

QUOTAS FOR MEN IN UNIVERSITY:
BREAKING THE STEREOTYPE IN EUROPEAN UNION
LAW AND SWEDISH LAW

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Abstract

This thesis approaches the issue of quotas for the under-represented sex in higher education. The focus is mostly legal but it will also include a sociological point of view.

The first part of the study will approach this issue from an International Human Rights perspective, in what concerns the right to higher education and gender equality. The second part of the study will approach gender equality in higher education from a European Union Law perspective. The third part of the study will take the Swedish experience regarding quotas for the under-represented sex in university as an example in order to illustrate the results of the application of these positive action measures. Moreover, this part of the thesis will analogically apply the principles presented in the first part of the study, in order to illustrate the ways in which Sweden can be considered to be “opting-out” of its human rights obligations.

In its conclusion, this thesis will approach the “gendering” of men in today's societies, and relate it to the trend for their underachievement on an academic level, in order to contribute to break a stereotypical view that does not see men as a “vulnerable group” in the area of higher education. Ultimately, this thesis will attempt to answer whether or not men are being discriminated by the law and by society, in what concerns their educational opportunities.

Acronyms and Abbreviations

CFREU	Charter of Fundamental Rights of the European Union
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CPR	Civil and Political Rights
DO	Discrimination Ombudsman
EC	European Community
ECJ	European Court of Justice
ESCR	Economic, Social and Cultural Rights
ECHR	European Convention on Human Rights
EU	European Union
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
i.e.	In exemplis
SLU	Swedish University of Agricultural Sciences
TEC	Treaty of the European Community
TFEU	Treaty of the Functioning of the European Union

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1. Purpose of the thesis

1.1. The admissibility of quotas for the under-represented sex in university

The purpose of this thesis is to approach the issue of quotas for the under-represented sex in university. This will be a primarily legal analysis, but sociological perspectives will also be included in order to render the reader a more comprehensive view of the question at stake.

This thesis will question the *de facto* application of the principle of gender equality, taking the Swedish experience regarding quotas for the under-represented sex in higher education as an example. In some university degrees in Sweden men are the under-represented sex, instead of women. Men appear to be falling behind in relation to women at the moment of entering certain degrees. This situation is also occurring in other countries in Europe. Therefore, this thesis will look into situations regarding quotas in higher education in Sweden, as well as comparable cases regarding quotas under European law, mostly in the area of the labour market. This analogy will be carried out in order to establish a parallel regarding quotas for the under-represented sex in these two areas, in relation to issues regarding individual merits and gender balance, within the scope of the application of quota systems. As one of the objectives of this thesis is to attempt to ascertain the admissibility and lawfulness of the application of this type of quotas in practice, Swedish court cases on the matter will also be addressed.

An International Human Rights perspective will also be included, more specifically in what concerns the right to education, in order to approach the issue of quotas for the under-represented sex in the Swedish education system and to understand how their application in higher education admissions has resulted in gender imbalance. By approaching the perspective of human rights, this thesis will attempt to answer whether or not men are being discriminated on the grounds of sex, within the scope of their right to higher education, due to the incorrect application of quota systems by universities in Sweden.

The specific issue of indirect discrimination under European anti-discrimination

law will also be analysed. For this purpose, an analogy between situations where women were considered to be indirectly discriminated in situations involving quotas for the under-represented sex within the European context will also be carried out. The current situation for men as an under-represented group in higher education in Sweden will then be compared to the above mentioned situation of women, in order to determine whether or not men are being as protected as women under EU law.

In its conclusion, this thesis will also raise the issue of the “gendering” of men in today's societies, and attempt to relate it to the existing trend for their underachievement on an academic level, with the purpose of contributing to break what can be considered a stereotypical view that does not see men as a “vulnerable group” in the area of higher education. Ultimately, this thesis will attempt to answer whether or not men are being discriminated by the law and by society, where their educational opportunities are concerned.

2. Gender Equality

2.1. Defining the terms of gender equality

The trend that will be approached in this thesis regards men in European Union (EU) countries. EU statistics, referred to in 4.6. of this thesis, show that men are underachieving on an academic level in some university degrees and are accessing higher education in progressively fewer numbers. The referred data shows that there is a growing gender imbalance in areas such as medicine and law, as well as in some science subjects.

For the purposes of this thesis, the concepts that will be used are based on the terminology from a perspective of European law, namely, on definitions given by the European Commission.

Thus, the concept of “quota” will be understood as “(...) a proportion or share of places, seats or resources to be filled by, or allocated, to a specific group, generally

under certain rules or criteria, and aimed at correcting a previous imbalance, usually in decision-making positions or in access to training opportunities or jobs”.¹ Therefore, when the concept of “quota” is referred to in this thesis, it will be from a gender perspective, regarding quotas specifically for the under-represented sex, not only in the area of employment but also in the area of education. Any other type of quota, such as the so-called “ethnic quotas” in higher education, will be expressly distinguished from the concept of quotas for the under-represented sex, where deemed necessary. Moreover, “quota systems” will be understood as a form of preferential treatment, that is defined below as a type of “positive action” or “affirmative action”. These latter concepts will also be defined in this section.

As the above mentioned concept of “quotas” will be directly connected with the concepts of sex (or gender) discrimination, the concept of “sex” is to be understood as the “(...) set of biological characteristics which distinguish human beings as female or male.”² On the other hand, “gender” is to be understood as a concept that refers to “the social differences, as opposed to the biological ones, between women and men (...)”.³ As for the term “social differences” in relation to the concept of gender, it is to be interpreted as an array of differences that are considered to have been learned, that may vary through time, as well as within and between cultures.⁴ Nevertheless, for the purposes of this thesis, the terms “sex” and “gender” will be used alternately.

Thus, the concept of “sex discrimination” is also essential for an introduction to the terms that will deal with gender equality. It may occur in a direct or in an indirect form. Direct discrimination will be understood as occurring when “ (...) a person is treated less favourably because of his or her sex.”⁵ while indirect discrimination will be understood as concerning situations “Where a law, regulation, policy or practice, which is apparently neutral, has a disproportionate adverse impact on the members of one sex, unless the difference in treatment can be justified by objective factors (...)”.⁶

1 European Commission, 1998, p. 46.

2 Idem, p. 50.

3 Idem, p. 25.

4 Idem, Ibidem.

5 Idem, p. 51.

6 Idem, Ibidem.

On the other hand, within the context of sex discrimination, *de iure* discrimination will also be worded as discrimination “in law”, while *de facto* discrimination will also be worded as discrimination “in fact”.

Hereinafter, the concept of “gender discrimination” will be used alternately to the concept of “sex discrimination”, even though the former concept is broader. The concept of “gender discrimination” includes more than just discrimination with regard to sex as a set of biological characteristics, but also includes discrimination towards “ (...) what is considered to be male or female behaviour”.⁷

As for the concept of “gender equality”, it is henceforth to be understood in this sense: “(...) all human beings are free to develop their personal abilities and make choices without the limitations set by strict gender roles (...)”.⁸ As a consequence, equal consideration, favour and value is to be given to the needs, aspirations and behaviour of men and women alike.⁹ Gender equality can be seen from a formal or a substantial perspective. According to the formal conception of gender equality, equal situations must be treated equally, while unequal situations must be treated differently.¹⁰ Thus, this formal concept leaves no room for positive action measures (these measures will be defined below). On the other hand, substantive or *de facto* equality is to be understood as involving not only the idea of formal equal treatment but also comprises equal results in practice.¹¹ So, unlike formal equality, *de facto* equality does give leeway to treating apparently equal situations differently or considering that unequal situations should be treated in the same manner, thus allowing differential treatment.¹²

The terms “positive action” or “affirmative action”, “preferential treatment” or “differential treatment”, as well as “temporary special measures” are also to be understood as synonyms for the purposes of this thesis, whether the concepts are used in an international (International Human Rights Law), regional (European Union Law) or national (Swedish legislation) context.

7 Lerwall, 2001, p. 430.

8 European Commission, 1998, p. 28.

9 Idem, Ibidem.

10 Lerwall, 2001, p. 429.

11 Idem, Ibidem.

12 Idem, Ibidem.

Therefore, these terms are to be understood as a “(...) group of measures targeted at a particular group and intended to eliminate and prevent discrimination or to offset disadvantages arising from existing attitudes, behaviours and structures”.¹³ Nonetheless, the concept of “preferential treatment” is not exactly synonymous to the concept of positive action. It is somewhat “narrower”,¹⁴ as it is defined as “(...) the treatment of one individual or group of individuals in a manner which is likely to lead to better benefits, access, rights, opportunities or status than those of another individual or group of individuals. It may be used positively when it implies a positive action intended to eliminate previous discriminatory practice or negatively where it is intended to maintain differentials or advantages of one individual or group of individuals over another”.¹⁵ In other words, preferential treatment “ (...) refers to a specific kind of action and is a special form of affirmative action”.¹⁶ Positive action is broader, as it involves “ (...) any action promoting equality”.¹⁷ Nevertheless, for the purposes of this thesis, this term will also be used as alternate to the term “preferential treatment”.

As for the concept of formal equality, it is to be understood for the purposes of this thesis as related to the principle of non-discrimination on the grounds of sex.¹⁸ In this sense, positive action will be understood as involving situations that will represent an exception to formal equality, as certain situations justify differential treatment of men and women based on their sex.¹⁹ Therefore, measures of positive action will also be considered as exceptions to the principle of non-discrimination on the grounds of sex.²⁰ In other words, whether it is from a national, regional or international perspective, positive action measures will involve those cases where treating equal situations differently or considering unequal situations equally is accepted as reasonable, because it is considered to be a means of promoting equal results in practice (*de facto* equality).²¹

13 European Commission, 1998, p. 11.

14 Lerwall, 2001, p. 435.

15 European Commission, 1998, p. 45.

16 Lerwall, 2001, p. 435.

17 Idem, Ibidem.

18 Idem, p. 429.

19 Idem, p. 434.

20 Idem, p. 435.

21 Idem, p. 431.

Finally, the concept of “gender mainstreaming” is to be understood according to the definition given by the European Commission as “ (...) the systematic integration of the respective situations, priorities and needs of women and men in all policies. It views to promote equality between women and men and to mobilise all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account, at the planning stage, their effects on the respective situations of women and men in implementation, monitoring and evaluation”.²² This concept is relevant for the purposes of this thesis in order to point out that, according to the “Recast Directive”,²³ the obligation of the EU and its Member States for positive action measures can be considered as part of the obligation of “gender mainstreaming”, to be actively taken into account within the objective of equality between men and women, in the formulation and implementation of laws, policies and activities.

2.2. The context of affirmative action measures

The concept of affirmative action originated with the 1964 Civil Rights Act in the United States of America, and gained further impetus during the decade of the seventies, particularly after the 1971 *Swann versus Charlotte-Mecklenburg Board of Education* case, when the Supreme Court defended the use of ethnic quotas as a way of accelerating the process of racial integration in schools.²⁴ From then on, this affirmative action model has been reproduced in democratic States around the world, with the purpose of giving equal opportunities to those historically and culturally less favoured. State action encompasses the idea of action in the name of the principle of equality, and it has advanced in order to also guarantee women and men the fulfilment of their rights.

Today, the tendency of State policies is to target the individual from a specific point of view, and no longer from an abstract or generic point of view, as in the past.²⁵

²² European Commission, 1998, p. 45.

²³ Directive 2006/54/EC, *on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)*, at <http://is.gd/t8UutB> (consulted 22 March 2011).

²⁴ Cardoso Gomes, 2009, p. 1, at <http://is.gd/qKx7oL> (consulted 22 March 2011).

²⁵ *Idem*, *Ibidem*.

One of the major criticisms to the use of measures of affirmative action is that they socially reinforce cultural patterns in a stereotypical manner, consequently generating social injustice and limiting freedom. Sometimes, those who are targeted by these measures do not consider themselves to be living in a disadvantageous situation, or that they suffer from discrimination. This fact often makes it hard to justify on which basis this purposeful inequality should be established.²⁶

From an International Human Rights perspective, according to General Recommendation Number 28 of the Committee on the Elimination of All Forms of Discrimination against Women, the principle of equality between men and women entails that all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices.²⁷ This recommendation also calls upon States, when implementing their obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), not to use the concept of gender equity, but to use exclusively the concepts of equality of women and men or gender equality instead.²⁸ The concept of gender equity is used in some jurisdictions to refer to fair treatment of women and men, according to their respective needs. This may include equal treatment between the sexes but also treatment that is different. Nevertheless, this different treatment “(...) is considered equivalent in terms of rights, benefits, obligations and opportunities”.²⁹

In General Recommendation Number 25 on Article 4, paragraph 1 of CEDAW, these affirmative action measures are referred to as temporary special measures, aimed at accelerating equal participation of women in different areas of society, namely, the political, economic, social, cultural and civil fields.³⁰ In what concerns the strategy to be

26 Cardoso Gomes, 2009, p.1, at <http://is.gd/qKx7oL> (consulted 22 March 2011).

27 CEDAW, Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 2010, para. 22, at <http://is.gd/gczU7G> (consulted 24 March 2011).

28 Idem, Ibidem.

29 Idem, Ibidem.

30 CEDAW, Committee on the Elimination of Discrimination against Women, Thirteenth Session, *General Recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All*

adopted by States to achieve substantive equality for women and men, the application of these measures is not viewed by the committee as an exception to the norm of non-discrimination.³¹ Moreover, this recommendation considers that the obligation of States to improve the position of women regarding their *de facto* equality with men exists irrespectively of any proof of past discrimination. Most importantly, it also refers that States that adopt these measures under the Convention are not considered to be discriminating against men, when doing so.³²

Even though they are not deemed necessary forever, these positive action measures may be applied for a long period of time.³³ However, the duration of their application should be determined by their functional results, in response to a concrete problem, and not by a predetermined time-frame.³⁴ So, as these measures are limited by time and function, if there is a specific situation of gender imbalance, such measures are justified only until the point in time when the result of gender balance is considered to have been achieved in a given society.³⁵

According to this recommendation, within the concept of temporary special measures, the meaning of “special” should be understood as encompassing the idea that these measures serve a specific goal.³⁶ As for the term “measures”, it implies not only preferential treatment through quota systems, but also a wide variety of legislative, executive, administrative and other regulatory instruments, policies and practices, such as support programmes, targeted recruitment and numerical goals connected with time frames.³⁷ Nevertheless, this committee did consider that the adoption and implementation of temporary special measures could lead to a discussion concerning the qualifications and merits of specific groups or individuals and, consequently, argued

Forms of Discrimination against Women, on temporary special measures, 2004, paras. 18-19, at <http://is.gd/oIe42w> (consulted 24 March 2011).

31 Idem, Ibidem.

32 Idem, Ibidem.

33 Idem, para. 20.

34 Idem, Ibidem.

35 Idem, Ibidem.

36 Idem, para. 21.

37 Idem, para. 22.

against preferences for lesser-qualified women over men in areas such as education.³⁸ As these measures aim at accelerating the achievement of *de facto* or substantive equality, questions surrounding qualification and merits do, in fact, need to be reviewed carefully in order to avoid gender bias.³⁹ On this note, one must take into consideration that gender bias “works both ways”. Men can also be victims of it, as much as women.

Specifically with regard to quotas, these measures can be considered to be a type of proactive measure, in order that active steps are taken to promote gender equality.⁴⁰ However, there is an inevitable issue regarding the admissibility and lawfulness of quotas, as their use to promote gender equality generates controversy. However, this controversy exists if one takes a formal approach to the principle equality. According to this approach, any sort of differential treatment based on gender should be prohibited. From this point of view, preferential treatment through quotas for either women or men will risk undermining the principle of equality. On the other hand, if one takes a substantive or *de facto* point of view of the principle of equality, quotas aim to redress disadvantage. From this angle of approach, these measures are a way of achieving equality, and therefore do not violate the above mentioned principle.⁴¹

Nevertheless, quota systems in the name of gender balance have different ways of being carried out in practice. They may be applied in the area of labour or in the area of education, for example. However, the application of quotas may lead to positive or negative results for gender balance. Thus, this particular positive action measure may not necessarily lead to the fulfilment of the aim of redressing a particular disadvantage for the under-represented sex.

Furthermore, even though the above referred general recommendations focus on women and their needs as the under-represented sex in many situations, it is clear that

38 CEDAW, Committee on the Elimination of Discrimination against Women, Thirteenth Session, *General Recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004, para. 23, at <http://is.gd/oIe42w> (consulted 24 March 2011)

39 Idem, Ibidem.

40 European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, European Network of Legal Experts in the field of Gender Equality, *Making Equality Effective: the role of proactive measures*, 2009, p. 36-37, at <http://is.gd/iww400> (consulted 23 March 2011).

41 Idem, Ibidem.

men are also included in these measures of protection, as they are mentioned several times as being considered equal to women. So, according to the terms of the recommendations, there is no reason not to afford men, as a group, special protection on the grounds of sex.

Moreover, according to EU law, under certain conditions, it is also considered that Member States may provide “specific advantages” to the under-represented sex, in order to enable it to carry out a vocational activity, or to prevent or compensate for disadvantages in the professional careers of that specific group.⁴² Quotas are considered to be included among these “specific advantages”.⁴³ Nevertheless, it is also pointed out at an EU law level that, in the absence of a clear constitutional or legislative mandate for Member States, these particular measures might be regarded as discriminating against men or women, creating social tension as a result.⁴⁴

In conclusion, not only according to the historical purpose of affirmative action, but also to the above mentioned recommendations and EU law, there is no reason why men should not be considered a vulnerable group, in need of positive action measures in certain circumstances.

3. On an International Human Rights level: the human right to higher education and quotas for the under-represented sex

3.1. Considerations of the United Nations on the right to education and gender equality

According to the United Nations (UN), States have the obligation to provide the right to education.⁴⁵ However, it is difficult to specify the core content of this human right, or what the clear governmental are obligations in order to achieve its objectives. As it is an

42 European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, European Network of Legal Experts in the field of Gender Equality, *Making Equality Effective: the role of proactive measures*, 2009, p. 37, at <http://is.gd/iww400>, (consulted 23 March 2011).

43 *Idem*, *Ibidem*.

44 *Idem*, pp. 36-37.

