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This report aims to bring a greater clarity to the situation. Its aim is to outline the main legal issues surrounding positive action by parties for candidate selection, and in the light of this to suggest some ways forward. The sections of the report which focus on the law are based primarily on a series of interviews carried out with senior lawyers from March - May 2000. The intention of the report was not to set out a fixed legal opinion, but rather to present the different opinions offered by those who are expert in the subject. Somewhat surprisingly, given the positions that some of those interviewed have taken in the past, there appeared to be relatively little disagreement. Thus the report puts forward a rather more settled view of the law than had been expected.

The report is in five sections. The first two sections set the context in terms of positive action and the political parties, Section 1 looking at the UK parties and Section 2 at parties elsewhere in Europe. Section 2 also considers briefly the domestic legal contexts within which other European parties operate, and gives some details about pan-European initiatives on positive action. The remaining three sections, which form the bulk of the report, focus on the legal questions facing the UK. Section 3 provides a context, outlining the relevant parts of UK and EU law, and explaining the industrial tribunal decision on all women shortlists and the subsequent debate in more detail. Section 4 looks at the legal questions facing the government and the parties, and the likely outcome of a future legal challenge if the Sex Discrimination Act was amended. Section 5 looks at ways forward, and suggests four different ways of changing the law, and their likely consequences.

Party	Constituency seats		List seats		Total	
	Men	Women	Men	Women	Seats	% women
Labour	28	25	1	2	56	48.2
Conservative	0	0	15	3	18	16.7
Liberal Democrat	10	2	5	0	17	11.8
SNP	5	2	15	13	35	42.9
Green	0	0	1	0	1	0.0
Scottish Socialist	0	0	1	0	1	0.0
Independent	1	0	0	0	1	0.0
Total	44	29	38	18	10.00e	

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Party	Men	Women	Total seats	% women
Labour	18	11	29	37.9
Conservative	33	3	36	8.3
Liberal Democrat	5	5	10	50.0
UK Independence Party	3	0	3	0.0
SNP	2	0	2	0.0
Plaid Cymru	1	1	2	50.0
Green	0	2	2	100.0
SDLP	1	0	1	0.0
DUP	1	0	1	0.0
UUP	1	0	1	0.0
Total	65	22	87	25.3

1.1 Labour

The Labour Party first agreed the principle of quotas to promote women's representation in internal party positions in the late 1980s.[2] In 1988 a minimalist measure was agreed for candidate selection for Westminster, so that if a woman was nominated by a local branch, at least one woman should be included on the constituency shortlist. In 1993, following an electoral defeat where the party did not attract sufficient support amongst women, it was agreed that more radical measures were needed. Consequently the party's annual conference agreed that in half the seats where Labour MPs were retiring, or in seats with annual conference agreed that in half the seats where Labour MPs were retiring, or in seats with annual co

with a view to the winnability of seats'.[4] In the Scottish Labour Party there was therefore a determination to remain true to this promise. It was realised that the image of the Parliament, and the Assembly, would be tarnished if they proved to be as male dominated as Westminster. And once men were elected it would be difficult to unseat them and improve women's representation later.

The system agreed in Scotland for the selection of candidates was to 'twin' neighbouring seats, taking into account the 'winnability' of the seats, so that each pair would select one man and one woman. This opportunity was uniquely available, given that there were no incumbent members. Under the system the members of the two constituencies would come together for the purposes of selecting candidates, and would have two votes - one for a woman and one for a man. The top man and top woman would be selected, and between them would agree who should have which seat. For the first time the party also agreed to use a panel of 'approved' candidates, from amongst whom constituencies could make their choice.

Pressure to adopt the twinning system came from the Scottish Labour Party, but the same system was also adopted - by a slender majority - by the Labour Party in Wales. The detail of

This episode acted, to some extent, as a spur to action to improve women's representation. As a result of pressure from women activists the party was the only one to apply a strict positive action policy to selection of candidates for the 1999 European elections. This was agreed by Liberal Democrat conference in 1997. The European elections were fought on a new system of PR based on regional lists, which was certain to benefit the Liberal Democrats. The system chosen by the party to promote women was 'zipping', whereby male and female candidates were alternated on the lists. This could be applied relatively easily as there were only three incumbent candidates. A decision was taken centrally about which lists would be headed by women and which would be headed by men. Local members in the region then voted, on a one member one vote basis, amongst the candidates who were nominated. If the list in a region was due to be headed by a woman, for example, then the most popular woman would be placed at the top of the list. She would be followed by the most popular man, then the second most popular woman, and so on. This policy caused some controversy in the party, particularly in regions where only one seat was thought to be winnable. There were threats within the party that a legal challenge would be made against the system, but in the event this was not forthcoming. The result of the election was that the Liberal Democrats elected five male and five female MEPs.

The party has not been quite so successful, however, at securing better representation for women in other levels of elected office. In Scotland the Liberal Democrats signed the 'electoral agreement' with Labour, which committed them to electing equal numbers of women and men. However, the party failed to agree any mechanism to deliver on this commitment. Successive attempts to move a positive action system were voted down by Scottish party conference. The last attempt was made in March 1998, with a proposal that where there was an imbalance amongst the party's constituency candidates, the person at the top of the regional additional member list would be a woman. However this motion was not agreed. The party did use a system of 50/50 shortlists for the selection of constituency candidates. However, only 20 out of 73 constituency candidates selected were women, and most were not in winnable seats. Consequently just two of the Liberal Democrats' 17 MSPs are women.

In elections to the Welsh Assembly the party was luckier, with three out of six elected members being women. The process used here was the same as that in Scotland, with balanced shortlists in the constituencies and noomen.dures.191 the

Heinrich - chair of women Liberal Democrats, with support of Baroness Emma Nicholson and five others - wrote to newspaper stating that 'There is now a need for urgent clarification of the measures which may be legally adopted to redress the imbalance [between women and men in politics]'.[5]

1.3 Conservatives

The Conservative Party has been more consistently opposed to positive action for women than either of the other two main parties. Desp

in the party about the legality of this action. It was considered unlikely that a party member would mount a challenge against the party through the 'English' courts, given that it is Plaid Cymru's view that Wales should not be tied to an English legal system.

