1-1-2000

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All Things Being Equal: Affirmative Action and Candidate Selection from a Scottish Perspective

*Kirsteen Davidson, Rhona Smith, Ruth Webster, Nicole Busby*

Without the active participation of women and the incorporation of women's perspectives at all levels of decision-making, the goals of equality, development and peace cannot be achieved.¹

—Fourth World Conference on Women in Beijing

I. INTRODUCTION

Ten years after the first United Nations Conference on Women, and fifty years after the founding of the United Nations, Beijing hosted the United Nations Fourth World Conference on Women.² With a high media profile, the Conference advanced women's rights on the political agenda of the international community. Convinced that women's participation in the decision-making process is fundamental to the achievement of equality, development and peace,³ the Beijing Conference drew up a Platform for Action. Section G of the Platform is devoted to Women in Power and Decision-making.⁴ Section G identifies two strategic objectives: increasing

² Id.
³ See id.
⁴ Id. ¶¶ 181-195.
women's participation in decision-making and ensuring women's equal access to power structures. In June 2000, the UN General Assembly will meet in New York to review progress towards achieving the goals set in Beijing.

A. IMPROVING SOCIAL REPRESENTATIVENESS

There have always been individual women who wielded tremendous political powers—Cleopatra and Catherine the Great of Russia, for example. More recently significant political power has been exercised by Eva Peron, Corazon Aquino, Aung San Suu Kyi, Indira Gandhi, Benazir Bhutto and Margaret Thatcher. However, these women remain in a minority. The political structures in which power is concentrated are still clearly male-dominated.

The underrepresentation of women in formal political structures does not necessarily indicate a lack of interest in female candidates. Some evidence suggests that supply-side factors, rather than demand-side factors, best explain gender inequality in politics. The United Nations' Commission on the Status of Women notes that "the principal reason why women are not elected to office is that women are not put forward as candidates." There are clear indications that the votes of women in some countries are influenced by preferences for parties fielding women candidates and supporting the participation of women in decision-making.

Both substantive and symbolic considerations warrant serious efforts to facilitate women's participation in formal political structures. The 'substantive' case for greater social representativeness hinges on "the politics of difference" and the prediction that the inclusion of traditionally underrepresented groups in formal decision-making will lead to direct and substantive changes in policy outcome. Research indicates that the critical mass for female representation is only 30-35%. Once such a level is achieved, women should have a "visible impact on the style and content of political decisions."

5. Id. ¶ 181.
7. Supply side factors contributing to the under representation of women in politics include traditional stereotyping, the lack of family friendly policies, and the traditional bias against women. See id. at 390. A full discussion of these issues is beyond the scope of this paper.
However, even if substantive policy is not affected, the symbolic importance of gender diversity in formal political structures remains compelling. "There is a strong argument that the legitimacy and authority of Parliament is undermined if it fails to reflect the diversity of ... society." The "increased representation of women in elective and appointive positions of power is a matter of justice and equality." 

B. THE CONSTRAINTS OF LAW

It may be impossible to substantially improve social representativeness without the use of affirmative action in favor of women. However, affirmative action intended to promote the equal representation of women in politics must be consistent with the relevant legal provisions. International and European Law, as will be seen, permit affirmative action in furtherance of such objectives. However, affirmative action can be problematic. Overzealous use of such measures can lead to claims of reverse discrimination, which appears to be impermissible under current law.

Scotland, with its unique constitutional framework, is an ideal case study. Since 1997, the Scots have elected representatives to four levels of government. In several of these elections, important political parties turned to affirmative action in response to the problem of gender inequality in politics. This paper will explore the Scottish experience to determine how affirmative action can be used to promote social representativeness within the constraints of law.

The lessons to be learned from the Scottish experience and the constraints of law are of global relevance. Through the development of innovative techniques such as twinning and zipping, Scottish political parties seeking to facilitate women's participation in decision-making have demonstrated how affirmative action can be reconciled with the principle of equal treatment. In short, this paper will argue that recent developments in Scottish politics show how affirmative action can be distinguished from reverse discrimination.

