Editorial and subscription Correspondence should be sent to the editor at:

The School of Law
University of Limerick
Limerick, Ireland
Tel: 061 202344
Fax: 061 202417

**Website:**
**www.ul.ie/~law/review.html**

Cover design by David Lilburn
An Bradán Feassa – Thomas Ryan
Printed by Cube Printing, Ballysimon Road, Limerick.



This review may be cited as:
(2002) 3 U.L.L.R.



ISSN 1393 - 7812

**The Submission of Manuscripts**
Submitted articles should be original contributions. If the piece has previously been submitted to another journal, details of the submission should be included. All articles should be submitted in both hard copy and on disk in a format compatible to Microsoft Word.



# CONTENTS

# RECENT EUROPEAN ANTI-DISCRIMINATION LAW: THE IRISH AND UNITED KINGDOM CONTRIBUTIONS[*]

## Introduction

> "I think you are absolutely right that positive discrimination is totally counter-productive, based on my experience in other areas. People have to be advanced on merit."
> - Ken Livingstone MP, addressing Sir Ronnie Flanagan, then chief constable of the Royal Ulster Constabulary, Northern Ireland Affairs Committee, 12 November 1997.[1]

The advice above is highly ironic. It was given by the former leader of the Greater London Council; until abolition in 1986, 'Red Ken' had championed gesture politics by self-styled oppressed minorities. Sir Ronnie Flanagan was entrusted with upholding the law. Just over three years later, Westminster would legislate uniquely for reverse discrimination in Northern Ireland. Here, I want to discuss an important private law topic, recent European anti-discrimination law, where, as a result of interventions by Dublin and London in the autumn of 2000 based upon political expediency, a collectivist one inspired by social engineering obliterated the individual perspective essential to any system of justice.

The harm done by those two governments, however, may be reversible. There are options--discussed below--of domestic and European litigation. But it is not clear that radical social engineers using the law[2]--and implicated variously in Irish catholic nationalism--will be on the side of those opposed resolutely to discrimination against persons on the ground of religious belief.

---

[*] This paper was drafted originally (8 March 2001) to be presented at the Irish Association of Law Teachers conference, on 'The Person in the Law', to be held at Dublin City University Business School, on 30 March to 1 April 2001. The conference was cancelled on 24 March 2001, due to the outbreak of foot and mouth disease. I am grateful to Barbara Hewson for comments on that draft.

[1] Northern Ireland Affairs Committee, Third Report, *Composition, Recruitment and Training of the* RUC, 8 July 1998, 337-II, p.31.

[2] Erika Szyszczak, for example, obliterates action, where discrimination applies, in favour of structure, where her version of equality is located: 'If there is a formal right to equality where measures attempt to rectify existing inequalities, they cannot be regarded as discriminatory as they are designed to establish equality, not limit it.' ('Positive action after *Kalanke*', 1996, MLR, 59, 876, 883)

## The Sorry Tale in Essence

In advance of the Lisbon special European Council on 23-24 March 2000[3], the United Kingdom and Irish governments submitted a joint paper to the Portuguese presidency. The paper signalled growing cooperation between London and Dublin in Europe in three broad policy areas: education and lifelong learning; innovation and enterprise; and fighting social exclusion. Under the latter, Tony Blair and Bertie Ahern committed themselves to "combat all discrimination, and make early progress on the Commission's Article 13 anti-discrimination proposals [which are explained below]."[4]

Spool forward to Luxembourg on 17 October 2000, and a meeting of the Employment and Social Policy Council chaired by France's Martine Aubry. After difficult negotiations, the Council reached unanimous political agreement on the proposal for a Directive establishing a general framework for equal treatment in employment and occupation (this is introduced below). However, two amendments were secured at this last moment in the European legislative process: one by London, which became article 15 of the Directive, headed "Northern Ireland", and dealing with the police, but also catholic schools; the other by Dublin, greatly extending what became article 4 ("occupational requirements"), designed to exempt discrimination by religious bodies throughout the European Union.

Neither of these amendments was canvassed in parliamentary scrutiny of draft European legislation in London or Dublin. The House of Lords Select Committee on the European Union, having taken evidence, made a series of 45 recommendations at an early stage.[5] There was also a debate in the upper house on 30 June 2000.[6] The House of Commons European Scrutiny Committee failed to properly scrutinize government negotiations.[7] Nor were the Irish and United Kingdom amendments put forward for

[3] This is the summit which set the goal of making Europe the most competitive, dynamic and inclusive knowledge-based economy in the world within ten years. Tony Blair reported to the house of commons: 'The Council marks a sea change in European economic thinking. It points Europe in a new direction - away from heavy-handed intervention and regulation, towards a new approach based on enterprise, innovation and competition…We have made clear that the central European economic issue…is reform: how we modernise the European social model and how Europe embraces the enterprise agenda and seeks to match the dynamism of the United States, while preserving our commitment to social justice…We also agreed that EU social policy must be modernised to respond to changing employment patterns, increased life expectancy and deepening social exclusion.' (House of Commons, *Hansard*, vol. 347, col. 21, 27 March 2000).

[4] www.irlgov.ie/taoiseach/press/current/16-03-2000.htm

[5] It raised the problem of teachers in Northern Ireland, and religious voluntary schools in England and Wales (p. 31). It also discussed positive action constructively (pp. 32-4). On the former, the government adopted a status quo position: no amendment of section 60 of the School Standards and Framework Act 1998 (Government Response, para. 65: www.parliament.the-stationery-office.co.uk). On the latter, it stated: 'The Government agree with the Committee that positive action should be permitted, not required, and that in general quotas should remain unlawful.' (para. 74)

[6] House of Lords, *Hansard*, vol. 614, cols. 1177-1241.

[7] Under a resolution of the House of 17 November 1998: House of Commons, European Scrutiny Committee, *Seventh Report*, 2 February 2000, HC23-vii 1999-2000; *Nineteenth Report*, 24 May 2000, HC23-xix 1999-2000; *Twenty-fourth Report*, 12 July 2000, HC23-xxiv 1999-2000.



consideration by the Commission, the European Parliament, the Economic and Social Committee, or the Committee of the Regions. The decision of 17 October 2000 should not have been a carve up between national politicians; the Council of Employment and Social Affairs ministers was acting, under the European treaties, as a legislator.

It is not clear that London and Dublin cooperated to eat their words of six months earlier.[8] However, two things (discussed below) explain this *bouleversement*: the first is 'Patten'; and the second is 'the church' - which church being self evident in both parts of Ireland. In Northern Ireland, the United Kingdom government had the enthusiastic support of the human rights community over one if not both issues. As for the exception in European anti-discrimination law achieved by the Republic, activists there seem to have been preoccupied more with their own self interest; however, a Northern Ireland human rights commissioner played a crucial, and surprising, role (discussed below) south of the border.

## Anti-discrimination Law in Ireland

This dates from 1920 and the Westminster parliament. The Government of Ireland Act of that year provided for devolved administrations in Northern Ireland and Southern Ireland. Section 5 had the side note: prohibition of laws interfering with religious equality, taking property without compensation, etc.. It related to the competence of the two subordinate parliaments. Religious equality was apparently a right. And the section prohibited discriminatory legislation, various incidents being specified. A prohibition on taking property without compensation was also included.[9] (Also, under section 8(6), executive authorities were prohibited from discriminating on the ground of religious belief.)

Southern Ireland was short lived. Section 5, however, remained the law in Northern Ireland, until repealed in 1973.[10] And no Act of the provincial parliament (1921-72) was held by the courts to be void for contravening religious equality. No one has proved statutory discrimination by the former Stormont parliament, despite the passage of 30 years since its ending.

Article 8 of the Constitution of the Irish Free State (Saorstát Eireann) Act 1922 provided for freedom of conscience. It went on to prohibit religious discrimination in terms similar to those in Northern Ireland.

[8] The United Kingdom--where the lead department was education and employment--appears to have only considered the draft equal treatment Directive after Lisbon. On 25 July 2000, the House of Commons voted, by 302 to 115, to take note of it. The motion stated that the government would negotiate for 'the proposals to be made clear and workable'; 'and to ensure that the proposals take proper account of the legitimate concerns of employers and make a real difference to the lives of those whom they are designed to protect.' (House of Commons, *Hansard*, vol. 354, cols. 919-22, 25 July 2000).

[9] *O'Neill v NIRTB* [1938] NI 104; *Robb v Electricity Board for NI* [1937] NI 103.

[10] Northern Ireland Constitution Act 1973 s 41(1) & sch 6 part I.

In 1937, Bunreacht na hÉireann constituted a legal revolution (and founded a new state). Article 40 (personal rights), stated: 1. "All citizens shall, as human persons, be held equal before the law." However, it went on to arguably permit (unfair) discrimination: "This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."[11]

## The Impact of the European Economic Community

The European Economic Community ('EEC') is premised, it may be said, on opposition to discrimination on the ground of nationality[12], even if the motives had more to do with constructing a common, and then a single, market.

There is also a Aristotelian tradition informing the idea of equal treatment—"Things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unlikeness"[13]—in ECJ jurisprudence;[14] however, this is often misunderstood, equal opportunities, the objective of European policy, being elided with equality of outcome.

### *Equal Pay*

The EEC's first venture in anti-discrimination law related to equal pay for men and women. Article 119 of the original EEC Treaty (Rome, 1957)[15] contained the principle "that men and women should receive equal pay". (Directive 75/117/EEC[16], made under article 100 dealing with the approximation of the laws of member states, essentially added "work of equal value" to the definition.) Article 119 is attributed to French fear of competitive disadvantage, given its more favourable domestic legislation; it had little to do directly with the advance of women.

The Equal Pay Act 1970 was passed in Great Britain, before it joined the EEC at the beginning of 1973. The minister was Barbara Castle. There was also an Equal Pay Act (Northern Ireland) 1970. In the Republic, the

[11] In 1996, the Constitution Review Group recommended changing this to: 'This shall not be taken to mean that the State may not have due regard to relevant differences.' It also recommended adding a new section prohibiting direct and indirect unfair discrimination on specified illustrative grounds (*Report of the Constitution Review Group*, Pn 2632, Dublin May 1996, p. 242).
[12] See now article 12 EC (inserted by the 1997 Amsterdam Treaty).
[13] Aristotle, *Ethica Nicomachea*, volume 3, 1131a-b (trans. W. Ross), 1925. See also, *Jenness v Fortson* [1971] 403 US 431.
[14] Paul Craig & Gráinne de Búrca, eds., *The Evolution of EU Law*, Oxford 1999, p. 532 n 89.
[15] Now article 141 EC (following the 1997 Amsterdam Treaty).
[16] [1975] OJ L45/198. This led to infringement proceedings: Case 61/81, *Commission v United Kingdom* [1982] ECR 2601. Directive 86/378/EEC ([1986] OJ L225/40) extended the principle of equal treatment to occupational pensions.



Anti-Discrimination (Pay) Act 1974[17] followed entry (along with the United Kingdom) into the European Economic Community.

Equal pay litigation at the European Court of Justice ('ECJ') in Luxembourg helped found a constitutional principle of equal treatment of men and women: Case 80/70, *Defrenne v Belgium* (*Defrenne* I) [1971] ECR 445; Case 43/75, *Defrenne v Sabena* (*Defrenne* II) [1976] ECR 455 (article 119 pursues economic and social objectives[18]); Case 149/77, *Defrenne v Sabena* (*Defrenne* III) [1978] ECR 1365 (the scope of article 119 does not extent beyond equal pay, but the elimination of sex discrimination is a fundamental principle of Community law).

Equal pay is now provided for in article 141(1)-(2) EC, as amended by the 1997 Amsterdam Treaty (see further below).

### *Equal Treatment of Men and Women*

Directive 76/207/EEC[19] affirmed a principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.[20] It prohibited discrimination on the ground of sex either directly or indirectly by reference in particular to marital or family status. Its legal basis was article 235 of the then EEC Treaty[21], allowing action to attain a Community objective outside the powers of the Treaty. Article 2 of the Directive contained three important exceptions to the anti-discrimination rule. The first--article 2(2)--allowed member states to exclude "occupational activities…[where] the sex of the worker constitutes a determining factor".[22] Under article 9(2), the occupational activities were to be assessed periodically "in the light of social developments". The second--article 2(3)--exempted "provisions concerning the protection of women, particularly as regards pregnancy and maternity".[23] And the third--article 2(4)--was without prejudice to "measures to promote equal opportunity for men and women, in particular by removing existing inequalities in the areas referred to in Article 1." The Directive was addressed to all member states, and these exceptions were applicable throughout the European Economic Community.

[17] Also, Anti-Discrimination (Pay) Act 1979.
[18] Also, article 119 directly effective from the end of the first stage of the transitional period, though the ruling only had effect prospectively.
[19] [1976] OJ L39/40.
[20] Directive 79/7/EEC ([1979] OJ L6/24) extended it to matters of social security. Directive 86/613/EEC ([1986] OJ L359/56) extended the principle to the self-employed. Directive 96/34/EC ([1996] L145/4) extended it to parent leave.
[21] Now article 308 EC (following the 1997 Treaty of Amsterdam).
[22] Case 165/82, *Commission v United Kingdom* [1983] ECR 3431 (male midwives case: the ECJ upheld legislative restriction). This case turned on articles 2(2) and 9(2). The female advocate general was for opposing the discrimination.
[23] See also Directive 92/85/EEC ([1992] OJ L348/1) on the protection of the health and safety of pregnant and breastfeeding workers.

Directive 76/207/EEC had been anticipated by, or led to, the following domestic legislation in the two member states considered here:

- Sex Discrimination Act 1975 (Great Britain only);
- Sex Discrimination Act 1986 (Great Britain only);
- Sex Discrimination (Northern Ireland) Order 1976, SI 1976/1042;
- Sex Discrimination (Amendment) Order 1988, SI 1988/249 (Great Britain and Northern Ireland)[24];
- Employment Agency Act 1971 (Republic of Ireland);
- Employment Equality Act 1977 (Republic of Ireland).

