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Paritary Rights for Women

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ARTICLE

Paritary Rights for Women
and Universal Human Rights in
France

Eric Millard

Paritary Rights for Women

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On June 6, 2000, an act of the French National Assembly requiring “equal access by women and men to elective offices and positions” entered into force. This new system of “paritary” democratic rights to representation applies to all elections in which parties offer a list of candidates to the voters. Candidate lists in France must henceforth contain equal numbers of men and women, with equal precedence or status on the list, such that equal numbers of women and men will be elected to office. Any list of candidates that does not respect these requirements will be forbidden to go before the voters. French “paritary” rights provide an innovative model for securing the political equality of women in those parliamentary democracies that maintain systems of proportional representation, or multi-member electoral districts.

This new complex of paritary rights might seem at first to violate the French tradition of republican universalism, as elaborated since the French Revolution of 1789. The Constitution of the Fifth Republic, as adopted in 1958, expressly incorporates the 1789 Declaration of the Rights of Man and of the Citizen (*Déclaration des droits de l'homme et du citoyen*) and the Preamble of the French Constitution of 1946, which assert the equal rights of all human beings before the law, without regard to gender. Special provisions for quotas or affirmative action have in

¹ This text is based upon a conference held at the University of Baltimore in March 2001. The English version has been reviewed and rewritten with the great help of Mortimer Sellers.

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the past been disallowed by French courts as contrary to universal principles. This makes the recognition of paritary rights particularly significant, in their direct provision for equal representation, according to the sex of the candidates elected. The history of French paritary rights begins with universal principles (Part I of this paper). New paritary principles of equality (Part II) must be reconciled with these universal rights as expressed in the French constitution, but also (Part III) with universal human rights guaranteed by multilateral treaties, and by international law.

I. LEGAL UNIVERSALISM

The French principle of universalism or “republican universalism” rests on the Constitution of France and the Revolution of 1789. The Constitutional Council (*Conseil Constitutionnel*), as created by the Constitution of 1958, may review parliamentary acts for their conformity with the constitution, including the principle of universality. This encourages uniformity in interpreting the Constitution, but discourages innovation. Contemporary positive law is strongly rooted in French history, and cannot be understood outside the context of its origins. The principle of universalism has served for two centuries as a template for evaluating public policy and private behavior in France, including questions of equality and gender.

A. Symbol of the Revolution

The politicians of the Revolution of 1789 did not view the rights of women as their primary concern. Despite their active participation in the Revolution, very few

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women gained entry into the assemblies, clubs and other ruling elites that determined revolutionary policy. The often-mentioned experience of Olympe de Gouge, who campaigned for the recognition of women's rights (1791) as a supplement to the Declaration the Rights of Man of 1789, remained an isolated case and in the end a bitter failure.

The revolutionaries had other preoccupations. As a whole the legal rights that they established also applied to women and determine the way in which questions about the constitutional and legal status of women have been resolved in the French system. This gives rise to two problems: First, the revolutionaries wanted to end the class divisions of the Ancien Regime. The old society was divided into three orders or estates (*les états*) with different legal prerogatives and formal inequality. These three estates (the nobility, the clergy and the “third estate”) inherited from the feudal ages had no place for France’s emerging bourgeoisie, who wanted social and legal recognition of their new wealth and prominence. The law of the Ancien Regime was in any case different throughout France, because each province and locality had its own legal rules. The Revolution responded by enforcing legal equality throughout France, including uniform legal rules and formal equality in all legal rights and duties. This “liberal” approach required the suppression of special privileges for guilds and other social groups. The emphasis was on formal equality before the law, and not on actual equality of condition. Napoléon perpetuated this approach in his codification of the laws, after the Revolution.

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The Revolution also raised the question of sovereignty. For both theoretical (in Enlightenment constitutional discourse) and contextual reasons (after the flight of the King from Varennes), the revolutionaries modified their theory of sovereignty. French revolutionaries viewed the “Nation” as the ultimate sovereign. Actual human individuals could not hold sovereign power. As Raymond Carré de Malberg² has clearly shown, this change required a new conception of the relationship between government and those governed. This was not so much a question or representation as of the role of different organs of the state: the “representatives” (as in the French Parliament) do not represent something that existed before the state – they are creations of the state, designed to embody the sovereign. The representatives in parliament, the executives and the voters are all public “organs”, with specific constitutional prerogatives: voters have the right to vote and to be eligible (under certain circumstances) for election (see under II). Yet, the legislature seems to possess the “sovereign” right to alter the law (as an organ expressing a national will). In reaction against the broad jurisdiction of the Ancient Regime, the French revolutionaries limited the jurisdiction of courts to enforce statutes, or judicially to review the acts of the other powers. This established the “*legicentrisme*” of the French system, which subordinated the formal constitution to the laws, by limiting review for constitutionality.

B. The Legal Framework

² Contribution à la Théorie générale de l’Etat, 1920.

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The principle of universalism has several key components. First, the universal and inalienable natural rights of human beings, which implies the equality of rights among all persons without regard to other considerations, such as gender (Declaration of 1789 § 1).

Second, the unity and indivisibility of the Republic (Constitution of 1958, § 2), which significantly limits the possibility of legally recognizing separate social categories and divisions among citizens, whether natural or constructed. The principal of republican unity (§ 2) reinforces the principle of the universality of rights under § 1 of the Declaration of 1789, ensuring the equality of all citizens before the law. This forbids any categorization by national origin, race or religion (and doubtless similar distinctions, including gender, even if they are not expressly referred to by the constitution of 1958).

Finally, the principle of national sovereignty (Constitution of 1958, § 3) gives all citizens of both genders equal rights to vote and to be elected. This model, developed at the time of the Revolution, has several constitutional implications for women. The formal equality of universalism has prevented formal references to gender in the constitutional context. But universalism does not exclude and may even require a legislative structure that respects both genders, and protects their equal opportunity to participate in public life³.

C. Constitutional Norm

³ For many years supposedly “universal” or “equal” treatment simply reproduced the common social image for each gender, in disfavour of women.

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The French Declaration of the Rights of Man and of the Citizen (1789) was first and foremost a political text designed to declare the aims of the Revolution as “the natural, unalienable and sacred rights of man.” Securing positive legislation to protect these rights should be “the aim of every political association.” Therefore, the statement in Article 1 that “men are born and remain free and equal in rights” is immediately qualified by the recognition that “social distinctions may be based only on considerations of the common good”. Article 6 says that “the Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employment, according to their ability, and without other distinction than that of their virtues and talents.” Article 16 confirms that “any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution.”

Article 16 alone would not be sufficient to give the Declaration a binding force. French legal doctrine has considered two possible interpretations: either a) the Declaration is one of the constituent Acts that created the first revolutionary constitution of 1791, and lost all constitutional force with the adoption of the Republic in 1792 and the enactment of the first republican constitution in 1793; or b) the declaration was not part of the 1791 Constitution and never had binding force. Both these interpretations would reduce the text to a simple declaration of political principles, without legal force. In practice, the Declaration did not play a legal role until

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quite recently. But the situation changed with the adoption of a text that referred directly to the Declaration, at the end of the Second World War.

This was done in 1946, when the Preamble of the Constitution of the IVth Republic opens with these words: "... the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights. They solemnly reaffirm the rights and freedoms of man and the citizen enshrined in the Declaration of Rights of 1789 and the fundamental principles acknowledged in the laws of the Republic". This constitutionalization of the Declaration had little immediate practical effect, because of the absence of any effective control of constitutionality. The present constitution of 1958 has changed this. The Preamble maintains the constitutionalization of the Declaration: "The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946"; and Chapter VII gives the Constitutional council the power - from 1971 (when the first case of amendment was presented before the Conseil) - really to control the actions of the legislature by enforcing the Declaration of 1789. So the principle of universalism, which was the political inspiration of the Revolution of 1789, only gained full constitutional force nearly two centuries later.

The Constitution of 1958 is silent on questions of gender, although Article I provides that the state "...shall ensure the equality of all citizens before the law, without distinction of origin, race or religion". The Constitution

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of 1958 does, however, encompass the Preamble of the Constitution of 1946, which proclaimed it “especially necessary to our times, [and to] the political, economic and social principles enumerated below” that “the law guarantees women equal rights to those of men in all spheres.”

D. Complex implementation of gender politics

The implementation of the principle of universalism depends on the legal status of men and women, and on the constitutional control of their legal status.

1. Controls

The Constitution of the Fifth Republic significantly changed the powers of constitutional control. The creation of an organ to regulate the constitutionality of the laws limited the power of the legislature to disregard the Constitution, with certain limitations.

The first limitation arises from the procedures used to control constitutionality, which take place prior to the adoption of a statute. Once enacted - once the text has become law and has binding force - statutes become indisputable. The judicial and administrative jurisdictions deciding cases cannot examine possible inconsistencies between the statute that rules the case and the constitutional texts (or declarations of rights) that might contradict the statute. A statute that has not been submitted to the Constitutional Council cannot be opposed and remains in force, unless amended. Only a small number of public actors have the power to submit laws to the Constitutional Council: the President of the

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Republic, the Prime Minister, the Presidents of the Chambers, or 60 members of one of the Assemblies. The citizens do not have this power.

The introduction of judicial review supposes that the organ of control has some standards to apply to the cases. The principle of universalism is wide enough to prevent almost any differentiation of social status. Laws that recognize differences between men and women would almost certainly fall foul of this universal principle, unless directly related to the general interest. In principle the general interest, as expressed in the Constitution, should guide all decisions of the legislature, as well as of the Constitutional Council.

In fact, cases concerning gender have seldom reached the Constitutional Council. The Council first emerged in France at exactly the same time that social differences between men and women began to decrease. The legislature has been less inclined to pass laws that damage the social status of women, and constrained by the knowledge that such laws could be challenged in the Constitutional Council.

Unfortunately, the very principle of universalism that prevents active discrimination against women may also undermine affirmative action in their favor. The constitutional requirement of formal equality before the law restricts efforts to advance the status of women, by any method that amounts to “discrimination” against men. The case of women is similar to that of France’s regional minorities. The Constitutional Council has used the principle of universalism to oppose the symbolic

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recognition of the Corsican People, on the grounds that this would divide France's national community.

The scarcity of cases has meant that the Council has made no comprehensive statement on gender, beyond the issue of political representation (see under II). Certainly the Council would not tolerate formal legal discrimination against women, but such laws have become rare. The established rationale of universalism threatens the validity of affirmative action in favor of women, which might seem to divide the "unitary" national community.

2. Realization of Universalism

The principle of universalism is implemented by different political authorities, depending on the circumstances. Many rights are simply legislative assertions. They are not mentioned in the Declaration of Rights, nor in the text of the Constitution, recognizing such rights may simply rely on non-interference by the Constitutional Council. Some such rights have differentiated between men and women, or recognized women's particular rights. For example, the right to birth control was authorised in 1967. The right of abortion was enacted in 1975, and confirmed and reinforced recently by statute. The Constitutional Council has never disallowed these laws as unconstitutional.

Since the end of the nineteenth century the French legislature has gradually put an end to most formal discrimination against women. Provisions designed to "protect" women in dangerous jobs were finally removed in 2000. Equal pay for equal work was secured in 1972.

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Yet women still make less than men. Women are more often unemployed (13.6% against 10.2%) and poorly represented among managers, or in the intellectually superior professions.

So what should be the next step? Formal equality before the law has not been enough to overcome actual inequality in the workforce. Yet the Constitutional Council seems committed to a paradigm of formal equality. This calls for constitutional amendment, to facilitate a more dynamic conception of equality and secure the equal rights of women.

II. PARITY, A MODERN FORM OF UNIVERSALISM?

The introduction of “parity rights” in France responds to the contradictions and difficulties of constitutional universalism, by applying modern feminist theory to law. Launched by the feminist movement in the early nineties to accommodate the Constitutional Council’s interpretation of universalism, the idea of parity came into general use in political debate and culminated in a change in the positive law. French “paritary” rights avoid some of the constitutional difficulties of quotas, and offer an interesting model for the rest of the world.

A. Context

The idea of parity arose in response to two problems: first, to the endemic under-representation of women in French politics and institutions; second, in response to the limitations of the universalist tradition.

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1. Correcting the under-representation of women within the political sphere.

Traditionally in France, political responsibility has belonged to men. Whereas women represent a little more than 51% of the population, and 53% of the electorate, they comprise scarcely 10% of the National Assembly, less than 6% of the Senate, less than 10% within the departmental councils, and hardly a quarter within the regional councils. While women constituted more than 20% of the town councillors, less than 10% of mayors were women.⁴ On the other hand, 40% of French European deputies are women (1999), and a third of the ministers (1997). The reason for this state of affairs are numerous and complex, and only some of them depend on the law.

Paritary rights arose from the observation that National Sovereignty does not necessarily entail direct representation, since the organ to be represented is not the real population, but a constitutional fiction, the “Nation”. Voting exists, not as a personal right (on this theory) but rather as a vehicle for choosing representatives of the nation. Following this rationale, women and men of limited “capacity” (based on wealth) were excluded from the vote. When suffrage finally became “universal”, during the Third Republic (1875-1940)⁵, it retained limitations regarding nationality, age, dignity, and sex: women were still excluded. In spite of numerous claims

⁴ Data for organs in function on January the First, 2001 (before the enforcement of the paritary reform, which began in the March 2001 elections to town councils).

⁵ Universal suffrage was first adopted during the 2nd Republic (1848-1851).

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(expressed by feminists and by a great number of jurists, lawyers, and constitutionalists), it was not until 1944 that women gained the right to vote and to run for office. This happened in the end through asserting a very strong concept of universalism, that negated almost all distinctions between citizens, so that “all French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided by statute” (article 3 of the 1958 constitution).

2. Learning from a failure

Despite their technical eligibility for election, women remain a small minority within political organs. Some suggested affirmative action as a corrective measure, and a movement began to implement this change.

The move towards affirmative action or quotas to secure equal representation resulted in 1982 in reforms in the manner of balloting for elections to French town councils. The new rules required that candidate lists should not comprise more than 75 per cent candidates of the same sex. A broad political consensus appeared to support this provision. Nevertheless, the entire new statute was referred to the Constitutional Council by the parliamentary opposition.

The Constitutional Council stated that the establishment of quotas was contrary to the Constitution (Decision 82-146 DC November the 18th, 1982). This decision rested on the traditional principle of universalism. The court held that quotas violate the principles of national sovereignty and the universal right of suffrage. Since “no section of the people nor any

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individual may arrogate to itself, or to himself, the exercise [of the National Sovereignty]" (article 3 of the Constitution of the Vth republic), suffrage must be "equal" (id.) and therefore, according to Article 6 of the Declaration of the Rights of Man and of the Citizen of 1789: "all citizens, being equal in the eyes of the law, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents". This means that "citizenship gives the right to vote and to be elected under the same conditions to all those who are not excluded on grounds of age, of incapacity or nationality, or for a reason aiming at preserving the freedom of the voter, or the independence of the elected person" and that "any division or categorization of the electorate, or of eligible persons, would be against these principles, which have a constitutional force".

This decision would support two interpretations. On the one hand, the Constitutional Court could be seen as having prohibited any categorization by gender at all, so that affirmative action would require a constitutional amendment to be valid. In this case, only the people in their constituent capacity could make an exception to universalist principles. Most jurists adopted this view. On the other hand, the Constitutional Council could be understood as having disallowed the statute because it separated the sexes into unequal groups (75% and 25%). On this theory an equal division would be acceptable – thus the concept of parity.

3. Renewing the idea of affirmative action

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The failure of the 1982 reform inspired a new approach to quotas. Parity could be viewed as true equality, or “concrete” equality, that would not discriminate, but simply realize the duality of the human race. Understood in this way, parity would not contravene the principle of universalism or the universality of rights. Parity of this sort no longer relied on arguments from equity or quotas, which could, in any case, have been unequally applied, but rather on the full and equal representation of men and women in the legislature.

The ambiguity of the term “parity” allowed it to transcend the conflict between universalists and differentialists. It recasts affirmative action in a more acceptable light, with useful implications for both European and for international law (Beijing Conference, 1995). In France, the concept of “parity” appealed widely both to politicians and to the population at large. The return to first principles helped to revive the discredited political class, by giving an idealistic tinge to public debate about democracy. Since “women have been excluded, by principle and by the law of democracy, they must be restored by the law, for it is by the law that a society shows itself” (Manifesto of the 577 for democracy⁶). Of course, politicians applied the concept of parity only to elections, while feminist theory would apply it to all sectors of society.

B. The Legal Reform

1. Providing a constitutional basis

⁶ Published in 1993 by the newspaper *Le Monde*, 577 is a symbolic number, referring to the number of deputies in the National Assembly.

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At first some politicians hoped to impose parity without a constitutional amendment. The first private bill to this end was written in 1994. Others have followed. A new statute, concerning the election at the Corsican Assembly, was adopted, providing that : “each list of candidates shall maintain parity between male and female candidates”. But the Constitutional Council, in decision 98-407.DC, stated on January the 14th 1999 that this provision was contrary to the constitution. Its argumentation expressly referred to the 1982 decision, in which the Constitutional Council disallowed quotas. This proved that, for the Constitutional Council, it was the very idea of gender categorization that was invalid, unless the Constitution was changed.

So, a constitutional amendment became necessary, and was in fact adopted on June the 28th 1999. This was a minimal reform. Rather than insert paritary rules directly into the Constitution, the Congress simply removed the Constitutional barrier, by adding language to Article 3 requiring that the “statutes shall promote equal access by women and men to elective offices and positions” and at the end of article 4 that “Political parties shall contribute to the implementation of the principle [of parity] as provided by statute”. This left it up to the legislature to organize parity, on the basis of this new constitutional support for legislative action.

