

Women Caught in a Logical Trap in EC Law: An Analysis of the Use of Quotas in the Case of Kalanke

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Introduction

Among feminist legal theorists today, there is a great deal of scepticism regarding the possibility of promoting sex equality within the existing legal systems. This is because laws, as well as legal methods and legal systems as a whole, rest on a patriarchal foundation celebrating a traditional masculine perception of the Self and this particular (male) Self's relation to the world at large.¹ In order to change and improve legal systems it is therefore very important to thoroughly analyse how the existing legal systems work, especially in regards to systems which pass themselves off as actively creating equality between the sexes.

In our day and time therefore, the legal system of the EU, as it manifests itself in the rulings of the European Court of Justice, is of great interest. Because of article 119 on equal pay in the Treaty of Rome and the EC-legislation that has followed the equal pay principle, the European Court of Justice has become the highest legal authority in the process of shaping sex equality in the EU member states.

In this article I will analyse the case of *Kalanke*² which is the first EC-case which goes into the question of the use of quotas. The case has been subject to intense discussions and caused the Commission of the European Community to take a very unusual step; it has proposed an amendment of the article interpreted by the Court in the *Kalanke*-case.³ The proposed amendment has not yet been enacted and it is doubtful whether it ever will, since an amendment requires an unanimous resolution by the Council of the European Community.

As the Court's judgment in the case of *Kalanke* does not leave much reasoning to be analysed and as the Court followed the legal opinion of Mr. Advocate General, the analysis is concentrated on Mr. Advocate General's opinion. In order to analyse his reasoning I use the same method as in my doctoral thesis titled, "Equality between men and women in the EC law. A feminist analysis". In this article, I shall begin by briefly introducing the theories used, followed by a summary of the *Kalanke* case and the EC-law brought into focus. Thereafter I present my analysis of the legal opinion of Mr Advocate General. The

article ends with an estimation on how quotas could be used if there were an awareness of the complexity and the seriousness of problems with sex-discrimination in the Court of Justice. However, before pursuing this any further, I would just like to say a few words about the different notions of equality from a feminist perspective.

Notions of equality

The abstract standard of equality is based on the Aristotelian notion which means that likes ought to be treated alike, and unlike unlike. As women were seen as different from men, these differences were the reasons for treating men and women differently. In the nineteenth century, John Stuart Mill advocated against laws which denied women equal civil rights in the areas of property, suffrage, marriage, education and employment. Mill's argumentation is the historical basis for the notion of *formal equality* in the liberal tradition: as there are no real, substantive differences between the sexes, there are no reasons to treat women differently from men.⁴ Formal equality has got the implication that women ought to be treated *as men*, not that women and men ought to be treated alike. In order to create a legal structure that imposes the recognition of formal equality between the sexes, many Western legal systems have introduced a ban on discrimination on the grounds of sex. That is, to deny a person equal treatment by reference to the person's sex is called *direct discrimination*.

During the last decade, a number of prominent feminist legal theorists have realised that the traditional liberal legal formula is unable to produce real, substantive equality. As Finley puts it, "To be treated as if you were the same as a norm from which you actually differ in significant ways is just as discriminatory as being penalized directly for your difference."⁵ Thus for a multitude of possible underlying reasons like sociological, structural, historical, cultural, psychological, biological or whatever else, differences between women and men have been created and should not be ignored.

As a consequence of the realization that the traditional liberal notion of formal equality cannot produce what can be labeled *substantive equality*, the notion of *indirect discrimination* has been developed. This was first introduced by the US Supreme Court in a case of race-discrimination: *Griggs vs. Duke Power Co.*⁶ In this case, the Court ruled that US law proscribes not only overt discrimination, but also such *practices which may be fair in form but are discriminatory in practice*. In other words, it was realised that in order to tackle the roots of discrimination it is necessary not to focus only on the question of intention to discriminate, but to look beyond, at the actual implications of the decisions in question. In regards to the EC legislation, the notion of indirect discrimination was included into its praxis without any explicit reference to the *Griggs*-case, but in the case of *Jenkins* the plaintiff cited it and the European Court of Justice accepted its argument about unintentional discrimination.⁷ It is clear that the notion of indirect discrimination could become very useful, especially if it were realised that discriminatory practices include discrimina-

tory structures. It also means that a rule itself may be proved or shown to be biased if based on patriarchal philosophical assumptions.