*Article 141(3)-(4) EC*

This is based on the former article 119. While article 141(1)-(2) deals with equal pay, article 143(3) deals with the principle of equal opportunities and equal treatment for men and women (despite the reference to "sex" in article 13 EC). Article 141(4) provides for positive action. The Treaty of Amsterdam entered into force on 1 May 1999.

*Directive 2002/73/EC*

Directive 76/207/EEC has been amended by Directive 2002/73/EC of 23 September 2002. This is on the basis of article 141(3)-(4) EC, and not article 13 EC. It entered into force on 5 October 2002. It is due to be implemented by the member states by 5 October 2005. Directive 2002/73/EC follows article 13 EC, in that it defines the concepts of direct and indirect discrimination. The three article 2 exceptions to the anti-discrimination rule in Directive 76/207/EEC have been replaced. The article 2(2) exception is now article 2(6): "particular occupational activities". The article 2(3) exception is now article 2(7): pregnancy and maternity. And the article 2(4) exception is now article 2(8): "Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women."[25]

The first and third exceptions, in Directive 76/207/EEC as amended by Directive 2002/73/EC will be considered further below in the contexts of ECJ jurisprudence and/or recent European legislation.

[24] Following the ECJ decision in *Johnston v Chief Constable of the Royal Ulster Constabulary (Case 111/84)* [1986] 3 CMLR 240.

[25] Article 141(1) reads: 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 to providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.'



*The Burden of Proof*

The principle of civil litigation in adversarial systems is: he who alleges has the burden of proof to discharge. In 1997[26], this was changed by Europe for cases of sex discrimination: Directive 97/80/EC, with effect from 1 January 2001[27]. (This Directive also defined indirect discrimination for the first time.) Its legal basis was the agreement on social policy annexed to a protocol in the 1992 Maastricht Treaty. Under article 4 of the Directive, it is the respondent who has to prove there has been no breach of the principle of equal treatment. However, this is only where the claimant establishes facts from which it may be presumed that there has been direct or indirect discrimination. The thinking is that the employer has privileged access to information not shared with the person alleging discrimination. The United Kingdom, however, which had not signed up to the 1989 Social Charter, a political declaration, and secured opt-outs in the 1992 Maastricht Treaty, was exempted from 15 December 1997. With the depositing of the instruments of ratification of the 1997 Amsterdam Treaty on 15 June 1998, the United Kingdom agreed on 13 July 1998 to reverse the burden of proof in sex discrimination cases, from 22 July 2001: Directive 98/52/EC[28]. The legal basis for this extension was article 100 EC. The government elected in 1997 argued that, on the basis of legal advice, the Directive would make little practical difference in the United Kingdom. There was no need for legislation to implement the reversing of the burden of proof; it was already part of the common law.

A reverse burden of proof may well raise a human rights point. Under article 6 of the European Convention on Human Rights (right to a fair trial), "in the determination of his civil rights and obligations..., everyone is entitled to a fair and public hearing...". This is to be given a broad and purposive interpretation. However, under article 6(2), it is only the person charged with a criminal offence who shall be presumed innocent until proved guilty according to law.[29] The presumption does not apply to civil liability. Nevertheless, there is a principle of "equality of arms" in Strasbourg jurisprudence[30]: "The right to a fair hearing requires that everyone who is a party to proceedings must have a reasonable opportunity of presenting his

[26] This followed two aborted attempts, in 1988 and in 1993.

[27] [1998] OJ L14/6. This had been stimulated by ECJ jurisprudence, where, it was held, that, following the establishment of a prima facie case by the claimant, the burden of proof should then shift to the respondent to show there had not been direct or indirect discrimination. But this did not apply to inquisitorial systems (Belgium, France, Italy and Luxembourg) or other member states with an inquisitorial component.

[28] [1998] OJ L205/66.

[29] For a recent case on statutory defences in criminal liability, which held that two instances were not contrary to article 6(2), see: R *v Lambert* [2001] 2 WLR 211 CA.

[30] *Neumeister v Austria* (1960) 1EHRR 91.

case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent."[31]

### Other Anti-discrimination Law

Within the United Kingdom, the grounds of race, political and religious belief (Northern Ireland only) and disability were added by:

- Race Relations Act 1976[32] (Great Britain only);
- Race Relations (Northern Ireland) Order 1997, SI 1997/869;
- Northern Ireland Constitution Act 1973;
- Fair Employment (Northern Ireland) Act 1976 (now repealed);
- Fair Employment (Northern Ireland) Act 1989 (now repealed);
- Fair Employment and Treatment (Northern Ireland) Order 1998, SI 1998/3162;
- Northern Ireland Act 1998;
- Disability Discrimination Act 1995 (Great Britain only);
- Discrimination Rights Commission Act 1999 (Great Britain only);
- Equality (Disability, etc.) (Northern Ireland) Order 2000, SI 2000/1110[33].

In the absence of European pressure, there was no similar anti-discrimination legislation in the Republic of Ireland in the 1970s, 1980s and for much of the 1990s. Despite delays brought about by President Mary Robinson's referral of two bills to the Supreme Court[34], the following domestic legislation--uncharacteristically--anticipated article 13 EC:

- Employment Equality Act 1998;
- Equal Status Act 2000.

It remains to be assessed whether the implementation of the two European Directives will require amending domestic legislation in the Republic. This is not a task I address here. Both the above measures, however, are remarkably dependent upon European concepts and terminology.

### The United States: a Lesson for Europe

Anti-discrimination law may be said to originate in the United States. This is a federal state with a written constitution dating from the eighteenth century: its fourteenth amendment of 1868 introduced an equal protection clause. However, legal action against unfair discrimination is a phenomenon of the 1960s, when Chief Justice Earl Warren presided in the Supreme Court.

[31] Lord Lester of Herne Hill & David Pannick, *Human Rights Law and Practice*, London 1999, para. 4.6.31.
[32] Also Acts of 1965 and 1968.
[33] This began in the Northern Ireland assembly, but, due to suspension, it was enacted at Westminster under the Northern Ireland Act 2000.
[34] *Employment Equality Bill 1996* [1997] 2 IR 321; *Equal Status Bill 1997* [1997] 2 IR 387.



Discrimination, as a legal concept, is bound by the idea of action (a natural or legal person discriminates, directly or indirectly, against another or a group). Anti-discrimination law bears on conduct. Discrimination is also time bound: there must be evidence of recent conduct, in litigation between living parties; with public policy bearing on the immediate future.

It was in the United States that political movements--of ethnic minorities and women principally--articulated an analogous concept of past discrimination. By definition, this falls outside any possible legal process governed by limitation. (An exception may be the treatment of blacks, who were, under United States constitutional law, legally discriminated against.) However, the concept of past discrimination (on the basis of ideological assertion as well as emerging scholarship) was used to generate the idea of reverse discrimination - also known as positive discrimination. This was related to the idea of structural inequality. The solution to discrimination against, say, blacks and women was lawful discrimination in favour of blacks and women (and therefore against whites and men). Thus the idea of quotas for disadvantaged minorities, or, in a milder form, goals or targets (which preserved the idea of fairness in selection whatever of their practical effect).

This affirmative action originated in United States courts, as a legal remedy obtained against employers found to have discriminated. The purpose was to stop discrimination on a case-by-case basis, not re-engineer society. It was based on due process, and also the idea of fault. The Kennedy and Johnson administrations, however, made affirmative action a tool of executive action - not always with legislation authority. Contract compliance--the use of state economic power--was a principal weapon. This forced private interests to carry out action plans benefiting blacks etc. if they wished to benefit from public contracts. The term affirmative action in the United States came to embrace reverse discrimination. But it also had a narrower meaning: namely actions taken to ensure genuine equality of opportunity between candidates distinguished on various grounds.

It is in this latter sense that affirmative action crossed the Atlantic, to the United Kingdom in the 1970s. It is the equivalent of positive action in Europe, though this is often confused, by supporters, with positive discrimination[35].

The United States Supreme Court has consistently opposed a system of rigid quotas: *Regents of the University of California v Bakke* 483 US 265 1978 (a special admissions programme for medical students, which discriminated against the white respondent[36], held to be invalid under the constitution). The

[35] For example, Meg Russell, *Women's Representation in UK Politics: what can be done within the law?*, The Constitution Unit, June 2000, who defines positive action as quotas.
[36] He also appears--in one of the first recorded instances of political correctness--to have been victimized (p. 277).

Supreme Court has accepted goals, but imposed conditions. This affirmative action must be transitional, correcting imbalance with equality of opportunity: *United Steelworkers of America, AFL-CIO-CLC v Webster* 443 US 193 1979 (a voluntary[37] collective bargaining agreement, with a company which had recruited mainly white skilled workers, containing an affirmative action plan reserving fifty per cent of training places to blacks, not contrary to civil rights legislation[38]). It must also be justifiable by a number of objectively verifiable facts: *City of Richmond v Croson* 488 US 469 1989 (city plan requiring contractors to subcontract to country-wide minority businesses). The Supreme Court held[39] that the plan was not justified by a compelling government interest, there being no evidence (as opposed to assertion) of discrimination by the city in awarding contracts; further, the 30 per cent set aside was not narrowly tailored to accomplish a remedial purpose.

Affirmative action in the United States--certainly under William Rehnquist's Supreme Court[40]--may be said to be in a state of legal crisis. The doctrine of strict scrutiny in United States federal law--which has served to arrest affirmative action--is essentially constitutional, justifying judicial review across the separation of powers between the judiciary, legislature and the executive.[41]

Three socio-economic arguments, to do with the operation of labour markets, and the economy in general, emerged in response to the United States experience of affirmation action. The first has to do with unsuccessful applicants.[42] Those discriminated against--unfairly treated--had a legitimate grievance. Secondly, and more important for workplace relations, those perceived to have benefited unfairly in their selection, tended to be treated as second-class colleagues; some such beneficiaries--according to anecdotal evidence--found affirmative action personally oppressive. Thirdly, in a heavily free market society, this degree of state intervention was considered inefficient: the lack of competitiveness, in allocating the best people to the best jobs, was seen as an excessive economic cost; and this in a context of a

[37] The office of federal contract compliance was, however, involved (p. 222).
[38] The minority dealt better with the legislative history. No judge queried the relationship between training and recruitment.
[39] Distinguishing *Fullilove v Klutznick*, 448 US 448 1980. There would be no race-based relief under the fourteenth amendment of the constitution.
[40] 'From the perspective of the more liberal Justices and their supporters, today's Supreme Court--the Rehnquist Court--has been engaged in a sustained and evil counterrevolution, undermining or destroying the civil rights and civil liberties that the Warren Court properly championed. In curtailing affirmative action and civil rights enforcement, in limiting the right to abortion and enhancing the power of the police and prosecutors, in rushing executions and curbing the power of the federal government, including the judiciary, the Rehnquist Court, it is said, has been turning back the clock on social progress and retreating from the institution's own duty to enforce the constitutional promises of liberty and equality.' (Edward Lazarus, *Closed Chambers: the rise, fall, and future of the modern supreme court*, New York 1999, pp. 7-8).
[41] *Maladeen v Pointu* [1998] 3 WLR 18 PC, 26-9 per Lord Hoffman.
[42] A contemporary example is the two Garda officers who were not short listed by the Police Authority of Northern Ireland, leading to less than fully informed indignation in the Republic: *Irish Independent*, 20, 23 & 24 February 2001.



popular revolt from the 1970s, which spread to Europe, against big government tax and spend.

In 1996, the Clinton White House published a review of federal affirmative action programmes. The president reaffirmed his support, but, crucially, instructed federal bodies to review their policies to ensure they did not: create quotas; prefer unqualified candidates; use reverse discrimination; or continue after the achievement of their purposes. The basis of contract compliance was shifted from race to all contractors from deprived areas.

**"Discrimination" in Northern Ireland**

The word dates from the 1960s, and was used by the civil rights movement in a general political critique of unionist rule. The reputedly irreformable nature of Northern Ireland became a justification for republican terrorism. Discrimination became part of a communal assertion related to the solution of a united Ireland.

Now orthodoxy, certainly outside Northern Ireland, it is remarkable how little scholarly study there has been of the extent and nature of anti-catholic (and anti-protestant?) discrimination. John Whyte's seminal article, "How much discrimination was there under the unionist regime, 1921-68?", was not published until 1983.[43] It was largely a review of the literature. The topic was not seriously revisited, until after the Belfast Agreement: Graham Gudgin's "Discrimination against Catholics during the Stormont Regime", written in August 1998 and published the following year.[44] This uses census data, and also focuses on the private sector, where most jobs are located. Gudgin attributes continuing catholic over-representation among the unemployed, even with fair employment legislation, not to past and present discrimination, but to a higher rate of minority population growth, combined with less catholic out-migration by way of response to unemployment. While unemployment (of catholics or protestants) is a social problem, it is not one amenable to anti-discrimination law; affirmative action practice may, however, have a role.

Northern Ireland catholics have now acquired their place in history[45], but they have also earned the acronym MOPE (most oppressed people ever)[46] given their attachment to, and use of, victim culture.

[43] In T. Gallagher & J. O'Connell, eds., *Contemporary Irish Studies*, Manchester 1983.
[44] In Patrick J. Roche & Brian Barton, eds., *The Northern Ireland Question: nationalism, unionism and partition*, Aldershot, Hampshire 1999.
[45] Marianne Elliott, *The Catholics of Ulster*, Belfast 2000.
[46] Coined by Liam Kennedy.