Parity requires a system of electoral lists to be effective. Once the Constitution had been amended the French legislature faced the question not only of how to implement parity in those elections that already required

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electoral lists, but also, whether the list method should be introduced into formerly single member districts.

2. The June the 6th, 2000 act dealing with equal access by women and men to elective offices and positions

The new act to implement parity concerns all the political elections except four: the presidential election, because the function is exercised by a single person; elections for the departmental councils, which are elections on majority basis for a single member in each district; elections to the Senate when they are elections on majority basis;⁷ and elections for town councils in small towns (less than 3,500 inhabitants) because prior candidacy is not required.

In all elections governed by the new statute (elections for town councils in towns populated by more than 3,500 inhabitants, elections to regional councils, elections to Corsican Assembly, elections to the Senate when they are organized on the basis of proportional representation, and elections to the European Assembly), the electoral list must comprise 50 % candidates of each sex, submitted as one unit. Women may not be relegated to the low end of the list, where they might not be elected, because the law requires gender equality in each list of six candidates. For the elections to Senate and to the European Assembly, it is required that from the beginning to the end of the list, systematic alternation in accordance to sex shall be

⁷ Ballot modes vary according to the size of the department, which is the electoral district for elections to the Senate : for small departments (electing less than three senators), the election is organized on majority basis.

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guaranteed. Any list that does not respect these requirements will not be allowed to compete.

In elections to National Assembly, for which the legislature did not wish to change the method of voting but felt that it was not desirable to leave this organ entirely without parity, political parties are entrusted with guaranteeing parity among candidacies. The requirement shall be satisfied, for each political party, if for each election, they nominate 50% female candidates and 50% male candidates, with up to 2% variation from this norm. Political parties which do not will be financially punished in the next round of public electoral financing. There is, however, no restriction on results, so it is possible that winnable seats will not be allocated fairly.

3. Constitutional validity

This statute has been referred to the Constitutional Council. The parliamentary opposition argued in doing so that parity was not required by the constitutional amendment which simply encouraged promoting “equal access by women and men to elective offices and positions”. To promote women’s participation in this way need not deny the voters full liberty of choice, as paritary rights would, by excluding surplus candidates from the “wrong” gender. Instead, according to this argument, universal principles should have been respected by making parity a “goal” and not a mandate. Under full mandatory parity, some men would have to give their places up to women.

The Constitutional Council did not agree with this argument. In decision 2000-429-DC, of May the 30th

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2000, the Council concluded that the new constitutional provisions had modified the old principles (i.e. the principle of universalism) and that these modifications were “intended to permit the legislator to institute any mechanism aiming to give effect to the equal access by women and men to elective offices and positions; to this end, it is now possible for the legislature to pass provisions that create either incentives or restraints” so long as the legislature “reconciles the new constitutional provisions with other constitutional rules and principles, from which the constituent power did not intend to derogate”. The Council concluded that in this case the “criticized provisions of the statute, setting obligatory rules dealing with the presence of candidates of each sex in the candidate lists for elections taking place through proportional representation, were within the discretion of the legislature to implement the new provisions of the third article of the constitution:” such measures “do not ignore any constitutional principles which the constitutional amendment did not intend to repeal.” The Constitutional Council formally recognized that that constitution had been amended, giving the legislature a broader jurisdiction to implement parity.

4. Implementation

It is too soon to appreciate the real consequences and effects of the new statute. According to the supporters of parity, it is obvious that the new provisions do not go as far as was claimed. Most of the real centers of power in French democracy are still beyond the reach of parity, which is to say, the executive functions, at both the local and the national levels, and even Parliamentary elections are only imperfectly subject to paritary rules.

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The first elections to be ruled by the new provisions were the elections to town councils in March 2001. Opinion polls confirm the attachment of the population to the principle of parity, which has forced the political parties to modify completely their practices in selecting candidates. On the one hand, many male incumbents had to be deselected. On the other, women had to be found who would be willing to run for public office. In some cases, men have been replaced by their wives or daughters, but this still represents a massive change of personnel. Some believe that this will result in short-term inexperience, but also quite possibly a whole new outlook among the newly-selected female politicians. Parity will bring excluded voices into politics, which is worth the cost of any short-term disruptions this brings with it.

The results of the March 2001 elections confirmed the importance of the parity movement, and its imperfections. In the towns where paritarian candidacies were required, the town council members are now 47.5% women (compared to the prior 20%). Nevertheless, the mayors (elected by the council) remain in a great majority men: in the towns concerned by the paritarian requirement, women lead the executive in only 6.9% of the towns (181 towns). Curiously, it seems that the political parties avoided, as far as they can, a direct struggle of man versus woman: frequently, when a woman was heading a list (and implicitly designated to the mayor office), the other main parties supported a woman on their own⁸. An interesting point is to compare the profiles of councillors

⁸ For that reason, women mayors are not limited to the smaller towns, and there are more female mayors in the big towns than in smaller ones.

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men and women. The main differences, which were expected, remain the age (women are older, certainly due to the greater difficulty for women working, and new in politics, to find time and freedom, while they work and are much more involved in domestic and family life than men⁹) and non-political belonging (due to the necessity for political parties to find female candidacies everywhere, and mainly outside of their members, traditionally men).

On the same day were held the elections for department councils, for which there was no parity requirement. There were only 20.1% women candidates, and only 9.8% of the elected councillors were women. As far as the parity claiming was to call for greater presence of women in political spheres, it is obvious that it was necessary to adopt this reform (and that it should be generalized to all the elections), and that the new reform is efficient.

C. Parity: technique of representation within the frame of universalism, or representativeness against universalism?

This still leaves open the question of how or whether parity can be reconciled with universalism. The feminists who introduced paritary principles into the French debate claimed to be acting within the republican universalist framework, but if that were so, it is hard to imagine why a constitutional amendment become necessary. Clearly the Constitutional Council thought that parity derogates from France's old universalist principles.

1. Parity within the universalistic framework

⁹ All the studies show that there is no parity at all in that sphere.

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The issue comes down to representation, which need not necessarily require parity. In a universalistic system, sovereignty is national, and this national sovereignty, under the Fifth republic, belongs to the people (article 3 of the Constitution). But the French theory of representation dematerializes the question of sovereignty, by displacing it onto the people's representatives.

Elections do not necessarily aim at exactly reproducing the national society in the legislature. The purpose instead has been to encourage that expression of the national will that is most consonant with common good, according to prevailing social conceptions. For a long time this sort of reasoning justified the legal exclusion of women from politics. There is no reason why the same principles should not now be applied to support paritary rights of equal representation as conducive to the common good.

In a democracy, the common good requires that the electorate shall be formed by the people as a whole (through universal suffrage) and that each citizen shall be entitled to an equal right of suffrage. The common good requires free access for all to elective positions, so that voters have an effective choice.

Parity fulfills each of these requirements. Parity respects equal and universal suffrage, and leaves room for all citizens to become candidates, so long as they create their own paritary list of candidates. Parity does not limit anyone's eligibility for office. Instead it shapes the nature of one of the essential organs of the state.

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By changing the conditions in which political organs of the state are created, parity renews political life in France. By involving men and women equally in all decisions, parity will overcome the inbuilt male prejudices of government, to better grasp the common good. Affirmative action, if one must call it that, does not exist in this case for the benefit of women alone, but for all citizens. Parity better fulfills the French conception of the Nation, as defined by Renan: “a dream of a shared future, a desire to live together”.

Viewing parity in this way reconciles it with national sovereignty and republican universalism. The point should not be to think of paritary rights in terms of representation, but rather of better structuring the organs of state to serve the common good.

Now, the constitutional texts ruling this issue necessarily maintain, beyond their purely legal qualifications, an important rhetorical force. Saying that national sovereignty belongs to the people obviously has no legal meaning until it has been made concrete in the legal conditions under which someone acts as a member of the electorate, i.e. has the right to vote. This makes the “people”. But rhetorically and politically, such texts, such occurrences, have consequences. In a democracy, the national sovereignty cannot politically cut itself off from a logic of representativeness. And here, indeed, parity may undermine universalism.

2. Parity and representativeness

Some would say that parity is required by fairness or justice, according to the principle of representation. This

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may be true, but it was not the basis on which France created its new constitutional provisions. That is why the Constitution needed to be amended.

There is still no guarantee that the new provisions will lead to a paritarian presence of men and women within the National Assembly, and parity is still far from fully worked out. The new legislation considered the parity of men and women within political organs, without tackling global questions about the political process, and the status of those elected. Parity creates a double presence or legislative partnership between men and women, without considering the dynamic that this presence will generate. This limitation is intensified by the fact that the new provisions introduced into the legal order are without limits in time: the change will be permanent, not simply a correction but a principle. Thus, the purpose of parity, as seen by the constituent power, was a complete renewal of politics. Simple affirmative action was replaced by a new recognition of the duality of the human condition. The idea of representation has been replaced by a new principle of measurable “representativeness”.

Now, the question that the logic of representation could ignore can no longer be avoided, once the common good is set aside as its primary justification. If parity depends on the claim that all sociological groupings should be represented in proportion to their presence within society, why should representativeness be restricted to gender? It was possible to not worry about this question when arguing from the common good, inasmuch as human duality is politically useful for the whole of the society, no other considerations are needed, and the debate is strictly a political debate. But if the reason for parity is a

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question of justice, on the criterion that what really exists has the right to be represented, what distinguishes gender from ethnicity, religion, language, and the like? This issue has frequently been discussed within the networks promoting parity, both from a practical point of view (any breach within universalism will provoke new claims), and from a theoretical point of view (is it still possible to think universalism on such a basis, without swinging towards differentialism?).

III. FRENCH UNIVERSALISM IN THE FACE OF INTERNATIONAL LAW

French universalism may also be evaluated in the light of international law. The French have taken a dualistic view of the relations between national and international law, insofar as they do not consider international law to be directly binding until it is validated by national authorities. At that point international law has a superior force to national statutes. There is a procedure for reviewing statutes to reconcile them with international law, but this procedure is optional. According to article 54: "If the Constitutional Council, on a reference from the President of the Republic, from the Prime Minister, from the President of one or the other assembly, or from sixty deputies or sixty senators, has declared that an international commitment contains a clause contrary to the Constitution, authorization to ratify or approve the international commitment in question may be given only after amendment of the Constitution."

The Constitutional Council refuses, when reviewing the constitutionality of statutes, to invalidate statutes on the ground of their contradiction with international law, or

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other international commitments. For example, when the Constitutional Council had to evaluate the statute allowing abortion under certain conditions (Decision 74-54.DC, January 15th 1975), the Constitutional Court denied that a statute could be judged to be contrary to the right to life protected by the second article of the European Convention on Human Rights (“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”). The Constitutional Council did not analyse whether, materially, there was an inconsistency between the women’s right to abortion and the right to life; it refused to consider the international text, on the grounds that violations of international commitments had no bearing on the legal validity under the French Constitution. The argumentation used by the Constitutional Council arises from the fact that article 55 of the constitution gives legal validity to a treaty within the French legal order only if this treaty is effectively put into operation by the other committed State (according to the condition of reciprocity). The Constitutional Council, held such conditions to vary with circumstances, depending on the facts of each specific case. Since the Constitutional Council only reviews statutes *a priori*, before they are enforced, the constitutional judges considered that they were not in a position to know the necessary facts.

This argumentation adopted by the Constitutional Council is debatable. On the one hand, as to the questions concerning human rights and multilateral agreements, it seems difficult to require such strict reciprocity, unless one is willing that such agreements should always be

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without effect. To justify human rights violations a state could simply point to other states' violations. On the other hand, because the European Convention on Human Rights is so closely linked to the development of other European institutions, including the European Union, organs of the Union, such as the Luxembourg Court, have considered the Convention to be part of European law, and directly applicable to the member states of the European Union.

Nevertheless, the Constitutional Council's statement has encouraged ordinary courts to enforce international law within the French system, when deciding ordinary cases. In principle, courts should examine if there is an inconsistency between international law and the texts or acts relevant for the case, but French courts differ in their appreciation of the direct enforcement of international law, i.e. their views on whether the parties to the case may invoke a right deriving from international law. The *Conseil d'Etat* (supreme administrative court) considers that in each case courts must decide if the relevant international agreements have created such rights, or if they merely intend to provide directives for the committed State, letting its legal authorities act to satisfy those directives.

European law (including the European Convention on Human Rights) is different in that the direct enforcement doctrine is adopted by all the ordinary courts, and international law prevails over contrary national provisions. Drawing conclusions from the doctrine of the Constitutional Council, the *Conseil d'Etat* has been led to examine the consistency between the women's right to abortion protected by French statute and the European

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right to life. The court stated that there was no inconsistency so long as the woman's right to abortion was conditioned and limited by the French statute (as to time: 10 weeks; consent: women must be fully informed; safety: the operation should be by a physician) (*December 21st 1990, Confédération nationale des associations familiales catholiques*).

But, even if European laws may be applied to French laws at the ordinary court level, it does not necessarily follow that French universalism will be challenged. The European Convention of Human Rights itself seems to rest on a universalist philosophy of freedom and formal equality. The European Court of Human Rights has been very suspicious of discrimination by quotas or affirmative action.

France has been condemned by the Luxembourg Court for maintaining certain formal inequalities unfavourable to women. For instance, Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, obliged France to review some of its legal provisions, including the so-called provisions protecting women and motherhood, which forbade women to work at night, and the French policy for access to civil service employment, which restricted some jobs according to sex.

So the question to be asked now is whether the European Union can create a new interpretation of universalism, which might allow some distinctions justified on the grounds of the necessity "to promote

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equal opportunities for men and women” (article 2 of the aforesaid directive). With regard to this question, it must be said that this has not been done yet, but that European law could lead France into a third stage in its conception of universalism, now that the new conception of paritary rights has already made inroads into the old ways of thinking.

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COMMENTS

Women's Rights, Paritary Rights and the Rule of Law in Ukraine

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International law guarantees women the right to participate in the formulation of governmental policy, the right to hold public office, and the right to represent their country at the international level. In an effort to promote these competencies of women to participate in government, Articles 7 and 8 of the Convention on the Elimination of All Forms of Discrimination Against Women require states to take affirmative measures to eliminate discrimination against women in the political and public sectors of society. Although a majority of states in the world have ratified this Convention, very few have implemented all the norms it requires. Having adopted the June 6th 2000 act dealing with "equal access by women and men to elective offices and positions", France serves as a possible model for doing so. Obviously, only states with established democratic traditions, the rule of law, well-developed party systems and proportional representation can afford paritary rights for women. Thus they compensate for the historic injustices that women have experienced for hundreds of years.

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Ukraine has democratic traditions and a history of highly respected and educated women that goes back as far as the Kyivan Rus in the IXth - XIIIth centuries. Unlike women under the Roman and Old-Germanic legal systems, women in Kyivan Rus were considered legally competent and needed no trustee. During the period of the Lithuanian-Ruthenian state (XIV-XVI c.), women's legal status was defined by the "Lithuanian Statute" which incorporated the principle of gender equality into its criminal and civil articles. Like men, women were subject to laws and regulations, and were granted legal rights without gender restrictions¹⁰. The Constitution of the Ukrainian People's Republic in 1918 proclaimed the equality of men and women regarding legal rights and duties¹¹.

Whenever Ukraine lost independence and became part of another state, the position of Ukrainian women became more difficult. For example, when Ukraine was part of the Austrian Empire, under Austrian civil law women were on the same legal footing as the mentally incompetent, the blind, and the deaf – unable to attest to the making of wills.

In the former Soviet Union there existed some unwritten rules concerning the number of women in legislative bodies. This was done for statistical purposes – at each Party Congress it was reported that there were many women in all branches of state power just as there were milkmaids, tractor drivers and representatives of

¹⁰ Danylo Husar Struk, ed. *Encyclopedia of Ukraine* 705 (1993).

¹¹ *Constitution of Ukrainian People's Republic*, Chapter 2.11, April 28, 1918 // *History of Ukrainian Constitutionalism* (in documents) 10 (1996).

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various other professions in the Parliament. On the level of legislature principle of universality and non-discrimination was formulated, mandating equality before the law which had nothing to do with equality of condition. The electoral system was based on the first-past-the-post principle, and one candidate usually gained 99.9% of votes in a single member district.

Presently, the status of women in Ukraine reflects the circumstances of a country straining to change its political system from that of a totalitarian super state to liberal democracy. Women's issues in Ukraine are of extreme importance, as women constitute fifty-four percent of the population. According to the 1996 Constitution, the equality of men and women is guaranteed in regards to political and cultural activities, in employment and wages, and in education and vocational training. The equality is further guaranteed by special measures for women, including retirement benefits, maternity accommodations in the workplace, and maternity leave with pay for pregnant women and mothers. There are also some norms, which provide positive discrimination in their favor. Thus, in April 1996 the Ukrainian Cabinet of Ministers implemented a program, which requires the removal of women from jobs that involve heavy manual labor and harmful work conditions. The program also places limitations on women working nightshifts and promises the removal of women from positions in iron-processing, foundries, galvanic and etching works, nickel- and chromium-plating, ferrous metallurgy, some types of furniture manufacturing, and driving trucks with a carrying capacity of above one ton. Subsequently, training women for these positions has ceased.

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This positive discrimination in the economic sphere is unfortunately not accompanied by any affirmative action in the political sphere. Thus far access by women and men to elective offices and positions in Ukraine has been far from being equal. Ukraine cannot boast of implementing the international norms on taking affirmative measures to eliminate discrimination against women in the political and public sectors of society. In fact, women constitute fewer than 5% in the 450 member Verkhovna Rada, and the situation is the same if not worse in local bodies. Some politicians and scholars have proposed establishing a quota for women among the people's deputies, following the example of many European states.

