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Nothing to Fear? Equal Representation in the Scottish Parliament and the Threat of Legal Challenge
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Introduction

The aim of this article is to assess the validity of claims that the use of positive action measures as a means of redressing past gender imbalance within national political structures would be contrary to UK and/or EC anti-discrimination provisions. This will be attempted by an exploration of the historical factors relating to the present under-representation of women within formal political structures in the UK. The use of positive action measures as a viable means of redressing the present gender imbalance will be assessed. Consideration will then be paid to the legal arguments previously advanced both for and against the adoption of such measures. Relevant submissions have centred around the anti-discrimination legislation of the UK as well as the equal treatment provisions which exist under European Community law and so the relevant statutory provisions and resulting case law within both jurisdictions will be examined.

The promotion of positive action has found favour within both international law and European social policy, and the relevant provisions and initiatives will be considered within the context of increased participation for women in the political decision-making process.

The background to this analysis is the formation of the constitutional framework within which the Scottish Parliament will be created, but the arguments presented here have far-reaching implications and could be applied with equal validity to the embryonic debate concerning regional assemblies in

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England and to the well-established discourse regarding women’s increased participation in the labour market.

**Background**

**Scotland's Parliament and the 50:50 Campaign**

In July 1997 the Government published the white paper which set out the proposals for the creation of the new Scottish Parliament. Among other electoral arrangements was a commitment that attempts would be made to facilitate the promotion of equal opportunities within the new Parliament.²

This commitment arose largely as a result of the Scottish Constitutional Convention’s Electoral Agreement which was endorsed in 1995 in which the Labour and Liberal Democratic Parties, as members of the Convention, pledged their acceptance of the principle of equal numbers of men and women in Scotland’s Parliament.³

Despite their 'electoral contract', the Labour Party and the Liberal Democrats have adopted opposing positions based on very different interpretations of the original agreement. The Labour Party is committed to a system of 'twinning' - whereby:

'constituencies will be paired for the purpose of selections, with each pair of constituencies selecting one man and one woman. The pairing will be on the basis of geography and 'winnability' - eg, neighbouring constituencies with similar electoral majorities'.⁴

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² 'The Government is keen to see people with standing in their communities and who represent the widest possible range of interests in Scotland putting themselves forward for election to the Scottish Parliament. In particular the Government attaches great importance to equal opportunities for all - including women, members of ethnic minorities and disabled people. The Government urge all political parties offering candidates for election to the Scottish Parliament to have this in mind in their internal candidate selection processes.' White Paper, *Scotland's Parliament*, The Scottish Office, July 1997, Cm 3658 at 8.5.


⁴ *Women’s Representation Update* - Report to NEC Women’s Committee, 8 May 1998.
The Liberal Democrats, on the other hand, took the view that in order to combat the threat of legal challenge, the Sex Discrimination Act 1975 would have to be amended. In the absence of such amendment at present, the local groups within the Party will select candidates regardless of gender. In the event that a change to the law is effected, the Liberal Democrats would opt for 'zipping', whereby candidates would be placed on the party's regional lists for the elections alternately, by gender. One half of the lists for each region would be headed by male candidates, the other half by women.

Opinion regarding the level of priority which should be given to a commitment to gender balance has also been the subject of disagreement within the other main political parties in Scotland. At their party conference in June, the Scottish Nationalist Party narrowly voted (282 votes to 257) against the adoption of a 'zipping' system. The Scottish Conservative and Unionist Party, which is completely opposed to any 'artificial' selection process, has chosen the introduction of non-gender-specific 'good practice' guidelines as a possible means of boosting the number of women selected as prospective MSPs - this despite a report commissioned by the Party's leadership and written by former Cabinet Minister Virginia Bottomley which recommended the inclusion of a woman on every selection shortlist.

What has emerged, despite the Government's attempts to initiate cross-party consensus in relation to the gender balance of the new Parliament, is a picture of fragmentation on this issue.

Historical perspective: under-representation

The traditionally low level of women's representation within national politics in Scotland is well illustrated by the present situation: 17% of members of Parliament for Scottish constituencies are women, representing 12 out of a possible 72 seats. Yet, in terms of historical comparison, this is a record-breaking figure. Until the Representation of the People Act 1918 all women were ineligible to vote or stand as parliamentary candidates. The introduction of votes for women was originally subject to an age restriction so

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5 The Times, 6 October 1997.
6 The Times, 3 May 1997.
that only women over 30 were able to vote and only women over 21 could stand as candidates. It was not until 1928 that women won equal voting rights (ie from the age of 21) with men. Only five women held Scottish seats in the inter-war period.8

The general under-representation of women in Westminster has continued to the present day, despite political activity and participation by women in other fora, most notably at community level. However, as Levy has observed, 'low levels of women's representation have gone hand in hand with low levels of interest in improving women's representation.'9 Reasons for the under-representation of women in public life have been described by Brown as being 'varied and inter-related in complex ways'.10 However, certain underlying themes emerge from an analysis of the situation in the UK and from studies of other European countries. Randall has identified 'supply and demand factors' in her study of the UK, the former being subject to certain constraints due to women's traditional domestic role and the latter restricted in terms of access for women due to institutionalised exclusionary factors.11

Leijenaar and Mahon, in their analysis of national elections in European countries, have asserted that there is no significant gender gap in turnout figures for elections or significant differences in voting preferences of men and women, although, where the option exists, women vote more often for women candidates.12 The under-representation of women in national parliaments, although subject to variation in cross-national comparisons, is still a Europe-wide phenomenon. The arguments advanced by Leijenaar and

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7 Representation of the People Act 1928.
9 Ibid, p 59.
Mahon by way of explanation divide into two categories: 'individual characteristics' and 'institutional factors' which, in many ways, relate back to the distinction between supply and demand identified by Randall.

