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Ann Numhauser-Henning, *Lund University*



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SWEDEN

RECRUITMENT TARGETS FOR WOMEN PROFESSORS – MISSION IMPOSSIBLE?

Ann Numhauser-Henning

1 GENERAL BACKGROUND: PUBLIC POLICIES AND MOTIVES TO PROMOTE SEX EQUALITY IN HIGHER EDUCATION AND RESEARCH

1.1 Public policies and motives

During the 1990s there was a growing awareness in all Member States, and also within the Community institutions, of the fact that women are under-represented in the scientific community and that something would have to be done about it. In its communication *Women and science – Mobilising women to enrich European science*,¹ the Commission addresses the issue of equality between men and women in research and science in accordance with the mainstreaming approach. Later on, it has been said that ‘the gender dimension is at the core of the science/society issue, which itself is at the core of the European Research Area. Progress towards gender equality in science is essential, in order to harness the potential of women scientists, to enhance quality and innovation and bring science closer to society. Gender equality in science will sustain the necessary reform of science’.² As regards European Research Programmes, a target to achieve at least a 40% representation for women has been stated. Following the communication, the Council and the Parliament adopted Resolutions on women and science.³ Member States have been urged to engage in the task of furthering the positions of women in Academia.

In the case of Sweden, there is a strong commitment on the part of the Swedish Government and the National Agency for Higher Education (*Högskoleverket*) to the

1 COM(1999)76 final. The communication was preceded by a Commission’s and the European Parliament’s joint conference on ‘Women and Science’ in Brussels in April 1998. Early seminars on the subject were organised as far back as 1993.

2 SEC(2001)771 p. 16.

3 Council Resolution, adopted 20 May 1999, OJ C 201/1 – 16.7.1999 and European Parliament Resolution, adopted 3 February 2000 (PE 284.656), respectively.

gender issue and equal opportunities in higher education.⁴ Since 1997 recruitment targets for the appointing of new professors have been set, and universities and university colleges are required to report back periodically.⁵ In 1996–97 there was also an attempt to kick-start change by establishing a number of positions as professors and post-doctoral fellows (*forskarassistent*) for the under-represented sex.

Both these reforms were introduced in the first Governmental Bill to address equal opportunities between women and men in the educational field specifically; this Bill was presented in 1995.⁶ Equal opportunities within higher education had then been an issue since the late seventies; but the immediate background for the Government's initiative was a report containing an inventory of equal-opportunities projects within the area of higher education 1985–1994,⁷ as well as a report from the so-called JÄST-group, initiated by the Ministry of Education in 1992.⁸ Another background explanation was the considerable expansion of higher education in Sweden during the nineties in respect of undergraduate education, postgraduate education, the number of higher-education institutions, etc. This context also created opportunities to increase the representation of women.⁹ Finally, the 1991 Equal Opportunities Act's rules on equality planning (also applicable to higher-education institutions) should be taken into account as should the more goal-oriented steering system of higher education.¹⁰

The targeted launching of a number of positions for women mentioned above contained about 120 PhD positions, 90 post-doctoral fellowships and 30 professorships as well as a number of post-doctoral grants and guest-professorships, in total amounting to SEK 116 million at the time. A special role was given to the Swedish Council for Planning and Coordination of Research (FRN): in cooperation with higher-education institutions, it was commissioned to identify appropriate areas and indicate a suitable distribution of positions. In this process existing gender inequality, research needs and the existence of women candidates were to be taken into account. Positive-action measures were suggested as the adequate strategy. This reform – the 'Tham-package' – was named after Carl Tham, Secretary of State for Education at the time, who introduced it in an effort to come to terms with the appalling under-representation of women as regards post-doctoral positions in

4 The position of the Swedish Government has sometimes been labelled 'State Feminism'. See further, for instance Regeringens skrivelse 2002/03:140, Jämt och ständigt (The Government's equal opportunities policies programme).

5 In Sweden there are (September 2004) 13 State universities, 23 State university colleges, 1 county university college and 13 privately run higher-education institutions.

6 Prop. 1994/95:164, Jämställdhet mellan kvinnor och män inom utbildningsområdet, Stockholm 1995.

7 Ds 1994:130, Kartläggning och utvärdering av jämställdhetsprojekt inom universitet och högskolor, which accounts for about 950 such projects carried out during the indicated period.

8 U 1992:E. See also the final report of this group, Ds 1997:56, Jämställdhet för kunskap, insikt och kvalitet.

9 Prop. 1994/95:164 p. 23.

10 *Ibid.* p. 5.

the university sector (see further below, Section 3). This ‘instant’ reinforcement of women in Academia was subsequently complemented by a reinforcement of gender studies as such.

In this context, the 1997 general ‘Promotion Reform’ implying a right for permanently employed lecturers to be promoted to full professors once they became eligible for such a position should also be mentioned.¹¹ The reform entailed a shift from a system of advancement by recruitment only to a two-way system of advancement: by (an individual right to) promotion and by recruitment. Among the motives were the aim to double professorships and to provide new possibilities for individual careers while augmenting transparency in the field of career advancement. This reform is, of course, a key agent with regard to the gender-balanced aspect of climbing the academic ladder (see below, Sections 1.2 and 2).

The 1994/95 Bill thus also launched the recruitment target system as a long-term instrument.¹² Recruitment targets for the first period, 1998–2000, were specified later, in 1997.¹³ The second term of recruitment targets for new women professors covers the period 2001–2004. The set targets vary considerably among the different higher-education institutions, ranging from 13 to 45% and allowing for the line of education and research of each institution.¹⁴ The very small university colleges are not given any recruitment targets at all.¹⁵ The Government has already indicated their intention to present new recruitment targets concerning new women professors in higher-education institutions for the period 2005–2008.¹⁶

Swedish higher-education policies thus make use of targets but also of budget means and preferential treatment. Apart from this, there is a great variety of other proactive measures in the field of equality between men and women (see further below, Section 4).

The explicit motives for promoting women in science vary. To illustrate the normative arguments that come into play here, I have chosen to proceed from

11 Prop. 1996/97:141, Högskolans ledning, lärare och organisation. This Bill contained a major reform of higher-education institutions apart from the ‘promotion reform’.

12 Compare the original statement that recruitment targets are to be given on a three-year basis until the share of women professors reaches at least 40%, prop. 1994/95:164 pp. 25 f.

13 Prop. 1996/97:141. See also Report 1997:9 R by the National Agency for Higher Education, Rekryteringsmål för kvinnliga professorer – ett regeringsuppdrag.

14 See, for instance, the report by the National Agency for Higher Education 2003:31 pp. 36 ff. The actual share of women professors (in general, not only newly hired) varied from 0 to 100% depending on the institution of higher education concerned. As regards the area of education and research, figures also varied: women made up 47% of the professors in health care and some related sciences, as compared to 25% in humanities, 16% in social sciences and only 4% in mathematics.

15 Observe that the recruitment targets are not ‘quotas’ as regards actual access to employment but ‘target quotas’, like the ones accepted by the ECJ in *Badeck*.

16 Prop. 2004/05:1 p. 140. As regards university colleges without doctoral programmes of their own, however, such targets will be set for faculty staff in general (professors and lecturers).

some concepts drawn from representation theory.¹⁷ This theory and the relevant concepts were primarily developed in relation to the issues of democracy and fair representation, but in my opinion the concepts are also useful with regard to the area at issue here – inclusion in or exclusion from the social structures of remunerated positions in higher education and research/knowledge production.¹⁸

The argument of fair representation (or *the justice argument*) can be said to relate to participation rights (inclusion) in the sense of equal opportunities; but it also relates to a more substantial notion of participation, meaning equal (or at least more equal) distribution as regards access to employment, status and social and economic conditions.¹⁹

The conflict-of-interest argument concerns the right to have your own/your group's interests and needs²⁰ satisfied within the development of activities. This line of argument is more closely connected to the democracy discourse than the others presented here, but it is also fruitfully articulated in relation to working life and knowledge production. It is concerned with different preconditions (whether originally so or socially created) between the sexes and the (re-)formulation of underlying norms, whether with regard to working life or the concept of knowledge. Here, it becomes especially obvious that this argument as well as the other two embodies two dimensions, both of which are significant in the area of higher education. There are the interests/needs of women with regard to working life as such, for example conditions connected to tenure tracks; and then there are the interests/needs of women as regards research and knowledge production – that is to say, the results.

The resource argument (or *the quality argument*) focuses even more on differences between the sexes, and the chief interest involved here is the common interest ensuring that all kinds of resources are integrated/made of use in the development of social activities. This argument is of particular interest where knowledge production is concerned.