**ECJ Case Law on the Principle of Equal Treatment between Men and Women**

Here I want to concentrate upon the third exception in Directive 76/207/EEC (before amendment), what has come to be called positive action in European law: article 2(4).[47] I look at the schemes before the ECJ in four important cases (three of them from Germany), and also the reasoning of the advocates general which led to the judgments of the Court on--it should be noted--the questions referred by national courts.[48]

*(1) Case 312/86,* Commission of the European Communities v French Republic *[1988] ECR 6315*

France had national legislation which maintained special rights for women in collective agreements concluded before the Directive came into force. (It also belatedly left the removal of such inequalities to the social partners without specifying timescales.) The member state was held to have failed to fulfil its obligations under the Treaty by not implementing the Directive in full.

According to the Court,

> "the exception provided for in Article 2(4) is specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life. Nothing...makes it possible to conclude that a generalized preservation of special rights for women in collective agreements may correspond to the situation envisaged in the provision."

Sir Gordon Slynn, the advocate general, had stated:

> "It is not permissible to argue, as France appears to argue, that because women in general have been discriminated against then any provisions in favour of women in the employment field are *per se* valid as part of an evening up process...Community law does not require, and the Commission in this action does not seek, the withdrawal from women of the benefits in question: it merely requires them to be offered to men and women on equal terms."

[47] See also, Recommendation 84/635/EEC of 13 December 1984 ([1984] OJ L331/34), where the Council stated in the third recital: 'existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures.'

[48] In a memorandum of 9 February 2000, Odile Quintin, the acting deputy director general of the Commission's employment and social affairs directorate general, stated that positive action in the Directives was as defined in ECJ case-law: House of Lords, Select Committee on the European Union, 9th Report, *EU Proposals to Combat Discrimination,* HL Paper 68, 1999-2000, evidence p. 14.



*(2) Case 450/93,* Kalanke v Freie Hansestadt Bremen *[1995] ECRI - 3051*

The male plaintiff applied unsuccessfully for promotion in the Bremen parks department, the managerial position going to an (arguably) equally qualified woman because of local public service equal treatment law: this provided that women were underrepresented where they did not make up at least half of each relevant group of employees. Bremen had a system of quotas dependent on candidates' abilities (women only benefited if they were equally qualified). The German federal labour court sought a preliminary ruling from the ECJ, instituting a case in which the successful candidate intervened.

The Court held that article 2(4) of the Directive precluded such national rules. As a derogation from an individual right (not to be discriminated against), positive action (as an exception) had to be interpreted strictly: *Case 222/84, Johnston v Chief Constable of the RUC [1986] ECR 1651, para. 36.*

According to the judgment,

> "national rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive. Furthermore, in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity."

The opinion of advocate general Tesauro contrasted "formal equality, in the sense of equal treatment as between individuals belonging to different groups, and substantive equality, in the sense of equal treatment as between groups."

There were three models of positive action: dealing with the causes of disadvantage through vocational guidance and training; social policy designed to balance home and work and the contributions of men and women; and "preferential treatment in favour of disadvantaged categories...in particular through systems of quotas and goals." The first two aimed at achieving equal opportunities, and, in the final analysis, attaining substantive equality. While the third was "certainly suitable for bringing about a quantitative increase in female employment, it is also true that it is the one which most affects the principle of equality as between individuals...".

Consturing article 2(4), the advocate general distinguished equality with respect to starting points or with respect to points of arrival. The two candidates--accepting the finding of the regional labour court--had equal opportunities at the starting block. By then giving priority to women, the national legislation "[did] not seem to [him] to fall within either the scope or the rationale of Article 2(4) of the Directive." The permitted derogation from the principle in article 2(1)-following the *Commission* case above – was

> "only discrimination in appearance in so far as it authorizes or requires different treatment in favour of women and in order to protect them with a view to attaining substantive and not formal equality, which would in contrast be the negation of equality."

*(3) Case 409/95,* Marschall v Land Nordrhein-Westfalen *[1997] ECR I - 6363*

The male plaintiff applied unsuccessfully for promotion as a teacher, in a different German land, an equally suitable woman candidate succeeding because of a--different--local public service equal treatment law: this provided that where there were fewer women than men in the relevant group of employees, 'women [we]re 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[ed] the balance in his favour [A.M.].***'

This case, eminently distinguishable from *Kalanke* above[49], was referred by the first instance administrative court (which did not think so[50]), to the ECJ for a preliminary ruling shortly after *Kalanke* was decided.

The Court held that the Nordrhein-Westfalen national rule was not precluded by article 2(1) and (4), provided that

> "in each individual case the rule provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate, and such criteria are not such as to discriminate against the female candidates."

In Bremen, Kalanke could not have been promoted. Here, Marschall could have been selected fairly under the law in question - though it seems from the report that he was not so considered.[51]

According to the judgment,

[49] This was the view of Nordrhein-Westfalen, Spain, Austria, Finland, Sweden and Norway. France and the United Kingdom held that it fell foul of *Kalanke*, as it was concerned with equality of representation and not opportunity. The Court, however, took account of the observations of France and the United Kingdom in its judgment.

[50] It thought there was discrimination under article 2(1). As for article 2(4), the provision had nothing to do with equal opportunities.

[51] The ECJ did not decide the case for the German court. It simply gave a preliminary ruling on the questions posed.



> "a national rule in terms of which, subject to the application of the saving clause, female candidates for promotion who are equally as qualified as the male candidates are to be treated preferentially in sectors where they are underrepresented may fall within the scope of Article 2(4) if such a rule may counteract the prejudicial effects on female candidates of the attitudes and behaviour described above [that is, prejudices and stereotypes about work being less important to women] and thus reduce actual incidents of inequality which may exist in the real world."

The opinion of the advocate general, F.G. Jacob--whose conclusion was qualified by the Court[52]--emphasized the legal uncertainty of the proviso in the German law. He accepted implicitly the observations of France and the United Kingdom. Article 3(1) referred to "no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts..." The advocate general followed *Kalanke*, arguing that article 2(4) could not embrace the scheme in question. Advocate general Tesauro's insight was accepted:

> "Whether it is expressed in terms of removing obstacles rather than imposing results, or ensuring equality at starting points rather than at points of arrival, or guaranteeing equality of opportunity rather than equality of result, the distinction is conceptually clear, and will in my view normally be apparent on which side of the line a given measure falls."

Advocate general Jacobs concluded by considering what might be permitted by article 2(4). "A gender-specific measure will not to my mind be proportionate to the aims of remedying specific inequalities faced by women in practice and promoting equal opportunity if the same result could be achieved by a gender-neutral provision." One example was an extension of the age limit for candidates who had been engaged in full-time childcare, though this would be indirectly discriminatory in favour of women.

*(4) Case 158/97,* Badeck and Others, Hessischer Ministerprasident intervening, ***unreported 28 March 2000***

Forty-six members of the Landtag of Hesse applied on 28 November 1994 (before *Kalanke*) to the state constitutional court for a review of the legality of a local public service equal treatment law (which had 13 years to run from the end of 1993), the prime minister and land attorney of Hesse intervening. The law provided for advancement plans for women, including

[52] He had said: 'I would add as a general point that in my view any temptation to distinguish *Kalanke* on narrow technical grounds should be resisted...Straining to differentiate similar cases on the grounds of nuances in the contested legislation is likely to lead to confusion as to the law and a proliferation of litigation with arbitrary results.'

two-year binding targets of more than fifty per cent women. This was known as a flexible result quota. Under-representation was defined as fewer women than men; in the academic service, it was the percentage of women graduates, or women with higher degrees, in each discipline. The state constitutional court referred the case to Luxembourg on 16 April 1997 (before *Marschall*) for a preliminary ruling.

The Court (with advocate general M.A. Saggio)--which answered a question of five parts--held that article 2(1) and (4) did not preclude a national rule which provided that, where women were underrepresented, and they were as equally qualified as men, it was possible to comply with an advancement plan "if no reasons of greater legal weight are opposed"[53], and "provided that that rule guarantees that candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates."

This was consistent with *Kalanke*, as developed by *Marschall*, though *Badeck* conceded that legally binding targets (as targets) were acceptable (other aspects of the Hesse scheme were criticized). As with *Marschall*, the ECJ did not decide *Badeck* for the German court.

According to the judgment, following *Marschall*:

> "It follows that a measure which is intended to give priority in promotion to women in sectors of the public service where they are under-represented must be regarded as compatible with Community law if: it does not automatically and unconditionally give priority to women when women and men are equally qualified; and the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates. It is for the national court to determine whether those conditions are fulfilled on the basis of an examination of the scope of the provision at issue."

## Reactions to *Kalanke* after 17 October 1995

On 6 April 1995, advocate general Tesauro had concluded his opinion: "In sum, positive action may not be regarded, even less employed, as a means of remedying, through discriminatory measures, a situation of impaired inequality in the past."

*Kalanke* produced a furore of legal and other academic responses, mostly by women. References to case notes and articles litter the opinion of 15 May 1997 of advocate general Jacobs in *Marschall*. I do not propose to review this literature. One of the severest articles I have seen is: Sandra Fredman of Oxford University (with an acknowledgement to Christopher

[53] A reference apparently to German basic law, in particular the social state and the protection of marriage and the family.



McCrudden), "Reversing Discrimination", *Law Quarterly Review*, 1997, 113, 575. "A law", she writes, "which genuinely aims to narrow the disparities and eventually achieve equality must tolerate unequal treatment where necessary to achieve more equal results." The article criticizes *Kalanke* (and other cases) through an examination of the philosophical and strategic dimensions of affirmative action.[54] Fredman reveals no awareness of labour markets and socio-economic mobility[55], of history and politics (other than her own theoretical practice), and of how legal principles, may, and may not, be applied to influence the conduct of natural persons.

### *The European Commission*

On 2 May 1996, the Commission proposed an amendment to article 2(4) of the 1976 Directive in the light of *Kalanke* (which was misconstrued in the preamble to the draft Directive): [1996] OJ C179/8, 22 June 1996. The Commission proposed to add to the existing text: "Possible measures shall include the giving of preference, as regards access to employment or promotion, to a member of the under-represented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case."

Advocate general Jacobs criticized this draft in his opinion in *Marschall*, as being more innovatory than the Commission suggested. He cited a critical opinion of the Economic and Social Committee of 25 September 1996, which had been carried by 97 votes to two with eight abstentions: [1997] OJ C30/97, 30 January 1997. According to the Committee, which wanted the Commission to take a clear stand on positive measures, a Directive was not the appropriate legal instrument: it should be left to the intergovernmental conference and primary legislation.

## Amending the European Treaties

The EEC Treaty, or Treaty of Rome, dates from 1957. It was amended by the 1986 Single European Act. The next major step was the Treaty on European Union ('TEU'), agreed at Maastricht in 1992; the EEC became the EC. This Treaty was amended at Amsterdam (1997), and again in

[54] She distinguishes three approaches: the 'symmetrical' (the United Kingdom's), which rejects reverse discrimination; the 'substantive' (United States, in part), which supports it; and the 'equal opportunities' approach (ECJ), which favours positive action. 'Individualism' is specified as a theoretical error. She also rejects, what she calls, formal justice, and the neutrality of the state. Fredman concludes: there are 'deep moral differences between discrimination against a group which has been subject to historical and continuing detriment on the basis of their race or sex, and programmes which aim to remedy that discrimination.' (p. 600)

[55] For example, the document of the Portuguese presidency, 'Employment, economic reforms and social cohesion - towards a Europe based on innovation and knowledge', issued in January 2000, stated that the twofold strategic objective of combating unemployment and increasing the employment rate required, inter alia, 'a resolute inversion of the trend towards early retirement from the labour market', and 'an increase in the rate of female employment, encouraging equal opportunity of access to the labour market and positive action…'. (Document 5256/00)

Nice (2000). The TEU and the Treaty establishing the European Community ('EC') are two separate but related instruments.

In terms of the principle of the equal treatment of men and women, a major advance was made with the agreement on social policy, annexed to a protocol to the Maastricht Treaty. This was because the United Kingdom secured an opt-out in the negotiations. Article 6(3) of the protocol provided, with regard to the equal pay principle, for positive action. It was only in 1997, that equality between men and women was added to the treaties proper, applying throughout the EC: articles 2 and 3(2), under principles; and, under social provisions, articles 137(1) and 141(3) and (4); article 141 is the former article 119 on equal pay, to which has now been added equal treatment and positive action[56].

*The Extension of the Principle of Equal Treatment*

The most important aspect of the Amsterdam Treaty is article 13 EC (inserted as article 6a EC of the Maastricht Treaty[57]), under part 1 on 'principles'. Article 13 reads:

> "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

The provision was, of course, permissive and not mandatory. The Amsterdam Treaty was signed on 2 October 1997. It entered into force on 1 May 1999. There followed speedy action by the Commission. This action, comparing articles 12 and 13, has to be construed narrowly, when examining the acts of the Council, given that its competence is defined by: "within the limits of the powers conferred by [the Treaty] upon the Community"

[56] '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.' This is the provision the Economic and Social Committee argued for on 25 September 1996 (see above). Article 141(4) has to be read with declaration No. 28, attached to the Treaty of Amsterdam: 'When adopting measures referred to in Article 141(4)..., Member States should, in the first instance, aim at improving the situation of women in working life.'

[57] See *Grant v South-West Trains* [1998] 1 CMLR 993, 1013-4.



## The Implementation of Article 13 EC[58]

On 25 November 1999, the Employment and Social Affairs Directorate General of the Commission published three texts:

- a proposed Council Directive establishing a general framework for equal treatment in employment and occupation (with an explanatory memorandum[59]) ("the equal treatment Directive");
- a proposed Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (with an explanatory memorandum[60]) ("the race Directive");
- a proposed Council decision establishing a Community Action Programme to combat discrimination 2001-2006[61].

There followed a communication from the Commission to the Council, the European Parliament, Economic and Social Committee and Committee of the Regions: [1999] OJ C369/03, 21 December 1999.