In a report published by the European Commission in 1997,¹³ the United Kingdom, Greece and France emerged as the three European Union Member States with the lowest percentages of women within their national parliaments. The report identified certain barriers to women's political representation which included the assignation of different sex roles to men and women through socialisation and education, as well as situational constraints such as the division of labour within the family and political culture.

Despite the provision of de jure equality in the political arena, the attainment of de facto equality in terms of absolute numbers (ie 50:50) has never been achieved in any European Union Member State. There is a wide divergence in terms of percentages of women in national assemblies across the 15 countries with Sweden, Denmark and Finland hovering around the 30-40% level and Greece at under 10%,¹⁴ which cannot be easily explained.¹⁵ The relatively high numbers of women in the national assemblies of the Scandinavian countries is partly attributable to the use of legally enforceable quota schemes. For example, changes to the Finnish Equality Act were introduced in 1995 in order to ensure the increased participation of women in public bodies.¹⁶ However, the Scandinavian countries have historically returned more women as members of their national parliaments than southern European countries and the ready adoption of such legal intervention illustrates the perception within those countries that equal representation in national politics is a desirable goal.

In the UK this perception has not found support from all quarters and women in political life have come under close scrutiny as theorists have attempted to develop arguments either in favour of or against means of

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¹⁴ Ibid.


¹⁶ Ibid p 83.
increasing participation based on the likely contribution of higher numbers of women to public life and policy-making. Such posturing arises out of the assertion that women speak with 'a different voice'. The assumption is that women policy-makers would give priority to so-called 'women's issues' such as improving the provision of childcare and other 'family friendly' concerns. Norris considered the validity of such assumptions in the context of responses to the British Candidate Study 1992 and found that, although women politicians tended to give stronger support to issues of women's rights and social policy issues than their male counterparts, the gender gap between politicians was marginal, with membership of a particular political party providing the strongest explanation of divisions between individual members of parliament.

In her work on the relative merits of quota schemes, Squires questioned the validity of such schemes as a mechanism by which the democratic process can be enhanced and found that:

"Whilst most studies do indicate that a critical mass of women within a parliament may make a difference to policy attitudes and political procedures, the research has yet to prove conclusively that the presence of women does make in itself a significant difference."

Such analyses do not provide compelling evidence in support of the notion that increased numbers of women in Parliament would lead directly to improvements in women's lives in general. However, the assertion that women must earn the right to enter Parliament on a ticket for women's interests may be something of a red herring in this whole debate. Indeed the assumption that every woman in Parliament should somehow represent the collective needs of


18 op cit note 16.


20 Ibid p 75.
women in the wider society presents such individuals with a far larger caseload than that generated by an average constituency, as well as inferring that 'women' are a homogeneous group with similar or identical interests and preoccupations.²¹

The most forceful argument in support of increased participation by women in national politics centres around the notion of representative democracy. If women do indeed have different concerns and priorities from men which, given their reproductive function and traditional role as the main bearers of domestic responsibility would hardly be surprising, their increased participation in the political decision-making process may offer important subsidiary benefits. However, the main focus in this debate should surely be on the past exclusion of women as much as on the proposed inclusion. The very foundations of the so-called democratic process must be called into question when large numbers of women are excluded from that very process, albeit in covert or indirect ways, but expected to live their lives according to the rules emanating from it. Such exclusion or non-participation has given rise to a 'democratic deficit'. As Norris²² points out, such claims to representative democracy are not new but have arisen in recent years in contemporary contexts, namely gender and ethnic representation rather than, as in the past, in terms of class interests. Representative democracy cannot be achieved unless all citizens, regardless of gender, race or class have a truly equal opportunity to participate in politics.

The Way Forward - Achieving Equality

Understanding the reasons for the traditionally low levels of women representatives across all political parties at Westminster calls for something of the 'chicken and egg' analogy: the structures inherent within the present arrangement of political life are incompatible with women's dual role in both domestic and professional contexts, as well as being unattractive to women

²¹ For an illuminating discussion on the perceptions of current Members of Parliament towards the likely contribution of increased numbers of women in the Scottish Parliament see Hansard Debates for 27, Feb. 1998 from column 640.

²² op cit note 16 p 92.
due to their perceptions of the institutions as male-dominated and exclusionary. As Lovenduski has observed:

'Feminist critics of British politics agree that its organisations and structures institutionalise the predominance of particular masculinities, thereby empowering and/or advantaging certain men over almost all women and some men. Such biases are both causes and effects of women's political under-representation, a likely consequence of which is that policy makers are less attuned than they would otherwise be to women's interests.'

It was recognised by the subscribers to the cross-party electoral agreement that the establishment of the new Scottish Parliament would offer a unique opportunity for change. To effect real change, what is needed is an increase in the numbers of women present so that change can occur from the inside out.