45 ICESCR, Article 13, at <http://is.gd/pVuFM4> (consulted 4 June 2011).

economic, social and cultural right (ESCR),⁴⁶ the right to education is also considered to be harder to enforce due to the nature of the legal obligations involved in its application.⁴⁷

The International Covenant on Civil and Political Rights (ICCPR)⁴⁸ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴⁹ are directly related to the division of “first generation” (Civil and Political Rights or CPR) and “second generation” rights (ESCR). The divide between these two sets of rights was based on the concept that “first generation” rights were immediately applicable and enforceable by governments, while economic, social and cultural rights did not share that immediate applicability and enforceability.⁵⁰ Thus, these covenants created a different standard regarding State obligations, by wording Article 2 of the ICCPR and Article 2 of the ICESCR in different ways.⁵¹ The wording of the ICESCR leaves fewer grounds to hold governments accountable if they fail to implement ESCR, which makes the implementation of these rights harder to achieve.⁵² The introduction of a number of limitations in Article 2.1. of the ICESCR created what can be considered to be different degrees of obligations in the two covenants, thus allowing the desired leeway for States to carry out the implementation of economic, cultural and social rights as they deemed most appropriate.⁵³

One of the limitations that can be found in the ICESCR is the concept of “progressive realisation”.⁵⁴ It is a key principle in economic, social and cultural rights and part of an array of pragmatic obligations, to be fulfilled by States in order to fully implement these rights. The idea behind this principle is that it requires positive action

46 ICESCR, Article 13, at <http://is.gd/pVuFM4> (consulted 4 June 2011).

47 Wilson, *A Human Rights contribution to defining quality education*, United Nations Educational, Scientific and Cultural Organisation, 2004, p. 5, at <http://is.gd/3mVQFo>, (consulted 2 April 2011).

48 ICCPR, at <http://is.gd/AESnLE> (consulted 4 June 2011).

49 ICESCR, at <http://is.gd/r68kqk> (consulted 2 April 2011)

50 Wilson, *A Human Rights contribution to defining quality education*, United Nations Educational, Scientific and Cultural Organisation, 2004, p. 6, at <http://is.gd/3mVQFo>, (consulted 2 April 2011).

51 ICCPR, Art. 2, at <http://is.gd/KzCG7x> (consulted 2 April 2011) & ICECSR Art.2, 1, at <http://is.gd/r68kqk> (consulted 2 April 2011).

52 Wilson, *A Human Rights contribution to defining quality education*, United Nations Educational, Scientific and Cultural Organisation, 2004, p. 6, at <http://is.gd/3mVQFo>, (consulted 2 April 2011).

53 ICECSR, Art. 2, 1, at <http://is.gd/r68kqk>, (consulted 2 April 2011).

54 Wilson, *A Human Rights contribution to defining quality education*, United Nations Educational, Scientific and Cultural Organisation, 2004, p. 6, at <http://is.gd/3mVQFo>, (consulted 2 April 2011).

by State governments to take steps to implement ESCR, according to an identifiable standard.⁵⁵ General Comment 3 of the Committee on Economic, Cultural and Social Rights (CESCR) recognizes that the full realization of all ECSR will not occur in a short period of time. Therefore, this comment also shows that the obligation of progressive realisation set out in Article 2 of the ICESCR differs from the immediate obligation to respect and ensure civil and political rights in Article 2 of the ICCPR.⁵⁶ Moreover, the committee itself points out that the concept of the realisation of ESCR over time is nothing more than a flexibility device for countries. Nevertheless, the comment also notes that there is an imposition of an obligation on States to move as fast and effectively as possible toward the full realisation of the rights in question.⁵⁷

The right to education is included not only in the ICESCR but also in the ICCPR, namely in Article 18, paragraph 4, regarding the liberty of parents to ensure religious and moral education.⁵⁸ This fact indicates that “ (...) the right to education straddles this false division of human rights, and is included in the ICCPR (...)”.⁵⁹ Thus, this particular human right overcomes what can be considered an artificial separation of human rights that was created with the two covenants. Along with other ESCR, it has also been included, side by side with civil and political rights, in more recent human rights standards, such as the Convention on the Elimination of Discrimination Against Women (CEDAW). In addition, the right to education is also recognized in the views on discrimination and equality of treatment of the Human Rights Committee (HRC),⁶⁰ which also monitors State compliance with the ICCPR with regard to these areas.⁶¹ The General Comments of this Committee will be analysed in point 3.1.2. of this thesis,

55 Wilson, *A Human Rights contribution to defining quality education*, United Nations Educational, Scientific and Cultural Organisation, 2004, p. 6, at <http://is.gd/3mVQFo>, (consulted 2 April 2011).

56 CESCR, General Comment 3, *The Nature of States parties obligations*, 1990, para. 9, available at <http://is.gd/McDk0v>, (consulted on 2 April 2011).

57 Idem, *Ibidem*.

58 ICCPR, at <http://is.gd/AESnLE> (consulted 4 June 2011).

59 Wilson, *A Human Rights contribution to defining quality education*, United Nations Educational, Scientific and Cultural Organisation, 2004, p. 6, at <http://is.gd/3mVQFo>, (consulted 2 April 2011).

60 Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, *Monitoring Civil and Political Rights*, at <http://is.gd/9rMaWC> (consulted 4 June 2011).

61 Wilson, *A Human Rights contribution to defining quality education*, United Nations Educational, Scientific and Cultural Organisation, 2004, p. 6, at <http://is.gd/3mVQFo>, (consulted 2 April 2011).

under the title of non-discrimination on the grounds of sex in the right to education. In conclusion, the right to education can be considered a transversal human right when one considers the above mentioned division between economic, cultural and social rights and civil and political rights.

3.1.1. The progressive realisation of the right to education

According to Article 13 (1) of the ICESCR “The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms”.⁶² Specifically regarding higher education, Article 13 (2) c) of the ICESCR refers that it "(...) shall be made equally accessible to all, on the basis of capacity, by every appropriate means (...)".⁶³

However, when one considers the realisation of this right, General Comment 3 refers to the nature of State obligations in relation to Article 2, (1) of the ICESCR. This article specifically establishes that “Each State Party to the present Covenant undertakes to take steps “(...) to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”.⁶⁴ The comment interprets the concept of “all appropriate means” in the sense that, even though each State Party must decide for itself which means are the most appropriate under each set of circumstances, the determination of the “appropriateness” of those means is up to the referred committee. As a consequence, States should indicate not only the measures that have been taken but also the basis on which they are considered to be the most “appropriate”.⁶⁵ The need for the specifications as to the interpretation of Article 2 (1) of the ICESCR is coherent with the idea that States must avoid deliberately

⁶² ICESCR, Art. 13, 1, at <http://is.gd/r68kqk> (consulted 2 April 2011).

⁶³ Idem, Art. 13, 2, c).

⁶⁴ ICESCR, Art. 2, para. 1, at <http://is.gd/r68kqk> (consulted 2 April 2011).

⁶⁵ CESCR, General Comment 3, *The Nature of States parties obligations*, 1990, paras. 3- 4, at <http://is.gd/McDk0v> (consulted 2 April 2011).

retrogressive measures regarding economic, cultural and social rights. In laying down these specifications, the purpose of the international community could be seen to be an attempt to contain the scope of this article. The idea behind this interpretation would be that the steps that governments take should not be deliberately backward steps, but steps forward, by using the maximum of available resources and all the appropriate means, with the intent of progressively achieving the full realization of the rights in question.

So, in conclusion, the progressive realisation of the right to education is controversial, as governmental “opting-out” afforded to States through these somewhat ambiguous terms remains a possibility for States.⁶⁶ Because of this ambiguity, the committee, in General Comment 3, notes that any deliberately retrogressive measures in regard to ESCR require the most careful consideration by States and their respective governments, and need to be fully justified, by reference to the totality of the rights provided for in the Covenant. The concept of deliberately retrogressive measures will be further developed in the following two points of this section, as well as in the Swedish context, under point 5.5.1.

3.1.2. Non-discrimination on the grounds of sex in the right to education

The identification of violations in order to rectify and end human rights abuses constitutes a high priority for the international community. It is considered to be a more important objective than the promotion of the progressive realisation of the right to education. As a consequence, the concept of violations of the right to education is evolving.⁶⁷

The CESCR, in General Comment Number 13, considers that the gender equality references given in other human rights texts are to be implicitly included in the interpretation of Article 13 (1) of the ICESCR, that establishes the right of everyone to an education.⁶⁸ In the comment, the committee interprets the normative content of

⁶⁶ Wilson, *A Human Rights contribution to defining quality education*, United Nations Educational, Scientific and Cultural Organisation, 2004, p. 10, at <http://is.gd/3mVQFo>, (consulted 2 April 2011).

⁶⁷ Idem, *Ibidem*.

⁶⁸ CESCR, General Comment No. 13, *The right to education (Art. 13)*, 1999, par. 5., at <http://is.gd/znwxSj> (consulted April 3 2011).

Article 13. In order to do so, it uses the "4-A scheme" regarding the elements of the right to education. The four elements that should be involved in the right to education are, namely, its availability, accessibility, acceptability and adaptability.⁶⁹

The concept of non-discrimination is included in the element of “accessibility” to education, which, in its own turn, is part of a specific dimension of this human right, that is the right to receive an education. Therefore, the committee considers that “ (...) educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party”.⁷⁰ Moreover, within the scope of the right to receive an education, non-discrimination should be understood as follows “ (...) education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (...)”.⁷¹ As a consequence, the State has an obligation “ (...) to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis (...)”⁷² as well as “ (...) to ensure that education conforms to the objectives set out in article 13 (1) (...)”.⁷³ The committee further tackles the concept of non-discrimination by approaching the general prohibition in article 2 (2) of the ICESCR, whereby States Parties to the Covenant guarantee that the rights included in it will be exercised without discrimination of any kind, namely, on the grounds of sex.⁷⁴

Unlike other aspects of the right to education, the prohibition against discrimination is interpreted by the committee as not being subject to progressive realisation. Instead, this prohibition is considered to be fully and immediately applicable to all aspects of education, as well as to encompass all internationally prohibited grounds of discrimination.⁷⁵ Therefore, in General Comment Number 13, the committee considers that Article 2 (2) of the ICESCR should be interpreted in the light of the relevant provisions of the Convention on the Elimination of All Forms of

69 CESCR, General Comment No. 13, *The right to education (Art. 13)*, 1999, par. 6., at <http://is.gd/znwxSj> (consulted April 3 2011).

70 *Idem*, para. 6. (b).

71 *Idem*, *Ibidem*.

72 *Idem*, par. 57.

73 *Idem*, *Ibidem*.

74 *Idem*, paras. 31-37.

75 *Idem*, para. 31.

Discrimination against Women (CEDAW).⁷⁶ Article 2 (2) specifically notes that “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁷⁷ As a consequence of this, the adoption of temporary special measures intended to create *de facto* equality for men and women is not considered a violation of the right to non-discrimination with regard to education. From an International Human Rights perspective, this will only be the case as long as these measures comply with certain conditions, such as that they are not applied after their objective has been achieved or that they do not lead to the perpetuation of unequal or separate standards for different groups.⁷⁸

The ICCPR also approaches the issue of non-discrimination in General Comment Number 18, by stating that the principle of equality sometimes requires States to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.⁷⁹ As an example of this type of action, preferential treatment is suggested in order to correct the conditions that hinder the enjoyment of human rights of a certain part of the population of a given State, but under the condition that it is granted only for certain a time and in specific matters.⁸⁰ This is considered to be a case of legitimate differentiation under the ICCPR, as long as such action is needed to correct *de facto* discrimination.⁸¹

General Comment Number 18 not only approaches the issue of discrimination in general, but also specifically refers to discrimination on the grounds of sex, included the above mentioned Article 2 (1) and also in Article 26 of the ICCPR. This latter article expressly states that “All persons are equal before the law and are entitled without any

76 CESCR, General Comment No. 13, *The right to education (Art. 13)*, 1999, par. 31., at <http://is.gd/znwxSj> (consulted April 3 2011).

77 ICECSR, Art. 2 (2) at <http://is.gd/r68kqk> (consulted 2 April 2011).

78 CESCR, General Comment No. 13, *The right to education (Art. 13)*, 1999, par. 32, at <http://is.gd/znwxSj> (consulted 3 April 2011)

79 UN Human Rights Committee, General Comment No. 18: *Non-discrimination*, 1989, para. 10, available at <http://is.gd/Bxnot1> (consulted on the 14 April 2011).

80 Idem, Ibidem.

81 Idem, Ibidem.

discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁸² The committee considers discrimination on the grounds of sex to be included in the broader scope of applicability of this article, that prohibits discrimination “in law” or “in fact”, in any field that is regulated and protected by public authorities, and also involves the obligations imposed on States' Parties legislation.⁸³ In other words, the application of the principle of non-discrimination contained in this article is not merely limited to those rights which are provided for in the ICCPR. Finally, the committee considers that “(...) not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”.⁸⁴

General Comment Number 28 by the HRC also approaches the issue of the equality of rights of men and women stated in Article 3 of the ICCPR.⁸⁵ This article implies that all human beings should enjoy all the rights provided for in the Covenant on an equal basis and in their totality and that, therefore, States should ensure to both men and women the enjoyment of all those rights.⁸⁶ The obligation to ensure the rights recognized in this Covenant to all individuals is established not only in Article 3 but also in the above mentioned Article 2 of the ICCPR, that specifically focuses on the obligation of each State to respect and to ensure these rights, without distinction, including on the grounds of sex.⁸⁷ As a consequence, the committee requires that States take all necessary steps to enable every person to enjoy CPR.⁸⁸ These steps include the removal of obstacles to the equal enjoyment of these rights, as well as the adjustment of

82 ICCPR, at <http://is.gd/AESnLE> (consulted 4 June 2011).

83 UN Human Rights Committee, General Comment No. 18: *Non-discrimination*, 1989, paras. 11-13, at <http://is.gd/Bxnot1> (consulted on the 14 April 2011).

84 *Idem*, *Ibidem*.

85 UN Human Rights Committee, *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 2000, para. 6, at <http://is.gd/eBbpGk> (consulted 16 June 2011).

86 ICCPR, at <http://is.gd/AESnLE> (consulted 4 June 2011).

87 UN Human Rights Committee, *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 2000, para. 3-4, at <http://is.gd/eBbpGk> (consulted 16 June 2011).

88 *Idem*, para. 3.

domestic legislation where necessary.⁸⁹ Specifically regarding positive action, the Committee considers that States must do more than just create measures of protection, but must also adopt positive measures in all areas so as to achieve the effective and equal empowerment of women.⁹⁰ For this purpose, States are obliged to provide information regarding the actual role of women in society so that the Committee may ascertain what measures should be taken to give effect to the obligations of States, what progress has been made, what difficulties have been encountered and what steps are being taken to overcome them.⁹¹

In conclusion, from an International Human Rights perspective, within the scope of the right to education, not only this right *per se*, but also the right to non-discrimination on the grounds of sex are afforded special protection. The protection of these rights leaves room for fewer exceptions in comparison to other ESCR, when considering the leeway given to States regarding compliance with their progressive realisation. Thus, a State cannot go against the progressive realisation of these specific rights by means of deliberately retrogressive measures, and is also more strongly bound to positive action measures with regard to the promotion and protection of gender balance and gender equality, within the scope of the realisation of the right to education. All these elements indicate that the right to education and the right to non-discrimination on the grounds of sex are exceptionally protected on an international level and therefore, when combined, can be considered to afford a greater standard of security to all individuals.

3.1.3. The violation of the human right to education

The Committee on Economic Social and Cultural Rights also produced examples of violations of the right to education.⁹² However, the difficulty in defining and applying

89 UN Human Rights Committee, *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 2000, para. 3, at <http://is.gd/eBbpGk> (consulted 16 June 2011).

90 *Idem*, *Ibidem*.

91 *Idem*, *Ibidem*.

92 CESCR, *Violations of the Right to Education*, 1998, para. 7, at <http://is.gd/W187he> (consulted on 5 April 2011).

the standard of progressive realisation is a major reason that makes the task of the international community hard to carry out when monitoring violations of this human right. In order to monitor progressive realisation, it is not sufficient to determine the current performance of States.⁹³ It also requires an ability to pin point trends, such as the detection of whether or not a State is moving in the fastest and most effective way possible towards the full implementation of the right in question.⁹⁴

According to General Comment 3, the mere failure of a State to meet the minimum core obligation of the progressive realisation of an ESCR is a violation of its obligations under the respective Covenant.⁹⁵ Nevertheless, focusing on the identification of violations may be a more effective path in order to determine the positive content of ESCR than the more abstract attempts to determine the specificities of concepts such as “progressive realisation”.⁹⁶

If one goes back in the history of International Human Rights regarding ESCR, in 1986, the International Commission of Jurists (ICJ) gathered a group of distinguished experts in international law to consider the nature and scope of the obligations of States' Parties to the ICESCR. The meeting witnessed the birth of the Limburg Principles on the Implementation of the ICESCR, which continue to guide international law in the interpretation of ESCR. These principles can be considered to have been a starting point in the interpretation of violations of these rights, and they have been used extensively by States. The general observations of the Limburg Principles begin by referring that “As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights”.⁹⁷

These observations also point out that these rights “(...) may be realized in a variety of

93 CESCR, *Violations of the Right to Education*, 1998, para. 7, at <http://is.gd/W187he> (consulted on 5 April 2011).

94 Idem, *Ibidem*.

95 CESCR, General Comment 3, *The Nature of States parties obligations*, 1990, para. 10, at <http://is.gd/McDk0v> (consulted on 2 April 2011).

96 CESCR, *Violations of the Right to Education*, 1998, para. 11, at <http://is.gd/W187he> (consulted on 5 April 2011).

97 UN Commission on Human Rights, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 1987, para. 3, at <http://is.gd/assp2z> (consulted 6 April 2011).

political settings. There is no single road to their full realization. Successes and failures have been registered in both market and non-market economies, in both centralized and decentralized political structures”.⁹⁸ This consideration seems to indicate an early intent of the international community to break a stereotypical view that countries that are not considered to be “developing” countries need not give as much attention to ESCR as to CPR.

These principles also assert the need for States to act in good faith when fulfilling the obligations they have accepted under the Covenant,⁹⁹ and that some ESCR rights can be made justiciable immediately, even though their full realisation is to be attained progressively.¹⁰⁰ Nevertheless, it is expressly noted that States are considered accountable both to the international community and to their own people for their compliance with the obligations under the ICESCR.¹⁰¹ Moreover, special attention is afforded to the principles of non-discrimination and equality before the law when assessing States' Parties compliance with the Covenant, namely, within the scope of Article 3 of the ICESCR, regarding the equal enjoyment of these rights by men and women.¹⁰² It is also pointed out that, in the application of this article, due regard should be paid to CEDAW and to the activities of its supervisory committee, as well as to other relevant instruments under this convention.¹⁰³

Where violations of ESCR are concerned, the Limburg Principles are clear: failure by a State to comply with an obligation contained in the Covenant represents a violation under international law.¹⁰⁴ Even though a margin of discretion is afforded to States in the selection of means for complying with these obligations,¹⁰⁵ a State will be in violation of the Covenant if, for example, it fails to “ (...) implement without delay a

98 UN Commission on Human Rights, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 1987, para. 6, at <http://is.gd/assp2z> (consulted 6 April 2011).

