a two-stage process. First, the ECJ held that national measures such as those provided for in Section 4 of the LGG involved discrimination on the grounds of sex and thus breached Article 2(1). This part of the decision is straightforward and not surprising. It is plainly foreseeable that positive discrimination would be in breach of anti-discrimination legislation unless: (1) an exception permitting such

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[86] *See* Prechal's discussion on this point in Prechal, *supra* note 26, at 1252-53.

[87] Senden, *supra* note 84.

[88] Titia Loenen & Albertine Veldman, Preferential Treatment in the Labour Market after Kalanke: Some Comparative Perspectives, 12 Int'l J. Comp. Lab. L. & Indus. Rel. 43 (1996).

[89] Peters, *supra* note 40, at 192.

[90] *See* discussion at text accompanying notes 117-119.

discrimination was contained in the legislation; and (2) the discrimination in question fell within the exception. In the second part of Kalanke, the ECJ went on to find that the positive action measures provided for in the LGG did not fall within the exception provided in Article 2(4) of the Equal Treatment Directive.

The second, and more topical, part of the ECJ's judgment is sparse. The Court cited EC Commission v. France with approval and found that Article 2(4) permitted measures which were discriminatory in appearance but worked to eliminate existing inequalities.[91] Hence, the Court ruled that Article 2(4):

> permits national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men.[92]

The ECJ then briefly mentioned the Positive Action Recommendation, and in so doing, acknowledged that it lends support to the implementation of certain forms of positive action. However, the ECJ did not dwell on this Recommendation. Instead, it abruptly changed the apparent direction of the judgment. The Court stated that a derogation from individual rights laid down in the Equal Treatment Directive must be interpreted strictly.[93] As a result, Article 2(4) was read narrowly and was not considered to embrace the implementation of all types of positive action.[94] In conclusion, in two key paragraphs, the ECJ held 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.
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> Furthermore, in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of opportunity as

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[91] EC Commission v. France, 1 C.M.L.R. 408.

[92] Kalanke, 1 C.M.L.R. 175, at para. 19.

[93] In accordance with its earlier ruling in Johnston, 1 C.M.L.R. 240 (1986).

[94] Although it could be argued that the Positive Action Recommendation does not mandate absolute and unconditional priority for appointment or promotion over men.

> envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity.[95]

Thus, there are two aspects to Kalanke, and accordingly two factors, which arguably contributed to making the provisions unlawful. The first aspect makes it clear that positive action measures which guarantee "absolute and unconditional" priority do not fall within the scope of Article 2(4). The second aspect states (albeit more obliquely) that positive action measures which mandate a particular result, as opposed to providing equal opportunity, are not sanctioned by Article 2(4).

A general overview of the manner in which Kalanke has been interpreted indicates that there are two ways of reading the decision. Depending upon whether the first aspect of the decision is alone emphasized, or whether both aspects are taken into account, scope is provided for alternative interpretations. Some Member States and commentators have interpreted the decision very narrowly such that it is strictly confined to its facts. Others have given the decision a broader scope, reading it more generally to cover a wide variety of positive action measures. The Commission endorsed the idea that Kalanke could be interpreted in these two ways, when it stated in a Communication on the Interpretation of Kalanke:

> [E]ither the Court dismissed the possibility of justifying any quota system, even one containing a safeguard clause which allows the particular circumstances of a case to be taken into account, or the Court restricted itself to 'rigid' quotas provided for in the Bremen law and applied to Mr. Kalanke, that is in an automatic manner.[96]

As alluded to in the above statement, the first and narrower interpretation of Kalanke finds that it was only the "absolute and unconditional" nature of the preferential treatment scheme which took it beyond the scope of Article 2(4). This interpretation ignores the second aspect of the decision. Admittedly, this part of Kalanke is not phrased as forcefully as the first part. Arguably, because it does not form an essential element of the decision, it is not binding.[97] Dagmar Schiek argues that the use

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[95] Kalanke, 1 C.M.L.R. 175, at para. 22 & 23.

[96] Commission of the European Communities, Commission communication on the interpretation of the judgment delivered on 17 October 1995 by the European Court of Justice in Case C-450/93 (Eckhard Kalanke v. Freie Hansestadt Bremen), COM (96) 88 & 93.

[97] *See, e.g.*, Prechal, *supra* note 26, at 1257; Senden, *supra* note 84, at 153.

of the word "furthermore" indicates that the second paragraph is not fundamental to a narrow view of the Court's reasoning and that a "wider, result orientated interpretation of the ban on discrimination" was not necessarily adopted by the ECJ.[98] Indeed, he points out that Advocate-General Tesauro did not consider the ECJ's judgment to follow the reasoning in his Opinion.[99]

By adopting a narrow interpretation of Kalanke, it is possible to say that the Court found that the particular positive action law in this instance was too rigid, went beyond promoting equal opportunities, and thus fell out of the scope of Article 2(4). Thus, the ruling would not necessarily reach to other positive action schemes, even if they did impose quotas. Selecting this interpretation means choosing to confine the scope of Kalanke. The judgment can even be further limited on the grounds that, while the ECJ found that "absolute and unconditional" positive action overstepped the bounds of Article 2(4), it failed to define what those bounds were or what "absolute and unconditional" positive action was. This task, and accordingly that of clarifying the reach of the judgment, was left to subsequent decision-makers.

The broader interpretation of Kalanke focuses on the result aspect of the ECJ's reasoning. In other words, the idea that any positive action system which adopts a result-oriented, as opposed to an opportunity-oriented approach, goes beyond Article 2(4). In this part of the decision the ECJ makes a distinction between "equal representation" (the ends) and "equal opportunity" (the means). The Court seems to be saying that while equal representation of men and women in the work force may be a desirable result, such equality may only be pursued by providing equal opportunities for both sexes, not by mandating such an end through an unconditional positive action policy. Thus the *method* of achieving this particular result assumes great importance. A result of equal representation will only be acceptable if the *means* by which that result is sought promotes equal opportunity. This interpretation would mean that Kalanke was much more far-reaching and influential. It would rule out all positive action measures that provided for a particular result on the basis of sex, although "measures targeting the means to the result rather than the result itself, [could] still be implemented."[100] For

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[98] Dagmar Schiek, Positive Action in Community Law, 25 Indus. L. J. 239, 243 (1996).