The means of achieving that particular end have been the cause of much controversy, not just in the context of political participation but in other areas of public life, such as within certain occupations/sectors of employment and at certain levels within occupational hierarchies. In the employment context, legal provisions are available which are designed to contribute to the elimination of discrimination on the grounds of sex. These provisions will be considered in detail later in this article in the ironic context of the threat that they may pose to the promotion of positive action designed to increase the participation of women within the Scottish Parliament. What such provisions have in common with similar attempts at legal intervention within the jurisdictions of other Western industrialised economies, is their reliance on the equal opportunities model which, given the historical under-representation outlined above, is subject to certain limitations in this context. As O'Donovan and Szyszczak have observed:

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24 eg, the USA, Germany and European Community law in general.
'Equality of opportunity in its full sense requires a fair, rational and appropriate competition for goods and benefits. This means that competitors must have an equal starting point where possible...For women to compete equally with men, both sexes must start equally.\textsuperscript{25}

It is this notion of the 'level playing field' that has rendered the promotion of the equal opportunities model ineffective as a means of redressing the gender imbalances that have arisen out of historical factors but which still pervade many areas of traditional male dominance. To provide equal (the same) treatment to individuals or groups who are, due to past subordination, not at equal starting points, is often to reinforce the inequalities that already exist.

Dworkin has distinguished between \textit{equal treatment} and \textit{treatment as an equal} arguing against the former and in favour of the latter as a fundamental means of recognising the differing needs of people:

'There are two different sorts of rights ... The first is the right to equal treatment which is the right to an equal distribution of some opportunity or resource or burden. Every citizen, for example, has the right to vote in a democracy ... The second is the right to treatment as an equal, which is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else.\textsuperscript{26}

In Dworkin's analysis, the emphasis is placed on the result achieved, that is the result of the treatment received, rather than the treatment itself. Outcomes are stressed which result from whatever inputs are necessary depending on the needs of the individual(s) concerned:

'If I have two children and one is dying from a disease that is making the other uncomfortable, I do not show equal concern if I flip a coin to


decide which should have the remaining dose of a drug. This example shows that the right to treatment as an equal is fundamental, and the right to equal treatment derivative. In some circumstances, the right to treatment as an equal will entail a right to equal treatment, but not, by any means, in all circumstances.\textsuperscript{27}

The equal treatment model is useful at times as a subsidiary measure, or as a means to an end, but cannot be effectively deployed in isolation as a mechanism for the achievement of treatment as an equal. This is particularly true if the parties involved are unequal due to historical factors and if the relationship operates within institutions which are based on such inequalities and serve to uphold and reinforce them. This line of argument is all the more relevant when applied to the present context - the increased participation of women in political structures. As Cynthia Cockburn has observed in her study of men's resistance to sex equality in organisations:

'Equality of opportunity involves ensuring that women have no doors closed to them that are open to men. If, however, women's past history and present circumstances prevent them from taking up the opportunities offered or competing on equal terms in the use of them, equality of results will never be achieved. Special actions are needed discriminating in favour of women as a sex if women are to make progress towards equality of outcomes.'\textsuperscript{28}

This is the theoretical foundation on which the argument advanced in the rest of this analysis will be based. It is a feminist perspective which, at times, proposes the use of radical means, but it is based on an historical analysis and looks towards a democratic outcome. Its main premise is that temporary measures should be introduced in order to increase the numbers of women entering the Scottish Parliament. Such measures could take the form of 'quota schemes' supported by amendments to existing legal provisions.

\textsuperscript{27} Ibid. Dworkin's application of utilitarianism in the context of reverse discrimination provides a useful distinction between those entitled to an institutional right, which may be denied them due to positive discrimination, and those who are not entitled to this type of right - see the analysis applied to the DeFunis and Sweatt cases throughout this chapter.

Women's increased participation would provide the necessary culture change so that, on removal of such mechanisms, we would see a parliament which would be more representative of society as a whole. The elements of political life which are ripe for change by way of this process include improved working hours, the introduction of family friendly policies and a move away from the more boorish/macho aspects of parliamentary debate which arise out of the adversarial approach - positive advancement in such areas would surely benefit male as well as female politicians. The advantages to be gained by society at large would be the advancement of policy designed to ensure a better deal across a range of issues for women from all walks of life.

Legal Interventions

The role of affirmative action

Current UK legislation prohibiting discrimination on the grounds of sex in the fields of employment, education and the provision of services is based on the equal opportunities model. Section 1 of the Sex Discrimination Act 1975 outlaws direct and indirect discrimination against women whilst section 2 of the Act applies such prohibition to discrimination against men. By outlawing all forms of discrimination on the grounds of sex or marital status, the Act effectively prohibits reverse discrimination which arises 'where a less-qualified applicant may be preferred to a better-qualified candidate on account of race or sex'.

The scope of this legislation, restricted as it is to employment, education and the provision of goods and services, has caused some commentators to question whether the selection of parliamentary candidates by political parties is actually within its ambit and this pertinent question is considered later. However, let us proceed for now on the assumption that the legislation does apply to the situation in hand. Gwyneth Pitt, in her essay on the justification of reverse discrimination, makes the important distinction between reverse discrimination (as defined above) and positive or affirmative actions which

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'refer to programmes designed to eliminate invisible as well as visible discrimination and to encourage under-represented groups to reach a situation where they are more likely to be the best candidates for a post or place.\(^{30}\) As Pitt acknowledges, the distinction can become blurred in practice when a positive action programme adopts reverse discrimination as part of its strategy.