The party has also adopted a minimal requirement of positive action for Westminster selections, similar to that adopted by Labour in 1988. This is a requirement that if a woman applies to a constituency, there must be at least one on the shortlist put to local members (for fairness, the same rule applies to men). If there is more than one man and one woman on the shortlist, then there will be separate votes on each group, with a final run-off vote between the top man and top woman. However, despite this measure, Plaid Cymru has selected only one woman to fight a winnable seat at the general election.

1.5 Scottish National Party

The Scottish National Party has a better record of representation at Westminster, and currently has two women MPs out of six. There has been little recent debate about positive action measures for the selection of the party's candidates for the House of Commons.

However, the party did debate the possibility of using positive action for the selection of Scottish Parliament candidates. A proposal to use zipping for the party's additional member lists was made by its Women's Forum. However, this was rejected at party conference. Legal arguments were mentioned in the debate, alongside other objections, and the proposal was defeated by a narrow majority.

In the event the party went ahead with selection without a positive action mechanism in place, although encouragement was given to select women. There was an approved panel of candidates, selected against a set of written criteria using equal opportunities procedures. Constituencies chose their candidates from amongst the members of the panel, and the National Election Committee wrote to constituencies advising them to consider women. The lists of regional candidates were selected by regional delegate conferences. The party's election results were impressive, with 15 out of 35 members elected being women (13 of them elected from the lists). Explanations suggested for how the party did so well without a positive action mechanism include the better organisation of women, backed up by the Women's Forum, and the party's determination to see a new institution which looked very distinct from Westminster. However, it is also clear that there was considerable pressure from the centre to select women.

1.6 Summary of action taken

There are now a diversity of electoral systems operating in the United Kingdom. The House of Commons is elected by first past the post, using single member constituencies, whilst the devolved assemblies in Scotland, Wales and London use an additional member system which combines single member constituencies with electoral lists. The Northern Ireland Assembly is elected using the single transferable vote, whilst the European elections use a pure list system. Different parties have adopted a series of positive action systems to fit these different electoral systems.

The precise systems adopted also depend to some extent on individual party traditions, although it is notable that the parties' selection procedures are converging. All five of the parties discussed here use some kind of national panel for selections to Westminster, and similar Welsh / Scottish panels for selections to the Parliament and Assembly. In all five, local constituency parties are responsible for their own selection of candidates from this panel, but the involvement of members in selection of candidates presented on lists varies considerably (for example the Labour Party's list candidates were selected by panels of senior members,

whilst the Liberal Democrats used one member one vote and the SNP and Plaid Cymru used delegate conferences). All parties have made attempts, particularly since the industrial tribunal ruling, to integrate equal opportunities procedures into their selection methods.

For list elections two mechanisms have been applied. One is the straight 'zipping' policy where men's and women's names are alternated on the list. This was adopted by the Liberal Democrats for the European elections, and debated by the SNP for 'top-up' lists for the Scottish Parliament. The other approach is a more pragmatic one, whereby seats on the list are allocated in a way which compensates for shortcomings in the constituency selections. This was the policy adopted by Plaid Cymru for top-up lists for the Welsh Assembly, and rejected by the Liberal Democrats for top-up lists for the Scottish Parliament. It must be noted, however, that the usefulness of these different mechanisms very much depends on a party's pattern of electoral support. For example zipping would have been of little use to the Labour Party in Wales, where the party gained only one of its 28 seats in the Assembly from a top-up list.

To a greater or lesser extent the debate about legality of positive action has influenced the behaviour of all the parties. This was a factor in the Liberal Democrat party and the SNP when these parties rejected positive action measures for the Scottish Parliament. Debates about legality brought the Labour Party's commitment to equal representation in the Scottish Parliament and Welsh Assembly (the latter in particular) close to collapse. Even Labour, which has so far led the field in terms of positive action measures, has no mechanism in place to ensure that it retains its proportion of women MPs after the general election. And in the Conservative Party the perceived legal obstacles provide ammunition to those members who oppose any form of positive action.

2. Positive Action Elsewhere in Europe

The United Kingdom is still significantly behind many other European countries in terms of women's representation in both the national and European parliament. Women's current representation amongst EU member states is illustrated in Tables 7 and 8. Representation in the House of Commons still stands at just 18.2%. In contrast, women make up 43% of members of the Swedish parliament, where women's representation passed the 20% mark in as long ago as 1973. The same level was reached in Finland in 1970.[9]

One reason for the British shortfall is that our political parties were relatively late in adopting positive action for women, in international terms. The adoption of quotas by the British Labour Party was influenced initially by international pressures, co-ordinated by the Socialist International Women and themselves inspired by positive action policies amongst the Nordic parties, where quotas were adopted in the 1970s.[10] Since quotas were first adopted by European parties women's representation has increased dramatically in some cases. Recent moves have gone beyond quotas at party level, and in some EU states it is now compulsory by law to put forward gender balanced slates of candidates. In these circumstances it may appear strange that UK lawyers have indicated positive action could be in breach of EU law.

[9] Raaum, N. C. (1999). 'Women in Parliamentary Politics: Historical Lines of Development', in C. Bergqvist, A Borchorst, A. Christensen, V. Ramstedt-Silén, N. C. Raaum and A. Styrkársdóttir (eds.), , Olso: Scandinavian University Press.

[10] C. Short (1996). 'Women and the Labour Party', in J. Lovenduski and P. Norris (eds.), Oxford: Oxford University Press.