Part II of this paper will introduce the Scottish political landscape, so the reader is able to follow the political and legal developments surrounding the recent affirmative action controversy. First, Section A will briefly explain the ideological perspective of each of the four main political

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14. In this article, 'affirmative action' refers to measures which encourage the participation of women.
15. In this article, 'reverse discrimination' refers to measures which overtly discriminate against men in favor of women.
16. See infra Parts II.A, II.B.
parties. Second, Section B will explain how the political parties choose candidates for parliamentary office. Finally, Section C will explain the structure of Scottish government. There are four levels of democratically elected government in Scotland: local, regional, national and supranational (European). Part III will explain how international, European and domestic law treat the issue of gender equality in the political context. This discussion will show that affirmative action intended to promote women’s participation in decisionmaking does not offend the relevant provisions of law. Affirmative action can be used as a tool to effectuate the legal policy of equal participation so long as reverse discrimination does not result. Finally, Part IV will show how political parties in Scotland have achieved greater gender diversity by developing affirmative action techniques that stop short of subjecting men to reverse discrimination. In other words, Scottish political parties committed to equal gender representation have been able to adopt and implement successful affirmative action strategies within the constraints of law.

II. THE POLITICAL LANDSCAPE OF SCOTLAND

A. THE PRINCIPAL POLITICAL PARTIES

At present, four political parties dominate politics in Scotland: the Scottish Labour Party; the Scottish Conservative and Unionist Party; the Scottish Liberal Democrats; and the Scottish National Party. While all of these parties, with the exception of the Scottish National Party, have their counterparts in the UK (United Kingdom) political system, there exists a substantial level of distinctiveness about Scottish political parties. Indeed, the Scottish political system has developed relatively autonomously within the British State. One of the most striking features of the Scottish political system is the significance of the debate surrounding Scotland’s constitutional status. Indeed, this issue has helped to shape the Scottish political system in the last few decades.

The Labour Party in particular dominates politics in Scotland, although the present Labour Government’s agenda suggests a significant move towards a more pragmatic and moderate political stance which extends to the UK as a whole. While traditional Labour philosophy that is based on a coalition of interests in the social democratic tradition is still very much in evidence, current policy is focused on such issues as constitutional reform, political modernisation and social inclusion.

Unlike their position in the UK as a whole, the Scottish Conservative and Unionist Party has increasingly become a marginalized force in Scottish politics. The political stance followed by the Scottish party largely reflects the right-of-centre ideologies of the UK party which, in recent years, has focused on a belief in free market ideology and the importance of a strong government and state. Unlike the other three main political
parties in Scotland, the Scottish Conservative and Unionist Party were strongly opposed to devolution for Scotland and Wales.

The Liberal Democrats remain a minor force in UK politics although the party enjoys significant pockets of support in Scotland. Traditionally the party has positioned itself somewhere between the Labour and Conservative Parties, although that position has become increasingly difficult in recent years as the political divide between the two main parties has lessened. Together with the Scottish National Party, the Scottish Liberal Democrats represent the main counterbalance to Labour domination in Scottish Politics. The Scottish National Party has increasingly become a significant force on the Scottish political scene, although their pledge to deliver an independent Scotland (separate from England, Wales and Northern Ireland) distinguishes the Nationalists from the other political parties.

B. ELECTORAL PROCESS AND METHODS OF CANDIDATE SELECTION

Traditionally, all governmental elections in mainland Britain have been conducted using a ‘first-past-the-post system’ (FPTP) which is essentially a plurality system which operates within single-member constituencies. The winning candidate is the one who gains more votes than any other candidate, irrespective of whether the winning number of votes cast represents an absolute majority of the total number of votes cast in the constituency. In other words, a ‘simple majority’ is all that is required. The FPTP system has increasingly come under criticism in the UK and elsewhere such that a consensus has emerged in favour of some kind of electoral reform. Indeed, the inaugural elections to the Scottish Parliament and the most recent elections to the European Parliament have been conducted using reformed electoral systems, while the debate continues surrounding the desirability of reforming the electoral arrangements for the remaining tiers of government.