On the legislative level, after gaining independence in 1991 the Law of the Ukrainian SSR "On the Election of People's Deputies" adopted in 1989 with some amendments continued to be valid. Under this Law, women and men had equal elective rights (art. 3, Para 2) and there was direct right to vote in single member districts. The 1993 Law "On the Election of People's Deputies of Ukraine" contained the same norms of non-discrimination on the basis of gender (art. 2.3) and the direct election of deputies in single member districts (art.1, 4). The 1997 Law "On the Election of People's Deputies of Ukraine" introduced essential changes. Of 450 deputies 225 were to be elected by the list method on the basis of proportional representation in a multi-member all-state electoral district and 225 were elected in single member districts on the basis of relative majority (art. 1.2). The Law also includes a clause banning discrimination on the basis of gender. The new 2001 Law

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“On the Election of People’s Deputies of Ukraine”, passed by the Parliament but vetoed by the President, calls for 75 % of the deputies to be elected by party tickets and the remaining 25% in first-past-the-post elections.

The 1998 Law of Ukraine on the Election of Deputies of Local Councils and Town, Settlement and City Mayors with its 1999 amendments foresees elections of deputies of village, settlement, city, and district in city councils according to the first-past-the-post principle in single member districts. Elections of deputies of district and regional councils are run on the first-past-the-post basis in multi-member districts. However the 2001 draft Law on changes to the 1998 Law calls for mixed elections of deputies of city, district and regional deputies on both proportional and the first-past-the-post principles.

Thus, Ukraine as a transitional state has many contradictions in the sphere of gender legislation. On the one hand, there is a clear tendency toward establishing universalism in the Constitution and other laws. On the other hand, there are norms designed to “protect” women in dangerous jobs. Before raising the issue of paritary rights for women, Ukraine must first introduce a system of proportional representation – the introduction of paritary rights will be possible only when elections are conducted by list method.

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The passing of a law on gender parity law for elective office in France seems to be a victory for the movement towards quotas that has been going on around the world for more than twenty years. The movement arose from the fact that the principle of the universality in democracy and human rights, which should have put an end to discrimination, did little to remedy the social imbalances between men and women. In the prevailing stereotypes, which differ little from culture to culture and tradition to tradition throughout the world¹², men are perceived as decisive, steady, calm, disciplined, methodical, organized, strict, patriotic, with a gift for assessing and taking risks, independent, needing power and fame, ambitious, inclined to and with a sense of leadership, self-satisfied, self-confident, needing prestige, career and affirmation, combative, active, clear-headed, objective, favouring theoretical ideas and concepts, with a flair for science, sceptical, reasonable and sensible. The prevailing stereotype of women is that they are talkative or even gossipy, affected, frivolous, sly, indiscreet, anxious to please, subservient, weak, unstable, passive, inquisitive,

¹² Research into the roles of men and women was carried out in France in 1964, and the results cited and analysed by Elisabeth Badinter in a book entitled *Jedno je Drugo*, pp.124-125, "Svjetlost", Sarajevo, 1988.

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intuitive, ingratiating, sympathetic and compassionate, inclined to be scheming, and amorous.

In practice the formal principle of democracy – universality and equality – relates differently to men and to women, since they start from entirely unequal positions. From the outset of every political race, men are the political favourites and women the outsiders. Women must first struggle within their own party circles for a more serious status within the party hierarchy, to overcome the inertia of political marginalization, and only then create a political image in the public eye and strive to win over the electorate by triumphing over the ruling stereotype that assigns them to an inferior position. The traits that, stereotypically, belong to women (frivolity, sensitivity, inquisitiveness, coquettishness, and fickleness) are not the characteristics required for a serious politician and do not inspire confidence among voters.

This background reality of inequality led to the proposal that political parties should be required to include women high enough on their electoral lists, actually to be elected to office. This proposal would be to exercise positive discrimination by means of parity and quotas for the minority sex (women) as a transitional solution until such time as the situation changes enough to make such measures redundant. Regardless of the political circles in which the issue arises, it invariably comes up against similar or identical arguments on both sides.¹³

The following arguments are put forward in favour of parity and quotas:

¹³ See International IDEA, *Women in Politics: The World of Quotas*.

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- the introduction of quotas and parity realizes the fundamental meaning of human rights and the principle of equality, because it goes beyond mere lip service but to create the environment necessary for the true enjoyment of human rights. In this regard, quotas and parity are instruments that contribute to the realization of the principle of equality. Quotas, and to a still greater extent parity, lead a declarative right to become one that can actually be enjoyed.
- in the current social environment, in which men hold social power and the means of retaining it legally without undermining the principles of democracy or violating human rights, it is evident that without the application of quotas and parity women have no chance of making a more significant breakthrough into political electoral bodies. Universalism as it exists now is a fraudulent universalism, since it is applied to a situation in which, for historical, traditional and cultural reasons, women are *de facto* excluded.
- the basic purpose of introducing quotas and parity is to raise the political profile of women, and in the case of gender-neutral quotas, to ensure the participation of the inadequately represented sex. The successful application of quotas and parity requires political parties to have a sufficient number of qualified women to fulfil the requirements of parity or the quota system. This demand leads to greater openness on the part of political parties to women, to the integration of women's needs into the political agenda, to an

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equitable distribution of party power and to the democratization of politics.

- the quota system ensures the critical mass of women members of parliament required to bring about changes to political life and to make parliament accessible to women. This paves the way for women to influence the decision-making process, in which women can express themselves either as individuals or as advocates of the outlook of women on the world and female values.
- the experience of women is necessary in political life.
- in reality it is the political parties and not the electorate that determines who shall be elected, so it is important for women in political parties dominated by men to have the chance to become electoral candidates in the first place.

The following arguments are used to contest the application of quotas and parity:

- no exception should be made for women, since this undermines the principles of universality and equality.
- the idea of parity is unacceptable since it implies that women represent only women and men only men, which is absurd.
- it is unacceptable that the principal reason for someone's inclusion or otherwise on the electoral list should be that person's sex. This gives scope for the elimination of better and more able candidates.

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- such provisions are humiliating to women themselves, since it imputes to them the inability to be elected in their own right to the position that legal norms accord them. Many women do not wish to be elected in this way.
- quotas and parity are undemocratic, since it is the elector who should decide who is to be elected.

I. THE BROADER CONTEXT FOR A CONSIDERATION OF THE LAW ON PARITY

The Law on Parity should be viewed in the broader context suggested by the notions of universalism, democracy and human rights. It was only at the end of the Second World War, in 1944, that women in France formally acquired the suffrage and thus the right to direct involvement in the political life of France: that is, almost 150 years after the French Declaration on the Rights of Man and the Citizen (1789), in which the concept of civil equality was understood to mean that of men, and political rights were understood to mean those of men. This remained true long after universal suffrage – understood, that is, as the right of every adult male – was recognized in France in 1848. (The later recognition of the political rights of women does not mean that women were in fact deprived of influence on the political events of their day, but this influence was channelled through other, informal, personal networks, and remained covert and unrecognized at the formal level. Research into these networks of political influence would probably give a different picture at the political level, but this, would go beyond the topic and context of this paper.)

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France stands at the 56th place world-wide and the 26th place in Europe on the scale of the percentage of women's representation in parliament¹⁴. The subject of women's absence from political bodies has been highly topical among the general public in France in recent decades. Linguistic analysis of the constitution and laws¹⁵ shows how women are excluded from the laws of France. Given that laws determine the political system, electoral methods and political representation, linguistic analysis indicates that the equal treatment of citizens really only considers men as suggested by the titles, concepts and values that legal norms formulate. The way a state is organized, the hierarchy of governmental bodies and the titles of state and political functions all refer to men. Women are linguistically invisible in legal norms, which are expressed in the masculine gender. The exclusion or invisibility of women in law leads to their exclusion and invisibility in political life. Since the legal norm is universal, but linguistically implies men, when translated to the political level it indicates that only men appear as universal political representatives, representing the citizen, who is male, while women are represented through the existence of the masculine. Women are not in politics on the basis of universal human rights, therefore, but are involved in politics on the existing male model, and must fit into the existing male forms.

The French values of the republic, democracy, and human rights are called into question by an analysis that suggests the masculine form of the existence of these values. The values of universality and democracy, when

¹⁴ See statistics of International IDEA.

¹⁵ See Francine Demichel (University of Paris 8): *The Status of French Women in Political Life: Legal point of view.*

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measured against women's experience, indicate the poor representation of women in political electoral bodies¹⁶, discrimination against women by male politics and politicians, and the sexist attitudes of the media towards women's political commitment. Serious changes will need to be made to secure women's true equality.

II. THE BOSNIAN EXPERIENCE

As with other countries in transition, Bosnia and Herzegovina has a history of communist rule, which included the official ideological and legislative equality of men and women, in which men's and women's interests were understood as identical and subsumed under common class interests. Western feminist movements were perceived in a doubly negative fashion. At the cultural, patriarchal level, they were seen as an aggressive and eccentric phenomenon that was contrary to the 'natural course of things', and at the communist, ideological level, they were a bourgeois movement within the ambit of a civic ideology¹⁷. As a result, they did not

¹⁶ The French electoral law of 21 April 1944 prescribed that 'women shall have the right to vote and to be elected on the same terms as men'. From the time of the first parliament to contain women (in 1945) right up until the 1977 elections, the percentage of women in parliament did not exceed 6%, and was at its lowest, in the 1960s, falling as low as between 1.6% and 2.1 (Jenson and Sineau, 1994, Parite-Infos, 1977).

¹⁷ 'The new historical context, that defined the social status of women in a new way, did away with the potential for a feminist approach to the so-called "women's issue". In the current Yugoslav environment, women are an integral part of the self-managing social structure, and the struggle for the emancipation and equality of women is merely part of the overall struggle for the disalienation of men and women. That women do indubitably have certain specific and distinct problems is not evidence that the struggle for equality can and should be conducted independently of the struggle to liberate the worker as a human person. On the other hand, the inequality of

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correlate with the range of issues that formed part of the political and social involvement of women as mothers, workers and self-managers. Mass free education, however, with compulsory free elementary schooling for all children, whether boys or girls, equal access to secondary and higher education, female employment in the economic sector, social security and welfare for women and the family, and state benefits in the form of organized child-care, significantly altered the lives of women in former Yugoslavia, including in Bosnia and Herzegovina. The situation in Bosnia and Herzegovina, however, had its own specific characteristics within the overall Yugoslav environment, and constitutional and legal equality and the ideological construct of equality before the law obscured the true image, which was in essence one of a patriarchal power that had merely adapted its expression to altered ideological, economic and political circumstances. In conformity with the adopted Marxist philosophy and the ruling ideology based on that philosophy, the equality of men and women was part of the political agenda and normative activity, but the reality was more in line with traditional values.

Just as in France, the political and legislative terminology of Bosnia was adapted to men. As an example that vividly illustrates this assertion, one may take the meaning of party secretary (in the masculine

women is an indicator of the existence of social inequality, which is an indicator of the lack of a genuine self-managing structure – since equality, and equality before the law, are among the principal founding criteria of the self-managing organization of society.’ Dr. Franjo Ko)ul: Samoupravni i radni status)ene u Bosni i Hercegovini, Rezultati istra)ivanja (Self-management and employment status of women in Bosnia and Herzegovina, Research findings), Sarajevo, 1972.

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gender) and party secretary (in the feminine gender). In the first instance, the term implies the executive and political power enjoyed by a party secretary (in the masculine gender, and such functions belonged as a rule to men), and in the second, feminine gender, the term implies the provision of technical services, not merely meaning women's work but jobs reserved as a rule for women. This blatant discord between constitutional and legislative equality and the reality is a fundamental characteristic of the current situation.

Women acquired the suffrage in Bosnia and Herzegovina in 1946, in conformity with the communist ideology of the equality of women and men. However, one of the characteristics of that era in the Socialist Republic of Bosnia and Herzegovina was the perpetually insufficient representation of women in social and political bodies and the loci of decision-making. In 1986 women formed 24.1% of the members of the Parliamentary Assembly of Bosnia and Herzegovina, while at the municipal authority level they represented only 17.3%. This percentage should be seen in the light of the reserved places for women in the Assembly, which was a way of ensuring equality. The true expression of their political power was not directly proportionate to the percentage of their representation. This general evaluation does not call into question the existence of individual cases in which the political power of women was more an expression of the individual power of a personality than of the real power enjoyed by women in politics.

As in other countries in transition, it was only the first multi-party elections that indicated the true political

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opportunities of women. Following the 1990 elections, of a total of 240 elected members of the first multi-party parliament in Bosnia and Herzegovina, there were only 7 women, or 2.92%. At the local level, women gained 315 out of a total of 6229 places, meaning that they represented a mere 5% at the municipal council level. The elections were held on the basis of proportional representation model, with closed electoral lists, which indicates that political parties, whatever their political orientation, did not include women on their electoral lists or did so low down on the list, with little chance of being elected. Under the principle of equality, the politics of Bosnia and Herzegovina had a male face.

According to data from OSCE, the situation in 1996, in the first post-war elections, was not much better. Of 42 members of the House of Representatives of Bosnia and Herzegovina, only one was a woman, a percentage of 2.38%. In the House of Representatives of the Federation, 7 members out of a total of 140, or 5%, were women, and in the National Assembly of Republika Srpska, 2 members out of a total of 106, or 1.89%, were women. In the Cantonal parliaments, female representation ranged from 0% to 10.17%.

As can be seen, regardless of the ethnic, religious, cultural and social heterogeneity of society, the attitude towards women's involvement in political electoral bodies was more or less identical. This is an expression of the political relations between men and women within the parties themselves, and of women's influence on the shaping of party politics and the constitution of electoral political lists. Despite equality in the recognition, enjoyment and protection of political rights, male

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dominance is evident in all sectors and at all levels of political governance. The local elections held in 1997 did not significantly alter the existing image of women's political involvement. At the local level in the Federation women's representation was 6.15% and in the National Assembly of the Republika Srpska, where elections were held in that same year, women were represented by a mere token 2.4%.

The situation prior to the adoption of Rule 7.50 by the Provisional Elections Commission and the requirement that political parties include at least three women among the ten leading candidates (in third, sixth and ninth place) was characterized by the complete marginalization of women at the political level. With no more than a token presence at all levels of governance, women had no opportunity to influence political life and the nature of the state. The trend continued of speaking of women only in unusual situations¹⁸, as on the occasion of 8 March celebrations, or when it seemed that women's votes would be decisive. This was only lip service, to forestall more serious attempts to make women more visible in the political life of Bosnia and Herzegovina. The rules of the Provisional Elections Commission and the application of the quota principle (30% in the case of Bosnia and Herzegovina) thus had a significant impact on changing the picture of the political involvement of women.

Following the 1998 elections the situation was as follows:

¹⁸ Protests by the Mothers of Srebrenica, the drama of returnees, evictions of families onto the streets, the difficult social circumstances of single mothers, and so on.

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- House of Representatives of Bosnia and Herzegovina: 26% women
- House of Representatives of the Federation of B-H: 15% women
- National Assembly of Republika Srpska: 22.8% women
- At the Cantonal level: 18.46% women

The application of quotas met with significant resistance within the political parties and considerable controversy among the general public. In the assessment of certain international organizations involved in election monitoring, there had been attempts at manipulation by political parties, in that some ignored the rule, and others refused to allow experienced women politicians a place among the first ten candidates, allocating these places instead to young members who would be easier to influence or to replace by male colleagues after the elections, although the OSCE stepped in to prevent it when such changes were attempted¹⁹. The arguments being heard in the debate in Bosnia and Herzegovina were set against the backdrop of the arguments in the global debate as a whole on the application of quotas or parity. In summary, the arguments against quotas were that they were a kind of forcible promotion of women in politics, and that women should impose themselves through their knowledge and abilities, under existing canons of constitutional and legislative equality, that this was a form of legalized discrimination, that paritarily-selected women had no real political power and that they satisfied only the formal conditions and not the true conditions of being members of governance, that they had

¹⁹ NGO report on the human rights situation in Bosnia and Herzegovina, p. 46.

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insufficient political experience, that they were politically anonymous which undermined the political chances of the party itself, that their involvement would not contribute to qualitative changes in political life, and so forth.

The arguments for the quota system began with the observation that equal legal norms applied to unequal situations give rise to a differential effect on men and women, that in the established political framework that sees political activity as primarily a male activity women have no real chance of being elected on an equal footing, that there are a number of obstacles to women's involvement in politics, whether within the political parties themselves or in public opinion as a whole which is characterized by classic gender stereotypes and is indifferent to the issue of balanced representation for women, that paritary intervention is a necessary initial mechanism and transition technique until opportunities for genuine equality arise, and so forth. The positive aspects of applying the quota system are advanced for the most part by representatives of the international community, human rights organizations and women's organizations.

The end result was that since political parties were only compelled by the rules of the Provisional Elections Commission to include women candidates on their lists, the practice of political disregard continued at the level of executive governance.

- The Council of Ministers did not have a single woman among its complement.

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- Of 67 persons appointed by the Council to various electoral offices, only 4 were women (5.9%).
- The Government of the Federation had not a single woman minister and only one deputy minister was a woman.
- Of a total of 200 persons appointed by the Government of the Federation, only 34 were women (17%).
- Unlike the period 1996-1998, when two women were appointed as cantonal governors (Sarajevo Canton and Mostar-Neretva Canton), during this period there was not a single woman governor.
- In Republika Srpska the situation was essentially the same, with not a single woman holding a ministerial post out of the total of 21 ministries in the Government of RS.
- Of 21 secretaries appointed by the Government, only 4 were women (19%).

The political culture of Bosnia and Herzegovina is predominantly a male culture. However, the changes that came about as a result of the Rules of the Provisional Elections Commission, which introduced a larger number of women into political life and thus strengthened their position, resulted in a higher profile for women politicians. The exclusively male political image was shattered, more recognizable female political names became known to the public, and women had the opportunity to acquire political experience. In general, women are not outsiders in political life any longer.