Theory and method

It has become more difficult to answer the question why men's domination of women perpetuates since theorists have become aware of how complex the question is. Joan Scott is one of the theorists who suggests that the question has to be answered on different levels.⁸ She means that gender involves four interrelated elements: 1) culturally available symbols, 2) normative concepts, 3) social institutions and organisations and 4) subjective identity. According to Scott the cultural symbols are open to many interpretations of meaning, but when the symbols are interpreted through normative concepts these concepts attempt to limit and contain the metaphorical possibilities of the symbols. Normative concepts are expressed in legal, religious and political doctrines and typically take the form of fixed binary oppositions, categorically and unequivocally asserting the meaning of – for example – male and female, masculine and feminine. Every analysis of normative concepts must, according to Scott, include a notion of politics and reference to social institutions. Scott's approach is fruitful in feminist legal analysis since the legal language is based on dichotomies, oppositions and conflicts.

In this article I shall focus on some of the normative concepts shaped by the European Court of Justice. While analysing normative concepts, Joan Scott uses Ferdinand de Saussure's structuralist linguistics and Jacques Derrida's theories of how meaning is constructed in the Western philosophical tradition.⁹ de Saussure has claimed that meaning is made through implicit or explicit contrast, that a positive definition rests on the negation or repression of something represented as antithetical to it. Fixed oppositions conceal the extent to which things presented as oppositions are interdependent. They derive their meaning from a particularly established contrast rather than from some inherent or pure antithesis.

According to Derrida, the interdependence is hierarchical with one term dominant and prior and the opposite term subordinated and secondary. Derrida argues that the Western philosophical tradition rests on binary oppositions like unity/diversity, identity/difference and universality/specificity. To the numbers of binary oppositions feminist theorists have added among others reason/emotion, culture/nature, mind/body, activity/passivity, day/night and sun/moon.¹⁰ The leading terms, Derrida claims, are accorded primacy while their partners are represented as weaker or derivative. Yet the first terms depend on and derive their meaning from the second to such an extent that the secondary terms can be seen as generative of the definition of the first terms.

The EC-law

In the field of equality between men and women the EC-law contains a number of pairs of words. The aim of this article is to show how they are made oppositions and hierarchical. The most important pairs of words in the Kalanke case

are the following: men/women,¹¹ individual/collective, direct discrimination/indirect discrimination, formal equality/ substantive equality and legal actions/ positive actions.

The Kalanke case

Mr. Kalanke was a horticulturist employed by Bremen's Parks Department. He had applied for a post as section manager but was not appointed because there was an equally qualified female candidate. According to Bremen's *Landesgleichstellungsgesetz* women were to be given priority for every appointment, provided that: a) women had the same qualifications as men applying for the same post and b) women did not make up half of the staff in the relevant personnel group within a department. Mr. Kalanke brought actions against the decision of appointment in the *Arbeitsgericht*, the *Landesarbeitsgericht* and the *Bundesarbeitsgericht*, without success. The Highest Court ascertained that the disputed provision was consistent with German Basic Law, but turned to the EC Court to ask whether the provision was consistent with Articles 2(1) and 2 (4) of the directives 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working condition.¹²

Relevant EC legislation

Article 2(1) of the directive 76/207 defines the principle of equal treatment for men and women. The principle means that "there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status". When this directive was passed, twenty years ago, it was the first time indirect discrimination was explicitly prohibited. However, neither in this directive nor in any later is there a definition of the two types of discrimination. Thus, by reading the text of the article it is impossible to come to any other conclusion than that the two kinds of discrimination are equally valued, that is, indirect discrimination is as prohibited as direct discrimination.