All of these arguments – the representation argument, the conflict-of-interest argument and the resource argument – may also be said to incorporate the notion of social *legitimacy*.

In the Governmental Bill initiating current Swedish equal-opportunities policies in the area of higher education may be said to invoke all these arguments. It says that 'the equality deficit causes quality and knowledge losses in the activities of

17 See further, for instance, Helga Hernes, *Welfare State and Woman Power: Essays in State Feminism*, Norwegian University Press, Oslo 1987, Ann Phillips, *The Politics of Presence*, Clarendon Press, Oxford 1995 and Lena Wängnerud, 'Politikens andra sida. Om kvinnorepresentationen i Sveriges riksdag', *Göteborg Studies in Politics* 53, Gothenburg 1998.

18 Compare the extension of democracy to include substantial democracy, i.e. social and economic rights. See further, for instance, Ann Numhauser-Henning, 'Om rättens roll i en demokratisk samhällsutveckling', in *Maktodelning*, SOU 1999:76, Stockholm 1999.

19 Compare also the concept of social representation and quota systems, Wängnerud pp. 13 et seq.

20 However, compare Wängnerud p. 114.

higher-education institutions [the resource argument, my comment]. Because of the under-representation of women in many areas, important educational and research perspectives are not given the attention required, and the conclusions drawn are too restricted [the interest argument, my remark]. Equality between the sexes is a question of democracy and power [the representation argument, my remark].²¹ 'This (under-representation) creates a serious problem of democracy. Women are absent where decisions are taken in higher-education institutions which are of interest not only in terms of the quantity and content of research and education, but also in terms of social developments in general. ... Women's experiences, perspectives and problem identification are not sufficiently reflected in education and research, and this has unfavourable effects on the quality of activities. For the highest possible level of knowledge to be attained, both sexes must be given equal opportunities to influence the direction, contents and form of education and research, as well as the environment in which activities take place. Moreover, an increased share of women teachers would further the visibility of women in academe and provide young women with role models.'²²

A proactive approach towards sex equality may include a wide range of actions promoting equality. In addition, the concepts 'affirmative action' and 'positive action' may be used in this very broad sense. In the so-called ETAN report²³ Professor Rees identified networks, quotas and targets, encouraging role models and mentors and earmarking chairs, budgets and research funds for women as key tools. This report focuses on positive action in relation to recruitment and appointments in the higher-education sector, one of the starting-points being the recruitment targets for new women professors set by the Swedish Government. This entails a focus on legal instruments and practices that imply what is frequently labelled 'preferential treatment', i.e. situations where one sex is given advantages such as priority regarding access to work.²⁴ However, since 'positive action' is the concept most frequently used in connection with related Community case-law, I will use this somewhat less precise concept throughout the report. In Section 4 on positive action practices and in Section 5, Discussion, the scope is also widened somewhat, going beyond preferential treatment situations in the more limited sense.

21 Prop. 1994/95:164 p. 5. My translation.

22 *Ibid.* p. 15. My translation.

23 *Science Policies in the European Union: Promoting Excellence through Mainstreaming Gender Equality*, November 1999. The report was the product of a group of experts set up by the Commission under the auspices of ETAN, the European Technology Assessment Network.

24 Compare Lotta Lerwall, *Könsdiskriminering, En analys av nationell och internationell rätt*, Uppsala 2001 p. 435.

1.2 Statistics

In Sweden, the National Agency for Higher Education is responsible for the production of statistics on the presence of women in Academia.²⁵

There is a majority of women in the higher-education system at *undergraduate level* in Sweden. In the academic year 2002/2003, women undergraduates amounted to 61%. Higher education is, however, also very segregated (as is the Swedish labour market). Only 26% of undergraduate students attended sex-balanced programmes (40 to 60% of each sex).²⁶ At *postgraduate level*, in PhD studies, women now make up almost 50%.²⁷ However, as compared to their share among undergraduate students women may still be said to be under-represented even at this early stage of academic life. The share of women keeps decreasing as we look at *teaching positions* and start to climb the academic ladder. The phenomenon of ‘the leaky pipe-line’ is well known in Sweden at every step on the way – that is, it is not just a question of time until women make up for 60% at higher levels, too; they tend to be squeezed out at a higher rate than men on their way there.

Table 1

Women and men in different teaching categories.

	1995		2000 ²⁸		2003 ²⁹	
	Women	Men	Women	Men	Women	Men
Professors	8% (172)	92% (2005)	13% (410)	87% (2748)	15% (592)	85% (3401)
Lecturers	22% (1175)	78% (4135)	28% (1620)	72% (4255)	33% (2229)	67% (4526)
Post-doctoral fellows	27% (278)	73% (752)	38% (433)	62% (701)	39% (418)	61% (661)
Instructors	45% (2347)	55% (2894)	54% (3487)	46% (3020)	54% (4272)	46% (3582)

25 See www.hsv.se. See also www.scb.se/templates/Product8626.asp.

26 The recommended approach to come to terms with this is to alternate recruitment practices and/or change the direction/contents of education programmes, prop 2004/2005:1 p. 139. See further, for instance, Antoinette Hetzler, The Swedish Model and the Role of Gender, in *Women in European Universities, Research and Training Network*, <http://csn.uni-muenster.de/women-eu/download/HetzlerCP.pdf>.

27 Prop. 2004/2005:1 pp. 138 f.

28 Refers to full-year equivalents.

29 Refers to actual number of individuals.

Sweden obtained its first woman professor in 1937;³⁰ and by the time of the Governmental proposals to initiate the current higher-education equal-opportunities policies back in 1994/95, women amounted to 150, or 7% of all professors. At that time women lecturers amounted to 21%, women post-doctoral fellows to 24% and women instructors (no doctoral degree required) to 42%.³¹

Among professors women are now (2003) 15%, as compared to 8% in 1995. As was explained above, the Government's recruitment targets for *new* women professors 2001–2004 are to be reported by the end of the year. In 1995 the share of women among appointed professors was 10.9%. As regards the current period, starting out at 17% in 2001 the share of new women professors had risen to 23% in 2003.

The 'Promotion Reform' indicated above (see also Section 2 below) was initially feared to hamper the possibilities to reach the recruitment targets for new women professors, as men made up the majority of lecturers to be promoted. However, evaluations claim that the reform was in fact 'gender neutral'. Women lecturers do not apply for promotion to the same extent as men lecturers do (women's share among applications was 22%, whereas women amounted to 24% of lecturers). On the other hand, they do become promoted to a slightly higher degree (62.5% for women as compared to 59% for men).³² Besides, as we saw above, women's share of professorships has risen steadily over the last few years. However, it is impossible to say to what extent this is a consequence of the reform and to what extent it is due to other efforts to promote women professors. It is clear, though, that the reform has, in principle, achieved its goal to double the number of professorships as compared to 1996.³³ On the other hand, it has been criticised as a 'title reform' because it was not financed, and investigations show that conditions as regards pay, teaching assignments etc. differ considerably between promoted and recruited professors.³⁴

2 SYSTEM OF POSITIONS AND APPOINTMENTS IN HIGHER EDUCATION

Employees in the area of higher education in Sweden are mainly public employees hired by the State. Since the 1970s the main principle of Swedish labour legisla-

30 As for the history of Swedish women academics, see, for instance, Carls, Lina, *Våp eller nucka?*, *Kvinnors högre studier och genusdiskursen 1930–1970*, Lund 2004 and Hanna Markusson Winkvist, *Som isolerade är: De lagerkransade kvinnorna och akademien under 1900-talets första hälft*, Eslöv 2003.

31 Prop. 1994/95:164 p. 23.

32 The National Board of Higher Education Report Series 2003:3 R p. 19. This report contains a general evaluation of the 'Promotion Reform'; see also the same report series 2001:7 R, 2002:2 R and 2002:33 R.

33 *Ibid.* p. 17.

34 *Ibid.* pp. 43 ff.

tion has been that the same legal rules should apply on the entire labour market, irrespective of whether the relevant employee is in private or public employment. Though deviating regulations have continually been eliminated, a certain set of special regulations still obtains as regards public employment.³⁵ This is particularly true in respect of State employees in the area of higher education.