When positive action does not involve the selection of a less-qualified candidate, it is lawful in the UK and has, in the past, been actively encouraged by those directly involved in the administration of sex discrimination law.\(^{31}\) This distinction is particularly important in the current context, given the fact that the selection of prospective parliamentary candidates is not generally based on rigid or preordained selection criteria but on a more general assessment of suitability for political life in terms of what the candidate has to offer.

Pitt concludes her analysis of the merits and demerits of preferable treatment by submitting that, in considering individual cases, the American usage of exclusionary and inclusionary purposes should be adopted, 'measures taken to bring groups into the mainstream of society and industry are acceptable; discrimination to keep them out is not.\(^{32}\)

This treatment would appear to lend support to measures designed to increase the participation of women in political life. However, the causes and effects of past exclusionary practices appear to have taken a back seat in this debate in favour of a literal application of both UK and European Community legal provisions which were originally introduced to counter discrimination faced by women primarily in relation to employment. These provisions have been interpreted in the context of positive action measures both by the Industrial Tribunal in the UK and by the European Court of Justice and it is necessary to examine these decisions and their possible implications for the selection of prospective parliamentary candidates.

\(^{30}\) op cit p 282.


\(^{32}\) Ibid at 297.
Women-only shortlists and the Jepson case

In 1993, under John Smith's leadership, the Labour Party declared its commitment to a policy of adopting all-women shortlists of candidates for the General Election in half the seats within marginal constituencies, new constituencies or where a sitting MP was retiring. This policy was endorsed by two Party Conferences (in 1993 and 1994) with the aim of doubling the number of women Labour MPs from 39 to around 80 in the forthcoming election. The policy immediately attracted controversy from within as much as from outside the Party.  

The introduction of women-only shortlists arose largely as a result of a recognition that such measures might increase the much needed 'women's vote' and was the product of the activities of the women's organisation within the Party under the auspices of the NEC Women's Committee chaired at that time by Clare Short MP. The Party had already introduced a quota target of 40% women at every level of its internal organisation in 1989 but, as Clare Short has written:

'It was when we came to parliamentary selection that the squeals and howls became fast and furious. It seems that the conservative elements in our party do not mind women being branch officers or even members of the NEC but if they ask for equal representation in the House of Commons then things have gone too far!'  

In January 1996 two male applicants who had not been considered for selection as Labour Party candidates in three constituencies took their case to an Employment Tribunal in England claiming unlawful discrimination on the
grounds of sex contrary to s 13 of the Sex Discrimination Act 1975.35 Section 13 provides:

'It is unlawful for an authority or body which can confer an authorisation or qualification which is needed for, or facilitates engagement in a particular profession or trade to discriminate against a woman - (a) in the terms on which it is prepared to confer on her that authorisation or qualification, or (b) by refusing or deliberately omitting to grant her application for it.'

The Act further defines the terms 'authorisation' under s 13(3) as including 'approval'; 'profession' under s 82 as including 'any vocation or occupation'.

Jepson and Dyas-Elliott were successful in obtaining their stated objective in this case, namely a declaration to the effect that the women-only shortlist arrangements constituted direct discrimination against men in contravention of the 1975 Act. The Tribunal accepted their assertion that selection for such purposes did fall within the scope of the Sex Discrimination Act despite the Labour Party's argument that it did not by virtue of the fact that a Member of Parliament is not a 'person in employment'.36

The Tribunal's decision sent shock waves throughout the Labour Party which was, at the time, heavily involved in preparations for the impending General Election. The Party announced that the 35 women already selected under the scheme would not be affected but that, following legal advice, the Party's National Executive Committee had voted to discontinue the scheme and not to appeal against the decision. This was on the basis that an appeal would be 'expensive, time-consuming and had no guarantee of success'. A statement from the leadership said 'The Party is disappointed, but the NEC considered that to appeal would be a distraction from the overriding aim of defeating the Tories'.37

36 op cit at para 15.
37 The Telegraph, 1 February 1996.
After Jepson - effects and critiques

The immediate impact of the decision in the Jepson case was, of course, the removal of the policy of women-only shortlists but the lasting effects of this case are still being felt. As the only example of adjudication in the UK context, the current climate of fear of legal challenge surrounding the use of positive measures can be directly attributed to this decision. In the absence of an appeal to a higher court, the reasoning of the Tribunal remains open to question.

Burrows has argued that the Tribunal, in applying a wide interpretation to section 13 of the Sex Discrimination Act, strained the meaning of the legislation by asserting that selection for a short-list was the same as conferral of a qualification of the type required in order to gain membership of a professional body, the latter representing the more commonly accepted application of the prohibition contained in s13.38 Furthermore, Burrows notes that in seeking support for its decision, the Tribunal interpreted European provisions contained in the Equal Treatment Directive - an action that clearly falls out with the jurisdiction afforded to Industrial Tribunals and one which alone could have provided suitable grounds for an appeal on the part of the Labour Party.39

The Jepson case clearly demonstrates the shortcomings inherent in the symmetrical approach whereby protection against discrimination aimed at women can be equally applied to men. This is particularly evident where the protection would otherwise assist in the elimination of existing inequality as in the present case and will always represent a stumbling block in any attempt to improve the participation of women in traditionally male-dominated areas. As Fredman has commented, the most striking feature of the Jepson case is the notable absence of any serious attempt to consider the concept of reverse discrimination in the political context.40

Perhaps the most compelling criticism of the decision in the Jepson case relates to the authority of the Employment Tribunal to adjudicate on the

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39 Ibid.
particular issues raised by the case. The Tribunal, in its brief judgment, responded to the Labour Party's assertion that the regulation of the Parliamentary election process should be the prerogative of Parliament itself by arguing that Parliament had given authority for tribunals to consider such matters where they arise as a matter of public interest by entrusting the application of the sex discrimination legislation to the tribunal system. This is an unsatisfactory response to a reasonable assertion and can be countered in two main ways.

