Affirmative Action without Quotas in Northern Ireland

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New research has shown that Northern Ireland's innovative affirmative action programme has resulted in improvements in fair employment, both for Catholics and Protestants.[2]

Historically, Catholics and Protestants in Northern Ireland were typically highly segregated from each other in employment, with Catholics being concentrated in particular sectors of the labour market, and in particular firms, and suffering unemployment rates two to three times as high as those of Protestants. But for the last twenty years, Northern Ireland's programme of affirmative action has used detailed monitoring for firms' composition plus agreed action plans, where necessary, to ensure for both groups "fair participation" in employment, avoiding the setting of quotas.

The legislation requires employers to carry out regular reviews of their workforce composition to determine whether there is fair employment, and to undertake remedial action where required. These reviews enable the Commission responsible for enforcement of the legislation (from 1990 to 2000, the Fair Employment Commission; from 2000, the Equality Commission) to identify those employers whose workforce is insufficiently representative and to initiate agreements with them for improvement.

The Nuffield Foundation funded an in-depth study over the past two years into the extent to which any changes to workforce composition can be attributed to the fair employment policies. The interdisciplinary team of researchers from Oxford University found not only a direct association between the agreements and positive change, but that that there appeared to be "spill-over" effects on employers overall, with a general move towards fair employment.

In this article, we provide a non-technical account of this research and some preliminary "headline" results, together with a brief analysis of some policy implications. More detailed discussion, together with an account of research methods and data analysis will be published subsequently.

1. Background

Northern Ireland has, since 1989, had a remarkable and innovative programme of affirmative action that aims to use legal enforcement measures to ensure that both communities in Northern Ireland - Catholics and Protestants - enjoy "fair participation" in employment.

The Northern Ireland approach is radically different from the approach to inequality of opportunity in the rest of the UK and is also somewhat different from the much better-known American affirmative action programmes. The success (or otherwise) of the Northern Ireland approach may well have important implications for other jurisdictions such as the EU that are considering how to tackle issues of fair employment (for

example in the context of ethnic inequalities in the labour market).

2. Affirmative Action in Other Countries

Affirmative action in the labour market has been practised in a number of countries, most notably in India, where quotas have been established for the employment of members of the Scheduled Castes, Scheduled Tribes and Other Backward Classes in public sector jobs, and in the USA where federal contractors are obliged to show evidence of fair employment with respect to gender and ethnicity in order to qualify for government contracts. There are also programmes in South Africa, Malaysia, Canada, Namibia, Fiji and finally in Northern Ireland, on which this paper focuses.

The American programmes have been by far the most extensively researched. Several studies have compared the employment growth of females and minorities in establishments that are federal contractors (and so subject to affirmative action) with that of non-contractors. Under Executive Order 11246[3] employers with federal contracts are required to file reports indicating "underutilization" of women or minorities and are then obliged to address this by making corrective efforts including the use of written goals and timetables. Contractors may be sued and barred from federal contracts if they are judged to be not pursuing affirmative action.

Whilst there is some disagreement about the size of the effects, there is general agreement that the federal contractor programme as a whole has improved the proportions of African Americans and of women both in employment generally and in managerial posts specifically. The gains, however, have been greater in periods when the programme received greater political emphasis from the federal government than in periods (such as the Reagan years) when government relied more on market forces to remedy disparities.

3. The Northern Irish Approach to Fair Employment

The affirmative action programme was established by the Fair Employment (Northern Ireland) Act 1989 (amending and substantially replacing the previous 1976 fair employment legislation which essentially prohibited discrimination but which did not require any significant positive action to promote fair employment). This legislation was subsequently modified by the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO).

The Northern Ireland legislation imposes on all regulated employers, both public and private, a duty to carry out regular reviews of the composition of their workforce in order to determine whether there is fair participation of both communities, and to undertake remedial action where fair participation has not been achieved. The major tool available under the legislation to the principal legal enforcement agency (initially the Fair Employment Commission (FEC), and from 2000 the Equality Commission for Northern Ireland (ECNI)) was to select regulated employers for investigation and, where deemed necessary, to establish agreements to improve the representation of the under-represented group. While the majority of agreements have been established to remedy Catholic under-representation, there have also been a number designed to remedy Protestant under-representation in specific regulated employers.

These affirmative action agreements typically included process requirements and substantive requirements. They involved:

■ Changes in the way in which regulated employers conducted their personnel functions, particularly by formalising advertising, hiring, promotion, dismissal, and equal opportunities training;

■ Specified affirmative action measures deemed most appropriate for regulated employers, such as the use of targeted advertising to the under-represented group, and statements in advertisements particularly welcoming applications from the under-represented group;

■ The adoption of specified numerical goals which regulated employers committed themselves to achieving them in order to reduce under-representation, together with timetables by which these numerical targets would be achieved.