1. The Scottish Parliament

The first elections to the Scottish Parliament were conducted using a form of Additional Member System (AMS). This system essentially combines a single member plurality system as discussed above, with an additional list system. In an AMS system, voters are able to cast two votes—the first vote elects a constituency representative on a majority of the votes cast, while the second vote requires the voter to select their preferred party. Additional members are then elected from party lists proportional to the number of votes cast for each political party.

17. The Party-List system is a form of proportional representation (PR) which is widely used across Europe. Each party puts forward a list of candidates equal to the number of seats available. Voters cast their votes in favour of their preferred party and parties then receive seats in proportion to their share of the vote.
2. The European Parliament

A system of proportional representation used for the European elections is a list system which calls upon each political party to draw up separate lists of candidates for the nine English Regions and a list for both Scotland and Wales. Voters are presented with the lists for their regions (or for Scotland or Wales) and merely have to choose between the parties. Voters are not given the choice between individual candidates because the party lists are closed. In other words, it is the party’s responsibility to decide the order in which candidates are placed on the list. When a party wins a seat, it is the candidate at the top of the list who is elected. How candidates are listed is very important. The ability to rank candidates in order of preference gives the political parties the opportunity to promote women candidates.

C. LEVELS OF GOVERNMENT

1. Local Government

The current structure of local government in Scotland came into being in 1996 (although the local councils for the Scottish Islands were elected one year previously). Essentially, it is a unitary system, which consists of twenty-nine local councils for areas on mainland Scotland and three local councils for the areas on the Island. Each local area is divided into wards, with one councillor representing each ward.

Local elections take place every three years when the council is elected en bloc. The 1,222 local councillors in Scotland are elected using a ‘first past the post’ system. All four main political parties are represented on Scotland’s councils, although the Labour Party in particular dominates. The most recent local government election took place on May 6, 1999.

2. The Scottish Parliament

On May 6, 1999, the people of Scotland went to the polls to elect their first Parliament in three hundred years. The Scotland Act of 1998, the

18. Scottish local government has responsibility for the delivery and management of an extensive range of public services including education, low cost housing, family social services, land use planning, environmental services and leisure and recreation. In addition, local councils fulfil an important advocacy role on behalf of the communities they represent. For a more detailed description of the structure and functions of local government in Scotland, see GEORGE MONIES, LOCAL GOVERNMENT IN SCOTLAND (1985); ARTHUR MIDWINTER, LOCAL GOVERNMENT IN SCOTLAND: REFORM OR DECLINE? (1995).

19. The new Parliament has a substantial array of powers and responsibilities over matters such as health, education and training, social work and housing, economic development and transport, law and home affairs, the environment, agriculture, forestry and fishing and sport and the arts. Significantly, responsibility for local government in Scotland is also the responsibility of the Parliament. For a more detailed description of the structure and functions of The Scottish Parliament, see JEAN MCFADDEN & LAZAROWICZ, THE SCOTTISH PARLIAMENT: AN INTRODUCTION (1999).
statute that created the new Parliament, provides that all matters which are not specifically reserved to the United Kingdom (Westminster) Parliament are devolved to the Scottish Parliament. As a result, the new Parliament has extensive powers and responsibilities.

The electoral system used for the election of MSPs (Members of the Scottish Parliament) represents a radical departure from existing electoral systems in the UK and from various systems of proportional representation previously used in the UK. The Parliament consists of seventy-six "constituency members" and fifty-six "regional members." The constituency members are elected on a first past the post system to represent single-member constituencies across Scotland. The regional members are elected on a list system to represent the eight designated regions of Scotland. These eight regions are the same as those used for elections to the European Parliament (see below). Elections to the Scottish Parliament will be held every four years.

3. The Parliament of Great Britain and Northern Ireland

Despite the devolution of power to the new Scottish Parliament, the United Kingdom (Westminster) Parliament remains of central importance. Many important areas of law are still "reserved" to the Westminster Parliament. The Scottish Parliament is likely to remain subordinate to the UK Parliament because of the continuing influence of the doctrine of parliamentary sovereignty.

Scotland returns seventy-two members (MPs) to the UK Parliament out of a total membership of 659. General elections normally take place every five years although elections can be called at any time. At present, the electoral system in use for elections to the Westminster Parliament is a simple majority system.