I do not propose to discuss this article 13 EC initiative in full. (The idea of two Directives, one general the other particular[62], gave way to making the race Directive a priority[63]: political agreement was reached by the Council on 6 June 2000: Council Directive 2000/43/EC). Hereafter, I will refer only to the equal treatment Directive, from which racial or ethnic origin was to be deleted.) I simply want to make a number of relevant points about proposed European equal treatment law.

One, the addressees were "the Member States" (then article 18). There were no opt outs or derogations for particular regions, industries or professions. Two, the ground of gender (men and women) was extended to: racial or ethnic origin; religion or belief, disability, age or sexual orientation. The absence in the proposed directive of sex, now provided for expressly in article 141 EC, counts against this list being illustrative of a general principle (then article 1). Three, the principle of equal treatment was being extended from Council Directive 76/207/EEC, meaning the case law of the ECJ on men and women was relevant. Four, discrimination was defined as direct and indirect (then article 2). Five, the material scope was further specified compared with 1976, but remains essentially the world of work (then article 3). Six, the exceptions were threefold: first, for "genuine occupational

[58] Article 13 EC has been amended by the 2001 Treaty of Nice, which has yet to enter into force. The original article 13 becomes paragraph 1. A new paragraph 2 is added, allowing derogation from paragraph 1: this applies to EC incentive measures, not based on harmonization, to support action taken by member states to contribute to the achievement of paragraph 1 objectives.

[59] COM(1999) 565 final.

[60] COM(1999) 566 final.

[61] COM (1999)567 final.

[62] Referred to initially as respectively the horizontal proposal and the vertical proposal.

[63] COM(2000) 328 final, 31 May 2000 (amended proposal). This was seemingly due to the European Parliament.

qualifications" (following the 1976 Directive) (then article 4); more exceptions for the ground of age than other grounds (then article 5); and positive action (then article 6), inspired in part by article 141(4) EC - which applies only to men and women. The Commission stated in the explanatory memorandum: "as positive action measures are a derogation form the principle of equality, they should be interpreted strictly, in the light of the current case-law on sex discrimination [*Kalanke* and *Marschall* being cited]." Seven, the burden of proof was reversed (then article 9). Eight, the implementation date was to be 31 December 2002 (then article 15).

The Equal Treatment Directive had a coherence based on extending the law on men and women to other groups. Mention should also be made of a proposed Directive of the European Parliament and Council, amending Council Directive 76/207/EEC to bring it into line with the article 13 EC initiative.[64] This (as noted above) led to Directive 2002/73/EC of 4 October 2002. The explanatory memorandum accompanying the proposed Directive stressed that positive action as between men and women was now to be based on article 141(4) EC: "The proposed Directive puts this obligation in concrete terms and takes account of the case law of the European Court of Justice, which comprises 40 judgments in the last 25 years."

The Equal Treatment Directive was amended by the European Parliament on 5 October 2000, and the Commission issued an amended proposed Directive on 12 October 2000.

The relevant changes were as follows. One, the addition of "the constitutional traditions common to the Member States" to article 6(2) EC in the first recital of the preamble. Two, the first exception in then article 4 was altered to "genuine occupational requirement", and substantially redrafted. Any instance had to have a legitimate objective, and the requirement had to be proportionate. But there was a loosening up of the restriction, for "public or private organisations based on religion or belief". The explanatory memorandum stated this was to allow for "social work" by religious organizations. Three, the positive action provision in then article 6 was brought more into line with the spirit of article 141(4) EC.[65] Four, under implementation in then article 16, provision was made for the social partners, at their joint request, putting into effect the principle of equal treatment through collective agreements. Five, under reporting in then article 17, reference was made to "the principle of integration of equal-opportunities policy".

[64] COM(2000) 334 final (7 June 2000).

[65] For the view of the House of Lords, Select Committee on the European Union, see 9th Report, *EU Proposals to Combat Discrimination*, HL Paper 67, 1999-2000, pp. 32-4.



**The Council of Employment and Social Affairs Ministers of 17 October 2000**

This document then went to the member states, in particular the lead departments and ministers.

However, a Council working group had negotiated on the original text in private, using documents largely in French. The working group reported to COREPER 1[66] in early October 2000, there being three meetings on the Directive. This COREPER text was not received in London until 16 October 2000. Ministers, therefore, did not actually consider the amended Commission proposal on 17 October 2000. Nor did they take account of the European Parliament's amendment, as required by article 13 EC. The political bargaining conducted by officials in Brussels for much of 2000 was continued by national ministers lacking familiarity with the text and the issues.

On 6 July 2002, I applied to the Council for access to relevant documents. This was granted on 23 July 2002, for six documents on inter-institutional file 99/0225 (CNS), some in French and the remainder in English. A social questions group had reported to COREPER 1 on 29 September, 2 and 10 October 2000. COREPER 1 then reported to the Council on 11 (twice) and 12 October 2000. These documents cast interesting light on the roles of the Irish and United Kingdom governments.

The house of lords select committee on the European Union was to comment shortly afterwards:

> "with a [French] Presidency desperate for unanimous agreement, any Member State [could] effectively force the Council to accept their demands...Nine months of detailed examination by the working group failed to produce a text to which all fifteen Member States were prepared to agree...Hurried last-minute bargaining is not the way to prepare good legislation...We note that of the major changes agreed by the Council...all but one were additional exemptions; the final change was the extension of the implementation period from three to six years...The general structure and the underlying objectives...were agreed by this stage - but the UK and Ireland were able to exploit the situation to secure agreement to specific provisions weakening the application of the principle of equal treatment."[67]

At this point, it is necessary to trace events in Dublin and London separately. The accounts below are not comprehensive; however, they are likely to be essentially accurate.

[66] Committee of permanent representatives.

[67] House of Lords, Select Committee on the European Union, Fourth Report, *The EU Framework Directive on Discrimination*, HL Paper 13, 2000-01, p. 8.

*Dublin: "pushing at an open door"*

Though it was not obvious at the time, it is now clear that religious interests throughout the European Union had been alarmed by the prospect that then article 4 ("genuine occupational [qualifications] *requirement*") would restrict their abilities to discriminate. It may be inferred that the opinion of the European Parliament of 5 October 2000 would have satisfied most in the fifteen member states. However, most lobbyists, including those beseeching the Irish government, were railing against the text of 25 November 1999.[68] (So much had been evident in the house of lords debate in London on 30 June 2000.) Also, as noted above, the European Parliament's 5 October 2000 text had been eclipsed by the work in COREPER 1 ~~with~~ which went to the 17 October 2000 Council.

On 2 October 2000--according to *Irish Times* reports[69]--the Taoiseach, Bertie Ahern, had received a religious delegation (this was three days before the European Parliament opinion.) Gone were the days of direct catholic interference in politics.[70] The Bishop of Clogher and Fr O'Connor of Dublin were accompanied by five protestants representing three churches[71]. Subsequently, the Irish government represented itself as concerned with minorities, such as Buddhists![72]. It was at this meeting, seemingly, that Dublin decided to try and amend then article 4 of the equal treatment Directive. However, it would not do this through COREPER, where the United Kingdom was taking the lead in protecting religious interests.[73] (The religious delegation had a good argument in domestic law: section 37 of the Employment Equality Act 1998, which the churches had inspired originally, exempted "religious, educational or medical institution[s]...under the direction or control of a body established for religious purposes" in two ways; one, they could discriminate on the ground of religion "in order to maintain the religious ethos of the institution", and, two, they could take reasonable action to prevent employees from "undermining the religious ethos of the institution". What the churches had achieved in 1998 they wanted to repeat in 2000.)

The catholic bishops' spokesman said later that, as regards protecting religious education, in Northern Ireland, and in the Republic, the delegation had been "pushing at an open door".

[68] David Quinn referred subsequently to an early opinion of Prof Ian Leigh of the University of Durham: *Sunday Times*, 22 October 2000.
[69] 17, 18 and 19 October 2000.
[70] J.H. Whyte, *Church and State in Modern Ireland, 1923- 1970*, Dublin 1971.
[71] Archbishop of Dublin and Canon John McCullagh (Church of Ireland); Rev Sam Hutchinson and George McCullagh (Presbyterians); and Rev Harold Good (Methodists).
[72] John O'Donoghue, *Irish Times*, 18 October 2000.
[73] The United Kingdom, supported by the Irish delegation and two others, had proposed an amendment to article 4(2) on 29 September 2000.



*A Human Rights Commissioner*

One of the pushers, representing the methodists, was the Rev Harold Good. (He has not contradicted press reports of his role.) The Rev Good lives and works in Northern Ireland, and has been, since March 1999, a member of the Human Rights Commission there. It is not known how he reconciles his public appointment in one jurisdiction, with his lobbying of the government of another state. The Human Rights Commission has not, so far, expressed any view on the matter.[74] However, it its first annual report[75], under "education work", the Commission listed seven issues of concern given the Human Rights Act 1998. The sixth is: "exempting the appointment of teachers from [Northern Ireland's] fair employment legislation". But the exemption is precisely what the delegation of clerics and lay members to the Irish government was seeking to protect from Brussels.

*Permitted Religious Discrimination*

At this point it is appropriate to look at article 4, as proposed by the Commission, and after agreement in the Council on 17 October 2000. [Deletions] and *additions* are shown thus:

> "Preamble
>
> ...
>
> *(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate....*
>
> ...
>
> Article 4
> [Genuine] *O*[o]ccupational requirement*s*
>
> 1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the discriminatory grounds referred to in Article 1 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 the objective is legitimate and the requirement is proportionate.

[74] The chief commissioner, Prof Brice Dickson, defended the Rev. Harold Good in a letter to Lord Laird of Artigarvan on 26 February 2001.
[75] HC 715, 1999-2000.

2. [Notwithstanding paragraph 1, the Member States may provide that in the case of public or private organisations based on religion or belief, and for the particular occupational activities within those organisations which are directly and essentially related to religion or belief,] *Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief,* a difference [in] *of* treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or *of* the context in which they are carried out, a person's religion or belief constitute [sic] a genuine, *legitimate and justified* occupational requirement, *having regard to the organisation's ethos.* This difference of treatment [may not, however, give rise to any discrimination on the other grounds referred to in Article 13 of the EC Treaty] *shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.*

*Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public and private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.*"

This is a remarkable article, in a Directive, which remains relatively well drafted. The principal casualty was the text originating with the United Kingdom delegation. The distinct contributions of the Irish draftsman are clear: "national practices"; "national constitutions and laws"; "to act in good faith and with loyalty to the organisation's ethos" (minor amendments appear to have been made by other ministers, and the preamble may prove decisive in limiting the effects of article 4).

The original exception in Council Directive 76/207/EEC had envisaged waning away with time, in accord with a liberal-democratic worldview[76]. Almost 25 years later, in a major venture in secondary anti-discrimination legislation, the Irish government--apparently--committed the European Union to tolerance of widespread cultural control (extending beyond major churches into the territory of organizations with a religious ethos).

I say apparently, because the jurisprudence of the ECJ remains that the principle of equal treatment is to be construed broadly and any derogation, such as article 4, construed narrowly. Most likely, if Irish courts indulge Irish national practices, enacted by the Oireachtas, the ECJ will, in

[76] Articles 2(2) and 9(2).



considering Irish and other cases, significantly limit the effects of the Irish intervention.

*The Council of Ministers*

Nevertheless, it was a considerable morale booster for religious and other interests, which had been alarmed in the summer of 2000. How did the Irish do it? Again, I am limited mainly to press reports, though I have also spoken to journalists who were covering the Council in Luxembourg on 17 October 2000.

That morning, the *Irish Times* reported that the Republic might veto the Directive. John O'Donoghue, the minister for justice, equality and law reform, was said to have consulted "church leaders and educational interests" the day before. Normally, a junior minister, Tom Kitt, responsible for labour affairs, consumer protection and international trade, attended the Employment and Social Affairs Council. This time, John O'Donoghue took the lead on behalf of the Irish cabinet.

The Council was chaired by Martine Aubry, the then French employment minister (also known for being Jacques Delors's daughter). The official press release of this 2296th meeting included:

> "After difficult negotiations the Council reached unanimous political agreement…Agreement was finally reached on the basis of a compromise text which accommodated the difficulties encountered by certain Member States concerning, in particular, the possibility of churches and organisations the ethics [sic] of which are based on religion or belief of applying different treatment on account of essential, legitimate and justified professional requirements."[77]

The *Irish Times* elaborated: "as Mr O'Donoghue left Luxembourg after an ill tempered, 12-hour meeting, the EU [French] Presidency cast doubt on his interpretation of the new equality Directive and complained that Ireland gave no warning of its doubts about the original draft." The minister was quoted as saying: "I don't believe we squandered any goodwill. It's very unusual for Ireland to put its head above the parapet like this. We've always sought to compromise with others."[78]

Three positions seem to have crystallized. One, a (say) catholic school could insist upon a catholic to teach religion (a concession which ignores multi-faith education). Two, a catholic school could insist upon a catholic to teach even mathematics, regardless of whether he/she was competent (competence only comes into it if there is another catholic candidate). And

[77] 12125 (Presse 378), http://ue.eu.int.
[78] 18 October 2000.

three, any catholic-owned or controlled institution (including hospitals) could insist upon catholic secretaries, drivers, gardeners and cleaners etc. etc.

Martine Aubry was reported afterwards as interpreting article 4 in terms of the first position.[79] The second was undoubtedly achieved by the amended text. And John O'Donoghue claimed victory for the third position: Irish national practices (whether legal or not?) would be unaffected by this important European Directive (an argument now available in the other 14 member states).

The Commissioner, and her ministerial colleagues, also appear to have missed the probable human rights significance of the Irish requirement, whereby employees may not undermine their institution's religious ethos, being adopted by the European Union: there are surely articles 8, 9, 10, and 11 of the European Convention on Human Rights points here.