Firstly, as Fredman contends, the more satisfactory legal response to an issue of such constitutional importance would surely have been an application for judicial review. Had the opportunity arose, the Labour Party could have cited the low levels of female participation in national politics as justification for pursuing such a policy. In any case, women-only shortlists were not adopted in all constituencies and the fact that the complainants were free to stand as independent candidates would have provided further proof that the policy did not represent an absolute bar to all male prospective parliamentary candidates.

Furthermore, even if we accept that the sex discrimination legislation does have application in the selection of members of Parliament, it would surely have been in the public interest to have given due consideration to the wider issues involved. Notwithstanding the assertion that the traditionally low levels of female participation may well arise out of institutionalised exclusionary practices and working conditions and thus be attributable to indirect sex discrimination, the more obvious examples of direct sex discrimination against women in political appointments should also be examined. In order to eradicate the possibility of discriminatory practices in political appointments in line with the requirements of the anti-discrimination legislation, all such vacancies would have to be advertised in future.

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41 IRLR report, cited note 35 at 6 - 7.
42 Ibid at 582.
43 Eg the system of hereditary peerage by which appointment to the upper House passes in the first instance from father to son.
44 For further development of this argument see Burrows supra.
Secondly, the scope of the legislative provisions applied merits some consideration. The Sex Discrimination Act 1975 applies, in the employment context, to job applicants and employees. To assert that prospective parliamentary candidates are included in this scope infers that such candidates are job applicants. In order to avoid the use of potentially discriminatory practices during the recruitment and selection process, the Equal Opportunities Commission recommends that certain steps should be taken by prospective employers. Such steps include the removal of job requirements that effectively inhibit applications from one sex and the provision of suitable training for all those involved in the selection process. The non-observance of such measures in the past selection of parliamentary candidates is highly likely to have had a negative impact on the recruitment of women.

In the wider international context, it is arguable that the Jepson decision is in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms, which binds the UK internationally. Article 3 of the First Protocol thereto provides for free elections. When read in conjunction with Article 14 (the prohibition of discrimination on the grounds of sex), it would appear that women-only shortlists could be construed as contrary to the Convention. Had Jepson and Dyas-Elliot lost their case and subsequent appeals, they could have considered bringing a complaint before the European Commission of Human Rights. However, as discussed infra, it is possible that such an application to the Council of Europe would have been ultimately unsuccessful: whilst women-only shortlists could be viewed as discriminatory, the Commission and Court of Human Rights would only take action if the election itself (as opposed to the selection procedure) contravened the spirit of the Convention.

45 Part II, s 6.


47 For example anti-social hours which may have more of an exclusionary impact on women than men due to domestic responsibilities.

48 As this case predates the Human Rights Act 1998, the European Convention could not have been invoked before the Employment Tribunal or UK courts.
Consideration of the wider issues raised by the *Jepson* case reveals such gaps in the Tribunal's ratio, that it seems strange that the decision was able to go unchallenged. As the current debate surrounding the creation of the Scottish Parliament illustrates, political parties in the UK feel themselves bound by the decision in *Jepson* and are thus prevented from introducing any measures, even on a temporary basis, which would assist in increasing female participation in the parliamentary process. We have arrived at a situation of 'who dares (may) win' with the challenge being taken up by the party in power, albeit in a fairly limited way, and shirked by the others.49

The Liberal Democrats have adopted the stance that, before any attempts at positive action are employed, an amendment to the legislation would have to be secured. During the passage of the Scotland Bill, the House of Commons considered inserting a clause to the effect that the Sex Discrimination Act 1975 should be disapplied for the electoral process.50 This, it was argued, would facilitate the realisation of gender equality in the new Scottish Parliament as envisaged by the Scottish Constitutional Convention. However, the clause was defeated at its first reading with the parties indicating that they would strive to secure greater gender equality within the law as it stands.51 Attempts have also been made to insert a similar amendment into the Registration of Political Parties Bill.52 Although such a clause would be too late for the first elections to the Scottish Parliament, it could apply subsequently. However, in replication of the fortune of the clause in the Scotland Bill, this amendment has been withdrawn.

The reasons for such defeats are largely attributable to the perception, supported by authoritative legal opinions53 and accepted by the Equal Opportunities Commission that, even if amendments to UK law were


51 272 votes to 38, *Hansard*, ibid.


53 eg Cherie Booth QC for the Liberal Democrats; Ian Mitchell QC for the Scottish Conservative and Unionist Party.
introduced in order to remove the threat of legal challenge in the domestic context, the application of the Equal Treatment Directive would render any attempts at positive action unlawful under European Community law. Authority for this assertion has been attributed to the decision of the European Court of Justice in *Kalanke v Freie Hansestadt Bremen* - a German case which was concerned with the use of women's quotas within public sector employment.