Local elections were held in April 2000, and general elections in November 2000. There were changes to the election rules, so that in these elections the

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proportional model of open lists was applied. Among the positive aspects of open lists was the individual responsibility of deputies whose unsatisfactory conduct can be sanctioned by non-election, the constraints on the exclusive autonomy of political parties in determining which candidates shall be party representatives in parliament, and greater freedom for the electorate to use the vote to 'rectify' party lists and their positioning of candidates. On the other hand, there is a real danger that representatives of minority groups, including women, will not be elected, or at least not in such numbers as would be appropriate, given their numerical strength.

In this system, women were doubly handicapped, given the total domination of the ethnic, whatever their position on the issues. Sexual affiliation, as one aspect of collective identities, was politically marginalized by comparison with the ethnic, the religious and the political, just as women's interests are marginalized in relation to ethnic, religious and political interests. The next handicap is direct political competition with party colleagues, which, bearing in mind the real power ratio, reflects on the potential for women candidates to be represented in election campaigns. Political parties sought the support of the electorate by highlighting other issues.

According to OSCE data submitted on 12 January 2001, the proportional model of open lists was applied in Bosnia and Herzegovina. Of 42 deputies to the House of Representatives of Bosnia and Herzegovina, 40 are men and 2 are women, making the percentage of women in the Parliament of Bosnia and Herzegovina a mere 4.76%. Of the sixteen parties in the House of

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Representatives of the Parliament of Bosnia and Herzegovina, fourteen have no women representatives. In the House of Representatives of the Federation of B-H, of a total of 140 representatives 116 are men and 24 women, or 17.14%. Of the 17 political parties represented, 12 have no women representatives. In the National Assembly of Republika Srpska, 69 deputies of a total of 83 are men, with the 14 women representing 16.86%. Of a total of 13 parties, six have no women deputies. At the cantonal level, of a total of 285 representatives, there are 228 men and 57 women, or 18.59%. Overall, at the state, entity and cantonal level, there is a total of 550 representatives, of whom 453 are men and 97 women, or 17.63%. Of the 30 political parties represented at all levels of governance in Bosnia and Herzegovina, 19, or 66.33%, have no women representatives. These are chiefly the political parties with few or only one representative.

However, if these results are compared with the situation prior to the application of the quota system, it can be seen that things are significantly better, notwithstanding all the experiences that women have gone through. It can be concluded that the quota system of 30%, requiring political parties to include women candidates in their political electoral lists, has had positive results. Women have acquired the potential to show their political capacity and to build their own political physiognomy. Voters elected women who were already known to them, when voting in the open lists. This is an indicator that the quota system, or better still the parity system, should remain in force for a certain period and be extended not only to elections but also to the legislature. The principle of equality and universality should be seen

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in the light of the fact that half the population are women and half men, and that both halves should be represented.

As regards the implementation of the European programme for the equality of women and men, the French example could stimulate change in other countries as well.

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'.²⁰

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

Many thanks to the Swiss National Fund for Scientific Research without whose support I could not have pursued this research.

²⁰ 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.).

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(“*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

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In this paper, measures of positive action or, simpler, positive measures²¹ are measures which intentionally use gender-conscious criteria in order to favour women and to correct past disadvantages.²²

The term designates a variety of measures.²³ 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.²⁴ One should note, for instance, that whereas French law has chosen to use the term ‘paritary rights’ for 50% quotas, this term is almost unknown to Swiss law.

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*”, “*Entscheidungs-quoten*”); and, second, the usage of ‘quotas’ *stricto sensu* (“result quotas”, “*quotas de résultat*”, “*Ergebnisquoten*”²⁵). It is possible to distinguish two forms of quotas *stricto sensu*:²⁶ 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

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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 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.²⁷ 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

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must ensure respect for international guarantees of 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 guarantees²⁸, 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.²⁹ 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-based³⁰ inequalities were progressively 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.³¹

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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.³² 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.

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.

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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.³³ 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*.³⁴

The mandate is imperative. Despite the strict delimitation of competence set by art. 8 par. 3 phr. 2 Cst., cantonal legislative inactivity can be sanctioned in court as a violation of art. 8 par. 3 phr. 1 Cst.³⁵

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.

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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.³⁶ It is also true, however, that the mandate does not clearly mention them either.³⁷

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 sex, except in cases where biological or functional differences related to sex matter objectively³⁸, and this in favour of women or of men³⁹ (“*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.⁴⁰ 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.⁴¹

However, to read art. 8 par. 3 Cst. this way would be simplistic⁴² because positive measures do not amount to a complete exception to the principle of equality.⁴³ On the contrary, they are an integral part of it.⁴⁴ 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

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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.⁴⁵ Actual consequences of past discrimination based on sex call for a distinction between damaging discrimination and discrimination that redresses past wrongs.⁴⁶

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;⁴⁷ 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.⁴⁸

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.⁴⁹ 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.⁵⁰

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 part of Swiss law. Art. 3 par. 3 LEg. states that measures that

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promote material equality between men and women are not discriminatory.⁵¹

The exception of art. 3 par. 3 LEg. does not, however, render positive measures automatically constitutional.⁵² True, it allows one to regard positive measures as not *a priori* contrary to art. 8 par. 3 Cst.⁵³ 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 professional situation of female civil servants in the federal administration.⁵⁴

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

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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, 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

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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.⁵⁵ 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 quotas was eased by the fact that linguistic quotas were already entrenched.

Of course, these forms of proportional or descriptive⁵⁶ 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.

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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.

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.⁵⁷

The most recent was launched by feminist groups and the committee 'Women in the Federal Council'. The so-

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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.

ii. The official reaction

Both the Federal Council and the Parliament recommended that the people reject the initiative.⁵⁸ 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

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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 *voluntary* 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

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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 paritary 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 1997⁵⁹; 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

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stringent than the French parity act of 6th June, 2000, that requires that candidate lists 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 cantons⁶⁰ rejected the initiative. Half of the votes were 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

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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.

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.⁶¹ This

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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*⁶² decision between *equality of opportunity and equality of results*. The quotas foreseen in the 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.⁶³ The principle of material equality guaranteed by art. 8

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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.⁶⁴ Art. 8 par. 3 Cst. cannot therefore found the unconstitutionality of measures that promote equality of results.⁶⁵

Second, the application of the principle of proportionality by the Federal Tribunal is too rigid. Given the temporary and often experimental nature of positive measures, the 'necessity condition' for proportionality blocks any progress in the matter.⁶⁶ The changes in American jurisprudence⁶⁷, as well as the ECJ's position on the German exception clauses in *Marschal*⁶⁸ 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.⁶⁹

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.⁷⁰

ii. The '*arrêt uranais*'

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In its second decision, the ‘Uranais’ decision of 7th October, 1998, the Federal Tribunal has adopted a more nuanced position on the unconstitutionality of political quotas.⁷¹ 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

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the other, for the respect of the 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 paritary 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

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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.⁷² 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.⁷³ These revisions could play their traditional role as 'constitutional laboratories' in a federal system.⁷⁴

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

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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* and *fluid*, in the image of the new equilibrium that has been reached in the recent American and European case-law.⁷⁵

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.⁷⁶ 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*.⁷⁷ When they infringe other rights,

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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*.⁷⁸ 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.

The Prospect for Paritary Rights in Australia

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At the beginning of the last century New Zealand and Australia led the World in the fight for the franchise for women. The Colony of South Australia introduced suffrage for men and women in 1894. The Colony of Western Australia followed in 1899.⁷⁹ While all Australian women did not vote in the first elections of the new federal Commonwealth of Australia in 1901, by 1902 all Australian women⁸⁰ had the right to vote in Federal elections. New Zealand celebrated the centenary of the franchise for women in 1993.⁸¹

Notwithstanding these formal developments, the substantive position of women in the political life of Australia resembles pre-paritary France. In 1994 women accounted for only 10.2% of the members of the Federal House of Representatives and 22.4% of the Federal Senate. Women made up 16% of the members of State parliaments. In local government, women accounted for only 20.2% of elected officials.⁸²

In light of this history and current realities it might be thought that the French system of “paritary” rights would be a potentially significant influence on electoral reform in Australia. Furthermore, Australia does not appear to face the legal obstacles to the introduction of a “paritary” system faced by France prior to its constitutional

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amendments in 1999. Those legal obstacles that do exist in Australia could be avoided by adjustments in the “paritary” model and would not require any form of constitutional amendment. This is significant because the Australian Constitution is extremely difficult to amend.

Despite all this, an Australian “paritary” system would probably face significant political opposition. Affirmative action policies employing mandatory quotas have been the subject of fierce controversy in Australia. Federal and State legislation consequently favors the use of non-binding targets. It is inconceivable that opponents of binding quotas would treat the notion of “parity” between men and women as anything other than a binding quota. Finally, Australia is an ethnically diverse nation. There has been political acceptance of the need for general mechanisms to redress the effects of past and present racial discrimination and various temporary special measures have been introduced. Whether a “paritary” system would receive the same level of political support in Australia can be questioned. The French “paritary” system appears to privilege gender difference over other forms of difference by instituting a permanent system that is not dependent on the continuing demonstration of the effects of discrimination. The desire to foreclose the proliferation of potentially irreconcilable demands by other groups seeking similar privilege is likely to be politically significant in Australia.

I. LEGAL OBSTACLES TO THE INTRODUCTION OF A PARITARY SYSTEM IN AUSTRALIA

Australia’s federal system is established by a written Constitution that recently celebrated its centenary. The

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Constitution of the Commonwealth of Australia gives the Federal Parliament legislative power under enumerated heads of power. The constituent States of the Federation are given concurrent and residual legislative powers. State legislation can be validly enacted in an area of Federal legislative competence provided that it is consistent with existing Federal legislation. Unlike the French constitutional system, constitutional review in Australia is not limited to review of the legality of proposed legislation. Legislation can have its constitutional validity challenged in Australian Courts at any time. There are also liberal rules in relation to standing to seek review.

The Australian Constitution contains few explicit provisions protecting human rights.⁸³ The Constitution's main focus is on regulating the relationship between Federal and State governments rather than setting out the rights of the governed vis-à-vis their government. Judges of the Australian High Court have noted that so far as individual rights were concerned those who drafted the Constitution were prepared to place their faith in the democratic process and in the rules of "common law" developed by an independent judiciary.⁸⁴ It is also clear that at least some of those influential in the drafting of the Constitution were opposed to the recognition of human rights in the Constitution precisely in order to ensure the capacity to enact racially discriminatory legislation!⁸⁵

There is therefore no general commitment in the Australian Constitution to substantive or even formal equality.⁸⁶ Australia has no 14th Amendment (as incorporated in the US Constitution) or a developed notion of republican universalism. Australian Judges,

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endorsing statements made by Judges in Canada, have emphasized the evolutionary, as opposed to revolutionary, path taken in constitutional development.⁸⁷ The tradition in Britain, Australia and Canada is "... a tradition which, even in its more modern phases, accommodates significant deviation from the ideals of equal representation. Pragmatism, rather than conformity to a philosophical ideal, has been its watchword."⁸⁸

A "paritary" system therefore appears to face no express Constitutional obstacles. Though the Constitution does establish criteria for eligibility for election to Federal Parliament, these criteria can be altered without requiring Constitutional amendment.⁸⁹ The "paritary" requirement that candidates belong to a political party that fields equal numbers of male and female candidates could therefore be added to the existing eligibility criteria.

Australian Courts have not had to consider the constitutional validity of a "paritary" system. They have, however, considered the validity of electoral rules that provide for inequality in the number of voters in electoral divisions. Weighting in favour of rural voters has existed in Australia since Federation. On this issue Australian Judges, again following Canadian Authority, have recognised formal equality is not demanded by the Constitution.⁹⁰

"Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the

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pursuit of more effective representation; the list is not closed.”⁹¹

While there appears to be no express constitutional impediment to the adoption of a “paritary” system in Australia, there may be an implied constitutional obstacle. Despite the absence of anything like a Bill of Rights in the US form, the Australian High Court has been prepared to infer rights which necessarily arise from the structure of the Constitution.⁹² The Constitution presupposes the existence of representative government. Representative government requires freedom of political communication. This implied right or freedom operates as a limitation on legislative competence. The High Court has declared invalid legislation that undermines freedom of political communication. There is also judicial support for the existence of a related implied right (or freedom) of association under the Constitution.⁹³

According to Professor Millard, the “paritary” system “...leaves room for all citizens to become candidates, so long as they create their own paritary lists of candidates.”⁹⁴ Whilst three major political parties dominate the Australian political landscape, independent candidates have been increasingly significant in recent years. Requiring an independent candidate to associate with others in order to be eligible to run as a candidate raises questions of freedom of association. Questions of this nature may, however, be quite simply avoided. The parity system could be modified to allow for independent individual candidates and thus avoid concerns over freedom of association.

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Australia is a party to the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of All Forms of Racial Discrimination* (“CERD”), the *Convention on the Elimination of All Forms of Discrimination Against Women* (“CEDAW”), the *Convention on the Political Rights of Women* and the *ILO Convention Concerning Discrimination in Respect of Employment and Occupation* (No 111). Under Australian law entry into treaties is a Federal executive prerogative. As a consequence Australia is essentially dualist in its treatment of obligations under international law. Treaties entered into by Australia do not become part of Australian domestic law unless specifically incorporated by legislation. Under Australian law there are no distinctions such as those drawn by US courts between “treaties”, “executive agreements” and “congressional executive agreements”.

Though Federal executive power is limited to specific heads of power, included amongst these heads is the power to legislate in relation to “external affairs”.⁹⁵ The expansion in the nature and scope of international relations has therefore resulted in an expansion in the Federal Government’s power to legislate.⁹⁶ Entry into treaties provides constitutional foundation for Federal legislation.

Australia’s ratification of the CERD and the CEDAW has been used to justify Federal legislation implementing many (but not all) of the provisions of these treaties. Both treaties envisage affirmative action programs and Australian legislation allows for the establishment of

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affirmative action programs.⁹⁷ States and Territories in Australia have also enacted legislation implementing the standards contained in the CERD and the CEDAW. These jurisdictions also generally allow for affirmative action programs.

A significant weakness of the Federal legislation is its apparent failure to prohibit gender discrimination in the selection of political candidates. This defect remains notwithstanding its identification by the Australian Law Reform Commission in 1994.⁹⁸

II. POLITICAL SUPPORT FOR “PARITARY RIGHTS” IN AUSTRALIA?

Though the Australian legal system is unlikely to be the source of major obstacles to the establishment of a “paritary” system, political support may be more difficult to establish. The largest political party in Australia, the Australian Labor Party, does have a policy of promoting women as candidates in State and Federal elections.⁹⁹

Beyond encouraging voluntary measures it is difficult to see governments and the major political parties in Australia supporting legislation that follows the French model. Measures to implement binding quotas in affirmative action programs have been the subject of controversy since the 1980s.¹⁰⁰ The preferred approach in both governmental and non-governmental employment sectors has been to opt for “soft” affirmative programs involving non-binding targets.

Professor Millard appears reluctant to cast the “paritary” system as an affirmative action program.¹⁰¹ He

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also acknowledges that the French system is “permanent, not simply a correction but a principle.”¹⁰² This break with the approach countenanced in the CEDAW¹⁰³, the CERD¹⁰⁴ and Australian legislation implementing these treaties is noteworthy for at least two reasons. First, the Australian High Court has not invalidated affirmative action legislation that is cast in permanent terms. The High Court has, however, indicated that once the objectives of the legislation have been achieved the affirmative action must cease.¹⁰⁵ Second, the distinction between “correction” and “principle” is problematic. Affirmative action in Australia is essentially based on a “corrective” principle that provides an important justification for discriminatory measures to redress the effects of past and present discrimination. Whether one agrees with this “corrective” argument¹⁰⁶, it appears to be critical to the existence of political support in Australia for affirmative action policies in favour, for example, of Aborigines. It remains to be seen whether equivalent political support would exist in favour of a “paritary” system.

The French system appears to rely in part on the rhetorical force of the concept of parity. That the number of men and women in society is equal translates into an argument that there ought to be equal numbers of male and female political representatives. Reasons offered for the unequal number of female representatives in Australia have included the “terms and conditions of Parliamentarians” making a representative career less attractive for women.¹⁰⁷ It is unclear how the “paritary” system is to address the issue of individual choice. Presumably changes in representatives will be followed by changes in Parliamentary conditions.

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One could also ask (as Professor Millard appropriately does) how the “paritary” system might affect other areas of potential affirmative action such as race and disability.¹⁰⁸ Does a measure cease to involve “parity” when it applies to a form of difference that does not divide the community down the middle? If the measure is denied the hallowed designation “paritary” and must assume instead the title “quota” what affect will this have on efforts to garner support for such measures? If other forms of difference are accorded the equivalent of “paritary” rights, how is this to be achieved when different types of difference intersect in social groups and individuals?

And what about the notion of political representation? The acceptance of rural weighting in electoral divisions in Australia has already been noted. In theory, however, rural members of parliament still represent all members of their electorates. What would be the effect of a “paritary” system? Certainly the existence of party politics (and the degree of loyalty to parties) in Australia collides with notions of direct representation. Perhaps a paritary system would result in no significant change in this respect.

If the French “paritary” system is successful in “renewing political life”, overcoming “built in male prejudices of government” and if it ultimately benefits all members of the community then a strong moral case can be made for similar developments elsewhere. Whether such success can be demonstrated and whether an already cynical Australian electorate and (predominately male) politicians are prepared to accept such a change will be

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critical questions in any political campaign to establish
“paritary” rights in Australia.