[99] *Id.*

[100] Rebecca Means, Kalanke v. Freie Hansestadt Bremen: The Significance of the Kalanke Decision on Future Positive Action Programs in the European Union, 30 Vand. J. Transnat'l L. 1087, 1089 (1997).

example, a training program designed to increase female participation and representation in the workplace would be acceptable because it would not mandate a result but would merely provide the means by which to achieve it.

Criticisms and Critiques of Kalanke

There have been numerous articles on Kalanke which both analyze the ECJ's reasoning and discuss the scope of the decision.[101] The prevailing criticism of the judgment is that the Court was unduly brief and failed to give adequate reasoning to support its decision.[102] The absence of detailed analysis in the Court's judgment may well be by design rather than accident. One can postulate, for example, that there was some degree of disagreement within the ECJ on the subject of quota schemes. This would hardly be surprising, as it is such a controversial topic. Because the ECJ only hands down unanimous judgments, it is feasible to envisage a situation where the judges could not agree on the exact reasoning supporting this result, but managed to agree on a sparse judgment that provided "room" for further reflection and delineation.[103] In any event, the fact that the judgment is so short means that it leaves too much scope for interpretive speculation. As a result too many different readings of the decision were possible and no-one knew exactly what the Court was saying.

Two of the different ways in which the decision can be interpreted were discussed above. These are by no means the only ways in which the decision has been interpreted. It has been read both extremely narrowly (limited to the precise facts and law upon which it was based)[104] and very

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[101] *See, e.g.*, Brems, *supra* note 84; Prechal, *supra* note 26; Senden, *supra* note 84; Loenen & Veldman, *supra* note 88; Means, *supra* note 100; Gabriel A. Moens, Equal Opportunities not Equal Results: "Equal Opportunity" in European Law after Kalancke [sic], 23 J. Legis. 43 (1997); Laura Molinari, The Effect of the Kalanke Decision on the European Union: A Decision with Teeth but Little Bite, 71 St. John's L. Rev. 591 (1997); Peters, *supra* note 40; Szyszczak, *supra* note 31.

[102] *See, e.g.*, Brems, *supra* note 84, at 175; Prechal, *supra* note 26, at 1255; Senden, *supra* note 84, at 147; Loenen & Veldman *supra* note 88, at 46; Peters, *supra* note 40, at 191.

[103] Senden states that a possible reason for the brevity of Kalanke may be that "there was no full agreement within the ranks of the Court and that it therefore wished to leave the matter 'open' to a certain extent"; *see* Senden, *supra* note 84, at 151.

[104] Szyszczak, *supra* note 31, at 880.

broadly (*i.e.*, as completely rejecting the concept of positive action).[105] A decision leaving itself open to such varied interpretations can be criticized as causing confusion and throwing the validity of existing positive action legislation into doubt. In this respect Kalanke must be considered to be the epitome of poor decision-making. As well as being criticized for this general reason, two more precise criticisms have surfaced.

First, the ECJ is criticized for failing to elaborate on why it determined the positive action scheme in Kalanke to be "absolute and unconditional" and thus offensive.[106] Prechal argues that the quota system in Kalanke should not be regarded as "absolute and unconditional" and that to describe it as such is inaccurate.[107] Both Brems and Prechal point out that, in some respects, the scheme in Kalanke was relatively flexible. It only came into operation in those few marginal cases where a male and female candidate were equally qualified for a position and women were under-represented in the particular job category for which they were applying. Certainly it could not be equated with a rigid quota system, which automatically promoted women once they had acquired a minimum threshold or qualification.[108]

However, given that the Court did take exception to some aspect of the LGG, one can postulate about a few possible objections it may have had. The Court may, quite simply, have disapproved of the legislation because it mandated that in some circumstances a woman be given automatic preference over a man. This would mean that the ECJ considered both aspects of its decision to be binding and that it was of the opinion that legislation which is result-, rather than opportunity-, oriented could not be reconciled with the purposes of Article 2(4). If this were the case, all result-oriented schemes would fall outside of Article 2(4). No matter how flexible the schemes were,[109] the mere fact that in some instances a woman received automatic

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[105] This was the initial interpretation throughout much of the EU, caused, in part, by dire media reports about the decision. *See* Szyszczak, *supra* note 31, at 880.

[106] *See, e.g.*, Brems, *supra* note 84, at 175.

[107] Prechal, *supra* note 26, at 1255-1256. Interestingly, in Advocate-General Jacob's opinion in Marschall he agrees that the rule in Kalanke was not "absolute and unconditional" and points out that the Court in fact recognizes this fact in its judgment (in para 9); *see* Marschall, All ER (EC) 865, at para. 28.

[108] *See* discussion above at text accompanying note 34 on what is commonly thought of as the differences between "rigid" and "flexible" preferential treatment/quota schemes.