The main provisions regarding higher education are found in the Higher Education Act (1992:1434) (*Högskolelagen*) and the Higher Education Ordinance (1993:100) (*Högskoleförordningen*). Here we also find the specific rules on employment, that is the different teaching categories, in the area of higher education. There are only three categories of permanently employed teachers in Swedish higher education: instructor (*högskoleadjunkt*), lecturer (*högskolelektor*) and professor (*professor*). There are also the fixed-term categories post-doctoral fellow (*forskarassistent*), assistant lecturer (*biträdande lektor*) and adjunct professor (*adjungerad professor*). During postgraduate studies the student normally holds a doctoral position for a maximum period of four years. – Apart from this, general employment-law rules on, for instance, fixed-term employment, deputyships, etc., may apply.³⁶ Thus, especially in research-dominated disciplines like medicine and natural sciences, teaching employment categories are frequently complemented by fixed-term or permanent ‘research positions’ (*forskare*), not expressly accounted for in higher-education legislation.

Since 1998 there are, in principle, no longer any special employment-protection devices for professors.

In general labour law, the legal point of departure as regards recruitment/appointment is the idea of the employer’s right to hire at will, though it has lately been considerably circumscribed by non-discrimination rules for a number of categories (including members of either sex as well as fixed-term and part-time workers) as well as by general rules on a right to re-employment after lay-offs. Besides, there are no imperative provisions concerning the procedure that should be adopted. Generally speaking, the situation as regards State employees is quite different. The State employer does not have the right to hire at will. According to Chapter 11 Section 9 of the Instrument of Government (*Regeringsformen*), one out of four Swedish Constitutional Acts, the State employer is obliged to base its choice on strictly objective grounds, such as merit and ability. Statements made in conjunction with the Constitutional changes in 1975 allow for the consideration of other factors, too. Among these factors we find equal opportunities concerns, i.e. an applicant’s belonging to an under-represented sex (see further below, Section 3). The higher validity of the Constitutional rule tends to devalue the implications of some inferior legal instruments.³⁷

35 General rules of this kind are to be found in the 1994 Public Employment Act as well as in the Appointments Ordinance.

36 Mainly found in the 1982 Employment Protection Act (*Anställningsskyddslagen*).

37 It might be worth noticing that the aim of the special rules pertaining to the State sector is not primarily to safeguard the interests of applicants, but to satisfy the demands of the public, ac-

The Higher Education Ordinance contains an elaborate set of rules as regards eligibility and the bases of assessment for the different teaching positions and other categories of employment mentioned above.³⁸ There are also detailed rules when it comes to the actual appointment procedure, modes of employment permitted and so on.

Thus, to be eligible as an *instructor* you need to have an undergraduate education (or comparable qualifications) as well as pedagogic education and attested pedagogical skill. To be a *lecturer* you need a PhD degree (or comparable qualifications) and pedagogical education as well as satisfactorily attested scientific (artistic) and pedagogical skill. To be eligible as a *professor* you have to possess a high degree of scientific (artistic) skill and a high degree of pedagogic skill, including a good ability to supervise PhD students, and you must possess the ability to develop, manage and implement high-quality education, research or artistic activities and to serve as an academic leader. – As regards a post-doctoral fellow, a PhD degree is a basic requirement and the basis for assessment is formed by good ability to develop, manage and carry out high-quality research as well as pedagogic ability, scientific ability being the prime consideration.

Special attention should be given to the so-called ‘Promotion Reform’ of 1997 which introduced a right for instructors to be promoted to lecturers and for lecturers to be promoted to professors, respectively, once the individual possesses the general qualities required for such a position.³⁹ A necessary pre-requirement is holding a permanent position as an instructor or a lecturer, respectively. The considerable share of women instructors offers an important potential to increase women’s share in Academia, if only they could be promoted. Special efforts were made over the years to increase the necessary funds to allow women instructors to complete their doctoral studies.⁴⁰ The reform has also made the lecturer level a more crucial stage for recruitment targets, constituting the basis for new professor recruitments. At the same time, it has been said to make the difficulties encountered by women lecturers when it comes to assembling qualifications more obvious.

In the 1998 reform of higher education, as was indicated above, the rules on how to deal with applications were also reformed.⁴¹ In general, appointment decisions are made by the vice-chancellor of the relevant higher-education institution (always as regards professors) or by the boards of the respective faculties. Normally, the

ording to which public office should be held by the people who possess the best qualifications for it; see Wennergren, *I statens tjänst*, Stockholm 1985 p. 76.

38 These rules are to be complemented by local ordinances at the individual institution of higher education; Chapter 2 Section 2 paragraph 9 and Chapter 4 Section 14 in the Higher Education Ordinance.

39 As regards instructors, the regulation offers a possibility for promoting people without a doctoral degree as well, provided they possess special abilities. Such promotions turn out to have been very scarce, though, less than 1%, see the National Agency for Higher Education Report Series 2003:3 R p. 18.

40 See, for instance, Prop. 1994/95:164.

41 Prop. 1996/97:141.

process also involves a teacher appointments committee. As regards professorships and lectureships, the committee is obliged to hear two experts before making their suggestion on the appointment. When such a committee is appointed, members of both sexes shall (if this is not impossible) be included, and an even gender distribution shall be aimed at. Both sexes shall also be represented among the experts involved, unless extraordinary reasons allow exceptions to be made. When submitting their proposal, the committee has an obligation to declare its considerations regarding the equal opportunities issue.

The decision to appoint a certain applicant can be appealed against to the Higher Education Board of Appeals (*Överklagandenämnden*).

In practice, then, an academic career can be described as follows. First, you must be admitted to a postgraduate programme, since a Ph. D. degree is a general requirement for other positions. (To be admitted to Ph. D. studies you require funding for four years and openings are thus limited.) In some areas – mainly university colleges with a heavy load of undergraduate teaching – you may obtain a permanent position as an instructor even before holding a doctorate. If so, you are on track, and promotion may be the way to a full professorship in due course. Normally, you are only qualified to compete for an academic position after getting a doctoral degree. Post-doctoral grants and fixed-term post-doctoral fellowships are possibilities in this respect, though scarce. Fixed-term ‘research positions’ and deputyships are other alternatives. Depending on the discipline, after a few or a number of years you can apply for a permanent employment as a lecturer if there is an opening. Here again, promotion to a full professorship is a possibility later on. Sometimes, a vacant professorial chair is still filled by way of a recruitment procedure.

3 EQUAL OPPORTUNITIES AND POSITIVE ACTION LEGISLATION IN THE AREA OF HIGHER EDUCATION

This is not the time or the place for a description of Community Sex Equality Law in general, nor for a thorough analysis of the ECJ’s case law on positive action. Such reviews have been provided elsewhere. I will, however, supply a couple of points specifically with regard to positive action. Before the Amsterdam Treaty, the scope of positive action was mainly regulated by Article 2.4 as compared to Article 2.1 of the Equal Treatment Directive.⁴² This is also the regulation scrutinised by the ECJ in most of the cases hitherto dealt with.⁴³ Now the scope of positive

42 Article 2.1 articulates the principle of equal treatment, saying, ‘there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status’. However, according to the former Article 2.4: ‘This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities in the areas referred to in Article 1.1.’, *inter alia*, access to employment and promotion.

43 See Case 312/86 *The Commission v. France*, ECR 1988-6315, C-450/93 *Kalanke v. Freie*

action is dealt with in Article 141.4 EC.⁴⁴ The 1995 judgment in *Kalanke*⁴⁵ caused somewhat of a shock in Member States which regarded positive action as a both legitimate and desirable means, immediately launching a debate on its correct interpretation. Did the ECJ reject quotas in general or *only* a quota system of the ‘strict’ Bremen model?⁴⁶ In *Marschall*⁴⁷ the ECJ gave us an answer to this question, and later on, in *Badeck*,⁴⁸ the ECJ summarised positive action as being compatible with Community law if it does not automatically and unconditionally give priority to women when women and men are equally qualified, and if the candidatures are the subject of an objective assessment which takes account of the specific personal situation of all candidates.⁴⁹

As was already indicated above, the main principle in Swedish labour legislation is that the same legal rules should obtain on the entire labour market, irrespective of whether the relevant employee is in private or public employment. The general rules on equal treatment on the grounds of sex are found in the 1991 Equal Opportunities Act, EOA (*Jämställdhetslagen* 1991:433), which thus also implements Community Sex Equality Law. A ‘background’ rule is found in Chapter 2 Section 16 of the Instrument of Government. Here legislation that discriminates on the

Hansestadt Bremen [1995] ECR I-3051, C-409/95 *Marschall v. Land Nordrhein-Westfalen* [1997] ECR I-6363, C-158/97 *Badeck et al v. Land Hessen* [2000] ECR I-1875, C-407/98 *Abrahamsson v. Fogelqvist* [2000] ECR I-5539, C-79/99 *Schnorbus v. Land Hessen* [2000] ECR I-10997, C-476/99 *Lommers v. Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891, C-186/01 *Dory v. Federal Republic of Germany* [2003] ECR I-0000 and C-380/01 *Schneider v. Bundesminister der Justiz*. See also the EFTA Court judgment 2003-01-24 in Case E-1/02 *The EFTA Surveillance Authority v. The Kingdom of Norway*.