*London: Northern Ireland is different!*

There is no reference to the United Kingdom in newspaper reports of this Council. Its two usual junior ministers represented London: Tessa Jowell, minister for the new deal in the department of education and employment; and Alan Johnson from the department of trade and industry. There was no Northern Ireland Office attendance, though Peter Mandelson, the secretary of state, had once presided over trade and industry. However, his impact on the Commission's amended proposal on 17 October 2000, whether negotiated earlier in the working group or COREPER 1, was undoubtedly greater than that of the Irish justice minister.

It is impossible to comprehend any particular Northern Ireland policy of London's without appreciating two mantras of United Kingdom statecraft after 30 years of terrorist violence. The first is that Northern Ireland is different; ministers and officials never say how[80], much less appreciate that, by their special treatment, they help make it different. The second mantra, laid down in the 1990s is simply: the peace process[81]. Mere utterance allows for the suspension of reason, and the abandonment of the need for argument - apparently necessary for good public administration in all other times and places.[82]

---

[79] This had been the view of the employment and social affairs directorate general from the start: House of Lords, Select Committee on the European Union, 9th Report, *EU Proposals to Combat Discrimination*, HL Paper 68, 1999-2000, evidence, pp. 17-8, 27.

[80] Thus, John Major, then prime minister and leader of an anti-devolutionist party, wrote in his foreword to the 1995 *Framework Documents*: 'For reasons that are unique to Northern Ireland, devolution…has always been a central plank of Government policy for Northern Ireland alone.'

[81] For a recent judicial example, see *Re Williamson's Application* [2000] NI 281, 291g per Kerr J.

[82] Having written the above, I located the following: 'The Minister was asked whether a specific exemption for Northern Ireland on the face of the Directive was appropriate, given that other Member States, present or future, might at some point wish to overcome similar problems of historical under-representation of particular ethnic or religious groups. She replied that in the Government's view "the situation in Northern Ireland is unique", and so requires a specific



*Permitted Religious Discrimination*

At this point it is appropriate to look at article 15, which was agreed on 17 October 2000 without apparently any fuss:

> PREAMBLE
>
> Recital (34)
>
> The need to promote peace and reconciliation between the major communities in Northern Ireland necessitates the incorporation of particular provisions into this Directive.
>
> …
>
> PARTICULAR PROVISIONS
>
> Article 15
>
> Northern Ireland
>
> 1. In order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, differences in treatment regarding recruitment into that service, including its support staff, shall not constitute discrimination insofar as those differences in treatment are expressly authorised by national legislation.
>
> 2. In order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, the provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorised by national legislation.

I will look first at the law as applied to teachers in Northern Ireland, and then at policing. This requires an examination of the policy antecedents to a consideration of the equal treatment Directive in the United Kingdom in 2000. The provision as regards teachers seems to have been an afterthought to the opt out for the police in Northern Ireland. It seems to have first appeared in a COREPER 1 report of 11 October 2000 to the Council.

In a report of 12 October 2000, under other outstanding issues, COREPER 1 noted:

---

provision…' (House of Lords, Select Committee on the European Union, 4th Report, *The EU Framework Directive on Discrimination*, HL Paper 13, 2000-1, para. 53).

(b) Northern Ireland
*The Irish delegation* said that it fully supported the addition of recital 35 and Article 18 as proposed by the United Kingdom delegation, but that the UK and Irish authorities were still holding talks on the exact wording of those provisions.

*The delegations* stated that they were able to give their provisional agreement to the texts set out in 12269/00.

For its part, *the Commission* reiterated its position of principle that explicit derogations for a part of Community territory should be avoided in Community texts. It nevertheless took note of the Council's unanimous stance on recital 35 and Article 18.

## Teachers in Northern Ireland

*Religious and Political Discrimination*

Reference was made above to the Northern Ireland Constitution Act 1973, and the Northern Ireland Act 1998.

In the former, part III was devoted to the prevention of religious and political discrimination. This was direct discrimination only. Section 17 prohibited legislation which "discriminated against any person or class of persons on the ground of religious belief or political opinion". It replaced section 5 of the Government of Ireland Act 1920. Legislation could be referred by the secretary of state to the judicial committee of the privy council for a decision on validity (section 18). Section 19 made discrimination by public authorities unlawful.

A statutory tort was created. Arguably, Westminster also created a human right not to be discriminated against on one if not two of the specified grounds. The Northern Ireland courts were to have nearly three decades of experience interpreting section 19 (religious and political discrimination), drawing also upon gender, race and disability discrimination legislation extended from Great Britain.

The Northern Ireland Act 1998--the second full devolution measure since 1968--re-acted and developed this law: sections 6(e) (legislative competence of the assembly); 24 plus 90 to 92 and schedule 11(executive competence); 79 to 83 and schedule 10 (judicial scrutiny); 76 plus 90 to 92 and schedule 11 (discrimination by public authorities).

However, it is the Fair Employment Acts of 1976 and 1989, now re-enacted (with some amendments) as the Fair Employment and Treatment



(Northern Ireland) Order ("FETNIO") 1998, SI 1998/3162, which governs teachers in Northern Ireland.

Here, the story is again one of exception (part VIII of the order). Article 70 contains three: for clergymen or ministers; private households; and where "the essential nature of the job requires". Article 71 is for "school teachers":

> (1) Subject to paragraph (2), this Order does not apply to or in relation to employment as a teacher in a school.
> (2) The [Equality] Commission shall keep under review the exception contained in paragraph (1) with a view to considering whether, in the opinion of the Commission, it is appropriate that any steps should be taken to further equality of opportunity in the employment of teachers in schools.
> (3) …
> (4) …
> (5) …
> schedule 2 [all dealing with Commission investigations].

The exception is for all school teachers in Northern Ireland, school being defined in the Education and Libraries (Northern Ireland) Order 1986, SI 1986/594: article 2(2). Sir Robert Cooper, former chairman of the Fair Employment Commission, told the House of Lords Select Committee on 5 April 2000: the teachers' exception was proposed "for all sorts of reasons which I think are complicated but are probably valid"; the major problem was avoiding giving catholic teachers a monopoly in their own schools, and equal opportunities in state or protestant schools (thus all teachers were exempted from the principle of fair treatment); there had been no move, by the government or from within the Commission, to stop exempting teachers from fair employment and treatment legislation during his time at the Commission.[83]

*Domestic Legislation and the Equal Treatment Directive*

Looking at article 71 of FETNIO 1998, it may be argued that the provision for commission investigations was so as to make the exemption proportionate. However, it is difficult to see what purpose was being pursued (Westminster was conceding to catholic power, and in practice disadvantaging protestant teachers). Paragraph (2) clearly indicates that there was little or no equality of opportunity given the exception. Further, it would have to be removed if there was to be equality of opportunity for all teachers in Northern Ireland.

[83] Question 300. Interestingly, on the article 4 exception in the equal treatment Directive, Sir Robert said that the government had resisted religious pressure to allow churches to employ only coreligionists. It was left to the courts. He distinguished 'a representational role or proselytising' from 'the janitor' (Question 301).

However, article 15(2) of the Directive (see above), gives two reasons for exempting domestic legislation (of whatever nature) from the equal treatment principle. One, "in order to maintain a balance of opportunity in employment for teachers in Northern Ireland" (in French: *"afin de maintenir un équilibre dans les possibilités d'emploi pour les enseignants en Irlande du Nord"*[84]). This clearly contradicts national legislation. It is, in other words, meaningless. Two, "furthering the reconciliation of historical divisions between the major religious communities there". This is spurious. The separate education of catholics and protestants is related to communal division. The proof of this is the emergence in the last twenty years of a voluntary movement for publicly funded integrated education; the state, while responding, is failing fully to meet popular demand.

Article 15(2) is unlikely to survive judicial scrutiny by the ECJ. Since it states that the Directive will not apply to teachers in Northern Ireland, domestic courts will have no occasion to consider it directly (they would have difficulty interpreting "in so far as this[85] is expressly authorised by national legislation").

There is a considerable irony here, as a result of the separate Irish and United Kingdom interventions, neither of which prevents the ending of the exception for teachers in Northern Ireland.

"The provisions on religion or belief" refers to a ground in article 1. However, it was the Irish who diminished protection against discrimination on the ground of religion or belief by their amendment to article 4. The catholic church clearly thought, when it was lobbying Dublin, that it was looking after interests in Northern Ireland. However, while article 4 applies to hospitals and any other institutions there, it does not apply to schools with an "ethos...based on religion or belief" in Northern Ireland. That is the effect of article 15(2): "the provisions on religion and belief in the Directive [including article 4] shall not apply...". Courtesy of the United Kingdom, and also under rules of legislative interpretation about general and particular provision, it disapplies article 4 as regards Northern Ireland schools.

The interests of the catholic church as regards its schools in Northern Ireland are protected by, first, domestic legislation, and then by article 15(2). If the latter were to be nullified, article 4 would then apply. If article 4 were to fall in the ECJ, the church would be left with only domestic protection - now the responsibility of the Northern Ireland assembly (currently suspended). If the exception for teachers in Northern Ireland were to be removed, and the Directive survived unchallenged, then articles 15(2) and 4 would be of no use.

[84] The first translation to emerge from the United Kingdom government was: 'In order to maintain equality of opportunity for teachers in Northern Ireland'.
[85] A reference presumably to 'the recruitment of teachers in Northern Ireland'. Domestic legislation cannot disapply a Directive. But will any legislation on teachers be enough?



The maintenance of catholic teachers in catholic schools will owe nothing to the Irish and United Kingdom amendments on 17 October 2000; articles 4 and 15(2) simply prevent the equal treatment Directive being used, after 2 December 2003, in domestic courts against national legislation.

## Policing in Northern Ireland

### *The Belfast Agreement*

The origin of article 15(1) of the equal treatment Directive is the Belfast Agreement of 10 April 1998, in particular the section on Policing and Justice.[86] Paragraph 3 provided for an independent commission to make recommendations for future policing arrangements in Northern Ireland including means of encouraging widespread support for these arrangements. An independent commission, chaired by Chris Patten, was announced on 3 June 1998 by the secretary of state. It reported on 9 September 1999. The report, however, contained no recommendations on how to encourage widespread support for reforming the police.

The Belfast Agreement did not make any practical provisions for police reform. "A new beginning to policing in Northern Ireland" is political rhetoric. Nothing was legalized, in international law. Under general principles of domestic public law, the United Kingdom government had to consider the Patten report after 9 September 1999. It could not fetter its discretion. It had a choice, and responsibility, about what it would do as regards policing in Northern Ireland.

Such were the politics of the Belfast Agreement, that the Northern Ireland Office conceded to nationalist Ireland, and treated what Patten said as legitimized by the Northern Ireland referendum (that in the Republic was about amending the constitution only). But Chris Patten had not even been a twinkle in Mo Mowlam's eye on 22 May 1998 when the people of Northern Ireland voted on the Belfast Agreement (not including the Patten report).

Things changed when Peter Mandelson took over in October 1999. He gave his considered opinion to the house of commons on 19 January 2000. This was the basis of the Police (Northern Ireland) Bill, which passed through parliament between May and November 2000.

The Police (Northern Ireland) Act 2000[87] received the royal assent on 23 November 2000. Relevant sections were brought into force on 22 December 2000 and 30 March and 4 November 2001.[88]

[86] This is discussed in chapter 21 of my book, *The Belfast Agreement: a practical legal analysis*, London 2000.
[87] I annotated this Act for Current Law Statutes, published by Sweet & Maxwell.
[88] Police (Northern Ireland) Act 2000 (Commencement) Order 2000, SR 412; Police (Northern Ireland) Act 2000 (Commencement No.2) Order 2001, SR 132; Police (Northern Ireland) Act 2000 (Commencement No.3 and Transitional Provisions) Order 2001, SR 396.

*The Patten Report*

I am concerned only with the question of reverse discrimination. Patten quotes the figures of 8.0 per cent catholics, 88.1 per cent protestants (with 3.9 per cent others) in the Royal Ulster Constabulary for 31 December 1998. This is clearly unrepresentative, and Peter Mandelson, as secretary of state, referred to the problem time and time again. It is obvious that catholics are underrepresented in the RUC. However, when it comes to senior officers (superintendents and above), catholics are over-represented at 16 per cent. This is strong evidence that the RUC has not discriminated against catholics during, at least, the period when those senior officers were promoted from lower ranks.

The only alternative hypothesis is: the RUC discriminates against catholics in recruitment, but not in promotion.

If there is no discrimination, then anti-discrimination law will have no effect outside any cases brought. The problem is different, namely structural inequality. And here the question is what sort of reforms might work legally. What are the causes of catholic under-representation?

*Alternative Explanations*

Alternative explanations must be found for minority under-representation (some of which were mentioned by Peter Mandelson at third reading in the house of commons on 11 July 2000). They include: (1) intimidation by republican paramilitaries[89]; (2) social ostracism by important elements of the catholic community; and (3) political abstentionism from the institutions of government in Northern Ireland. The first factor can be measured in part by the increase in catholic applicants after the temporary IRA ceasefires of 1994 and 1997.[90] It may be measured further by the decrease in catholic applicants, after Patten's 50/50 was being implemented.[91] No significant studies have been carried out on the second factor. The third factor is a matter of historical record, and has been implicit in the government's handling of recommendation 121 of the Patten report: catholics must be given reverse discrimination on paper, because only then will they apply in sufficient numbers to achieve the 50/50 representation on merit to which their numbers entitle them. This proposition, if true in 2000, has been proved by 2002 not to be the full story. Implement Patten in full may be as much about, continuing communal and national opposition, as democratic accommodation in a new Northern Ireland.