Gender Equality and Paritary Rights in Portugal

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I. GENDER EQUALITY – RECENT TRENDS IN PORTUGUESE CONSTITUTIONAL LAW

“The unmarried woman, who has no family, or has to support her own family, should have full legal capability to guarantee her sustenance and that of those that depend on her. But the married woman, like the married man, is a pillar of the family, an indispensable basis of a work of moral reconstruction. Of course, married women are not slaves. They must be treated with kindness, loved and protected, because their task as mothers and teachers of their sons is in no way inferior to that of the man. In the countries where married women compete directly with men in factories, in workshops, in offices, or in business, the family institution for which we fight as a fundamental corner-stone of a well organized society, will begin to collapse... So let us leave the man fighting with life outside, in the street... And the woman defending life, sheltering it in her arms, inside the home... I don't know, in the end which of the two has a more beautiful, a higher and a more useful role” .¹⁰⁹

Salazar's statement (made in 1933) sums up, in a most complete manner, the ideology of the Portuguese Estado Novo¹¹⁰ towards the question of gender equality. The government maintained a profoundly conservative view

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of society and family and of the place of women in it, which had decisive effects, both at the political and at the legal levels.

Thus, the Constitution of 1933 stated that all citizens were equal except for women, due to “the differences arising from her nature¹¹¹ and the good of the family”.¹¹²

Women’s political participation faced important restrictions on the right to vote, which persisted until the end of the Salazar regime, particularly in local elections. It was not until 1971 that a woman finally, for the first time, took part in the Portuguese government.¹¹³

The consequences on the domain of civil law were significant. The Civil Code of 1967 took the dependence and subordination of women as given, defining the husband as the “head of the family”, and granting him the power to take the decisions regarding the couples’ life, including all aspects having to do with the children. Husbands had the sole right to choose the family residence or to administer their collective “patrimony”.

These and other limitations on the full citizenship of women extended to practically all areas, including professional life, since women’s access to some careers, such as diplomacy or the judiciary, was strictly forbidden.

That was the situation scarcely twenty-five years ago. Consequently, one of the major concerns of the democratic movement after the 1974 Revolution was to change that state of affairs, both in theory and in practice. That was – and still is – a difficult task, since the problem of gender discrimination was not only the consequence of

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the political views of an authoritarian regime but also the result of cultural attitudes that remain deeply rooted in Portuguese society.

Some important measures were taken in the transitional period – for instance, the abolition of any restriction to the right to vote – but major changes had to wait for the approval, in 1976, of a new fundamental law.

Recent historical experience had profound effects on the “fathers” of the Constitution, particularly as regards their attitudes towards fundamental rights. They recognized an extensive catalogue of rights, which occupies Part I of the constitution opening with the enunciation of two essential rules:

- The principle of universality (article 12), according to which all citizens shall enjoy the rights and be subject to the duties laid down in the Constitution;
- The principle of equality, stating that all citizens have the same social rank and are equal before the law (article 13 number 1) and that no one shall be privileged or favoured, or discriminated against, or deprived of any right or exempted from any duty, by reason of his or her ancestry, sex, race, language, territory of origin, religion, political or ideological convictions, education, economic situation or social circumstances (number 2 of the same article).

These two principles complement each other, in the sense that they signify, on the one hand, that all citizens

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have all rights and duties and, on the other hand, that all citizens have the same rights and duties.¹¹⁴ Of primary importance for the purpose of our analysis is the inclusion in article 13 number 2 of an express prohibition of any kind of discrimination based on sex.

The legal “*capitis deminutio*” which affected women also explains why the constitutional text not only enunciated the fundamental principle of equality, but also drew certain direct conclusions about the practical implications of equality in various fields.

For instance, in the field of family law, the Constitution specifically states that spouses have equal rights in relation both to their civil and political capacities and to the education and maintenance of their children.¹¹⁵

Similar concern was extended to labour law, affirming the principle of equal opportunities when choosing a profession or any kind of work¹¹⁶ and assuring respect for the principle of “equal pay for equal work”, putting an end – at least at the legal level – to the traditional practice of salary discrimination according to the worker’s sex.¹¹⁷

At the same time the 1976 Constitution recognises the special status of women, including the need for special protections at work during pregnancy and after childbirth¹¹⁸, and the right of working mothers to an adequate period of leave from work without loss of remuneration or other privileges.¹¹⁹

But the fundamental text also acknowledges that effective equality between men and women cannot be assured just by banning discrimination. Effective equality

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will also require taking positive measures to overcome inequalities. For example, the constitution requires guaranteed access to day nurseries for children,¹²⁰ and the right to family planning.¹²¹

In the last quarter of a century Portugal has built a very solid legal framework for gender equality under both international law¹²² and it's own constitution. European law has also contributed, through amendments introduced in Amsterdam to article 2 of the Rome Treaty and more recently, article 23 of the European Charter of Fundamental Rights.

Portuguese society still faces a difficult and demanding challenge in some of the traditional stereotypes rooted in national culture and individual mentalities that will be very hard to change. This puts particular pressure on public powers, and helps to explain a number of choices made when the Constitution was amended for the fourth time in 1997.

Promoting equality between men and women was recognized for the first time, as a basic responsibility of the State¹²³, side by side with the assurance of national independence, the protection of political democracy, the promotion of the well being of the people and the promotion of balanced development throughout all national territory.

One of the problems still facing women in Portugal concerns the need to reconcile their professional and their family lives.¹²⁴ Despite some progress made in sharing household tasks, Portuguese women still do most of the work at home. This interferes with their careers, and

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women will never be able fully to participate in social and political life until this problem is solved. The Portuguese Constitution has been amended to require that professional activity do more to accommodate the requirements of family life.¹²⁵

In the end, full gender equality will require more equal political participation. Women have progressively made their way in practically all aspects of social, economic and cultural life. But when it comes to political activity (political parties, parliament, government, local power, etc.), major difficulties still remain.

Of the 230 members of the “*Assembleia da República*” – the Portuguese parliament – only 46 are women (20%). In the government, only 1 of the 19 ministers in office today is a woman (5,5%); we can only find 4 women in a total of 41 secretaries of state (9,75%). When we look at local power the reality is even worse: of 308 mayors only 12 are women (3,9%).¹²⁶

The original text of the Portuguese fundamental law included an article recognizing that all citizens have the right to take part in political life and in the management of the country’s public affairs.¹²⁷ This classic formula made no special reference to the need to encourage the political participation of women.

There was an amendment in 1997 to article 109 of the constitution that refers to the participation in political life of both men and women.¹²⁸ More importantly, the Constitution now requires the law to promote equality in the exercise of civil and political rights and non-

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discrimination on the basis of gender for access to political positions.

This makes the question more practical than theoretical, and more political than legal. The question is how to create material conditions that will give women, in practice, the rights that they already theoretically enjoy. It is more a problem of *Prudentia* rather than of *Scientia*.

II. ARE THERE CONSTITUTIONAL OBJECTIONS TO PARITY OR QUOTAS?

In France the entry into force of the law establishing equal access by women and men to electoral offices and positions required a previous amendment of the 1958 Constitution, in order to solve the problems arising out of the decisions by the *Conseil Constitutionnel*, which viewed parity as incompatible with the principle of republican universalism.

That principle, as it is pointed out in the article of professor Eric Millard, has three components:

- The universal and inalienable natural rights of human beings, implying equality of rights among all persons
- The unity and indivisibility of the Republic, significantly limiting the possibility of legally recognizing separate social categories and divisions among citizens
- The principle of national sovereignty, granting all citizens – men and women – exactly the same rights to elect and to be elected.

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The French constitutional text had a well-known influence on the Portuguese one. So, in the latter we can also find the references that define universalism:

- The universality and equality of fundamental rights (articles 12 and 13)
- The unity and indivisibility of sovereignty (article 3)
- People as the only source of political power (article 108), which implies that all citizens above 18 years have the right to elect and to be elected (article 49).

If one adds to these commitments the express constitutional prohibition of any privilege or discrimination based on sex (article 13 number 2), one might be tempted to infer that the concept of parity or the establishment of quotas would be unconstitutional.

It is important to note that the Portuguese system of control of constitutionality is rather different from the French one. There exists an “*a priori*” control that can only be required by political entities, but the system also includes, inter alia, forms of “*a posteriori*” control allowing any citizen to invoke the question of constitutionality in the context of a judicial process in which he takes part (what is called “concrete fiscalization”, comparable to the American “judicial review”). Thus, in Portugal problems can occur as a consequence of the application of the law – due to the fact that a successive control exists – and may derive from the initiative of a single individual – because it is not only political actors that enjoy procedural legitimacy.

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Portugal has no law on the question of parity or quotas, so, the Constitutional Court has not yet been called upon to decide on the constitutional compatibility of these solutions, but the central question to be answered is whether parity or quotas would violate the principle of universality (article 12 of the Constitution) or the principle of equality (article 13). In fact, questions like the principle of national sovereignty have no special relevance as far as the question of parity or quotas is concerned and play second fiddle to the concepts of universality and equality.

Let us first analyse the problem in terms of respect for the principle of universality. As already noted, the constitutional principle of universality entails that every citizen has all the rights and duties of citizenship. Parity or quotas would seem to violate that principle. If quantitative gender restrictions were placed on electoral lists, then Portuguese citizens, whether male or female, would be constrained by numerical criteria excluding some, in possible violation of the universal right to run for office.

One could also argue that the principle of universality “represents a limitation to the disaggregation of the political community, to the dispersion of these and those rights by these and that categories”.¹²⁹ To establish parity or quotas could then be regarded as an administrative division of the political community on the grounds of sex and thus question the respect for the constitutional imposition of universality.

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In the end, these criticisms cannot be sustained. The idea that all citizens have all rights must be interpreted in the context of the constitutional architecture of fundamental rights. There are many places in the Portuguese Constitution where rights are ascribed to certain groups of citizens and not to all of them; as with fathers, sons, workers, youth, the handicapped, and (of course) women.¹³⁰

The freedom of association¹³¹, which comprises the freedom to create political parties¹³², is constitutionally classified as a fundamental right. However, the law requires at least 5000 signatures of citizens enjoying full political and civic capacity in order for a political party to be allowed. If that number is not reached its registration shall not be authorized and the political party shall have no legal existence. Therefore, a fundamental right can be denied to hundreds or thousands of citizens on the ground that a legally – but not constitutionally – established requirement is not respected. Nevertheless, the Constitutional Court has considered that condition to be acceptable.¹³³

On the other hand, if one considers that parity or quotas violate the principle of universality, one should also conclude that the prohibition of independent candidacies to parliamentary elections - as occurs in Portugal - is equally incompatible with that principle, because it prevents citizens not affiliated with a political party from being elected. Yet no one question the constitutionality of those restrictions.

Parity or quotas do not deprive any citizen – male or female – of any fundamental right. They only define

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procedural conditions for one of the many forms of political participation – the right to be elected. Such conditions are fully compatible with the principle of universality so long as a) an exigency of proportionality is respected; b) they serve other constitutional objectives – for instance, encouraging democratic participation of the citizens (article 9 c) of the Constitution), deepening participative democracy (article 2) or building a free and just society (article 1).

The next question concerns how to reconcile the principle of equality with parity or quotas. The Portuguese Constitution views equality as going beyond mere equality of opportunity. In fact, if we look at article 9 d) we can see that one of the basic responsibilities of the State lies in promoting “actual equality between the Portuguese”, thus defining a material criterion for the action of political powers.

Due to the essential part it plays, the principle of equality has naturally been the subject of frequent jurisprudential attention in the decisions of the Constitutional Court.

The Court has repeatedly stated that the idea of equality cannot be interpreted in absolute terms. Instead one should consider that equality means “dealing in an equal way with what is essentially equal but also dealing in an unequal way with what is essentially unequal”.¹³⁴ Infraction of this principle of equality can thus be a consequence of an unjustified discrimination between similar or comparable situations, but also of a legal assimilation of different realities.¹³⁵

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Deepening its analysis, the Court has pointed out that in the global constitutional context, the principle of equality must be interpreted in three different dimensions: as a prohibition of discretion; as a prohibition of discrimination; and as an imposition of differentiation.¹³⁶

The two first categories correspond unequivocally to the traditional view of fundamental rights, in the sense that they define a limit to the action of public powers. The third, however, supports the concept of “affirmative action”, simultaneously authorizing and imposing measures adequate to compensate “the inequality of opportunities”¹³⁷, that is, to favor those who find themselves, for different reasons, in a position of weakness. In these situations, to positively discriminate in favor of the weak cannot be seen as a violation of the principle of equality but rather as a way of fully guaranteeing it.

Looked at in this way, it becomes clear that the legal establishment of parity or quotas would not violate the Constitution. In any case, the controversy that could have taken place over this question before 1997 seems to be completely precluded by the changes introduced into article 109 of the Constitution by the fourth amendment.¹³⁸

In fact, the new formulation of that article merges two complementary ideas: prohibition of discrimination and the promotion of equality. The text clearly opens the way to “positive measures aimed at promoting equality”¹³⁹, but it does not contain any reference to parity or quotas, the inclusion of which was suggested during the discussion.

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The Portuguese Constitution has consequently assumed a new positive attitude toward affirmative action, when affirmative action is necessary to assure non-discrimination in the access to political functions, or actively to promote gender equality in political and civic rights.¹⁴⁰ Positive discrimination is thus authorized. Legal action in order to further equality between men and women is not only authorized but required. So, the absence of adequate legislative measures may even constitute a case of unconstitutionality by omission¹⁴¹ and justify intervention by the Constitutional Court.

Quotas or parity are undoubtedly one possible way to increase the level of gender equality in political participation. But they are far from being the only way to do so. While Portuguese fundamental law does not forbid parity or quotas, neither does it require them.

One thing does seem to be indisputable however, that parity or quotas are, in Portugal, a political and not a legal question.

III. RECENT DEBATES ON PARITY AND QUOTAS

As we have already seen, the Portuguese Constitution since 1997 has mandated legal action that would increase the participation of women in political life. That exigency reinforced the discussion that already existed about the establishment of quotas or parity, and lead to the appearance of new initiatives to legislate on this issue.

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So, in 1998 a governmental proposal was presented to the Parliament¹⁴², in order to create a quota system in parliamentary elections – both for the “Assembleia da República” and the European Parliament. The final objective was to assure a minimal representation of 33.3 % for each sex. As an intermediate goal the minimum requirement of 25% would be permitted in the two first elections subsequent to the entry into force of the law. Electoral lists could not therefore have more than three candidates of the same sex in a row in the first phase and more than two in the second phase.

The parliamentary discussion that took place in March of 1999 repeated the standard arguments for and against quotas or parity.

Those who favored that kind of approach to the question of gender equality pointed out the need to adopt positive measures by means of minimally quantified objectives. This would counter the systematic tendency that political parties – traditionally controlled by men – have displayed in excluding women from their lists or relegating them to ineligible positions. This situation violates basic principles of equality, of justice and of representativeness, and reality has shown that auto-regulation is not the way to put an end to it.

On the side of those who opposed quotas or parity it was said that such a solution: a) humiliates women – elected not because they deserve to be but only on the grounds of a “*numerus clausus*” scheme; b) is unfair both to men and women because election is not based on individual merit but in gender; c) is a way to divert attention from the real problems that affect Portuguese

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women – unequal salaries, difficulties in choosing a profession, part-time work, and the absence of infrastructures for their children.

In a country such as Portugal, where women are still frequently faced with sexual discrimination, where in the last twenty-five years nearly one century of delay in women's rights had to be recovered, should priority be given to the formal aspects of political participation? Instead of beginning at the top by creating an artificial impression of progress, wouldn't it be more useful to remember that the most important aim, as the Constitution requires, is "real equality"?

At the end of the process the proposal was rejected, having received support only from the Socialist party in government with all other parties - conservatives, social democrats and communists - voting against paritary rights.

The question was resumed in June 2000, by means of a new governmental proposal that was later followed by an initiative of one of the opposition parties.¹⁴³

The new governmental proposal is significantly different from the one offered in 1998. First, it extends beyond parliament to local elections – excluding elections for the assemblies of the Autonomous Regions of Azores and Madeira.¹⁴⁴ Second, it has no references to intermediate goals, immediately imposing a minimum representation of 33.3%. The aim is thus to establish a quota system although the government euphemistically speaks of "minimum parity".

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The other proposal under consideration is very similar. The goal is also to define a minimum level of representation at 33,3 %. The more relevant difference is that it would apply to all elections based on proportional representation, including the ones on the Autonomous Regions.

Discussions of these proposals simply repeated old arguments. Voting has not yet taken place and it is unclear what the result will be.

One last note on the question of articulation between electoral system and parity or quotas system.¹⁴⁵ It is generally accepted that quantitative objectives of political representation can only coexist with multiple-seats circumscriptions and list suffrage.¹⁴⁶ That is why, e.g., the French parity law is not applicable to the elections for the National Assembly, which are based on a “ballotage” solution.

Elections to the Portuguese Parliament have been taking place under a proportional system based on the Hondt method and in the framework of district circumscriptions. Since 1997 the Constitution also consents on the establishment of single-seat constituencies in a solution clearly influenced by the german system of “*personalisierte Verhältniswahlrecht*”.¹⁴⁷

Thus, it seems that the 1997 amendment of the Portuguese Constitution sent contradictory messages. On the one hand, the amendment introduced the possibility of changes in the electoral laws that would make gender equality in politics even more difficult. On the other

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hand, it expressly stated the necessity of greater actual political equality between the sexes, and laid the foundation for such reforms, if there is the political will to implement them.

Paritary Rights for Women in Israel

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Women in Israel, as in many other western countries have suffered from discrimination and the denial of many basic rights. Various reasons can be offered to explain this discrimination, which is deeply rooted in religious, social and cultural tradition. Recently, women have mobilized to demand their rights and fundamental equality with men. The people of Israel embraced equality as a basic norm, and condemned discrimination in their declaration of independence in 1948, but the declaration was never given the force of law, and remained an unrealized aspiration for many Israeli women.