Through the Court's judgments the term "direct discrimination" has come to imply all discrimination by explicit reference to sex.¹³ The term "indirect discrimination" has been developed gradually. From this point of view the *Bilka-Kaufhaus*-case is the most important.¹⁴ Here the Court declares that a seemingly objective provision may constitute indirect discrimination if a statistical study shows that the provision is a disadvantage for a far greater number of women than of men. Then the burden of proof changes to the defendant who has to prove objective reasons for the provision for the purpose of justifying the indirect discrimination. Indirect discrimination has thus got an important meaning as it queries the objectivity of the rules and aims to create substantive equality.

Article 2(4) states that the principle of equal treatment in article 2(1) shall be without prejudice to positive actions for women enacted by Member States.

Positive actions are defined as “measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities” in the labour market. This exception from the principle of equal treatment was initiated late in the enacting process, which means that there are no comments on it.¹⁵

However, in the first community action programme 1982 – 1985 the Commission took the responsibility for giving the term “positive actions” a substance.¹⁶ The Commission referred to “affirmative actions” in the US and in the Scandinavian countries but then gave the notion such a limited meaning that I think it is important to draw a distinction between the EC-notion of positive actions and the notion of affirmative actions. From the Commission’s action programme it is obvious that positive actions are something else than legal measures. While legal measures are designed to afford rights to individuals, positive actions mean practical measures whose purpose is to remove non-legal obstacles for women in the labour market; attitudes for example.¹⁷ Information campaigns, investigations and training are some of the positive actions the Commission proposed in the first action programme.

In the recommendation on the promotion of positive action for women¹⁸ this division between legal action and positive action is repeated already in the preamble. The positive actions then recommended are not legal in their character: to inform and increase awareness, qualitative and quantitative studies and analyses, to encourage, adapt and so on.

Article 6(3) of the agreement on social policy annexed to the Maastricht Treaty also contains a provision for positive action. According to that article, the principle of equal pay for equal work does not prevent Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers. Here it is not that obvious that positive actions are something else than legal measures.

The judgment of the Court

The judgment of the Court in the Kalanke case is brief. It ascertains that a national rule which automatically gives women priority involves sex-discrimination.¹⁹ The question of whether this sex-discrimination is permissible under the derogation for positive actions in article 2(4) the Court answers by quoting a previously delivered judgment, in which it declared that article 2(4) specifically and exclusively is designed to allow measures “which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life”.²⁰ As article 2(4) is a derogation from an individual right laid down in the directive it must be interpreted strictly.²¹ Therefore, the Court ascertains without further argumentation, national rules, which absolutely and unconditionally guarantee women priority for appointments, are not consistent with article 2(4) while they go beyond promoting equal opportunities and overstep the limits of the

exception in the article.²² Furthermore, the Court adds, as far as the German system “seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity.”²³ This means that even when a woman candidate is equally qualified with a male candidate, the use of quotas is contrary to the principle of equal treatment in article 2(1) because quotas make the female sex the decisive factor. Quotas are not in accordance with the derogation in article 2(4) either since the only permissible kinds of positive actions are those which remove obstacles for women in order to achieve equal opportunity to compete in the labour market. The use of quotas takes one step further, beyond the scope of the derogation, since it seeks to bring about equal representation of men and women in the labour market. Equal representation is the result of equal opportunity to compete, that is; the Court presupposes that there is an automatic link between equal opportunity to compete and equal representation.

The reasoning in this judgment is difficult to understand if it is not read in the light of the opinion of the Italian Mr. Advocate General Tesaro.²⁴

The legal opinion of Mr. Advocate General

Mr. Advocate General Tesaro’s legal opinion is charged with emotional rhetoric, hardly ever seen in judgments in Sweden. However, the problem with Swedish judgments is often that their reasoning is so meagre that the judgments may well be based on emotions, though this is thereby carefully concealed from every analysis. As mentioned above, in this article I will concentrate on Mr. Tesaro’s use of pairs of words, especially formal equality/substantive equality, but also men/women; individual/collective and legal actions/positive actions.