Country	% women	Election year	Electoral system for lower house
Sweden	43%	1998	List PR (closed lists)
Denmark	37%	1998	List PR (open lists)
Finland	36%	1999	List PR (open lists)
Netherlands	36%	1998	List PR (open lists)
Germany	31%	1998	Additional Member System (50% constituency, 50% list)
Spain	28%	2000	List PR (closed lists)
Austria	27%	1999	List PR (closed lists)
Belgium	23%	1999	List PR (semi-open lists)
Portugal	19%	1999	List PR (closed lists)

Perhaps unsurprisingly, the parties which use positive action measures tend to be those with the best representation of women in elected office. Of the parties shown in Table 9, 35 (46%) achieve women's representation in the national parliament better than or equal to the Labour Party's record of 24.2%. Of these parties, 24 (69%) were known to use some kind of quota. A total of 17 (22%) of the parties - including the British Conservatives, Liberal Democrats and UUP - achieved women's representation of 10% or less. Of these, only one (4%) was known to use any kind of quota.

Party	Country	Election year	Seats held	% women	Party quota
1. VIHR	Finland	1999	11	81.8	y
1. PDS	Germany	1998	36	58.3	y
1.					

1.	CDU	Germany	1998	200	19.5	y
1.	PDS	Italy	1996	156	19.2	n
1.	CVP	Belgium	1999	22	18.2	y
1.	K.K.E	Greece	2000	11	18.2	not known
1.	VLD	Belgium	1999	23	17.4	n
1.	FPÖ	Austria	1999	52	17.3	n
1.	Partie Socialiste	France	1997	251	16.7	y
1.	PCS/CSV	Luxembourg	1999	19	15.8	y
1.	Popular Party	Spain	1996	156	14.1	not known
1.	PSD	Portugal	1999	81	13.6	n
1.	CSU	Germany	1998	45	13.3	n
1.	Labour	Ireland	1997	17	11.8	y
1.	PCF	France	1997	36	11.1	y
1.	Fianna Gael	Ireland	1997	54	11.1	not known
1.	PASOK	Greece	2000	158	10.8	y
1.	PS	Belgium	1999	19	10.5	n
1.	Fianna Fáil	Ireland	1997	77	10.4	not known
1.	Lega Nord	Italy	1996	59	10.2	n
1.	PSC	Belgium	1999	10	10.0	n
1.	Verdi (Greens)	Italy	1996	21	9.5	n
1.	Forza Italia	Italy	1996	123	8.1	n
1.	ND	Greece	2000	125	8.0	y
1.	P-S-P-U-P	Italy	1996	67	7.5	n
1.	Vlaams Blok 7.6V9942.5(1999)-2688.5(11)-2770.516.7				n	
1.	D-S-PD					
1.	7.5 Fo1 z0 0 1 72.024 144.96 764144.96 Tm(Italy)6 TD-0.0371.2076 Td0s24 .0001 Tw[(Verdi (Greens))-4142(Italy)-5694(					

place to someone of either gender. Amongst the SPD's 86 list members in the Bundestag, 45% are women.

Belgium

Belgium was one of the first countries in Europe to employ a statutory quota - i.e. a system requiring parties by law to put forward a minimum percentage of women candidates. This law was passed in 1994 and required that there should be a minimum of 25% women on all party lists for election. This rose to 33% in 1999. Initially it was suggested that there should be sanctions for parties which did not comply - including withholding state party funding. However, the Belgian Council of State, whilst allowing the quota, found the proposed sanctions to be unconstitutional. Instead if a party does not meet the quota it is required to

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in March 2001. Furthermore, lists for European and Senate elections must be zipped. In other elections, including those to the lower house, parties are required to put forward a gender balanced slate of candidates, or pay a financial penalty. A party putting forward 49% of candidates of one sex and 51% of the other pays no penalty. But if the discrepancy is any greater than this, the party's state funding will be cut by an amount equalling half the percentage difference. Thus if a party puts forward 45% women and 55% men - a difference of 10% - it will lose 5% of its state funding. This system clearly offers a strong incentive for parties to comply. It will apply for elections to the lower house of parliament in 2002.

The Socialist Party itself applied a strict quota system for women in the lower house elections in 1997. This required that 30% of seats would be fought by women. In essence the system operated in the same way as the Labour Party's policy of all women shortlists. Geographical blocks of seats were considered together, by a party committee, and 30% designated as women's seats. An attempt was made to ensure that a fair portion of the seats were winnable. However in fact only 16.7% of candidates elected were women. The Socialist Party more successfully applied a quota system to its candidates for the European elections in 1999, when nine of the 18 Socialist members elected were women.

Italy

In Italy a law was passed in 1993 requiring parties to use the zipping system for elections using list systems. The law stated that 'male and female candidates will appear alternately' for the list part of any election. However, in September 1995 the Constitutional Court repealed the law, saying it was unconstitutional, on the basis that it contravened Article 51 of the constitution, which states that 'All citizens of either sex are eligible for public offices and for elective positions on conditions of equality, according to the requisites established by law'.

This matter is currently still unresolved. A joint committee of both houses of parliament reported in 1997 on proposals for far-reaching constitutional reform. Amongst its recommendations was the addition of words in the constitution stating that 'the law promotes balance between the sexes in elected representation'.[17] The intention of this would be, as has happened in France, to overturn the previous ruling of unconstitutionality and allow a new quota law. However, the report of the commission has not been implemented and no separate action has yet been taken on this point.

Portugal

Portugal, like Italy, Belgium and France, has

2.2 Domestic legislation in other EU member states

The extent of positive action practised in some EU member states leads those coming from a UK perspective to wonder what is the legal framework, in terms of equalities legislation, within which these parties are operating. Given the obstacle which UK domestic legislation has presented to parties wanting to pursue positive action measures, it is useful to look at the domestic legal framework. Because of the perceived difficulties in Britain about complying with EU legislation, there is also an important question about why this hasn't caused difficulties in other countries. This question is considered in the later sections of the report.

