

What Can One Learn From A Negative Popular Verdict?

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On 12th March, 2000, 82% of the Swiss people rejected a popular initiative 'For a fair representation of women in federal authorities'.¹

This initiative proposed that the Federal Constitution be amended in order to introduce a rigid 50% quota of women elected to federal authorities. This meant in practice that each canton (one of the 26 sovereign states of the Swiss Confederation) would elect one woman and one man to the Council of States ("*Conseil des Etats*", one of the two chambers of the Federal Assembly, i.e. the Swiss parliament) and that, in the National Council ("*Conseil national*", the second chamber of the Federal Assembly) the difference between the number of men and women elected from each canton could not be superior to one. The Federal

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¹ FF 1999 V 4656. In the Swiss semi-direct democracy, there are two types of constitutional initiatives: *popular* ones which are launched by a sufficient number of citizens and are submitted to a popular vote (art. 139 Cst.) and *parliamentary* ones that are issued by a parliamentary group and are dealt with within the federal Assembly (art. 160 Cst.).

Council ("Conseil fédéral", i.e. the Swiss executive) would be composed of at least three women out of seven members and the Federal Tribunal ("Tribunal fédéral", i.e. the Swiss supreme court) of at least forty percent women.

Faced with this radical and rigid conception of equality, both the Federal Council and the Federal Assembly recommended that the people reject the initiative, without even offering a more flexible and proportionate counter-project to the voters; according to the voting instructions, such representation quotas would violate, on the one hand, the principle of equality and, on the other, the right to vote. A clear-cut popular verdict confirmed the Federal Council's view that the underrepresentation of women in politics is a social problem that cannot be solved through legal means and in particular not through the introduction of rigid quotas of representation.

In this paper I would like to show why political quotas and parity rights for women are needed as much in Switzerland as in France, what flexible and proportionate form they could take and how they could relate coherently to the existing guarantees of the principle of material equality in Swiss law and to other institutions such as the federal system of proportional representation. To do so, after making (I) a few general observations on the concepts of positive action and quotas, I will discuss (II) the Swiss legal regime of equality between men and women including (III) the recent developments and debates about the introduction of quotas and parity rights. I will conclude (IV) with a brief assessment of the future of political quotas in

Switzerland after their paradoxical rejection by the people.

I. GENERAL OBSERVATIONS ON THE CONCEPTS OF POSITIVE ACTION AND QUOTAS

In this paper, measures of positive action or, simpler, positive measures² are measures which intentionally use gender-conscious criteria in order to favour women and to correct past disadvantages.³

The term designates a variety of measures.⁴ These encompass most famously preferential measures when hiring or electing people according to their sex, i.e. quotas in a broad sense ("*quotas impératifs*", "*Förderungsmassnahmen*"). The terminology is not strict and in fact quite vague.⁵ One should note, for instance, that whereas French law has chosen to use the term 'parity rights' for 50% quotas, this term is almost unknown to Swiss law.

² On the appellation and its scope, AUER A., *Les mesures positives et l'art. 4 al. 2 Cst.*, PJA 11/1993 p. 1336 ff.

³ FREDMAN S., *Reversing Discrimination*, (1997) 113 LQR p. 575 ff.; MCCRUDDEN C., *The Constitutionality of Affirmative Action in the United States: A Casenote on Adarand v. Peña*, (1996) 2 IJDL p. 369 ff.

⁴ See MCCRUDDEN C., *Rethinking Positive Action*, (1986) 15 ILJ p. 219 ff., 223 ff. See also ATF 123 I 152/160 f. cons. 4 b), SJ 1997 656*. See also VOGEL-POLSKY E., *Les actions positives, les quotas au crible du droit de l'égalité, les quotas, mode d'emploi, limites et dérives du système des quotas sexués*, in: Arioli K. (ed.), *Quoten und Gleichstellung von Frau und Mann*, Bâle/Francfort-sur-le-Main 1996, p. 127 ff.

⁵ For a comparative discussion of the American, European and Swiss approaches to positive measures, see BESSON S., *Mesures positives: le nouvel équilibre asymétrique*, Perspectives pour le droit suisse, PJA 4/1999 p. 390 ff.

It is useful to draw a few distinctions among preferential positive measures or quotas: first, the reference to attributive characteristics, like sex, within the general evaluation of the qualifications of a candidate ("goals", "quotas décisionnels", "Entscheidungsquoten"); and, second, the usage of 'quotas' *stricto sensu* ("result quotas", "quotas de résultat", "Ergebnisquoten"⁶). It is possible to distinguish two forms of quotas *stricto sensu*:⁷ first, the preference given to sex in case of 'tie-break', that is the case where two equally qualified candidates are competing and where women are underrepresented in the sector at stake ("flexible quotas", "quotas souples", "flexible Quoten"); second, the preference given to members of a group *independently of the candidates' qualifications* ("rigid quotas", "quotas rigides", "starre Quoten").

II. THE REGIME OF EQUALITY

1. The Principle of Equality in General

The consecration of the principle of equality in the Swiss legal order is one of the fruits of the bourgeois

⁶ On the distinction, see BIGLER-EGGENBERGER/KAUFMANN (eds), *Kommentar zum Gleichstellungsgesetz*, Bâle/Francfort-sur-le-Main 1997, n. 154 ff.

