

# Journal of Legislation

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Volume 23 | Issue 1

Article 2

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1-1-1997

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### Recommended Citation

Moens, Gabriel A. (1997) "Equal Opportunities Not Equal Results: Equal Opportunity in European Law after Kalancke," *Journal of Legislation*: Vol. 23: Iss. 1, Article 2.

Available at: <http://scholarship.law.nd.edu/jleg/vol23/iss1/2>

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# EQUAL OPPORTUNITIES NOT EQUAL RESULTS: “EQUAL OPPORTUNITY” IN EUROPEAN LAW AFTER KALANCKE

Gabriël A. Moens\*

## I. INTRODUCTION

In *Kalancke v. Freie Hansestadt Bremen*,<sup>1</sup> the European Court of Justice expressly embraced the philosophy of equality of opportunity over equality of result in employment. The Court examined a Bremen law which granted preference in public service appointment to women over equally qualified men when women did not make up half of the employees in the relevant pay bracket. The Court held that the law violated the Equal Treatment Directive adopted by the European Council in 1976. In so finding, the Court stated that “such a system substitutes for equality of opportunity as envisaged in Article 2(4) [of the directive] the result which is only to be arrived at by providing such equality of opportunity.”<sup>2</sup> The Court thus drew a distinction between equality of opportunity, which is required by the directive, and equality of result, which is not.

*Kalancke's* significance to the debate over affirmative action extends well beyond the boundaries of the European Community. It vindicates equality of opportunity and highlights the underlying infirmity of so many affirmative action plans: substituting equal (pre-determined) outcomes for equal (and hence competitive) opportunities. However, *Kalancke* predictably raised a storm among advocates of affirmative action in Europe. Karin Junker, a member of the European Parliament, denounced the decision as “a macho verdict” from “a court made up solely of men who have never felt what it is like to be disadvantaged solely on the basis of sex.”<sup>3</sup> (Affirmative action has not yet reached the judiciary.) She suggested that half of the judges of the Court be removed and replaced with women.<sup>4</sup> This discreditable ‘solution’ suggested (presumably in jest) by Junker is, as we shall see, compatible with her repudiation of the philosophy of equality of opportunity.

In response to these critics, European Court Judge David A.O. Edwards emphasised that mandating equality of result denies equality of opportunity and hence is discriminatory. He asked, “Has the court done any more than say there comes a

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1. Case C-450/93, *Kalancke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-3051, [1996] 1 C.M.L.R. 175 (1996) [Hereafter *Kalancke*] (All other references are to the C.M.L.R.).

2. *Kalancke*, 1 C.M.L.R. at 194 (para. 23) (Judgment of the Court).

3. James Pressley, *Sex-Discrimination Case Shows Anomaly in EU Law*, WALL ST. J. EUR., Oct. 31, 1995, at 4.

4. *Id.*

point at which 'positive discrimination' is discrimination?"<sup>5</sup> However, the distinction drawn by the Court between equality of opportunity and equality of result signifies more than Judge Edward's comment might suggest. Many affirmative action schemes will be open to legal challenge as automatic preferences after the *Kalancke* judgment.

The remainder of this article will argue that the European Court of Justice rightly emphasised that equality of opportunity does not demand equality of result, and that automatic preferences based on gender are inconsistent with equality of opportunity.

## II. DIFFERENT VERSIONS OF EQUALITY

### Equality of Opportunity Versus Equality of Result

The affirmative action debate revolves around two basic ideals: equality of opportunity and equality of result. Equality of opportunity allows individuals to compete for employment solely on the basis of characteristics relevant to satisfactory performance, and not on the basis of generally extraneous factors such as sex or race. In a society adhering to this ideal, individuals occupy positions earned exclusively on the basis of their demonstrated individual talents and skills.<sup>6</sup> International instruments such as the European Community ("EC") Equal Treatment Directive and the Multilateral Human Rights Treaties<sup>7</sup> further equal opportunity by stipulating that race and sex are irrelevant to the satisfactory performance of most jobs. Thus, employees should be selected without regard to such characteristics, and arbitrary barriers to employment based on such characteristics should not be set up.

Removing artificial barriers to employment in order to provide equal opportunity does not necessarily result in proportionate representation of groups in the workforce. Instead, removing these barriers to employment widens the field to allow classes of people previously excluded to compete for jobs. This does not, however, guarantee that the competition will result in proportionate participation. Indeed, the outcome of the competition becomes less predictable. Talents and skills are not distributed uniformly throughout the human race such that each market within each geographic area contains a proportionate number of qualified applicants of each sex and race. Consequently, implementing equality of opportunity will almost surely result in very different outcomes in each geographic area and market. Individual differences explain why different groups in society are represented in varying degrees (often to a marked extent) in a certain employment context.<sup>8</sup> These outcomes are likely to change over time, moreover, because social mobility enables people "to move up and down the hierarchy" according to their own talents and skills.<sup>9</sup> Such a view of equality is consistent with individual choice of occupation and education according to the skills and talents of each individual.

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5. *Id.*

6. See JOHN C. LIVINGSTON, *FAIR GAME? INEQUALITY AND AFFIRMATIVE ACTION* 18 (1979).

7. See, e.g., Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93; Convention Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, ILO No. 111, 362 U.N.T.S. 31.

8. See also PHILIP DE LACEY AND GABRIEL MOENS, *THE DECLINE OF THE UNIVERSITY* 138-39 (1990).

9. Charles Frankel, *Equality of Opportunity*, 81 *ETHICS* 191, 203 (1971).

Equality of result, in contrast, is premised upon the belief that a "nearly random distribution of women or other minorities in all jobs" would be expected to occur in the absence of discriminatory practices.<sup>10</sup> Those adhering to this premise, therefore, wish to legislatively mandate proportionate representation of each group in society according to its numerical strength.<sup>11</sup> Proponents conclude that any large disparities in result (or outcome) must necessarily be due to a system or structure of discrimination which disadvantages a substantially higher proportion of one group more than another.