Formal equality vs. substantive equality

Mr. Advocate General Tesaro uses different and inconsistent notions of equality. He commences with a definition of formal and substantive equality, which has not been explicitly stated before. To Mr. Advocate General, *formal equality* means equal treatment of individuals belonging to different groups and *substantive equality* denotes equal treatment of groups.²⁵ Here I would like to claim that Mr. Advocate General has not, it seems, realized the meaning of the term indirect discrimination. The statistical material of the group of men and the group of women which is necessary for proving indirect discrimination is only a method of investigation. If this statistical investigation shows that a far greater number of women than men are at a disadvantage under a seemingly objective rule it means that the rule is not objective and thus that a large number of individual women are directly discriminated against by that rule.

In his text, Mr. Tesaro commences with assuming an implicit hierarchy between the two terms by asserting that any action which aims at giving group

favours will conflict with the principle of formal equality.²⁶ Likewise, if the terms were equally valued he would also have declared that any application of formal equality which leads to indirect discrimination conflicts with the principle of substantive equality.

According to Mr. Tesouro's definition, positive action means to temporarily remove obstacles which stand in the way of the achievement of equal opportunities between men and women.²⁷ He connects positive action to the secondary form of equality by stating that the aim with positive action is to create substantive equality.²⁸ At the same time he declares that the only permissible measures to create substantive equality are those necessary to eliminate the obstacles which prevent women from pursuing the same results as men on equal terms. The reason why only such measures are permissible is that it is only those which are merely discriminatory in appearance. Mr. Advocate General here refers to the same judgment as the Court quoted.²⁹

In his legal opinion of the Kalanke case, Mr. Tesouro then expressively creates a hierarchy of the terms *formal* and *substantive equality*, "the principle of *substantive equality* complements the principle of *formal equality*"³⁰ (italics added). For that reason, Mr. Tesouro argues, it is only permissible to deviate from the principle of formal equality if the purpose is to create *actual equality* which, according to Mr. Advocate General, means equality between persons.

Actual equality is a new term for equality introduced by Mr. Advocate General. The principles of equal pay and equal treatment concern economic and social rights. Any intent to create equality between persons concerning economic and social rights does not exist in EC law, much less a ban on discrimination in this respect. Thus, deviating from the principle of formal equality, in liberal tradition referred to as individual equality, is only justified if the purpose is to realize a kind of socialist goal which does not exist in EC law.

Mr. Advocate General also introduces the term *reverse discrimination* which, until now, has not been utilized in reference to equality between the sexes. Reverse discrimination does however frequently appear in questions relating to discrimination on the grounds of nationality. More specifically, the term relates to queries regarding less favourable treatment of the own citizens than migrants from other EU-countries, for example in matters of social advantages. However, Mr. Tesouro does not care to define the term reverse discrimination in the field of sex discrimination. He just ascertains that it is reverse discrimination to grant women priority on the grounds that they are women. Is Mr. Advocate General implying that the male population is in fact the EU's own citizens whereas women are a kind of migrants? If so, this coincides with Simone de Beauvoir's famous conclusion, "He is the Subject, the Absolute — she is the Other."³¹

An important element of the term indirect discrimination has been that no demand exists to prove intent to discriminate. Still Mr. Advocate General takes the intent into consideration in the Kalanke case.³² He states that the under-representation of women in certain segments of the employment market may indicate inequality, but this is not necessarily attributable to an intent to marginalize women. From this he draws the conclusion that there is an element of

arbitrariness inherent in systems of quotas: "Hence the element of arbitrariness inherent in any preferential treatment which is mechanically confined to the under-represented group and based solely on that ground."³³ In other words, individual men have not necessarily had any intent to discriminate against women. The right of individual men to employment must not therefore be violated by quotation of women. Mr. Advocate General thus succeeds in creating an association between *positive actions* and *arbitrariness*. Like the word emotional, arbitrariness has been attributed to the feminine. Masculine has been attributed adjectives like logical and rational. Thus the masculine is the predictable, the opposite of arbitrary.

Finally, Mr. Tesuro ends his opinion with a volte-face concerning the mutual hierarchy of the terms formal and substantive equality. In contrast to genuine derogation from the principle of formal equality, which aim at eliminating obstacles, the derogation in the German law is false as it is destined to achieve equal representation of men and women in the labour market.³⁴ Such *numerical equality* is only formal equality, illusory and devoid of all substance.