No reverse discrimination or quotas was permitted or could be required by the FEC/ECNI. (A major exception to this approach involves affirmative action in the police force where a form of quota system has been in operation since the implementation of the Patten Report of 1999.)

There are two main sorts of agreement, namely legally enforceable agreements and voluntary agreements negotiated with Commission staff. In practice, the great majority of the agreements (around two-thirds) have been voluntary ones. The Commission moved towards legally binding agreements when it was unable to secure a satisfactory voluntary agreement. Ultimately these legally binding agreements are backed up by sanctions although in practice the Commission has primarily employed persuasion rather than enforcement.

In summary, the most notable features of the Northern Ireland legislation and approach to affirmative action are:

■ Its symmetrical character – the legislation applies both to Catholic and to Protestant under-representation;

■ A concern with outcomes and not solely with process (although issues of process are by no means ignored);

■ The annual monitoring of regulated employers composition and the publication of these returns identifying individual regulated employers by name;

■ A definition of fair participation that takes account of the availability of suitably-qualified personnel in the relevant geographical area;

■ The use of legally-binding and voluntary agreements depending on the judgement of the Commission as to which is more likely to be successful to achieve compliance and redress under-representation;

■ The limited measures that employers were permitted to take in order to redress under-representation in comparison with other countries such as the USA or India adopting affirmative action measures.

4. The MacBride Principles

Another politically important reason for employers to engage in affirmative action in Northern Ireland was provided by the campaign to establish the MacBride Principles. This was a campaign by US-based activists,

largely from the Irish-American community, together with some human rights groups, to put pressure on the British government to act more decisively on fair employment in Northern Ireland. One of the main aims of the campaign was to put pressure on American corporations with subsidiaries in Northern Ireland to adopt a set of anti-discrimination principles called the MacBride Principles. These were named after and sponsored by Sean MacBride, a controversial Irish statesman who had been chief of staff of the IRA during the 1930s, Minister of Foreign Affairs in the Irish Republic, founder of Amnesty International, and recipient of the Nobel Peace Prize in 1974.

The MacBride Principles were launched in 1984. American companies with subsidiaries in Northern Ireland were invited to commit themselves to a series of non-discrimination and affirmative action principles in their operations in Northern Ireland. These principles had much in common with the content of the agreements described above that were reached with the FEC/ECNI. They included, *inter alia*:

- Increasing the representation of individuals from under-represented religious groups in the work force, including managerial, supervisory, administrative, clerical and technical jobs;

- All job openings should be publicly advertised and special recruitment efforts should be made to attract applicants from under-represented religious groups;

- The abolition of job reservations, apprenticeship restrictions and differential employment criteria, which discriminate on the basis of religion or ethnic origin;

- The appointment of a senior management staff member to oversee the company's affirmative action efforts and the setting up of timetables to carry out affirmative action principles.

In addition to the above, each signatory to the MacBride Principles was required to report annually to an independent monitoring agency on its progress in the implementation of these Principles. (This was specified in the 1986 amplified version of the Principles).

Companies were invited to indicate their acceptance of the Principles by "signing" them. The model chosen was that previously adopted in the Sullivan Principles relating to South Africa although, unlike in South Africa, there was no substantial move to force divestment from companies that were unwilling to sign the Principles. The MacBride Principles had no legal force in Northern Ireland, but there was the risk of economic sanctions from US state or non-governmental activity. For example, some US jurisdictions (such as New York City) legislated that firms with operations in Northern Ireland could lose state or city contract bids if their Northern Ireland subsidiaries were not implementing the MacBride Principles.

The body monitoring the operation of the MacBride Principles in the United States was the Investor Research Responsibility Centre (IRRC). A comparison of their effectiveness with that of the FEC/ECNI agreements should be instructive. On the one hand, the risk of economic sanctions in the case of MacBride might be expected to strengthen their effects, although the risks might be expected to decline over time as the "troubles" began to recede (particularly following the Belfast/Good Friday Agreement of 1998) and pressure from activists accordingly might have been reduced. On the other hand, the greater institutional authority and legal power of the

FEC/ECNI to check on implementation of the agreements might be expected to increase their long-term effectiveness.