Some writers go further, arguing that, even if talents and skills are *not* distributed uniformly, society must remove the large disparities that result from implementing equality of opportunity. Because equality of opportunity does not necessarily result in proportionate representation, these writers, in order to further their "utopian" goal, demand that race or sex again be a formal basis for appointment to employment.<sup>12</sup> Thus, the proponents of equality of result promote preferential measures advancing applicants on the basis of race or sex, such as the measure in *Kalancke*.

Such a view of equality rejects the consequences arising from free choice of occupation and education. Its proponents believe that the under-represented's free choice could not itself account for under-representation. However, as the Advocate-General observed in *Kalancke*, "under-representation of women in a given segment of the employment market . . . is not necessarily attributable to a consummate determination to marginalise women."<sup>13</sup> Rather, equality of opportunity, and the freedom of individual choice it protects, lends itself to widely differing outcomes based on individual choices. In contrast, equality of result aims at pre-determined outcomes and is ultimately inconsistent with freedom of choice.

### Two Forms of Affirmative Action: Two Forms of Equality

Just as there are two ideals of equality, two forms of affirmative action programs may be distinguished. These forms of affirmative action programs, labeled "soft" and "hard" affirmative action programs, follow the different ideals of equality. "Soft" affirmative action programs are consistent with the ideal of equality of opportunity, whereas "hard" affirmative action programs conform to the ideal of equality of result.

"Soft" affirmative action programs include measures taken to remove arbitrary barriers to employment that invidiously discriminate on the basis of race or sex. Such measures include the publication of statements that the employer is an equal opportunity employer, improvement of recruiting procedures, information campaigns aimed at locating suitable minority applicants, and any other specific remedies that enable applicants to compete effectively for scarce employment opportunities. These measures promote equality of opportunity by removing artificial barriers to employment.

Opening positions through the use of affirmative action measures conforms to equality of opportunity described above. Justice is achieved when individuals are allowed to compete for valued rewards determined exclusively by characteristics relevant

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10. LANCE W. ROBERTS, *Understanding Affirmative Action*, in DISCRIMINATION, AFFIRMATIVE ACTION, AND EQUAL OPPORTUNITY 145, 157 (W.E. Block & M.A. Walker eds., 1982).

11. See, e.g., Titia Loenen & Albertine Veldman, *Preferential Treatment in the Labour Market After Kalancke: Some Comparative Perspectives*, 12 INT'L J. OF COMP. LAB. L. & INDUS. REL. 48 (1996) [hereinafter *Loenen & Veldman*].

12. Jeffrey Rosen, *Affirmative Action: A Solution*, NEW REPUB., May 8, 1995 at 20.

13. *Kalancke*, 1 C.M.L.R. at 189 (para. 24) (Opinion of Advocate-General).

to the reward. Such programs preserve the right of individuals to be selected solely on the basis of factors relevant to employment.

In contrast, "hard" affirmative action programs involve the selection and recruitment of minority workers and women precisely on the basis of their race or sex. Such measures typically involve setting aside a specified proportion of positions to be filled by persons of a specified race or sex or a requirement that members of one societal group be preferred over another. They seek to substitute the outcome of equality of result for the practice of equality of opportunity. In preferring women over equally qualified men, the Bremen law at issue in *Kalancke* may be classified as a "hard" affirmative action program.

Supporters of "hard" affirmative action programs believe that replacing discriminatory practices with legitimate procedures does not accomplish enough. They point out that "soft" affirmative action programs require a "comparatively long time to produce a social order free of the marks signifying its discriminatory past."<sup>14</sup> They, consequently, insist that more vigorous affirmative action is needed immediately to rectify inequities produced by past "societal" discrimination. Those supporting this strain of affirmative action claim that reparation must be made for past discrimination practiced by society as a whole. They are not concerned that such reparation may involve discrimination in favour of individuals who belong to preferred groups. This process of reparation is called *redress*. Redress is essentially a kind of make-up or revenge process, whereby the descendants of those who were inappropriately advantaged in the past are required to forfeit, disproportionately, opportunities for social benefits in consideration of past sins committed by people of the same sex or race. Taken to its logical extreme, the notion of redress would give women two votes for a period of time because their grandmothers had none.

### III. THE KALANCKE CASE

#### Equality of Opportunity Versus Equality of Result Comes to European Law

In *Kalancke*, the European Court of Justice had its first occasion to decide whether affirmative action comports with the Equal Treatment Directive.<sup>15</sup> At about the same time that the European Court rendered its decision in *Kalancke*, American affirmative action programs were also being reviewed by the United States Supreme Court. Many commentators viewed the Supreme Court's decision in *Adarand Constructors v. Peña*<sup>16</sup> as the possible end of racially-based affirmative action in America. As the Advocate-General<sup>17</sup> told the European Court, "In Europe, positive action has begun to take hold or, at any event, to become the object of attention at the very time when affirmative action seems to be a state of crisis in its country of origin."<sup>18</sup>

Although this was the first time when the European Court had to rule on the compatibility of gender preferences with the directive, there were indications in prior

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14. ROBERTS, *supra* note 10, at 151.

15. *Kalancke*, 1 C.M.L.R. at 180 (para. 7) (Opinion of Advocate-General).

16. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).

17. The Advocates-General give impartial advice to the Court in public session as to how cases should be decided. GABRIËL MOENS & DAVID FLINT, *BUSINESS LAW OF THE EUROPEAN COMMUNITY* ¶ 12.3.1, at 304 (1993). Normally the Advocate-General's Opinion is accorded great weight. *Id.* ¶ 12.3.7 at 306.

18. *Kalancke*, 1 C.M.L.R. at 182 n.10 (Opinion of Advocate-General).

case law that the Court would not be likely to view favourably legislation based upon the philosophy of enforced equality of result. In *De Lauche v. Commission*,<sup>19</sup> the Court stated that the Equal Treatment Directive did not permit reverse discrimination. The Court also held in *Commission v. France*<sup>20</sup> that the directive did not permit conferring special rights upon women.