[89] Paragraph 3.11 of the Patten report.
[90] Paragraph 15.3 of the Patten report.
[91] In June 2002, the Real IRA planted a bomb under the car of a catholic police trainee in Ballymena. This reportedly deterred catholics in training, and those who had been offered places: *Sunday Times*, 11 August 2002. This was denied by the PSNI: *Sunday Times*, 25 August 2002. But see, *Sunday Independent*, 8 September 2002 & *Belfast Telegraph*, 15 September 2002.



*The Patten Report*

Three recommendations are relevant:

"All candidates for the police service should continue to be required to reach a specified standard of merit in the selection procedure. Candidates reaching this standard should then enter a pool from which the required number of recruits can be drawn." (120);

"an equal number of Protestants and Catholics should be drawn from the pool of qualified candidates." (121);

"there should be an enlarged Part Time Reserve of up to 2,500 officers, the additional recruits to come from those areas in which there are currently very few reservists or none at all." (104)

There was little apparent appreciation of the significance of these recommendations.[92]

*The Secretary of State's statement of 19 January 2000*

Peter Mandelson announced:

"I attach particular importance to Patten's recommendations for action to transform the composition of the police service, which are essential to gaining widespread acceptability. I endorse the proposal for 50/50 recruitment of Protestants and Catholics, from a pool of candidates all of whom--I stress--will have qualified on merit. We propose that the requirement for this special measure should be kept under review on a triennial basis, with rigorous safeguards to ensure that the, rightly, challenging targets for recruitment do not diminish the standard required of recruits."[93]

In so deciding, Peter Mandelson reversed the policy of Mo Mowlam and the entire labour government elected in May 1997; reverse discrimination--quotas--had been opposed for Northern Ireland as well as Great Britain.

*Merit and Discrimination*

The following comments are apposite on the government's acceptance of Patten's 50/50 proposal: selection of qualified applicants to form a pool of applicants is on the basis of merit; that does not mean that appointments from the pool of qualified applicants are on that basis; they are clearly

[92] Note Sir Thomas Legg's distinction between maximal and minimal merit, and his separate treatment of the 'state' of Northern Ireland: [2001] PL 62, 69-70.
[93] The use of the word target is inaccurate.

discriminatory; so also is the non appointment of those left in the pool; they have been discriminated against on the ground of religious belief, having been selected as qualified applicants. This is not recruitment on merit, as the government tried to pretend; it is rejection despite merit, because of the imperative of religious discrimination.

An example will elaborate. Suppose the police seek 200 recruits each year. If 100 catholics and 100 protestants come forward, and are admitted to the pool on merit, there is no problem. The police can empty the pool. There has been recruitment on merit. If, however, 50 catholics and 150 protestants come forward, and all are admitted to the pool, the police take out the 50 catholics followed by 50 protestants (on what basis of selection?). There are 100 qualified applicants in the pool, but they cannot be taken. The police are also short of 100 trainees. If--as seemed possible in September 1999, given catholic over confidence and protestant alienation after Patten--150 catholics came forward along with 50 protestants, all being admitted to the pool, the police would select the 50 protestants followed by 50 catholics (on what basis of selection?). There would be a 100 qualified applicants, and a 100 short in the recruitment. That's why Patten's pool, while it has discriminated against protestants since 2001, is direct discrimination on the ground of religion or belief; it could just as readily keep out further catholics who wished to join (and who should be admitted under the principle of fair treatment, thereby achieving the objective which quotas are unlikely to facilitate).

*Compounding Religious with Political Discrimination?*

Before the full scale of Patten's--unprecedented--adoption of reverse discrimination had been appreciated, arguments were raised in public for compounding religious with political discrimination. Seemingly, fifty per cent catholic recruits was not good enough. These would not all be nationalists and republicans, it was claimed.

The research of Graham Ellison was quoted to suggest that at least a third of catholics in the RUC were ex-army and largely not from Northern Ireland.[94] However, according to Patten in September 1999, "the RUC do not at present ask candidates their religion. Assumptions are made on the basis of what school a candidate attended. If a candidate attended a school outside Northern Ireland, no determination is made."[95] So, far from these politically incorrect catholics inflating the figures of under-representation, there may in fact be more catholics--those from outside Northern Ireland (as well as those who did not attend catholic schools in Northern Ireland)--in the RUC.

[94] By, for example, Mary O'Rowe & Dr Linda Moore, *Human Rights on Duty: principles for better policing: international lessons for Northern Ireland*, Belfast nd but 1997, p. 27; Mary O'Rowe, in evidence to the Northern Ireland Affairs Committee, Third Report, *Composition, Recruitment and Training of the RUC*, 8 July 1998, 337-II, p. 95.

[95] Footnote to paragraph 15.13 of the Patten report.



The idea of political discrimination originated with John McGarry and Brendan O'Leary's *Policing Northern Ireland: proposals for a new start*, Belfast 1999, where the idea of "especially nationalist Catholics" was put forward.[96] In the *Irish Independent* of 2 November 1999, Brendan O'Leary shifted the argument from the percentage of catholics to the percentage of nationalists and republicans. This tactic was adopted belatedly by Sinn Féin, in talks with the United Kingdom government after the enactment of the Police (Northern Ireland) Act 2000.[97] It was another reason for not agreeing to policing.

Reverse discrimination in favour of catholics is producing legal and other practical problems. How does Brendan O'Leary propose to impose a political test, before otherwise qualified applicants are admitted to Patten's pool? Would they have to produce party membership cards? Or evidence of voting in 1997, 1998 or 2001? Or be certified by Mark Durkan and/or Gerry Adams? What proportion would be nationalist? And what proportion republican? The fact that we are reduced to such questions is a measure of how low the debate has been brought.

*Patten's Reverse Discrimination Recommendation*

In paragraph 15.11 of his report, Patten stated that, having consulted the Fair Employment Commission (now the Equality Commission), and received a legal opinion from counsel, his proposal, while contrary to existing anti-discrimination law, would not be contrary to European law, unlike the proposal to have reverse discrimination in favour of women (who were 12.6 per cent of the RUC, one third being in the Part Time Reserve).

This calls for the following comments. One, the Patten Commission contained a lawyer, Peter Smith QC, with experience of policing law in Northern Ireland. Two, the Fair Employment Commission (if it did recommend Patten's pool[98]) was incorrect. Three, so was unnamed counsel.[99] Article 13 EC had been agreed on 2 October 1997, and the Commission moved quickly after 1 May 1999. That should have been known to any lawyer advising on European law, if not to the Patten commission itself. Patten did not report until 2 September 1999, only a matter of weeks before the draft equal treatment Directive was published on 25 November 1999. Four, Patten was correct about his proposal being contrary to Northern Ireland law: that is why section 46(10) and (11) of the Police (Northern Ireland) Act 2000 makes the police another exception (while section 74 and schedule 5 applies other

[96] Quoted in paragraphs 1.18 and 14.2 of the Patten report.

[97] *Irish News*, 19 February 2001.

[98] Sir Robert Cooper, while accepting Patten as inevitable, subsequently suggested that the equal treatment Directive would cause problems for the United Kingdom government (House of Lords, Select Committee on the European Union, 9th Report, *EU Proposals to Combat Discrimination*, HL Paper 68, 1999-2000, Qs322-3).

[99] This person has not identified him or herself. It is interesting that Lord Lester of Herne Hill QC, the father and mother of contemporary human rights and equality law, should find it difficult to criticize Patten's 50/50: [2001] PL 77, 96.

anti-discrimination law to the police!). Five, Patten was also correct about ECJ jurisprudence prohibiting reverse discrimination for women.

But, radical social engineers may ask, if 8 per cent catholics justifies reverse discrimination until there is 50/50, why does 12.6 per cent women (the figure is less when the part-time reserve is discounted) not deserve the same special treatment? The logic is irrefutable. But the answer is: equal treatment prevents reverse discrimination, but not positive action, in favour of women; and, with the extension of European anti-discrimination law, it was inevitable that Patten's scheme would be caught by the new Directive.

Patten only recommended 50/50 on the (false) presumption that it was not contrary to European law. At the point at which it became clear that it was contrary, the United Kingdom should have rejected the proposal as unlawful. It should then have rationally analyzed the reasons for catholic under-representation. None of this was done. Instead, because of the politics of Patten, article 15(1) was inserted at the behest of the United Kingdom, with Irish support, on 17 October 2000. Every since, the guiding idea has been: implement Patten in full.

*The Human Rights Community*

There is no evidence, other than with Patten, that the human rights organizations in Northern Ireland, made any substantial contribution to the policy debate. However, when the government came under serious challenge in parliament, the Committee on the Administration of Justice, the Northern Ireland Human Rights Commission and the Equality Commission--for various nationalist, republican and/or radical reasons--threw their considerable weight behind the position: implement Patten in full (using their putative expertise to justify 50/50).

The CAJ, ironically, and unusually, while it was clearly anti-RUC[100], did not come up with the idea of 50/50. In its submission to Patten in August 1998, it stated that achieving fair representation "will be complex and difficult going by the experience of other societies". It called for serious research, and a review of selection criteria and training practices. It advocated "the setting of official targets and timetables for greater representation by under-represented groups…".[101] However, a little over a year later, and following the publication of the Patten report, it jumped on the Patten bandwagon[102]: "The setting of quotas…is a very vexed one but one that we

[100] Angela Hegarty, then chairperson, in evidence to the Forum for Peace and Reconciliation in Dublin: *Report of Proceedings: volume 12: Friday, 31 March 1995*, p. 14.
[101] *CAJ's Submission to the Commission on Policing for Northern Ireland*, submission no. S.72, August 1998, p. 7.
[102] Patten's quotas were accepted unreservedly at a CAJ conference on 8 October 1999: *The Patten Commission: the way forward for policing in Northern Ireland?*, November 1999, pp. 12, 19 & 33.



included in the array of options[103], since it has been tried reasonably successfully elsewhere."[104]

The NIHRC, established in March 1999, and publicly funded, but a very unrepresentative statutory body, had none of the CAJ's hesitancy. In a long response to the Patten report, it stated: "The NIHRC is of the view that the kind of positive discrimination recommended by the Patten Report is the only viable option at this time." It tested the 50/50 proposal against "relevant international [?] and national laws" in an annex: "our conclusion is that it passes muster." It bemoaned the fact that women were not being treated similarly, and then went on to urge the police to act "consistent with European Community law". In the annex, it was claimed that the equal treatment Directive would not prohibit Patten's 50/50.[105] Draft protocol no. 12 to the European Convention on Human Rights (see below) was similarly dismissed as not a problem. The document contains truly extraordinary legal reasoning.[106]

This did not prevent the NIHRC intervening throughout the legislative process at Westminster, with briefings and personal visits by the chief commissioner, Prof Brice Dickson. Before the committee stage in the house of commons, the NIHRC stated:

> "We also conclude[d] that the kind of positive discrimination recommended by Patten [is] the only viable option at this time…We would remind MPs that the international standard in this context [is] that the temporary recruitment system should be kept in place until the requisite degree of representativeness of society has been achieved, however long that takes. Our understanding of current European Community law is that such preferential recruitment policies would *not* be unlawful."[107]

Despite reasoned argument presented in public[108], the Northern Ireland Human Rights Commission declines to upset the Patten bandwagon[109].

[103] They did not argue for quotas in August 1998. However, quotas in Canada and El Salvador had been discussed briefly in an earlier book: Mary O'Rowe & Dr Linda Moore, *Human Rights on Duty: principles for better policing: international lessons for Northern Ireland*, Belfast nd but 1997, p. 45. This was supplied to the Patten Commission. There is a footnote (to tie-breaks) on p. 45 referring to *Kalanke* and *Marschall*. It is stated–incorrectly--that the cases 'suggest that positive discrimination of this kind [?] is likely to be found acceptable'. On pp. 46-7, the authors advised against quotas.
[104] *CAJ's Commentary on the Patten Report: 'a new beginning: policing in Northern Ireland'*, submission no. S.91, November 1999, p. 19.
[105] 'Even if these Directives applied to the recruitment of police, which is uncertain [?], neither as presently envisaged would rule out the kind of measures proposed in the Patten Report.' (p. 33)
[106] *Response to the Report of the Independent Commission on Policing in Northern Ireland (The Patten Report)*, November 1999, pp. 16-17 & 25-35.
[107] *Briefing Note for the Committee Stage in the House of Commons*, 9 June 2000, p. 9.
[108] I published two, albeit journalistic, articles on how the Bill would be at risk from the equal treatment Directive: *Sunday Times*, 18 June 2000; *Observer*, 23 July 2000. I was not asked to elaborate by any member of the human rights community. The only rejoinder was a published letter from Harry Coll, a solicitor and member of the Equality Commission: *Belfast Telegraph*, 28 June 2000, who argued that *Badeck* justified Patten's proposal (even though the latter postdated the former).

The Equality Commission, through one of its constituents (see above), may have helped stimulate the 50/50 idea. Deferring to the NIHRC, reputed to know more about international, including European, law, it too jumped on the Patten bandwagon.

In its response to the Patten report, the Equality Commission outlined its legal basis, and then went on to endorse the principle of representativeness *tout court*:

> "The recommendation that an equal number of Protestants and Catholics be taken on would not be permitted by present legislation...We support the proposal that equal numbers of Protestants and Catholics should be recruited...The Patten Commission's assessment of the legal position is that the proposal would require an amendment to domestic legislation but is not incompatible with European legislation. We consider that permissive amendments should be strictly limited to specific circumstances and specific time frames, and subject to regular review."

The Equality Commission wanted women (and others) treated the way catholics were being advantaged, and interpreted *Marschall* (incorrectly) to cast doubt on Patten's reference to European law. [110]

The Equality Commission also intervened in the legislative process. In a press release following the publication of the bill, the chief commissioner, Joan Harbinson, singled out the 50/50 proposal for welcome. She called for all underrepresented groups to be specially treated. While, in the response to the Patten report, the Equality Commission had called for a strictly limited exception in fair treatment legislation, the chief commissioner now favoured sufficient time: "a ten year period at least, as proposed in the Patten Report should be provided for, and we do not see the need for a review after three years."[111] In separate comments, the Equality Commission proposed amendments to the bill: aggregation of 50/50 over 2-3 years (accepted by the government); 50/50 for support staff where there was more than one vacancy (accepted in part).