Israel did not have a written constitution until 1992, and therefore no written Bill of Rights. Legal rights were formed by the judiciary and could be abrogated or changed by a simple act of parliament. Israel's first formal and written bill of rights (The Basic Law: Liberty and Dignity) was enacted in 1992, and although it made no specific mention of the right to equality, courts have interpreted it having incorporated equality rights by implication.

The Israeli parliament or "Knesset" has enacted several laws to realize this norm of equality. For example, the Women's Equality Law of 1951, the Equal Salary Law of

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1964 and the Equal Opportunity Employment Law of 1988 were all intended to give women more equality in jobs and salaries, and diminish discrimination against them. But simply prohibiting discrimination has not secured equality. Years of oppression prevented women from easily entering traditionally male occupations.

Israel has turned to affirmative action to remedy this imbalance, and instituted preferences for women in certain professions. For example, the amendment to section 18A of the State Corporate Act, states that the board of directors of a state corporation shall consist of equal numbers of men and women. Until this is achieved the board shall prefer women as directors.

Thus Israel has already instituted “paritary” rights in the boardroom, and laid the foundation for a future extension of paritary rights in politics. The only barrier to this extension is the conservatism of politicians, who fear for their own positions. Many Israeli women have already entered politics, despite social barriers. They may be the vanguard of things to come.

Paritary Rights for Women in Belgium

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I. THE HISTORY OF PARITARY RIGHTS IN BELGIUM

Belgians often look to their southern neighbours, the French, for solutions to social problems. However, this was not the case with the equal treatment of men and women in politics. As early as 1994, Belgium passed a law providing that the number of candidates of the same gender on a list may not exceed two thirds of the total number of candidates¹⁴⁸. At that point, Belgium was the first European country to adopt quotas for women. At the international level only five other states had taken similar steps¹⁴⁹.

This law was not passed as a matter of course. Indeed, a number of conservatives within the House of Representatives and the Senate were radically opposed to it. The Council of State (le Conseil d'Etat, i.e. the supreme administrative court) also had reservations, mainly on constitutional grounds. The Council feared it might jeopardise the people's right to become candidates for office. Even those in favour of the law were not absolutely happy because it would still allow a party that reserved 33% of its places for persons of the same gender to place women at the back of the list, rendering them unelectable. In Belgium, a person's chances of being

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elected depend strongly on their position on the list. The lower their position on the list, the smaller their chances of being elected.

The effectiveness of the new law was put to the test during the elections of 13 June 1999. Whilst 40% of those on the lists were women, only 20% stood a genuine chance of being elected¹⁵⁰. As far as the results are concerned, it is difficult to draw a general conclusion. In absolute figures, the total number of female representatives under the new system has risen from 17.3% to 22.1% . In some parliaments, progress has been spectacular: the percentage of women in the House of Representatives rose from 12% to 23.3%¹⁵¹.

There are currently plans to amend the constitution and to include the principle of equal treatment of men and women¹⁵². This proposal will probably lead to further changes to the political landscape. There will probably be minimum guarantees of seats for women in the regional governments. Perhaps, as in France, lists will be required to alternate men and women. There have even been calls for a guarantee that the parliaments will consist evenly of 50% men and 50% women¹⁵³.

II. PARITARY RIGHTS FOR WOMEN: AN IDEOLOGICAL CONSTRUCT?

International treaties commonly oblige the contracting states to implement the principle of equal treatment for men and women and to protect the exercise of fundamental freedom in the political field. For example the *Convention on the Political Rights of Women* (United Nations, 1952), Articles 7 and 8 of the

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Convention on the Elimination of Discrimination against Women (United Nations, 1979), and Article 3 of the *International Covenant on Civil and Political Rights* (United Nations, 1966) all require equal political rights for women, as do many non-binding human rights instruments and directives. The issue has played a prominent role in world conferences on women (as in Beijing in 1995)¹⁵⁴.

In Belgium, such texts were referred to during preparatory parliamentary meetings to justify a more women-friendly electoral system. Careful reading of the actual texts, however, reveals that they were intended only to ensure that men and women would have the same right to vote. Not a single text included any obligation for states to develop systems to ensure equal political representation for men and women.

In 1981, a proposal for introducing quotas in municipal elections was submitted in Belgium¹⁵⁵. This was stopped by the Council of State, citing several international treaties, and promptly forgotten. Almost twenty years later the same treaties are now being used to justify quotas.

This complete reversal reflects the fact that opinions on equality evolve as a result of ideology¹⁵⁶. In France, and in the French speaking part of Belgium, Sylviane Agacanski strongly influenced politicians with her book "*Politique des sexes*"¹⁵⁷. She defends the notion that parliament should mirror and reflect the nation. Given that nations are composed (almost) equally of men and women, she believes that men and women should clearly be equally represented in politics. Agacanski argues that equal

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opportunities should be replaced by equal results and her philosophy has been embraced by the political elite¹⁵⁸. However, parliamentary debates still use international treaties to camouflage this ideological approach.

III. CRITICAL CONSIDERATIONS

Equality should be the rule. Whenever certain groups advocate positive discrimination, and in this case preferential treatment for women, it can only be justified when the objective is legitimate, i.e. when there is proportionality between the objective and the means and if the measure is effective.

Paritary rights for women are not illegitimate. However, the requirement of proportionality raises a number of misgivings. When a country such as Belgium offers the same education and training opportunities to men and women, and the same political rights, why should women be guaranteed a specific number of parliamentary seats?

Another question in this regard is whether one should always choose the option that infringes the least fundamental rights. As things stand now, a party that does not respect quotas is not allowed to offer a list of candidates to the voters. This can cause problems.

In the Netherlands for example women cannot become members of the Staatkundig Gereformeerde Partij¹⁵⁹. This religious party bars women on religious grounds and in Belgium would not be allowed to take part in elections. Freedom of religion conflicts with the principle of equality. Which should prevail?

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Some authors therefore advocate another – less rigid - approach. Rather than penalising parties they propose rewarding parties that respect quotas¹⁶⁰. A woman-friendly party that obtains the majority in the municipal council would, for example be entitled to an additional female alderman. Others favour negative publicity¹⁶¹: a party's women-unfriendly stance would be listed explicitly, not unlike the cancer warnings on cigarette packets.

Targeting the parties' coffers is another possibility. Donations, unless the amounts are very small, are forbidden in Belgium. To prevent corruption, parties are allocated a certain sum in accordance with their size. They use these subsidies, among other things, for publicity. If they fail to respect the quota rule "voluntarily" their funding could be cut.

Finally, a number of considerations with regard to the effectiveness of quotas: they only serve formal equality. Women with children (and certainly those who do not have a partner) will rarely be able to enter politics. Politics has been dominated by men for so long that there are no family-friendly provisions in place to enable women to combine family life with a political career.

When The Flemish government sought to examine whether there were any special provisions for maternity leave, benefits and so forth for pregnant politicians,¹⁶² the Council for the Equal Treatment of Men and Women found that only the Scandinavian countries provided such benefits. Other countries tended to solve such matters in an ad hoc manner (or not at all).

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IV. CONCLUSION

Genuine equality for men and women will only be realised when society is organised in a totally different manner than it is today. Parity rights alone will not correct the problem. Inventive measures will be needed to encourage all women to become politically active. Introducing maternity benefit and leave for elected officials is one option. Finding others is a challenge that will keep legal scholars busy for many years to come.¹⁶³

WOMEN'S PARITARY RIGHTS IN INDIA

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INTRODUCTION

Women in India have made major inroads into nearly all the traditionally male-dominated professions, including the corporate world and governmental bureaucracy, but not politics. In complete contrast to women's progress in other fields, female participation in Indian politics has declined consistently since the days of the freedom movement, both in quantity and quality. Women's contribution in the independence struggle were enormous, but gradually since then women have been shut out of politics by male politicians, who have had little interest in women's interest and affairs.

I. HISTORICAL BACKGROUND

Women played an important role in the freedom struggle and the political demonstrations in the colonial era. The non-cooperation and the civil disobedience movement, Salt Satyagraha and innumerable other protests, had a large number of women participating in them. It is interesting to note that in the 1930s and 1940s there were more women leaders at all levels in the Congress party alone than are found today in all the

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parties put together. The British government had set up a committee headed by Montague and Chelmsford in 1919 to work out a proposal for constitutional reforms that would facilitate the inclusion of some Indians in government. Among the many delegations that met with this committee and presented their case, was a small delegation of women led by Sarojini Naidu and Margaret Cousins to demand rights of representation in legislatures for women on the same footing as men.

The British government left it up to each of the individual provincial legislatures that they had just set up in India to grant or to refuse the franchise to women. Each of the Indian provincial legislatures voted to make it possible within a short span of time for women to be represented on the same basis as men. Between the Madras Legislative Council in 1921 and Bihar Council in 1929 all the legislative areas of India had conferred the symbols and instruments of equal citizenship on all women and men who possessed certain basic qualifications, such as literacy, property, sufficient age, the payment of taxes and length of residence. These conditions restricted the vote to women from the elite families only. The British would not countenance universal adult suffrage.

In 1930 representative women's organizations drafted a memorandum demanding immediate acceptance of adult franchise without gender discrimination. It was turned down by the British government, but Indian leaders took up the issue at once. In 1931, the Karachi session of the Indian National Congress committed itself to the political equality of women, regardless of their status and qualifications, and this proposal met with virtually no

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opposition. The trend continued and in states such as Maharashtra and Gujarat, virtually every neighborhood and most villages could boast of at least one effective woman leader, even into the 1950s. But as politics became more centralized and corrupt, undermining all other institutions of civil society, women were pushed out of leadership positions to function on the margins, relegated at best to pursue social work at the local level. Even that tradition eroded from the 1970s onward.¹⁶⁴

II. THE INDIAN POLITICAL SYSTEM

India is a parliamentary democracy, with a multi-party political system and a quasi-federal structure. The country has twenty-eight states and a number of union territories directly under the control of the federal government. The Lower House is called the Lok Sabha (Peoples' Assembly) and has 546 members. The upper house is called the Rajya Sabha (States' Assembly) and has 250 members.

Elections are held every five years for the two houses of the union government. Direct elections are held for the 546 seats of the Lok Sabha. Each of the states also has two houses and elections are held for the legislative Assemblies at the state level. In addition, the municipal areas in the states have locally elected municipal corporations or municipalities. The villages enjoy self-governance through the election of local "Panchayats" to look after village administration.

India has three major political parties, the Congress party; the Bhartiya Janta Party (BJP) and the Communist Party, which has two factions, The Communist Party of India (CPI) and the Marxwadi Communist Party of

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India(CPI(M)) and a large number of small parties at the national level. Some of them have been floated by prominent political leaders who left the major political parties to create these smaller parties of their own. There are also a number of political parties at the state levels. The Congress was the major ruling party at the center for the first forty years after independence. After it lost power the country has been experimenting with different parties and coalitions and currently India's governance is held by the BJP in a coalition of around 24 small parties.

India has no law analogous to the French law maintaining parity in the list of candidates given out by the parties. There is no minimum and no maximum, and the miniscule number of women in the list of nearly all the parties reflects the attitudes of the party bosses who control the distribution of places on the lists.

III. THE CONSTITUTIONAL PROVISIONS

India attained freedom in 1947 and the Constitution was promulgated in 1950. At that time it seemed that women would enter politics without difficulty, and no special provision was made to secure women's adequate representation in the parliament.

The Constitution guarantees to all women the fundamental right to equality and political participation. It prohibits discrimination on the grounds of sex, caste, place of birth, domicile and religion.¹⁶⁵ The state is also barred from sex discrimination in public employment.¹⁶⁶ In theory, the political rights of the women were and are recognized without any discrimination, and women have the full right to contest elections, and to participate in the

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decision making process at all levels with men. Side by side with this guarantee of political equality and the absence of any kind of discrimination or exclusion from the political process is the power conferred on the government by the Constitution to take affirmative action in favor of women. Art 15 of the Constitution expressly empowers the state to enact or make special provisions for women and children.¹⁶⁷ The state has exercised their powers under this Article on many occasions including ensuring political representation through reservation at the grass roots level.¹⁶⁸

IV. GENERAL MOOD OF THE NATION

In complete contrast to the patriarchal attitude towards women within the family, Indians as a rule strongly disapprove of a party, politician or public figure denigrating women in public or opposing moves for women's empowerment. Parties have suffered major defeats when their leaders disparaged women. Because of this, very few politicians dare attack women in public forums, except when they are in direct electoral competition with a woman. Indian society celebrates women who prove themselves to be stronger than men. Women who show extraordinary resilience and courage get special reverence. However this does little to improve the life of ordinary women. Most Indians support women's participation in politics, but few politicians give this more than lip service. The recent countrywide post-election opinion survey conducted by the Centre for the Study of Developing Societies for India Today reveals a consensus between men and women on this point. 75 percent of men and 79 percent of women favor active participation of women in politics and 75 percent of men

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and an equal number of women favor reservations for women in legislatures. On the eve of assembly elections in Uttar Pradesh, one of the conservative states of northern India, Madhu Kishwar interviewed scores of men and women in the Meerut constituency to gauge people's response on a range of political issues, including reservations for women. Men and women alike said that the inclusion of women was both necessary and desirable and would be beneficial not just for women but for politics as a whole.¹⁶⁹ However, the political parties put only a very small number of women onto their list of candidates.

V. LEGISLATIVE EFFORTS TO SECURE MORE REPRESENTATION

A systematic movement towards the emancipation of women started after the publication of the report of the "Committee on the Status of Women in India" in 1976. The recommendation of this government appointed committee was that some seats should be reserved in favor of women to ensure their political empowerment.¹⁷⁰ To give effect to these recommendations the Constitution (73rd) Amendment Act, of 1992, and the Constitution (74th Amendment) Act, 1992, guaranteed the reservation for women of a third of the seats in the Panchayats¹⁷¹ and Municipalities¹⁷². The method was to reserve certain constituencies as "women only constituencies" as a result of which men become ineligible to contest elections from that constituency. All political parties intending to field candidates for that seat had to offer only women as candidates. Women could also contest elections for other seats.

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There are no exclusively "male" constituencies. As all political parties intend to capture as many seats as possible, their tendency is to field candidates for as many constituencies as they can. The law reserving one-third of the total number of seats for women was implemented at the Panchayat and Zilla Parishad level in all the states of India without any opposition from any political quarter whatsoever. Even before this, Ramakrishna Hegde's government in Karnataka had started a similar process in 1983. Karnataka provided for a 25 percent reservation for women at village Panchayat levels. This was before any powerful women's lobby emerged in Karnataka to press for this move and before there was any popular groundswell of opinion in favour of women's reservations. In the mid 1980s, the Shetkari Sangathana of Maharashtra, led by Sharad Joshi, pioneered the move to field all-women panels for Panchayat elections in that state and subsequently focused on getting women elected to Zilla Parishads in as many constituencies as possible, with men of the Sangathana playing a supportive role¹⁷³.

However, at the national level there is no compulsion to field women candidates and this is perhaps the reason why the number of women candidates and elected women is very low. Political parties do not want to make space for more women in the parliament and legislative Assemblies. They support this by saying that women would not win but statistics show that although the number of women representatives in the parliament has been very low, in comparison to the number of candidates the percentage that have won has been impressive. Women candidates success rate has always been higher than that of men. However, political parties have usually only supported those women who come from families

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which have been politically prominent in the past. Parties turn to the widows and daughters of established politicians to hold onto existing seats, without giving the women themselves any respect of power.

VI. WOMEN'S REPRESENTATION AT THE STATE AND THE NATIONAL LEVEL

Representation of women at the state and the national level is very low. Women in India constitute nearly half of the population but the average percentage of women's representation in the Parliament, Assemblies and council of ministers taken together has been around 10%. Women's under-representation has been even more severe at the state level than in Lok Sabha. This is clearly evident in Bihar, which had 14 women elected to the Vidhan Sabha in 1952, 31 women in 1957, and 26 women in 1962. But in the 1967 elections, women won only 11 seats. Their number declined to 4 in 1969. Thereafter, it reached a plateau, leveling at a mere 13 during the last state assembly elections. In the last Assembly elections, Uttar Pradesh had the largest number of women candidates contesting the elections, 55 for 85 seats. In Rajasthan 17 women contested for 25 seats; Orissa had 10 for 21; in W.B. 21 for 42 constituencies and Kerela had only 4. A total of 599 women contested the elections, making up 3.4 % of the total number of candidates.

Table 1: Representation of Women and Men in State Legislatures (Source: A Status Report on Participation of Women in Panchayati Raj. Institute of Social Sciences, New Delhi 1995.)

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States/Uts	Year	Year	Total	Total Women
Andhra Pradesh	1957	252	11	
	1994	294	9	
Karnataka		1957	179	
18		1994	224	
	7			
Kerala		1957	127	
6		1991	140	
	8			
Madhya Pradesh	1957	218	26	
	1993	320	12	
Punjab		1957	101	
5		1992	117	
	6			
Rajasthan		1957	136	
9		1994	200	
	9			
Tripura		1957	30	
	0		1992	
	60	2		
Uttar Pradesh	1957	341	24	
	1993	425	12	
West Bengal	1957	195	11	
		1991	294	
	18			
Delhi		1972	56	
	3		1993	
	70	3		

The representation of women in the Lok Sabha has remained stagnant. It reached a "high" of 8% in 1984. This figure has not been crossed since then. In fact, it has declined. This despite the fact that every major national party in recent years has declared through their manifestos that they would implement a 33% reservation for women in all legislatures.

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Since the first general elections in 1952, there have been 13 general elections. The most recent election illustrates a uniform attitude cutting across the party lines. All the parties in their manifestoes had something for women. Though it varied from party to party, almost all had come out in favor of an increased representation for women generally. This idea, however, remained on paper and was not reflected in the actual lists of candidates.