**Fact: Mr. Kalancke is Not a Woman**

Two candidates applied for the position of section manager in Bremen Parks Department. One was male, Mr. Kalancke, and the other female, Mrs. Glißmann. Mr. Kalancke was the section manager's deputy and held a diploma in horticulture and landscape gardening. He had worked as a horticultural employee since 1973. Mrs. Glißmann, on the other hand, held qualifications as a horticultural scientist and landscape gardener. She had worked as a horticultural employee since 1975. Parks Department management supported Mr. Kalancke for the position while the Personnel Committee opposed his appointment to the post. Because of this disagreement, the appointment went to arbitration where Mr. Kalancke was favoured once more. However, the Personnel Committee could not accept this decision, and deeming the arbitration to have been a failure, requested that the matter be referred to the Conciliation Board. The Board ruled that both candidates possessed the same qualifications.<sup>21</sup>

Since women constituted less than fifty percent of the employees in the relevant individual pay bracket of this personnel group within the department, affirmative action was mandatory under Bremen law. Thus, the finding that both candidates possessed the same qualifications was instantly fatal to Mr. Kalancke's application. Under the Bremen Law on Equal Treatment for Men and Women in the Public Service,<sup>22</sup> if women comprised less than fifty percent of the employees in an individual pay bracket within the relevant personnel group of a department, priority was to be given to a female candidate over a male candidate of the "same qualifications."<sup>23</sup> That women comprised less than fifty percent of employees in any such pay bracket was statutorily deemed "under-representation," even if women did not comprise fifty percent of the relevant labour force. Such "under-representation" triggered preferential treatment for women in cases of equal qualification.<sup>24</sup>

Mr. Kalancke unsuccessfully challenged the law under various provisions of German law.<sup>25</sup> However, a German court<sup>26</sup> referred the matter to the Court of Justice for a preliminary ruling as to the compatibility of the Bremen law with European law, as established in the Equal Treatment Directive.<sup>27</sup>

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19. Case 111/86, *De Lauche v. Commission*, 1987 E.C.R. I-5345, [1989] 2 C.M.L.R. 565 (1989).

20. Case 312/86, *Commission v. France*, 1988 E.C.R. 6315, [1989] 1 C.M.L.R. 408 (1989).

21. *Kalancke*, 1 C.M.L.R. at 191 (paras. 4-5) (Opinion of the Court), 179 (para. 4) (Opinion of Advocate-General).

22. *Gesetz zur Gleichstellung von Frau und Mann im Öffentlichen Dienst des Landes Bremen*, ¶ 4, Nov. 20, 1990, *Bremisches Gesetzblatt* 433 (Law on Equal Treatment of Men and Women in the Public Service of the Land of Bremen), quoted in *Kalancke*, 1 C.M.L.R. at 191 (para. 3) (Judgment of the Court).

23. *Id.*

24. *Id.*

25. *Kalancke*, 1 C.M.L.R. at 179-80 (para. 5) (Opinion of Advocate-General).

26. The *Bundesarbeitsgericht* (Federal Labour Court).

27. *Kalancke*, 1 C.M.L.R. at 180 (para. 6) (Opinion of Advocate-General).

### A European Safeguard of Equality of Opportunity? The Equal Treatment Directive

The European Court of Justice declared the Bremen law inconsistent with the Equal Treatment Directive of 1976.<sup>28</sup> The Equal Treatment Directive is one of the directives adopted by the Council to give effect to Article 119 of the EC Treaty.<sup>29</sup> Article 119 requires Member States to maintain the "principle that men and women should receive equal pay for equal work."<sup>30</sup> Article 119 is thus "the European translation"<sup>31</sup> of I.L.O. Convention No. 100<sup>32</sup> on equal remuneration for men and women workers for work of equal value.<sup>33</sup>

Two provisions of the Equal Treatment Directive are central to the *Kalancke* judgment. Article 2(1) unqualifiedly prohibits direct and indirect sex discrimination: "the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status."<sup>34</sup> Article 2(4) expressly permits discriminatory measures that promote equality of opportunity, but never allows discrimination mandating equality of result.<sup>35</sup> Article 2(4) thus allows Member States to adopt "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)."<sup>36</sup>

The Court and the Advocate-General both recognized the discriminatory nature of the Bremen law. Since it gave automatic preference to women over equally qualified men in employment sectors in which women were "under-represented," it constituted discrimination based on sex.<sup>37</sup> Thus, the law fell foul of Article 2(1)'s general prohibition against sex discrimination, unless it could be squeezed into the Article 2(4) exception as a measure promoting equal opportunity.

#### One for Equality of Opportunity, One for Equality of Result

The British Government and the European Commission intervened in the proceedings to make submissions to the Court. The British Government supported the principle of equality of opportunity arguing that the Bremen law was directed not to equal treatment but to social engineering. It further pointed out that since a multitude of factors could account for a lack of proportional representation, quota rules are predicated upon an erroneous assumption that unequal representation equates with discrimination. Appointments must be consistent with the principle of equality of opportunity, so appointment quotas are impermissible since they subject appointments to the principle of equality of result.<sup>38</sup>

28. *Id.* at 194 (para. 23) (Judgment of the Court).

29. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 119.

30. *Id.*

31. Case 43/75, *Defrenne v. Sabena*, 1976 E.C.R. 455, 484, [1976] 2 C.M.L.R. 98, 110 (1976) (Opinion of Advocate-General).

32. Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951, 165 U.N.T.S. 303.

33. See MOENS & FLINT, *supra* note 17, ¶ 10.1, at 260.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Kalancke*, 1 C.M.L.R. at 193 (para. 16) (Judgment of the Court); *id.* at 182 (para. 10) (Opinion of Advocate-General).