**The application of European Community Law**

**i. The Kalanke Case**

The *Kalanke* case involved two candidates employed by the City of Bremen who had applied for promotion and were deemed to be equally well qualified. The female candidate was selected in favour of the male candidate due to the application of a provision contained in the equal treatment regulations, the Landesgleichstellungsgesetz (LGG), which provided that:

'in the case of assignment to a position in a higher pay, remuneration and salary bracket, women who have the same qualifications as men applying for the same post are to be given priority if they are under-represented.'

Under-representation was defined as existing where women did not constitute at least half the staff within the relevant personnel group.

Mr Kalanke brought proceedings claiming sex discrimination under German law and the case was referred to the European Court of Justice (ECJ). The Court was asked to ascertain whether the LGG provision was covered by

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55 Also see reports of a leaked Cabinet committee minute in which Lord Irvine, the Lord Chancellor, appears to support this position - Party Opinion Split on Legal Challenge, *The Scotsman* 4 March 1998 referred to in Hansard Debates for 31.3.98 at column 1140.


57 The LGG which governs public sector employment in Bremen.
the exception to the principle of equal treatment contained in Article 2(4) of the Equal Treatment Directive which allows for measures to promote equal opportunity between men and women 'by removing existing inequalities which affect women's opportunities' in relation to access to employment and working conditions.

The Court held that the provision in question was in breach of the Directive as it overstepped the limits of the exception by guaranteeing women 'absolute and unconditional priority for appointment or promotion'. 58 Such attempts at attaining equal representation of men and women were ruled to amount to a prohibited substitute for the concept of equality of opportunity, contrary to Article 2(4).

Although the decision in Kalanke offered some guidance as to the forms of positive action which are unacceptable under European law, the Judgment is difficult to reconcile with the existing legal framework in order to determine acceptable methods of positive action. The derogation provided for by Article 2(4) of the Equal Treatment Directive sits alongside Article 6(3) of the Social Policy Agreement 59 which affirms that the principle of equal pay for equal work does not prevent:

'any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers'.

Furthermore, the Council Recommendation on the Promotion of Positive Action for Women of 1984 60 advises Member States to adopt policies comprising positive action which are 'designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment'. 61

58 IRLR 660 at 22.

59 Agreement on Social Policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland, 1989.

60 84/635/EEC.

61 Ibid at para 1.
The Marschall case

Clarification on how to comply with the spirit of such provisions without breaching the symmetrical application of the concept of equal treatment has emerged in a more recent decision of the ECJ in another German case, Marschall v Land Nordrhein Westfalen. In this case, the Court was asked to consider whether positive action measures permitted under the civil service law of North Rhine-Westphalia were precluded by Articles 2(1) and (4) of the Equal Treatment Directive. The law in question provided that where:

'there are fewer women than men in the particular high-grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to an individual male candidate tilt the balance in his favour' (emphasis added).

The Court ruled that such provision was compatible with European law and fell within the scope of Article 2(4) as it contained a saving clause and, therefore, did not guarantee absolute and unconditional priority for women. The Court, in identifying the saving clause as the determining factor, was able to distinguish the earlier decision in Kalanke. While the overall rationale of this decision may be welcomed, it is somewhat surprising that the mere inclusion of such a clause, the spirit of which would have been implicit in the selection process where a tie-break situation arose in any event, should have resulted in such a different outcome from that in Kalanke.

The decisions in both Kalanke and Marschall (and to a greater extent the accompanying Advocate General’s opinions) clearly illustrate the obvious difficulty encountered by the Court in reconciling, on the one hand, the right of the individual to equal opportunities in a procedural sense and, on the other, the concept of improvements in representation for a collective group, the achievement of which depends on a results-based approach. The protection of individual rights, enshrined as it is in the equality directives, has been the linchpin for the developing jurisprudence of the Court of Justice in this context.

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context. Soft law measures such as Council Recommendation 84/635/EEC recognise that a departure from the general concept of equal opportunities may be necessary in order to address under-representation arising from the inequalities of the past. This was presumably recognised as a legitimate tool in certain restricted circumstances in the drafting of the legislation, as evidenced by the derogation from the general principle contained in Article 2(4) of the Equal Treatment Directive.

It would appear that, in the absence of any firm legislative provisions in support of positive action in either the European or domestic contexts, the development of the concept as a viable means of redressing present imbalances in representative terms depends on the degree of commitment to substantive equality which the judiciary is prepared to make in applying the respective legislative frameworks. In other words, development will depend on consideration being paid to the 'spirit' of the provisions rather than on a black letter application. Given the decisions in Jepson, Kalanke and the restricted future application of the decision in Marschall, such development seems unlikely at the present time. This should not, however, detract from the importance of the Court's acceptance of the valid use of positive action measures, albeit in limited circumstances, in Marschall. Given the nature of the arguments which have been advanced previously in support of the notion that positive action measures would certainly be prohibited by European Community law, the Marschall decision represents an important step forward.