D. THE EUROPEAN PARLIAMENT

Since the United Kingdom joined the Community in 1973, the influence of EC Law on national law has been significant. As the

20. For instance, Northern Ireland's electoral system provides an example of a Proportional Representation system.
24. By virtue of the doctrine of parliamentary sovereignty, it is generally accepted that the Westminster Parliament has unrestricted legislative powers. The powers of the Scottish Parliament to make laws is derived from the Scotland Act which, in theory, could be amended or repealed by the Westminster Parliament.
Community has developed and moved further towards integration, so the transfer of sovereignty, albeit in limited fields from the national Parliaments to the European institutions, has increased. European legislation has assumed increasing importance in the governance of the UK. The main areas of influence of the European Community are agriculture, intra-Community trade, environmental and social law/policy.

The UK elects representatives to the European Parliament for a five year term. Out of a total of 626 Members of the European Parliament (MEPs), eighty-seven are elected from the UK. Of these, eight represent Scottish constituencies. Departing from previous arrangements, the June 1999 election employed a system of proportional representation, bringing the UK more into line with her European colleagues. It was essentially a list system.

III. RELEVANT LEGAL PROVISIONS

A. THE LEGAL FRAMEWORK

The United Kingdom has a dualistic approach to treaty law. The laws of the European Community are automatically binding. Implementing domestic legislation may be enacted, but is not necessary. The Treaty of Rome (as amended) provides that the European Court of Justice in Luxembourg has jurisdiction to hear claims that any member nation has failed to comply with its Community obligations. Thus, member nations that disregard Community law face the possibility of legal sanctions.

International law in general has a different legal effect. Those conventions which the State has ratified bind it under international law, but do not become part of national law unless specifically incorporated by an Act of Parliament. To quote Lord Ross, speaking in the Outer House of the Court of Session in Edinburgh, Scotland: "[a] treaty or a convention is not part of the law of Scotland unless and until Parliament has passed

28. See discussion infra Part III.D.
30. See EC Treaty art. 226. The European Commission has jurisdiction to hear claims under EC Treaty art. 226. See, e.g., Case 129/78, Commission v. United Kingdom, 1979 E.C.R. 419. Also, the Commission has jurisdiction to hear claims brought by member state under art. 227. See, e.g., Case 141/78, France v. United Kingdom of Great Britain and Northern Ireland, 1979 E.C.T. 2923.
31. See EC Treaty art. 228.
legislation giving effect to the treaty provisions.\textsuperscript{32} Naturally, given the potential diplomatic repercussions, the United Kingdom, like any State, aspires to act in accordance with its international obligations. In Scotland, the Westminster and Scottish Parliaments have an obligation to act in accordance with international law. This is usually achieved through favourable statutory interpretation.

B. INTERNATIONAL LAW\textsuperscript{33}

Affirmative action in the political context would not violate the relevant provisions of international law. International law clearly provides that the right to participation in public life should not be prejudiced solely on account of gender. Article 21(1) of The Universal Declaration of Human Rights recognizes that “everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”\textsuperscript{34} The Preamble to The Universal Declaration of Human Rights expressly recognizes “the equal rights of men and women.” Hailed as a “common standard of achievement for all peoples and all nations,”\textsuperscript{35} the Declaration notably prohibits discrimination on grounds of sex.\textsuperscript{36} The Convention on the Political Rights of Women 1952\textsuperscript{37} aimed at “equalizing the status of men and women in the enjoyment and exercise of political rights, in accordance with the provisions of the Charter of the United Nations and of The Universal Declaration of Human Rights.”\textsuperscript{38}

The International Covenant on Civil and Political Rights\textsuperscript{39} specifically addresses the issue of women in the decision-making process. Article 25 recognizes the right of women and men to be elected to public office and to take part in the conduct of public affairs, without discrimination on grounds of sex.\textsuperscript{40} The Convention on the Elimination of All Forms of Discrimination against Women 1979\textsuperscript{41} goes further still. Article 7 seeks to secure for women not only the right to vote and be eligible for election to public bodies and NGOs (nongovernmental organizations), but also the right to “participate in the formulation of government policy and the

\textsuperscript{32} Kaur v. Lord Advocate 1980 Sess. Cas. 316, 327. Note that the Treaty of Rome 1957, as amended, which is the constituent document of the European Community is incorporated into national laws by the European Communities Act 1972, as amended.