38. Ursula A. O'Hare, *Positive Action Before the European Court of Justice: Case C-450/93*

The European Commission intervened in favour of Bremen's version of equality of result. The Commission argued that Bremen's law was not a strict quota, but a "tie-break" provision. It argued that if two candidates were "equally qualified" the decision as to appointment should be made on the basis of gender.<sup>39</sup>

#### IV. THE *KALANCKE* DECISION

The Court and the Advocate-General both held that the Bremen law violated Article 2(1)'s general prohibition against sex discrimination and could not be justified by falling within the Article 2(4) exception for measures promoting equal opportunity. Their reasons will be critically examined in the following section.

##### Opportunity Equality is Equal, Result Equality is Not

Both the Court and the Advocate-General endorsed equality of opportunity over equality of result. In a significant passage, the Court said that "in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, [the Bremen] system substitutes, for the equality of opportunity envisaged in Article 2(4), the result which is only to be arrived at by providing such equality of opportunity."<sup>40</sup> Hence, the discriminatory approach of the Bremen law violated Article 2(1) and was not saved by Article 2(4).

One writer demurs that "[t]he approach of the Court illustrates its underlying assumption that all discrimination on grounds of sex is to be treated the same," whether it be invidious or "benign."<sup>41</sup> The Court's assumption is logical because the directive itself, in its prohibition of sex discrimination (Article 2(1)), does not differentiate between (invidious) discrimination against women and (benign) discrimination against men.

The Advocate-General also endorsed the concept of equality of opportunity. He condemned "measures not in fact designed to remove the obstacles preventing women from pursuing the same results on equal terms, but to confer the results on them directly."<sup>42</sup> He defines "equal opportunities" in Article 2(4) as "equality with respect to starting points" (equality of opportunity) not "with respect to points of arrival" (equality of result). Measures to "promote equal opportunities" were those eliminating barriers in the way of "equality with respect to starting points."<sup>43</sup> The Advocate-General was no more impressed with the Bremen law at issue than was the Court. This law was not designed to eliminate barriers impeding "equality with respect to starting points" but sought to create equality "with respect to points of arrival." Hence, it overstepped the limits of the derogation.<sup>44</sup>

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*Kalancke v. Freie Hansestadt Bremen*, 2 WEB J. OF CURRENT LEGAL ISSUES (March 24, 1996) <<http://www.ncl.ac.uk/~nlawwww/1996/issue2/ohare2.html>> (hereinafter *O'Hare*).

39. *Id.* (Intervention of the Commission).

40. *Kalancke*, 1 C.M.L.R. at 194 (para. 23) (Judgment of the Court).

41. S. Moore, *Nothing Positive From the Court of Justice*, 21 EUROPEAN L. REV. 156, 159 (1996). Contrast *Adarand*, 115 S. Ct. at 2119-20 (Thomas, J., concurring in part and concurring in the judgment).

42. *Kalancke*, 1 C.M.L.R. at 188 (para. 22) (Opinion of Advocate-General).

43. *Id.* at 183 (para. 13).

44. *Id.* at 183-84 (para. 13).



### Non-discrimination and Individual Rights

Both the Advocate-General and the Court viewed the right to non-discrimination on the ground of sex as an individual right.<sup>45</sup> This should be uncontroversial. The Court draws a conclusion from this, however, which goes to the dispute between the supporters and foes of equality of opportunity.<sup>46</sup> Because non-discrimination on the basis of sex is an individual right -- a fundamental right in the Court's case law<sup>47</sup> -- the Court ruled that the derogation in Article 2(4) from the principle of non-discrimination had to be interpreted strictly.<sup>48</sup>

Proponents of preferences cannot contend that the derogation in Article 2(4) is itself an individual right, simply because the provision is not structured in that way. The individual right of non-discrimination appears in Article 2(1), but the derogation limiting that right appears in Article 2(4). While Article 2(4) is a derogation from an individual right, Article 2(1) is clearly an individual right. A derogation from a fundamental right reduces the scope and content of that right. Consequently, in order to preserve fundamental rights to their fullest, a derogation must be interpreted strictly.

Relatively little attention is paid to the text of Article 2(4) by supporters of preferential treatment. The language of the provision itself is inconsistent with the concept of equality of result. Any interpretation of the derogation in Article 2(4) must take into account its express emphasis upon equal opportunity not upon equal result. Nowhere does the provision mention numerical enhancement of women's occupational representation or even proportional representation. Instead, the provision speaks of "removing existing inequalities which affect women's *opportunities* . . . to promote equal *opportunity*."<sup>49</sup> Thus, the provision is not directed to result. Rather, it is oriented towards opportunity.

The wider a derogation from an individual right is interpreted, the less significant that right becomes. Of all the rights in law that should be safeguarded from being undermined by judicial interpretation, the principle of non-discrimination must surely be paramount. Preferences of any sort open a gaping hole in the principle of non-discrimination.

#### "Absolute and Unconditional" Preferences

The Court ruled that laws "which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities" and thus could not be saved by Article 2(4).<sup>50</sup> The use of the term "absolute and unconditional priority" is one of the most problematic aspects of the judgment because of its ambiguity. Perhaps the Court means that a law which contains any preference based on

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45. *Id.* at 194 (para. 21) (Judgment of the Court); *id.* at 180 (para. 7) (Opinion of Advocate-General).

46. *Loenen & Veldman, supra* note 11, at 50-52.

47. Case 149/77, *Defrenne (No. 2) v. Sabena*, 1978 E.C.R. 1365, 3 C.M.L.R. 312, 329 (para. 27) (1978) (Judgment of the Court); Case T-45/90, *Speybroek v. European Parliament*, 1992 E.C.R. II-33 (para. 47).

48. *Kalancke*, 1 C.M.L.R. at 194 (para. 21) (Judgment of the Court), citing Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651, [1986] 3 C.M.L.R. 240 (para. 36) (1986).

49. *Id.*

50. *Kalancke*, 1 C.M.L.R. at 194 (para. 22) (Judgment of the Court).

sex is inconsistent with the directive. Such a holding would be the most comprehensive way in which the Court could adopt equality of opportunity. Nonetheless, it is at least clear that preferential laws that offer "absolute and unconditional priority" violate the directive. Unfortunately, the Court does not explain what constitutes an "absolute and unconditional priority," nor does it indicate why the Bremen law was "absolute and unconditional." The facts of the case must be closely scrutinized to gain some insight into the factors which caused the Court to so characterize the Bremen law.

