

Equality, Ireland, and EU Law

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This article belongs to the debate » [50 Years On: Ireland and the UK In and Out of the EU](#)
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An Interactive Relationship

In reflections on fifty years of membership, the employment of women is often identified as a tangible example of [how membership changed Ireland](#). Concretely, in the years immediately following accession, the state was required to enact legislation on equal pay and equal treatment for women and men in employment. This narrative tends to place emphasis on EU law as a cause of law reform in Ireland. 50 years on, both Irish and EU equality law have expanded significantly. While EU legislation and case-law continue to be drivers of change in Ireland, there are also ways in which Ireland has contributed to shaping EU law on equality. This discloses a more interactive and complex relationship than merely the reception and implementation of externally-designed norms.

Prior to Ireland joining the European Community (EC), the ‘marriage bar’ described measures that required women to resign from their jobs if they got married. As described by [Laura Bambrick](#), this was based upon regulations or contractual provisions that were extensively used in the public sector. There was not an absolute prohibition on any employment of married women, but their dismissal was standard practice, and also occurred in the private sector. The norm of married women remaining ‘in the home’ was (and remains) echoed in [Article 41.2.2](#) of the Constitution, which provides that the state shall ‘endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home’. The Irish government has [recently announced](#) that it intends to hold a referendum in November 2023 on revising the text of this provision, as well as the constitutional equality clause, in the light of earlier recommendations from the [Citizens’ Assembly on Gender Equality](#).

At the time of accession, Article 119 of the European Economic Community (EEC) Treaty established the principle of equal pay for equal work for women and men. While this had been relatively dormant for much of the Community’s early history, the vanguard judgment of the Court of Justice in [Defrenne v SABENA](#) breathed life into this provision by establishing that it could be relied upon in domestic legal proceedings. This decision was complemented by the adoption of EC legislation on [equal pay](#) (1975), [equal treatment in employment](#) (1976), and [equal treatment in social security](#) (1978). While these developments occurred shortly after Ireland’s accession, in his book, *The Tortuous Path: The Course of Ireland’s Entry into the EEC 1948-73*, DJ Maher showed that the Irish government understood that Article 119 EEC was going to require change to

Ireland's domestic laws and practices on the employment and remuneration of women. Indeed, it sought to negotiate a transitional period before the principle of equal pay would be fully effective. It was not successful in this request. Accordingly, the marriage bar was dismantled in the public sector and legislation was adopted on equal pay (1974) and equal treatment in employment (1977). Ireland joined at the very moment when EC law and policy on gender equality was taking off and it was brought along with that tide of reform.

In due course, the novelty of this social legislation manifested itself in legal proceedings that sought to explore its full potential. The Court of Justice became an important actor in advancing gender equality law in Ireland. As Judge Síofra O'Leary, President of the European Court of Human Rights, has recently observed, pioneering women and their lawyers brought cases that were referred to Luxembourg. For example, McDermott and Cotter on equal treatment in social security benefits and Murphy and others on equal pay were cases successfully brought by Mary Robinson, who subsequently held the offices of President of Ireland and UN High Commissioner for Human Rights. Such legal battles forged change not only for women in Ireland, but also for women across the Member States.

Moving into the 1990s, Ireland took its own initiative to replace its existing gender equality legislation with new instruments. The Employment Equality Act of 1998 and the Equal Status Act of 2000, prohibited discrimination on the grounds of gender, family status, marital status, sexual orientation, religion, age, disability, race, and membership of the Traveller community. From a comparative law perspective, Ireland moved from its initial position of laggard towards becoming a leader. In the same period, change was also under way at EU level. The Treaty of Amsterdam, agreed in 1997, amended the EC Treaty to permit the Community to adopt legislation to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation. Using these legislative powers, the EU adopted two flagship Directives in 2000. The Race Equality Directive prohibited discrimination on grounds of racial or ethnic origin in a wide range of social activities and the Employment Equality Directive prohibited discrimination in employment on grounds of religion or belief, disability, age, and sexual orientation. With regard to the latter, Ireland was one of a minority of Member States who had already enacted laws on discrimination on grounds of age, disability, and sexual orientation. Moreover, Irish law included a duty to provide reasonable accommodation for persons with disabilities. In taking this step, Ireland had been inspired by similar provisions recently adopted in the USA, Australia, and the UK. Reasonable accommodation was not, however, widely found in other Member States' laws on disability. In this light, Ireland's domestic reforms made a constructive contribution to subsequent EU-level instruments insofar as they illustrated the new trajectories rippling across this field of law. Indeed, Ireland's legislation was mentioned in the Commission's proposal for the Employment Equality Directive.

That said, it must be noted that the Irish government had certain reservations about the impact that the new EU Directives would have upon its own recently-adopted legislation. A particular point of sensitivity was the position of organisations with a religious ethos, such as schools and healthcare providers. The Irish legislation balanced the prohibition of discrimination on grounds of religion with broad exceptions for measures to preserve the ethos of such organisations. It was reported that the Catholic Church made representations to the Irish government during the negotiation of the Employment Equality Directive on the breadth of the exceptions for religious ethos organisations. Article 4(2) of the Employment Equality Directive contains a complex and convoluted exception for organisations with an ethos based on religion or belief and it appears that, to a certain extent, this was designed to accommodate the concerns of the Irish government and like-minded states.

In the past twenty years, the Union has become a key actor on law and policy on equality. In part, this is driven by a constant flow of references from national courts and tribunals to the Court of Justice (CJEU). Irish adjudicators continue to play their part in this iterative dialogue through which the legislation unfolds. This spans both the long-standing body of gender equality law and the measures adopted in 2000. For example, in Z, the Irish Equality Tribunal sought guidance on whether the denial of paid maternity leave to a woman who became a mother via surrogacy constituted prohibited discrimination on either the grounds of sex or disability. The CJEU held that it did not entail discrimination on either ground.

In recent times, the most striking example of equality litigation stemming from Ireland related to the jurisdiction of its specialised body for adjudicating on complaints of discrimination. This was initially the Equality Tribunal, but in 2015 it was replaced by the Workplace Relations Commission (WRC). In Boyle and others, the applicants challenged a rule that only permitted those under the age of 35 to be recruited to An Garda Síochána (Ireland's police service). The rule was laid down in a statutory regulations, but the applicants contended that it was breach of the prohibition of age discrimination found in the Employment Equality Directive. The High Court and the Supreme Court both held that, in accordance with the Constitution of Ireland, only courts enjoyed the jurisdiction to disapply legislation. In contrast, the CJEU focused upon the primacy and effectiveness of Union law. Given that the WRC had been entrusted by Ireland with the application of the rights found in the Directive, then it must have the power to disapply any domestic legal provisions that were contrary to the requirements of EU law. This decision was a reminder of the critical role that EU law plays in underpinning and strengthening domestic law on discrimination, including as regards the mechanisms for its enforcement.

Looking back over 50 years of Irish and European law on equality, the relationship between these two has evolved considerably. Following accession, Community law was instrumental in compelling Ireland to guarantee the right to equal pay and equal treatment in the workplace for women. Had Ireland not joined the Community, the path to law reform would likely have been much slower and less effective. Recent decades reveal a more elaborate relationship. In certain respects, Ireland's domestic legislation moved ahead of

the minimum required by EU law and, in this way, it made a positive contribution to the evolution of European law reform. In 2023, the Irish government intends to publish proposals for reform of domestic legislation. This is expected to address issues such as discrimination on grounds of gender identity or socio-economic disadvantaged status, and intersectional forms of discrimination. If these reforms are adopted, Ireland could again offer an example of possible future directions for EU law.

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