\textsuperscript{33} The United Kingdom has acceded to all of the following instruments.


\textsuperscript{35} Id. Preamble.

\textsuperscript{36} Id. art. 2.


\textsuperscript{38} Id.


\textsuperscript{40} Id. at 179.

implementation thereof and to hold public office and perform all public functions at all levels of government" on equal terms with men. In addition, Article 4 expressly allows States to adopt "temporary special measures aimed at accelerating de facto equality between men and women." Any measures taken under this provision should be discontinued "when the objectives of equality of opportunity" have been achieved. Thus, contemporary international law recognizes that affirmative action may be necessary to secure the advancement of women in politics.

C. COUNCIL OF EUROPE LAW

Affirmative action in the political context appears to be permissible under the relevant provisions of Council of Europe Law. Article 3 of Protocol One to the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms prescribes a right to free elections. The European Court of Human Rights has held this to imply the principle of equal treatment for all citizens in the exercise of their right to stand for election. There is thus a freedom from discrimination in the election process protected by the Convention and nothing therein which would appear to prevent affirmative action from being taken in furtherance of securing such a gender balance. The terms of this Convention will be subject to judicial application by Courts in Scotland and elsewhere in the United Kingdom when the Human Rights Act of 1998 enters into force this year.

D. DOMESTIC AND EUROPEAN COMMUNITY LAW

Domestic and European Community Law condone affirmative action in favor of women so long as their male counterparts do not suffer reverse discrimination. Realizing the full equality of men and women is a stated objective of European Community Law. Article 141 of the Treaty imposes on the Council of the European Union the obligation to adopt secondary legislation to ensure "the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation." The Equal Treatment Directive expands on these provisions, prohibiting discrimination on grounds of sex in

42. Id. art. 7.
44. See generally STEPHEN WEATHERILL & PAUL BEAUMONT, EC LAW (1999); EVELYN ELLIS, EC SEX EQUALITY LAW (1998)
45. EC Treaty art. 3, § 2.
46. Treaty of Rome (as amended) art. 141(3) (1957).
selection criteria, access to posts and all levels of occupational hierarchy.  

The Westminster Parliament amended The Sex Discrimination Act of 1975 (passed by the Westminster Parliament) to give effect to the provisions of, inter alia, Article 141 of the Treaty of Rome and the Equal Treatment Directive. By outlawing all forms of discrimination on the grounds of sex or marital status, the Act effectively prohibits reverse discrimination which arises "[w]here a less-qualified applicant may be preferred to a better qualified candidate on account of race or sex."  

This statute was invoked in Jepson and Dyas-Elliott v. The Labour Party and Others, the principle case on gender representation in Parliament. The case arose out of a dispute between two potential Labour candidates for the 1997 General (Westminster) Election and the Labour Party. The Labour Party had adopted a policy for promoting women in government which involved, inter alia, women only shortlists for certain constituencies, with the avowed intention of doubling the number of female Members of Parliament representing the Labour Party. In January 1996, two male applicants who had not been considered for selection as Labour Party candidates in three constituencies took their case to an Employment Tribunal in England, claiming unlawful discrimination. The applicants were successful in obtaining a declaration to the effect that the women-only shortlist arrangements constituted direct discrimination

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48. Id.
50. [1996] LR.L.R. 116
51. The shortlisting of prospective candidates depends on the internal candidate selection procedures adopted by the individual parties. The extent to which women's representation can be enhanced in the shortlisting process depends upon which positive measures parties are prepared to promote. The use of such measures has often proved controversial, particularly in relation to the use of quotas and women-only shortlists. In the instant case, the Labour Party drew up women only shortlists for half of the seats within marginal constituencies, new constituencies or where a sitting MP was retiring.
52. Section 1 of the Sex Discrimination Act 1975 outlaws direct and indirect discrimination against women. Sex Discrimination Act, 1975, ch. 65, § 1 (U.K.). Section 1 provides:

(1) A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if—
(a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or
(b) he applies to her a requirement or condition which he applies or would apply equally to a man but—
(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
(iii) which is to her detriment because she cannot comply with it.