[109] *See* text accompanying note 34 for a description of how a saving clause operates.

preference because of her sex, would take such a scheme outside of the scope of Article 2(4).[110]

Alternatively, the measures may have been regarded as "absolute and unconditional," not because they mandated a particular result, but because there was no saving clause in the legislation. A saving clause would allow a male candidate's individual circumstances to be considered even after it had been determined that he and his female co-applicant were equally qualified. A number of commentators do mention the possibility of a saving clause operating to transform this otherwise "rigid" quota system into a "flexible" one.[111] However, making a saving clause the defining characteristic of a quota system is unusual. Normally other features are thought to separate rigid from flexible quota systems: a rigid quota system is usually defined as one in which there is a fixed number of positions for women. In such a scheme, once minimum standards are met, women are automatically appointed. By contrast, in Kalanke, there was no fixed number of positions for women and priority was only given to a female candidate if she and her male co-applicant were equally well qualified in all respects. In other words, this system is much more akin to a flexible quota scheme.[112] It is also interesting to note that the German legislators consciously chose not to include a saving clause in the LGG because of the risks of discrimination that are associated with it.[113]

Finally, the quota scheme may have been regarded as rigid for reasons quite independent of the absence of a saving clause. For example, the German legislation mandated that women have priority for appointment or promotion if they did not make up 50 percent of the job category for which they were applying. This percentage was fixed and did not reflect the actual number of available women in the labor market. In contrast, a proportionate representation scheme would only have allowed preferential treatment "when the percentage of women in a specific job class is less than the percentage of women in the qualified labour market supply."[114] Thus, if women made up 20 percent of the qualified labor market for a particular job, quotas would only need to be applied by employers who employed fewer than 20 percent women

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[110] I argue that this is the reading adopted by General-Advocate Jacobs in his opinion in Marschall (*see* text accompanying notes 141-146 below).

[111] Molinari, *supra* note 101, at 625; Brems, *supra* note 84, at 175; Senden, *supra* note 84, at 153.

[112] *See, e.g.*, Brems, *supra* note 84, at 175; Prechal, *supra* note 26, at 1255-56.

[113] Prechal, *supra* note 26, at 1257.

[114] Loenen & Veldman, *supra* note 88, at 47.

in that specific job category.[115] This is the way a number of Member States have chosen to interpret the judgment.[116]

The second major ground on which the judgment is attacked is on the basis of the Court's narrow approach to the concept of equality. The ECJ does not give an expansive analysis of its understanding of "equality." However, it does appear to make a distinction between equality of starting points and imposing a particular result. Thus, the Court appears to pick up on a part of the Advocate-General's analysis of equality. Limiting "equal opportunity" to starting points, and not allowing it to embrace any notion of equal results, is thought by some commentators to be a limited view of equal opportunity and a rather arbitrary one at that.[117] Indeed, "results" may be considered to be a vital indicator of the existence of factual or substantive equal opportunity.[118] Prechal states:

> [T]he representation ratio is a useful indicator about the existence of real equality in opportunity. It would seem that, like the Advocate General, the Court fails to realize that the issue of real equality of opportunity is also closely linked to the elimination of stereotypes and the like, which often structurally (and above all silently) hinder women in their professional career.[119]

Similarly, Peters criticizes the Court's failure to demonstrate any awareness of the different aspects of equality and its reluctance to acknowledge the tensions arising from its multiple aspects. Peters is of the opinion that the Court's rationale for its decision is simplistic. She also criticizes the Advocate-General's opinion (which she says the Court's judgment can be traced back to) on the ground that Tesauro treats quotas as a purely

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[115] *Id.*; Brems, *supra* note 84, at 175.

[116] For example, the Netherlands, Germany, and Ireland, which all consider the judgment only to apply to inflexible legal quotas (*i.e.*, those which do not incorporate proportionate representation); *see* Senden, *supra* note 84, at 153-54.

[117] Brems, *supra* note 84, at 177.

[118] Sloot describes two aspects of equal opportunity: "procedural equal opportunity" which is concerned with starting points, and "substantive equal opportunity" which is concerned with results: B.P. Sloot, Positieve Discriminatie 240-244 (1986) in Brems, *supra* note 84, at 177. *See also* Prechal, *supra* note 26, at 1257.

[119] Prechal, *supra* note 26, at 1257. It is interesting to note that in Marschall the Court seems to have recognized the effect of stereotypes on women and the role that quota schemes have in eliminating such stereotypes; *see also* text accompanying note 149 below.

compensatory tool, only able to achieve formal equality. She argues that this approach assumes that discrimination is a thing of the past and ignores the need to address continuing discriminatory practices. In this way she believes that quotas can have a role in achieving substantive as well as formal equality.

The Response to Kalanke

The initial response to Kalanke was primarily one of shocked hostility.[120] Women's rights advocates and organizations denounced the decision, and Member States and EU institutions criticized it.[121] The Court was first thought to be "rejecting the concept of positive action *per se*" and as a consequence the future of positive action programs, already implemented to varying degrees in Member States and within EU institutions itself, appeared to be in jeopardy.[122] In response to the outcry, the majority of Member States sought to limit Kalanke's reach by choosing to interpret it narrowly, so as to limit the legal impact of the decision.[123] The notable exception to this was the United Kingdom, where the Equal Opportunities Commission and the Confederation of British Industry spoke out strongly in support of Kalanke.[124] In contrast to the legislation existing in some of the other Member States of the EU, Kalanke was in line with UK legislation prohibiting positive discrimination in preference for gender-based training initiatives.[125]

The European Commission took a firm stance on Kalanke early on. In a Communication addressed to the European Council and Parliament shortly after Kalanke was handed down, the Commission set out its interpretation of the decision.[126] It took the view that the decision was restricted to positive action systems of the precise form at issue in Kalanke and that rigid quota schemes aside, positive action measures in general were

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[120] Prechal, *supra* note 26, at 1257-58; Szyszczak, *supra* note 31, at 880.

[121] Means, *supra* note 100, at 1122-23.

[122] Szyszczak, *supra* note 31, at 880.

[123] For example, Germany, Ireland, and the Netherlands. *See* Senden, *supra* note 84, at 153-54.

[124] Means, *supra* note 100, at 1124.