The application of the decision in Marschall to the increased participation of women in national parliaments is questionable. The scope of the Equal Treatment Directive is '...access to employment, including promotion, and to vocational training and as regards working conditions and in social security.' The Directive does not appear to apply to political participation which has thus far remained entirely a matter for the individual Member States concerned.

iii. Parliamentary participation - the European policy agenda

Despite the shortcomings inherent in the application of the equal opportunities approach, the case law to date on the use of positive action in

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63 Article 1, Directive 76/207.
both the UK and European contexts gives little cause for concern in the context of political participation. The ruling in Jepson is fraught with difficulties and the decision by the Labour Party not to appeal represents a missed opportunity. The European Court's decision in Marschall sets out important guidelines concerning the future use of positive action measures in the employment context but it is doubtful that the decision has application in the context of political participation. Informing the whole debate and setting the agenda are the parallel developments taking place at European level in the context of social policy initiatives designed to advance the use of positive action as a viable means of addressing inequality.

It is interesting to note the response given by Commissioner Padraig Flynn to a written question regarding the use of positive discrimination in the electoral process following the Jepson case. The Commission was asked if it held the view that 'membership of parliament is a job' and, therefore covered by the Equal Treatment Directive. The Commission responded in the negative, stating clearly that candidature for an election does not fall within the scope of either Article 119 of the Treaty or Directive 76/207.64

This response comes as no surprise when consideration is paid to the use of quota schemes in this context in other European Union Member States. According to a recent European Commission report on promoting gender balance in decision-making,65 quotas to improve women's participation in the political process have been used to varying degrees in Belgium, Denmark, Finland, France, Germany, Italy and the Netherlands - all apparently without challenge under European law. Furthermore, the Commission's Fourth Equal Opportunities Action Programme has adopted the promotion of gender balance in decision-making as one of its five objectives.

In the employment context an amendment to the Treaty of Rome by way of the Amsterdam Treaty provides that:

'With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not

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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 disadvantage in professional careers.66

This amendment, when enacted, could form the basis of future legislative provisions promoting the use of positive action in the employment field. In the European context, it would appear that the legal and policy framework has been created for the promotion of positive action measures designed to increase the numbers of women within national parliaments, all that is now needed is the political will of those in positions of power within the Member States.

The Application of International Law

It is hoped that the developments taking place at European level, outlined above, will have a positive impact on increasing gender parity within the political decision-making process. Further to these developments, this concept has also found favour in the context of international obligations conferred by the system of international law and this area will now be considered.

In the United Kingdom, international law67 is essentially binding on the State at the international level but does not become part of national law unless it is specifically incorporated by an Act of Parliament. Hence the European Communities Act 1972, as amended, facilitated the direct implementation of European Community laws within the UK. Similarly, the Human Rights Bill 1998 will give effect to the Council of Europe Convention on the Protection of Human Rights and Fundamental Freedoms. The importance of international law cannot be underestimated - no State or organisation (such as the European Community) wishes to be viewed as legislating contrary to international law. Similarly neither the United Kingdom nor the European Community would wish to infringe the internationally enshrined human rights

66 Amended Article 119, new Article 141.

67 Which includes the various instruments adopted by the United Nations, the International Labour Organisation and regional organisations such as the Council of Europe.
of their citizens, regardless of the status accorded to such international instruments within the national/ regional legal framework. It is thus appropriate that the relevant provisions of international law are examined - the United Kingdom and the European Community both wish to act in conformity with international law. Moreover, international law may be employed to 'fill gaps' in the domestic or regional legal systems.

i. United Nations instruments

Almost fifty years ago the peoples of the United Nations (including those of the United Kingdom) adopted the Universal Declaration of Human Rights in which they reaffirmed their faith in the equal rights of men and women and pledged themselves to the promotion of universal respect, for and observance of, human rights and fundamental freedoms. The Declaration was hailed as a 'common standard of achievement for all peoples and all nations' but its goals have not been realised. Consequently the provisions of the Declaration have been elaborated on, not only in a general legal format, but also in a plethora of specialist texts aimed at achieving, inter alia, full equality for women and men.

Most international texts contain a non-discrimination clause which prohibits discrimination in the exercise of human rights on various grounds including gender. With respect to women, the principle of non-discrimination has been detailed in separate instruments, most importantly, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women. The salient article demands States take all appropriate measures to ensure that women, on equal terms with men, are eligible for election to all

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68 Preamble to the Universal Declaration of Human Rights 1948 [full cite.]
69 Proclamation preceding the Declaration, ibid.
70 As was the original intention of the drafters: The International Covenant on Civil and Political Rights 1966, 999 UNTS 171 and the International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3.
71 See, for example, Article 2, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights.
72 1249 UNTS 13. This Convention was ratified by the United Kingdom on 7 April 1986.
publicly elected bodies, and can hold public office and participate in the formulation and implementation of government policy, and can represent their governments at the international level. These articles are in furtherance of the earlier 1952 Convention on the Political Rights of Women which was adopted under the auspices of the United Nations in a desire to equalise the status of men and women in the exercise of political rights. Under international law, the United Kingdom is under an obligation to comply with these treaties. Failure to do so could result in international censure.