⁷ On the distinction, see BENDA E., *Notwendigkeit und Möglichkeit positiver Aktionen zugunsten von Frauen im öffentlichen Dienst*, Rechtsgutachten erstattet im Auftrag der Senatskanzlei - Leitstelle Gleichstellung der Frau - der Freien und Hansestadt Hamburg, Freiburg i. Brisg. 1986, p. 43 ff.; ARIOLI K., *Frauenförderungsmassnahmen im Erwerbsleben*, Zurich 1992, p. 146 ff.; KAUFMANN C., *Les quotas valent mieux que leur réputation*, in: Morand C.A. (ed.), *L'égalité entre hommes et femmes*, Lausanne 1987, p. 274 ff.

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revolutions of the 18th and 19th centuries. Until the revision of the Federal Constitution in 1999, the principle was guaranteed by art. 4 of the 1848 Federal Constitution (aCst.).

Since 1999, the principle of equality has been guaranteed by art. 8 of the new Constitution (Cst.). It entails four paragraphs. The first paragraph guarantees the principle of *equality within and before the law*. The second paragraph expresses the *corollary principle of non-discrimination* and provides a non-exhaustive list of different criteria of discrimination that are prohibited. The third paragraph entrenches the *principle of equality between men and women*. And the fourth paragraph gives a mandate to the legislator for the elimination of all inequalities suffered by *disabled people*.

In addition to the Federal provisions, most *cantonal constitutions* also guarantee the principle of equality. According to the principle of the derogatory force of federal law, the cantonal guarantees of equality only exert an independent influence when their scope of protection is broader than the federal guarantee.⁸ For the sake of clarity, my discussion here will concentrate on *federal law*.

Note that the Swiss legal order is monistic and that *international law* is therefore directly binding for national authorities. Thus, whereas there is no judicial review of federal law in Swiss law, the Federal Tribunal must ensure respect for international guarantees of

⁸ ATF 119 Ia 53, 55 = JdT 1995 I 305.

equality within the application of federal law. This is particularly the case for art. 14 of the European Convention of Human Rights (ECHR), the UN Human Rights Pacts and the 1979 International Convention on the elimination of all forms of discrimination of women. However, given the lack of independence of those guarantees⁹, and the limited role of the principle of material equality in those instruments more generally, stronger protections of Swiss women's paritary rights cannot be clearly derived from them.

2. The Principle of Equality Between Men and Women

The general principle of equality of art. 4 par. 1 aCst. was for a long time the only constitutional guarantee that could be used to fight inequalities between men and women. As such it hardly offered sufficient protection.¹⁰ It is only since 1981, as the result of a popular initiative, that the Swiss Constitution has offered an independent guarantee of the principle of equality between men and women. This principle used to be entrenched in the second paragraph of art. 4 aCst. It has now become the third paragraph of art. 8 Cst.

This principle has been applied extensively since 1981 in all realms of life, and in particular in the domains of political rights, social security and private law where severe gender-based¹¹ inequalities were progres-

⁹ See ACEDH *Petrovic*, 27th March 1998, Rec. 1998 II 67, 579, par. 22.

¹⁰ ATF 49 I 14, 19.

¹¹ Please note that I am indifferently using 'gender' for 'sex' in this essay.

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sively eliminated; thus, the principle was applied in 1992 to partly invalidate the Constitution of the Canton of Appenzell because art. 16 gave men alone the right to vote.¹²

Art. 8 par. 3 Cst. contains three phrases. The first and last phrases confer directly justiciable constitutional *rights*, whereas the second one gives a *mandate* to the legislator.¹³ Art. 8 par. 3 Cst.'s first phrase repeats art. 8 par. 1 Cst.'s principle of equality before the law in the context of equality between men and women. Art. 8 par. 3 Cst.'s second phrase gives to the communal, cantonal and federal legislators the mandate to promote equality under and before the law as well as material equality, in particular in the realms of family, training and labour. Art. 8 par. 3 Cst.'s third phrase establishes the right to equal pay for work of similar value, both in the public and the private spheres.

3. The Mandate To Realize Equality Between Men and Women

Art. 8 par. 3 phr. 2 Cst.'s *mandate* requires that the legislator, on the one hand, *eliminate all discriminations* on the grounds of sex from existing *legislation* and, on the other, *adopt all necessary measures* to further the *material* equality between men and women in society.

¹² ATF 116 Ia 259=JdT 1992 I 98.

¹³ ATF 114 Ia 331 ; 117 Ia 265.

Since 1981, many federal laws (e.g. the Civil Code and in particular the rules on the rights and duties of spouses, the Federal Law on the acquisition of the Swiss nationality through marriage and the Federal Law on old age pensions) were revised accordingly. In 1995, the Federal Law on the Equality between men and women (*Loi fédérale sur l'égalité entre hommes et femmes, LEg.*) was adopted.