[125] *Id.*

[126] Commission of the European Communities, COM (96) 88 & 93, *supra* note 96.

still lawful.[127] The Commission also proposed an amendment to Article 2(4) of the Equal Treatment Directive, which would clarify the types of measures embraced within the Article. The proposed amending provision reads as follows:

> (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 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.*[128]

The proposed amendment is not intended to change the scope of the Equal Treatment Directive but is described by the Commission as being "interpretative" of it. The amendment has, not surprisingly, been criticized for being unclear.[129] Indeed the Economic and Social Committee reproved the Commission for failing to achieve unequivocal clarification on the question of whether all quota systems contradicts Community law, or if only rigid ones do.[130] At present, no agreement has been reached amongst Member States on whether to amend the Equal Treatment Directive. In light of Marschall it seems increasingly unlikely that it will happen.[131]

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[127] *See* Commission of the European Communities, Explanatory Memorandum to the Proposal for a Council Directive amending Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, COM (96) 93 final, pp 3, 4 & 7; *see also* Szyszczak, *supra* note 31, at 882; Prechal, *supra* note 26, at 1258.

[128] [1996] OJ C179, p8 (Art. 1 of the proposed Amending Directive). Amending language is italicized.

[129] Senden, *supra* note 26, at 163; *see also* Marschall, All ER (EC) 865, at para. 49.

[130] Economic and Social Committee of the European Communities, Opinion of the Economic and Social Committee on the 'Proposal for a Council Directive amending Directive 76/207/EEC on the implementation of equal treatment of men and women as regards to employment vocational training and promotion, and working conditions,' C30/19, 1997 O.J. para. 3.1-3.2.

[131] Support for the proposal appears to be waning. *See* Means, *supra* note 100, at 1126. *See also* Equal Opportunities: Disagreements About How to Interpret Marschall Judgement, Eur. Info. Serv., Eur. Rep., Jan. 28, 1998.

The possibility of a general equal treatment principle in the EC Treaty has also been considered. This idea was initially put forward by the Commission and the European Parliament but was also supported by national experts and organizations.[132] Two pertinent amendments were drafted at the Inter-Governmental Conference and included as part of the Treaty of Amsterdam.[133] This treaty was signed in October last year, and is currently being ratified by Member States.[134] One of the amendments was a supplement to Article 3 of the Maastricht Treaty and reads "In all activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women."[135] The other amendment alters Article 119 of the Maastricht Treaty to allow Member States to adopt or maintain "measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity."[136] While the amendments seek to make it clear that positive action is not contrary to the concepts of equal treatment and equal opportunity, they fail to give unequivocal support for the concept of positive action in all its diverse manners and forms.

However, it may be that such support is unnecessary. Despite the initial fear that positive action had been done away with in one fell swoop, the general consensus ultimately arrived at on Kalanke was that it was to be interpreted narrowly and to be regarded as having little legal impact. Thus, the decision did not deal the devastating blow to positive action schemes that was first feared. Still, in view of the unclear nature of Kalanke, it was not

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[132] Senden, *supra* note 26, at 162.

[133] The Amsterdam Treaty was concluded on June 18, 1997 and signed on October 2, 1997. It will supersede the Treaty of Maastricht on January 1, 1999. *See* Amsterdam Treaty: Progress on Ratification Varies Between Member States, Eur. Info. Serv., Eur. Rep., Feb. 7, 1998.

[134] All Member States of the EU must have ratified the Amsterdam Treaty by the end of 1998. It may encounter ratification problems in Denmark, and possibly in Belgium and France. *See* Amsterdam Treaty: Progress on Ratification Varies Between Member States, *supra* note 133.

[135] Treaty of Amsterdam, Sec. I: Freedom, Security and Justice, Chap. 1, Fundamental Rights and Non-Discrimination, Equality of Men and Women, Supplement to Art. 3, (visited Feb. 20, 1998) <http://www.undp.org:81/missions/netherlands/eurunion/amsterdm/treaty/chapte01.htm>.

[136] *Id.* at Art. 141 (ex Art. 119(4)) (Previously article 6(3) of the Social Protocol). *See also* Commission of the European Communities, Speech by Padraig Flynn European Commissioner with responsibility for Employment, Industrial Relations and Social Affairs Women's Committee, European Parliament, Brussels, 21 Jan. 1998, SPEECH: 98/7.

possible to determine conclusively the true state of positive action in the EU until the issue came before the ECJ once more.[137] This opportunity presented itself in 1997 with the ECJ's consideration of Marschall.

IV. MARSCHALL V. LAND NORDHEIN-WESTFALEN[138]

The national legislation before the ECJ in Marschall was the *Beamtengesetzfur das landNordrhein-Westfalen* from Germany.[139] Paragraph 25(5) of this legislation provided that where there were fewer women than men in a particular career bracket, and female candidates were as equally well qualified as their male counterparts, they were to be given priority for promotion "unless reasons specific to an individual [male] candidate tilt the balance in his favour."[140] Mr. Marschall, a tenured teacher working in career bracket A12, applied for a promotion to an A13 teaching position. The *Bezirksregierung* (District Authority) informed Mr. Marschall that it intended to appoint a woman to the teaching position, as required by paragraph 25(5) of the legislation, due to the fact that a woman, equally qualified as Mr. Marschall, had also applied for the promotion and there were fewer women than men in career bracket A13. Mr. Marschall lodged an objection to this decision with the *Bezirksregierung* but it was rejected. He then brought legal proceedings before the *Verwaltungsgericht* (Administrative Court) *Gelsenkirchen*. Relying on Kalanke, the *Verwaltungsgericht* was of the opinion that Paragraph 25(5) might fall foul of the Equal Treatment Directive Article 2(1) and (4) and thus referred the issue to the ECJ for a preliminary ruling on the matter.

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[137] As Senden states, "[A] conclusive assessment is difficult, if not impossible, in view of the loopholes which can be identified in the judgment."; *see* Senden, *supra* note 84, at 147.

[138] Marschall, All ER (EC) 865.

[139] The Law on Civil Servants of the Land.

[140] *Id.* at Para. 25(5) (version published on May 1, 1981 as last amended by paragraph 1 of the 7th Law amending certain rules relating to the civil service, of 5 Feb. 1995) provides: "Where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professionalism, unless reasons specific to an individual [male] candidate tilt the balance in his favour."