99 *Idem*, para. 7.

100 *Idem*, para. 8.

101 *Idem*, para. 10.

102 *Idem*, para. 13.

103 *Idem*, para. 45.

104 *Idem*, para. 70.

105 *Idem*, para. 71.

right which it is required by the Covenant to provide immediately;”¹⁰⁶ or, if “ (...) it applies a limitation to a right recognized in the Covenant other than in accordance with the Covenant;”¹⁰⁷ or “ (...) it deliberately retards or halts the progressive realization of a right (...)”.¹⁰⁸

Ten years after the Limburg Principles were established, they were further elaborated on by the Maastricht Guidelines, in what concerned the nature and scope of violations of ESCR and regarding appropriate responses and remedies. These guidelines were designed to be used by all those concerned with not only understanding and determining violations of these rights, but also in providing remedies for these violations through the identification of the legal implications of acts and omissions that may have occurred.¹⁰⁹ Three different types of obligations are therefore imposed on States: the obligation to respect, the obligation to protect and the obligation to fulfil. The obligation to respect obliges States to refrain from interfering with the enjoyment of ECSR, the obligation to protect requires States to prevent violations of such rights by third parties and the obligation to fulfil creates the need for States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights.¹¹⁰

The Maastricht Guidelines, like the Limburg Principles before them, can therefore be considered *de facto* international standard when conceptualizing violations of ESCR by States.¹¹¹ Failure to perform any one of these three types of obligations constitutes a violation of ESCR.¹¹² Just as in the case of civil and political rights, both individuals and groups can be victims of violations of economic, cultural and social

106 UN Commission on Human Rights, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 1987, para. 72, at <http://is.gd/assp2z> (consulted 6 April 2011).

107 Idem, Ibidem.

108 Idem, Ibidem.

109 ICJ, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 1997, Introduction, para. 14-15, at <http://is.gd/3otDIW> (consulted 7 April 2011).

110 Idem, para 6.

111 CESCR, *Violations of the Right to Education*, 1998, para. 15, at <http://is.gd/W187he> (consulted on 5 April 2011).

112 ICJ, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 1997, para. 6, at <http://is.gd/3otDIW> (consulted 7 April 2011).

rights. Moreover, as the obligations to respect, protect and fulfil each contain elements of an obligation of conduct and an obligation of result, these guidelines also recognize that ECSR impose both these types of obligations, depending on the right in question.¹¹³ The obligation of conduct requires an action that is reasonably calculated by a State in order to realize the enjoyment of a particular right, while the obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard.¹¹⁴ Therefore, with regard to the right of men, as a group, to be afforded special protection in education, this may be considered to be an obligation to protect, both in terms of conduct and of result. The State must not only provide the conditions for men to enjoy their right, within the scope of above mentioned accessibility element of the right to receive an education, but must also attain certain substantive targets regarding the number of men in education. Furthermore, the guidelines specifically state that certain groups, particularly those that are already vulnerable and underprivileged, such as women, are more likely to suffer disproportionate harm.¹¹⁵ The guidelines also approach gender discrimination when stating that “Discrimination against women in relation to the rights recognized in the Covenant, is understood in light of the standard of equality for women under the Convention on the Elimination of All Forms of Discrimination Against Women. That standard requires the elimination of all forms of discrimination against women including gender discrimination arising out of social, cultural and other structural disadvantages”.¹¹⁶ In light of these principles, as women as a group may be considered vulnerable or underprivileged, an analogy is possible in what concerns the interests of men, as a group, in the case that they too may suffer such disproportionate harm. The idea that men are being somehow disadvantaged in their educational opportunities is, however, hard to envisage, especially as education is an ESCR, which makes this right hard to enforce, particularly with regard to the male gender. Nevertheless, the obligation to protect men from violations of their right to education by a given State remains on an equal footing with the obligation to protect women.

113 ICJ, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 1997, para. 7, at <http://is.gd/3otDIW> (consulted 7 April 2011).

114 *Idem*, *Ibidem*.

115 *Idem*, para. 20.

116 *Idem*, para. 12.

A specific example of a violation of the obligation to protect by the State in the area of the right to education is given by a background paper produced by the UN CESCR on violations of the right to education. According to this paper, a violation with a direct correlation to gender will occur if “The educational opportunities and facilities available to girls and women are inferior to those provided for boys and men”.¹¹⁷ This type of violation may take two forms: “The first is the existence of explicit and overt discrimination against girls and women that is included in the rules of the institution (...)”¹¹⁸ which is comparable to *de iure* discrimination (“in law”). The second is that schools “ (...) fail to acknowledge and address the existence and effects of gender discrimination on a societal level (...)”¹¹⁹ which, on the other hand, is comparable to *de facto* discrimination (“in fact”). This form of discrimination, in its own turn, also includes situations such as: “ (...) girls' reduced career and vocational horizons (...)”¹²⁰ and “(...) failure to recognize and address obstacles to girls' academic achievement (...)”.¹²¹ The background paper concludes that “Addressing these issues is likely to require some kind of affirmative action approach, which the Covenant permits”.¹²²

So, regarding the obligation to protect, if sex discrimination (whether *de iure* or *de facto*) takes place within the scope of the right to education, it is considered to be a violation of this human right. Moreover, according to these examples, the above mentioned criteria for violations of the right to education on the grounds of sex is also applicable to men. The first form of the above mentioned violation, whereby an educational institution has explicit discriminatory rules against one sex, is considered to be *de iure* discrimination. This type of discrimination can be related to direct discrimination, as there is a need for not only a discriminatory intent, but also for a comparator.¹²³ In the case of the discrimination of men, the comparator would be

117 CESCR, *Violations of the Right to Education*, 1998, para. 24., at <http://is.gd/W187he> (consulted on 5 April 2011).

118 Idem, Ibidem.

119 Idem, Ibidem.

120 Idem, Ibidem.

121 Idem, Ibidem.

122 Idem, Ibidem.

123 Lerwall, 2001, p. 431.

women, in “ (...) an equal and comparable situation (...)”.¹²⁴ On the other hand, when *de facto* discrimination is considered, if a particular State education system fails to acknowledge gender discrimination against men on a societal level, it can be related to indirect discrimination. However, unlike direct discrimination, it can be considered that there is not even a need for a comparator in this case, as the qualifications of the individuals are not submitted to comparison, but it is the aim of the discriminating entity that is the focus of the analysis instead.¹²⁵ Therefore, the fact that there is no need for a comparator makes indirect discrimination easier to justify from a gender neutral perspective.¹²⁶

Nonetheless, when the obligation to protect is analysed in practice from an international human rights perspective, the tendency is to focus on developing countries, such as Costa Rica or the Philippines, where the victims of violations of the right to education on the grounds of sex are mostly women.¹²⁷ Even though the *status quo* regarding ESCR may direct international attention to developing countries when focusing on the right to education, this kind of violation also occurs in developed countries. This concept will be further developed in the section dedicated to analysing the application of these rules on a national level to Sweden (5.5.3.). The purpose of this analogy is to break what can be considered an underlying stereotyped view, on a societal level, and especially in developed countries, that men are not a vulnerable group in terms of sex discrimination within the scope of their right to education. This thesis will attempt to connect these issues with the reluctance that seems to be taking place, at a national level, in Sweden, to allow for the application of certain positive action measures, such as quota systems in the admissions procedures to higher education, where men are the under-represented sex.

124 Lerwall, 2001, p. 433.

125 Idem, Ibidem.

126 Idem, Ibidem.

127 Wilson, *A Human Rights contribution to defining quality education*, United Nations Educational, Scientific and Cultural Organisation, 2004, p. 8, at <http://is.gd/3mVQFo> (consulted 2 April 2011).

3.1.4. The role of universities

Within the scope of the right to education, General Comment Number 13 extends the above referred elements of availability, accessibility, acceptability and adaptability to the right to higher education.¹²⁸ As a starting point, this comment considers that «higher education "shall be made equally accessible to all, on the basis of capacity"»¹²⁹ and also considers that «According to article 13 (2) (c), higher education is not to be "generally available" (...) »¹³⁰ (as secondary education is, according to article 13 (2) (b)). Furthermore «The "capacity" of individuals should be assessed by reference to all their relevant expertise and experience».¹³¹ This is a clear reference to the concept of merit when it comes to the moment of accessing higher education. So, even though it is made generally available, this comment indicates that some criteria regarding the merits of each individual should come into play. Nevertheless, besides the fact that this criteria exists in relation to the element of merit and its role in the assessment of the capacity of candidates to higher education, the CESCR also considered that the adoption of temporary special measures intended to create *de facto* equality for men and women was not a violation of the right to non-discrimination with regard to education.¹³² However, one must not disregard the fact that these temporary special measures will be considered a violation in this context if they lead to the perpetuation of unequal or separate standards for different groups, or if they are continued after the objectives for which they were taken have been achieved.¹³³

The remarks of the committee in General Comment Number 13 also address the issue of the autonomy of universities. In these remarks, it is stressed that particular attention must be given to institutions of higher education because staff are especially vulnerable to political pressures.¹³⁴ Autonomy is defined as the “ (...) degree of self-

128 CESCR, General Comment No. 13, *The right to education (Art. 13)*, 1999, par. 17, at <http://is.gd/znwxSj> (consulted April 3 2011).

129 *Idem*, para. 19.

130 *Idem*, *Ibidem*.

131 *Idem*, *Ibidem*.

132 *Idem*, par. 32.

133 *Idem*, *Ibidem*.

134 *Idem*, par. 38.

governance necessary for effective decision-making by institutions of higher education (...)”.¹³⁵ However, it is also pointed out that self-governance must be consistent with systems of public accountability, as well as the need for balance between institutional autonomy and accountability.¹³⁶

Thus, it is also relevant, for the purposes of this thesis, to consider that there may be some influence as to the degree of autonomy given by States to their universities regarding the specific application of positive action measures. In the application of quotas in admissions procedures that lead to negative results in terms gender balance, who is to be held accountable? Is it the university, because of the application of the system in an *ad hoc* manner? Or is it the government, in allowing excessive autonomy, that should be held accountable in these situations? A parallel with this section will be established in section 5.5.4., in relation to Sweden, with the application of the concepts of the accountability and the autonomy of universities to the context of this country. As for the issue of universities being subject to political pressure, this point will also be considered further on in this study, within the Swedish context, where the issue of the separation of powers in society, between the executive, the legislative and the judiciary will likewise be questioned.

In conclusion, within the context of the fight against gender discrimination, and considering the general tendency for the under-represented sex in higher education to be men, one may question how well the element of “accessibility” to the right to higher education is put in practice by universities in developed countries, through the application of gender quota systems in admission procedures.

135 CESCR, General Comment No. 13, *The right to education (Art. 13)* , 1999, par. 40, at <http://is.gd/znwxSj> (consulted April 3 2011).

136 Idem, Ibidem.

4. On a regional level: European Union law

4.1. Considerations of the Charter of Fundamental Rights of the European Union on the right to education and gender equality

The Charter of Fundamental Rights of the European Union (CFREU), agreed in 2000, proclaims the right to education in Article 14.¹³⁷ According to the explanations given in the process of elaborating the draft of the Charter, this article is based on Article 2 of the first Protocol to the European Convention on Human Rights (ECHR),¹³⁸ that reads that "No person shall be denied the right to education".¹³⁹

In its chapter on equality, the Charter refers to the principle of non-discrimination in Article 21, that includes the prohibition of discrimination on the grounds of sex in paragraph 1, alongside the prohibition of discrimination on the grounds of race, colour, ethnic or social origin. This paragraph draws on Article 13 of the EC Treaty,¹⁴⁰ that empowered EU institutions to combat acts of discrimination based on sex.¹⁴¹ According to the draft explanations of the Charter, Article 21 applies this particular prohibition in compliance with Article 14 of the ECHR, that also refers to other prohibitions of discrimination.¹⁴²

Furthermore, in Article 23, the Charter focuses specifically on equality between men and women, stating that it must be ensured in areas such as employment. However, the Charter points out in paragraph 2 that "The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex".¹⁴³ According to the explanations in the draft version of the Charter, this paragraph takes over, in shorter form, Article 141(4) of the EC Treaty, which provided that the principle of equal treatment should not prevent any Member

137 CFREU, 2000, Article 14, at <http://is.gd/RZDbni> (consulted 14 May 2011).

138 Draft Charter of Fundamental Rights of the European Union, at <http://is.gd/RWzmfq> (consulted 4 June 2011).

139 ECHR, *Protocol I*, Article 2, at <http://is.gd/xdv1Dc> (consulted 4 June 2011).

140 TEC, (97/C 340/03), Article 13, at <http://is.gd/p0bHGP> (consulted 4 June 2011).

141 *Idem*, *Ibidem*.

142 ECHR, at <http://is.gd/dIA40n> (consulted 4 June 2011).

143 CFREU, Article 23 (2) at <http://is.gd/RZDbni> (consulted May 14 2011).

State from adopting measures that gave specific advantages to the under-represented sex, in order to enable this particular group to pursue a vocational activity or compensate for disadvantages in careers.¹⁴⁴ Therefore, positive action measures in favour of the under-represented sex are expressly established in the Charter as an exception to the principle of formal equality. The wording of this part of Article 23 is crucial for the concept of positive action and preferential treatment, as it clearly refers to specific advantages in favour of the under-represented sex. This Charter not only comprises the general principles of EU law,¹⁴⁵ but has also become binding with the Treaty of the Functioning of the European Union (TFEU).¹⁴⁶

In conclusion, the Charter of Fundamental Rights shows how positive action measures such as quota systems are allowed as an exception to the principle of formal equality, that can be included within the scope of the equal right to education, by allowing these specific advantages to be given to the under represented sex.

4.2. Considerations of the European Convention on Human Rights

Besides the above mentioned CFREU,¹⁴⁷ and notwithstanding the national constitutions of each Member State, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),¹⁴⁸ is also included among the instruments which are considered important sources of general principles on equal treatment in EU law.¹⁴⁹ As referred above, Article 14 of the Convention also establishes a prohibition of discrimination on the grounds of sex.

Regarding this prohibition, the European Court of Human Rights has considered, in accordance with the Convention, that a difference in treatment in the exercise of a right must not only pursue a legitimate aim but also that there must be a reasonable

144 TEC, (97/C 340/03), Article 141 (4), at <http://is.gd/p0bHGP> (consulted 4 June 2011).

145 Ellis, 2005, pp. 317-318.

146 TFEU, p. 391, at <http://is.gd/ZcYeAj> (consulted 13 May 2011).

147 CFREU, at <http://is.gd/RZDbni> (consulted 14 May 2011).

148 ECHR or Convention for the Protection of Human Rights and Fundamental Freedoms, at <http://is.gd/dlA40n>, (consulted 13 May 2011).

149 Ellis, 2005, p. 318.

relationship of proportionality between the means employed in order to obtain the difference in treatment and the aim of the exception to the prohibition of discrimination.¹⁵⁰ On the other hand, the “Recast Directive”, that deals with equal treatment of men and women in fields such as promotion and the access to employment, refers to exceptions to the prohibition of discrimination in Article 14 (2). This article considers that “Member States may provide (...) that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate”.¹⁵¹In conclusion, it appears that the concept of discrimination is different for the purposes of the ECHR and for the purposes of EU law as, within the scope of the Convention, even direct discrimination can be justified in general terms, as long as it is proportionate to the aim pursued and that aim is acceptable.¹⁵²

4.3. European Union law on gender equality

Regarding sex equality in the area of labour, the above mentioned “Recast Directive”¹⁵³ aims at recasting previous EU directives that prohibited discrimination on the grounds of sex, as well as at incorporating some of the case law of the European Court of Justice (ECJ).¹⁵⁴When it comes to discrimination on the grounds of sex, over the years, the European Court of Human Rights has also been known to demand a higher level of scrutiny when faced with allegations of unlawful discrimination and, thereby, has also

150 Ellis, 2005, p. 321.

151 Directive 2006/54/EC, *on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)*, p. 30, at <http://is.gd/t8UutB> (consulted 22 March 2011).

152 Ellis, 2005, p. 321.

153 Directive 2006/54/EC, *on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)*, at <http://is.gd/t8UutB> (consulted 22 March 2011).

154 Prechal & Burri, 2009, pp. 3, 33.

been raising its standards regarding justifications for differential treatment.¹⁵⁵

Article 3 of the “Recast Directive” specifically considers that Member States of the EU may maintain or adopt measures within the scope of Article number 157 (4) of the TFEU,¹⁵⁶ in order to ensure full equality between men and women in working life, in practice. This is one example of the tendency of the EU to establish a common legal ground for gender equality rules. According to Article number 157 (4) TFEU “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”.¹⁵⁷ Therefore, the promotion of equality between men and women, specifically through positive action measures, is one of the essential tasks of the EU, in order to eliminate inequalities, namely, in the contribution to education and training of quality.

The obligation to carry out positive action measures can be considered to be part of the obligation of the EU regarding gender mainstreaming, as Article 29 of the “Recast Directive” considers that the objective of equality between the sexes is to be actively taken into account by both the EU and the Member States, when formulating and implementing laws, policies and activities.¹⁵⁸ Although these provisions do not create enforceable rights for individuals as such, they are important for the interpretation of EU law and they impose obligations on both the EU and the Member States.¹⁵⁹

The term “positive action” appeared for the first time expressly in EU legislation in the “Race Directive”. Article 5 expressly lays out that the objective of

155 Ellis, 2005, p. 321.

156 Treaty on the Functioning of the European Union, pp. 118-119, (ex Article 141 (4) of the TEC) at <http://is.gd/ZcYeAj> (consulted 4 June 2011).

157 TFEU, Article 157 (4), (ex article 141 (4) EC Treaty), pp. 117-118, at <http://is.gd/ZcYeAj> (consulted May 13 2011).

158 Directive 2006/54/EC, *on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)*, p. 32, at <http://is.gd/t8UutB> (consulted 22 March 2011).

159 Prechal & Burri, 2009, p. 3.

positive action is full equality in practice (substantive equality), by considering that Member States shall maintain or adopt specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin, and that this measure should not be prevented by the principle of equal treatment (formal equality).¹⁶⁰ Therefore, positive action is defined as an exception to formal equality.