To conclude, when the formal equality aims at giving equally qualified women an individual right not to be discriminated against, formal equality is, according to Mr. Tesuro's conception, illusory and empty and therefore subordinate to substantive equality.

The fact that Mr. Advocate General some points earlier has stated that the ultimate objective of equal opportunities is to promote representation of women in the employment market and thus attain *substantive equality* does not appear to be a contradiction to him.³⁵

According to Mr. Advocate General "the fundamental, inviolable objective of equality – the real equality, not that equality which is only called for – may only be pursued in compliance with the law, in this case a fundamental principle."³⁶ He does not explain what this fundamental principle is, but he must refer to the principle of *formal, individual equality* as it is this principle from which it is not permissible to deviate unless the aim is to create *actual equality* between persons, in other words socialist equality. Mr. Advocate General does not think that women will merit from the *formal, numerical equality* in the German case at the cost of "an incontestable violation of a fundamental value of every civil society"³⁷ which must mean men's individual rights since the discrimination of individual women in attitudes and social structures is not any violation of a fundamental value of civil societies.

This is another example of Mr. Advocate General's thinking in terms of subject/object. Men are per definition subjects with individual, inviolable rights. Women are objects to a legislation which – possibly – aim at giving them status as individuals with individual rights in certain respects, namely as workers. However, women can not acquire status as individuals with individual rights at the expense of men's individual rights. The use of quotas violates men's individual rights to employment. Furthermore, women will not merit from violating men's rights. Mr. Tesuro's, "women do not merit the attainment of numerical – and hence only formal – equality"³⁸ could indeed even be perceived as a sort of threat: Watch out women, your situation will only be-

come worse if you try to challenge the superior-inferior relationship between men and women!

What according to Mr. Tesauro, is necessary above all in creating genuine equality for women is to produce "a substantial change in the economic, social and cultural model which is at the root of the inequalities".³⁹ The revolutionary changes Mr. Advocate General suggests here are usually not made in accordance with the law, especially not in liberal legal systems such as the EC's just because of the inviolable rights of male individuals. But "the fundamental, inviolable objective of equality may only be pursued in compliance with the law."⁴⁰

Thus in Mr. Tesauro's world, women in the EU seem to be trapped. For whereas women on the one hand cannot expect to have genuine or substantive equality via means produced by the legal system of the EC, on the other hand, the equality women might acquire by staging a social revolution would not be a fundamental inviolable equality since it would not have been acquired in accordance with the law.

Men vs. women, individual vs. collective

Must each individual's right not to be discriminated against on the grounds of sex yield to the rights of women in order to compensate for the discrimination suffered by them in the past? This is a question Mr Advocate General puts at the beginning of his opinion.⁴¹ The question is interestingly formulated. It puts the individual against the collective; the individual man against the collective of women, and the present against the past, which presupposes that discrimination against women no longer exists. It is also Mr Advocate General's conception that it is the discrimination of women in the past which still persists and appears in the marginalization of women in the employment market. However, in one point he admits that there still exist "particular social structures which penalize women, in particular because of their dual role".⁴² In spite of this he considers quotas as a kind of collective, historical revenge.

It is only in one respect that he describes women as individuals: when he compares the derogation in article 2(4) with the derogation for protective measures for women in connection with pregnancy and maternity in article 2(3).⁴³ According to Mr. Advocate General, the latter article leaves the Member States with a discretion to protect the woman in connection with pregnancy and maternity in order to "eliminate the unfavourable consequences for women of their biological conditions." On the contrary the derogation in article 2(4) is not linked with any specific condition of the woman but relates to all women as such in their general situation of disadvantages "caused by past discrimination and existing difficulties connected with playing a dual role". Here a new pair of words appears: *biological difference* and *social difference*. Thus, through the biological difference from the man the woman becomes individual. This biological difference motivates special derogations from the principle of formal equality which the social difference does not. However, it is not the biological difference in itself which constitute the legal grounds for

derogation but the way this difference manifests itself: pregnancy and maternity. When the woman then becomes a mother and she has to play dual roles and therefore meets difficulties on the employment market, she is not seen as an individual any more but belongs to the collective of women. Then it is not the biological difference but the social difference which causes discrimination and the latter difference does not motivate the special derogation from the principle of formal equality which the former difference does.