*Permitting Reverse Discrimination*

At this point, it is appropriate to return to article 15(1) (above), added by the United Kingdom government at the Luxembourg meeting on 17 October 2000.

[109] Minutes, 14 August 2000.
[110] *Response to A New Beginning: Policing in Northern Ireland: the report of the independent Commission on policing for Northern Ireland*, nd, pp. 3, 8, 9, 12-13.
[111] Press release, 6 June 2000.



The reason given is: "in order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland". This, unlike in article 15(2), is not spurious. One of the major religious communities refers to catholics in Northern Ireland. The term "police service of Northern Ireland" is used, rather than the existing or the new name, under section 1 of the Police (Northern Ireland) Act 2000. The problem with the reason, however, is whether 50/50 will tackle under-representation, and without leading to under recruitment. If it could be shown that 50/50--partly because discrimination is not the problem--is not the solution, and that there are other causes, then the reason in article 15(1) might be invalidated. It is also possible of course that recruitment under existing fair employment legislation would achieve 50/50 on merit, or even a higher percentage of catholics, which is the common objective. A higher proportion would, of course, be prevented by Patten and the Police (Northern Ireland) Act 2000.

Again, the point about the relationship between domestic law and the equal treatment Directive may be made: section 46 of the Police (Northern Ireland) Act 2000 was brought into force on 30 March 2001; after 2 December 2003, but for article 15(1), the Directive could be used in Northern Ireland law against section 46; however, it is only section 46 which provides for reverse discrimination; if domestic law were to be amended, there is nothing in the equal treatment Directive preventing this, either before 2 December 2003 or afterwards.

## Passage of the Police (Northern Ireland) Bill

### *The Provisions on Reverse Discrimination*

The Act, at royal assent, contained the following:

- section 46, with the marginal note: discrimination in appointments;
  - subsections (10) and (11) disapply Northern Ireland anti-discrimination law dealing with the grounds of religious belief or political opinion or race (but not sex because of Council Directive 76/207/EEC);
  - subsection (1) requires the chief constable to select police trainees from the pool of qualified applicants (provided for in section 44(5)) on the basis of one half catholics and one half non-catholics;
  - subsections (2) to (4) allow for the aggregation of catholics over three years, to a maximum of 75 per cent, where catholics are less than 50 per cent of the pool[112];
  - subsections (5) to (7): reverse discrimination for police support staff (with a threshold of six) but without aggregation;
  - subsections (8) and (9): not discussed;

[112] This is also the case with non-catholics, which, in the case of very few catholics, still means under recruitment.

- section 47 makes 50/50 temporary, with expiry after three years, unless the secretary of state renews it by order; this could be repeated endlessly, but the section does refer to "temporary provisions";
- section 48 deals with women only; it provides for affirmative action, the police having been excluded hitherto from fair employment and treatment legislation; the action plans are likely to include targets and timetables.

*The European Law Point*

The United Kingdom made no reference to the equal treatment Directive when it introduced the Bill in parliament. In answer to a question about domestic anti-discrimination law and human rights, at second reading on 6 June 2000, the secretary of state (answering a different question) said that the government would comply with the Directive or seek a derogation.[113] On 15 June 2000, Peter Mandelson wrote that he was going to "persuade our European partners that [policing] is a special case of reverse discrimination."[114] At third reading on 11 July 2000, Lembit Öpik for the liberal democrats led the opposition parties in an attack upon quotas. Dominic Grieve of the conservatives made the point that he would not object to the recruitment of more than 50 per cent catholics on merit.[115] Opposition continued in the house of lords, but the government survived the criticism. By the autumn, the objection of the liberal democrats had been bought off with the 75 per cent limit in what became section 46(4).[116] When the Bill returned to the house of commons on 21 November 2000, a draft of article 15(1) of the equal treatment Directive was available. It was David Trimble who said: "The fact that the Government had to get a derogation from the Directive shows that the arguments that we made about the Directive before there was a derogation were sound."[117]

An interesting constitutional point had been raised by the first minister of Northern Ireland at an earlier stage[118], about the duty of ministers to parliament. David Trimble referred to an issue in 1998, involving domestic and European anti-discrimination law. Then, Donald Dewar, the Scottish secretary, had wanted to amend domestic sex discrimination law to permit all-women shortlists in the selection by parties of candidates for election to the first Scottish parliament.[119] Two opinions from Patrick Elias QC, with which all four law officers concurred, held that such a proposal was contrary to, not

[113] House of Commons, *Hansard*, vol. 351, cols. 181 & 255, 6 June 2000.
[114] *Irish News*, 15 June 2000. See also *Sunday Times*, 18 June 2000, and Standing Committee B, *Hansard*, cols. 85-6, 20 June 2000.
[115] House of Commons, *Hansard*, vol. 353, cols. 794-813, 11 July 2000. The principal debate had taken place in committee on 27 June 2000: Standing Committee B, *Hansard*, cols. 297-328.
[116] House of Commons, *Hansard*, vol. 357, cols. 261-3, 21 November 2000. Lord Lester of Herne Hill QC took no part in the parliamentary debates on this point.
[117] House of Commons, *Hansard*, vol. 357, col. 265, 21 November 2000. The full debate is at 255-70.
[118] House of Commons, *Hansard*, vol. 353, cols. 799-801, 11 July 2000.
[119] This had been held to be unlawful by an employment tribunal: *Jepson and Dyas-Elliot v The Labour Party* [1996] IRLR 116.



just domestic law, but also Council Directive 76/207/EEC. Lord Irvine of Lairg, the lord chancellor, chaired a special cabinet committee (including Peter Mandelson) on the issue. Some members raised the constitutional point about advice from the law officers:

> "Any minister bringing forward or accepting an amendment [the lord chancellor minuted the prime minister] would not be able to assure the House that it was ECJ proof. That would put him in an impossible position and create handling difficulties."[120]

The difference between 1998 and 2000 was between an implemented Directive and a proposed Directive; however, the United Kingdom constitutional point about ECJ-proofing was the same. The government, driven by the political imperative of Patten, was enacting 50/50 against the draft equal treatment Directive, it only being after 17 October 2000 that it could refer to article 15(1) in parliament.[121]

## Hypothetical Legal Challenges?

Section 46 of the Police (Northern Ireland) Act 2000 was brought into force on 30 March 2001. Council Directive 2000/78/EC had entered into force on 2 December 2000 (with an implementation date of 2 December 2003). The first recruitment under Patten's 50/50 was in the spring of 2001; the second was in the autumn of 2002.

No legal challenges were mounted based upon European law, in whole or in part. Yet, there were, and are, a number of possible bases, which I propose to consider at length. It is clear that section 46 of the Police (Northern Ireland) Act 2000 would be at risk of Council Directive 2000/78/EC - but for the late insertion of article 15(1). But what if article 15(1) was annulled after a successful application or referral to the ECJ? There were, and are, windows of legal opportunity in Belfast and Luxembourg for challenging the Northern Ireland police opt-out: (1) from 2 December 2000, but with a cut-off of 1 February 2001; (2) from 2 December 2000 to 1 December 2003; and (3) after 2 December 2003 but without unnecessary delay. Privileged applicants, including the Commission, are heard by the ECJ; non-privileged applicants, that is natural or legal persons, are heard by the Court of First Instance ('CFI') in Luxembourg.

*(I) 2 December 2000 to 1 February 2001: the Commission v EU Council?*

Under the first paragraph of article 230 EC, the ECJ shall review the legality of acts of inter alia the Council, such as Directive 2000/78/EC.

[120] This minute was leaked: *Guardian*, 3 March 1998.
[121] 'I could ask a simple question of those who oppose what we seek to do. Which EU Directive do they have in mind? None. There is no EU Directive that prohibits what we seek to do through the bill - not one.' (Adam Ingram, House of Commons, *Hansard*, vol. 353, col. 805, 11 July 2000)

Actions may be brought inter alia by a member state[122] or the Commission (or, once the 2000 Treaty of Nice enters into force, by the European parliament), under the second paragraph, on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any rule of law relating to its application, or misuse of powers. Here, lack of competence and infringement of the EC Treaty would have been the grounds in the period 2 December 2000 to 1 February 2001.

Though it could not have been ruled out theoretically, any member state was unrealistic. The Irish state has an interest in supporting the United Kingdom, since it was strongly in favour of article 15(1). None of the other 13 member states was likely to have a general interest in article 15(1).[123] The European parliament also had to be ruled out, given the then delay in ratification of the Nice Treaty.

That left the Commission, and in particular the then commissioner, Anna Diamantopoulou, in the employment and social affairs directorate general. A civil engineer by training and profession, and a member of parliament and deputy minister for the socialist party, PASOK, in Greece in the late 1990s, she was appointed Commissioner in March 1999 (and was therefore responsible for all the work on the equal treatment Directive following the Treaty of Amsterdam entering into force on 1 May 1999).

However, no attempt was made to approach Commissioner Diamantopoulou, between the publication of the Patten report and 17 October 2000, and in the crucial 2 December 2000 to 1 February 2001 period. And this in spite of the Commission's principled opposition to explicit derogations for any part of Community territory. Though the Commission operated behind the scenes, students of Brussels were familiar with this general stance.

Commission actions against member states are not uncommon; while actions against the Council are much less frequent, they became more extensive in the 1990s[124].

It is impossible to retrospectively guess what the response of the Commissioner might have been, after 17 October 2000. The United Kingdom chose not to raise the question of Patten's pool through the Commission. The Northern Ireland partial opt-out was not the Brussels bureaucracy's doing. Nor was any action taken by British labour members in the European parliament, either alone or in alliance with Irish MEPs; two of Northern Ireland's three MEPs would have been opposed to article 15(1).

---

[122] See for example, *United Kingdom v EU Council*, Case 84/94 [1996] ECR I - 5755, where the United Kingdom succeeded in having part of Council Directive 93/104/EC on working time annulled.
[123] They were more likely to challenge article 4.
[124] The table of cases in Paul Craig & Gráinne de Búrca, *The Evolution of EU Law*, Oxford 1999, lists respectively 43 and 7 cases (pp. xxxvi-xxxviii).



*(II) 2 December 2000 to 1 December 2003: the Tobacco Advertising Directive Route*

This window of opportunity--the gap between entry into force and the implementation date--is analogous to what happened with another European directive in 1998-2000.

On 6 July 1998, the European Parliament and the Council adopted Directive 98/43/EC on the approximation of the laws, regulations and administrative provisions of the member states relating to the advertising and sponsorship of tobacco products: [1998] OJ L213/9, 30 July 1998. It prohibited all forms of advertising and sponsorship of tobacco products (by 1 October 2006, in the case of the latter), there being exceptions for brand names already used in good faith for other goods and services and for certain trade activities. This was, in fact, a public health measure (article 152 EC), but it was formulated under articles 47(2), 55 and 95 EC in terms of the establishment and functioning of the internal market. Tobacco interests objected. But so also did Germany as a member state. It gave rise to the following litigation, conducted principally but not exclusively by tobacco interests, which led to the Directive being annulled by the ECJ on 5 October 2000:

► R *v Secretary of State for Health, ex parte Imperial Tobacco Ltd* [2000] 2 WLR 834 CA: [2001] 1 WLR 127 HL;
► *Salamander AG v European Parliament and EU Council*, Joined Cases T 172, 175, 176 & 177/98 [2000] 2 CMLR 1099 CFI;
► R *v Secretary of State for Health, ex parte Imperial Tobacco Ltd*, Case 74/99, [2000] 3 CMLR 1175 ECJ;
► Case 376/98, *Germany v European Parliament and EU Council*, Case [2000] 3 CMLR 1175 ECJ.

The key dates in the litigation were:

- 30 July 1998: Directive entered into force;
- 21 September 1998: Imperial Tobacco Ltd made an application in London for permission to apply for judicial review of the intention and/or obligation of the United Kingdom to give effect to the Directive; the remedies sought included a declaration of invalidity of the Directive;
- 19 October 1998: *Germany* action brought before ECJ under article 230 (Case 376/98);
- 19/23/26 October 1998: *Salamander* actions instituted in CFI under article 230 EC;
- 30 November 1998, application for permission to apply for judicial review by Imperial Tobacco Ltd in the High Court in London;
- 16 December 1998: Turner J granted permission;

- 2 March 1999: High Court in London makes article 234 referral on the validity of the Directive to the ECJ, instituting Case 74/99 (decision expected November 2000);
- 29 October 1999: Turner J in London grants an injunction restraining the secretary of state from implementing the Directive (scheduled for 10 December 1999) before a decision on the referral;
- 16 December 1999: Court of Appeal reverses Turner J;
- 15 June 2000, Advocate General Fennelly's opinion in Cases C 376/98 and 74/99 that the Directive was adopted on the wrong legal basis, and should be annulled;
- 27 June 2000: CFI dismisses as inadmissible *Salamander* actions (applicants lack locus standi under article 230 EC);
- 5 October 2000: ECJ annuls the Directive in whole in Case 376/98, consequently holding that there was no need to rule on Case 74/99;
- 7 December 2000: House of Lords declines to decide on the injunction point, the reference procedure not being available;
- 30 July 2001: Directive was due to be implemented by member states.

Two distinct actions are possible simultaneously, as regards article 15(1) of Directive 2000/78/EC. This has been the position since 2 December 2000; it remains the position until 1 December 2003. The first is an application for judicial review in Northern Ireland. The second is a direct action in Luxembourg, before the CFI or the ECJ. Both turn on questions of standing, in, respectively, Northern Ireland law and in European law.