It is interesting that challenges to quota systems adopted in other EU states have been made on grounds of constitutionality, rather than compliance with equalities legislation. This is because the selection of candidates is generally considered to be a constitutional matter, rather than something governed by discrimination legislation, which applies explicitly to employment. Thus in Sweden the Act on Equal Opportunities 1980 does not cover selection procedures by political parties.[19] In Belgium there has been no debate about whether quotas are covered by the equal treatment legislation, since that covers only workers and the self employed. Likewise in the Netherlands, where four of the parties shown in Table 9 use quotas, there is an assumption that political parties and people chosen to fulfil political functions do not fall within the scope of the Equal Treatment Act. This applies only to civil servants, employees with a regular labour contract and the self-employed - politicians do not fall easily into any of these categories. In Germany there is no question that employment discrimination legislation should cover selection to political office, since selections are explicitly governed by electoral law.

Many countries, in any case, have discrimination legislation which explicitly allows positive action. For example the Danish Act on Equal Opportunity between Men and Women of 1988 states in Article 1(2) that 'public authorities . . . may in connection herewith implement special measures in order to promote equal opportunities for men and women'. Likewise the Consolidation Act on Equal Treatment of Men and Women (1990) states in article 13(2) that measures which deviate from the principles of equal treatment may be allowed 'with a view to promoting equal opportunities for men and women, mainly by redressing actual inequalities which have an impact upon the access to employment, vocational training, etc.'. In the Netherlands Section 2(3) of the Equal Treatment Act states that 'the prohibition on discrimination contained in this Act shall not apply if the aim of the discrimination is to place women or persons belonging to a particular ethnic or cultural minority group in a privileged position in order to eliminate or reduce inequalities and the discrimination is reasonably proportionate to that aim'. The Austrian Equal Treatment Act goes further, stating that 'promotion in favour of women must be enforced in all administrative units where women are under-represented below quota of 40% with regard to all salary scales and functions'.

Many EU countries have additionally introduced programmes which require women to be fairly represented on public bodies. In doing so, some have set down quite rigid positive action. For example in Denmark the Act on Equality in Appointing Members to Public Committees (1985) requires that public committees are gender balanced. Organisations represented on such committees are required to nominate a man and a woman, whilst the minister responsible must pick members so as to achieve balance. A government programme in Sweden laid down similar rule to achieve targets of 30% women on public boards by 1992

[19] Borchorst, A. (1999). 'Gender Equality Law', in C. Bergqvist, A Borchorst, A. Christensen, V. Ramstedt-Silén, N. C. Raaum and A. Styrkársdóttir (eds.),
, Olso: Scandinavian University Press.

and 40% by 1995. In Germany a federal law passed in 1994 also stipulates that every federal authority with the right to propose candidates for consultative bodies must nominate two qualified candidates, a woman and a man, for each seat. As in Denmark and Sweden the authority responsible for the distribution of seats must ensure that there is a balanced participation of men and women. In the Netherlands the government went further and announced in 1992 that from then on it was only going to appoint women to existing advisory committees, until gender balance was reached. New committees would be initiated with a gender balance.[20] In Finland the 1987 law on equality states that men and women must be fairly represented in committees and consultative councils. In 1995 a quota was added so that at least 40% of each gender must sit on such committees. In Belgium a law adopted in 1997 states that nominations for consultative committees must be gender balanced, and that such committees must have a maximum of 2/3 of either sex.[21] In Norway (which is not a member of the EU) the 1988 Gender Equality Act requires 40% representation on all non-elected public boards, councils and committees. This requirement extends to the

This declaration noted that positive action 'measures' might be necessary in order to improve women's representation in positions of power. A follow up conference four years later resulted in the 'Charter of Rome' (adopted on 18 May 1996), which reinforced this. The Charter stated that:

In 1996 the Commission's Fourth Action Programme on Equal Opportunities began. One of the objectives of the programme was 'to improve the gender balance in decision making at all levels'. In the same year the Commission agreed another recommendation, on 'the balanced participation of women and men in the decision-making process'.[24] This recommends that member states 'Adopt a comprehensive, integrated strategy designed to promote balanced participation of women and men in the decision-making process'. In 1999, as the Fourth Action Programme was drawing to a close Commissioner Flynn (Employment and Social Affairs) announced an initiative for 2000 to evaluate the measures adopted by member states to increase participation of women in decision-making. This was originally called for in the 1996 recommendation.

The Council of Europe have also taken an active interest in the issue of improving women's representation in decision making bodies. On 22 June 1999 the Council's Parliamentary Assembly adopted a recommendation on Equal Representation in Political Life (no. 1413). Point 12 (ii) of this recommendation stated that:

This is precisely the form of action which the French government has just taken, as detailed above.

Point 14 of the same recommendation called on states 'to implement the principle of equality and adopt special measures such as provided for by the United Nations Convention on the Elimination of All Forms of Discrimination against Women'. Article 4 of this 1986 Convention, commonly known as CEDAW, states that:

de facto

[24] Recommendation of 2 December 1996 (96/694/EC).

These words from the Convention have been used

discrimination in three main fields. These are the 'employment field' (Part II), 'education', and 'goods, facilities and premises' (both covered by Part III).

Section 29(1) of the Act covers the provision of services 'to the public or a section of the public', and prohibits discrimination in this field. However, political parties are expressly exempted from this clause by Section 33 of the Act, which reads:

When the Labour Party pursued its policy of all women shortlists, it had been advised that selection of candidates fell under this section, and thus that the requirement to treat men and women equally did not apply. Thus the exemption, the party believed, allowed it to exclude potential male candidates from consideration for certain seats. The Equal Opportunities Commission had received similar advice.[26]

However, a legal challenge came from two male party members, Peter Jepson and Roger Dyas-Elliot. These members sought legal redress because they had been prevented from applying to be candidates in two seats (Regents Park and Kensington North, and Keighley, respectively). A complaint was lodged with the Leeds Industrial Tribunal in a case where Jepson (a postgraduate law student) represented the two men.[27] The Labour Party was represented by James Goudie QC.