In the specific area of labour, Directive 2002/73/EC, that amended the Equal Treatment Directive (76/207/EEC),¹⁶¹ referred to the idea of positive action in Article 2 (8)¹⁶² by determining that Member States may maintain or adopt measures within the meaning of the above mentioned Article 157 (4) of the TFEU (141 (4) of the TEC, with a view to ensuring full equality in practice between men and women.¹⁶³ However, the first EU provision to refer to the term of “positive action” was Directive 2000/78/EC,¹⁶⁴ also known as the “Framework Directive”, in Article 7, with reference to the promotion of equal opportunities between the sexes. This article uses the term “positive action” as a title, stating in point 1 that “With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.”¹⁶⁵ Article 1 refers to the purpose of this Directive “ (...) to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment”.¹⁶⁶

The concept of positive action is therefore understood to be composed of a series

160 Directive 2000/43/EC, *implementing the principle of equal treatment between persons irrespective of racial and ethnic origin*, p. 24., at <http://is.gd/iQHwwu> (consulted May 13 2011).

161 Directive 76/207/EEC, *on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*, at <http://is.gd/wlGmyQ> (consulted 10 May 2011).

162 Directive 2002/73/EC, *amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*, p. 18, at <http://is.gd/lfWvvC> (consulted May 12 2011).

163 Ellis, 2005, p. 297.

164 Directive 2000/78/EC, *establishing a general framework for equal treatment in employment and occupation*, pp. 18, 20, at <http://is.gd/csPcg9> (consulted 10 May 2011).

165 *Idem*, p. 20.

166 *Idem*, p. 18.

of measures intended to promote “substantive” or real equality, that range from “softer” measures such as the encouragement of under-represented groups, to “hard” measures, such as reverse discrimination and quotas in favour of those under-represented groups.¹⁶⁷ One can consider “active measures” to come within the category of softer positive action measures, that often consist of mere targets and goals to be achieved in the name of equality, while preferential treatment through quotas falls within the scope of the harder measures to promote equality.

Even though positive action provisions in EU law are permissive in nature, which means that they are not laid down for States as an obligation,¹⁶⁸ the concept has been transposed into the national legislation of most EU countries.¹⁶⁹ It may apply in the various areas covered by EU law, such as employment, occupational pension schemes and access to the provision of goods and services. However, the most important area for positive action is the area of access to employment and working conditions.¹⁷⁰

The principle of formal equality can be related to the concept of direct discrimination under European law. Directive 2002/73/EC, in its introductory remarks, starts by pointing out that “The right to equality before the law and protection against discrimination for all persons constitutes a universal right (...)”¹⁷¹ and that “Equality between women and men is a fundamental principle, under Article 2 and Article 3(2) of the EC Treaty and the case-law of the Court of Justice”.¹⁷² It also refers that “These Treaty provisions proclaim equality between women and men as a ‘task’ and an ‘aim’ of the Community and impose a positive obligation to ‘promote’ it in all its activities”.¹⁷³ Formal equality, or equality “in law” between men and women is thus defined as the primary objective of the EU. This Directive goes on to specifically define direct discrimination in respect to sex as a situation “ (...) where one person is treated less

167 Ellis, 2005, p. 297.

168 Prechal & Burri, 2009, p. 7.

169 Idem, p. 6.

170 Idem, Ibidem.

171 Directive 2002/73/EC, *amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*, p. 15. para. 2, at <http://is.gd/lfWvvC> (consulted 12 May 2011).

172 Idem, p. 15, para. 4 (consulted 13 May 2011).

173 Idem, Ibidem; TEC, (97/C 340/03), Article 2, Article 3 (2), at <http://is.gd/p0bHGP> (consulted 4 June 2011).

favourably on grounds of sex than another is, has been or would be treated in a comparable situation (...)”.¹⁷⁴ Therefore, the concept of direct discrimination can be associated to situations where there is a direct disregard for the principle of formal equality. On the other hand, indirect discrimination is defined as a situation “ (...) where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary (...)”.¹⁷⁵ So, by contrast, indirect discrimination can be associated with the concept of substantial (or *de facto*) equality, as this type of discrimination implies that the rule in question is “formally” equal for both sexes but, in practice, it creates *de facto* inequality among them.

Nevertheless, due to the need for more positive measures,¹⁷⁶ the above mentioned Directive contains specific positive provisions for positive action, such as provisions for the protection of both women and men, in Article 2 (7).¹⁷⁷ This article is emblematic in terms of positive action, as it not only considers that less favourable treatment of a woman related to pregnancy and maternity leave shall constitute discrimination, but also gives Member States the right to recognise distinct rights to paternity and adoption leave. In doing so, it expressly determines that the necessary measures shall be taken by States in order to protect working men and women against dismissal due to exercising those rights.¹⁷⁸

In conclusion, the principle of formal equality often does not produce “real equality”.¹⁷⁹ In order to create it, the law must often go beyond the consistency of treatment that comes with formal equality, and treat certain vulnerable or under-

174 Directive 2002/73/EC, amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Art.2, 2, para. 1., at <http://is.gd/lfWvvc> (consulted 12 May 2011).

175 *Idem*, para. 2.

176 Ellis, 2005, p. 285.

177 Directive 2002/73/EC, amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Art. 2, para. 7, at <http://is.gd/lfWvvc> (consulted May 12 2011).

178 *Idem*, *Ibidem*.

179 Ellis, 2005, pp. 114-115.

represented groups “differently”.¹⁸⁰ One of the objectives of this exception is to create “real” equal opportunities for these groups in society. As a consequence, the main resource of the EU to tackle this problem is the above mentioned concept of “indirect discrimination”,¹⁸¹ as the purpose of this concept is to bring out the hidden barriers faced by the above mentioned groups.¹⁸² The ECJ has applied it in many cases, but has often failed to break down these barriers and address, for example, certain stereotyped roles that are an impediment to the creation of “real” equal opportunities for these disadvantaged groups.¹⁸³

4.4. Benchmark cases of the European Court of Justice regarding gender quotas

It was within the context of equal treatment of men and women in employment that the legal regime of positive action in EU law was first developed.¹⁸⁴ There are several cases from the European Court of Justice (ECJ) regarding quotas and recruitment in the labour market and also cases regarding admissions to universities.

The *Kalanke versus Freie Hansestadt Bremen* case¹⁸⁵ took place within the context of labour, whereby a system of quotas in favour of the under-represented sex gave priority in recruitment and promotions to people belonging to this group. The criteria for the promotion of the under-represented sex was that it did not make up at least half of the staff in the pay bracket of a certain personnel group, within a specific department of public service.¹⁸⁶ The legal issue at stake was whether or not a national law was compatible with the principle of equal treatment for men and women under European Community law. This particular law granted women absolute and unconditional priority over equally qualified men for appointment or promotion in

180 Ellis, 2005, p. 335.

181 *Idem*, pp. 114-115.

182 *Idem*, p. 115.

183 *Idem*, *Ibidem*.

184 Schiek, Waddington & Bell, 2007, p. 801.

185 ECJ, C- 450/93, *Kalanke versus Freie Hansestadt Bremen*, 17 October 1995, <http://is.gd/QNMble> (consulted 26 March 2011).

186 Emerton, Adams, Byrnes and Connors, 2005, p. 99.

certain sectors where women were under-represented.¹⁸⁷ Women would be entitled to a promotion under certain conditions, such as, that they had the same qualifications as the male applicants.¹⁸⁸ So, in other words, the question was whether this system constituted a form of sex discrimination contrary to EU law or if, on the other hand, it was a positive action measure to promote equal opportunities.¹⁸⁹

Furthermore, an important distinction was made in this case between group rights and individual rights. Group rights were connected to substantive equality, that attempts to achieve equal treatment between groups, while individual rights were connected with the right to equal treatment between individuals, which suggests a greater connection to formal equality. In this case, positive action measures were understood to aim at creating substantive equality,¹⁹⁰ by eliminating obstacles or barriers faced by the under-represented group.¹⁹¹ The decision elaborates on the principle of substantive equality, that involves taking into account the existent inequalities which arise when a person belongs to a certain group, and requires that the detrimental effects which those inequalities have on that group be neutralised by means of specific measures.¹⁹² Substantive equality is then compared with the principle of formal equality, which precludes the idea of basing unequal treatment of individuals on certain differentiating factors, such as the sex of the candidates. In conclusion, in this case, the principle of substantive equality is defined as complementary to the principle of formal equality. This complementarity is revealed by the fact that derogations to the principle of formal equality are only authorised when the end they seek to achieve is to ensure *de facto* equality.¹⁹³

The court decision also defines three different models of positive action, and quotas are included in the “third” model. In other words, quotas are considered to be a part of the model of positive action that attempts to remedy the effects of legally

187 Emerton, Adams, Byrnes and Connors, 2005, p. 99.

188 ECJ, C- 450/93, *Kalanke versus Freie Hansestadt Bremen*, 1995, pp. I-3053-I-3054, paras.1-2.

189 Ellis, 2005, pp. 300-301.

190 ECJ, C- 450/93, *Kalanke versus Freie Hansestadt Bremen*, 1995, p. I-3057, para.7.

191 Ellis, 2005, p. 301.

192 ECJ, C- 450/93, *Kalanke versus Freie Hansestadt Bremen*, 1995, pp. I-3061-I-3062, para.16.

193 *Idem*, pp. I-3061-I-3062, paras.16-17.

relevant historical discrimination, that has been adopted in order to eliminate *de facto* inequalities in society.¹⁹⁴ In this particular case, the preferential treatment that takes place is legitimised as a “reparation” for the disadvantaged group. However, this decision also considers that quotas are very controversial because of the fact that they affect the principle of equality between individuals. Nevertheless, in the referred observations, quotas are still considered to be an adequate instrument to increase female job occupation, at least on a numerical level.¹⁹⁵

In this case, the notion of “quota system” with regard to the under-represented sex was considered to be included among a variety of measures, and was considered to be a form of positive action that breaches anti-discrimination laws.¹⁹⁶ The decision refers to the possibility of this breach, when it mentions how Article 2 (4) of the Equal Treatment Directive¹⁹⁷ authorises Member States to adopt measures to promote equal opportunities, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1 (1) of the same Directive.¹⁹⁸ This “removal” is considered to involve a derogation to the principle of equal treatment.¹⁹⁹ However, this derogation involves a “discrimination in appearance”,²⁰⁰ as different treatment in favour of women is authorised with the objective of attaining substantive equality. Therefore, these derogatory provisions, instead of being true deviations to the prohibition of discrimination on the grounds of sex “(...) aim at ensuring that the principle of equal treatment is effective, by authorising such inequalities as are necessary in order to achieve it”.²⁰¹

Nevertheless, the type of quota system in the Kalanke case was a “soft” one, as the criteria for promotion not only took the individual qualifications of the under-represented sex into account but also the percentage of official posts that were

194 ECJ, C- 450/93, *Kalanke versus Freie Hansestadt Bremen*, 1995, p. I-3058, para. 9.

195 *Idem*, pp. I-3058-I-3059, paras. 9-11.

196 Ellis, 2005, p. 302.

197 Directive 76/207/EEC, *on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*, at <http://is.gd/wlGmyQ> (consulted 10 May 2011).

198 ECJ, C- 450/93, *Kalanke versus Freie Hansestadt Bremen*, 1995, pp. I-3059-I-3060, para. 12.

199 *Idem*, p. I-3062, para. 17.

200 *Idem*, p. I-3061, para. 15.

201 *Idem*, p. I-3062, para. 17.

designated to be allocated to that particular sex. Therefore, only as long as the “under-representation” was particularly demarcated (more than 50 percent), and in the case that the contenders for a particular post were equally qualified, would there be a “tie-break” in the name of gender balance.²⁰² This criteria was expressed in the decision of the court, that considered that a derogation of Article 2 (1) and (4) of the Equal Treatment Directive²⁰³ would not be allowed by a national legislation if the under-represented candidates to a particular job did not constitute at least half of the employees in the department of public service in question. So, in conclusion, the decision considered that automatic preference should be given to women if they constituted less than 50 percent of the employees within the department.²⁰⁴

The Marschall *versus* Land Nordrhein-Westfalen case²⁰⁵ was based on the same principle as the Kalanke case, as there were also fewer women than men carrying out the job in question. However, it concerned a male teacher having been denied a promotion because of a law that gave preference to an equally qualified female candidate. In this case, there was a national rule which determined that if there were fewer women than men in a relevant post of public service, and a man and a woman candidate were equally qualified for a certain available post, priority should be given to the female candidate. However, this was on the condition that no “specific characteristic” of an individual male candidate tilted the balance in his favour. Thus, the individual evaluation of each candidate was also established in the selection, by objectively taking into account all specific criteria of the candidates, in order to avoid, for example, the danger of a subjective “pro-women” assessment.²⁰⁶ So, this case also concerned derogations to the principle of equal treatment, as a national law allowed the promotion of women over men, on the basis that the candidates of both sexes had equal qualifications.

202 Ellis, 2005, p. 302.

203 Directive 76/207/EEC, *on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*, at <http://is.gd/wlGmyQ> (consulted 10 May 2011).

204 ECJ, C- 450/93, *Kalanke versus Freie Hansestadt Bremen*, 1995, p. I-3079.

205 ECJ, C-409/95, *Marschall versus Land Nordrhein-Westfalen*, 11 November 1997, at <http://is.gd/7fNBcg> (consulted 26 March 2011).

206 Ellis, 2005, p. 307.

The decision concludes that a national rule that preferentially promotes female candidates does not go against the prohibition of discrimination of the Equal Treatment Directive. However, there were certain conditions established for the promotion, namely, the equal qualification of the male and female candidates, as well as the condition that the section of public service where these promotions took place would have to have women in lesser quantities than men. In the final decision, it was stated that as long as the national law in question does not unconditionally favour female candidates in promotions, it is possible to apply this preferential treatment measure in sectors where women are under represented. These promotions would only take place as long as the objective of the rule was to contribute to counteract the negative effects that occur for female candidates due to certain prejudices and stereotyped ideas about their capacities in the workforce and social role. Thus, the purpose of the measure must be to objectively reduce the *de facto* inequalities that exist in society.²⁰⁷ However, this was under the condition that male and female candidates were subjected to an objective appreciation of their capabilities for the jobs in question, in order that all relevant characteristics were taken into account.²⁰⁸ In conclusion, the promotion in question was not considered to be against the principles of equal treatment of men and women in the referred Directive. Moreover, a parallel may be drawn between the Marschall case and the situation of gender quota systems in higher education, as long as the under-represented sex is not favoured unconditionally and the objective is to contribute to counteract gender imbalance. The reasons for social prejudices and stereotyped ideas regarding men and women may vary, but their consequences must be fought against, whatever the basis for the existence of a gender imbalance, whether in the area of labour or education. This issue will be further developed in 4.6. of this section on gender equality in higher education, as well as in the Swedish national context, in 5.3., regarding the court case of the Swedish University of Agricultural Sciences.

In the *Badeck versus Landesanwalt Beim Staatsgerichtshof des Landes Hessen case*,²⁰⁹ the Court restated its position in the Marschall case regarding equal

207 ECJ, C-409/95, *Marschall versus Land Nordrhein-Westfalen*, 1997, p. I-6392, para 29.

208 *Idem*, p. I-6393, para. 33.

209 ECJ, C-158/97, *Badeck versus Landesanwalt Beim Staatsgerichtshof des Landes Hessen case*, 28

opportunities between men and women, with regard to the need to take into account the specific and personal situations of all candidates in the case of a promotion for women over men in public service.²¹⁰ The Court's conclusions are clear when it restates that the Equal Treatment Directive does not preclude national rules targeted at equal rights for the removal of discrimination against women in public service.²¹¹

In this particular case, among the rules that provided that national authorities were required to take certain measures in any sector or career group where women were under-represented, one particular measure is of relevance for the purposes of this thesis. The rule in question designates a proportion of posts in the academic sector for a proportion of women among graduates, on the understanding that the proportion regards no more than half of the number of posts to be filled, and that female candidates are not given automatic priority.²¹² This measure is considered to be within the scope of what is designated in the case as a “women's advancement plan”. The underlying principle of this particular measure is similar to the principle behind quota systems applied to the under-represented sex at the moment of access to higher education degrees. Thus, the objective of the national measure in this case is pointed out as being that “(...) more than half the posts to be filled in a sector in which women are under-represented are to be designated for filling by women”.²¹³

In conclusion, as in the Marschall case, the Court stated that the national rule by which under-represented women in sectors of public service are given priority over equally qualified male candidates was not precluded by Article 2 (1) and (4) of the Equal Treatment Directive, on the condition that the objective of the national rule was directed at compliance with the above mentioned national “women's advancement plan”,²¹⁴ and reasons of greater legal weight did not oppose this particular measure.²¹⁵

Most relevantly for the purposes of this thesis, the decision considered that the

March 2000, at <http://is.gd/jDpxbo> (consulted 12 April 2011).

210 ECJ, C-158/97, *Badeck versus Landesanwalt Beim Staatsgerichtshof des Landes Hessen case*, 2000-3, p. I – 1932, para. 1.

211 *Idem*, pp. I- 1900-1901, para. 43.

212 *Idem*, para. 43 (a).

213 *Idem*, p. I-1911, para. 4.

214 *Idem*, pp. I- 1910-1911.

215 *Idem*, p. I – 1932, para. 1.

national rule in question may also prescribe that the above mentioned advancement plan, specifically in the area of temporary posts in the academic service and academic assistance “(...) must provide for a minimum percentage of women which is at least equal to the percentage of women among graduates, holders of higher degrees and students in each discipline (...)”²¹⁶ and, among other conditions, “ In so far as its objective is to eliminate under-representation of women (...)”.²¹⁷ Another measure that was considered admissible in this case was a national rule that guarantees that the employer is obliged to call qualified women for a particular job in public administration to be interviewed, within the sectors in which they are under-represented, as long as they satisfy all the required conditions.²¹⁸ After these cases, it had become clear that there was a line followed by the decisions of the ECJ where differential treatment on the grounds of sex was permitted. In these cases, the interpretation given to Article 2 (4) of the Equal Treatment Directive undoubtedly represents an exception to the prohibition of discrimination on the grounds of sex.²¹⁹

Finally, in the *Abrahamsson and Anderson versus Fogelqvist* case,²²⁰ the ECJ ruled on the legality of reserving posts for women in Swedish universities, provided that their qualifications were sufficient for the post and the differences of qualifications of the chosen candidates were not contrary to the requirement of objectivity in the reservation of those posts previously mentioned in the *Marschall* case (the condition that male and female candidates were subjected to an objective appreciation of their capabilities for the jobs in question).²²¹ The ECJ expressly treated this case as an example of “positive discrimination”, but pointed out that it was different from the three previously mentioned cases. The difference lay in the fact that, in this context, the qualifications of the under-represented sex were allowed to be inferior to those of the

216 CJ, C-158/97, *Badeck versus Landesanwalt Beim Staatsgerichtshof des Landes Hessen* case, 2000-3, p. I – 1932, para 2.