44 ‘With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.’ The Equal Treatment Directive has now been amended. Former Article 2.4 ETD was replaced by an obligation for the Commission to adopt and publish a report establishing a comparative assessment of the positive measures adopted by the Member States pursuant to Article 141.4 EC every three years, on the basis of information provided by the Member States (Art. 2.8 ETD). See also Article 23 in the EU Charter on Fundamental Rights 2000, now a part of the New Constitution. See the ECJ’s cases C-407/98 *Abrahamsson v. Fogelqvist* [2000] ECR I-5539, C-218/98 *Abdoulaye v. Régie nationale des usines Renault SA* [1999] ECR I-0000, C-366/99 *Griesmar v. Ministre de l’Économie, des Finances et de l’Industrie, Ministre de la Fonction publique, de la Réforme de l’État et de la Décentralisation* [2001] ECR I-000.

45 C-450/93 *Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3051.

46 See Communication by the Commission to the Council and the European Parliament on the Interpretation of the Judgment of the European Court of Justice on 17 October 1995 in case C-450/93, *Kalanke v. Freie Hansestadt Bremen*, COM (1996) 88 final. The European Commission submitted an interpretation of the ECJ judgment arguing the latter. Later on, a clarifying amendment proposal in respect of the Equal Treatment Directive was presented, OJ L 179/8. During the preparations of the Amsterdam Treaty, several possible redactions of a treaty rule on positive action were discussed.

47 C-409/95 *Marschall v. Land Nordrhein-Westfalen* [1997] ECR I-6363.

48 C-158/97 *Badeck et al v. Land Hessen* [2000] ECR I-1875.

49 See paragraph 23 of the *Badeck* judgment.

grounds of sex is forbidden. However, the same rule makes room for positive action when such treatment is an element in efforts to promote equality between women and men.

The EOA contains rules on co-operation (Sec. 2) and active measures (Secs. 3–14) as well as bans on discrimination (Secs. 15–21). The rules on active measures are of special importance when it comes to a proactive approach. The EOA, though formally gender neutral, starts out with the statement that ‘The aim of the Act is primarily to improve women’s conditions in working life’ (Sec. 1 par. 2).⁵⁰ The rules on active measures imply, among other things, that the employer has a duty to conduct goal-oriented work to actively promote equality in working life, including the promotion of an equal distribution between women and men in various types of work and within different categories of employees, to ensure that both women and men apply for vacant positions and to especially endeavour to recruit applicants of the under-represented sex so as to gradually increase the proportion of employees of that sex. A strategic means for this is the plan of action for equality, compulsory for any employer with at least ten employees. The rules must not be interpreted so as to imply an obligation for employers to actually apply practices of positive action in the sense of preferential treatment, and generally speaking the sanctions for not meeting the active-measures requirements are of an administrative and less than swift character.⁵¹ – Section 15 containing the ban on direct discrimination also contains the *permissive* rule on positive action: ‘The prohibition [on direct discrimination, my remark] does not apply if the treatment is an element in efforts to promote equality in working life and it does not involve the application of pay or other terms of employment for work which is regarded as equal or of equal value’.⁵²

Initially, the scope for positive action was regulated by Section 16 (2)(2) of the 1991 EOA. However, and possibly by mistake, when the EOA was amended in the year 2000 in order to comply better with other domestic non-discrimination acts in the area of the Article 13 Directives,⁵³ the scope for positive action was expressly restricted to cases of direct discrimination.⁵⁴ This has been criticised, among others

50 Compare explanation 28 to the Amsterdam Treaty and the preamble p. 14 of the Directive 2002/73/EEC amending the Equal Treatment Directive.

51 These rules thus do not give rise to individual rights. The Equal Opportunities Ombudsman (EOO) should in the first place attempt to persuade employers to follow the rules on a voluntary basis. However, the EOO can impose an administrative fine on employers who fail to submit information of importance in relation to the supervision of these rules and may also put forward requests to the Equal Opportunities Board for the imposition of a penalty on employers who do not observe the rules on active measures.

52 As of 1 July 2005 this rule on positive action is – otherwise unamended – situated in Sec. 17 para. 2(2) of the EOA.

53 Prop. 1999/2000:143.

54 The rule on indirect discrimination states: ‘An employer may not disfavour a job seeker or an employee by applying a provision, a criterion or a method of procedure that appears to be neutral but which in practice is particularly disadvantageous to persons of one sex, unless the provision,

by the EOO and the Ombudsman against Ethnic Discrimination.⁵⁵ This makes the EOA narrower in scope than Community Law, something which I also find unacceptable. In *Badeck* the Court accepted positive-action measures which imply that the underlying selection formula is modified by transparent criteria amenable to review ‘which, although formulated in terms which are neutral as regards sex and thus capable of benefiting men too, in general favour women’.⁵⁶ In other words, the ECJ accepts that the evaluation-of-qualifications equation is modified by means of positive action within the framework of the concept of indirect discrimination. The Swedish reform was never argued in relation to Community Law on the scope for positive action.

Concerning the higher education area we must turn to the Higher Education Act and the 1993 Higher Education Ordinance. As was already indicated above (Section 2), in the Ordinance we find detailed rules on the appointment of teaching staff. Generally, according to Chapter 11 Section 9 of the Instrument of Government, only objective criteria are to be taken into account when appointments to State posts are made, including such criteria as merits and abilities. *Chapter 4 Section 15 of the Higher Education Ordinance* prescribes, in relation to the grounds of assessment for promotions and appointments to teaching posts, that ‘appointment ... must be based on merits of a scientific, artistic, pedagogical, and administrative or other nature relating to the discipline covered by the post in question and its nature in general’. However, account must also be taken ‘of objective reasons consistent with the general aims of policies relating to the labour market, equality, social matters and employment’. This rule is the express reflection of long-term practices within Swedish public administrative law as regards positive action within the constitutional rule on objective grounds.⁵⁷ As far as it concerns equality and positive action, the rule is generally referred to as the basic rule on the permissive ‘equality interval’.

Chapter 4 Section 16 of the Higher Education Ordinance – part of the 1995 Tham-package itself – establishes a specific form of positive action for cases where a higher educational institution has decided that such discrimination is permissible in the filling of posts or certain categories of posts with a view to promoting equality in the workplace. In such cases ‘a candidate belonging to an under-represented sex and possessing sufficient qualifications for the post *may be* (italics added) chosen in preference to a candidate belonging to the opposite sex who would otherwise have been chosen’.

According to the special *Ordinance (1995:936) concerning certain professors’ and post-doctoral fellows’ posts* created with a view to promoting equality – a

criterion or method of procedure is appropriate and necessary and can be justified with objective factors *that are not connected to the sex of the persons* (italics added)’.

55 See their special votas in SOU 2004:55 pp. 522 and 537.

56 See the judgment paragraph 47.

57 See, for instance, Tore Sigeman, *Tjänstetillsättning vid universitet och högskolor, Rättsfrågor i överklagandenämndens praxis*, Stockholm 1997.

limited number of ‘Tham-positions’, part of the ‘Tham-package’ – this specific form of positive action *shall be* used ‘where it proves necessary to do so in order for a candidate of the under-represented sex to be appointed’.

Both with regard to the Higher Education Ordinance and the 1995 Ordinance, owing to the basic constitutional rule on merits and abilities, the following limitation applies: ‘provided that the difference in their respective qualifications is not so great that application of the rule would be contrary to the requirement of objectivity in the making of appointments’. There is, however, no doubt that according to Swedish constitutional law, the promotion of equality has long been regarded as an ‘objective criterion’ for appointment.⁵⁸ This is part of the explanation why Sweden has chosen to go down the path of modifying the principle of merit.⁵⁹

This regulation had just been put forward at the time of the *Kalanke* judgment and was subsequently put to the test in the *Abrahamsson* case.⁶⁰

At the heart of *Abrahamsson* we find the question whether Articles 2.1 and 2.4 of the Equal Treatment Directive 76/207/EEC preclude national legislation under which a candidate of the under-represented sex possessing sufficient qualifications for a public post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, where this is necessary to secure the appointment of a candidate of the under-represented sex – that is, a national rule

58 Compare 4:15 the Higher Education Ordinance, only just described above.

59 However, the original EOA’s rule on positive action is also noteworthy here. As a consequence of the design of the ban on discrimination concerning promotion and appointments (discrimination required differential treatment despite a clear advantage in merits as compared to another person of the opposite sex), the permissive rule on positive action was only relevant in situations where there was a clear difference in respect of qualifications.