Some suggest that the Bremen law was not "unconditional" because conditions were placed upon the granting of preference: "under-representation" (as defined) and "equal qualification."<sup>51</sup> It is probable that the Court's use of the words "absolute and unconditional" follows from the Bremen law's automatic ("absolute and unconditional") preference in the specified circumstances and not from preconditions to automatic priority.

Two possible explanations of "automatic priority" have been identified. According to the first explanation, priority for women in cases of "equal qualification" is "automatic priority." This was the view of the Advocate-General, who considered that such a practice is directed only to result and not opportunity.<sup>52</sup> This view is the more plausible of the two.

Others criticize this approach. They point out that the Court has already refused to grant special rights for women.<sup>53</sup> If women are not either allowed automatic appointment when equally qualified, "no feasible measures [remain to be] covered by Article 2 para. 4."<sup>54</sup> This criticism is not accurate. "Soft" affirmative action measures fall within the exception of Article 2(4) because they are consistent with the directive's aim of promoting equality of opportunity. Denying the feasibility of such measures is consistent only with a preoccupation with result rather than equal opportunity. So-called "feasible" measures are likely to be "hard" affirmative action measures. Such measures do not secure (and are inconsistent with) equality of opportunity but seek to secure an equality of result. They are not saved by the exception in Article 2(4) and fail under the general prohibition of discrimination in Article 2(1).

The second possible interpretation of "automatic priority" is the less likely explanation of the decision, and it is one that robs the decision of much of its force. This explanation offers that the Court did not condemn priority for women in cases of "equal qualification." Rather, the Court condemned the particular characteristics of the Bremen scheme that caused it to constitute automatic priority. The argument maintains that the Bremen scheme constituted "automatic priority" because the preference continued to operate even when women *did* make up fifty percent of the relevant labour market. This was "considered too blunt an instrument by the Court."<sup>55</sup>

Supporters of this position, however, do not explain how the proportion of women in the relevant labour market ties in with the Court's language: "automatic priority" or "absolute and unconditional." That pre-condition goes to proportionality rather than to the automatic nature of the preference.

Furthermore, if priority for women in cases of "equal qualification" is not "auto-

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51. *Loenen & Veldman*, *supra* note 11, at 46.

52. *Id.* at 47.

53. Case 312/86, *Commission v. France*, 1988 E.C.R. 6315, [1989] 1 C.M.L.R. 408 (1988).

54. *Loenen & Veldman*, *supra* note 11, at 47.

55. *Id.*

matic priority," why did the Court not proceed to the second step and examine the proportionality of the national measure to the objective sought to be achieved? If priority for women in cases of "equal qualification" were not "automatic priority," the Court would have to decide the question of proportionality. That it did not do so strongly suggests that "automatic priority" for women meant (perhaps *inter alia*) priority for women in cases of "equal qualification."

### How Equal is "Equally Qualified"?

The criteria "equally qualified" adopted by the Bremen law is somewhat mystifying. How will two candidates ever be truly "equally qualified" for the job? Rarely indeed will two people be identical in every possible criteria that might have any relevance for the job. More likely, a hiring committee would settle for a finding of "equally qualified" rather than more rigorously scrutinizing which candidate has better qualifications for the job. It operates as an excuse for preference to operate.

Likely, considerable pressure would lead a hiring authority to deem candidates "equally qualified" thus creating an excuse for preferential treatment. The very fact that the two candidates in this case were deemed "equally qualified" despite two prior recommendations for Mr. Kalancke's appointment suggests that the phrase "equally qualified" merely acts as a veil for discrimination. Superior qualifications possessed by a male employee would not be thought inconsistent with the "equal qualification" of a female employee.

Commentators have suggested that when candidates are "equally qualified," the choice could only be made on the basis of sex. In such a situation, the only alternative to female appointment is male appointment, a more invidious form of sex discrimination. These commentators suggest flipping a coin is the only way not to discriminate. "We think it safe to say that the Court cannot have intended that its decision would subject application procedures to such a community law requirement."<sup>56</sup>

It is safe to conclude that the Court meant no such thing. This scenario ignores that, instead of the Personnel Committee's supine insistence that the candidates possessed equal qualifications, thus activating the gender preference, they should have more rigorously scrutinized the candidates' suitability for the position. A more exacting study of each applicant's suitability would almost certainly have revealed one to be more suitable than the other. Thus, there would have been no justification for a gender preference for either applicant, and the more suitable applicant would have been appointed. The Bremen authorities did not have to flip a coin.

### Blunt Instrument Social Engineering and Proportionality

Even if the directive had been held to authorize preferences based on sex, the preference in issue would have failed the proportionality test by which "the national measure in question must not exceed that which is appropriate and necessary to achieve the intended aim."<sup>57</sup> Because granting automatic preferences based on sex was not authorized by the directive, the Court did not consider the proportionality test. Had it needed to do so, the Bremen law would surely have been thought disproportionate relative to any objective, short of compelling equal representation of men and

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56. *Id.* at 48.

57. *Kalancke*, 1 C.M.L.R. at 188 (para. 23) (Opinion of Advocate-General).

women in all occupations.

The Bremen law was a particularly outrageous form of discrimination because of its definition of "under-representation." The law required that preferences be given to women unless they made up one half of the employees in a particular pay bracket, even if women did represent less (even much less) than one half of the labour force from which employees could be chosen. Thus, even if women represented only five per cent of the relevant labour market, the employer had to continue to give preference in the defined circumstances until women made up fifty percent of employees of the relevant pay bracket. This is an especially blunt instrument of social engineering<sup>58</sup> based on the idea that proportional representation should exist in every occupation, even if women have not chosen to pursue that occupation in numbers approaching those of men.