217 *Idem*, para 3.

218 *Idem*, p. I – 1933, para 1.

219 Ellis, 2005, p. 307.

220 ECJ, C-407/98, *Abrahamsson and Anderson versus Fogelqvist*, 6 July 2000, at <http://is.gd/ZWhQ3d> (consulted 26 March 2011).

221 European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, European Network of Legal Experts in the field of Gender Equality, *Making Equality Effective: the role of proactive measures*, 2009, pp. 36-37, at <http://is.gd/iww400> (consulted 23 March 2011).

candidate of the opposite sex, as long as they were nearly equal. In this case, the application of the “gender-quota” was considered to be arbitrary, as the selection criteria was not sufficiently transparent. In the ruling, the Court restated that the condition of equivalent (or substantially equivalent) merits of the candidates to higher education was necessary in order to allow for positive discrimination, so that a candidate of the under-represented sex could be granted preference over a competitor of the opposite sex.²²²

These cases are examples of how the of the ECJ has tended toward considering quota systems in favour of the under-represented sex admissible, when based on equal merits. So, the “soft quota” (based on equal merits of the candidates) seems to be less controversial than a quota system that allows quotas for candidates of the under-represented sex who lack the same merits as their “comparator” group.

4.5. Indirect discrimination on the grounds of sex

One of the key concepts in EU anti-discrimination law is the concept of indirect discrimination. According to Directive 2002/73/EC, indirect discrimination concerns situations where an apparently neutral provision, criterion or practice creates a disadvantage for one sex in comparison with the other sex.²²³ This type of discrimination is only admissible if it is objectively justified by a legitimate aim, and the means of achieving it are deemed necessary and appropriate.²²⁴ So, in general terms, it occurs where an unjustified adverse impact is produced, for a protected class of persons, by an apparently class-neutral action.²²⁵

Regarding the concept of adverse impact, a problem arose within the interpretation given by the ECJ regarding the issue of whether this impact must have had already occurred in order for it to be considered, or whether it was enough for it to

222 ECJ, C-407/98, *Abrahamsson and Anderson versus Fogelqvist*, 6 July 2000, 2000-3, pp. 5586-5587.

223 Directive 2002/73/EC, *amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*, Art. 2 (2). para. 2, at <http://is.gd/lfWvvc> (consulted 12 May 2011).

224 *Idem*, *Ibidem*.

225 Ellis, 2005, p. 91.

be anticipated as a future or “contingent harm” to a particular group.²²⁶

Specifically regarding sex discrimination, the definition of indirect discrimination was formalised in the previous Burden of Proof Directive. It was considered to occur in cases where an apparently neutral provision, criterion or practice created a disadvantage for a substantially higher proportion of the members of one sex. It can only be justified by objective factors unrelated to sex and if the provision, criterion or practice is considered appropriate and necessary.²²⁷

However, regarding sex discrimination, the concept of indirect discrimination developed further, in what concerns the above mentioned concept of adverse impact. The concept was broadened in its application by both the Race Directive²²⁸ and the Framework Directive for equal treatment in employment and occupation,²²⁹ in order that the idea of a future adverse impact be included in the concept of adverse impact itself. Each of the above mentioned directives adopted a test for indirect discrimination based on the concept of “contingent harm”. In their respective articles 2 (2) b), they refer to the concept of apparently neutral provisions, criteria or practices that would put persons belonging to a certain group at a particular disadvantage, compared with other persons.²³⁰ In order to support the claim that a particular group is being the victim of an adverse impact that emerges from a specific practice, this contingent harm has to be proved by statistical evidence.²³¹

Furthermore, as a matter of principle, when a specific law determines that a certain situation is forbidden, it is not usually necessary to wait for actual harm to occur.²³² Even though one can consider that indirect discrimination does not involve the need for a comparator,²³³ it is often considered necessary to identify a group of persons

226 Ellis, 2005, pp. 91-93.

227 Directive 97/80/EC, *on the burden of proof in cases of discrimination based on sex*, Article 2 (2) at <http://is.gd/xGLNLR> (consulted 16 May 2011).

228 Directive 2000/43/EC, *implementing the principle of equal treatment between persons irrespective of racial and ethnic origin*, at <http://is.gd/iQHwwu> (consulted May 13 2011).

229 Directive 2000/78/EC, *establishing a general framework for equal treatment in employment and occupation*, at <http://is.gd/csPcg9> (consulted 10 May 2011).

230 Ellis, 2005, p. 94.

231 Idem, Ibidem.

232 Idem, Ibidem.

233 Lerwall, 2001, pp. 431-433.

with whom to make a comparison. The purpose of this is to determine a situation of indirect discrimination in a court of law, in order to be able to claim that another group has received a more advantageous treatment.²³⁴

Regarding proof of the degree of the “actual adverse impact” in sex discrimination claims, the ECJ has demanded proof of this with different levels of precision, in several cases.²³⁵ For example, in the *Nolte versus Landesversicherungsanstalt Hannover*²³⁶ case, it is deemed to be necessary that the measure at stake must affect a far greater number or percentage of people of one sex over another, in order for actual adverse impact to be considered.²³⁷ Therefore, according to the decision of the court in this case, the proportion of members of a group of one sex that is affected by the measure must be particularly marked.²³⁸ However, the exact percentage or number of people affected is different on a case by case level.²³⁹ The *R versus Secretary of State for Employment* case²⁴⁰ is an example of a decision based on statistics that showed that there was not a considerably smaller percentage of one of the sexes that could comply with a rule regarding a two year period of employment.²⁴¹ In this case, two female employees claimed that the company they worked for had purposefully dismissed them before the termination of a two-year labour period, so that they could not bring a complaint of unfair dismissal against the company.²⁴² The two employees considered that the rule indirectly discriminated women on the grounds of sex as it was harder for women to comply with it than men.²⁴³ The ECJ used the same formula in the *Deutsche Telekom AG versus Schröder* case.²⁴⁴ This case stated that the

234 Ellis, 2005, p. 95.

235 Idem, p. 96.

236 ECJ, C-317/93, *Nolte vs Landesversicherungsanstalt Hannover*, of 14 December 1995, at <http://is.gd/RfVFHE> (consulted 9 May 2011).

237 ECJ, C-317/93, *Nolte vs Landesversicherungsanstalt Hannover*, 1995, pp. I- 4625, p. I-4640.

238 Ellis, 2005, p. 96.

239 ECJ, C- 167/97, *R vs Secretary of State for Employment, ex parte Seymour-Smith*, of 9 February 1999, at <http://is.gd/VjuqxK> (consulted 8 May 2011).

240 ECJ, C- 167/97, *R vs Secretary of State for Employment, ex parte Seymour-Smith*, 1999, pp. I-683-4.

241 Ellis, 2005, p. 97.

242 Idem, Ibidem.

243 ECJ, C- 167/97, *R vs Secretary of State for Employment, ex parte Seymour-Smith*, 1999, p. I-683.

244 ECJ, C-50/95, *Deutsche Telekom AG vs Schröder*, of 10 February 2000, at <http://is.gd/CNzBvU> (consulted 7 May 2011).

statistics available must reveal that a “considerably smaller percentage of women than men” could comply with the above mentioned 2 year rule.²⁴⁵ However, in the *R versus Secretary of State for Employment* case, the required percentage of gender imbalance was considered not to have been attained, as the statistics presented by the Seymour-Smith company proved to have established the above mentioned rule at a time where 77.4 percent of men and 68.9 percent of women fulfilled the requirement of the employment for two years.²⁴⁶

Nevertheless, the ECJ does not limit itself to statistical evidence at a specific moment in time. In the *Jørgensen versus Foreningen af Speciallaeger* case,²⁴⁷ statistical evidence does not necessarily need to be “marked”, but can also be less evident, if it is considered to be persistent and constant over a long period of time.²⁴⁸ However, the ECJ leaves the discretionary power to the national court at stake, in order to draw conclusions and assess whether the statistics can be taken into account (i.e. with regard to the significance of the phenomena at stake or the quantities of individuals involved in the groups in question).²⁴⁹ Furthermore, the issue of the moment in time when the above mentioned adverse impact should be determined is also relevant in terms of proof. In the *R versus Secretary of State for Employment* case,²⁵⁰ the ECJ considered that the appropriate moment to judge the impact of a rule may vary according to the circumstances of each case. Even though the Court considered that EU law must be taken into account at all relevant times (whether it is the time of the adoption, implementation or application of the national measure at stake), it also considers that the legal and factual circumstances of the time when the legality of a certain rule is assessed (and consequently the time of its impact) should also be left to the discretion of the national court. Therefore, the “appropriate moment” may vary in time, according to each national context. For example, when a national authority is considered to have

²⁴⁵ ECJ, C- 50/95, *Deutsche Telekom AG vs Schröder*, 2000, p. I- 743.

²⁴⁶ ECJ, C- 167/97, *R vs Secretary of State for Employment, ex parte Seymour-Smith*, 1999, pp. I-683-4.

²⁴⁷ ECJ, C-226/98, *Jørgensen vs Foreningen af Speciallaeger*, of 6 April 2000, at <http://is.gd/OFWo5n> (consulted 7 May 2011).

²⁴⁸ ECJ, C-226/98, *Jørgensen vs Foreningen af Speciallaeger*, 2000, p. I-2447.

²⁴⁹ Ellis, 2005, p. 97.

²⁵⁰ ECJ, C- 167/97, *R vs Secretary of State for Employment, ex parte Seymour-Smith*, 1999, pp. I-679-80.

acted beyond its lawful powers, the time of the adoption of a certain measure might be the relevant moment to assess its legality. In other circumstances, however, if the rule has been lawfully adopted by the national authority in question, the appropriate moment may be the time of its application, as well as the verification of its conformity with EU law at that time.²⁵¹ Specifically with regard to statistics, the ECJ goes on to consider that, besides the relevance of the data at the moment when a certain act was adopted, subsequent data contributing to the assessment of the impact of a certain measure on men and women may also be taken into account.²⁵² According to the requirements of the above mentioned case law and the development of the concept of indirect discrimination itself, it is possible to draw a parallel with the situation regarding gender quota systems in higher education in Sweden. The idea behind this analogy is that, by taking away the possibility for a quota based on gender in higher education admissions procedures, men are being indirectly discriminated. This indirect discrimination lies in the withdrawal of the possibility for this positive action measure, when the gender imbalance in some university degrees is still growing, and men are currently the under-represented sex. This analogy will be developed in section 5.4. of this thesis.

4.6. Gender equality in higher education

The concept of positive action has been most developed in the EU within the area of labour law. Nevertheless, issues surrounding positive action measures in the area of education are connected and comparable to those raised by measures in the area of labour. As one of the purposes of this thesis is to approach the issue of quotas for the under-represented sex in higher education in Europe, this section will start by exposing statistics that point out the gender imbalance at the level of admissions to certain higher education degrees, followed by some recommendations, opinions, strategies and agreements that have been adopted on an EU level in order to promote gender equality in education.

251 ECJ, C- 167/97, *R vs Secretary of State for Employment, ex parte Seymour-Smith*, 1999, pp. I-679-80.
252 Idem, Ibidem.

According to the statistical annex of the European Commission Report on equality between women and men of 2009, women between the ages of 20 and 24 obtain better educational results than men in all Member States.²⁵³ In 2007, at the level of secondary schools in the EU, 80,8 percent of women between the ages of 20 to 24 reached, on average, the upper level of education, while only 75,4 percent of young men managed to do the same. The statistics also show that women make up 59 percent of university graduates.²⁵⁴

In the context of the “Post - 2010 Lisbon Strategy”, in its conclusions on gender equality, the Council of the European Union stated that the Member States must act in the education sector, i.e. with vocational guidance and training (especially for young men and women), to accomplish gender equality in the labour market, in order to strengthen it and achieve economic growth.²⁵⁵ The Council added that there is a need to carry out measures, particularly to fight against underachievement by both sexes in education, as well as gender-based segregation, and to make sure that the choices of the students are not influenced by gender stereotypes.²⁵⁶

The Advisory Committee on Equal Opportunities for Women and Men of the European Commission also issued an opinion on the future of Gender Equality Policy after 2010.²⁵⁷ One of the objectives is achieving equality between women and men not only in education but also in skills. This committee considers that, in the area of education, gender differences and inequalities remain in terms of quality and training experience. Not only are these differences evident in the respective performances of men and women, but also in their choices of subjects.²⁵⁸ According to the statistical information presented in this opinion, women not only frequent all areas of study but

253 European Commission, 2009, p. 16.

254 Idem.

255 Council of the European Union, *Conclusions on Gender equality: strengthening growth and employment – input to the post-2010 Lisbon Strategy*, 2009, p. 4, at <http://is.gd/FtU3Yn> (consulted 23 March 2011).

256 Idem, Ibidem.

257 European Commission, Employment Social Affairs and Equal Opportunities, *Opinion on The Future of Gender Equality Policy after 2010 and on the priorities for a possible future framework for equality between women and men*, Advisory Committee on Equal Opportunities for Women and Men, 2010, pp. 14 -16, at <http://is.gd/9mbNNa> (consulted on 23 March 2011).

258 Idem, p. 13.

also have an “(...) educational attainment above 60% compared to men”.²⁵⁹ There are also more women than men in most subjects, including medicine and law.²⁶⁰ Moreover, the committee also refers that women are now more highly represented in some science subjects, i.e. biological sciences and veterinary sciences.²⁶¹ This makes gender imbalance at the level of higher education evident in these areas. The recommendations of this Committee are, among others, that the new Strategy for Equality Between Women and Men for the period of 2010 to 2015²⁶² supports the implementation and development of non-sexist education, in order to counteract the effects of the so-called “(...) *feminisation* of education and teaching (...)”,²⁶³ so that traditional gender stereotypes may be eliminated. Another recommendation is the fight against gender prejudice and discrimination in general.²⁶⁴ For these purposes to be achieved within the scope of the above mentioned strategy, the committee underlined the necessity of the EU to promote the evaluation and implementation of its gender equality legislation and also stressed the need of the EU to encourage Member States to review and amend their policies and legal frameworks, if necessary. The objective of the amendments would be to eliminate gender gaps in education and university systems, as well as to ensure a minimum level of legal protection against gender-based discrimination, that would be equivalent to the level of legal protection against discrimination based on race. However, the way in which this particular recommendation was worded did not gain the full approval of some Member States, which preferred a wording that emphasised that the EU should “propose and support” the revision and amendment of policies and legislation, instead of having the EU “encourage” these acts.²⁶⁵ Moreover, the TFEU

259 European Commission, Employment Social Affairs and Equal Opportunities, *Opinion on The Future of Gender Equality Policy after 2010 and on the priorities for a possible future framework for equality between women and men*, Advisory Committee on Equal Opportunities for Women and Men, 2010, pp. 13 -14, at <http://is.gd/9mbNNa> (consulted on 23 March 2011).

260 Idem, p. 14

261 Idem, Ibidem.

262 European Commission, *Strategy for equality between women and men 2010-2015*, 2010, at <http://is.gd/x15OdS> & <http://is.gd/wMYdNA> (consulted on 23 March 2011).

263 European Commission, Employment Social Affairs and Equal Opportunities, *Opinion on The Future of Gender Equality Policy after 2010 and on the priorities for a possible future framework for equality between women and men*, Advisory Committee on Equal Opportunities for Women and Men, 2010, p. 14, at <http://is.gd/9mbNNa> (consulted on 23 March 2011).

264 Idem, pp. 14 -16.

265 Idem, p. 14.

restated the need for the EU and Member States to strengthen and implement specific actions aimed at ensuring women's full equality in education, particularly in university systems.²⁶⁶ Actions aimed at encouraging women to choose non-traditional fields of studies were also recommended, in order to increase access to all fields of occupation and work.²⁶⁷

Finally, according to the European Pact for Gender Equality (2011-2020),²⁶⁸ the Council of the European Union reaffirmed its commitment to fulfil the objectives of the EU on gender equality, especially in education, in training and in working life, and urged Member States to take measures to close gender gaps and fight against gender segregation. According to the conclusions of the Pact, elimination of gender stereotypes is one of the ways in which gender segregation in the labour market can be reduced.²⁶⁹ Thus, this objective can easily be extensively interpreted and applied to the specific area of higher education.

In view of the current statistics regarding gender balance in Europe and the EU strategies regarding gender balance and equality, it becomes quite evident that men are currently in need of protection and positive action measures. Eliminating gender gaps in education and university systems is a strongly defended objective of the EU, as well as the insurance of a minimum level of legal protection against gender-based discrimination. Furthermore, the opinion on the future of the Gender Equality Policy of the Advisory Committee on Equal Opportunities for Women and Men of the European Commission²⁷⁰ can also specifically be applied to the current situation of men. In other words, when the committee states that there is a need for the EU and Member States to strengthen and implement specific actions aimed at ensuring women's full equality in

266 European Commission, Employment Social Affairs and Equal Opportunities, *Opinion on The Future of Gender Equality Policy after 2010 and on the priorities for a possible future framework for equality between women and men*, Advisory Committee on Equal Opportunities for Women and Men, 2010, pp. 14-16, at <http://is.gd/9mbNNa> (consulted on 23 March 2011).

267 Idem, Ibidem.

268 Council of the European Union, *Council conclusions on the European Pact for gender equality for the period 2011 – 2020*, 2011, p. 4, at <http://is.gd/FbP8ou> (consulted on 23 March 2011).

269 Idem, Ibidem.

270 European Commission, Employment Social Affairs and Equal Opportunities, *Opinion on The Future of Gender Equality Policy after 2010 and on the priorities for a possible future framework for equality between women and men*, Advisory Committee on Equal Opportunities for Women and Men, 2010, pp. 14 -16, at <http://is.gd/9mbNNa> (consulted on 23 March 2011).

education, particularly in university systems, this line of thought should also be applied when the under-represented sex is men. The data presented indicates that guidelines should also be applied to specific actions aimed at ensuring full equality for men in this area, particularly in higher education. It seems that there is also a need for actions encouraging men to choose certain fields of studies, that are currently lacking in male representation, namely, medicine and law. Therefore, measures to increase the access of men to all areas of occupation and work should be taken, and education is a definite stepping stone to enable their access to those fields.