60 C-407/98 *Abrahamsson v. Fogelqvist* [2000] ECR I-5539. The *Abrahamsson* case concerns the appointment of a Professor of Hydrospheric Science at the University of Gothenburg according to Regulation 1995:936. A Ms Fogelqvist was appointed to the post, a decision against which an appeal was made to the Higher Education Board of Appeals (Överklagandenämnden) by Mr Anderson and by another applicant, Ms Abrahamsson. Överklagandenämnden referred the following questions to the Court: 1. Does the Equal Treatment Directive preclude national legislation under which an applicant of the under-represented sex possessing sufficient qualifications for a public post is to be selected in priority over an applicant of the opposite sex who would otherwise have been selected if there is a need for an applicant of the under-represented sex to be selected and under which positive special treatment is not to be applied only where the difference between the applicants’ qualifications is so great that such treatment would be contrary to the requirement of objectivity in the making of appointments? 2. Is positive special treatment impermissible in such a case even where application of the national legislation is restricted to appointments to *either* a number of posts limited in advance (as under Ordinance 1995:936) *or* posts created as part of a special programme adopted by an individual university under which positive special treatment may be applied (as under 4:16 of the Higher Education Ordinance)? 3. Can the rule based on 4:15 the Higher Education Ordinance, that an applicant belonging to the under-represented sex must be given priority over a fellow applicant of the opposite sex, provided that the applicants can be regarded as equal or nearly equal in terms of merit, be regarded as being in some respect contrary to Directive 76/207/EEC?, and, 4. does it make any difference in determining the questions set out above whether the legislation concerns lower-grade recruitment posts in an authority’s sphere of activity or the highest posts in that sphere?

like the one in Regulation 1995:936. Both the Advocate General Antonio Saggio and the ECJ answered this question in the affirmative.

As regards *Ordinance 1995:936* it is clear that we deal with a ‘strict quota system’ in the sense of a binding (i.e. unconditional) rule on preference for the under-represented sex. There is no articulated ‘saving clause’, although the preference rule is somewhat limited by the requirement of ‘objectivity in the making of appointments’. Moreover, unlike earlier cases, the national regulation ‘enables preference to be given to a candidate of the under-represented sex who, although sufficiently qualified, does not possess qualifications equal to those of other candidates of the opposite sex’.⁶¹

The *Abrahamsson* case itself has, of course, been settled.⁶² The *Överklagandenämnd*, which found the claimant, Mr Anderson, to be substantially better qualified than his woman competitor Ms Fogelqvist, appointed Mr Anderson to the post, ‘since it is clear from the judgment of the ECJ that Article 2.1 and Article 2.4 the Equal Treatment Directive as well as Article 141.4 EC preclude an application of Regulation 1995:936 so as to give priority to Ms Fogelqvist’. However, Regulation 1995:936 as such was in force until recently. Since the regulation only concerned a limited number of posts, it could be said to have fulfilled its mission.⁶³ It was the recommendation of a recent Governmental Investigations Committee to eliminate the Ordinance altogether, and it was finally abolished on 1 June 2005.⁶⁴

The Court’s answer to the second question indicates, in my opinion, that it is of no importance whether the rule is absolute as in Regulation 1995:936 or facultative as in *Chapter 4 Section 16 of the Higher Education Ordinance*. Nor can the special character of the posts it refers to justify such a selection procedure, according to the answer to the fourth question, which, in my opinion, reflects the highly principle-oriented reasoning behind the judgment. What is rejected is a selection procedure bridging the gap, which directly refers to (under-represented) sex and not overt and transparent criteria.⁶⁵ As a matter of principle, such a method

61 Paragraph 45 of the judgment. In his opinion the Advocate General Antonio Saggio departs from a requirement of equal qualifications as a precondition for positive action. Any selection method where sex is not only a complementary criterion must be regarded as ‘automatic and unconditional’ and is regarded to distort the whole purpose of the selection process. The objectivity requirement present in the Swedish context cannot change this (points 26 and 28). Just like the Court, the Advocate General did accept that priority was given to a candidate of the under-represented sex when ‘equally or substantially equally qualified’, providing there was a saving clause (point 29).

62 Överklagandenämndens beslut 2000-10-11, Reg.nr. 21-447/98 and 21-448/98

63 In fact, though we dealt with about 120 positions, the Ordinance was applied in very few – if any – cases apart from in *Abrahamsson*. Birgitta Jordansson, Jämställdhetspolitikens villkor, Rapport 1/99, Nationella sekretariatet för genusforskning, Göteborg 1999.

64 SOU 2004:55 p. 274.

65 In its judgment the Court rejects not only automatic – that is absolute and unconditional – preferential rules but a *selection method* that ‘automatically grants preference to candidates belonging to the under-represented sex’ (paragraph 52). This line of argument is further underpinned by the Advocate General (paragraphs 28, 32 and 33).

is not acceptable and proportionate, nor can it be justified under Article 141.4 EC according to the ECJ.⁶⁶

However, in Sweden the judgment has raised the question of a possible misunderstanding as regards the second query put forward by the *Överklagandenämnd*.⁶⁷ The judgment seems to disregard the facultative character of the national regulation at issue, 4:16 (then 4:15a) of the Higher Education Ordinance, probably owing to the way in which the *Överklagandenämnd* phrased its question. On closer scrutiny, the relevant national regulation does indeed allow for the kind of assessment stipulated by the Court, which takes account of the specific personal situations of all candidates – although not in the form of an express saving clause. It does not, however, stipulate any more transparent criteria for the selection process than Ordinance 1995:936. The question is: does the judgment, and thus Community Law, provide scope for a *flexible* quota system not only when the competitors are equally qualified, but also when there is a considerable gap in qualifications? Or should the judgment be interpreted as meaning that such a gap in qualifications must always be bridged by specified selection criteria ‘transparent and amenable to review’?

It must be held to be the official opinion in Sweden that there is no need to eliminate 4:16 in the Higher Education Ordinance. The rule is still standing, and a Governmental Investigations Committee recently stated that its application is within Community Law.⁶⁸ The origin of this opinion seems to be an interpretation of the *Abrahamsson* judgment presented by the EOO.⁶⁹ The interpretation is based on the fact that 4:16 the Higher Education Ordinance is facultative and thus does contain a (though not an express) saving clause at the same time as the ECJ did accept preference being given to the under-represented sex when candidates possess ‘equivalent or substantially equivalent’ merits (see further below). If this implies that what one is arguing⁷⁰ is that ‘the equality interval’ (i.e. not substantial differences in merit) accepted by the ECJ may, in practice, turn out to be wider than what is the case in Sweden according to Chapter 4 Section 15 of the Higher Education Ordinance, I, too, can accept such a conclusion.⁷¹ In my opinion, however, such a somewhat broadened ‘equality interval’ requires, in practice, an amendment of the Swedish rules on positive action in the area of higher education. The wording

66 Carl Tham has accused the ECJ of not making proper use of Article 141.4 EC, ‘jumping’ to a conclusion lacking in arguments and analysis. See newspaper article ‘EG-domen oroar’ in *Dagens Nyheter* of 14 July 2000. I share Carl Tham’s opinion that the scope of Article 141.4 EC could have been more carefully argued.

67 Compare Lerwall pp. 389 f.

68 SOU 2004:55 p. 205.

69 SOU 2004:55 p. 189.

70 Compare SOU 2004:55 pp. 189 and 205.

71 Compare Lerwall, who is of the opinion that sex (according to the ECJ) can be admitted as the substantial reason for giving preference to one candidate also when there is a difference in qualifications, provided the selection process is transparent and proportionate, pp. 386 and 390. She seems to find it sufficient should this apply only to the criteria for applying an exceptional rule on positive action.

of the current Section 16⁷² challenges a number of the statements made by the Court in *Abrahamsson* and was literally declared incompatible with Community Law by the ECJ.

Finally, in *Abrahamsson*, as was already touched upon, the ECJ held Swedish administrative practice, according to which the rule of preference for the under-represented sex is applied when candidates possess ‘equivalent or substantially equivalent’ merits, to be in accordance with Community Law providing there is a saving clause.⁷³ This still leaves an opening for the application of the positive-action measures most frequently used in the Swedish labour market as regards public employment. On closer scrutiny, however, the question is how the exact range of this ‘equality interval’ should be defined. The answer may be crucial in relation to the wider implications of the judgment in *Abrahamsson* (see above and further below, Sections 4 and 5).