Id. Section 2 of the Act applies such a prohibition to discrimination against men. Id. § 2.
against men contrary to the Sex Discrimination Act of 1975.

At the time of this decision, the Labour Party was preparing for the coming General Election and determined to maintain a positive media profile. After taking legal advice, the Party announced that the thirty-five women already selected under the scheme would not be affected but the policy would be discontinued and no appeal would be lodged.

The Jepson case is, in many ways, unfortunate. While protecting women from employment discrimination on account of gender, the Sex Discrimination Act does not necessarily preclude resort to affirmative action to secure equal gender representation in politics. Despite the outcome of the Jepson case, the statute appears to protect only employees. The case may have been overturned if the Labour party had challenged the decision on appeal.

In the wake of the decision in the Jepson case, a written question was posed to the European Commission on the use of positive discrimination in the electoral process. The Commission responded that membership of Parliament was not a job and thus fell without the ambit of Article 119 (now 141) and Directive 76/207. Because of this, quota systems have been used to promote gender balance in decision-making in many EC States without legal challenge.

Moreover, authoritative support for affirmative action, albeit within limited fields, can be drawn from the jurisprudence of the European Court of Justice and from the legislation itself. The new Article 141(4) specifically enables member States to maintain and adopt measures 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 path has thus been paved for future legislative provisions advocating affirmative action in the employment context. Although the foregoing may be restricted in application to employees, the European Commission has identified the promotion of gender balance in decision-making as one of five objectives in its Fourth Equal Opportunities Action Programme.

Even setting these issues aside, what must be remembered is that in the Jepson case, women only shortlists were condemned. It is submitted that this policy constituted reverse discrimination, i.e., discrimination against men. The provisions of international law and European laws enable measures of affirmative action to redress the gender imbalance but stop

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54. See 1996 O.J. (C 305) 4.
55. See id. at 5.
57. Article 2(4) of the Equal Treatment Directive and Article 141(4) of the Treaty of Rome both acknowledge the legitimacy of supporting gender balance by positive methods.
58. Proposal for a Council decision on the Fourth Medium-Term Community Action Programme on Equal Opportunities for Women and Men, COM (95) 381.
short of condoning discrimination against men. Consequently, even if the *Jeppson* decision was to be upheld and deemed applicable to the selection of all future candidates for all levels of election, the Tribunal has not prima facie outlawed affirmative action, rather it has condemned practices of reverse discrimination. The difference between reverse discrimination and affirmative action may be subtle but it is significant as will be demonstrated in the following case studies.

E. CONCLUSIONS ON THE APPLICABLE LEGAL PROVISIONS

It is clear that all levels of law support gender equality. Accordingly, there should be equal opportunities for men and women wishing to enter the political arena. It is acknowledged that affirmative action may be required to secure fair female representation. Such action is accepted under international and European laws in order to rectify imbalances between the representation of men and women. Many States, in Europe, the United States and elsewhere have successfully employed affirmative action measures to elections to secure gender equality in the decision-making process.

IV. AFFIRMATIVE ACTION IN POLITICS AFTER *JEPPSON*60

A. TWINNING: GENDER DIVERSITY IN THE SCOTTISH PARLIAMENT61

An impressive number of women were returned to the newly reconvened Scottish Parliament: 37.2% of the total number of Members of the Scottish Parliament (MSPs).62 As previously stated, this propels Scotland into third place in the World League Table of women’s representation in national Parliaments drawn up by the Inter-Parliamentary Union, behind Sweden and Denmark.63

The Scottish Labour Party in particular contributed substantially to gender diversity in the new Scottish Parliament. Measured by both percentage of total representation and by absolute numbers, the Scottish Labour Party boasts more female MSPs than any other party. The Labour Party employed a system of ‘twinning’ for seats elected according to the first past the post system. Constituencies were paired for the purpose of selection, with each pair of constituencies selecting one man and one woman. Despite the *Jeppson* case and vocal criticism by other political

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59. In 1986 Iowa became the first State in the US to require equal appointment of women.
60. Please see the Appendix to this article for tabular data on the elections after *Jeppson*. The data illustrate the results based on gender.
63. See id.
parties and commentators, the practice of twinning was used without legal challenge.