In conclusion, EU law endorses preferential treatment for the under-represented sex not only in the area of labour but also in education. Moreover, as referred to in section 4.4. of the thesis, quotas are included among the existing positive action measures prescribed by EU law, in the area of higher education, as can be verified from the analysis of the *Abrahamsson and Anderson versus FogeLqvist* case of the ECJ.²⁷¹

5. On a national level: gender quotas in higher education in Sweden

5.1. European Union equality law in Sweden

In Sweden, positive action is expressly mentioned in the Swedish Instrument of Government, in Chapter 2 on unlawful discrimination.²⁷² It contains a rule in Article 13 of this Chapter by which no act of law should treat a citizen unfavourably on the grounds of gender, unless the provision forms part of efforts to promote equality between men and women.²⁷³

The Swedish Discrimination Act²⁷⁴ aims at promoting equality of opportunity,

²⁷¹ ECJ, C-407/98, *Abrahamsson and Anderson versus FogeLqvist*, 6 July 2000, at <http://is.gd/ZWhQ3d> (consulted 26 March 2011).

²⁷² Sveriges Riksdag, *The Instrument of Government*, SFS 1974:152, at <http://is.gd/6CTXCK> (viewed on 24 March 2011).

²⁷³ European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, European Network of Legal Experts in the field of Gender Equality, *Making Equality Effective: the role of proactive measures*, 2009, p. 38, at <http://is.gd/iww400> (consulted 23 March 2011).

²⁷⁴ Swedish Code of Statutes, *Discrimination Act*, 2008, at <http://is.gd/1GI5gq> (consulted 11 April 2011).

and contains provisions on positive action.²⁷⁵ As of the 1st of January 2009, non-discrimination legislation in Sweden was compiled in this single act, that now covers discrimination in the areas of religion, ethnicity, age and disability, as well as gender, sexual orientation and transsexual identity.²⁷⁶

The general definitions of the Act state prohibitions of discrimination in areas such as employment and education, among others.²⁷⁷ Under the specific topic of education, within Chapter 2, the Discrimination Act also contains special provisions on positive action. It starts by defining the prohibition of discrimination in education in Section 5. This particular prohibition is directed at any natural or legal person conducting activities referred to in the Education Act.²⁷⁸ It includes activities by “education providers”, whereby universities and other higher education institutions are included, according to the latest Higher Education Ordinance (Chapter 1, section 2)²⁷⁹ as well as to the latest Swedish Higher Education Act (Chapter 1, section 1).²⁸⁰ Section 5 of Chapter 2 of the Discrimination Act clearly states that these education providers may not discriminate against any student applying for educational activities, and Section 6 also approaches the exceptions to the prohibition of discrimination in the area of education set out in Section 5.

Among the measures that are considered exceptions to the prohibition of discrimination are those that contribute to efforts to promote equality between women and men in admissions to education (section 6 (1)). Positive action measures such as quota systems in the admissions procedures to higher education are included among these measures. Furthermore, in the area of education, the Discrimination Act establishes the need for “Goal-oriented work” in Chapter 3, Section 14, in order that

275 Prechal & Burri, 2009, p. 4.

276 European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, European Network of Legal Experts in the field of Gender Equality, *Gender Equality Law in 30 European Countries*, 2008, pp. 153-154, at <http://is.gd/Sb8qyo> (consulted 24 March 2011).

277 Idem, Ibidem.

278 Ministry of Education and Science in Sweden, *Education Act*, 1985, at <http://is.gd/k54yvj> (consulted 10 May 2011).

279 Ministry of Education and Research, Sweden, *Higher Education Ordinance* (2010: 2020), at <http://is.gd/XeXec8> (consulted 5 June 2011).

280 Swedish National Agency for Higher Education, *The Swedish Higher Education Act*, (2010:701) at <http://is.gd/OD0oqY> (consulted 25 March 2011).

education providers actively promote equal rights and opportunities for students. The Higher Education Act also includes education providers among those that are obliged to promote equality among students.²⁸¹ Moreover, the Discrimination Act also refers directly to an “Equal treatment plan” in Section 16 of Chapter 3, where it is considered essential that an education provider elaborates a yearly plan that includes several measures, such as to “ (...) promote equal rights and opportunities for the children, pupils or students participating in or applying for the activities, regardless of sex, ethnicity, religion or other belief, disability or sexual orientation (...).”²⁸² In conclusion, positive action measures are included in the Swedish Discrimination Act as a means to promote equality between the sexes. These measures seem to be mostly focused on the “soft” kind of positive action, related to goals and plans in order to achieve equality objectives, and less focused on “harder” measures, such as quotas for the under-represented sex.

5.2. Quota systems for gender balance in higher education in Sweden

Within the scope of the Gender Equality Policy, the Swedish government appointed a committee in February of 2009 to promote gender equality in higher education. It focused particularly on the fight against gender-based subject choices, as well as on reversing the tendency towards fewer male students in higher education. It also addressed gender differences in terms of study and drop out rates of males and females, as well as the propensity of both sexes to complete a degree. Career opportunities in research and representation of both sexes at an executive level in higher education were also the object of the attention of the committee.²⁸³

The previous Swedish Higher Education Ordinance (1993:100)²⁸⁴ referred to

281 Swedish Code of Statutes, *Discrimination Act*, Chapter 3, Section 14, 2008, at <http://is.gd/1GI5gq> (consulted 11 April 2011).

282 Idem, Section 16, at <http://is.gd/1GI5gq> (consulted 11 April 2011).

283 Government Offices of Sweden, Ministry of Integration and Gender Equality, *The Swedish Government's Gender Equality Policy*, 2009, p. 3, at <http://is.gd/FT2Ux9> (consulted 26 March 2011).

284 Ministry of Education and Research, Sweden, *Higher Education Ordinance* (1993:100), at <http://is.gd/gvFAM3> (consulted 26 March 2011).

gender equality in Section 8 of Chapter 1. This section stated that, according to Chapter 1, Section 5 of the previous Higher Education Act,²⁸⁵ equality between men and women should always be observed and promoted in the activities of institutions of higher education. The need for the equal treatment of students and applicants to such institutions, irrespective of gender, ethnic origin, sexual orientation or disability was also pointed out in Section 9 of Chapter 1 of the above mentioned Ordinance. This need was also referred to in the Equal Treatment of Students at Universities Act,²⁸⁶ before it was abolished and included in the Discrimination Act.²⁸⁷

The purpose of the Equal Treatment of Students at Universities Act (also known as The Equal Treatment Act) was to promote equal rights for students and applicants, as well as to fight discrimination in the higher education sector. This Act expressly stated, in Section 7, that “A university may not disfavour a student or an applicant by treating him or her worse than the university treats, has treated or would have treated someone else in a comparable situation, if the disfavour is connected with sex, ethnic belonging, religion or other religious faith, sexual orientation or disability”.²⁸⁸ Most importantly, however, the rule added an exception to the prohibition of discrimination, that expressly determined that “The prohibition does not apply if the treatment is justified taking into account a special interest that is manifestly more important than the interest of preventing discrimination at the university”.²⁸⁹ In other words, this rule opens the possibility for positive action measures, such as quota systems in the admissions procedures to higher education, as long as this treatment is justified by a “special interest”, to be considered of greater importance than the purpose of preventing discrimination.

In conclusion, differential treatment on the grounds of sex in higher education was

285 Ministry of Education and Research, *The Swedish Higher Education Act*, (1992:1434), at <http://is.gd/oVGBMI> (consulted 10 June 2011).

286 *Equal Treatment of Students at Universities Act*, 2007, at <http://is.gd/824R6t> (consulted 25 March 2011).

287 Swedish Code of Statutes, *Discrimination Act*, 2008, at <http://is.gd/1GI5gq> (consulted 11 April 2011).

288 *Equal Treatment of Students at Universities Act*, 2007, p. 3, at <http://is.gd/824R6t> (consulted 25 March 2011).

289 *Idem*, *Ibidem*.

seen as one of the exceptions to the principle of the prohibition of discrimination within the scope of the Equal Treatment of Students at Universities Act, before it was abolished by the current Discrimination Act, that is less detailed regarding these particular issues. Therefore, it seems that the issue of gender equality in university admissions procedures has been subject to a more “closed” wording in the Discrimination Act, in comparison to the more “open” and detailed wording given to the exceptions to the prohibition of discrimination based on gender of the previous Equal Treatment of Students at Universities Act. In other words, the Discrimination Act shows a more restrictive approach to the possibility of positive action measures such as quotas.

This alteration is an evident contradiction in light of the growing gender imbalance in certain higher education degrees in Sweden, where the under-represented sex is men.²⁹⁰ According to the Ministry of Integration and Gender Equality, in order to promote equality in higher education, the focus should not only be on combating gender-based subject choices but also on reversing what the government considers to be a trend towards fewer male students in the sector.²⁹¹ So, in practice, the alteration in the wording of the Discrimination Act has clear implications in the possibility for positive action measures in the name of gender balance, where the entrance procedures to higher education are concerned, namely, the protection of the under represented sex through quota-systems in these procedures.

In 2008, the CEDAW Committee, in its concluding observations regarding Sweden,²⁹² considered that it should strengthen its efforts to encourage an increase the number of women in high-ranking posts, particularly in academia. For this purpose, it recommended the adoption of measures to encourage more women to apply for these kinds of jobs. The observations urged the Swedish State to undertake temporary special measures in order to accelerate the realization of women’s *de facto* equality with men.

290 Government Offices of Sweden, Ministry of Integration and Gender Equality, *The Swedish Government's Gender Equality Policy*, 2009, p. 3, at <http://is.gd/FT2Ux9> (consulted 26 March 2011).

291 *Idem*, *Ibidem*.

292 Convention on the Elimination of All Forms of Discrimination against Women, Committee on the Elimination of Discrimination against Women, Fortieth Session, *Concluding observations of the committee on the Elimination of Discrimination against Women*, 2008, p. 4, at <http://is.gd/z3TAMU> (consulted 24 March 2011).

More specifically, the committee also recommended that Sweden included temporary special measures such as goals and quotas in its gender equality legislation, enhanced by a system of incentives, in both the public and private sectors.²⁹³ In what concerned the special interests of men, the committee only focused on parental leave by stating that “ The Committee recommends that the State party continue its efforts to ensure reconciliation of family and professional responsibilities and for the promotion of equal sharing of domestic and family tasks between women and men, including by increasing the incentives for men to use their right to parental leave.”²⁹⁴ Therefore, there is no particular emphasis in these observations on the needs of men in the area of higher education, namely in admissions procedures. There is also no direct reference to men as a group in need of protection in the above mentioned Gender Equality Policy. The government only refers that “ Gender mainstreaming means that decisions in all policy areas are to be permeated by a gender equality perspective. Since everyday decisions, the allocation of resources and the establishing of standards all affect gender equality, a gender perspective must be an integral part of day-to-day activities. The strategy has been developed as a means of combating the tendency to neglect gender equality issues or to consider them secondary to other political issues and activities.”²⁹⁵ However, the Swedish government does not appear to be adopting this strategy, as it seems to have neglected gender balance in university admissions procedures, in what concerns the special needs of men as the under-represented sex. Moreover, the government seems to have considered this issue secondary to other political issues and activities, as the element of gender balance in higher education was excluded with the amendment of the Higher Education Ordinance.

Swedish universities had been given autonomy by the Swedish government to implement quota systems for the under-represented sex in order to provide gender

293 Convention on the Elimination of All Forms of Discrimination against Women, Committee on the Elimination of Discrimination against Women, Fortieth Session, *Concluding observations of the committee on the Elimination of Discrimination against Women*, 2008, p. 4, at <http://is.gd/z3TAMU> (consulted 24 March 2011).

294 *Idem*, pp. 4-5.

295 Government Offices of Sweden, Ministry of Integration and Gender Equality, *The Swedish Government's Gender Equality Policy*, 2009, p. 3, at <http://is.gd/FT2Ux9> (consulted 26 March 2011).

balance within certain higher education degrees.²⁹⁶ However, some members of government, namely Sweden's previous Minister for Higher Education and Research Tobias Krantz, considered that quota systems based on gender did not produce positive practical results.²⁹⁷ As an example of these negative results, one may consider the case of Swedish University of Agricultural Sciences.²⁹⁸ This case, as well as a case regarding ethnic quotas of the Uppsala Faculty of Law,²⁹⁹ both led to imbalanced results due to the application of quota systems. These cases will be further developed in this thesis, as they can be considered to have motivated the Swedish government's decision to disallow the use of gender quotas in university entry procedures, as well as the consequent amendment of the Swedish Higher Education Ordinance.

The amended version of the Ordinance, (2010:2020)³⁰⁰ no longer includes the references to gender of its previous version (1993:100),³⁰¹ regarding the provisions for equal treatment of students in admissions procedures. Section 9 of Chapter 1 of the previous Ordinance made direct reference to Section 7 of the Equal Treatment of Students at Universities Act.³⁰² This Act allowed for an exception to the prohibition of direct discrimination when a more favourable treatment of students was justified due to a special interest, that was required to be manifestly more important than the interest of preventing discrimination at university. The exception could be made on the grounds of sex, ethnic belonging, or other factors. However, section 9 of Chapter 1 of the previous Ordinance was repealed by the new, amended Higher Education Ordinance, whereby this possibility of favourable treatment based on gender has ceased to apply.³⁰³

296 The European Directory of Women and ICT, *Sweden ends use of preferential treatment in connection with university entries*, 2010, at <http://is.gd/uI954N> (consulted 21 March 2011).

297 Idem, Ibidem.

298 Svea Hovrätt, Case T 3552-09 of the 21st December 2009, at <http://is.gd/fuGqCh> (consulted 10 May 2011).

299 Högsta Domstolen, Case T 400-06 of the 21st December 2006, at <http://is.gd/OUXaC7> (consulted 10 June 2011).

300 Swedish National Agency for Higher Education, *Higher Education Ordinance* (2010:2020), at <http://is.gd/XeXec8> (consulted 8 June 2011).

301 Ministry of Education and Research, Sweden, *Higher Education Ordinance* (1993:100), at <http://is.gd/gvFAM3> (consulted 26 March 2011).

302 *Equal Treatment of Students at Universities Act*, 2007, at <http://is.gd/824R6t> (consulted 25 March 2011).

303 Swedish National Agency for Higher Education, *Higher Education Ordinance* (2010:2020), at <http://is.gd/XeXec8> (consulted 8 June 2011).

Up until the time of this amendment, it was considered lawful for universities to apply gender quota systems for the under-represented sex in their admissions procedures (on the condition that all other factors between a potential male and female candidate were equal). However, with this alteration, from the second semester of 2011 on, the possibility for admissions to take gender into account will no longer be applicable as a measure for equal treatment, including measures of positive action through quota systems. Sweden had already disallowed the exceptional use of quotas based on ethnicity in 2006, regarding applicants with lower qualifications.³⁰⁴ Coincidentally, it was in 2006 that the aforementioned ethnic quota court case involving the Uppsala Law Faculty took place.³⁰⁵ The Law Faculty had a quota system whereby 10 percent of seats were reserved for students with both parents of foreign origin, whose qualifications were inferior to the majority of the applicants for this degree. Two students of Swedish origin considered that they had been discriminated due to their ethnic origin. They took their case to the Supreme Court because they were denied the possibility of entering the law degree due to this “ethnic quota”, which was applied favourably for students who did not have equal merits to their Swedish counterparts. The above mentioned exception to the prohibition of discrimination of section 7 of the Equal Treatment of Students at Universities Act was at stake in this case,³⁰⁶ whereby universities were allowed to disregard this prohibition if there was a justified special interest that was manifestly more important than the interest of preventing discrimination at university (paragraph 2 of section 7). The question in this case was whether or not this exception permitted the application of a quota system for admissions. The court ruled that, in this case, 10 percent of the seats could not be used for applicants of a specific ethnic origin.

Since 2006 there has been the progressive prohibition of the use of quotas based

304 The European Directory of Women and ICT, *Sweden ends use of preferential treatment in connection with university entries*, 2010, at <http://is.gd/ui954N> (consulted 21 March 2011).

305 Högsta Domstolen, Case T 400-06 of the 21st December 2006, at <http://is.gd/OUXaC7> (consulted 10 June 2011).

306 *Equal Treatment of Students at Universities Act*, 2007, at <http://is.gd/824R6t> (consulted 25 March 2011).

on ethnicity and gender when granting admission to higher education institutions.³⁰⁷ Even though a number of universities in Sweden made use of the provision of the Higher Education Ordinance regarding gender in admissions, the way the provision was applied varied from institution to institution.³⁰⁸ The practical result of the application of these quota systems caused this type of preferential treatment to especially benefit male students in medicine, dentistry, psychology and law.³⁰⁹ Among the universities that incorporated preferential treatment based on gender in their admissions processes, the veterinary program of the Swedish University of Agricultural Sciences is emblematic because in this case (as in others in Sweden), there were “gender-biased competition” complaints by a majority of female applicants.³¹⁰ These measures, instead of just especially benefiting men, also resulted in women being left on the reserve list to admissions. Therefore, in this case, instead of counteracting gender imbalance, the gender quota system resulted in gender discrimination towards women, who were left out due to what can be considered to be an unlawful application of quotas in order to protect the under-represented sex.

On the other hand, the Office of the Swedish Equality Ombudsman (now the Discrimination Ombudsman or DO)³¹¹ did not agree with the Swedish government's decision regarding the elimination of the provision allowing the use of preferential treatment on the grounds of sex from the admissions procedures to higher education.³¹² Along with several consultative bodies, the DO advised against amending the regulations. The Ombudsman also criticized the fact that the regulatory change at stake was not sufficiently scrutinized prior to the decision of excluding gender as a criterion in the admissions to university.³¹³ According to the DO, the fact that some particular schemes of preferential treatment did not achieve the intended results does not mean

307 The European Directory of Women and ICT, *Sweden ends use of preferential treatment in connection with university entries*, 2010, at <http://is.gd/uI954N> (consulted 21 March 2011).

308 Idem, Ibidem.

309 Idem, Ibidem.

310 Idem, Ibidem.

311 Discrimination Ombudsman, at <http://www.do.se/en/> (consulted March 22 2011).

312 The European Directory of Women and ICT, *Sweden ends use of preferential treatment in connection with university entries*, 2010, at <http://is.gd/uI954N> (consulted 21 March 2011).