Peter Jepson argued that the selection of candidates by a political party is not covered by Section 33 of the Sex Discrimination Act, which relates only to services, but instead by Part II of the Act, governing 'the employment field'. He relied on Section 13, in Part II, which prevents sex discrimination by professional bodies in awarding of qualifications. Section 13(1) states that:

James Goudie argued that parliamentary candidates are not covered by Section 13 of the Act, because they are not in employment. Even MPs are 'office holders' rather than employees. In any case, the choice of who is elected as an MP is not made by the party, but by the voters. He stated that 'the regulation of the Parliamentary election process is the prerogative of Parliament itself, election courts, the High Court and the Privy Council and is not for an

[26] Equal Opportunities Commission (1997).
. Manchester: EOC.

[27] , [1996] IRLR 116 ET.

industrial tribunal', arguing that selection of candidates is exempt from the Act under the provisions of Article 33.[28]

However, the tribunal were convinced by Mr Jepson's argument that the Labour Party should be considered as a body granting a qualification. Ruling in favour of Jepson and Dyas-Elliot they stated that:

However, once the ruling had been made, positive action appeared riskier than before. This was partly because once one high-profile case had been taken, it appeared more likely that further party members might seek to launch challenges against their respective parties. In the absence of a definitive ruling on the status of candidate selection within employment law, the parties proceeded cautiously.

A more settled view

In 1999 a definitive ruling was given by the Employment Appeal Tribunal. This time the case related to alleged racial discrimination, but depended on a section of the Race Relations Act 1976 containing virtually identical wording to that in the Sex Discrimination Act.

The case was again brought against the Labour Party, by a Mr Ahsan, who alleged that he had suffered racial discrimination in the selection process to become a local councillor.[31] The Labour Party again claimed that selection of candidates was not covered by employment legislation. However, Mr Ahsan won his case in an Employment Tribunal.[32] On this occasion the Labour Party appealed the decision, and the matter was thus decided by the Employment Appeal Tribunal.

The Ahsan case rested on whether selection as a Labour Party candidate - this time for local government - constituted an 'authorisation or qualification' for 'engagement in a particular profession' under Section 12 of the Race Relations Act (equivalent to Section 13 of the Sex Discrimination Act). In its judgement given on 14 July 1999, the Employment Appeal Tribunal upheld the findings of the Employment Tribunal - citing, among other things, the case. It ruled that:

[33]

and that

[34]

The Employment Appeal Tribunal therefore backed up the industrial tribunal in the case, in ruling that candidate selection is subject to UK employment discrimination legislation. The Labour Party chose not to appeal this decision any further. It has therefore now become the settled position in UK law that selection of candidates by political parties is subject to Section 12 of the Race Relations Act, and by association to Section 13 of the Sex Discrimination Act. Any future employment tribunal would be bound to apply this decision. This therefore creates a more dangerous environment for parties pursuing positive action policies, since any such policy which was found to be discriminatory would be judged illegal by a future tribunal. This is discussed further in Section 4.2, below.

Having got support from the Employment Appeal Tribunal for his claim that candidate selection is subject to Section 12 of the Race Relations Act, Mr Ahsan has yet to have his case decided on the issue of substance: whether there was discrimination in the process.

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[31] [1999] IRLR 609 EAT

[32] Note that 'industrial' tribunals have been renamed 'employment' tribunals since 1996.

[33] [1999] IRLR 609 EAT.

[34] Ibid.

However, since the Employment Appeal Tribunal ruling another employment tribunal has found against the Labour Party in case of alleged racial discrimination.[35] This is the first time that such a tribunal has investigated in detail the ordinary selection procedures of a political party. Now that the principle of using discrimination law against parties has been established, it seems likely that further discrimination claims may follow. Parties may see a string of claims from disgruntled women and ethnic minority candidates who feel that the selection process is biased against them. As one commentator noted after the case was decided:

Thus the uncertainty has shifted from the status of positive action in UK law to its status in EU and international law. This is discussed in the following sections.

There has been one further attempt to amend the Sex Discrimination Act to explicitly allow positive action in the selection of party candidates. Labour MP and ex- Minister for Women Joan Ruddock has recently launched a campaign on this issue. This includes an Early Day Motion calling for a change in the law, which has been signed by 118 MPs of all parties.[41] Joan Ruddock has also moved a ten minute rule bill which seeks to achieve this change. Like the earlier amendments this seeks to exempt political parties from the Act for pursuit of candidate selection processes which favour an under-represented sex. It would insert the following clauses in the Sex Discrimination Act:

[42]

On this occasion the move to amend the Act was not opposed by the government, which may indicate a more relaxed attitude to the situation in EU law. However, Joan Ruddock's bill has virtually no chance of reaching the statute book.

3.2 European law

The government did not accept proposed amendments to the Sex Discrimination Act which would have protected parties using positive action for the selection of candidates for the Scottish Parliament and Welsh Assembly. The primary reason given for this was that a change in domestic law could fall foul of European equality law.

On 3 March 1998, in the midst of the debates on this matter, a memo was leaked to

[43]

Lord Irvine concluded that the government line should be that 'amendment of the SDA would be pointless because of the substantial risk of successful challenge under the ETD'. This was the line which was pressed publicly by Henry McLeish during the debate on the Scotland Bill. It is this fear, therefore, which appears to have been the biggest obstacle to amending domestic law in response to the decision.

As a member of the European Union, the United Kingdom is required to comply with EU legislation, including the terms of treaties and directives. If the UK clearly flouts a directive, it can potentially be taken to the European Court of Justice by the European Commission. Equally, a UK citizen can cite EU legislation in a case in a domestic court. If UK legislation is found to be in breach of EU law, either by a domestic court or through such a court asking for an opinion from the European Court of Justice, there will be an imperative for the law to be amended. Government would clearly not, therefore, want to be seen to be supporting an amendment to domestic legislation which could be found to be in breach of EU law.