The Bremen law may be explained only by drawing a presumption of discrimination in situations of "under-representation." It is often argued that the statistical "under-representation" of women in certain categories of occupation is a *prima facie* indicator, raising a presumption of discrimination. The *prima facie* presumption of discrimination is based on belief that "under-representation" must be the consequence of discriminatory causes rather than the consequence of individual decisions as to career path, education, marriage,<sup>59</sup> and a multitude of other voluntary factors which can make a major, even dramatic, difference to occupational patterns.<sup>60</sup>

The argument assumes that each sex must contain an equal proportion of members as the other, interested in every line of work. If so, "under-representation" proves discrimination. The *prima facie* presumption is entertained by people who cannot believe that "under-representation" may be the consequence of free choices made by members of the under-represented group.

Fixation with equality of result leads to a line of thought inconsistent with freedom of choice. Because people are not all the same, free choice of employment is likely to lead to different choices by the individuals who make up groups. Proportional representation will never be achieved within each occupational group if freedom of choice is maintained.

### **The Inequality of Equality: the Different Standards for Sex and Race-Based Affirmative Action in Europe and America**

European Community law provides no specific legislation prohibiting racial discrimination,<sup>61</sup> although it has passed specific legislation forbidding sex discrimination.<sup>62</sup> In America, however, sex discrimination is subject to less exacting constitu-

58. Such a scheme would not be upheld in the United States. *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *Nancy L. Perkins, Judgment of the Court in Eckhard Kalancke v. Freie Hansestadt Bremen*, 35 INT'L LEGAL MATERIALS (Am. Soc. Int'l Law) 265-66 (Mar. 1996).

59. See THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY* 98 (1984).

60. The presumption that under-representation is a *prima facie* indicator of discrimination also implies that proportional representation (or full utilisation) is a *prima facie* indicator of the absence of discrimination. A preference scheme consistent with equality of result that achieves proportional representation at the expense of equality of opportunity shows that this is not necessarily the case.

61. *But see* Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* 1970 E.C.R. 1125, 1972 C.M.L.R. 255 and Art. F(2); Treaty on European Union, Feb. 7, 1992, art. F, para. 2, 1992 O.J. (C 191) 5.

62. *Sionaidh Douglas-Scott, Ruling Out Affirmative Action*, 145 NEW L. J. 1586, 1587 n.16 (Oct. 27, 1995).

tional review than is racial discrimination.<sup>63</sup> It has been observed that the recent decisions of the United States Supreme Court and the European Court of Justice have led to an anomalous situation. In Europe, racially-based affirmative action is easier for governments to practice than sex-based affirmative action. But in the United States, sex-based affirmative action is easier for governments to practice than racially-based affirmative action.<sup>64</sup> This is indeed an anomaly and cannot be justified. This article proposes, as a solution, to abolish all affirmative action measures (whether based on sex or race) incompatible with the principle of equality of opportunity.

### **The Insignificance of Incompatible European Parliament Interpretation and National Practice Before Judgment**

The European Parliament and a number of Member States, especially Scandinavian states, had, in the Advocate-General's words, adopted affirmative action schemes "in order to guarantee . . . not equal opportunities but an equal share of jobs."<sup>65</sup> The Advocate-General said that he thought he "must resist the temptation to follow the trend"<sup>66</sup> within the European Parliament and many Member States in favour of equality of result rather than equality of opportunity.

The interpretation and practice of certain European institutions and Member States is opposed to the interpretations reached by the Court and Advocate-General. Many criticise the judgment for this. Some suggest that the Advocate-General and Court could have referred more fully to the Parliament's position and the schemes in place in Member States,<sup>67</sup> presumably because they might have provided some support for the view that quotas and preferences are compatible with "equal opportunity" rather than compelling equality of result.

Unless the Court was disposed to ignore the wording of the directive ("equal opportunity" not "equal result") it is unlikely that reference to national practice would have changed the Court's decision. If the directive had truly intended to permit equality of result rather than equality of opportunity, the language chosen was singularly ill adapted to convey that meaning. One can readily see that a proposal that mandated equality of result based on the sole ground of sex would not have been proposed let alone passed in 1976. Instead, promoting equal opportunity by measures intended to ensure equality of starting points was proposed and readily accepted.

Furthermore, the Council's non-binding Recommendation on Positive Action for Women,<sup>68</sup> which does not define "positive action," appears to be rather more consistent with promoting equality of opportunity, than with measures coercing equal results.<sup>69</sup>

63. Compare *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982), *J.E.B. v. Alabama ex. rel. T.B.* 114 S. Ct. 1419, 1425 (1994), and *United States v. Virginia* 116 S. Ct. 2264, 2274 (1996), with *Adarand*, 115 S. Ct. 2097 (1995).

64. Compare *Douglas-Scott*, *supra* note 62 at 1587 n.16; *Loenen and Veldman*, *supra* note 11, at 49 n.16 with *Adarand*, 115 S. Ct. at 2122 (Stevens, J., dissenting).

65. *Kalancke*, 1 C.M.L.R. at 190 (para. 26) (Opinion of Advocate-General).

66. *Id.* at 190 (para. 27).

67. *O'Hare*, *supra* note 38.

68. Council Recommendation 84/635/EEC on the Promotion of Positive Action for Women, 1984 O.J. (L 331) 34.

69. *Kalancke*, 1 C.M.L.R. at 187 n.20 (Opinion of Advocate-General).

### The Influence of America: Is the Rehnquist Court to "Blame" for *Kalancke*?

The answer is clearly no. The influence of non-Community law upon the judgment was minimal. The Court referred solely to general principles drawn from its own case law. The Advocate-General drew upon American case law regarding the compatibility of affirmative action with the constitutional protection of equal protection found in the Fourteenth Amendment<sup>70</sup> but did not refer to the constitutional and legislative positions of Member States on affirmative action. The Advocate-General and the Court have been the subject of criticism suggesting they should have referred to developments in Member States.<sup>71</sup> This criticism is not a telling one. In deciding the case upon general principles of its own case law the Court was surely on safe ground. If the Advocate-General had restricted himself to the case law of the Court of Justice it is unlikely that comment would have been made about his failure to refer to the various laws of European nations. However, the part national law played in his opinion was slight. The Advocate-General's invocation of American authority was restricted to a single footnote.<sup>72</sup> Many more references are made by the Advocate-General to the case law of the Court of Justice.