Whilst there is a clear desire for equality underpinning contemporary human rights documentation, evidence of international recognition of the advantages of positive discrimination/affirmative action can also be found. Article 4 of the Convention on the Elimination of Discrimination against Women enables States to adopt 'temporary special measures aimed at accelerating de facto equality between men and women'. Such measures, however, should be discontinued when equality of opportunity and treatment is achieved. It is apparent from the foregoing discussion that the use of 'twinning' or 'zipping' as a special measure aimed at securing a greater number of women in parliament would, if for a limited time, be in conformity with international law. Once equal representation becomes a reality, the necessity of such programmes would be obviated as equal representation should be self-perpetuating.

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73 Article 7(a).
74 Article 7(b).
75 Article 8.
76 Preamble, 193 UNTS 135. The United Kingdom acceded to this Convention on 24 February 1967.
ii. Council of Europe instruments

The Council of Europe with its European Convention for the Protection Human Rights and Fundamental Freedoms is also instructive. The Council of Europe is a regional organisation - due to a combination of its early establishment and its relatively homogenous membership, it has an advanced system of human rights protection.

This Convention enshrines a prohibition on discrimination on grounds of sex which, when taken in conjunction with any of the rights or freedoms, will occasion a violation of the Convention. By virtue of Article 3 of the First Protocol to the European Convention, the High Contracting Parties undertake to hold free elections under conditions which will ensure the 'free expression of the opinion of the people in the choice of the legislature'. Unlike the other substantive articles of the Convention and its Protocols, Article 3 is imbued with greater solemnity by its phrasing as an obligation incumbent on a State to take positive measures to hold elections.

There is little jurisprudence directly on representation in parliaments. The principle case heard before the Court is Mathieu-Mohin & Clerfayt v Belgium. Although this case turned on the unique linguistic divisions of Belgium and the manner in which the election procedure seeks to ensure linguistic equality, some of the dicta is instructive in the present context. The European Court of Human Rights accords a broad interpretation to Article 3, referring to 'the political rights and liberties of the individual' and acknowledging that the Contracting States make the right to stand for election

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77 1950 ETS No 5.
78 As has been mentioned the Human Rights Bill 1998 will, when it receives royal assent, give effect to the Convention within the legal systems of the United Kingdom.
79 Article 14.
80 ETS No 9.
81 Mathieu-Mohin & Clerfayt v Belgium, Series A No 113 (1987) at para 50.
82 op cit.
83 Ibid, para 49 - the Court's consideration of the travaux preparatoires.
'subject to conditions which are not in principle precluded under Article 3'.

State discretion is clearly not unfettered - it is subject to the Court's review.

However, a perusal of the applications brought before the European Commission and Court of Human Rights suggests that it is unlikely the European Convention could be invoked against practices such as 'twinning' or 'zipping'. Both the European Commission of Human Rights and the Court have considered electoral systems under the ambit of the Protocol. For example, a claim by the Liberal Party that the United Kingdom's electoral system favoured the two major political parties was dismissed as manifestly unfounded, revealing no violation. The European Convention cannot be invoked against the selection procedures employed during an election unless the result is not a free election in accordance with Article 3. However, the Court is adamant that Article 3 implies 'the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election'. Surely an electoral system promoting gender equality would be in accordance with this principle.

Conclusions

Having regard to all the relevant legal provisions and resulting jurisprudence in national, European Community and international law, it appears unlikely that any legal challenge to positive action measures such as those proposed would meet with much success. On the contrary, it would appear that the use of such measures as a viable means of redressing past inequalities within political structures has firm foundations within both European social policy and international law.

The Tribunal's decision in Jepson remains the only direct UK authority on this issue but many unanswered questions remain concerning the ratio

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84 Ibid para 52.
85 Application 8765/79 4 EHRR 106.
86 Ibid. See also Mathieu-Mohin & Clerfayt v Belgium, op cit. at para 54.
87 Ibid.
applied in that case. In the absence of any amendments to existing legal provisions, the real challenge is for the political parties to test the durability of that decision - a call which appears at present to have gone unanswered.

In the context of European Community law, the legitimate use of positive action in line with the provisions of the Equal Treatment Directive has, in the past, been the subject of some confusion. The Court of Justice's decision in Marschall appears to have given necessary clarification in the employment context. However, it seems unlikely that this decision has any application in the context of political participation, which is outside of the scope of the Equal Treatment Directive. The most encouraging development at European level must be the apparent recognition by policy-makers that the achievement of gender balance in the decision-making process is a desirable goal. The current debate in this context surrounds the promotion of gender mainstreaming whereby, '... gender equality perspective is incorporated in all policies at all levels and at all stages by the actors normally involved in policy-making.' The success of such initiatives surely depends on the participation of female as well as male 'actors' in the policy-making process.

A Scottish Parliament with a 50:50 gender split would be a unique political institution, the creation of which would depend on the laying of new foundations. The next necessary development in the achievement of a gender balance within the Scottish Parliament would appear to be a real commitment to change from those charged with creating the constitutional framework within which the Parliament will operate. Without the necessary political will, any further development seems unlikely.

The Representation of the People Acts of 1918 and 1928 provided for universal suffrage. It is unfortunate that in the interim 70 years there has been no further progress towards securing gender equality in the UK electoral system. The creation of the Scottish Parliament presented an opportunity to move forward into the new millennium with a constitution overtly based on true equality for men and women. There is no constitutional bar to gender equality. It is not too late.

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88 Gender Mainstreaming: Final Report of Activities of the Group of Specialists in Mainstreaming (EGS. MS (98) 2); Strasbourg 1998 at 8.
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