Thus it seems that women as biological, birth-giving human beings are individuals with the right to formal, individual equality, while women in roles as culturally and socially conditioned mothers belong to the collective of women without any corresponding right to formal, individual equality. Obviously, Mr. Tesauro does not recognize that the collective of social mothers consists of a number of individual women and consequently he does not confer them formal equality with individual rights.

Legal actions vs. positive actions

That Mr. Advocate General holds the view that positive actions are not legal, but practical actions, is evident when he outlines different types of positive actions and chooses the one he describes as follow: "...remove, not discrimination in the legal sense, but a condition of disadvantage which characterizes women's presence in the employment market".⁴⁴ Thus, positive actions are not capable of removing legal discrimination and must therefore be subordinate to the prior notion of legal actions.

In this case Mr Tesauro's repeats the meaning of the notions "legal action" and "positive actions" received by the Commission in the first action programme and later on in the recommendation on the promotion of positive action for women.⁴⁵

Concluding remarks

After analysing Mr. Tesauro's legal opinion, it is easier to understand the philosophical underpinning to the European Court's interpretation of article 2(4). Men are seen as subjects with inviolable, individual rights, whereas women are seen as subordinated objects. As such women may possibly become individual subjects, however not if it threatens men's status as subjects. Thus, in the status of being subjects, men are seen as individuals whereas women as objects are transformed to a collective. Therefore men are protected by the higher principle of equality, i.e. the principle of *formal equality*, whereas women are relegated to the secondary and hierarchically lower principle of *substantive equality*.

Finally, that positive actions and quotas are seen as policies aimed at a collective also means to materialize the second kind of equality, substantive equality, and thereby it has become subordinated in a double sense: positive actions are subordinated legal actions and aim at ensuring the subordinated

Men	Women
Subject	Object
Individual	Collective
Formal equality	Substantive equality
Legal actions	Positive actions
The Absolute Norm	The Handicapped Other

Table 1. Mr. Advocate General's reasoning in his legal opinion in the Kalanke case.

principle of substantive equality. The existing obstacles standing in the way of equal opportunities for women in the labour market, which positive actions aim to remove, are seen as women's handicap and thus belong to women and the right side of the table below.

The hierarchy so crucial to understand Mr. Advocate General's reasoning in his legal opinion is shown in table 1.

The Commission has interpreted the Kalanke case as meaning that the only kinds of quotas which are not in accordance with the EC-law are those which absolutely and unconditionally guarantee women priority for appointments. As if the Commission itself does not believe in its own interpretation it has also proposed an amendment of article 2(4). According to the proposed amendment quotas are explicitly a kind of permitted positive action "provided that such measures do not preclude the assessment of the particular circumstances of an individual case."⁴⁶

The model of positive action Mr Advocate General used in the Kalanke case, i.e. to temporarily remove obstacles which stand in the way of the achievement of equal opportunities between men and women, could in fact have been used in accordance with the existing formulation of article 2(4) if there had been an awareness of the complexity and the seriousness of sex discrimination in the Court of Justice. The obstacles quota aims at eliminating are existing discriminating structures and attitudes, and the equal opportunities quota aims at creating equal opportunities to provide for oneself and to be economically independent. To be employed is not an end in itself, the end is the economical output.

That the objective of the directive 76/207 is to implement the principle of equal treatment as regards *access* to employment appears already from the title of the directive, but Mr. Advocate General and the Court named the access as the result and the representation, and declared that the access fall outside the scope of the directive.

However, this model of reasoning requires an understanding of Derrida and his theory of how meaning is constructed in the Western philosophical tradition. In his work, Derrida shows how meaning is constructed in hierarchically organized binary oppositions, which in fact are interdependent of one another. The terms men/women; individual/collective; formal equality/substantive equality and legal actions/positive actions are not hierarchical opposites, but describe differences within the terms themselves. As put by Barbara Johnson:

The starting point is often a binary difference that is subsequently shown to be an illusion created by the working of differences much harder to pin down. The differences *between* entities... are shown to be based on a repression of differences *within* entities, way in which an entity differs from itself. The "deconstruction" of a binary opposition is thus not an annihilation of all values or differences; it is an attempt to follow the subtle, powerful effects of differences already at work within the illusion of a binary opposition.⁴⁷

Consequently, women and men are all individual subjects belonging to the collective of human beings. Formal equality is necessary but not sufficient to create substantive equality, thus formal equality is only part of the broader notion of substantive equality; and legal actions and positive actions are part of all available measures in order for creating equality between the sexes.