The idea encapsulated in this mandate is twofold. It ensures, on the one hand, a certain amount of complementarity between the judicial response to violations of equality and legislative powers that can eliminate some discriminations which never appear in court or which, even if they do, cannot be declared unconstitutional given the absence of constitutional judicial review of federal law.¹⁴ It is therefore the legislator's, and not the judge's task to decide which measures to adopt or to amend to ensure true equality in society; this emphasis on the legislative protection as opposed to constitutional control is an important element of contrast between the French and the Swiss regimes of equality. On the other hand, the legislative mandate also reflects the wish to see measures of promotion of material equality established on a *formal legal basis*.¹⁵

The mandate is imperative. Despite the strict delimitation of competence set by art. 8 par. 3 phr. 2 Cst.,

¹⁴ See ATF 117 Ia 262, 264. See also AUER/MARTENET, *Les quotas, la démocratie et le fédéralisme*, SJ 35/1997 p. 629 ff., 636.

¹⁵ See AUER/MARTENET, above n. 14, p. 635.

cantonal legislative inactivity can be sanctioned in court as a violation of art. 8 par. 3 phr. 1 Cst.¹⁶

4. Positive Measures

a. The Constitution

Not only does art. 8 par. 3 phr. 2 Cst. require the legislator to ensure the concretization of equality under and before the law, but it also mentions the importance of furthering material equality between men and women. In this sense, the Swiss regime of equality contrasts with the French universalist regime of formal equality before the law.

Given that positive measures amount to one of the ways of furthering material equality between men and women, a priori nothing in the Constitution seems to prevent this mandate from constituting a ready-made constitutional basis for the adoption of positive measures and, in particular, of quotas.¹⁷ It is also true, however, that the mandate does not clearly mention them either.¹⁸

The question of the harmonization and reconciliation of the two facets and phrases of art. 8 par. 3 Cst. is a controversial one ; although it is true that the first phrase prohibits any formal discrimination based on

¹⁶ ATF 116 Ib 270, 283 = JdT 1993 I 117.

¹⁷ AUER, above n. 2, p. 1338 ff.; EPINEY/REFAIL, *Chancengleichheit, ein teilbarer Begriff?*, PJA 3/1996 p. 183 ff., 186.

¹⁸ See FF 1993 I 1321 f.; MUELLER J.P., *Grundrechte in der Schweiz*, 3rd edn, Berne 1999, p. 449.

sex, except in cases where biological or functional differences related to sex matter objectively¹⁹, and this in favour of women or of men²⁰ (“*Differenzierungsverbot*” or “*Gleichbehandlungsgebot*”), the second phrase gives a mandate to the legislator for the promotion of the material equality of women only (“*Gleichstellungsgebot*”).

For some authors, a broad and material interpretation of art. 8 par. 3 Cst. that includes positive measures would be contradictory.²¹ At first sight, indeed, positive measures seem to contravene the *formal principle of equality before the law* of art. 8 par. 3 phr. 1 Cst.²²

However, to read art. 8 par. 3 Cst. this way would be simplistic²³ because positive measures do not amount

¹⁹ See ATF 125 I 21, 24. BIGLER-EGGENBERGER/KAUFMANN, above n. 6, n. 168; TOBLER C., Quoten und das Verständnis der Rechtsgleichheit der Geschlechter im schweizerischen Verfassungsrecht, unter vergleichender Berücksichtigung der EuGH-Entscheidung *Kalanke*, in: Arioli K. (ed.), Frauenförderung durch Quoten, Bâle 1997, p. 49 ff., 85.

²⁰ See MUELLER G., Kommentar zu Art. 4 BV in: Kommentar zur Bundesverfassung der schweizerischen Eidgenossenschaft vom 29. Mai 1874, Loseblattausgabe, Bâle/Zürich/Berne 1987-1996, n. 133; SCHWANDER M., Bundesgerichtliche Rechtsprechung zu Artikel 4 Abs. 2 der Bundesverfassung und die Frage der Verfassungsmässigkeit von Frauenquoten, PJA 8/1997 p. 963 ff., 974. See on the denunciation of this neutralizing interpretation of the principle of equality in Swiss law, AUER, above n. 2, p. 1339 ff. and MUELLER, above n. 18, p. 457. See ATF 123 I 56.

²¹ See GRISEL E., Egalité des sexes et quotas de représentation, in: Ehrenzeller B. et alii (eds), Der Verfassungsstaat vor neuen Herausforderungen, Festschrift für Yvo Hangartner, St Gall 1998, p. 539 f.

²² See EPINEY A., Umgekehrte Diskriminierung, Cologne 1995, p. 19 f. and ARIOLI, above n. 7, p. 65 ff.

²³ See AGACINSKI S., Politique des sexes, précédé de Mise au

to a complete exception to the principle of equality.²⁴ On the contrary, they are an integral part of it.²⁵ Principles of formal equality and non-discrimination do not always ensure true equality between the sexes in cases where differentiations are deeply rooted in social reality. The correction of material inequalities therefore justifies the adoption of special measures, even when these amount to an intentional discrimination against members of the dominant and privileged group. Thus, the principle prohibiting sex discrimination should itself be understood as requiring the protection of women, *qua* underrepresented and historically disadvantaged group, and not of men who are sufficiently protected by the general principle of equality of art. 8 par. 1 Cst.²⁶ Actual consequences of past discrimination based on sex call for a distinction between damaging discrimination and discrimination that redresses past wrongs.²⁷

point sur la mixité, Paris 2001, p. 193, 101: ‘Prendre en compte théoriquement et pratiquement, la différence des sexes ne représente ainsi aucun abandon de l’universel, mais, au contraire, permet de reconnaître le contenu concret et différencié de l’universel.’