The Equal Treatment Directive (76/207/EEC)

The specific piece of European legislation referred to by the government law officers was the Equal Treatment Directive. This Directive was adopted in 1976. According to Article 1(1):

The Directive thus, like Part II of the Sex Discrimination Act, relates to employment. Its legal basis was Article 235 of the Treaty establishing the European Community, which allowed action necessary to attain 'the operation of the common market'.[44] The Directive complements the Equal Pay Directive of 1975, which implements rules necessary to protect the principle of equal pay for men and women. This principle was originally set down in Article 119 of the Treaty of Rome, which stated:

Although the Equal Treatment Directive exists to prevent discrimination, it explicitly recognises that there may be a need for some limited positive action measures. In this regard it is different to the UK's Sex Discrimination Act. The relevant part of the Directive is Article 2(4), which states:

[43] 'Why Irvine sent Dewar plan to boost women in Scottish Parliament back to the drawing board', , 3 March 1998.

[44] Following the adoption of the Treaty of Amsterdam, Article 235 has become Article 308.

Some campaigners in the UK have argued that the provision in Article 2(4) would allow positive action by political parties in the selection of candidates. However, it is important to note that this part of the Directive is permissive rather than compulsory. It member states to sanction positive action, but does not them to do so. Thus if the Sex Discrimination Act prevents positive action this is compatible with the Directive. However, if the Sex Discrimination Act were amended to allow some limited positive action this could also be acceptable.

The domestic legislation of many member states explicitly allows positive action (as demonstrated by some of the examples in Section 2.2 above). However, there has been a considerable amount of controversy in recent years about how far such positive action may go without falling foul of the anti-discrimination provisions of the Equal Treatment Directive. Three recent cases in the European Court of Justice have sought to interpret Article 2(4) and clarify the extent of positive action which the Directive allows. These cases have positive an7

[47]

The results of the Kalanke case reverberated around Europe. Since many member states had positive action clauses in their legislation, th

This ‘saving’ clause allowed the court to rule against Mr Marschall, without being seen to completely reverse its decision of two years earlier. The Court stated that:

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- [52]

one case at the European Court of Justice which seems to indicate that it is becoming more tolerant of positive action systems.

The Badeck case

One of the most recent developments in EU equality law is the Badeck case, on which the European Court of Justice gave judgement on 28 March 2000.[53] This was once again a case referred from Germany, where positive action measures set down in state legislation were questioned. This time the state in question was Hessen.

The Hessen law requires the adoption of 'advancement plans' for women in employment in the public service. Such plans last for a two year period and affect employment and promotion of women in sectors where they are underrepresented. The plans must include binding targets such that 'more than half the posts to be filled in a sector in which women are under-represented are to be designated for filling by women', unless it can be demonstrated that insufficient suitably qualified women are available.[54] The plan will set down that at least as many women as men must be invited to interview, provided that sufficient well qualified women apply. If the targets are not met after two years, every new appointment or promotion of a man must be individually approved by the body which first approved the plan. The Hessen law also requires that at least half the members of advisory boards, supervisory boards and boards of directors must be women.

The provisions of the Hessen law therefore appear more far reaching than those considered in either the or cases. Nonetheless, the European Court found nothing in the law which breached the Equal Treatment Directive. In support of this position the Court cited not only the two previous cases, but al

As the Irvine memo states, there are two parts of the Convention which, when read together, could be used to protect individuals from discrimination in the process of standing for election. As noted by the European Court of Human Rights in the case cited above, the interpretation of Article 3 of the First Protocol (free elections) has broadened:

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This has established 'the principle of equality of treatment of all citizens in the exercise of their rights to vote and the right to stand for election' under the Convention.[59]

Article 14 of the Convention, on discrimination, reinforces this by requiring access to all Convention rights to be equal:

These articles therefore appear to provide strong protection from discrimination in the right to stand for election. However, unlike the Sex Discrimination Act, the European Convention on Human Rights allows some forms of positive action. In a 1967 case relating to access to education for linguistic minorities, the Court stated that:

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right to freedom from discrimination free-standing, but would also explicitly exempt positive action from the terms of the Convention.[62]

been subject to such action. Other forms of positive action for public office in EU states, as described earlier in this report, have not attracted the intervention of the Commission.[63]

A third alternative is that a challenge could be made by an individual under the Human Rights Act. Again such an individual would have to be a direct 'victim' of the alleged discriminatory action, and could not simply be a bystander who was unhappy about the policy. This qualification is set down in the European Convention on Human Rights.[64] Such a case under the Human Rights Act would initially be considered by UK courts. However, if legal remedies in the UK were exhausted (ie. the case had worked its way up through the legal system) an appeal could be lodged with the European Court of Human Rights in Strasbourg.

4.2 Can parties take positive action now?

One point worth clarification is what the legal consequences could be for a party adopting positive action now, under the current law. As described earlier, parties have adopted a range of policies, including 'zipping' candidate lists, 'twinning' constituencies, and requiring

This would require a man to prove that he had been denied a place on the shortlist as a result of his gender (by demonstrating, for example, that he had received more votes than the woman or was otherwise better qualified). In deciding the outcome of such a case an employment tribunal would have no scope to consider the laudable objective of the policy, but would concentrate only on whether discrimination could be proven in the case of this particular individual.

Despite the permissive nature of EU and international law with regard to positive action, it is important to realise that this cannot be used to overrule domestic law on this point. There is currently nothing in EU law or the European Convention on Human Rights which

powers of the EU - a course that the Court would be unlikely to take alone, without express new Treaty provision. Furthermore, applying the Equal Treatment Directive to member states' constitutional arrangements could result in difficult anomalies, not least with regard to provisions for succession to the British monarchy.[65] In many ways then, this judgement would be a highly problematic one for the Court to make.

The European Court of Justice would also be influenced by a number of external factors. One

this, like evidence from member states, is not binding on the outcome. The European Commission has twice stated a clear belief that selection of candidates by political parties does not fall within the scope of the Directive, in answer to questions in the European Parliament. These are worth quoting in full, in order to give a clear picture of the Commission's view.