Advocate-General Jacobs' Opinion

In Kalanke, Advocate-General Tesauro's opinion is noteworthy because it included some substantive reasoning which was sorely lacking in the ECJ's judgment. Similarly, in Marschall, Advocate-General Jacob's opinion is interesting because it gives a detailed discussion of Kalanke that is not present in the judgment. His opinion is also interesting because it provides an alternative analysis (to that of the ECJ) of the positive action scheme in Marschall. It is an examination which leads to a very different outcome than the one ultimately mandated by the ECJ. The Court's ruling is discussed below, but, succinctly put, the ECJ found that the German legislation came within the Article 2(4) exception because the saving clause operated to ensure that the preferential system was not "absolute and unconditional." By contrast, the Advocate-General was of the opinion that the proviso was of essentially no effect and did not change the nature of legislation. In other words, he found that the quota system still imposed equal representation rather than promoting equal opportunity.

In coming to his determination, the Advocate-General examined the scope of Article 2(4), focusing in particular on Kalanke, which he summarized in some detail, before applying it to the present case. The Advocate-General was of the opinion that the positive action measures in Marschall were discriminatory in the same way the measures in Kalanke had been. Therefore the measures were contrary to the Equal Treatment Directive. Jacobs recognized that the saving clause in Marschall did mean that the legislation was different from that in Kalanke. However he stated:

> Although it is true that the national rule at issue in the present case is not expressed in terms of automatic promotion of a woman in the circumstances in which it applies, the crux of the rule is none the less that, otherwise than in exceptional cases, a woman is to be promoted because she is a woman, and that is clearly prima facie contrary to the principle of equal treatment laid down by the directive.[141]

The Advocate-General rejected the argument that the saving clause gave sufficient grounds to distinguish Marschall from the ruling in Kalanke for two reasons. First, he argued that the positive action measures in Kalanke were not in fact "absolute and unconditional," since the ECJ recognized that the measures were subject to some exceptions. Accordingly, the fact that the

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[141] Marschall, All ER (EC) 865, at para. 23.

Marschall provisions were not "absolute and unconditional" (due to the saving clause) did not mean that they were distinguishable from those in Kalanke. This is a somewhat bizarre argument, as the ECJ did consider the legislation in Kalanke to be "absolute and unconditional," despite the fact that when the LGG was in place it would have been applied consistently with German constitutional law and statutory provisions, which meant that in appropriate cases exceptions could and would have been made.

Secondly, Jacobs argued that the reasoning in Kalanke suggested that the present rule was unlawful because this law, like that in Kalanke, was not concerned with creating equal opportunity but rather, was concerned with ensuring a particular result. This argument has more substance. Advocate-General Jacobs argued that whatever terminology was used to express the concepts of equal opportunity and equality of results, the distinction between the two ideas was conceptually clear.[142] Accordingly, the Advocate-General chose to interpret Kalanke as meaning that,

> [A]ny rule which goes beyond the promotion of equal opportunities by seeking to impose instead the desired result of equal representation is similarly outside the scope of art[icle] 2(4) of the directive and hence contrary to the principle of equal treatment as enshrined in art[icle] 2(1) and, in the present state of Community law, unlawful.[143]

In adopting this approach the Advocate-General chose to adopt a broad interpretation of the Kalanke ruling. In his view the saving clause proviso did not affect his conclusion that the preferential treatment rule was unlawful because: (1) it did not alter the discriminatory nature of the rule; (2) the scope of the proviso was unclear; and (3) the proviso was objectionable in that it allowed discriminatory criteria to be used in making appointments or promotions.

The Advocate-General then went on to discuss the scope of Article 2(4) more generally. He stated that from its wording it is clear that Article 2(4) is concerned with the promotion of equal opportunity and not the imposition of equal representation. He thought that measures taken by Member States to this effect would be legitimate so long as such measures accorded with the principle of proportionality (which requires measures to be

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[142] He wrote that the concepts can also be expressed in terms of "removing obstacles rather than imposing results, or ensuring equality at starting points rather than at points of arrival..."; *see* Marschall, All ER (EC) 865, at para. 31.

[143] Marschall, All ER (EC) 865, at para. 32.

appropriate and necessary for achieving the objective that is sought). He made the general observation that gender-specific provisions will not be proportionate to the goal of remedying inequalities faced by women, if gender-neutral schemes could arrive at the same result. He also made the point, however, that if it so happened that gender-neutral measures provided greater benefits to women than men, this was nonetheless a lawful indirect discriminatory effect. The Advocate-General was of the opinion that if a provision would better achieve its goals framed in gender-specific language, it had to be aimed at achieving equal opportunity and not at imposing a particular result.

Advocate-General Jacobs made it clear that he was not expressing an opinion on the desirability of positive action but that he was merely applying the law as it stood before him. He argued that it was up to the legislature to make changes to the statutory scheme if it were of the opinion that it was desirable to implement positive action schemes, and particularly preferential treatment measures. He was of the opinion that the ECJ's role is merely to interpret existing legislation and therefore the Court should resist any temptation or pressure to tailor its judgments to what one might think to be desirable social policy. He also found that the Commission's proposed amendment to Article 2(4) lacked innovation and failed to clarify the issue of which types of positive action measures are lawful.

Finally, Advocate-General Jacobs found that international instruments brought to the Court's attention in support of positive action were not relevant to the case at hand.[144] International instruments were produced to the ECJ in Marschall as evidence of the growing international acceptance of the use of positive action measures to counteract inequality. Article 5 of the International Labour Organization's Discrimination (Employment & Occupation) Convention (the "ILO Discrimination Convention") and Article 4 of the Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW") were specifically mentioned. Article 5 of the ILO Discrimination Convention permits "special measures" to be taken on behalf of persons who "require special protection or assistance." All Member States with the exception of Ireland, Luxembourg, and the UK have ratified this Convention.[145] Article 4 of CEDAW provides that the "adoption by States

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[144] *See* Marschall, All ER (EC) 865, at para. 51-57.