313 Idem, Ibidem.

that all types of positive action based on gender should be disregarded when granting admission to studies. In other words, even though the sued institutions acted unlawfully, it is wrong to totally eliminate the option of employing preferential treatment on the basis of the above mentioned court cases.³¹⁴ According to the Ombudsman, promoting gender equality in the higher education sector must be done in a way that does not break anti-discrimination principles. Furthermore, the DO considered the consequences of the application of this practice to admissions to higher education institutions were still relatively unknown. However, in the opinion of the DO, even though preferential treatment should continue to be an option, the question remained as to which concrete measures needed to be taken in order to obtain balanced results.³¹⁵ Rather than amending the regulations, the Equality Ombudsman's Office considers that Swedish universities should be informed about which lawful measures they could use to promote gender balance in the student body.³¹⁶

5.3. The case of the Swedish University of Agricultural Sciences

In 2007, a benchmark lawsuit took place in Sweden,³¹⁷ whereby women who had applied for the veterinary program of the Swedish University of Agricultural Sciences sued this university for unlawful gender discrimination. The Appeal Court's decision³¹⁸ found positive action treatment when admitting students to the veterinary program to be contrary to both EU law and Swedish legislation at the time, namely, the Equal Treatment of Students at Universities Act.³¹⁹ The veterinary program at the Swedish

314 The European Directory of Women and ICT, *Sweden ends use of preferential treatment in connection with university entries*, 2010, at <http://is.gd/uI954N> (consulted 21 March 2011).

315 *Idem*, *Ibidem*.

316 *Idem*, *Ibidem*.

317 Gunnar Strömmer and Clarence Crafoord were the lawyers that represented the women that sued this university. The Centre for Justice has taken legal action on behalf of women who have been denied admission to university degrees on the basis of their gender over the past years, at <http://is.gd/fllLv5> (consulted 20 March 2011).

318 Svea Hovrätt, Case T 3552-09 of 21 December 2009, at <http://is.gd/fuGqCh> (consulted 10 May 2011).

319 European Commission, Directorate-General for Employment Social Affairs and Equal Opportunities, European network of legal experts in the field of gender equality, *Gender Equality Law Review 2010-11*,

University of Agricultural Sciences (SLU) in Uppsala is the only veterinary school in Sweden. As there were many applicants for few places, and the number of applicants with top grades was higher than the number of seats specific selection criteria were used when it came to their distribution. The university stipulated that, if two or several applicants had equal merits, the under-represented gender would be given priority in admission. In the selection system, a gender was considered to be under-represented if it made up less than 50 percent of the total number of eligible applicants, and female student applicants far outnumbered males for this particular degree.³²⁰ So, when applicants had equal merits, male students were given priority in accessing the degree. The university gave instructions to the Swedish National Agency for Higher Education to implement this criteria of preferential treatment. The reasons for this were mostly based on the consideration that both sexes should be represented in the labour market, as well as reasons connected to gender balance in the student body.³²¹ This was considered to be a case of unlawful application of a quota system in the access to higher education, in order to promote gender balance. Even though the court accepted that a certain leeway for positive action should exist, it found preferential treatment in this case to be disproportionate. The university at stake had used a “weighed lottery” in the admission process. Since the male applicants were the gender minority, they had a chance that was six times greater than the women of entering that particular veterinary degree and, in fact, as a result, solely men were admitted.³²² The procedure meant that there would be a rotation list of randomly selected male applicants and a list of randomly selected female applicants. The applicants who were first on the list were alternately raffled against each other for a place in the program. The draw gave men a chance to get the place, and this chance was ever greater in inverse proportion to the percentage of male applicants to the program. As the proportion of male applicants to the veterinary program in 2006 and 2007 was approximately 15 percent, men were

pp. 133-134, at <http://is.gd/EhCFPz> (consulted March 20 2011).

320 Idem, Ibidem.

321 Idem, Ibidem.

322 The European Directory of Women and ICT, *Sweden ends use of preferential treatment in connection with university entries*, 2010, at <http://is.gd/uI954N> (consulted 21 March 2011).

therefore given a 85 percent chance of winning the draw against the female candidates. So, the outcome of this particular measure, in this year, was that many female students ended up on the reserve list for the degree in the above mentioned quota group. This fact was found to have such a disproportionate effect on the number of female applicants that were unable to enter the veterinary program, that it was considered to violate anti-discrimination legislation. Section 7 of the Equal Treatment Act was at stake, due to the violation by the university of the prohibition of discrimination based on gender. It was proved in this case that the objective treatment of the female candidates resulted in a clear disadvantage for them. According to this Act, in order for this disadvantage to be considered, it is sufficient that an applicant has less of a chance to be accepted in a degree. Therefore, in order to suffer a disadvantage, a candidate did not necessarily need to be completely excluded. Moreover, the State Anti-Discrimination Committee considered that affirmative action in this case had not been justified. The women won the case and were awarded compensation on an individual basis, under the terms of section 13 of this Act.³²³ The treatment of female candidates was also considered to violate European Equal Treatment Directives,³²⁴ as well as the above mentioned Article 141, (4) of the EC Treaty.

323 European Commission, Directorate-General for Employment Social Affairs and Equal Opportunities, European network of legal experts in the field of gender equality, *Gender Equality Law Review 2010-1*, pp. 133-134, at <http://is.gd/EhCFPz> (consulted March 20 2011).

324 Directive 76/207/EEC, *on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*, at <http://is.gd/wlGmyQ> (consulted 10 May 2011); Directive 2000/78/EC, *establishing a general framework for equal treatment in employment and occupation*, at <http://is.gd/csPcg9> (consulted 10 May 2011); Directive 2002/73/EC, *amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*, at <http://is.gd/lfWvvC> (consulted 12 May 2011);

5.4. Indirect discrimination of men in Sweden under European Union law

The purpose of this section is to apply the considerations approached on a regional level regarding indirect discrimination on the grounds of sex under EU law to the context of Sweden. As was referred in 4.5., indirect discrimination is one of the key concepts in EU anti-discrimination law and it occurs where an unjustified adverse impact is produced for a protected class of persons by an apparently class-neutral action.³²⁵ Therefore, it is possible to draw a parallel with the current situation regarding men's access to higher education in Sweden, in the sense that the State decided to take away the gender element in the quota-systems regarding admission procedures. In other words, this decision, although it seems to be based on a gender neutral criterion, creates a particular disadvantage to men, as they are the under-represented sex in some higher education degrees in Sweden. The alteration of the Higher Education Ordinance is only an apparently a class-neutral action. As the gender imbalance is growing between men and women, this amendment will create an unjustified adverse impact on men. Therefore, this decision by the government is not a class neutral action, as it discriminates the male gender as a class or group. The statistics presented in this thesis show that men are underachieving in some of the classical higher education degrees, not only in Sweden but also on a European level. So, the fact that Sweden took away this possibility of special protection for the under-represented sex can be considered to have created a situation of indirect discrimination for men.

Specifically regarding the concept of adverse impact, according to the case law of the ECJ, the developments of the Race Directive³²⁶ and the Framework Directive³²⁷ for equal treatment in employment and occupation, it is relatively undisputed that it is enough for the adverse impact to be anticipated as a future or “contingent harm” to a

³²⁵ Directive 2002/73/EC of the European Parliament and of the Council, of the 23 September 2002, Art. 2 (2), para. 2, at <http://is.gd/lfWvvyC> (consulted May 12 2011), Ellis, Evelyn, 2005, p. 91.

³²⁶ Directive 2000/43/EC, *implementing the principle of equal treatment between persons irrespective of racial and ethnic origin*, at <http://is.gd/iQHwwu> (consulted May 13 2011).

³²⁷ Directive 2000/78/EC, *establishing a general framework for equal treatment in employment and occupation*, at <http://is.gd/csPcg9> (consulted 10 May 2011).

particular group, in order for it to be considered to occur.³²⁸ Hence, the idea of a future adverse impact is included in the concept of adverse impact itself. This concept is also applicable to the Swedish scenario, whether in the present or in the future, as the effects of gender imbalance are already occurring in the present, with men accessing degrees in lower numbers than in the past, and will continue to occur in the future due to the changes in the legislation, that have reduced the level of protection of this gender.

Specifically regarding the concept of “contingent harm”, according to the ECJ, statistical evidence must be presented as proof, in order to support the claim that a particular group is being the victim of an adverse impact emerging from a specific practice.³²⁹ Moreover, as a matter of principle, when a specific law determines that a certain situation is forbidden it is not usually necessary to wait for actual harm to occur.³³⁰ This “contingent harm” can be considered to occur within the Swedish context, in the sense that men are the particular group that has become the victim of the above mentioned adverse impact, that has emerged from a particular State practice. The practice, in this case, was the decision to amend the Higher Education Ordinance, with the withdrawal of the gender element from the quota systems in the admissions procedures to higher education. Section 4.6. of this thesis, regarding gender equality in higher education on a European level, contains the statistical evidence that indicates this “contingent harm”. Men as a social group are falling back in higher education in the European context, in which Sweden is included. However, in order to determine a situation of indirect discrimination in a court of law, to be able to claim that another group has received a more advantageous treatment, it has often been considered necessary to identify a group of persons with whom to make a comparison.³³¹ Thus, one can consider that in the case of the Swedish University of Agricultural Sciences, developed in 5.3. of this Section, there was not enough reflection on the comparison between men and women regarding the application of the gender element to the quota system at stake. The only comparison that was made was between the disproportionate

328 Ellis, 2005, pp. 91-93.

329 Idem, p. 94.

330 Idem, Ibidem.

331 Idem, Ibidem.

number of women who were left out due to the incorrect application of the quota system, and the men that were admitted to this degree, when they were “under-qualified” in comparison with their female counterparts. The result was, in fact, one of gender imbalance, that tilted in the favour of men and left women out, even when they outnumbered men in terms of qualifications. Even though the decision ruled in favour of the discriminated women, it can also be considered that the issue of the indirect discrimination of men was disregarded, as the gender balance element was not taken into account regarding students of this gender.

Moreover, the fact that this situation occurred in this program and in other degrees in Swedish universities should not have influenced the decision of the State to withdraw the possibility of taking gender into account regarding in the application of quota systems *per se*. The outcome of these court cases for men was less protection than before the amendment of the Higher Education Ordinance.

Regarding the proof of the degree of actual adverse impact in sex discrimination claims, the ECJ has demanded it with different levels of precision.³³² The different cases of indirect discrimination under EU law that were referred to in 4.5. use different parameters in order to determine this concept. The criteria seems to be evolving in what concerns the demand for more detail and more specific statistical elements. For example, in some cases, in order for actual adverse impact to be considered, it is necessary that the measure affects a far greater number or percentage of people of one sex over another. Therefore, the proportion of members of a group of one sex that is affected by the measure must be particularly marked.³³³ However, the exact percentage or number of people affected varies on a case by case level. In some cases, such as the *R versus Secretary of State for Employment* case,³³⁴ it was considered necessary for the statistics to show that there was a considerably smaller percentage of one of the sexes that could comply with the rule in question.³³⁵ These concepts are still somewhat vague

332 Ellis, 2005, p. 96.

333 Idem, Ibidem.

334 ECJ, C- 167/97, *R vs Secretary of State for Employment, ex parte Seymour-Smith*, of 9 February 1999, at <http://is.gd/VjuqxK> (consulted 8 May 2011).

335 Ellis, 2005, p. 97.

and abstract, as “particularly marked” and “considerably smaller percentage” are difficult to define. Moreover, in this case, the time of the creation and application of the rule in question was also taken into account, in accordance with the required percentage of gender balance. In order to consider that there was a case of indirect discrimination, it had to be established that a certain percentage of workers of a particular gender had not been attained in the job at stake. However, the ECJ does not limit itself to statistical evidence at a specific moment in time. Statistical evidence does not necessarily need to be “marked”, but can also be less evident, if it is considered to be persistent and constant over a long period of time.³³⁶ The ECJ leaves the discretionary power to draw conclusions and assess whether the statistics can be taken into account to the national court (i.e. with regard to the significance of the phenomena at stake or the quantities of individuals involved in the groups in question).³³⁷ In the Swedish University of Agricultural Sciences case, it seems that the decision of the court does not comply with the rules of EU law in the Swedish context, namely, with regard to statistical elements regarding gender balance, where the concepts of adverse impact and contingent harm are concerned. It can be considered that the discretionary power that was left to the court in this case gave it too much leeway in the decision-making process, as the court seems to have disregarded any statistics that proved that the gender imbalance still existed. The ECJ also considered that, besides the relevance of the data at the moment when a certain act was adopted, the subsequent data contributing to the assessment of the impact of a certain measure on men and women may also be taken into account.³³⁸ In what concerns the withdrawal of the gender element from the positive action measures from the Higher Education Ordinance, the statistics that prove the growing gender imbalance in higher education in Sweden and in other European countries may also be of relevance for the issue of the indirect discrimination of men.

The ECJ also raises the issue of the moment in time when the above mentioned

336 ECJ, C-226/98, *Jørgensen vs Foreningen af Speciallaeger*, of 6 April 2000, at <http://is.gd/OFWo5n>, (consulted 7 May 2011).

337 Ellis, 2005, p. 97.

338 ECJ, C- 167/97, *R vs Secretary of State for Employment, ex parte Seymour-Smith*, of 9 February 1999, at <http://is.gd/VjuqxK> (consulted 8 May 2011).

adverse impact should be determined, that is also considered relevant in terms of proof. The Court has considered that the appropriate moment to judge the impact of a rule may vary according to the circumstances of each case.³³⁹ For this purpose, EU law must be taken into account, whether the relevant time is the time of the adoption, the implementation or of the application of the national measure in the case in question. For this purpose, the legal and factual circumstances of the time when the legality of a certain rule is assessed (and consequently, the time of its impact) should also be left to the discretion of the national court. According to this line of thought of the ECJ, a parallel can be drawn regarding the actions of the Swedish State and the amendment of the Higher Education Ordinance. This amendment can be considered not to have been carried out at an “appropriate moment”,³⁴⁰ according to the Swedish national context. Moreover, the time of the withdrawal of the gender element of this positive action measure may be questionable in terms of its legality, within the circumstances. The national authority that adopted it, the Swedish government, can be considered to have acted beyond its lawful powers. As a consequence, this amendment can be considered to not be in compliance with EU law, according to the above exposed case law and EU Directive guidelines. In conclusion, there are many grounds on which men can be considered to be indirectly discriminated in certain higher education admissions procedures in Sweden, not only according to the case law of the ECJ, but also according to EU Directives themselves.

5.5. Sweden's “opting-out” on a human rights level

The purpose of this section is to apply the considerations of the United Nations on the right to education and gender equality (3.1.) to Sweden's approach to the human right to higher education regarding quota systems for the under-represented sex. With this analogy in mind, each of the aspects that are considered by the UN will be applied to the Swedish context. Point 5.5.1. will look into point 3.1.1. on the progressive realisation of

³³⁹ ECJ, C- 167/97, *R vs Secretary of State for Employment, ex parte Seymour-Smith*, of 9 February 1999, at <http://is.gd/VjuqxK> (consulted 8 May 2011).

³⁴⁰ *Idem*, *Ibidem*.

the right to education, point 5.5.2. will look at the principle of non-discrimination on the grounds of sex in the right to education (3.1.2.), while 5.5.3. will consider the violation of the human right to education (3.1.3.) and, finally, 5.5.4. will focus on role of universities (3.1.4.). This parallel to the current situation regarding the right to education and gender balance in Sweden serves the purpose of raising the issue of a potential violation of the right to education by the Swedish State.

5.5.1. On the progressive realisation of the right to education

One of the elements that is considered to be included in the “core content” of the right to education is the access to this right on a non-discriminatory basis.³⁴¹ However, the Swedish government seems to have taken the “opting out” route afforded to States through the use of the concept of the progressive realisation of the right to education. Even though the idea of realisation over time is considered to be a flexibility device, it imposes an obligation on States to move as fast and effectively as possible towards the full realisation of the rights in question. The Swedish government seems to have disregarded the concept of “appropriate means”, within the scope of the progressive realisation of the right to education, when it took away the legal possibility of quotas for the under-represented sex in the admissions procedures. As referred to in the Section 3 of this thesis, from an International Human Rights perspective, “Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means (...)”.³⁴² The “means” which should be used to fulfil this obligation are «(...) "all appropriate means, including particularly the adoption of legislative measures.”»³⁴³ Given the established gender imbalance in certain higher education degrees, when the Swedish government amended the Higher Education Ordinance, excluding the possibility of taking gender balance into account as an element of appreciation in university admissions, it did not justify the “appropriateness” of the elimination of this

341 Wilson, *A Human Rights contribution to defining quality education*, United Nations Educational, Scientific and Cultural Organisation, 2004, p. 10, at <http://is.gd/3mVQFo>, (consulted 2 April 2011).

342 ICECSR Art. 13, 2, c), at <http://is.gd/r68kqk> (consulted 2 April 2011).

343 CESCR, General Comment 3, *The Nature of States parties obligations*, para. 3, 1990, at <http://is.gd/McDk0v> (consulted 10 June 2011).

measure. The Swedish State was, in fact, free to decide for itself which means were most appropriate under these specific circumstances, but should have indicated why this specific positive action measure was withdrawn.³⁴⁴ One can go as far as to consider this government decision a deliberately retrogressive measure, and therefore it should have been subjected to more careful consideration and full justification by reference to the totality of the rights provided for in the ICESCR.³⁴⁵ It is deliberately retrogressive in the sense that it was adopted at a time where there was no strong justification to alter the protective measure in question. Men's right to higher education, as well as their right to non-discrimination on the grounds of sex are highly protected and, therefore, any legislative measures against these rights on a national level needed to be based on overriding and urgent circumstances under the terms of the ICESCR. However, Sweden has not assumed the burden of proving these circumstances, and therefore can be considered not to have complied with International Human Rights law.³⁴⁶

Women have been afforded quotas in politics,³⁴⁷ as well as in university admissions procedures³⁴⁸ in several countries for years. More recently, the EU has launched a debate regarding seats for women in the administration boards of companies,³⁴⁹ as well as in academia, in order to fight the gender imbalance among higher education professors and researchers.³⁵⁰

Nonetheless, the gender imbalance in many university degrees is still growing,

344 CESCR, General Comment 3, *The Nature of States parties obligations*, 1990, para. 4, at <http://is.gd/McDk0v> (consulted 10 June 2011).

345 CESCR, General Comment No. 13, *The right to education (Art. 13)*, 1999, para. 45, at <http://is.gd/znwxSj> (consulted 3 April 2011); CESCR, General Comment 3, *The Nature of States parties obligations*, 1990, para. 9, at <http://is.gd/McDk0v> (consulted on 2 April 2011).