In the 1998 parliamentary elections, there were only 252 women candidates out of a total of 4,693 candidates contesting elections. In 1999, the BJP and the CPM fielded 7% of women in their list of candidates. The Congress party had 10% women in their list of candidates. Ultimately, only 46 women gained entry in a Parliament of 546.

Table 2: Women's Representation in the Lok Sabha (Lower House) (Source: Election Commission of India.)

Term of Lok Sabha of Women	Members	Total Seats	No. Percentage
1952-57	489	14	2.8
1957-62	494	18	3.6
1962-67	494	30	6.0

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1967-71		
520	6.0	31
1971-77		
520	3.8	20
1977-80		
542	3.5	19
1980-84		
529	5.3	28
1984-89		
542	7.7	42
1989-91		
523	4.4	23
1991-96		
536	7.2	39
1996		
543	6.4	35

Women's entry into politics is not directly related to their emancipation which suggests that very few women enter politics on their own. Most are propelled forward by their male relations, primarily to ensure a political legacy. This is the reason why conservative states like Rajasthan, with low female literacy (20%), high rates of female infanticide, and aggressively patriarchal communities have sent more females into the political arena than states such as Kerela, which has a high literacy rate (86%) and a

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comparatively free movement and decision making power. States such as Manipur and Nagaland, which have strong matrilineal societies, have sent a relatively larger proportion of women to the Lok Sabha and have also elected relatively more women MLAs.

VII. WOMEN'S RESERVATION BILL 1996

Inspired by the success of the 73rd and 74th Constitutional amendments and the resulting situation where despite much skepticism one million women in the country hold positions at the Panchayat and Zila levels and the municipalities, the 81st Amendment Bill (1996) was formulated and introduced to ensure a reservation of 33.3% of the seats to be filled in by direct elections in the Lok Sabha¹⁷⁴ (lower house of the Parliament) and the Vidhan Sabha¹⁷⁵ (legislative Assemblies). The 81st amendment included the following key provisions:

1. One-third of all seats in Lok Sabha and Vidhan Sabhas shall be reserved for women.
2. Such reservation shall also apply in case of seats reserved for Scheduled Castes (SCs) and Scheduled Tribes (STs).
3. There shall be rotation of seats so reserved for women.
4. Such rotation shall be determined by drawing lots, in such a manner that a seat shall be reserved only once in a block of three general elections. The manner of reservations is to reserve a seat as a woman's seat so that it becomes mandatory for the political parties to compulsorily field women candidates for that constituency. As only women candidates can be fielded from this constituency

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the representation of women on these 33 % seats can be ensured.

5. There is a restraint on reservation of women in those states or union territories where the number of reserved seats is less than three.

The Bill was introduced in the Parliament three times but could not be passed. It was the first time in the history of the Indian parliament that any Bill seeking the empowerment of women met with such intense opposition from men parliamentarians cutting across party lines¹⁷⁶. Nevertheless soon before the elections all major national parties, including the Congress, the BJP, the Janata Dal, and even the two Communist parties had committed themselves to reserving 33% of the seats in legislatures for women by including this promise in their respective election manifestos. The Common Minimum Program (CMP) agreed upon by the various parties constituting the present BJP-led United Front government assured the voters that one-third of the elected membership in Parliament and the state legislatures will be reserved for women and also promised to review and to remove provisions discriminating against women. However, the vast disparity between their claims made in public forums and their actual actions within the party soon became apparent. A study by the National Commission for Women has revealed that when the political parties supporting the Bill were in the process of finalizing their lists of candidates for the last general elections, none was close to fielding a third women candidates¹⁷⁷. Perhaps more women will be included in the lists of candidates at the time of the elections, but it seems that the parties made empty promises simply to

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woo the voters and had no genuine commitment towards the representation of women.

The issue is still alive and efforts are being made to reintroduce the amendment in parliament. It becomes imperative, therefore, to analyze the merits and demerits of the bill.

Those opposing the Bill argue that:

1. The Bill grants special privileges to elite women by ensuring seats for them in the parliament, and does not benefit women generally¹⁷⁸. It is no doubt true that a majority of women in the Indian Parliament are elite women and their class position often allows them a far greater range of options than those available to poorer women. A study indicated that of the 39 women representatives in the 1991-1996 Indian Parliament a significant number of them entered politics through their families and privileged class backgrounds¹⁷⁹. However, mandatory representation of a large number of women would help dilute the monopoly of elite women in the parliament.
2. Women's representation in the parliament, while important on the grounds of social justice and the legitimacy of the political system, does not easily translate into improved representation of women's various interests. As there are no "women's only" constituencies, women MPs are not accountable to women as women. Women politicians have never promoted other women's participation in politics. Indira Gandhi, for example, did little to

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promote women's representation in politics, but Rajiv Gandhi accepted the principle of the reservation of seats for women.

Women MPs have otherwise shown a deep concern and commitment towards issues concerning women. Cutting across party lines they unite on these issues and the substance of their debates in the parliament shows their sincerity and dedication towards achieving better rights for their sisters. Many women MP's cooperate with Non-Governmental Organizations to advance women's issues in the legislature.

3. Even assuming that the bill would benefit women generally, 33% is no small figure. If the Bill were to become law, the Parliament would have to accommodate a minimum of 180 women candidates, some of whom may not have any political experience, who may be illiterate or semi-literate, completely unaware of the task of policy-making at the macro level. Doling out such a large percentage of seats to such candidates may lower the parliament's standards as the parliament ought to be a forum for the most seasoned, thoughtful and well-informed individuals among us. It is no place for political novices to learn their first lessons in parliamentary democracy¹⁸⁰.

This argument does not reflect current realities. Women are not novices in politics. They are very active even at the grassroots level and are much more experienced in healthy politics than many male politicians, whose only experience is in crime and corruption.

4. The Bill provides for rotation of the reserved constituencies with each election. The reserved

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constituencies themselves would be determined by drawing lots. For the SCs and STs, constituencies are reserved on the basis of population proportion and are supposed to be delimited after some years. This yardstick cannot be applied in the case of women, since their population is evenly spread throughout the country.

The rotational principle is problematic and the apprehensions of those who oppose the Bill on this ground are justified. The rotating system will mean that every election sees a new set of constituencies reserved for women. Frequent changes of constituency would sever the fundamental link between the electorate and the elected and completely eliminate all incentive and interest in the development and continued prosperity of the constituency. It would also erode the chances of male politicians to seek re-election from their old constituencies where they might have done good work. It would also deprive voters of a choice and would promote unhealthy competition amongst women. Rotation would also mean that no candidate could come to the same constituency twice and this would make politicians less accountable to the people. Rotation will also automatically result in two-thirds of incumbent members being forcibly unseated in every general election.

5. There is already resentment about reserved seats for SCs and STs being frozen in the same constituencies over a long period of time. The passing of the bill would mean greater resentment against women, undermining the very objective of the Bill. Those men who get pushed out of their

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constituencies or who see their allies sidelined will either sabotage female contenders in revenge, or spend much of their political capital helping their own female relatives in cornering these reserved seats. Such proxies would be expected to keep the seat "safe" for the men until the next election, when they would again try to reclaim their seats. Such women would lack legitimacy in the eyes of the voters.

This argument has substance due to past experience. It is true that once propelled out of the four walls of the home into active politics women do take time to come to terms with the new role of public figure and representative of the people. Many women in public life do in fact start out as the tools of husbands and brothers, who use them as proxies.

Perhaps the most important argument against this bill is that it does not reach the underlying reasons for women's inadequate participation in politics and their marginalisation within the political parties.

The problem is not just that women in the political arena are denied places on their party's lists. The fundamental problem is that given the nature of electoral politics today, the system itself creates insurmountable obstacles for women. Proposals for reservation for women must therefore be a part of a larger package of general reforms in electoral politics, to reduce the corruption and criminality of political life.

VIII. ALTERNATE SUGGESTIONS

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A cross section of the Indian people supporting the proposal to require every recognized political party to nominate women candidates for election in one-third of their constituencies including those reserved for the SCs and STs. Supporters of this model feel that the parties will then be free to choose their female candidates and constituencies depending on local political and social factors. It would also encourage credible and serious women candidates and would inculcate flexibility in the promotion of natural leadership. As women candidates have suffered from the manipulations of the politicians, and not at the hands of the voters, the percentage success of woman candidates would, as in past, be higher than that of male candidates. The success rate of women candidates in Lok Sabha elections has been uniformly higher than that of their male counterparts in every general election. While 32.53% of the women candidates of recognized parties have been elected to Lok Sabha since 1984, the success rate of male candidates is only 26.50%. This trend is seen in all general elections since 1984, except in 1989. Therefore, it is reasonable to assume that women will be elected in large numbers, and that, in fact, their presence in Lok Sabha will exceed one-third in many cases.

IX. RELATED ISSUES

A. Does the Bill address the reasons for low representation?

It remains to be seen whether the present bill in any way addresses the real reasons for the decline in number of women parliamentarians.

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B. Party tickets distribution system

The reasons that women do not get selected as party candidates would bear examination. Is the distribution on the basis of the ability of the party worker, her commitment towards the public issues or something else? Indira Gandhi, the third Prime Minister of the country and the leader of the congress party started the practice of nominations by the "High Command" to party posts, as well as distribution of party tickets for elections. Gradually, this pattern was adopted by all the other parties as well. In course of time the decision-making bodies became more and more remote from people's lives, due to over-centralization of power, the few women who were active in the party were further marginalised. Getting onto the party ticket depended on how close one was to the "High Command" rather than what work a person had done in her or his own constituency. This made it difficult for women political workers in villages, districts or cities, to qualify for any post in the party to enter electoral politics without seriously jeopardizing their reputations¹⁸¹. As a result, before each election, women wanting to be candidates would shuffle from one politician's house to another as they tried to get the nomination. Many potential women aspirants have complained that lack of money, muscle power and mafia connections have prevented them from receiving a place on the party ticket¹⁸².

A compulsory reservation or nomination of 33% women may help women to come forward without, yet, interfering with the influence of the "High Command" in allocating seats.

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C. Compulsions of Competitive Elections

The compulsions of competitive elections and the quest for power by the political parties in a multiparty democracy is also responsible for pushing women out of politics. The compulsions of the political parties due to narrow majorities, precarious coalitions and hung parliaments have made the question one of power rather than simply a question of fair representation. Women's issues and women's participation and representation are encouraged only within certain parameters and are constrained by the basic objectives and interests of the parties, either to capture power or to retain it. While women are mobilized to vote by all the parties in choosing prospective candidates¹⁸³, power considerations take over and winability becomes the sole criterion for selection. The question hinges on funds and connections, which women often lack. Mandatory participation may solve this problem to some extent as the party workers would have to make space for women.

D. Gap between announcements from public forums and practice

Though no political party openly takes an anti-woman stand, as that would ruin their chances of winning, party lists have had very few women candidates. Many parties allot some seats to women, only as a token, for their propaganda value, as indicative of an egalitarian attitude. But the very same male party leaders who compete with each other in announcing their support of special reservations for women have shown little willingness to include women in party decision-making, or even to help

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to create a conducive atmosphere for women's participation in their own organisations. In fact, women's marginalisation is even more pronounced in the day-to-day functioning of almost all political parties than in the Lok Sabha. Increases in the number of women may change the situation for the better. Any specific legislation to increase the representation of women would expose this double standard to the voters and encourage public pressure for change.

E. Family responsibilities

Indian society favors women's political participation, but does not easily relax restrictions on their roles in families. Thus, women generally cannot escape the rigors of their family responsibilities. Usually the entry of married women into politics is delayed till they reach their late 30s and the pressures of domestic responsibilities diminish. A cooperative husband is a must for politically active married women. Many women enter politics after becoming widows or divorcees. The number of unmarried women MPs is very high even in the residential welfare associations at the grass roots level, men are actively involved while women remain in the background due to family responsibilities and lack of time.

Most women who have developed an independent political base and are able to compete with men in electoral politics are single or widowed, as for example Uma Bharti of the BJP, Mamta Banerjee of the TMC, Jaya Lalitha of the AIDMK; Sonia Gandhi of Congress, Mayawati of BSP and Maneka Gandhi of the Janata Dal. These women are able to give their undivided attention to politics because there is no man to hold them back.

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The Bill does not address this issue at all. It is yet to be seen how political parties and the society in general will relax the stereotypical roles assigned to men and women to enable a woman to enter politics at an earlier stage in life.

F. Politics not a clean profession

Politics in independent India is completely dominated by men, so much so that even veteran women politicians feel bypassed and ignored. Acceptability for new entrants into politics depends on the extent of patronage offered by powerful men in the party. Women, with a few exceptions, have not been as willing as men to compromise with corruption and criminality. Though the Bill provides for increased representation for women, it does not touch the issue of the decriminalization of politics. The Bill's sponsors presumably hope that the entry of more women would have a positive effect on the current dismal scenario. Indians as a rule would love to believe that women enter politics not to compete with men in loot and plunder but with a view to cleanse and purify politics. However, women's entry into politics will change the political atmosphere for the better only if the overall character of politics also improves.

X. CONCLUSION

The increased representation of women in politics would positively affect the gender hierarchy throughout India. Inadequate representation of women in governance is a serious flaw of our democracy which needs correction. To make Indian government more meaningful

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for ordinary women, they will need to be able to take part in political deliberations without having to make heroic sacrifices.

The greater representation of women in politics requires special consideration, and cannot be left to the decisions of those that presently dominate our parties and government. The Bill seeking reservations for women does not address some fundamental issues and contains some problematic provisions. In the present situation the best alternative to secure adequate representation for women seems to be to adopt a model analogous to the French law making it mandatory for all the political parties to nominate women in their list of candidates. The nomination should be for no less than one third of the seats. This would encourage healthy competition and would help to ensure the increased representation of women in the Indian political process.

The Legal Process of Paritary Rights for Women and Men: From Formal Equality to Substantive Equality

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The institution of paritary rights for women in France provides a valuable and positive model for law reform throughout the world. From a practical standpoint, however, paritary rights may still not be enough. Paritary rights alone will not give most women a real opportunity to run for office, without significant changes in the actual inequalities of their daily lives.

I. MULTIFACETED CONCEPTION OF EQUALITY

As Eric Millard has observed of French paritary rights, the concept of equality can transcend the differences between universalists and differentialists, because it is ambiguous. As the most important principle of justice, equality is continually enriched with the development of society, and its connotation has been quite different during differing historical periods. Reviewing some of these different possible meanings will help to illuminate the significance of the French innovations.

A. Equality Before Law

From Formal Equality to Substantive Equality

Equality before the law emphasizes legal and political rights as a shield against privilege. For example, the French Revolution embraced the principle of Universalism in the 1789 *Declaration of the Rights of Man and of the Citizen*, which asserts the universal and inalienable rights of human beings without regard to other considerations such as gender (*Declaration of 1789* §1). At this stage in social development, destroying and abandoning the feudal privileges of the old society is the main aim of the Revolution. The counterparts of this social movement are the newly emerged bourgeois and the traditional three estates, with the former asserting the new values of democracy. These claims of equality satisfy the people at first, but in fact it is only a formal equality which does not secure actual equality of condition or full rights for women. Equality before the law is the hallmark of liberalism, which opened new hope for the oppressed, without fully realizing their aspirations.

B. Social Equality

Social equality emphasizes the social dignity of all citizens and forbids social discrimination or prejudice against particular groups, such as the disabled, youth, minorities, women and homosexuals. In the Revolution of 1789, despite women's active participation in the struggle, politicians did not view their rights as of primary concern. Article 6 of the 1789 Declaration says that "the law is the expression of the general will. All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employment, according to their ability, and without other distinction than that of their virtues and talents." This general declaration of

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formal equality doesn't mention the social equality of men and women. The relevant article doesn't emerge until the 1793 Declaration, whose third article could be interpreted as endorsing social equality.

C. Equality of Opportunity

Equality of opportunity requires that all citizens with equal virtues and talents should be provided with the equal chances in society. It emphasizes citizens' equal opportunity to develop their talent. Modern society should fully acknowledge every person's abilities, and make full use of them. But this sort of equality still makes no provision for those with lesser talents. The state still discriminates on the basis of virtues and talents (Declaration of 1789, §6). The French act requiring "equal access by women and men to elective offices and positions" provides opportunities to those, whether men or women who appeal to the electorate, so long as they meet the basic requirement of citizenship. The same thing occurs in law school admissions, since almost all United States law schools declare policies of non-discrimination, insisting that "all decisions with regard to students are based on equitable and equally applied standards of excellence and all programs involving students are administered without regard to race, religion, creed, color, national origin, sex, age, disability, veteran or disabled veteran status, marital status, sexual orientation, or citizenship status as those terms are used in the law." It is obvious that once the applicants satisfy the school's standards, they will be treated equally for admission.

D. Equality of Opportunity with Equality of Basic Resources

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Equality of opportunity can be significantly deepened by guaranteeing all citizens the same point of departure. For example, universities implement financial aid programs for those who are eligible for admission but might drop off for the financial reasons. Here, the financial aid program guarantees students from poor families the same real opportunities as other eligible students. French parity political rights serve the same purpose, by ensuring women's participation in elections. But the question remains whether parity rights are enough.

E. Equal Rights

Reviewing different conceptions of the multifaceted concept of equality reveals its roots in the anti-feudal movement led by the bourgeois. At this period, the aim of equality was to break the traditional pattern of the old society, to eliminate the disparity in treatment of different estates, and all feudal privileges. In the end, the aim of the revolution is confirmed by the legislation. "Men and women are equal before law" guaranteed a new formal equality, against the formal inequality under the old regime.