[145] Art. 6 of the ILO Discrimination (Employment & Occupation) Recommendation contains a similar provision (ILO Recommendation 111, 1958). Note, however, that under the ILO Constitution Member States are not bound to enact legislation bringing the Recommendation into effect. They are only bound to bring the Recommendation to the attention of the legislative authority in that country. The ILO has also adopted a Declaration

Parties of temporary special measures aimed at accelerating defacto equality between men and women shall not be considered discrimination as defined in the present Convention."[146] All Member States have ratified CEDAW. The Advocate-General found that these instruments could not support an argument supporting preferential treatment measure because they are vague and contain permissive, as opposed to mandatory, provisions.

The ECJ's Ruling

Like Kalanke, Marschall is short and the ECJ fails to give sufficient background reasoning to explain its ruling. The Court made it clear early on in its judgment that it considered itself bound by Kalanke and its finding that national measures giving women automatic priority in job appointment or promotion involved discrimination on the grounds of sex and fell outside of Article 2(4). However, the Court did not explicitly state what its interpretation of Kalanke was. Instead, it latched on to the distinguishing feature of the legislation in issue in Marschall, the saving clause, and did not let go. The ECJ saw its role in Marschall as determining whether a national rule containing such a saving clause could come within the meaning of Article 2(4), insofar as a preferential treatment scheme with such a provision could be viewed as promoting equal opportunity. As in EC Commission v. France and Kalanke, the ECJ in Marschall interpreted Article 2(4) to authorize measures which "although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality."[147] The Court, as in Kalanke, expressed the opinion that Article 2(4) "authorises national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the

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on Equality of Opportunity and Treatment for Women Workers (adopted June 25, 1975) which explicitly states that "positive special treatment during a transitional period, aimed at effective equality between the sexes, shall not be regarded as discriminatory." Interestingly, Art. 1, Part II of the Additional Protocol to the European Social Charter also allows "appropriate measures" to be taken to ensure the effective exercise of the right to equal opportunities. Clearly such measures could embrace positive action schemes.

[146] Art. 4(1), Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), GA Res. 34/180 (1979). Note that France and the UK were of the view that the Convention should in no way require Governments to impose "reverse discrimination" in favor of women; *see* Rehof, Guide to the Travaux Préparatiores of the United Nations Convention on the Elimination of All Forms of Discrimination against Women 68 (1993).

[147] Marschall, All ER (EC) 865, at para. 26. *See also* EC Commission v. France, 1 C.M.L.R. 408, para. 15.; Kalanke, 1 C.M.L.R. 175, at para. 18.

labour market and to pursue a career on an equal footing to men."[148] As in Kalanke, the Court quoted from the preamble to the Positive Action Recommendation.

Clearly the ECJ was building up a collection of passages from Kalanke which were strongly supportive of the concept of positive action. Presumably it did this for two reasons: (1) to bolster its decision that quota schemes with saving clauses were permissible under the Equal Treatment Directive; and (2) to demonstrate that Marschall was being decided in accordance with the principles outlined in Kalanke. However, in the core part of its judgment, the ECJ went a step further than it had in Kalanke, by recognizing that:

> [E]ven where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life...the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances.[149]

Thus, the Court acknowledged that the way in which women are stereotypically viewed (particularly in relation to their role as mothers and home providers) means that equal qualifications (or starting points) do not necessarily equate with equal opportunity. Due to this fact, the ECJ reasoned that measures that sanctioned preferential treatment might fall within the Article 2(4) exception, insofar as they counteracted the prejudicial effect of commonly held stereotypes on female job candidates. Such measures would be legitimate because they would reduce actual inequality in the work place. The ECJ went on to say that because Article 2(4) was a derogation from an individual right provided by a Directive, positive action measures could not guarantee "absolute and unconditional" priority for women. This was why the law had been unlawful in Kalanke. However, the Court was able to distinguish the Kalanke ruling from the facts at hand, because the legislation before the Court in this instance had a saving clause to the effect that women would not be given priority in promotion if reasons specific to an individual male candidate tilted the balance in his favor.

The Court was not concerned that the saving clause was deliberately termed in vague language because it allowed the administration sufficient

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[148] Marschall, All ER (EC) 865, at para. 27.

[149] Marschall, All ER (EC) 865, at para. 29-30.

flexibility in making a determination as to whom to appoint. Free of the constraints of legal precision, any reasons specific to an individual male could be taken into account and, in theory, preference could always be given to a male candidate. In other words, even if a male and female candidate were equally qualified for a job, the woman would not "automatically" be awarded the position. The Court considered that such a rule was not "absolute and unconditional" and could come within Article 2(4) of the Equal Treatment Directive. It noted, however, that the "reasons specific" to a male candidate which could tilt the decision in his favor must not discriminate against the female candidate. In sum, the ECJ held that as long as positive discrimination is for the purpose of redressing a gender imbalance, as long as such measures do not provide for automatic preference, and as long as the assessment of the candidates is based on objective, non-discriminatory criteria, the positive discrimination will be lawful.[150]

Analysis of Marschall

In Marschall, the ECJ interpreted Kalanke narrowly. It focused on the first aspect of Kalanke (*i.e.*, the "absolute and unconditional" part), applied the saving clause as an "escape mechanism," and completely failed to address in any depth the equal opportunity/equality of results issue. An interesting issue arises from the ECJ's analysis of the legislation in Marschall which stems from the Court's approach to the saving clause in that case. The extent to which a saving clause actually changes the nature of a quota system is debatable and thus the ECJ's characterization of the clause as a distinguishing feature of the legislation is dubious. Accordingly, the accuracy of the Court's assessment of the preference scheme can be questioned.