Notes

1. See Catherine MacKinnon (1993), 427-453, Margot Stubbs (1993), 454-475, Janet Rifkin (1993), 412-418, Lucinda M. Finley (1993), 571-581.
2. Case C-450/93 Eckhard Kalanke -v- Freie Hansestadt Bremen (1995-I) ECR 3051.
3. The proposed amendment is published in Official Journal C no. 179/96, 8.
4. Linda J. Krieger and Patricia N. Cooney (1993), 162.
5. Lucinda M. Finley (1993), 198.
6. Griggs -v- Duke Power Co 401.US 424 (1971).
7. Case 96/80 Jenkins -v- Kingsgate Clothing Production Ltd (1981) ECR 911.
8. Joan Scott (1988), 43-44.
9. Joan Scott (1995), 36-37.
10. Helene Cixous and Catherine Clement (1986), *The Newly Born Woman*, Minneapolis: University of Minnesota Press, 63, 65. Cited in Rosemarie Tong (1989) *Feminist Thought. A Comprehensive Introduction*, London: Routledge, 224.
11. It is interesting to note that in all legal material of the EC of the older member states, the sexes are named as follows: men/women, hommes/femmes, Männer/Frauen, uomini/donne, maend/kvinder. However, in the newly become member Sweden's translations of the directives, the opposite order is used persistently, namely "kvinnor och män."
12. The directive is published in Official Journal L no. 39/76, 40.
13. See for example case C-177/88 Dekker -v- Stichting Vormingscentrum voor Jong Volwassenen (1990-I) ECR 3941.
14. Case 170/84 Bilka-Kaufhaus GmbH -v- Weber (1986) ECR 1607.
15. Hoskyns (1996), 104.
16. The community action programme is published in COM (81) 758 final.
17. *Ibid.*, 6, 8.
18. Council Recommendation on the promotion of positive action for women (84/635/EEC) Official Journal L no. 331/84, 34, third recital.
19. Case C-450/93 Kalanke, paragraph 16.
20. *Ibid.*, paragraph 18. The case the Court refers to is Case 312/86 Commission -v- France (1988) ECR 6315.
21. *Ibid.*, paragraph 21.
22. *Ibid.*, paragraph 22.
23. *Ibid.*, paragraph 23.
24. Opinion of Mr. Advocate General Tezauro, 6 April, 1995.
25. *Ibid.*, point 7.
26. *Ibid.*, point 11.
27. *Ibid.*, point 20.
28. *Ibid.*, point 15.
29. Case 312/86 Commission -v- France.
30. *Ibid.*, point 16.
31. Simone de Beauvoir, 13.
32. Opinion of Mr. Advocate General, point 24.
33. *Ibid.*, point 24.
34. *Ibid.*, point 17, 28.
35. *Ibid.*, point 14.
36. *Ibid.*, point 27.

37. *Ibid.*, point 28.
 38. *Ibid.*
 39. *Ibid.*
 40. *Ibid.*, point 27.
 41. *Ibid.*, point 7.
 42. *Ibid.*, point 14.
 43. *Ibid.*, point 17, 18. It is difficult to follow Mr. Advocate General's reasoning in the English version in which he talks about women in the plural in both exceptions. In the French translation he talks about "la femme" in relation to protection in connection with pregnancy and maternity, and about "les femmes" in relation to positive actions.
 44. *Ibid.*, point 9.
 45. The action programme is published in COM (81) 758 final and the recommendation in Official Journal L no. 331/1984, 34.
 46. The proposed amendment is published in Official Journal C no. 179/96, 8.
 47. Barbara Johnson, "The Critical Difference: Essays in the Contemporary Rhetoric of Reading," in Joan Scott (1995), 38.

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