When it comes to *access to higher education as such*, there are no possibilities to apply positive-action measures in the sense of preferential treatment on the grounds of sex according to domestic law, unless the applicants’ qualifications are really equal.⁷⁴

4 POSITIVE ACTION IN PRACTICE

The Higher Education Act and the Higher Education Ordinance described in the previous section also contain more general rules of importance to the promotion of equality between the sexes. According to Chapter 1 Section 5 of the Act, equality between women and men shall always be practised and promoted within the activities of institutions of higher education. Chapter 1 Section 8 in the Ordinance refers to this rule and to the EOA in general. Besides, as was already indicated above (Section 3), the EOA’s rules on active measures apply to employment in the area of higher education, too. This implies that there must be annual equality plans in higher-education institutions, plans addressing equality issues and spelling out the measures that are to be applied in order to ‘promote an equal distribution between women and men in various types of work and within different categories of employees’ (among other things). There is no legal requirement regarding the actual content of these plans (with the exception of the pay-monitoring process, not to be dealt with here), nor as regards the infrastructure of equal opportunities

72 ‘... a candidate belonging to an under-represented sex and possessing sufficient qualifications for the post may be chosen in preference to a candidate belonging to the opposite sex who would otherwise have been chosen’.

73 The judgment paragraphs 60–62.

74 Compare the (2001:1286) Act on Equal Treatment of Students and Chapter 10 Section 7 first paragraph the Higher Education Ordinance. However, in SOU 2004:55 the investigations committee proposes a rule on the right to positive action on the grounds of sex to be added to the 2001 Act.

work. Nevertheless, it is habitual that any higher institution has an equality plan – or an equality policy and a number of equality plans at faculty level – referring to (among other things) preferential treatment/positive action and an infrastructure to go with it, such as equality officers at central and, eventually, also faculty level.

First, as regards positive action within the realm of *the 1995 Ordinance*, there was no need to address this in the specific equality plans of higher institutions, since the regulation was compulsory within its area of application – that is, concerning the special Tham-positions. Although referring to about 120 positions with special funding, the Ordinance was hardly ever applied owing to the fact that there were only women applicants or the fact that women applicants were ranked first. In *Abrahamsson*, too, a woman applicant had first been recommended for the appointment, and the case developed only when she withdrew her application.⁷⁵ The Ordinance was finally abolished on 1 June 2005.

The application of *Chapter 4 Section 16 in the Higher Education Ordinance*, however, requires an express decision by the higher institution concerned to do so in relation to a certain category of positions or a certain number of positions. Even so, the rule does not imply an obligation on the part of the employer to actually apply it in an individual case – the requirement of a saving clause can be said to be inherent in the rule itself. There are, to my knowledge, no actual cases where the rule in 4:16 the Higher Education Ordinance has been applied, nor before neither following the *Abrahamsson* judgment.⁷⁶ The rule as such has not been amended nor eliminated after the ECJ's judgment (see Section 3 above). One of the higher education institutions that had adopted an equality plan (or acquainted document) under which such positive special treatment was permitted – Uppsala University – did draw another conclusion than the official one and decided to eliminate that part of the programme following the judgment.⁷⁷ The equality plan of Umeå University still makes a reference to 4:16 but this part of the plan was, according to my information, never put to the test in practice.⁷⁸ A decision where this rule

75 See further, Jordansson. The report examines professorial appointments only. The Ordinance was only put to use in one case, *Abrahamsson*.

76 Two cases presented to the Överklagandenämnd were finally decided within the scope of 4:15; see further Fredrik Bondestam, 'En önskan att skriva objektet, Analyser av akademisk jämställdhet, Stehag 2004', Report II pp. 13 and 57 ff.

77 Decision 2000-09-25. According to a study made by Bondestam, and limited to the appointment of post-doctoral fellows as part of a pilot project on positive action, only six out of 21 appointments in 1997–99 went to women. 4:16 was applied on seven occasions. On two occasions this resulted in a woman actually being appointed, but only after withdrawal of the candidate ranked as number one. In the only case where a woman was actually ranked number one with reference to 4:16, the Överklagandenämnd ruled that the differences between the two candidates went beyond the requirement of 'objectivity in the making of appointments' included in the rule and a man was appointed instead. See further Report II in Bondestam 2004.

78 <http://www.umu.se/personal>. See also the local 'Regulation concerning teachers' of Lund University, which leaves it open for the faculty boards to decide whether to apply 4:16 the Higher Education Ordinance or not with regard to a certain position, Secs. 4 and 9. This possibility was, to my knowledge, never used.

is applied would surely be appealed against, and the *Överklagandenämnd* is (at the very least; it could also find the matter settled already by *Abrahamsson*!) sure to refer such a situation to the ECJ for a preliminary ruling. Given the official standpoint on the rule, it is only natural that it should be put to the test again this way. Higher-education institutions have been reluctant to use it, though.

The possibilities of positive action offered by *Chapter 4 Section 15 in the Higher Education Ordinance* remain to be considered. The rule is thus an expression of the customary Swedish administrative practice, according to which the rule of preference for the under-represented sex may be applied when candidates possess 'equivalent or substantially equivalent' merits. It is a general rule that the equality plans of higher-education institutions address the issue of positive action so as to state that in situations where candidates possess equivalent merits preference shall, in principle, be given to the under-represented sex.⁷⁹ Originally, however, an articulated strategy of 'positive action' in such terms was not really necessary to apply 4:15.⁸⁰ To make use of the 'equality interval' in terms of that rule is regarded as an integrated part of the 'objective assessment' always applied concerning State appointments, and such a move may be based on the general policy aims expressed in Chapter 1 Section 5 of the Higher Education Act and the EOA as such.⁸¹ However, since the 2001 amendments of the EOA⁸² any differential treatment on the grounds of sex (i.e. positive action/equality arguments) now needs the justification required by Sec. 17 para. 2(2) in the EOA.

There are a number of cases where this rule has been applied, some of them from the area of higher education.⁸³ The 'equality interval' is taken to be rather narrow.⁸⁴ Differing opinions among the experts, as well as opinions stating only small differences among the candidates or hesitations concerning the ranking, are signs that the rule is applicable.⁸⁵ The rule implies no obligation to make use of it should the requirements be met; and the *Överklagandenämnd* itself has, prior to the ECJ's judgment in *Abrahamsson*, found it to be in compliance with Community Law.⁸⁶

There is a need to make the rule in 4:15 the Higher Education Ordinance more 'operational', regardless of whether we are talking about a broadened scope for the 'equality interval' or its application just as it is. The very rules on assessment in the Ordinance that indicate the obligation of the experts to rank the candidates

79 Not necessarily with an express reference to the requirement of there being a saving clause!

80 Lerwall pp. 367 f. and Sigeman 1997 p. 25.

81 This reflects the fact that from a Swedish perspective, positive action has been related to preferential treatment where there is a more or less clear difference in merits; see further Section 5 below. The *raison d'être* of the rule in 4:15 is really to bridge the gap in merits that requires equality, too, to be labelled an 'objective' ground.

82 Prop. 1999/2000:143 and, later on, also prop. 2004/2005:147.

83 Compare Sigeman 1997 pp. 23 ff. with references.

84 Decision 19/8 1998.

85 See, for instance, Decision 13/6 2003 (dnr 4796/02).

86 Decision 11/12 1996 (dnr 1053/96).

for an appointment have made way for a practice of ‘consecutive ranking’, which makes the use of the ‘equality interval’ very difficult. To make a decision in terms of ‘equivalent or substantially equivalent merits’ one has to create platforms for two or more candidates when assessing their merits, i.e. make use not of consecutive but of ‘terraced ranking’.⁸⁷ Uppsala University has developed this idea as an integrated part of their local appointment regulations.⁸⁸ The rule states that as regards the merits assessment, ‘terraced ranking’ may be applied (if the position is so announced); and when candidates are placed on the same ‘terrace’, the direction to pay attention to the equality argument in 4:15 the Higher Education Ordinance apply. Such a practice is allowed only if there is an under-represented sex (<40%) in the category of employment concerned. In addition, considerable differences between terraces are said to be acceptable within the scope of 4:15.⁸⁹ At Lund University, too, ‘terraced ranking’ has been presented as an important tool for the appointment committees.⁹⁰

Finally, the equality plans of higher-education institutions indicate a number of positive-action measures apart from the ones discussed so far. Some of these are internal budgetary and funding means in combination with flexible quota targets. One example is central or faculty funding offered to cover part of the salary cost when appointing a candidate of the under-represented sex at department level, thus promoting equality. Another is the provision of higher institutional bonuses in response to PhD degrees earned by persons of the under-represented sex. There are also a number of mentor programmes and training schemes ear-marked for women. More examples can be found in official reports and on the web pages of the higher-education institutions themselves.⁹¹

5 HOW DO WE GET FROM HERE TO THERE? DISCUSSION

5.1 To what extent is there really a scope for positive action in Community Equality Law?

Under Swedish national legislation, the general scope for positive action had appeared relatively uncomplicated for a long time when the judgment in the *Kalanke* case appeared.⁹² However, the question of the scope for positive action had hardly

87 Compare Tore Sigeman, *Utlåtande till Uppsala universitets konsistorium Dnr UFV 2000/1355, Positiv särbehandling vid Uppsala universitet* p. 7.