There are two ways in which a saving clause may be viewed. First, a saving clause can be perceived as a instrument that operates virtually to negate the effect of the preferential provisions. "Preferential treatment" legislation is thus rendered largely meaningless and ineffective. In the few instances when a male and female applicant are found to be equally qualified, the individual circumstances of the man will still be taken into account, such that the woman's "gender" advantage is considerably diminished, especially if the impact of ongoing gender bias is taken into account. While this view on the effect of a saving clause can be criticized for vastly overstating a clause's impact, there is no doubt that including an "escape mechanism" in a preferential treatment scheme is inherently risky. This is because its

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[150] *See* Smyth, *supra* note 15.

application may in fact lead to indirect discrimination. This was the reason a saving clause was omitted by the German legislature when drafting the LGG.[151]

The alternative view that one can take of the saving clause is to assume that it does not render the legislation effectively meaningless, but simply operates as a rarely employed "escape mechanism." If the circumstances justify it, the saving clause permits the appointment or promotion of a man, despite the fact that there is an equally qualified female candidate and women are under-represented in the job category in question. This view arguably reflects a more realistic approach to the way in which saving clauses work in practice. It means that such quota schemes continue to operate as a useful gender-rebalancing tool and thus the very purpose of their existence is affirmed. In the majority of instances where equal qualification conditions are met, the preferential measures still operate: a woman will get job priority over a man on the basis of her gender.

Some commentators take the view that because the saving clause operates so rarely and because, in essence, a preferential scheme continues to exist, the saving clause cannot be regarded as changing the basic character of the scheme. This point was made strongly in an editorial published following Marschall in the Wall Street Journal:

> In fact...either there are gender-based preferences or there are not. It is only the circumstances under which the priority kicks in that can be conditional...The preference required is absolute. It is only the point of application that is open to interpretation.[152]

The writer makes a valid comment: at some point, however many flexible "conditionals" precede that point, a preference based on gender sets in. A argument similar to this was put forward by the French and UK governments in Marschall. Those governments argued that because the clause had no impact on the "normal" case and was only applied in exceptional circumstances, preferential treatment was still discriminatory.[153] The ECJ rejected this argument and although it did not explicitly explain why it did so, it is not hard to fathom why. Comparatively speaking, the saving clause does render the preferential scheme more flexible. Indeed, as indicated above, such a clause has the potential to render a preference system essentially

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[151] Prechal, *supra* note 26, at 1257.

[152] Quotas by Another Name, *supra* note 6.

[153] Marschall, All ER (EC) 865, at para. 20.

meaningless. Therefore, although at some point a preference can still be thought to "kick in," its operation cannot be regarded as a foregone conclusion.

Given that the ECJ chose to interpret Kalanke narrowly, it was understandable that it chose to treat the saving clause as making a significant difference in Marschall. Under the narrow interpretation of Kalanke, the ECJ set a standard for itself: it ruled out measures which were "absolute and unconditional" and by implication allowed those measures which were not. In Marschall it set about the process of drawing a line between positive action measures which were and were not acceptable. The place the ECJ chose to draw the line in Marschall was at the saving clause. The Court could have chosen a different "place" to make the distinction. For example, it could have decided that only a saving clause coupled with proportionate representation would make a scheme sufficiently "flexible" to come within Article 2(4) of the Equal Treatment Directive.

If the Court had embraced a broader interpretation of Kalanke, the fact that the saving clause still imposes a result (albeit not an "absolute and unconditional" one) may have made it more difficult for the Court to avoid a finding that the legislation was discriminatory. This is essentially the route the Advocate-General took in his Opinion. If it is accepted that a preference scheme is still operative and meaningful despite a saving clause, then by definition we must accept that in some instances it does impose a result. In my view, a saving clause does not change the fundamental character of preferential legislation. A scheme still exists whereby at some point, and in most instances, a woman will be favored because of her gender. While the scheme may no longer be regarded as absolutely and unconditionally imposing results, the legislation is still "results oriented," as opposed to being "opportunity oriented" (using these concepts as they were defined in Kalanke). This debate is theoretical in the context of Marschall, because the ECJ did not take up the second aspect of Kalanke. One can nevertheless postulate that perhaps the reason why they did not take it up is because it would have necessitated a different result.

It is worth dwelling on what happened to the second aspect of Kalanke in Marschall. Apart from a glimpse of the equality issues surrounding positive action (one which belies the complexity of the concept of equality) the Court did not even hint that it was aware of the equality of results/opportunity dichotomy. For this reason Marschall must be regarded as very unsatisfactory, for it has failed to "clear up the problem of how to resolve the clash between the basic legislation on equal treatment and the creation of positive measures for the under-represented sex."[154] In other words, it has not even attempted to resolve the basic conflict between equality of treatment, equality of opportunity, and equality of result. Some might think that this is a good thing. It might be thought that the distinction made in Kalanke between equality of opportunity and equality of result is unfortunate and unhelpful and that the less attention paid to the matter in Marschall the better. It might further be thought that it is not the role of the Court to attempt to resolve such equality issues, which arguably lie beyond the scope of the issues at hand.

However, given that the equality of results/equality of opportunity dichotomy was dealt with in Kalanke, it would have been better for the ECJ to tackle the issue head on, rather than to ignore it. The Court's short and unforthcoming judgment in Marschall indicates yet again that the Court is unsure of where it stands on issues of equality. The one move the Court did make was to broaden its interpretation of equal opportunity. Admittedly, in Kalanke, the ECJ did not define what it meant by equal opportunity, although the Advocate-General did so in his opinion. Because in many ways the Court appears to follow his reasoning, it is reasonable to presume that it, like he, adopted a relatively narrow reading: *i.e.*, limiting it to the concept of "equal starting points." In Marschall, however, the Court realized, at least implicitly, that giving equal opportunities, in the narrow sense of ensuring equal starting points, was not enough to counteract inequalities between men and women in the employment arena. It recognized that an equally qualified man and woman do not necessarily have the same opportunity to achieve equal results because of the stereotypes and prejudices which burden women.