346 Idem, *Ibidem*.

347 Krook, 2006, pp. 110-118.

348 «Although affirmative action treats innocent white males unequally, it need not deprive them of any genuine equal opportunity rights. *Provided an affirmative action plan is precisely tailored to redress the losses in prospects of success [by African-Americans and women] attributable to racism and sexism, it only deprives innocent white males of the corresponding undeserved increases in their prospects of success.... [R]emedial affirmative action does not take away from innocent white males anything that they have rightfully earned or that they should be entitled to keep.*» see Fullinwider, Robert, *Affirmative Action*, 2010, par. 9, at <http://is.gd/F3TvyU> (consulted 14 April 2011).

349 EU Business, *EU launches debate on quotas for women in boardrooms*, at <http://is.gd/RDOWED> (consulted 15 April 2011).

350 Numhauser-Henning, 2006, pp.11-22.

leaving men out of the race to higher education. Whatever the explanations that may be put forward regarding this situation of the underachievement of men on an academic level, there is an objective gender imbalance that needs to be tackled.

Moreover, the law did not fulfil the function to predict potential “damage” nor did it attempt to prevent it. It also did not correct what was actually unlawful. Besides the damage that already existed with regard to men, the need to prevent greater gender imbalance as a consequence of these legal alterations was also ignored. Swedish law should still use the necessary measures (i.e. quotas) in order to prevent the existing imbalances from getting worse, until the point in time where this society is able correct the imbalance without the aid of this kind of positive action measure. Due to the fact that gender balance in higher education remains to be achieved in Swedish society, the law should not be changed, as it is depriving the under-represented sex of an extra measure of protection. So, the future of women as a social group in Sweden may also be compromised by this alteration, as this decision of the Swedish government to take away the gender balance element from higher education admissions may revert against them too. For instance, if the gender imbalance occurs on the female side in the future, there will be no extra protection for women either.

5.5.2. On the principle of non-discrimination on the grounds of sex in the right to education

Even though Sweden is bound by the general prohibition against discrimination on the grounds of sex in Article 2 (2) of the ICESCR, its government can be considered to have disregarded the interpretation by the CESCR of the normative content of Article 13 with in relation to the element of “accessibility” to higher education.³⁵¹ As within the jurisdiction of the State educational institutions and programmes have to be accessible to everyone, without discrimination,³⁵² the elimination of gender quotas as a positive action measure can be considered to indirectly discriminate men, as a group, by limiting

³⁵¹ CESCR, General Comment No. 13, *The right to education (Art. 13)*, 1999, para. 6, at <http://is.gd/znwxSj> (consulted 3 April 2011).

³⁵² Idem, para. 6 (b).

their chance to access higher education.

Non-discrimination should not only be based on the idea that education must be accessible to all, but also, in particular, to the most vulnerable groups of society, in law and fact.³⁵³ Moreover, the adoption of temporary special measures intended to create *de facto* equality for men and women (i.e. quotas) is not considered to be a violation of the right to non-discrimination with regard to education. However, these temporary special measures are only allowed as long as they do not lead to the perpetuation of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved.³⁵⁴ Furthermore, as has already been referred above, the prohibition against discrimination is not to be subject to progressive realisation from an International Human Rights perspective, as it is to be considered as fully and immediately applicable to all aspects of education. If one applies this principle to the Swedish context, there is an objective disregard for this fact, as the principle of non-discrimination on the grounds of sex in education cannot be subject to progressive realisation. Therefore, it also cannot be submitted to a retrogressive measure of any kind, as these exist within the scope of progressive realisation. According to the data and statistics referred to in this thesis, *de facto* equality between men and women in the area of higher education is still far from being achieved, not only at the level of the EU but also in Sweden. So, quotas as a positive action measure for reserving seats for men in certain university degrees in Sweden can be considered not only increasingly necessary but also justified.

In conclusion, as the prohibition against discrimination is not subject to progressive realisation, when the possibility gender quotas for the under-represented sex in higher education was withdrawn in Sweden, men can be considered to have been victims of indirect discrimination. The fact that the Higher Education Ordinance was amended before the achievement of gender balance in certain higher education degrees may be an indicator that men, as a group, have not been given equal treatment or

353 CESCR, General Comment No. 13, *The right to education (Art. 13)*, 1999, para. 6 (b), at <http://is.gd/znwxSj> (consulted 3 April 2011).

354 *Idem*, para. 32.

opportunities to those of women, in what concerns affirmative action measures.

Furthermore, General Comment 28 specifically highlights measures of “empowerment” for women, being quotas one of the “strong measures” that can be considered to lead to this “empowerment” in a faster and more direct manner. So, why are these measures not considered to have the same purpose in Sweden regarding men? It seems that the role of men in society is changing, and not enough attention has been given to what can be considered a social “trend” that involves men's under-achievement in the “classical” areas of academia.³⁵⁵ So, besides being the victims of discrimination in their right to education on the grounds of sex, men are also being disregarded in Sweden if one applies the above concept of “empowerment” to their social group, as they can no longer benefit from quotas, that are considered to be a “strong” positive action measure.

5.5.3. On the failure to comply with the obligation to protect in higher education

Within the framework of the right to education, the Swedish State can be considered to have violated its obligation to protect through the subjection of men to *de facto* discrimination. The *de facto* discrimination of men can be considered to be due to the State's failure to acknowledge and address discrimination, in the case of the withdrawal of the possibility for gender quotas in admissions procedures. This discrimination can be considered to take place on a societal level, regarding men's careers, due to the reduction of the horizons of young men in the access to higher education. Another reason for considering that men were the victims of *de facto* discrimination is the fact that the State failed to recognise and address the existence of obstacles to boys' academic achievement.

According to United Nations General Comment 3, a State's failure to meet the minimum core obligation of the “progressive realisation” of ESCR would be a violation

³⁵⁵ Numhauser-Henning, 2006, pp.11-22.

of its obligations under the respective Covenant.³⁵⁶ The Limburg Principles,³⁵⁷ and the Maastricht guidelines³⁵⁸ can be applied to particular cases and violations. Taking the obligation to protect into specific consideration, it requires States to prevent violations of such rights by third parties.³⁵⁹ Failure to perform this obligation constitutes a violation of the respective protected rights. Also, the Maastricht Guidelines recognize that economic, social and cultural rights impose obligations of conduct or result, and the right to education necessarily entails the obligation of “result”.

In the case of Sweden, the application of quota systems for the under-represented sex in admissions procedures to university led to a result of gender imbalance. If one goes back to the case of the Swedish University of Agricultural Sciences, where women were left out of some higher education degrees, the failure to comply with the obligation of “result” by the State is evident. From an International Human Rights perspective, with the application of that specific quota system, the university created exactly the opposite “effect” to the desired gender balance among the candidates. The practical outcome of these measures led to the obvious discrimination of the sex that was not under-represented (women), while also failing to accomplish the objective of promoting gender balance for the under-represented sex (men). Moreover, within the scope of International Human Rights, certain groups, particularly those that are already vulnerable and underprivileged, are more likely to suffer disproportionate harm in this respect. These groups are considered to include, among others, women.³⁶⁰ However, this principle should also be applied to men, that can also be considered a particularly vulnerable group in the Swedish context, due to the fact they are underachieving in different areas of education.

356 CESCR, General Comment 3, *The Nature of States parties obligations*, 1990, para. 10, at <http://is.gd/McDk0v> (consulted on 2 April 2011).

357 UN Commission on Human Rights, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 1987, at <http://is.gd/assp2z> (consulted 6 April 2011).

358 ICJ, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 1997, at <http://is.gd/3otDIW> (consulted 7 April 2011).

359 *Idem*, para. 6.

360 *Idem*, para. 20.

In the light of the Limburg principles and the Maastricht guidelines, a violation of the obligation to protect by the State in the area of the right to education will occur if “The educational opportunities and facilities available to girls and women are inferior to those provided for boys and men.”³⁶¹ This situation should also be applied when educational opportunities are made less available to boys. Thereby, the removal of the possibility of a gender quota in higher education can be seen as one less “educational opportunity” for men as the under-represented sex, as it reduces their chance of access to certain university degrees.

So, the issue remains as to whether or not the Swedish government is, in fact, violating its obligation to protect, when taking away the possibility of seats for the under-represented sex. Is it not failing to address obstacles to boys academic achievement?³⁶² The CESCR Committee offers a short list of likely violations, which in many respects mirrors the core minimum elements of the right to education, whereas “Violations of article 13 include: the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education; the failure to take measures which address *de facto* educational discrimination;(…) the failure to maintain a transparent and effective system to monitor conformity with article 13(1); (…) the failure to take ‘deliberate, concrete and targeted’ measures towards the progressive realisation of secondary, higher and fundamental education in accordance with article 14(2) (b)-(d);(…)”.³⁶³

In conclusion, Sweden can be considered to be failing to comply with its international human rights obligations through these three types of violations. Firstly because, by amending the Higher Education Ordinance, the State introduced an alteration in the legislation that indirectly discriminates men in the field of education. Secondly, because the State failed to take measures which address the *de facto* discrimination of men. Men are, in practice, discriminated by the lack of action of the

361 CESCR, *Violations of the Right to Education*, 1998, para. 24, at <http://is.gd/W187he> (consulted on 5 April 2011).

362 Idem, *Ibidem*.

363 CESCR, General Comment No. 13, *The right to education (Art. 13)*, 1999, para. 59, at <http://is.gd/znwxSj> (consulted 3 April 2011).

State in addressing the issue of their *de facto* discrimination in their access to higher education. This also means that Sweden is not effectively monitoring if everyone is being afforded the right to education. Finally, the removal of the possibility of quotas as a positive action measure can also be considered a failure to take a targeted measure towards the progressive realisation of the right to higher education with regard to men, as quotas are a stronger type of positive action measure, unlike the “softer” goals regarding education.

5.5.4. On the role of universities

Do universities in Sweden have too much autonomy in the application of positive action measures? If this is the case, is this excessive autonomy in the application of quota systems by universities the reason for the results of gender imbalance upon their implementation? One possible solution would be that quota systems could be determined by the government, on a standard and uniform basis, for all universities, so that the application of gender quotas it is not left in the hands of each higher education institution, on an *ad hoc* basis.

Moreover, is there a possibility that, in the face of the several court cases regarding the discrimination of women in admissions procedures in Sweden, the sued universities decided to stop applying gender quotas due to political and social pressure? On the other hand, did the government's decision to amend the Higher Education Ordinance, with the elimination of the reference to gender when addressing positive action measures also occur due to social pressure because of those very court cases?

The Limburg principles expressly lay down that States are accountable both to the international community and to their own people for their compliance with the obligations under the ICESCR.³⁶⁴ Ultimately, it is the Swedish State that has allowed for this excessive leeway in the implementation of quota systems by its universities, and

³⁶⁴ UN Commission on Human Rights, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 1987, para. 10, <http://is.gd/assp2z> (consulted 6 April 2011).

therefore is the State that is to be held accountable for potential human rights violations that occur as a result of its government's decisions. According to these principles, even though a margin of discretion is afforded to States in the selection of means for complying with these obligations,³⁶⁵ a State will be in violation of the Covenant, *inter alia*, if, among other obligations, it fails to “ (...) implement without delay a right which it is required by the Covenant to provide immediately (...)”³⁶⁶ or if “ (...) it applies a limitation to a right recognized in the Covenant other than in accordance with the Covenant;”³⁶⁷ or “ (...) it deliberately retards or halts the progressive realization of a right,(...)”.³⁶⁸ Considering the above, firstly, the Swedish State can be considered to have failed to implement “without delay” men's right to education on a non discriminatory basis, as the Higher Education Ordinance was amended in a way that goes against the promotion of gender balance in admissions. Secondly, one can consider that, with the withdrawal of the possibility of the gender quotas, the State applied a limitation to men's right to education, for reasons not in accordance with the ICESCR. Moreover, this would involve a limitation to the equal rights of men to the enjoyment of the right to education set forth in Article 3 of the Covenant, as the alteration of the Ordinance goes against the obligation of the State to move as fast and effectively as possible in order to enable men's access to higher education. Thirdly, this amendment can also be seen as a means of stalling the progressive realisation of men's right to education. If, in fact, this is the case, an issue regarding the separation of powers between the judicial, the legislative and the executive powers in Swedish democracy can also be raised. Was the motivation for the amendment of the Ordinance based on the fact that the sued Swedish universities did not apply the gender quota scheme with the aim of achieving the final result of gender balance? Women were, in fact, excluded from university in these cases, but this fact is not synonymous to the unlawfulness of the quota system itself. Therefore, there is no reason for the gender element of this positive

365 UN Commission on Human Rights, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 1987, para. 71, <http://is.gd/assp2z> (consulted 6 April 2011).

366 *Idem*, para. 72.

367 *Idem*, *Ibidem*.

368 *Idem*, *Ibidem*.

action measure in question should be withdrawn from the Ordinance.

6. Conclusion

Ultimately, this thesis has attempted to answer whether or not men are being discriminated from a legal and social perspective, where their educational opportunities are concerned. Therefore, behind this discrimination of men in the law, one may consider a previous underlying social issue. The trend for male underachievement on an academic level may be the result of the “gendering” of boys in today's society. When focusing specifically on academic performance and achievement, it seems that culture plays a part in the stereotyping of the roles of men and women, as even empirical research into sex differences is often highly influenced by politics, and may be manipulated.³⁶⁹ As gender does not exist outside culture, even the most simple connections between sex and academic performance are necessarily linked to social context. Moreover, culture attributes certain behaviours to certain genders and assigns values to those behaviours. According to some sociological studies, gender segregation is “rampant” in schools, as it is indoctrinated by parents, teachers and peers.³⁷⁰ Is it not society that expects boys to develop characteristics of dominance, such as independence, self-reliance, competitiveness and leadership?³⁷¹

Gender is, therefore, a largely social construct.³⁷² We live in a culture that not only celebrates differences but also looks for them, and biology easily becomes a perfect justification for discrimination.³⁷³ Where gender differences are concerned, that the fact that society constructs two separate gender cultures, that separates the sexes, disadvantages both females and males, and this fact needs to be strongly resisted, not only by means of the law, but also by all sectors of society.³⁷⁴

Female representation in many areas is considered crucial and necessary for a fair

³⁶⁹ Levit, 1998, pp. 21-22.

³⁷⁰ Idem, p. 44.

³⁷¹ Idem, p. 47.

³⁷² Idem, pp. 62-63.

³⁷³ Idem, p. 63.

³⁷⁴ Idem, p. 15.

and equal society. Therefore, male representation in those same areas should also be seen to be necessary. There have been quotas for women in politics for years, and currently quotas for this gender are being proposed in administration boards on an EU level, as well as in academia. So, in the same way as a society with no female lawyers, doctors or scientists is considered imbalanced, the same should apply if there is a lack of men in these areas. Moreover, due to the developments in the law, there is no reason to wait for the gender imbalance between men and women in higher education to be aggravated further in order to counteract it.

In regard to Sweden specifically, the adverse impact on men caused by the withdrawal of quotas for the under-represented sex in admissions to higher education will be progressively evident in the next few years. The gender element of positive action measures such as quotas should therefore be reinstated into the Higher Education Ordinance, as well as the ethnicity element of the same provision. In this way, disadvantaged and vulnerable groups within the student population in Sweden will not be denied this opportunity for extra protection in the law. The problems regarding the discrimination of men and women in the application procedures would be solved by a correct and proportionate application of the quota systems by the respective universities. If there were a greater degree of governmental control, those arbitrary results would be avoided. In Swedish democracy, if the government is truly independent in its evaluation of the necessity for gender balance, then the need to change the Ordinance back to its previous more protective version becomes evident. Under its human rights obligations, the government should also effectively monitor whether or not all students are being afforded their right to education.

So, is there not a "special interest" that justifies quotas for gender balance in Sweden at the moment? Why are men's interests not considered sufficiently important for them to be afforded special protection in higher education? Is there, in fact, an issue of gender bias that is disregarding men as a vulnerable social group? In this case, men clearly have not been given equal treatment or opportunities to women, in what concerns affirmative action measures. It is also clear that the Swedish State is failing to recognise and address the obstacles to boys' academic achievement, as the removal of

the possibility of a gender quota in higher education can be seen as one less “educational opportunity” for men as the under-represented sex, that reduces their chance of access to certain university degrees.

Furthermore, quotas in admissions to higher education don't necessarily need to be in a 50 percent proportion for each sex. They can be proportional to the population that attempts to access the respective degrees instead. In this way, true balance between the genders would be reflected in student numbers and, hopefully, in the labour market. If International Human Rights law, European law, and Swedish law all consider gender balance in labour and education important when women are the under-represented sex, then these legal systems should give the same importance to gender balance, when the under-represented sex is men, at the risk of their discrimination, on a direct and indirect level.

On the other hand, a State can decide for itself what is the most appropriate way of achieving gender balance. It is not forever bound by a previous decision to allow preferential treatment. In fact, a State has discretionary power to act in this area, but there are guidelines given on an International Human Rights level and on an EU regional level that should bind States not to withdraw protective measures for the under-represented sex before gender balance has been attained.

Sweden chose well in applying quotas as a positive action measure, but the application led to negative results. Moreover, the government must not base its decisions to amend laws such as the Higher Education Ordinance on court case results that tend to influence public opinion. All the public powers seem to be "singing the same song", which sounds like lack of independence in a democratic society. The fact that the law was changed in Sweden in the sequence of the court cases regarding ethnic quotas and gender quotas, respectively, shows that there may be a lack of independence among the democratic powers in Swedish society, namely, between the executive, the legislative and the judiciary. Regarding universities, the fact that they are subject to political pressure raises the issue of their autonomy towards implementing government policies. On the other hand, the excessive leeway given by the government to the universities may also be questionable, in the sense that the *ad hoc* application of quota

systems lead to gender discrimination of both women and men. So, the excessive autonomy given to the universities by the government may be considered to be contrary to human rights. Therefore the government should be held accountable for its actions.

It is true that quotas are not the ideal positive action measure, as they are the most “aggressive” form of creating equal opportunities, and can be seen to be an artificial way of providing gender equality. There is also a danger of creating a nightmare social scenario where there are quotas for every single group in society. Moreover, from the perspective of individual rights, every time you give a seat to someone due to a quota, you can be considered to be taking away this possibility from someone else, discriminating the person that was left out because of their gender, ethnicity or other factors in the process. Nevertheless, Sweden would better fulfil its international obligations if it did not regress on positive action measures that were pioneering, not only on a European level, but also on a human rights level, as it stands as a country which is notable for its democratic and egalitarian society.

In conclusion, as discrimination on the grounds of sex will not cease to exist in the near future, both men and women would benefit if quotas for the under-represented sex are maintained, not only within the Swedish context, but also at the level of European Union Law and International Human Rights law.

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