²⁴ See TOBLER C., Frauenförderung durch Quoten und Rechtsgleichheit der Geschlechter, oder: ‘Es ist zum Besten der Gesellschaft, wenn die Wertauffassungen der Frauen und ihr Gerechtigkeitssinn Teil der Politik werden’, recht 3/1998 p. 100 ff., 111; GIANFORMAGGIO L., Equalanza formale e sostanziale. Il grande equivoco, Il Foro Italiano 1996 p. 1961 ff., 1974; SACKOFKY U., Die verfassungsrechtliche Beurteilung von Quotenregelungen, in: Arioli K. (ed.), Quoten und Gleichstellung von Mann und Frau, Bâle/Francfort-sur-le-Main 1996, p. 23 ff., 27.

²⁵ See TOBLER, above n. 19, p. 51 ff.

²⁶ See MUELLER, above n. 18, p. 455 f.

²⁷ DWORKIN R., A Matter of Principle, Cambridge Mass. 1985, p. 314. See MACKINNON C.A., Difference and Dominance: On Sex Discrimination, in: Barlett/Kennedy (eds), Feminist Legal Theory,

One may therefore at least contend, with most authors, that art. 8 par. 3 phr. 2 Cst. allows the Confederation to adopt measures of positive action;²⁸ their justification in the public interest would allow for the restriction of fundamental individual rights and of the principle of formal equality, provided that there is a legal basis, a sufficient public interest and that the measures respect the principle of proportionality.²⁹

In 1991, the Federal Tribunal finally established that the constitutional guarantee of gender equality of art. 8 par. 3 phr. 2 Cst. does not promote material equality sufficiently when it is interpreted too formalistically.³⁰ This decision has since then been confirmed and the adoption of positive measures can now be founded directly on art. 8 par. 3 phr. 2 Cst.³¹

b. The law on equality between men and women

Since the adoption of the Equality Law in 1995, the concept of positive measures has become an objective

Readings in Law and Gender, San Francisco/Oxford 1991, p. 81 ff., 89.

²⁸ See MUELLER, above n. 20, n. 73 ff.; BIGLER-EGGENBERGER/KAUFMANN, above n. 6, n. 168. See also HANGARTNER Y., Umstrittene Frauenförderung: Chancengleichheit oder Quotengleichheit?, RJB 132/1996 p. 355 ff.

²⁹ See AUER, above n. 2, p. 1344 ff.; HANGARTNER Y., Gleicher Zugang von Männern und Frauen zu öffentlichen Aemtern, PJA 12/1995 p. 1554 ff., 1558; SCHWANDER CLAUS M., Verfassungsmässigkeit von Frauenquoten, Berne 1995.

³⁰ See AUER, above n. 2, p. 1342 f.; TOBLER, above n. 24, p. 110.

³¹ ATF 125 I 21, 25.

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part of Swiss law. Art. 3 par. 3 LEg. states that measures that promote material equality between men and women are not discriminatory.³²

The exception of art. 3 par. 3 LEg. does not, however, render positive measures automatically constitutional.³³ True, it allows one to regard positive measures as not *a priori* contrary to art. 8 par. 3 Cst.³⁴ Their constitutionality, however, must still be established in each case.

Besides, the Equality Law's title makes it easy to forget that it only applies to *labour relations* and that its scope cannot be extended outside of that realm.

c. A few examples

During the past ten years, positive measures have been introduced in various *public* and *private* domains. The most important innovations so far have concerned the promotion of women in the *family*, the access to *public education* and to the *civil service*.

Access to the public service and public functions was strengthened by the Federal Council's instructions on the improvement of representation and the profes-

³² See BIGLER-EGGENBERGER/KAUFMANN, above n. 6, n. 169; TOBLER, above n. 24, p. 110.

³³ See MADER L., Das Gleichstellungsgesetz-Entstehung, Ziele und Instrumente, in: Schwander/Schaffhauser (eds), Das Bundesgesetz über die Gleichstellung von Frauen und Männer, St Gall 1996, p. 10 ss, 26.

³⁴ See ATF 125 I 21/29 f. cons. 3 d) aa) (nt).

sional situation of female civil servants in the federal administration.³⁵

Of course, the question of the constitutionality of positive measures is even more acute in the political realm. It is to representation quotas of women in political elections and mandates that I will turn now.

III. POLITICAL QUOTAS

1. The context

For the past ten years now, political quotas have seemed to many to be an adequate means to promote material equality between men and women. This idea arose in response to two main arguments.

a. The underrepresentation of women in politics

Political power enables citizens to make a difference in different areas of social life and women have a right to make this difference as much as men. However, although women constitute a majority in the Swiss population, their representation in political institutions, both at the federal and cantonal levels, only amounts to one-fifth of the posts.

One reason for this state of affairs is that women do not have the same chances of being elected as men. From 1848, the date of the creation of the modern Swiss Confederation, to 1971, politics were made exclusively for and by men. It was only on 7th February,

³⁵ FF 1992 II p. 604.