However, such a selection process can be distinguished from that which gave rise to the *Jepson* case. In *Jepson*, women-only shortlists effectively discriminated against men. This is, at present, legally unacceptable. In contrast, the twinning system matches equal numbers of men with women. It is therefore a technique of affirmative action but it does not go as far as discriminating against men, i.e., it is not reverse discrimination. The importance of this cannot be underestimated and may account for the lack of legal challenge during the hustings for the Scottish Parliament.

Undoubtedly the presence of forty-eight women MSPs in Holyrood is a significant accomplishment. The first Scottish Parliamentary elections vividly demonstrate the potential for securing equal gender representation within the constraints of law. No other Parliament has achieved such equality in its inaugural election. Although the law at present will not condone reverse discrimination, affirmative action measures that do not result in discrimination against men are permissible.

**B. ZIPPING: UK WOMEN IN THE EUROPEAN PARLIAMENT**

Members of the European Parliament were elected in June 1999, a few weeks after the elections for Members of the Scottish Parliament. As previously indicated, Scotland elects eight MEPs as part of the total compliment of eighty-seven MEPs returned to Strasbourg from the UK. Following the 1999 elections, the UK is eleventh in the comparative table of women members for the 1999-2004 European Parliament with only 24% female MEPs, as compared to 45% for Sweden and 44% for Finland. However, these figures do mark an improvement. Comparing the 1994 and 1999 results in Table 3, the number of UK women in the European legislature has increased by six from fifteen to twenty-one.

The most interesting lesson to be drawn from the European election is in the experience and practice of the Liberal Democrats. This is the United Kingdom success story. From having no serving female members in the outgoing Parliament, the Liberal Democrats succeeded in securing a gender equilibrium in the 1999 elections. Considering the three main parties' share of the vote and seats in England, Scotland and Wales, the Liberal Democrats have the highest proportion of women MEPs.

At their 1997 Annual Conference, the Women Liberal Democrats tabled a motion calling for a quota system where women would account for 50% of shortlisted candidates for the forthcoming European Parliamentary

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66. *See Table 3 infra* p. 307.
elections. This would secure the goal of 50% of the Party’s MEPs being female at the 1999 election. Ultimately the Conference rejected the 50/50 motion but agreed to a policy of ‘zipping’ for the European election whereby each list of candidates in England presented male and female candidates alternately. Women topped the list in four regions and men in five. In this way, the Liberal Democrats hoped to ensure gender equality among their MEPs.

Given the experience of the Scottish Labour Party in the Scottish Parliamentary elections, the decision of the national Liberal Democrats adds further weight to the contention that affirmative action may be legitimate insofar as it does not constitute reverse discrimination. In women only shortlists, the selected constituencies can only elect women. In contrast, zipping requires the listing of potential candidates to alternate between male and female. Consequently, in proportional representation lists, a women only list would mean that only women are elected while a ziplist would mean that an almost equal number of male and female candidates are elected.

The outcome of the *Jepson* case suggested that such a policy may be vulnerable to legal challenge. However, campaigners for affirmative action argued that European Community law could protect the policy against legal challenge. The successful outcome of the zipping mechanism has proved the potential impact this type of action can have on equal representation.

V. CONCLUSIONS

Affirmative action has proved an effective but controversial mechanism for increasing the number of female candidates and elected representatives. As has been discussed, the Labour Party’s use of women only shortlists was successfully challenged in the *Jepson* case. Although the Labour Party ultimately failed in their attempt to use all women shortlists in the national election, the Scottish Labour Party achieved notable success with twinning at the elections for the Scottish Parliament. Shortly thereafter, the national Liberal Democrats secured a gender balance with zipping in the elections for the European Parliament. The fact that neither of these procedures gave rise to legal challenge is, in the wake of the *Jepson* decision, important. Both twinning and zipping may be classed as affirmative action measures. However, they appear to be within the ambit of the law.