88 Uppsala universitets anställningsordning, UFV 2002/1963, Sec. 24 – www.personalavd.uu.se.

89 See the Uppsala University ‘Guidelines concerning employment of teachers’ p. 19.

90 October seminar 2003.

91 See, for instance, HV 2003:31 and www.hsv.se for further links to higher-education institutions. See also prop. 2004/05:1 p. 139.

92 Ann Numhauser-Henning, ‘Positiv särbehandling – EG-domstolen överraskar igen!’, in *Juridisk Tidskrift* 1997–98 pp. 814–834.

been put to the test in case law,⁹³ and my impression is that positive action (in the Swedish sense, i.e. giving priority to the under-represented sex despite a difference in merits) had not – and still has not – been practised to any massive extent on the Swedish labour market. The controversies caused by positive action showed up in the debate on the Tham-professors. Maybe positive action is less acceptable in the area of higher education than elsewhere, not only owing to traditional male dominance and (increasingly) scarce resources but also to the elaborate system of academic merit assessment and the alleged ‘objectivity’ of science.⁹⁴ The reform as such can – as can requirements concerning active measures in the field of equality between men and women in general, at least in the area of higher education – be labelled ‘a revolution from above’. However, as was pointed out above, part of the Swedish regulation concerning positive action in the area of higher education has now been rejected by the ECJ in *Abrahamsson*.

To answer the question whether there still appears to be a scope for positive action from a Swedish perspective, we will have to consider the following. Traditionally, in Sweden positive action is understood as giving preference to one candidate despite his or her being less qualified than a competitor. According to the 1979 EOA, the ban on sex discrimination was constructed so as to apply only when there was a clear difference in merits. However, the scope for positive action in Community Law – clearly confirmed by the ECJ in the cases of *Marschall*, *Badeck* and *Abrahamsson* – is based on what McCrudden depicts as ‘the tie-break principle’: accepting the granting of precedence to be given to a member of the under-represented sex at the point of hiring in a case where a number of competing applicants for employment meet the requirements of the job in question, i.e. are equally qualified (and the saving clause does not apply).⁹⁵ Although the wording of the 1991 EOA is now such as to be in compliance with Community Law, this perception of positive action is still not the one that primarily comes to mind in Sweden. To give preference to the under-represented sex when applicants are equally qualified is still not spontaneously regarded as preferential treatment in Sweden. Compare the rule in Chapter 4 Section 15 of the Higher Education Ordinance, where such aspects within the ‘equality interval’ are regarded as part of the objective-assessment procedure. From the Swedish point of view the *raison d’être* of this rule, at least originally,

93 See the Swedish Labour Court’s judgment 1981 No. 171, where the positive special treatment of a less qualified man (under-represented sex) was not accepted. See also cases 1986 No. 103 and 1989 No. 122. See also case 1990:34.

94 The very fierce debate caused by mixing elements of equality into an appointment situation in the so-called *Gerner* case in Lund may illustrate this. See further, for instance, Gunilla Jarlbro, *Manliga snillen och tokiga feminister, En analys av mediernas rapportering kring tillsättningen av professuren i historia vid Lunds Universitet våren 2002*, stencil 2003.

95 McCrudden, Public Procurement, Contract Compliance and Social Policy in the European Union, 31 December 1996. This is only one of three identified types of positive action, the others being outreach programmes (to attract the attention of under-represented groups or to provide specific training, etc.) and accurate preferential treatment in employment (i.e. reverse discrimination of ‘the Swedish type’ in favour of members of the under-represented group upon hiring, etc.).

was really to bridge a gap in merits on the understanding that equality is also to be considered an ‘objective’ ground in relation to appointments.

Is there a scope for positive action, then? There certainly is, though its boundaries are far from thoroughly investigated. In *Badeck* the ECJ accepted flexible quota targets. Such targets seem to be possible to combine with rules on funding mechanisms, which should make them quite efficient as a means of positive action.⁹⁶ There is also the statement in *Badeck*, repeated in *Abrahamsson*, permitting the modification of assessment and selection criteria within the concept of indirect discrimination.⁹⁷ From the domestic point of view, however, and after *Abrahamsson*, I find the scope for positive action in the context of appointments in the area of higher education unacceptably reduced. This is mainly due to the domestic legislation. We are captured in a legislative deadlock situation steered by Swedish constitutional law, which is not amenable to (though not necessarily incompatible with) the concept of positive action which apply in Community Law. I find it necessary to fully integrate the Community Law approach to positive action, i.e. the rules also apply when two equally competent candidates are compared. Only then can we carefully elaborate the ‘equality interval’, the merits-assessment process and the criteria of possible exceptions under the premise of positive action and so test the limits of Community Law. It is at the interface between the assessment of qualifications as such and the acceptable ‘equality interval’, in the sense of terraced ranking, that much of the potential for positive action resides.⁹⁸ This requires a reform of the rules in Chapter 4 of the Higher Education Ordinance. It also requires an amendment of the EOA, so as to allow positive action where indirect discrimination is concerned.

5.2 The motives for promoting women in Academia – are they compatible with Community Equality Law?

My conclusion is thus that although it must be said that there is a scope for positive action in Community Law, that scope now seems – especially from the Swedish point of view – quite reduced when it comes to the actual process of hiring. A relevant question is to what extent this scope for positive action is compatible with

96 Compare the German report.

97 Ann Numhauser-Henning, *Legal Perspectives on Equal Treatment and Non-Discrimination*, The Hague 2001 p. 243.

98 It should be observed that in relation to Community Law, the evaluation of merits is a judgment normally left to the national tribunals and not for the ECJ to decide upon. According to Swedish tradition, in *Kalanke* the male applicant would probably have been considered the better qualified person in that competition and the issue presented to the ECJ not a case of two equally qualified competitors. Possibly, ‘equally qualified’ may refer to a case where the people in charge of the selection process have chosen to ignore ‘superfluous’ merits with regard to the requirements of the post in question, and so on. Compare *Badeck* and the regulation of the selection criteria ‘to be assessed in accordance with the requirements of the post to be filled’. In the case of Swedish academic professorial posts, however, this freedom is thus restricted by the Higher Education Ordinance. Compare also Lerwall p. 391.

the motives we initially (see above Section 1.1) identified behind the policies to promote women in the area of higher education.

Generally speaking, Community Law equal-treatment regulations are construed in the liberal legal tradition. Prohibitions against discrimination are articulated so as to elicit formal equal treatment in the individual case, implying a stipulation to the effect that a person's sex is irrelevant. However, this is not enough to achieve equality.⁹⁹ It is of crucial importance to note that systematic injustices between the sexes are not necessarily perceived at the individual level. The effect in terms of actual discrimination of the individual in a case where two competitors, a man and a woman, are equally qualified is something we can never know. Had the employer chosen freely, he could have appointed the man or the woman (not discriminating against either of them). Had he chosen as employers usually do (that is within the framework of existing structures and prejudices), he would have chosen the man. Of course, these practices throughout the years have entailed injustices to – individual – women. Coming to grips with such discriminatory structures, which can only be perceived at the aggregate level, calls for administrative measures – for instance in the form of positive special treatment. Such measures have also been accepted by the ECJ on condition that the candidates are equally, or almost equally, qualified and provided there is a saving clause. Awareness of conditions in 'the real world' has led to the abandonment (within the limits of the saving clause and the principle of proportionality) of the stipulated irrelevance of sex and the acceptance of positive-action measures at the administrative level. However, this can all be said to take place within the normative concept of equal opportunities for the similarly situated.

The normative picture is quite different when an individual of the under-represented sex is to be given priority even when less qualified than the competitor. In these cases other normative patterns and interests come to the fore. If we continuously proceed from the representation-theory concepts presented initially in this report, we get the following picture.

The argument of fair representation differs from the one of equal opportunities in that it stresses the equal *distribution* of opportunities (and not necessarily equal opportunities for the *similarly* situated). This is where the line of argument concerning positive action as a compensation for historical 'wrongs' belongs, as do quota systems irrespective of merits. The normative pattern focuses on the collective level, or the group, to quite a different extent than formal equal treatment does – the basis for distribution is, precisely, the person's sex.