5. Lawsuits

A third source of pressure for regulated employers to engage in fair employment practices, analogous to lawsuits in the US, is provided by cases alleging discrimination brought against regulated employers by individual complainants. From 1998 these have been heard in the Fair Employment Tribunal, which hears complaints of discrimination on the basis of religion or political opinion. The FET has the power, if it finds in favour of the complainant, to make a financial award (with no upper limit specified).

6. Our Research Objectives

Our research had five main objectives:

- To assess whether agreements concluded between employers and the Commissions had been successful in improving the extent to which regulated employers moved towards fair employment (both in occupational and employment terms), and to assess whether the legally-enforceable or the voluntary agreements were more effective;

- To investigate whether other influences on firms such as individual cases taken to Fair Employment Tribunal, and the MacBride Principles increased progress towards fair employment in individual firms;

- To evaluate the overall success of the affirmative action programme set up in the fair employment legislation;

- To understand the principal mechanisms which facilitated progress towards fair employment;

- To draw policy recommendations.

7. Key Findings

The study identified four key findings:

1. Agreements were positively associated with improvements in fair employment, both those designed to improve Catholic representation and those designed to improve Protestant representation. Voluntary agreements proved to be more effective than the legally-enforceable Article 13 agreements;

2. Agreements were effective both in boosting employment and increasing shares in managerial/professional occupations – i.e. the gains were not restricted to workers in low skill occupations;

3. There was no sign that either Fair Employment tribunal cases or the MacBride Principles had lasting impacts on individual regulated employers;

4. Improvements in fair employment were not restricted to regulated employers that had agreements – there appeared to be "spill-over" effects on non-agreement firms such that there was a general move towards fair employment, with a clear decline in "extreme" firms at both ends of the spectrum.

8. The Effects of Affirmative Action Agreements in More Detail

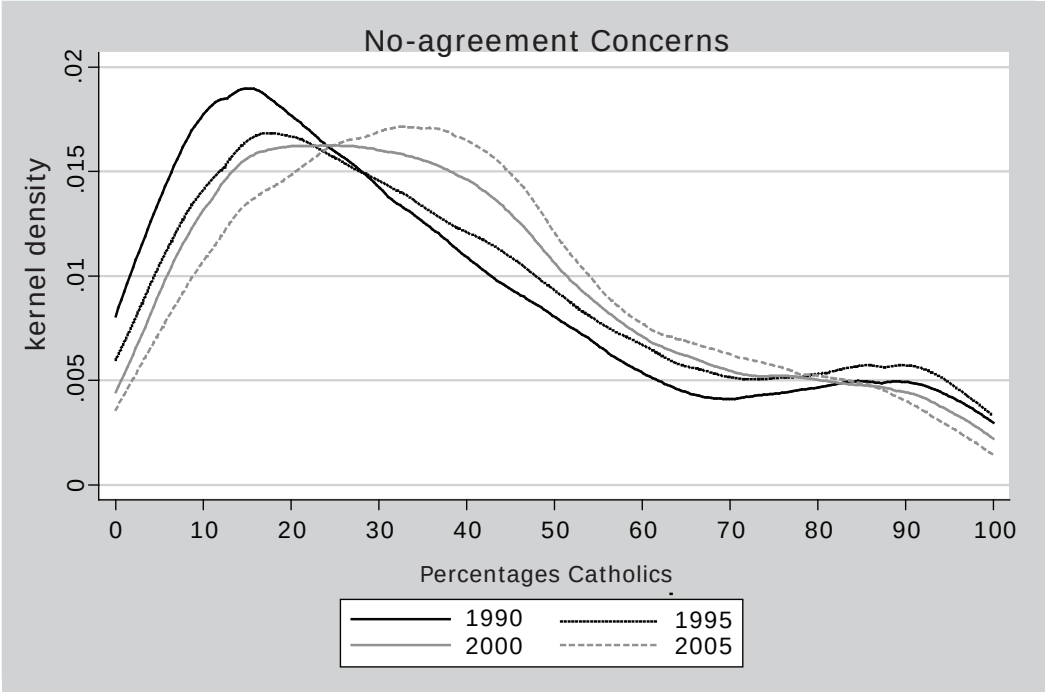
Turning, first, to the various measures of Commission enforcement activity, we find significant effects both for voluntary Catholic agreements (on the growth of Catholic employment) and for voluntary Protestant agreements (on the growth of Protestant employment). In contrast, the effects of legally-enforceable agreements are not significant. Moreover, in the case of Catholic agreements,

the magnitude of the coefficient for the legally enforceable agreements is clearly smaller than that for the voluntary agreements.