The development of democratic politics revealed that the general regulation that "men and women are equal before law" is too abstract and rigid to secure real equality in daily life. To make abstract equality more concrete it may be necessary to take gender and other differences into account. The law should give scientific and rational compensation or protection to those people who would otherwise fall behind. For example, the law offers special

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protections for women, children, the elderly, minority and the disabled. Such protection is reasonable, although discriminatory because making all citizens equal in reality requires special treatment for some. Therefore, the French act protecting women's paritary rights to be elected is a great advance.

II. PARITARY RIGHTS FOR WOMEN IN CHINA

Reviewing the history of human society, we can recognize that this conclusion is not only applicable to the French, but also to other countries in the world. China, for example, has had a very similar experience.

A. Before the Foundation of the People's Republic of China

In the Taiping Rebellion of 1851, an anti-feudal and anti-colonial movement led by peasantry after the Opium War, there was a constitutional text called the *New Creed of Capitalistic Politics*, which advocated equal rights between men and women. After that, the Nanjing Temporary Government, set up by the Xinhai Revolution of 1911, passed the Temporary Provisional Constitution of the Republic of China, which declared that "all the citizens in the Republic of China are equal before the law, without regard to race, estate and religion". It reflected the democratic ideas of the Chinese bourgeoisie, such as Dr. Sun Yat-Sen. In 1931, the Constitutional Compendium of the Soviet in China, drafted by Chinese Communist Party members such as Mao Zedong, confirmed that "all oppressed people are equal before the Soviet law, without regard to gender, race, belief and religion". This compendium was supplemented by a

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regulation “to liberate all women from oppression, empower them with rights of free marriage, and carry out all possible means to protect them.” In 1936, the Kuomintang Government in Nanjing passed the Constitution of Republic of China, which repeated similar regulations: “all the citizens, without distinctions of gender, religion, race, estate and party, are equal before the law”. It is clear that the revolution of this period, whether led by peasantry, the Chinese Communist Party or the Chinese bourgeoisie, sought to demolish feudal and colonial oppression, and to realize the formal equality for all the people in the country.

B. After the Foundation of the People’s Republic of China

After the People’s Republic of China was created, the Chinese government made a great effort to advance gender equality. Article 33 of the present Constitution declares that “all the citizens of the People’s Republic of China are equal before the law”. Article 34 states that “All the citizens of the People’s Republic of China upon reaching the age of 18, without regard to nation, race, gender, career, origin, religion, education, wealth and residency period, will have the right to vote and to be elected to all public positions.” Article 6 of the present Election Act says that “ Among the representatives in the National and the Regional People’s Congress, there should be a certain amount of women representatives, and the ratio should be increased gradually.” The Women’s Rights and Interests Protection Act of 1992, Article 2 holds that “women and men are equal in political, economic, cultural, social and family life.”

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Besides the acts listed above, the Chinese government has adopted other effective measures to ensure that women can participate in the legislature and make decisions equally with men. In 1995, the first General Design for the Development of Women in China was issued declaring the specific aim of bringing women into leadership positions at all levels. The Decree on Quota and Election Issues in the Ninth National People's Congress, made by the Fifth Session of the Eighth National People's Congress in March, 1997, requires that "among the representatives in the Ninth National People's Congress, the ratio of women should be higher than that of the Eighth National People's Congress". According to this Decree, in the Ninth National People's Congress of 1998, the women representatives reached 650, about 21.81% of the total; Among the Political Consultants in the Ninth National People's Congress, there were 341 women, accounting for 15.54% of the whole. After a series of efforts, the ratio of women in the leading groups is now greatly increased. There are 4 national women leaders, 18 women ministers in the 29 ministries and commissions of the State Affairs Administration and more than 400 women mayors among the 668 cities in the various provinces, autonomous regions and municipalities directly under the Central Government.

C. Current Questions

Women's interest in politics has been steadily increasing, but their participation has increased at a slower rate, particularly at the highest levels. Women find themselves as "vice" or "deputy" ministers, concentrated in certain ministries, such as education,

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science, culture and medicine. In the 668 cities around China, women mayors constitute only 1% of the total. Women leaders in counties are 15.2% of all the leaders at that level, they are 10.2% at the regional level, and 7.6% at the provincial level. There have not yet been any women leaders in the uppermost levels of the Central Government.

The presence (or absence) of women in the management circles of the national and social affairs, has become a symbol of a country's democracy. Thus, the Chinese government passed the General Design for the Development of Women in China 2001-2010, which declared the national aim of increasing the ration of women in the management circle, so that at least one woman is elected to each of the leading groups of the different governments. There must be women leaders in more than 50% of the leading groups among the ministries and departments of the national and regional organs, and the number of the positive and important positions for women should be increased. This Design is in accordance with Article 10 of the Women's Rights and Interests Protection Act, which says that "women and men have equal rights to vote and to be elected". Although the legal texts above provide women with the possibility of participating in political life equally with men, their terms of implementation are vague and ambiguous enough that enforcement will be difficult. The French model, by providing a specific ration, provides a useful example for China, which could then take positive steps to bring highly qualified women into politics.¹⁸⁴ In china, as in many other countries of the world, gender discrimination still takes place, and the social environment still erects many barriers for women. Setting

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rations for representation would help to assure that qualified women will be considered for leadership positions. According to the 2nd Data Report on Women's Social Status Poll 1,¹⁸⁵ the public would like to see more women in the higher positions. Presented with the statement that "among the important leaders in the government, at least 30% should be women", 74.7% of women and 75.5% of men support this proposal, which indicates that the gender ratio regulation is accepted by most people in China. Other countries have embraced similar policies. The Social Democratic Party in Norway first adopted the rule in 1980 that among the candidates recommended to the Parliament and Cabinet, women candidates should be no less than 40%. This idea was widely adopted by other parties, partly to appeal to the women voters, and the gender quota system came into being.

Economic development has brought many benefits to women, but not in every area of life. The market economy must be tempered with a certain amount of state regulation to minimize gender imbalances, in pursuit of substantive equality. From this point of view, the French act requiring equal numbers of men and women on candidate lists does not breach the equality principle. Instead, it makes this abstract principle more concrete. Formal equality alone would simply have perpetuated the existing situation.

III. OUTLOOK FOR FUTURE LEGISLATION

The long march from formal equality to substantive equality will take years of social change, and careful legislation. Paritary voting rights mark one important

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step on this journey. Formal equality offers a minimum standard, which should be construed according to the specific social context, in pursuit of the ultimate objective of democracy and freedom, which is eagerly sought by all the people in the world.

With the further development of society, inequality between men and women will be reduced, and perhaps the distinction between them will one day disappear altogether. When this happens, legislation will be able to disregard gender. The sexual composition of voting lists will become irrelevant, and virtue, talent and ability will be the sole criteria. Until then, parity rights to public office will help to secure equality for women.

The parity rights of men and women are a developing idea within the dynamic conception of equality. Their application will depend on the circumstances and historical evolution of each separate society, to achieve the universal equal rights of men and women everywhere.

Parity Rights for Women in France: Yes To The Final Result, But Not To The Underlying Principle

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I. INTRODUCTION

French politics is notorious for its male chauvinism - more than anywhere else in Western Europe male dominance has been the '*eminence grise*' which governs the political scene. Whereas 45% of Swedish MPs are women, French women (who attained the right to vote only in 1944) have just 8.7 %¹⁸⁶ of the national assembly's 577 seats - the lowest in any EU country and 52nd in the world, behind such countries as Tunisia and Senegal. Very soon, however, this state of affairs may be thoroughly transformed by the recently adopted law concerning 'equal access for women and men to elective offices and positions.'

That women play too limited a role in political life is a delicate but widely agreed upon subject in French politics. As appears from Eric Millard's most interesting article, the quest for reform of the status quo started as early as 1982 when an attempt was made to introduce affirmative action, that is, a quota system, for elections to

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the French town councils.¹⁸⁷ The idea failed, however, when the Constitutional Council declared quotas to be contrary to the French Constitution and its fundamental principle of universalism. The formal equality of the idea of universalism precludes references to gender in the constitutional text.

After the failure of the 1982 reform it took some years before the discussion on how to improve the political system revived. During the 1990's, the debate got a new impetus - under the catchphrase 'parity for women'.¹⁸⁸ *Le Monde* and a few years later, the weekly magazine *L'Express* provided a forum for adherents and opponents of a new quota system, which would require a constitutional reform. The vehement public debate eventually reached a point of 'ideological terrorism'¹⁸⁹ when those who were not in favour of the parity system were considered as class enemies, either women or men.

II. VIEWS ON REPRESENTATION

The dividing lines in the discussion on parity cut straight through party politics. The solution that was eventually adopted had its most prominent advocate in Sylviane Agacinski, philosopher and wife of the prime minister, Lionel Jospin. Earlier proponents pointed to the republican heritage as the underlying reason that French politics has been dominated by an aristocratic élite - a small group of men, made extremely homogeneous by their common education at the '*grandes écoles*'. To attain substantial equality of men and women in all echelons and sectors of society, politics should set an example. Agacinski went even further. In her 'new feminism', the recognition of the sexual duality as the

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only universal difference in mankind is regarded as a new achievement. In order to do justice to this achievement, Agacinski believes the law should give women the chance to escape today's false ideology of equality, which disregards women's true interests.

Five days before the constitutional amendment was formally presented to the National Assembly, a group of women '*respectable et respectées*' (among whom was the well-known philosopher Elisabeth Badinter) published a declaration against parity. As they insisted, it was not the principle of *parity itself* they denounced, but rather *the means to attain the result*. Making parity a legal principle, or "right" would violate a fundamental principle of the republic, namely the universalism of representation: a deputy is supposed to represent every citizen, regardless of color, gender, age and social background. The moment one decides to isolate one of these criteria, the system is open to all particularities, and to every particular claim.

But there is more to be said against parity. According to the signatories of the declaration, parity violates the first principle of every emancipation, which should liberate individuals from their natural differences.

Finally, the opponents argued that by elevating the 'feminine difference' to an absolute category, the principle of solidarity between victims of discrimination is abandoned. While distinguishing between levels of exclusion, one disregards the economic, social and racial inequalities which make so many women suffer.¹⁹⁰ According to Badinter, parity really means a regression. It means introducing the right to difference. 'The

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greatness of the concept of humanity is that it is common to all of us, despite our differences.¹⁹¹

Viewed from a grander perspective, the discussion of 'parity for women' seems to boil down to the view that people have about the concept of 'representation' - the making present, in some non-literal sense, of some entity, whether by personal or by abstract representation. In what sense and under what circumstances, does one entity 'stand for' another, and on what grounds can one say that representation is or is not taking place?¹⁹²

Two lines of thought can be distinguished. On the one hand, there is the 'modern', that is, the Enlightenment view, as expressed in the principle of universalism in the French Constitution. The formal equality of universalism prevents constitutional references to gender, race, religion and national origin, or to other petty differences. In this sense, the National Assembly is supposed to represent '*l'homme*', that is, abstract individuals and not collectivities. A classic statement of this view on representation is that of Edmund Burke, who, in a speech to the electors of Bristol, claimed that Parliament was not a 'congress of ambassadors from different local interests ...but... a deliberative assembly of one nation, with one interest, that of the whole.' In Burke's view, every member of Parliament was a representative of the nation as a whole, not a vehicle for the opinions of their constituents.¹⁹³

On the other hand, there is what we might label the postmodern or pluralist view. In this perspective, a representative stands for a plurality of interests, groups, collectivities. This perspective has now triumphed in

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France, although the pluralism of the law on equal access is somewhat limited as it is based on the supposed duality of the human race. In the year 2000 for the first time in history, 'l'homme' really does not refer to "mankind" anymore, but to men and women alike.

Now the question is whether this change of paradigm should really be considered as progress. Does France set an example for other constitutional democracies? The reader will not be surprised that I (being a woman myself) was at first inclined to support the change. On deeper reflection, however, I think that we should not follow the French in this respect. For two reasons: (1) because the quota system is imposed on political parties - a special case in kind; (2) because of the consequences of the ideal of republicanism.

In my view, Badinter and her colleagues are right. But their position would have been strengthened by recalling the distinctive function of political parties in representative democracies and the 'first principles' of republicanism. Whether or not 'parity' should be elevated to a constitutional principle must be decided by elections, and not be imposed by the incumbent government. I'll try to explain why.

III. AFFIRMATIVE ACTION; THREE DIFFERENT POSITIONS

As a matter of fact, it is quite remarkable that France has introduced this system of parity for women at a

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moment when in most Western countries and more specifically in the United States, the pioneer of affirmative action-programs, preferential treatment has come under severe criticism. Affirmative action, the practice of discriminating in favour of certain groups of people in society who are historically in backward positions, meets two standard objections. As regards hiring programs for minorities and women, it is frequently said that they are unfair to more qualified white males who are passed over because of their sex or race. Secondly, it is often assumed that these programs disadvantage males and whites who are not themselves responsible for the harm historically done to women and blacks.¹⁹⁴

It needs no argument that the law in question regarding parity for women is a different matter. But in order to find out how different it really is, it is necessary to distinguish between three positions regarding affirmative action (or, as it is sometimes labelled 'reverse discrimination').¹⁹⁵

First, there is the situation when the government obliges itself to hire as many women as men on the condition that they are equally qualified for the job. In itself, this seems a sympathetic and noble ambition, given the arguments in favour of reverse discrimination - justice requires that we compensate for the results of past discrimination¹⁹⁶; affirmative action is the only way to overcome current sexism and racism; and women and minorities need role models in all walks of life.¹⁹⁷

The situation of self-imposed government restrictions should be distinguished from the one in which the private sector is being confronted with imposed programs and measures regarding affirmative action. A major argument

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against this is that these programs deprive employers of the right to hire the most competent person for the job.

According to the current French law (after the constitutional reform), it is neither the government itself, nor the private sector which is confronted with an affirmative action programme, but political parties. Since the amendment of the Constitution of the Vth French Republic in 1999, Article 4 requires that: 'Political parties shall contribute to the implementation of the principle [of parity] as provided by statute.' The law concerning equal access for women and men to elective offices and positions is a means to implement parity.

Political parties: a special case

What makes this case of affirmative action, or rather this introduction of a quota system so fundamentally different? The answer is, because it concerns political parties. A political party is different from all other organisations in that it is an organised group which nominates candidates for a representative institution. Political parties stand between the state and the people. They serve as mechanisms which link the formal structure of government with the various elements of civil society; with individual citizens, and with the many types of economic, cultural, religious and other groups which they constitute.¹⁹⁸ Needless to say, in so doing, political parties are integral to the operation of modern political systems.

To be more specific, as far as representative democracies are concerned (and parliamentary democracies in particular), political parties play an important role in (1) the selection of candidates for

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parliament and for other parts of the political elite (i.e. the government). (2) Political parties represent the electorate. Without political parties, representative democracy cannot exist. (3) Political parties serve as agents of interest aggregation. They transform a multitude of specific demands into more manageable packages of proposals. Parties select, reduce and combine interests. They act as a filter between society and state, deciding which demands to allow through their net. And finally, (4) political parties help to determine government policy. A political party is not a means in itself; it is a means to the realization of a specific set of values and policies.¹⁹⁹

Given their role as mediators in a political system, and given the basic functions of political parties in the recruitment of the political elite and in determining government policy, it is obvious that parties require a maximum freedom from state interference. Indirectly, this principle has been laid down in the rights to freedom of association with others (Article 22 ICCPR), and the right to take part in the conduct of public affairs, directly or through freely chosen representatives (Article 25 ICCPR).

If we accept these propositions, the present French constitutional amendment and the law prescribing equal access for women and men to elective offices and positions becomes quite problematic. Despite its noble aims, the law stands revealed as an infringement on the freedom of political parties.²⁰⁰ Such infringements are unacceptable, as was explicitly recognized in Article 4 of the French Constitution. Article 4 says that: 'Political parties and groups shall contribute to the exercise of suffrage. They shall be formed and carry on their activities freely. They must respect the principles of national

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sovereignty and democracy.’ Parity, as it is now being implemented, cannot be reconciled with Article 4. Strange as it may seem, the discussion in France seems not to have touched upon this matter.

After the law had been adopted, one of the participants in the debate remarked that from now on: ‘There will be no more arguing about women’s role in politics; the law has simply imposed legitimacy.’ Now that is of course the key question: legal it is (though even that may be doubted), but is it legitimate?

IV. REPUBLICANISM

In order to answer that question it is necessary to have a closer look at the ideal of republicanism. Underlying the French constitution - and for that matter, most constitutions of contemporary democracies - is the notion of republicanism.²⁰¹ Much study has been made to the essence of this notion, which I will use here gratefully.²⁰²

Republican government means legislation for the ‘*res publica*’ or common good of the people - through popular sovereignty, constrained by the rule of law. In order to promote the common good and to find out what really is the ‘common good’ (parity for women, for instance), a few matters are essential. First and foremost, it is essential that the contest of different views on the public interest be as open as possible; legislation should be the product of broad and open-ended public deliberation. In other words, as many different views as possible must be under scrutiny in the public discussion. Every viewpoint, even dissident ones, should be welcomed to stimulate the

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discussion towards the best outcome. After all, it is in the elections that the clash of opinions takes place.

French government wrongly decided to place 'parity' outside the public debate. By elevating it to a constitutional principle, they determined for many generations

Now what does this all mean for the present discussion? Should the constitutional amendment on parity for women be considered legitimate from this point of view? In my opinion, by adopting the amendment the French government wrongly decided to place 'parity' outside the public debate. By elevating it to a constitutional principle, they determined for many generations to come, to withdraw this subject from majoritarian decision-making, and to place it outside 'normal politics'. A far better solution would have been to consult the French people by way of a referendum, as provided for in the Constitution itself.²⁰³ This would have perfected the French republic, without violating its fundamental republican ideals.

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