1971, i.e. twenty-seven years after French women, that Swiss women gained the right to vote and be elected in federal elections. Since then, however, despite their technical eligibility, women have remained a small minority within political organs. Although the number of elected women has been multiplied by five in thirty years, at this rate women would have to wait until 2040 to obtain full parity.

b. The existence of a system of proportional representation in Swiss law

By contrast to the French tradition of universalism, the Swiss constitutional order has entailed and applied quotas of proportional representation since 1919; this system has helped to maintain the proportions of political and linguistic groups in the different federal institutions more or less in proportion to their percentage in the population.³⁶ This system is affectionately called the 'magic formula' and it is the cement that makes the cooperation of so many different communities possible.

The introduction of gender-based political quotas would not therefore be something foreign to the Swiss democratic order, since the constitutional order already recognizes representativeness-based infringements on the right to vote. An instructive analogy can be drawn with Belgium where the introduction of list

³⁶ For instance, art. 84 par. 2 of the Constitution of the Canton of Bern foresees one seat in the executive for representatives of the Berner Jura, which is a francophone region of the canton.

quotas was eased by the fact that linguistic quotas were already entrenched.

Of course, these forms of proportional or descriptive³⁷ representation remain controversial outside of a specific federal context. According to one of the main objections, 'no one would argue that morons should be represented by morons', so why argue that women would be better represented by women if some male candidates have a greater ability to represent the substantive interests of their constituents.

This objection is not conclusive. First of all, my argument is not essentialist, but a merely *historically contingent* one; it is based on redressing past exclusion and the lack of representation of the diversity of the *people as a whole* by its political institutions, rather than on the need for a separate representation of each gender. Secondly, disadvantaged groups often need the full representation that proportionality allows in order to achieve *deliberative synergy*. For instance, some issues had never been considered in politics before women brought them to the legislative table. Finally, descriptive representation of women might enhance the construction of the social meaning of the gender characteristic; this might shape the *recognition of the equal capacity* to rule of women. Another related argument is based on the higher *legitimacy* of the law that will flow from a better representation of women in politics.

³⁷ The term 'descriptive representation' was first coined by PITKIN H., *The concept of representation*, Harvard 1972.

2. The Reactions to The Limits of The System

Faced with the constitutional mandate to further material equality and adopt positive measures when necessary, the limitations on the electoral chances of women that are built into the electoral system and the constitutional possibility of inserting a further criteria of proportional representation in the so-called 'magic formula', many have called for the adoption of political quotas as a perfect corrective.

a. The '3rd March' Initiative

i. The proposal

Many popular initiatives in favor of political quotas of seats have been put together during the past ten years, but none ever gathered a sufficient number of signatures to be officially submitted.³⁸

The most recent was launched by feminist groups and the committee 'Women in the Federal Council'. The so-called 'For a fair representation of women in federal authorities' initiative was put together after the scandal that followed the non-election of one of the first female French-speaking candidates to the Federal Council, on 3rd March, 1993, hence its name '3rd March Initiative'. In order to promote a fair representation of women within federal authorities, the initiative proposed a constitutional amendment to impose a 50% quota of women in elected office.

³⁸ See in particular the popular initiatives 'Women and Men': FF 1990 III 164 and 'National Council 2000': FF 1991 I 99.

ii. The official reaction

Both the Federal Council and the Parliament recommended that the people reject the initiative.³⁹ According to the Federal Council's message and its voting recommendations, the proposed quotas of elected women were too *rigid* a solution to the problem of female underrepresentation in politics. In fact, it was such a stringent solution that no other European country had yet adopted it.

The Federal Council's arguments were the following. First, in eliminating a *material* discrimination, the proposed scheme would create another *formal* one. Quotas violate the *right to be treated equally* as other candidates without regard to their gender. Second, rigid quotas infringe the *voting liberty* and the *free choice of electors*. Not all votes would have the same weight, depending on whether they were given to a female or a male candidate. Third, according to the Federal Council, although the initiative had a legitimate aim, its means were too restrictive. The underrepresentation of women in politics is a *social problem* that calls for in-depth measures and not quotas. Work should be done by the legislator in eliminating material inequalities before they appear in the political institutions, e.g. in the *family, education and labour realms*. Fourth, if women are still underrepresented in political institutions, the Federal Council contends that their number is in constant increase. It would therefore be best to leave to political parties the *volun-*

³⁹ FF 1997 III 489; FF 1999 V 4656.

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tary task of making sure that women are fairly represented in their organs and on electoral lists. Finally, according to the Federal Council, the comparison of women with other minorities that are taken care of in the Swiss proportional representation system is not relevant. Women are not a minority and have other means to further their political representation.

The first two arguments, that are based on the principle of equality and the liberty to vote, are important and understandable arguments given the rigidity and lack of proportionality of the quotas proposed. The same is not true of the Federal Council's other arguments, however.

True, positive measures in the educational and economic spheres are desirable, but they are mere enabling devices that still need more stringent action to overcome the obstacles to full political representation. To quote a member of the initiative committee, 'maybe we need more kindergartens before women can enter politics, but maybe there will be more kindergartens once women have entered politics.' Leaving women to the vagaries of the "free market" of party competition is not enough.