While the Advocate-General in Kalanke had recognized that equal starting points would not always guarantee equal results, he thought that such inequalities had to be addressed by other measures (such as vocational training), not by imposing numerical quotas. In Marschall, the ECJ went beyond this and found that the use of a flexible preferential treatment scheme was a legitimate way to address these inequalities and thus provide for equal opportunity. In effect, therefore, the Court embraced a more generous interpretation of "equal opportunity" so as to include the mandating of results. This is not a unique interpretation of the concept. Many commentators have

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[154] This was the view expressed by Vogel-Polsky, a professor at the Université Libre de Bruxelles in Equal Opportunities: Disagreements About How to Interpret Marschall Judgment, Eur. Info. Serv., Eur. Rep., Jan. 28, 1998.

pointed out that equal opportunity does not just have to be about starting points and that the term is open to a variety of interpretations.[155]

Although the ECJ failed to tackle the equality of results issue head on, it nevertheless has substituted a broader view of equal opportunity for a narrow one. It has realized, without explicitly stating so, the merits of positive action in tackling the real barriers that women face. Clearly, the saving clause enabled the ECJ to distinguish Marschall from Kalanke. However, because of the Court's ruling on equal opportunity, I believe the decision was slightly more radical than it appears at first glance. In a fundamental way, the Court took a quite definitive move away from the direction in which it appeared to be heading in Kalanke, perhaps in response to the political climate engendered by that case. Whatever the reason, it chose to interpret Kalanke narrowly and support a preferential scheme that was not substantially different to the one it had earlier rejected.

The Response to Marschall

In contrast to Kalanke, the response to Marschall was overwhelmingly positive. The European Commission welcomed the ruling as "putting positive action in the European Union back on the rails."[156] Padraig Flynn, the European Social Affairs Commissioner, spoke out in support of Marschall and described it as vindicating the Commission's narrow interpretation of Kalanke, as outlined in its Communication on the Interpretation of Kalanke.[157] The European Women's Lobby also spoke out in support of the ruling.[158] Some experts from the European Parliament's Committee on Women's Rights were more cautious in giving their support to the decision. Within the Committee there was some disagreement on how to interpret the judgment and what its implications were.[159] Some regarded the decision as a very positive step, while others thought more work still needed to be done to ensure that

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[155] *See* Peters' discussion of this point in Peters, *supra* note 40, at 181; *see also* Rae *supra* note 45; Rawls, *supra* note 45; Goldman, *supra* note 45.

[156] Buckley & Norman, *supra* note 14.

[157] Commission of the European Communities, Positive Action for Women: Statement by Commissioner Flynn on the Marschall Case, Press Release; IP 97/973. *See also* Traynor & Bates, *supra* note 8, at 13.

[158] European Women's Lobby Welcomes Marschall Judgment on Positive Discrimination, Eur. Info. Serv., Eur. Rep., Nov. 22, 1997.

[159] Equal Opportunities: Disagreements About How to Interpret Marschall Judgement, Eur. Info. Serv., Eur. Rep., Jan. 28, 1998.

positive action measures are regarded as a lawful means of redressing inequalities within Member States. Not surprisingly, the decision does have its critics. One report described the ECJ's ruling as "doublespeak" passing for law.[160] It is clear that positive action still can incite strong feelings of anger and resentment. On the whole, however, the EU views Marschall as a step forward, rather than a step back, for positive action.

CONCLUSION

Many supporters of positive action regard Marschall as an extremely satisfactory decision. It is viewed as preserving preferential action schemes in the EU and as bringing the ECJ into line with the existing law of many Member States and with international law, where increasing support for the concept of positive action can be found.[161] However, Marschall may also be regarded as extremely unsatisfactory for two reasons. First, the decision turns on a saving clause, which is not generally regarded as a distinguishing feature of a preference scheme. The Court's decision is thus based on a superficial distinction rather than fundamental principles. The saving clause in Marschall provided an easy way for the ECJ to avoid the "real" issues raised by the different concepts of equality. These issues still need to be addressed.

Secondly, because the Court failed to tackle the "real" issues in Marschall, it did not delineate the scope of Article 2(4). Nor has it, on a more fundamental level, helped to solve any of the basic problems and dilemmas underlying positive action schemes. Broad questions remain concerning how to resolve conflict between the different conceptions of equality. As a result, although Marschall has approved the use of flexible preferential schemes with saving clauses, it gives no guidance as to what other schemes are acceptable.[162] While in the short term the ECJ has realigned itself with the view of most Member States that preferential schemes are lawful, there is no predicting in what direction the Court will head in the future. The Court appears to have embraced a wider view of "equal opportunity" than it has done in the past and has accepted the merits of quota schemes in some

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[160] Quotas by Another Name, *supra* note 6.

[161] *See* discussion above at text accompanying notes 143-145.

[162] For example Szyszczak queries whether Article 2(4) allows "positive discrimination in the field of recruitment/promotion by giving preference to women under certain conditions?" or whether "a distinction should be made between positive action which takes account of considerations of necessity/proportionality and those which do not?"; *See* Szyszczak, *supra* note 31, at 883.

circumstances. However, until the ECJ explicitly determines its position on the basic tension between equal treatment and positive action the lawfulness of many preferential measures remains uncertain.

It may be some time before a positive action scheme comes before the ECJ again because, for many, the issue may seem to be resolved. Because Marschall sanctioned preference schemes with savings clauses, it is likely that many existing schemes will be amended, and new ones designed, so as to take advantage of this sliver of judicial certainty. What is troubling to employers, however, is that the status of other schemes is not clear. For this reason, unless clarifying legislation is enacted, there can be no doubt that at some point in the future questions concerning the legality of positive action and the scope of Article 2(4) will confront the Court once again. It is plainly foreseeable, for example, that a scheme that is not based on proportionate representation, but sets a rigid quota, could be challenged as not falling within Article 2(4).[163] It is to be hoped that, when this happens, the ECJ will take the opportunity to address the difficult equality issues that preferential schemes raise and help pave the way to a more certain and secure existence for positive action. Until then, the future of positive action in Europe remains unpredictable at best.

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[163] For example, if the rigid representation target bears no relation to the number of qualified women available in the labor market.