In *Abrahamsson* the ECJ rejected the technique of balancing two such different normative arguments as that of formal equal treatment and that of distributive representation against each other in a case where the candidates are not similarly situated, at least where the method of selection is 'automatically' based on (adherence

99 Compare the Council's Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women, OJ 1984 L 331/34.

to the under-represented) sex, and labelled it as being 'disproportionate to the aim pursued' whatever the circumstances.¹⁰⁰ Despite the 'cleaning up' of underlying norms of selection within the concept of indirect discrimination that can be regarded as permissive according to the judgments in *Badeck* and *Abrahamsson*, the legal application in these cases is compatible with the stipulation that sex cannot, by principle, be justified as the 'automatic' ground for selection. Once the formula for selection has been agreed upon, we deal (in the cases hitherto accepted by the ECJ) with priority for an applicant who is at least as qualified as his or her competitors of the opposite sex. Fair representation (i.e. distribution) might, however, make up part of the intrinsic motives for accepting this type of positive indirect discrimination.

How about the *conflict-of-interest argument* and the principle of need, then? In this case, too, it is natural to bear the group concerned – that is, women or men – in mind, for instance with regard to tenure track regimes making it more or less possible to harmonise working life and family life. Though both men and women tend to have families – and at the same time, there are women who do not – such tenure-track issues frequently present themselves as matters of particular interest to women. Here it should be pointed out that the ECJ in *Badeck*, and even more so in *Abrahamsson*, has left a certain scope for a regulation of the selection procedure, so as to make it better able to meet the needs of women than traditional criteria. By doing so, the ECJ has created – through the back door, as it were – a certain scope for the values underlying the conflict-of-interest argument and some kind of distributive justice. It is an arrangement which takes account of the special needs of women. The indirect discrimination created by such a measure of positive action as regards the non-prioritised sex may thus be compatible with Community Law, according to the ECJ.

The resource argument addresses other potential differences between the sexes than the ones involving different opportunities as regards access to employment, etc., such as the quality arguments with regard to research put forward in relation to the Tham-package. What scope is there in Community Law for this line of argument?

First, the express exemptions from the equal-treatment principle in the form of so-called *bfoq defences*¹⁰¹ should be mentioned here. Furthermore, Article 2.7 of the amended Equal Treatment Directive offers scope for protective measures as regards women, in conflict with the principle of equal treatment. This rule, too, has been strictly interpreted and is usually restricted to provisions that protect women's biological needs and the mother-child relationship in the first months after birth. The exemption is thus best referred to the conflict-of-interest argument.

The concept of direct discrimination is based on differentiation on the grounds of sex. The stipulation of a person's sex as irrelevant, and men and women as equal,

100 See the judgment in *Abrahamsson* paragraph 55, and also paragraphs 58 and 64.

101 *Bona fide occupational qualities*; compare Article 2.6 of the amended Equal Treatment Directive.

behind the prohibition of direct discrimination has led to the rejection – except within the scope of positive action hitherto dealt with – of any justification of direct discrimination outside the scope of Article 2 in the Equal Treatment Directive. Arguments built on considerations involving advantages to the working environment or to activities as such when the personnel in a workplace is equally distributed between the sexes, as well as the importance for research orientation, etc., of the representation of women in the academic world, do not – it seems to me – agree well with Article 2 in the Equal Treatment Directive and even less well with its interpretation in case law so far.¹⁰²

However, the creation of an opening for the resource argument does not primarily call for a change in the underlying rules; rather, the chief requirement is a readiness to contemplate the idea that there should – in certain situations – be a freedom to select characteristics felt to be needed also when related to a person's sex. The concept of indirect discrimination implies recognition of the fact that equality between the sexes cannot be judged independently of the group. The discriminatory potential of apparently neutral criteria – the underlying norms – has to be considered in relation to the effects they have on the group to which a disadvantaged individual belongs – are the effects detrimental and unjustified? Indirect discrimination can thus be justified and – as we have seen – also be viewed as an acceptable measure of positive action.¹⁰³ In fact, the boundaries between direct and indirect discrimination are by no means clear.¹⁰⁴ In view of the blurred boundary between direct and indirect discrimination, but also between what is to be regarded as sex-related and what constitutes an independent need/quality in itself, there are no reasons for failing to treat direct discrimination as something that may occasionally be justified in the individual case, too. On the contrary, this comes across as an arrangement which – in different ways – agrees well with the individually designed prohibitions against discrimination that are contained in the liberal order, even if it does presume that the relevant decision-making body disregards the stipulation that a person's sex is irrelevant (as has, after all, actually happened in connection with positive action, as long as the forms in which it occurred were the appropriate ones).¹⁰⁵ I thus

102 Compare, however, the special votum of Sigeman in the Överklagandenämnd's case settled on 1998-03-25 (dnr. 6976/97), where he argues the need of women tutors as an objective ground within the assessment process. See also the judgment of the Swedish Labour Court in case 1986:103, where the need of a male counsellor for co-therapy was accepted as a *bfoq defence*. Compare, however, case 1989 No. 122, too, where this was not the case.

103 Here, too, however, we have hitherto appeared to be caught up in the relevant stipulation in that the indirect discrimination must be excused by reasons which are unrelated to sex. Art. 1(2) of the (amended) Equal Treatment Directive no longer contains the reference 'unrelated to sex', however, whatever this may imply in relation to the ECJ's case law up to now.

104 See, for instance, Ruth Nielsen, Case Note, 29 [1992], CML Rev. 160–169, in relation to *Dekker*.

105 It is worth mentioning that Community Law nowadays presents several examples of direct discrimination as being justifiable. One is the Council Directive 1997/81/EC on part-time work, another the Council Directive 1999/70/EC on fixed-term work, and yet another the Council Directive 2000/78/EC establishing a general framework for equal treatment. Compare

argue that an extension of the normative basis of positive action can be admitted within the framework of the proportionality assessment, occasionally allowing for the justification of *direct* discrimination as well. And it is my personal opinion that within such a general proportionality assessment, balancing the individual's right to formal equal treatment against other interests, the legitimate scope for the resource argument behind the Tham-regulation and other considerations can be carefully addressed.

Moreover, maybe Article 141.4 EC embodies an element of surprise, although it can hardly be said to give us a clear-cut expression of the scope for positive action after Amsterdam. There are those who claim that Article 141.4 EC is significantly different from Article 2.4 in the Equal Treatment Directive, among other things with reference to the declared aim to 'promote full equality in practice between men and women in working life'. Luckily, the much 'slimmed' argument in *Abrahamsson* in this regard does not seem to close all doors. However, the manifold declarations of positive action as an exemption from the equal-treatment principle are somewhat depressing.

5.3 Recruitment targets for women professors – how do we get from here to there?

It is my opinion that the scope for positive action upon hiring in the area of higher education which is currently offered by domestic law, interpreted in the light of *Abrahamsson*, is quite restricted. The potential that may exist in revised practices regarding the merit-assessment process possibly offered by Community Law is severely hampered by domestic higher-education legislation.

The possibilities presented by the use of financial means, however, as suggested in the German report, seem a much more efficient road to success.¹⁰⁶ Such measures can also be used to meet the interests behind the representation, conflict-of-interest and resource arguments as presented above. Naturally, this calls for the commitment of the leadership of higher-education institutions. Such a commitment may be mobilised by means of financial tools. There is, however, also a reasonable chance of persuading men (and women) already in top positions of the necessity to increase equality within Academia. The advancement of younger women no longer necessarily implies a threat to people in their position. On the contrary, they may actually identify with the problem, thinking of the situation of their daughters, etc.

also Sigeman's votum in the decision 1998-03-25 (dnr 6976/97) by the Överklagandenämnd. Institutional needs of a woman role-model were addressed as 'objective grounds' according to 4:15 the Higher Education Ordinance.

106 Notice, that following the Tham-package, the share of women professors increased from 7 to 11%; Jordansson. As was already mentioned the actual regulation, Ordinance 1995, was only put to use once – in *Abrahamsson*. The effect was due to the fact that funding was made available in strategic areas related to strong female competence. See further Jordansson.

The resistance mobilised by the 'system' (dominated by male colleagues) should not be underestimated, though. Academia is a highly hierarchical structure with (increasingly so, it seems) scarce resources, built upon individuals with a strong commitment to (an often much personalised vision of) science. More often than not, people climbing the academic ladder will not regard any weapon as being excluded *per se*, and the individual is unlikely to give up a privileged position.