Moreover, the French example shows that it is not true that such measures would have made Switzerland the sole European country to have quotas. In fact, the comparison with neighboring countries, whose models of equality are more universalist than the Swiss model, is not relevant given the Swiss proportional system's specificity and art. 8 par. 3 phr. 2 Cst.'s legislative mandate to ensure the material equality of women. Besides, the initiative fulfilled the criteria of validity

developed by the French Constitutional Council, i.e. a constitutional basis and a parity representation of women.

Finally, the Federal Council's argument that denies women a minority status is simplistic; a political minority can be a dominated majority of the population as the Apartheid example suffices to show.

iii. The absence of a counter-project

It is regrettable on such an important issue that the federal authorities refused to present a *counter-proposal* to the vote. It is also quite unfortunate to have invoked, as they did, administrative reasons for not doing so. In fact, this omission reveals a deeper rejection of any more flexible form of quotas.

One potential counter-proposal could have been the National Council's parliamentary initiative, proposed in August 1997⁴⁰; this initiative offered a middle pathway in suggesting the imposition of a one third quota of women in the parties' electoral lists, rather than specifying the number of women elected.

This flexible counter-proposal would have introduced a proportionate restriction to the principle of equality of art. 8 par. 3 phr. 1 Cst. It would also have had the merit of reflecting what has been done in other European countries, and above all France. It would have been less stringent than the French parity act of 6th June, 2000, that requires that candidate lists

⁴⁰ FF 1998 p. 4157 ff.

contain an equal number of men and women. It is interesting to note that a proposal for 50% list quota was nearly adopted by the National Council, but that the list quota of a third was regarded as a compromise solution that would rally more votes. One wonders whether such a compromise, that does not reflect the true representation of women in the population, might not have constituted a more unequal response to material inequality than no corrective at all.

The Council of States – where women are underrepresented – and the Federal Council had several arguments against a counter-proposal of flexible list quotas. First, they contended that parties could take more efficient measures in favour of women without restrictions the liberty of choice of electors. Secondly, list quotas would force women to present themselves as candidates without really wanting to. Finally, list quotas would limit too stringently the liberty of choice of parties in small cantons, which have a very small representation.

These arguments again favor the free market solution to the political underrepresentation of women. They also ignore the temporary and flexible nature of list quotas; the latter allow for adaptation and will very quickly show how many capable women are eligible when they are called for, as one can see in France.

iv. The popular verdict

On 12th March, 2000, 82% of the people and all cantons⁴¹ rejected the initiative. Half of the votes were

⁴¹ In the Swiss federal system, initiatives that call for a consti-

presumably women's votes. Such a strong reaction against quotas, even rigid ones, is very surprising. Read together with the popular rejection of the project of a Federal Maternity Law in 1999, this verdict amounts to a defeat for many women rights' activists and a certain form of legal feminism. It also raises interesting questions about furthering of fundamental rights through semi-direct democratic procedures which I cannot discuss here for lack of space.

b. The Case Law

Faced with the controversial nature of positive measures in the general regime of equality and the reluctance of federal authorities to institute a system of quotas in the composition of the federal political organs, many have put their hopes in the cantonal experience and the federal judicial review of its constitutionality. Eventually, these judicial decisions might turn into a corpus of Swiss positive action law, as they did in American and European law.

Disappointing as it is, however, there have not so far been many judicial decisions on the issue. Nothing at all has been said, for instance, of the constitutionality of positive measures taken by *private* agents. Regarding *public* measures and political quotas in particular, the federal case-law amounts so far to two decisions.

tutional amendment must be accepted by a double majority, i.e. a majority of cantons and citizens.

i. The 'arrêt soleurois'

In its decision of 19th March, 1997, the Federal Tribunal declared unconstitutional the popular initiative 'For an equal representation of women and men in the cantonal authorities' presented in the canton of Soleure.⁴² This initiative called for the introduction of *rigid quotas of seats*.

The Federal Tribunal's decision is based on two main arguments.

First, the apparent contradiction between the two facets of equality guaranteed in art. 4 par. 2 aCst. calls for a weighing and balancing in each case in order to establish the respect of the principle of proportionality. To be proportional, a measure must be capable of reaching its aim (material equality), constitute a necessary means to do so and be the least restrictive measure of the fundamental individual right to formal equality. In this case, however, even if the measures aimed at more material equality, they were too restrictive of formal equality. The Federal Tribunal followed the distinction then developed – and since then revised – by the European Court of Justice (ECJ) in the *Kalanke*⁴³ decision between *equality of opportunity and equality of results*. The quotas foreseen in the

⁴² ATF 123 I 152, SJ 1997 656*.

⁴³ Decision C-450/93, *Kalanke c. Freie Hansestadt Bremen*, Rec. 1995 I p. 3051. Note, however, that *Kalanke* deals with positive measures that apply to the *hiring process* in the public service rather than with *political quotas*: BUSER/POLEDNA, Politische Quoten auf dem Schafott-Reflexionen zum Bundesgerichtsurteil zur 'Solothurner Quoteninitiative', PJA 12/1997 p. 981 ff., 988; BIGLER-EGGENBERGER/KAUFMANN, above n. 6, n. 170.

initiative aimed at equality of results, without taking into account the capacities and qualifications of the candidates and without limiting the measures in time, thus violating the principle of proportionality.