The persons most likely to be affected by article 15(1) are qualified applicants who will have been discriminated against on the ground of religion or belief after 2 December 2003 (and possibly before, given the failure of the Council to provide them with legal protection against discrimination from any point after section 46 of the Police (Northern Ireland) Act 2000 was brought into force on 31 March 2001).

The whole of the policing family was opposed to reverse discrimination before, during and after Patten sat.[125]

However, the chief constable (Sir Ronnie Flanagan) had been working closely with the secretary of state to ensure that his *Fundamental Review* of 1995-96 remained the bedrock of the reforms. The Police Authority for Northern Ireland was being wound up: Police (Northern Ireland) Act 2000 s

[125] The chief constable: *A Fundamental Review of Policing*, 1995-96, paras. 22.2-3 (a target of 35 per cent catholic applicants by a prescribed date based on selection on merit); the Police Authority for Northern Ireland: *Policing: a new beginning* (submission to Patten), Belfast December 1998, pp. 6, 42-3, 47-51; Police Federation for Northern Ireland: *Submission by the Police Federation for Northern Ireland*, September 1998, Vol. 1, Report, pp. 6-9 and *Submission to Government by the Police Federation for Northern Ireland*, November 1999, np but recommendations 104, 120 & 121; see also, Northern Ireland Affairs Committee, Third Report, *Composition, Recruitment and Training of the RUC*, 8 July 1998, 337-I, pp xv-xix, 337-II, pp. 31, 226, 230; and *Government Observations*, 4 November 1998, HC 1142 1997-98, p. v.



2(3). That left the issue for the Northern Ireland Policing Board, which was intended to comprise ten political members and nine independent members from 4 November 2001. It could, under paragraph 17(4) of schedule 1, have voted by a majority, with a quorum of seven, to launch a test case on reverse discrimination; the NIPB could have begun by taking proper legal advice.[126] There was also the Police Federation for Northern Ireland. It bore the brunt of resistance to unacceptable aspects of Patten, and secured important changes. It also remained part of the institutional network of policing, with a continuing statutory function.

The proposal for reverse discrimination, between Patten and the Police (Northern Ireland) Act 2000, remained substantially unchanged, suggesting that, while the United Kingdom government felt unable to politically touch it, it might not have been too distressed when the practical--including legal--problems emerged following the establishment of the Northern Ireland Policing Board on 4 November 2001.

The NIPB, and/or the PFNI (or individual representatives), could have commenced (and could still commence) two actions: one in Belfast and the other in Luxembourg. The PFNI would have standing in Northern Ireland. The standing of the NIPB in Luxembourg may be distinguishable from the *Salamander* applications: its role in United Kingdom law is defined by section 3 of the Police (Northern Ireland) Act 2000, and, following *Foster v British Gas plc*, Case 188/89, it could come under the fourth paragraph of article 230 EC. Success on this point, however, is not guaranteed. The first action would be an application for judicial review of inter alia the intention and/or obligation of the United Kingdom to give effect to Council Directive 2000/78/EC including article 15(1). The remedies would include referral to the ECJ for a preliminary ruling on the validity of the Directive, especially article 15(1), under article 234 EC. An injunction would not be appropriate in this eventuality. Enjoining implementation of article 15(1) is not possible given the nature of the provision, and enjoining implementation of the rest of the Directive is contrary to what is desired. Secondly, and following the *Salamander* applications, the NIPB, a public body and therefore an emanation of the United Kingdom state, could, as a legal person, institute proceedings under article 230 EC. The hurdles on admissibility would be: proving the Directive, as regards article 15(1), is a disguised decision referring only to the applicants; or is a decision of direct and individual concern to the applicants; any argument that the applicants lack adequate judicial protection is negated by the possibility of judicial review in Northern Ireland and the possibility of referral to the ECJ.

[126] Assuming full participation by the SDLP and Sinn Féin on the NIPB, it could have been done by ten to nine votes, including possibly a chairman's casting vote. The two unionists parties would have to have got four or five independent votes. If (as happened) Sinn Féin had not joined the NIPB, the two unionist parties only had to get the support of three or four of the nine independents (less two because of the extra two unionists who replaced Sinn Féin).

*(III) After 2 December 2003: an article 234 EC referral for an ECJ preliminary ruling*

It is only after implementation, before or on 2 December 2003, that qualified applicants, who have been discriminated against, in national law, on the ground of religion or belief, without receiving protection from the equal treatment Directive, could become parties to any action under (2) above. The reason principally would be to secure damages. But a preliminary ruling on article 15(1) is achievable under (2) above. If that were to be successful, article 15(1) would have been held by the ECJ to have been invalid. Section 46 of the Police (Northern Ireland) Act 2000 would then be exposed to the equal treatment Directive from before, or on, 2 December 2003.

*Grounds for Judicial Review*

This is the most important part of any legal challenge. In domestic law, the ground would be illegality. The issue turns, in European law, on article 15(1) in a Council Directive, made under the treaties, and governed by the jurisprudence of the ECJ.

*Ground 1: Treaty Opt-outs*

The United Kingdom—on analogy with the economic and monetary union and social chapter opt-outs in the 1992 Maastricht Treaty[127]—should have addressed the question of Northern Ireland when negotiating article 13 EC at Amsterdam in 1997.

To the argument that Northern Ireland is not a state, there is the argument that it is a region of a state. And, to the argument that it is not a full opt-out, is the argument that police and teachers are two large occupational groups in the public sector. The Commission certainly considered article 15 to be a derogation for a part of Community territory.

*Ground 2: the Principle of Equal Treatment*

This exists in the EC in the following articles:

- article 2 (principles): equality between men and women as a task of the EC;
- article 3(2) (principles): aim of promoting equality between men and women in all EC activities;
- article 137(1) (social provisions): equality between men and women with regard to labour market opportunities and treatment at work;
- article 141 (social provisions): equal pay;

[127] Protocol (no. 25) to the EC Treaty on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland; the social policy agreement and social policy protocol (the social chapter) in protocol no. 14 to the EC Treaty. See now the chapter on social policy (articles 136-145 EC) in the 1997 Amsterdam Treaty.



□(1)-(2): for male and female workers for equal work or work of equal value;

□(3): application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation;

□(4): specific advantages to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional career.

Equal treatment still relates to men and women. However, article 141(3) refers to equal opportunities, and article 141(4) to specific advantages. Nothing here provides Treaty authority for reverse discrimination as recommended in the Patten report, in general much less in particular.

*Ground 3: the Case law of the ECJ*

This has been discussed above. Nothing there provides for reverse discrimination as recommended in the Patten report, and the case law remains applicable after the 1997 Amsterdam Treaty. Moreover, the principle of equal treatment is to be construed broadly, any exception--such as positive action in article 141(4)--construed narrowly. A principle cannot be overridden by its opposite; the EC is concerned about discrimination.

*Ground 4: Article 13*

This is contained in Part One ("principles") of the EC Treaty. It was added by the 1997 Amsterdam Treaty. Article 12 prohibits discrimination on the ground of nationality. Article 13 permits the Council to take appropriate action to combat discrimination. The ground of sex is mentioned, as are five others: racial or ethnic origin; religion or belief; disability; age or sexual orientation.

While, on the basis of the application of the principle of equal treatment to men and women, positive action is not precluded, the Council was not empowered to disapply the principle entirely, in favour of reverse discrimination, in two main occupational groups in a region of a member state.

*Ground 5: Council Directive 2000/78/EC*

Any derogation from a principle in a Directive must have a legitimate objective and be proportionate.[128] The objective in recital (34) of the preamble to Council Directive 2000/78/EC refers to promoting peace and

[128] A three-part test: 'The principle of proportionality…requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.' (BSE, para. [96])

reconciliation between the major communities. That is legitimate. However, it is not clear that discriminating against protestants, and/or catholics, helps achieve reconciliation. Moreover, it is arguable that article 15(1), which relates under-representation and reverse discrimination, is not proportionate. No account has been taken of the reasons for the under-representation.

*Ground 6: Human Rights*

The preamble to the TEU invokes "the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law". And article 6(1) repeats this, adding: "principles which are common to the Member States". Article 6(2) states respect for fundamental rights as guaranteed by the European Convention on Human Rights, "and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

The ECJ, in its jurisprudence, is required to accept, as general principles of EC law, human rights.

The European Convention on Human Rights did not contain an equality provision: article 14 refers only to the enjoyment of Convention rights. However, on 4 November 2000 in Rome, member states of the Council of Europe, signed protocol no. 12. This contains a general prohibition of discrimination (article 1). There is no reference to positive action in the protocol. However, the third recital of the preamble refers to "measures to promote full and effective equality, provided that there is an objective and reasonable justification…". An explanatory report notes that there is no obligation to adopt positive action: "such a programmatic obligation would sit ill with the whole nature of the Convention and its control system which are based on the collective guarantee of individual rights which are formulated in terms sufficiently specific to be justiciable."

The Irish state signed on 4 November 2000; the United Kingdom did not. So far, there have only been two ratifications, by Cyprus and Georgia[129]. The United Kingdom is still refusing to sign. Ten ratifications are required for entry into force, which, under article 5, is due to take place on the first day of the month following the expiration of a period of three months.

At the point at which protocol no. 12 is ratified, a general prohibition of discrimination becomes a principle of EC law. The protocol may then be invoked before the ECJ.

## Conclusion

The legislative process in the EC, and the EU, is formally distinct from that in the United Kingdom and in the Republic of Ireland. In both

[129] As of 16 November 2002.



member states, a legislature of elected representatives engages in, at least, legislative scrutiny. In Europe, while there has been a widening of the process to include the Parliament, legislation remains the responsibility of civil servants in the Commission and/or national political leaders (namely ministers) in the Council.

Directive 2000/78/EC started as a rational extension of European law on men and women to new categories. Included was the ground of religion or belief. This is distinct from the ground of religion or political opinion, which had been the ground in Northern Ireland from 1973. The United Kingdom has been familiar with combating religious discrimination, at least in this part of its national territory, for nearly three decades. The Irish member state's experience as regards religious discrimination in its own territory was less: at most two years.

Both member states, partly because of a United Kingdom concern to consolidate the Belfast Agreement (shared with the Republic of Ireland), and partly because of a traditional Irish subservience to the catholic church, intervened effectively and destructively in the final shaping of Directive 2000/78/EC.

The result will become clearer, after the implementation date of 2 December 2003.

The Irish attempt to preserve its national ways (namely the autonomy of religious institutions), by forcing through a badly drafted article 4, with consequences for the whole of Europe, but not Northern Ireland schools, is unlikely to be upheld in the ECJ.

Article 15 on Northern Ireland is also likely to lead to interesting litigation in Belfast and Luxembourg.

I have stressed the singularity of Patten's 50/50 recruitment, as straightforward religious discrimination by quota, of the sort alien to United States and European law. Westminster's institutionalized sectarianism of 2000 contrasts with the absence of any similar measure from the Stormont parliament of 1921-72. There is no shortage of young protestant (and maybe in time catholic) men and women, who are applying to the police in Northern Ireland with a belief in merit, only to find that currently a low-ranging catholic trumps a high-ranking protestant. That is unfairness in anybody's language.

The exclusion of teachers in Northern Ireland from equality protection is a survival of the 1970s. It should have been abolished by now, at the behest of the Equality Commission (and the Northern Ireland assembly). This failure required the United Kingdom to buy more time from Europe with article 15(2). If the Northern Ireland assembly does the decent thing, nobody in the European institutions will be concerned in the slightest. However, European law will of no assistance to a Northern Ireland teacher looking for protection against religious discrimination. Unlike the case with policing, there is no issue of reverse discrimination which could be challenged legally in European law. (There is the lesser question of territorial derogation.)

Finally, a nice irony: the catholic church, the beneficiary of the absence of equality protection for teachers in Northern Ireland, would, if it lost that advantage due to Northern Ireland legislation, have to fall back on article 4 of Directive 2000/78/EC, to maintain its practices in its school there, an article likely to be considerably circumscribed by the ECJ due largely to Irish clerical intervention in advance of the Council of 17 October 2000.

**Austen Morgan**
*Barrister*
*Temple Gardens, London*



# THE EU INSURANCE FRAMEWORK DIRECTIVES: ORIGINS AND OBJECTIVES*

The origins and objectives of the Insurance Framework Directives can be traced back to the founding Treaty of Rome, 1957.

The insurance industries of the EU are but one, albeit highly significant sector of economic activity being carried out within Member States. As for all other sectors, operating within the EU involves adherence to Community Law. The fundamental economic law of the EU is contained in the Treaty of Rome, as amended.

In respect of the insurance sector, the objectives of the fundamental laws are to be achieved by market integration. Initially, the aim was to achieve a common insurance market within the European Community. However, arising from a lack of political will and progress towards this objective, these aims were lowered in 1986, and subsequently expressed as an objective of creating a single European market, accessible by a single insurance licence.

The single European insurance market along these lines came into being on implementation of the Third Insurance Framework Directives, which were approved by the Council of Ministers during 1992.

Let us now focus on the three decades of political negotiation which culminated in agreement in the 1992 Framework Directives.

## Liberalising European Insurance Markets

The Treaty of Rome contains specific provisions for liberalising (insurance) markets. Articles 52 to 58 provide for the gradual abolition of restrictions on the right of establishment, i.e. the right of insurance companies to cross into a foreign Member State and establish business there.

Articles 59 to 66 of the Rome Treaty further provide for the progressive abolition of restrictions on the free supply of services within the Community.

This right to supply services means freedom for any company to sell its services in another Member State without firstly having to set up a subsidiary or open a branch office there. Equally it means the freedom of a national insurance "consumer" to buy an insurance policy from any company established within the Community. It would mean, for example, that a French insurance "consumer" would be able to purchase an insurance policy from,

* Originally delivered as a paper at the Completing the Single Market in Insurance conference organised by the Academy of European Law, Trier, 23-4 April 2001.