The first question was asked by Dutch MEP Nal van Dijk in March 1996, shortly after the ruling on all women shortlists:

Commissioner Flynn responded even more forcefully than previously:

In these circumstances the Court would be most likely to seek to avoid confrontation by ruling that candidate selection was not within the scope of the Directive, but that this was a matter to be decided through the constitutional arrangements of individual member states. This would be in keeping with the domestic legislation of many member states. In this case, a change to UK law to allow positive action by parties would not concern the Court.

4.4 If the Directive applies, does it allow positive action?

So it appears probable that the European Court of Justice would rule that the Equal Treatment Directive does not cover the selection process. It is therefore quite unlikely that the Court would consider the substance of whether the positive action sanctioned by a new law was within the bounds of action allowed by the Directive. However, this section examines how the Court might react if faced with such a question. Many of the same arguments applied to the previous question are also relevant here.

At this point the wording of the new UK la

case suggests that even if candidature were considered within the reach of the Directive, there is now considerable scope for a law which is either permissive of positive action measures or, as in Hessen, requires them. Also, it must be borne in mind that the new draft Directive (described in Section 3.2) would remove Article 2(4) altogether and make it easier still for the Court to sanction positive action.

The response of the European Court in a case brought against the UK is of not course certain. Indeed, the Court has been known to change its mind.[69] But those interviewed for this project agreed that recent developments, including the adoption of the Amsterdam Treaty and the judgement in the case, make it far more likely than previously that the Court would support the UK in promoting positive action. This fact was recognised by the government Law Officers in 1998 (before the new Treaty had come into force), when they said that 'the chances of successfully defending the proposal would be materially increased by the new . . . Treaty of Amsterdam'.[70]

In summary, if the Court were faced with this question it would be likely to find a new law to be compatible with EU provision on positive action because:

- The Court would take into account the objectives of the EU in promoting women in decision making.
- It would be lobbied heavily by member states where positive action is used by parties, and is permitted - or even required - by law.
- The measures sanctioned by the new law would probably be similar to those recently approved by the Court in the case.
- In the near future, Article 2(4) of the Equal Treatment Directive - which has been the subject of recent controversies over positive action - may be deleted.

4.5 Human rights implications

The two previous sections discussed the likely outcome of a challenge to positive action, as sanctioned by a revision of UK legislation, using EU law. There is also another, separate, matter to consider. This is the possibility of a challenge using human rights law. There are some parallels to the previous arguments in considering the likely outcome of such a case.

Such a challenge could be brought by an individual under the Human Rights Act (after October this year). A case might be brought either against government, for sanctioning or requiring positive action, or against a party, for practising it. A case would be decided in the UK courts, although it could reach the European Court of Human Rights on appeal.
If a change in the law were permissive of positive action, there is very little chance that this could be brought into question through a challenge under the Human Rights Act. As

these requirements into a new clause. However, an amendment using words from existing EU law, UK law or CEDAW would also be likely to be found compatible with these criteria.

If the government took a more radical approach, such as France has recently done, and required positive action, this could be more open to challenge. In such a case it would be incumbent on government to demonstrate that it was a sufficiently 'legitimate aim' to use positive action to achieve a legislature which was gender balanced, and that it was 'proportionate' to require parties to take whatever action the new law required. If such a case were to proceed to the European Court of Human Rights in Strasbourg, it would become a major political issue, with pressure put on the court by France and other states. Support would be likely from signatories to the Convention which have in place compulsory positive action mechanisms for other forms of public office (see Section 2.2). It is possible, of course, that the French system will be challenged, and

- An overly prescriptive law might be more problematic for government. However, if such a case were to reach the European Court of Human Rights the UK would be supported by other states which operate similar systems.
- If the law is not changed there is a possibility for party members to challenge the current system on the basis that their choice of candidates has been overly constrained.

5. Ways Forward

The previous sections have considered the law and its interpretation, in the light of UK and other European experience of candidate selection. In particular, the likely consequences of adopting a legal change to allow positive action by political parties has been considered. However, previous sections have not looked in detail what form such a legal change might take.

In this final section, five distinct courses of future action are considered. In each case the advantages and disadvantages of the proposed course of action are considered, both for government and the parties. The different options are then summarised in a table at the end of the section.

Option 1: Do nothing

One option is obviously to do nothing. Since the

- The application of employment provisions

- Because political parties would be exempted from the employment provisions of the Sex Discrimination Act this would avoid completely the problem of tribunals investigating internal party selections. Party autonomy and democracy would therefore be protected, at least under the Sex Discrimination Act. If the law stated that candidature was not covered by Section 13 of this Act it might follow that parties should be exempted from Section 12 of the Race Relations Act, which is worded identically. In this case parties would no longer be troubled by discrimination claims from any disgruntled candidates.

Disadvantages of this approach

- The flip-side of the greater freedom which parties would enjoy would be that there was no guaranteed protection against discrimination in the selection process. The discriminatory action open to parties would not be restricted to positive action to promote under-represented groups. In some parties it could be these very groups which suffered. One positive result of the case was that all parties began examine their selection procedures to see if they might fall victim to a successful challenge of discrimination by a

words from one or more of the sources of discrimination law with which the UK is required to comply.

One option would be to use EU legislation. Taking words from the Amsterdam Treaty would allow parties to 'ensure full equality in practice between men and women [by] adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a [candidacy] or to prevent or compensate for disadvantages'. These words, however, have been criticised for their lack of clarity.

Given that a successful challenge under the EU law appears, in any case, relatively unlikely, it might be more appropriate to adopt the somewhat clearer words from human rights legislation. Thus the new clause might refer to the 'legitimate aim' of increasing women's representation in elected democratic bodies, and allow parties to take action which was 'proportionate' in achieving this aim. This would be in keeping with the Human Rights Act. Such words could be supplemented with the phrase from the UN Convention on the Elimination of all forms of Discrimination Against Women which allows 'temporary special measures aimed at accelerating equality between men and women'. This would bring UK law into line with that in several other EU member states.