Second, the quotas system would prevent a person from being elected only because of her gender. This decision has been widely criticized and rightly so.

First, the critique of the artificial nature of the *Kalanke* distinction between equality of opportunity and equality of results can be extended to its application in Swiss law.⁴⁴ The principle of material equality guaranteed by art. 8 par. 3 Cst. does not allow to distinguish clearly between the measures that promote equality of the opportunity that ensure results and those which merely protect 'starting gate' equality; equality of opportunity cannot exclude all concern for results and cannot be defined as a purely procedural requirement.⁴⁵ Art. 8 par. 3 Cst. cannot therefore found the unconstitutionality of measures that promote equality of results.⁴⁶

Second, the application of the principle of proportionality by the Federal Tribunal is too rigid. Given the

⁴⁴ Against the validity of the *Kalanke* ruling in Swiss law: EPINEY/REFAIL, above n. 17, p. 186 f.; BIGLER-EGGENBERGER M., Quoten als notwendiges Mittel zur Gleichstellung, NZZ 16.2.1996 p. 15.

⁴⁵ FREDMAN, above n. 3, p. 579 ff.; WILLIAMS B., The Idea of Equality, in: Laslett/Runciman (eds), Philosophy, Politics and Society, Oxford 1962, p. 110 ff., 125 f. See also HANGARTNER, above n. 29, p. 1558.

⁴⁶ See EPINEY/REFAIL, above n. 17, p. 186; EPINEY A., Chancengleichheit über das Ergebnis?, PJA 6/1997 p. 1033 ff.; BUSER/POLEDNA, above n. 43, p. 989.

temporary and often experimental nature of positive measures, the 'necessity condition' for proportionality blocks any progress in the matter.⁴⁷ The changes in American jurisprudence⁴⁸, as well as the ECJ's position on the German exception clauses in *Marschall*⁴⁹ allow us to nourish some hopes regarding the benefits of a strict standard of proportionality when controlling the validity of positive measures. This new standard acknowledges that, applied too loosely, it would be nothing more than an empty formula. This strict application of the principle will, however, be tempered by the fact that it is only one element among others controlling the constitutionality of positive measures.⁵⁰

Finally, the decision was made while the Federal Assembly was wrestling with the 3rd March Initiative. This sole fact should have dictated a more cautious approach on the part of the Federal Tribunal toward both the federal and the cantonal democratic process, especially since art. 8 par. 3 phr. 2 Cst.'s mandate is a mandate to the legislator only.⁵¹

ii. The 'arrêt uranais'

In its second decision, the 'Uranais' decision of 7th October, 1998, the Federal Tribunal has adopted a more nuanced position on the unconstitutionality of

⁴⁷ See AUER, above n. 2, p. 1347 f.; SCHWANDER CLAUS, above n. 29, p. 97, 146 ff.; SCHWANDER, above n. 20, p. 978.

⁴⁸ Decision *Adarand Constructors Inc v. Pena*, 115 S Ct 2097, 2119 (1995).

⁴⁹ Decision C-409/95, *Hellmut Marschall/Land Nordrhein-Westfalen*, Rec. 1997 I p. 6363.

⁵⁰ See TOBLER, above n. 24, p. 112 f.

⁵¹ See AUER/MARTENET, above n. 14, p. 651.

political quotas.⁵² This decision dealt with a popular initiative that called for a larger representation of women in the political institutions of the canton of Uri. This initiative requires that, in *direct popular elections* political parties must present candidate lists with an equal number of men and women and in *indirect elections*, i.e. elections by intermediary representatives, at least one third of the elected authorities should be women.

First, concerning the *representation or list quotas* in *direct* elections, the Federal Tribunal argued that the fact that the project did not foresee a fixed set of seats for candidates of each gender, but merely enhanced the chances of being elected for candidates of the underrepresented gender by requiring list quotas, played in favour of the validity of the initiative. In other words, list or representation quotas that are more flexible than seats quotas are not *a priori* unconstitutional, provided they respect the principle of proportionality.

Second, concerning the *seats quotas* in *indirect* elections, the Federal Tribunal concluded that the rule according to which, in indirectly elected authorities, each sex must be represented by at least one third promotes the equality of opportunity. It is not *a priori* contrary to the principle of equality between men and women because, despite establishing seats quotas, it is a *flexible* measure that allows, on the one hand, for a certain margin of appreciation on the part of cantonal institutions and, on the other, for the respect of the

⁵² ATF 125 I 21 (nt).

right to vote and be elected, since the election at stake here is an indirect one.

In accepting that the citizens of Uranais be allowed to vote about this project, the Federal Tribunal has acknowledged that quotas are not *a priori* contrary to the Constitution and to the principle of proportionality, even when they aim at ensuring equality of results. By doing so, it has reinterpreted and refined, without acknowledging it, its own '*arrêt soleurois*', with regard to the material equality of opportunity proportionality. This effort of moderation by the Federal Tribunal towards the cantons' initiative results, on the one hand, from the respect it owes to ongoing democratic procedures and, on the other hand, from the simultaneous change of jurisprudence of the ECJ and the Tribunal's efforts to render Swiss law 'eurocompatible'.