The most striking positive finding is that voluntary Commission agreements have been more effective than the legally enforceable ones. This finding applies both to Catholic and to Protestant agreements, to agreements concluded under the Fair Employment Commission and under its successor the Equality Commission, and to the effects of agreements both on overall employment in the concern and on the share of professional and managerial employees. It thus seems to be a very robust result.

We also found significant and positive effects both on the share of Catholic employees in regulated employers where there were less than 36% Catholics, and on the share of Protestant employees where there were less than 41% Protestant employees. This can probably be attributed to "spill-over" effects with a declining number of non-agreement firms being located in the two tails of the distribution (Figure 1). As Figure 1 shows, the distribution of regulated employers shifted from a bimodal one in 1990 to a unimodal one in 2005 with fewer firms located in the two tails of the distribution.

Figure 1: Distribution of regulated employers by percentages Catholics: 1990-2005 (non-agreement regulated employers)



Source: Monitoring return data, 1990 – 2005.

Apart from these positive results, we have found little evidence for direct effects of individual Fair Employment Tribunal activity and not a great deal of evidence for the effect of legally enforceable Commission agreements, or for MacBride agreements.

If this analysis is correct, then reforms of the kind sought by the Commission in their agreements, requiring wider advertising and outreach, can potentially play a bigger role than reforms designed to eliminate discrimination at the point of application. So even if the financial incentives of tribunal cases (the costs of defending them as well as the financial penalties imposed) lead regulated employers to reform their selection procedures (in itself an untested assumption), this may not in itself make a great deal of difference to the degree of under-representation in the concern.

This is not in any way intended to deny the importance of direct discrimination in hiring, promotion or firing (although unfortunately no field experiments of discrimination of the sort that have been carried out on racial discrimination have been attempted in Northern Ireland). Rather our point is that additional processes, some of which might be regarded as constituting indirect discrimination or deriving from prior beliefs about likely discrimination (such as the "chill factor"), may well be even more widespread but may also be more susceptible to policy intervention.

But if this argument for explaining differences in the effectiveness of tribunal and agreement activity is correct, how might we explain the differences in the effectiveness of voluntary and legally-enforceable agreements, or between Commission and MacBride agreements, all of which aim to tackle recruitment practices?

Our qualitative research suggests that leadership from the top of an organisation is crucial in the effective implementation of reforms. Actual implementation of reforms is bound to involve a degree of discretion on the part of lower-level employees: formal procedures, even if tightly specified, can never rule out discretion, and how that discretion is exercised may well depend upon the extent to which junior employees perceive that their seniors value the objectives. Voluntary agreements, where senior staff of the firm concerned (with whom agreements are typically negotiated) have been persuaded of the legitimacy of the exercise, may thus be more wholeheartedly implemented than are legally enforceable agreements where the leadership of the concern had to be compelled to accept the intervention.

This still leaves open the question of why the MacBride agreements were less successful than the voluntary agreements negotiated by the Commission. One possibility might be the different basis for targeting firms for MacBride agreements. As American subsidiaries they may already have had in place more professionalised and civil-rights oriented personnel functions.

Finally, it is important to recognise that our failure to find direct evidence of positive effects of legally-enforceable or of MacBride agreements on fair employment within individual regulated employers does not in any way imply that such agreements were without value. Here, our earlier distinction between direct effects and spill-over effects becomes highly relevant. The fact that the Commission had the power to impose legally-enforceable agreements, and that it was willing to exercise that power on occasion, might well have made its task of securing voluntary agreements considerably easier. It might also have signalled to other, non-agree-

ment, regulated employers that the Commission "meant business". The signalling effect of these agreements on other regulated employers might well have been important for the overall success of the programme.

9. Policy Implications

The Northern Ireland experience shows that progress can be made towards fair employment without resorting to quotas that would probably be politically unacceptable in the rest of the UK or in Europe.

A fundamental aspect of the Northern Ireland programme is the monitoring of employees, the targeting of employers by the Commission where progress is not being made, and the use of agreed programmes and timetables to achieve progress towards fair employment. The key mechanisms that "delivered" these favourable outcomes appeared to be:

- The professionalisation of Human Resources within regulated employers. In particular, the appointment of a designated employee to ensure compliance with FEC/ECNI guidelines.
- Formal advertising and recruitment methods rather than by word of mouth.
- Targeted advertising of vacancies to encourage applications from the under-represented group.
- The introduction of criteria-based redundancy policies.

These measures do not appear to have involved major administrative burdens on firms and have proven to be politically acceptable.

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[3] 28 September, 1965, 30 F.R. 12319.