A final option would be to use words from existing exceptions to the Sex Discrimination Act,

European Court of Justice and it was found that candidate selection was governed by the Equal Treatment Directive, a clause allowing limited positive action would probably be found to be compatible with the Directive.

Disadvantages of this approach

- If the new clause used quite general terms to state that positive action was now allowed, this would leave legal uncertainties. It would be left to parties and their legal advisers to decide, for example, what form/s of positive action were 'proportionate'. This matter would be disputed by lawyers, with some almost certainly claiming that a party operating a policy of all women shortlists in half the seats for Westminster was acting within the law, and others arguing the opposite. The position would not be settled absolutely until a case was taken against a party to interpret the terms of the new law in the UK courts. This might result in an over-cautious approach by the parties. The more specific the wording of the amendment in terms of what it allowed, the less the risk to the parties. For example saying that parties could take appropriate measures to ensure that half of their candidates were women would remove some of the pressure. This could leave the legislation itself more open to question - however, the risks of this still seem relatively low.

- Another problem with this approach is that, as under the present law, there could be difficulties for parties as a result of candidate selection remaining subject to employment discrimination law. This comes with the potential problems for party democracy described under option 1.

Option 4: A new electoral law permitting positive action

One of the major difficulties with option 3 is that it leaves parties subject to challenge in employment tribunals over their candidate selection procedures. Many believe that this is not the appropriate forum in which to resolve claims of discrimination, given the fundamental difference between candidate selection procedures in parties and those in ordinary job selection. Despite some of the positive effects of parties adopting more equal opportunities procedures for selection of candidates, there have been concerns voiced by some that this is reducing the diversity of candidates selected. The introduction of person specifications and the marking of candidates against pre-defined criteria may favour educated, middle class candidates and exclude more unconventional or maverick characters who have made up an important part of British political life in the past. Perhaps more importantly there is a potentially irreparable clash between the requirements of equal opportunities procedures and membership involvement in the process, as described under the disadvantages to option 1, above. The only way of avoiding these difficulties may be to ensure that under-represented groups are boosted through positive action.

Meanwhile option 2, which removed candidate selection from the scope of the Sex Discrimination Act, had problems of its own. This could result in unfair discrimination women in the selection process within parties. A more attractive option would therefore appear to be removing candidate selection from employment discrimination legislation, but imposing other restrictions on the process that prevent unnecessary discrimination.

This approach would suggest the drafting of a short electoral law governing the selection process in political parties, and explicitly exempting candidate selection from the Sex Discrimination Act (and probably Race Relations Act). The bill to enact this might have two short clauses. The first would require that se

incentive used in France of threats to cuts to parties' funding would not be available. Thus a more draconian system might have to be used, for example reserving a particular proportion of seats in the legislature for women. A more moderate alternative would be to regulate the selection for some elections, rather than its outcome. Thus a law could provide that party members must be presented with a balanced shortlist of candidates whenever selections take place. This would effectively be an extension of the 'fair selection' requirement included under option 4.

Action such as this would fall well outside th

a woman. If all parties in a seat were required to run candidates of the same gender, members of the electorate could likewise claim that their right to 'free expression . . . in the choice of the legislature' had been restricted. One way of assessing the risks of such a strategy will be to watch events in France. No challenge to the new electoral law there may be forthcoming, but if such a challenge were taken under the European Convention on Human Rights or Equal Treatment Directive this would demonstrate the safety, or otherwise, of such a course for Britain.

Summary

Action	General consequences	Legal challenge against government	Legal challenge against parties
Option 1: Do nothing	• Parties likely to remain cautious. • Slow progress towards improving women's representation. • To avoid discrimination claims, party selection processes may need to become more centralised.	• Unlikely.	• Would succeed if all women shortlists used. • Might succeed against other positive action measures, if discrimination proved. • Increasing challenges likely from women and ethnic minority members against standard selection process.
Option 2: Amend the Sex Discrimination Act to exempt political selections	• Parties can pursue positive action. • Women's representation likely to improve. • Law can no longer be used to claim discrimination against parties. • One member one vote (OMOV) selections protected.	• Possible under Equal Treatment Directive, but unlikely to succeed.	• No longer possible under Sex Discrimination Act, but may be forthcoming under Human Rights Act. 'Proportionate' positive action should be protected, but if parties found to discriminate women this could be problematic.
Option 3: Amend the Sex Discrimination Act to allow positive action by parties	• Parties can pursue limited positive action, with some caution remaining. • Women's representation likely to improve. • To avoid discrimination claims, party selection processes may need to become more centralised.	• Possible under Equal Treatment Directive, but unlikely to succeed.	• Action possible to establish which forms of positive action are allowable within the amended Act. • Challenges by members who claim they have suffered discrimination in the standard selection process likely to continue.
Option 4: A new electoral law permitting positive action	• Parties can pursue limited positive action, with some caution remaining. • Women's representation likely to improve. • OMOV selections protected.	• Possible under Equal Treatment Directive, but unlikely to succeed.	• Action possible to establish which forms of positive action are allowable within the new law. • Any discrimination claims under electoral law, rather than employment law.
Option 5: Require positive action by law	• Parties must pursue positive action. • Women's representation certain to improve, and more quickly than with options 1-4. • OMOV selections protected, within new constraints.	• Possible under Equal Treatment Directive. More risky but probably still unlikely to succeed. • Also possible under Human Rights Act, with chance of success dependent on what form of action is prescribed.	• Little risk of challenge to positive action policies, unless these go beyond what is legally required. • Reduced risk of challenge over (sex) discrimination, since fairer representation is prescribed.

which is what has been proposed previously. Alternative forms that a new electoral law might take are set out above, in options 4 and 5.

Following a legal change, parties would potentially still be subject to challenge over whether the positive action measures they adopted were legitimate. From the perspective of the parties a clearly worded law, making explicit what forms of action were permitted, would offer most protection. However, unless a prescriptive law is passed some areas of legal uncertainty are liable to remain, and parties adopting radical positive action measures may need to defend these in court.