IV. PERSPECTIVES FOR CHANGE

After the very strong popular rejection of political quotas in 2000 in the absence of an official counter-project and given the lack of flexibility one may observe in federal case-law, future perspectives for the adoption of political quotas, even flexible list quotas or parity rights *à la française*, are bleak.

This situation is very surprising given that such quotas are needed and would fit perfectly coherently with the existing guarantees of the principle of equality, the constitutional mandate to the legislator for the promotion of material equality, the existing programmes of positive action in the educational and industrial realms, and other institutions such as the federal system of proportional representation of cantons, parties

and languages. In fact, when the Swiss proportional representative system and its differentiated regime of material equality between men and women are compared with the French unitary and universalist regime, the rejection of quotas of representation, even rigid ones, by the federal authorities and the Swiss people is not only difficult to understand, but even paradoxical.

There are two possible explanations. First, that Swiss public opinion, which took until 1971 to accept women's right to vote and be elected, was simply not yet ready for a rigid intervention in favour of women; patience and constant dialogue are in order in a semi-direct democracy like Switzerland, which is not susceptible to the so-called 'cunning of reason' on the French model.⁵³ A second reason may be that the quotas proposed in the 3rd March initiative, and the 'Soleurois' initiative sanctioned by the Federal Tribunal, were all rigid quotas of results or seats.

Concretely, the hope now for advocates of paritary rights is that notwithstanding strong public opposition to rigid quotas, the debate about more flexible 50% list quotas or paritary rights in federal institutions can still be raised again. Such a debate is likely to be triggered by the fact that the numerous revisions of the *cantonal constitutions* that are now taking place deal with the issue.⁵⁴ These revisions could play their traditional

⁵³ See KRIEGEL B., Parité et principe d'égalité, in: Sur le principe d'égalité, rapport public 1996, Conseil d'Etat, La documentation française, Etudes et Documents, n° 48, Paris 1997.

⁵⁴ See, for instance, the new Constitution of the Canton of Neuchâtel (FF 2001 III 2355), which in its art. 8 par. 2 phr. 2 mentions the *right to an equal access to the public function*. This seems to indicate that it could for instance be used to found

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role as 'constitutional laboratories' in a federal system.⁵⁵

As long as there are no federal rules on the matter, however, cantonal legislative initiatives and constitutional revisions will have to satisfy either the constitutional review of the Federal Tribunal or the approval and guarantee of the Federal Assembly. Let us hope therefore that, given the absence of consensus over the issue, both institutions will respect cantons' constitutional autonomy and innovations and their democratic process that is protected by art. 8 par. 3 phr. 2 Cst.

Positive experiences with more flexible list quotas at the cantonal level might then generate enough enthusiasm and conviction among *parties at the federal level* for some of them to launch another *initiative* for the introduction of flexible list quotas, either a parliamentary initiative for the 2003 federal elections or a new popular initiative for the constitutional imposition of a 50% list quota of women with equal precedence on the lists.

Theoretically now, even in such a material model of equality, it is best, given the competing right to formal equality of third parties and the dangers of perpetuating stereotypes that the quotas one proposes remain *flexible*. Although this essay advocates better representation for women, it argues that the best strategic approach to proportional representation is *contextual*

flexible list quotas and paritary rights à la française.

⁵⁵ See AUER A., Les constitutions cantonales: une source négligée du droit constitutionnel suisse, ZBl. 1990 p. 14 ff.

and *fluid*, in the image of the new equilibrium that has been reached in the recent American and European case-law.⁵⁶

First of all, quotas should only be *temporary*. They must be revised regularly and abrogated as soon as their objectives of material equality have been reached.⁵⁷ One should be prepared to recognize and respond to the new political dynamic created by the presence of both men and women in political organs.

Second, positive measures must respect other *fundamental rights*.⁵⁸ When they infringe other rights, positive measures must at least satisfy the conditions of restriction of those rights, such as the requirement of a legal basis, the existence of a public interest and the respect of the principle of *proportionality*.⁵⁹ Thus, in principle, rigid quotas of representation will tend to be less proportionate than flexible tie-break or list quotas which take the qualifications of the candidates into account and leave some place for an overall evaluation.

Third, positive measures must be established *from case to case* by taking into account the circumstances of the women they aim at promoting. For instance, *qua* remedy to inequality, quotas should aim at respecting and representing the *parity* between men and

women in the population; any other repartition than a 50% quota would lose this original justification, as the French example shows.

Finally, quotas and other measures promoting equality of results constitute nothing more than an illusion without the accompaniment of enabling *measures of promoting equality of opportunity*, which by themselves are unlikely to have a real impact. A policy of equality of opportunity that is in conformity with art. 8 par. 3 phr. 2 Cst. requires an important investment of resources, in particular in education and training. A two-pronged strategy combining measures that take care of starting points and positive measures that aim at results will help to realize the mate equality of women that traditional anti-discriminatory laws have not been able to achieve so far.

⁵⁶ See for a survey of the case-law and a discussion of this new asymmetric equilibrium, BESSON, above n. 5.

⁵⁷ See SCHWANDER CLAUS, above n. 29, p. 149.

⁵⁸ See SCHWANDER, above n. 20, p. 977 f.

⁵⁹ See AUER, above n. 2, p. 1347. See also FREDMAN, above n. 3, p. 600; MCCRUDDEN, above n. 4, p. 242.