### A Judgment in Shorthand

The brevity of the Court's judgment in *Kalancke* has been much criticised. The Court's reasoning has been impugned as "minimal -- one might say non-existent"<sup>73</sup> and as "excel[ling] in ambiguity."<sup>74</sup> On the other hand, the Court's judgment has been admitted by the same critics to be "a tenable conclusion"<sup>75</sup> and a "reasonable outcome."<sup>76</sup> While criticism of the Court's brief statement of reasons is both understandable and inevitable, the substance of its conclusions is far more difficult to impugn. The Court reached the right conclusion in law and policy, which is to be preferred to its reaching the wrong conclusion with a full panoply of alleged supporting justifications. Furthermore, the Court is free to develop its reasoning as to the contrast between equality of opportunity and equality of result in greater depth in future cases, and it is likely to do so. It will surely not have a shortage of such opportunities.

The Court's reasoning is indeed sparse and truncated in its presentation. The judgment would have greatly enhanced its persuasive power had the Court's rationale been elaborated in more detail. In addition, the brevity of the judgment has resulted in some ambiguity. The Court did not define in detail its concept of equal opportunity. This is important because, while affirmative action's connection to equality of opportunity and to equality of result is clear in theory, a study of the relevant literature reveals that this connection is confused in practice. The Advocate-General's criticism of the Court's condemnation of the creation of special rights for women may be such an

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70. *Regents of the Univ. of California v. Bakke*, 483 U.S. 265 (1978); *United Steelworkers of America v. Webster*, 443 U.S. 193 (1979); *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) (cited in *Kalancke*, 1 C.M.L.R. at 182 n.10 (Opinion of Advocate-General)).

71. *O'Hare*, *supra* note 38.

72. *Kalancke*, 1 C.M.L.R. at 182 n.10 (Opinion of Advocate-General).

73. Moore, *supra* note 41, at 158.

74. Peter Noorlander, *Affirmative Action; Recent Developments*, Internet url: <<http://www.ccc.nottingham.ac.uk/~ilzweb/hrlc/hnews/15-2-96/affacti.htm>>.

75. Moore, *supra* note 41, at 161.

76. Noorlander, *supra* note 74.

example.

#### V. THE PRESENT STATE OF EQUAL OPPORTUNITY IN EUROPEAN LAW: WHAT AFFIRMATIVE ACTION REMAINS PERMISSIBLE?

In addition to indicating what Article 2(4) does not permit, the Court makes some general statements about what affirmative action measures are permitted by the derogation in Article 2(4). That Article, said the Court, "allow[ed] 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."<sup>77</sup> It thus "permits national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men."<sup>78</sup> Given the vagueness of these statements, probably the best indication of what derogations might be permitted comes from the Court's views of what is *not* permitted. The Court has said that "absolute and unconditional priorit[ies] . . . go beyond promoting equal opportunities" and that a law may not substitute "for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by such equality of opportunity." Consequently, probably only "soft" affirmative action measures will be permitted by this derogation from the individual right to non-discrimination.

Nonetheless, a number of suggestions have been made in Europe that "harder" affirmative action measures may still be permissible. Two such views have been put forward by the European Commission and the Government of the Netherlands.

##### The Commission's Views

The Commission interprets the Court's judgment to condemn the automatic nature of the preference rather than the concept of preference itself.<sup>79</sup> According to this view, a number of measures which involve employment preference for women continue to be lawful following the judgment, though their clear purpose is equality of result rather than equality of opportunity. One such measure promotes women by specifying proportions for representation and time frames within which this should be achieved. Such plans do not require that a woman be chosen in a particular decision.<sup>80</sup> Under such a plan, equality of opportunity (promotion of the best applicant) is likely to take second place to furthering compliance with the plan. Another such measure does impose an "obligation of principle" for employers to recruit or promote on the basis of sex but does not grant an individual right of gender preference.<sup>81</sup> Once again, such measures aim not at providing equality of appointment on the exclusive basis of job-related characteristics but aim at creating equality of result by preferring one sex over another. Similar comments may be made about state subsidies to employers recruiting women in fields where they are "under-represented."<sup>82</sup> Such measures, as governmental rewards for equality of result rather than equality of opportunity, undermine the non-discrimination principle. Such measures do not appear to pay sufficient heed to the

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77. *Kalancke*, 1 C.M.L.R. at 193-94 n.18 (citing Case 312/86, *Commission v. France*, 1988 E.C.R. 6315, 1 C.M.L.R. 408 (1989)).

78. *Id.* at 194 n.19.

79. *Affirmative action in the EC*, BUS. LAW BRIEF, April 10, 1996, at 2.

80. *Id.*

81. *Id.*

82. *Id.*

Court's endorsing equality of opportunity and condemning measures which substitute "the result which is only to be arrived at by providing such equality of opportunity."<sup>83</sup> The Court's definition of the scope of Article 2(4) similarly focuses on removing arbitrary barriers to employment and is consistent with equality of opportunity. The Court stated that Article 2(4) permits "national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men."<sup>84</sup> This is equality of starting points, not of result. Similarly, the Advocate-General argued that Article 2(4) permitted equalising starting but not of arrival points -- that is equality of opportunity in competing for employment but not equality of result in such employment.<sup>85</sup>

### The View of the Netherlands Government

The view of the Netherlands Government (based on the practice of the Dutch Equal Opportunities Commission<sup>86</sup>) is that preferences remain permissible where the proportion of women in a particular employment class or pay bracket is less than the proportion of women in the relevant labour market.<sup>87</sup> However, this view ignores the fact that *automatic* preferences *per se* may have been by condemned the Court.