68. See id.
70. See Perkins, supra note 67. This assumes that the problem of whether serving as a parliamentarian constitutes "employment" is resolved.
71. See Table 1 infra p. 307.
The foregoing analysis of the affirmative action techniques employed within the United Kingdom has demonstrated the remarkable improvements in female representation which can be achieved at any level of the decision-making process. It is evident that affirmative action measures are legitimate under international and European laws. The use thereof should be encouraged in all future elections. By merely practicing equal opportunities in the literal sense, i.e., by using zipping or twinning, a gender balance can be legitimately secured.

What is less apparent is the application of the law in instances of reverse discrimination. The United Kingdom’s Employment Tribunal found women only shortlists contrary to the law in the *Jepson* case. This may not be the case under International Law. The definition of measures “aimed at accelerating *de facto* equality” under the Convention on the Elimination of All Forms of Discrimination Against Women\(^2\) is open to interpretation. Even reverse discrimination may be legitimate so long as measures are only imposed for the period of time necessary to secure equality of opportunity and to right an historic wrong.

The law is clearly supportive of efforts to increase female representation in politics. Gender equilibrium is fundamental to the securement of equality, development and peace. However, the law cannot force the necessary changes in the attitudes of politicians and the general public. Policy remains the rhetoric of change. The law is the tool that transforms this rhetoric of change into reality.

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APPENDIX: TABLES

Table 1. Scottish Parliamentary Elections 1999 - Results Analysed by Gender

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<thead>
<tr>
<th>Party</th>
<th>Selected as Candidates</th>
<th>Elected as MSPs</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total number of women</td>
<td>Women as % of total</td>
</tr>
<tr>
<td>Labour</td>
<td>53</td>
<td>41.4</td>
</tr>
<tr>
<td>SNP</td>
<td>51</td>
<td>30.5</td>
</tr>
<tr>
<td>Conservative</td>
<td>25</td>
<td>17.1</td>
</tr>
<tr>
<td>Liberal Democ</td>
<td>46</td>
<td>27.5</td>
</tr>
</tbody>
</table>

Source: Engender 1999

Table 2. UK Parliamentary Elections 1997 - Results Analysed by Gender

<table>
<thead>
<tr>
<th>Party</th>
<th>Elected as MPs</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total no. of women</td>
</tr>
<tr>
<td>Labour</td>
<td>101</td>
</tr>
<tr>
<td>Conservative</td>
<td>13</td>
</tr>
<tr>
<td>Liberal Democ</td>
<td>3</td>
</tr>
<tr>
<td>Other</td>
<td>3</td>
</tr>
</tbody>
</table>

Source: Eagle and Lovenduski, 1998

Table 3. European Parliamentary Elections 1994 & 1999 - Results Analysed by Gender

<table>
<thead>
<tr>
<th>Year of Election</th>
<th>Elected as MEPs to represent the UK</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total no. of Women</td>
</tr>
<tr>
<td>1994</td>
<td>15</td>
</tr>
<tr>
<td>1999</td>
<td>21</td>
</tr>
</tbody>
</table>

Source: European Parliament 1999
Table 4. Scottish Local Government Elections 1999 - Results Analysed by Gender

<table>
<thead>
<tr>
<th>Party</th>
<th>Selected as Candidates</th>
<th>Elected as Councillors</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total no of women</td>
<td>Women as % of total</td>
</tr>
<tr>
<td>Labour</td>
<td>235</td>
<td>24</td>
</tr>
<tr>
<td>SNP</td>
<td>258</td>
<td>24.5</td>
</tr>
<tr>
<td>Conservative</td>
<td>221</td>
<td>30.6</td>
</tr>
<tr>
<td>Liberal Democrat</td>
<td>230</td>
<td>37.6</td>
</tr>
<tr>
<td>Independent / Other</td>
<td>104</td>
<td>18.6</td>
</tr>
</tbody>
</table>

Source: Scottish Local Government Information Unit 1999