### The Advocate-General's Suggestion

The Advocate-General suggested that Article 2(4) permitted "measures relating to the organization of work, in particular working hours, and structures for small children and other measures which will enable family and work commitments to be reconciled with each other" to be conferred on the basis of sex.<sup>88</sup> This suggestion appears to be contrary to the Court's ruling in *Commission v. France*,<sup>89</sup> where the Court had held that the directive did not permit the creation of special rights for women, such as reduced working hours, leave allowance for children, and contribution towards the cost of childcare, all allocated on the basis of sex. The Advocate-General suggested that this ruling was one of "excessive severity."<sup>90</sup> Such measures remain inconsistent with the directive as long as the Court's decision stands.

## VI. THE FUTURE OF EQUALITY OF OPPORTUNITY IN EUROPEAN LAW

### European Lawyers Await a New Ruling

Many issues raised by the *Kalancke* judgment await clarification by the Court of Justice. The pending proceedings in the *Marschall* case<sup>91</sup> provide an opportunity for the Court to clarify its approach. *Marschall* asks whether the directive is violated by an affirmative action scheme similar to that of Bremen but subject to a qualification.

83. *Kalancke*, 1 C.M.L.R. at 194 n.23.

84. *Id.* at 193-94 n.18.

85. *Kalancke*, at 186-87 n.19 (Opinion of Advocate-General).

86. The Dutch E.O.C. considers the *Kalancke* decision to be a confirmation of its policy. See *Loenen and Veldman*, *supra* note 11, at 47.

87. *Id.*

88. *Kalancke*, 1 C.M.L.R. at 186 n.18 (Opinion of Advocate-General).

89. Case 312/86, *Commission v. France*, 1988 E.C.R. 6315, 1 C.M.L.R. 408 (1989).

90. *Kalancke*, 1 C.M.L.R. at 186 n.18 (Opinion of Advocate-General).

91. Case 490/95, *Marschall v. Land Nordrhein-Westfalen* (1995).



Preference will not be given to a woman where an equally qualified male candidate would suffer an unbearable individual hardship.<sup>92</sup> In this case, defenders of the law will argue that the preference is discretionary rather than automatic. In practice, however, it operates as a near-automatic preference. Proponents of preferences will thus seek to do indirectly what they cannot do directly. The Court has yet to decide whether something styled as a less than automatic preference is compatible with the directive. Consequently, preferences may yet re-enter European law via the back door.

### **Calls for a Legislative Repudiation of Equality of Opportunity**

In March 1996, the European Commission released a draft amendment of Article 2(4) seeking to entrench equality of result in European law. The following wording is a proposed addition to that Article:

This directive shall be without prejudice to measures to promote equal opportunity for men and women in particular by removing existing inequalities which affect the opportunities of the under-represented sex.

Possible measures shall include the giving of preference, as regards access to employment or promotion, to a member of the under-represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case.<sup>93</sup>

Such an amendment is consistent with equality of result but is in tension with the expressed purpose of the directive to promote "equal opportunity" not "equal results." A preference given on the basis of gender secures a predetermined result, not a genuine competition directed towards choosing the best possible candidate. The prospects that such an amendment could become law are not certain. Any amendment of the directive must obtain unanimous assent from all fifteen Member States. The United Kingdom, which intervened in the case in support of Mr. Kalancke, is unlikely to support an amendment that weakens equality of opportunity.<sup>94</sup> To secure British approval, the drafters of an amendment would probably have to consolidate the position of equality of opportunity in European law. An amendment directed to mandatory equality of result is most unlikely to obtain the assent of the current British Government. Other Member States may be similarly reluctant. Support for the need to undermine or reverse the position taken by the Court of Justice is not overwhelming. Proponents of equality of result thus find themselves in an impasse.

Others have proposed that the Maastricht Treaty should be revised to permit employment measures consistent with equality of result and suggest a future Intergovernmental Conference as an ideal opportunity to further this agenda.<sup>95</sup> The fate of such attempts to undermine equality of opportunity remains to be seen.

## **VII. CONCLUSION**

In interpreting the "equal opportunity" of the Equal Treatment Directive as

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92. *O'Hare*, *supra* note 38.

93. *Affirmative action in the EC*, BUS. LAW BRIEF, April 10, 1996, at 2.

94. Tom Buerkle, *Europe's Court Strikes Down Hiring Quota for Women*, INT'L HERALD TRIB., October 18, 1995, at 1. See also, Alan Riley, *Positive Discrimination and Practical Solutions*, EUR. CURRENT LAW, January 1996.

95. *Loenen and Veldman*, *supra* note 11, at 53; *Social Policy: Experts Call for EU Treaty to Address Equal Opportunities*, EUR. REP., May 8, 1996, available in 1996 WL 8663568.

equality of opportunity, the European Court of Justice has embraced the logical result of the non-discrimination principle in employment: that, in accordance with European and international law, sex and race are in general not relevant to suitability for employment. It has enhanced the operation of the non-discrimination principle in Europe by maintaining that employment related decisions must be based on employment-related criteria. This comes at a time when the non-discrimination principle had been seriously eroded by legislative preferences on the basis of gender. The Court has rebuffed attempts to preempt the result of equality of opportunity by prescribing equality of result.

The Court refused to substitute for the directive's equality of opportunity "the result [of] which is only to be arrived at by providing such equality of opportunity"<sup>96</sup> at a time, however, when gender-based violations of equality of opportunity had secured a place in the laws of many European nations. These violations of equality of opportunity have now been denied a secure place in European law. Still, as proponents of equal result seek to undermine the *Kalancke* judgment, equality of opportunity stands under siege at the very moment when it has been vindicated by the Court of Justice. European society, now more than ever, should support the principle of non-discrimination by forbidding preferential treatment based on race or sex. Today's victims of such discrimination are not the oppressors of past discrimination, and should not be punished as if they were. European society should follow the European Court's lead and embrace equality of opportunity.

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96. *Kalancke*, 1 C.M.L.R. at 194 n.23.

