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Thomas Giegerich (ed.)

Gender Equality and Gender Quotas for Political Participation in Europe: Comparative, International and Supranational Perspectives



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Preface

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How to Effectuate Gender Equality in Political Decision-Making: An introduction

Thomas Giegerich

In April, the Europa-Institut – International Law School of the Law Faculty of Saarland University hosted an online conference entitled “New Quality in Education for Gender Equality”. It took place within the framework of the “Law and Gender – LAWGEM” project, an ERASMUS+ Strategic Partnership funded by the European Union. The objective of this project is to develop a master programme on law and gender. It is implemented by an international consortium of Belgrade University (coordination), the University of Cadiz, LUMSA University in Palermo, Örebro University and Saarland University. At the same time, the conference was one of the events celebrating the 70th anniversary of the Europa-Institut which was founded in 1951 and has since then educated many thousands of young people from all four corners of the earth who have enrolled in its LL.M. programme in European and international law.

An important part of our conference was a panel discussion on gender quotas for political participation in Europe. The participants have agreed to submit brief summaries of their positions which will be successively published online and ultimately collected in an expert paper. Philippe Cossalter explains the legal situation in France where a mandatory gender quota for electoral lists has been in force for two decades. Maria Jansson delineates the gender quotas effectively used in Sweden on a voluntary basis. In conclusion, I will take a look at the German situation within the framework of supranational and international precepts regarding gender equality.

More than 25 years ago, the Beijing Declaration and Platform for Action of the Fourth World Conference on Women was adopted by 189 Member States of the UN.¹ There the importance of gender equality in political participation was explained thus: “Equality in political decision-making performs a leverage function without which it is highly unlikely that a real integration of the equality dimension in government policy-making is feasible. In this respect, women’s equal participation in political life plays a pivotal role in the general process of the advancement of women. Women’s equal participation in decision-making is not only a demand for simple justice or democracy but can also be seen as a necessary condition for women’s interests to be taken into account. Without the active participation of women and the incorporation of women’s

¹ Available at <https://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf> (accessed: 03.05.2021).

perspective at all levels of decision-making, the goals of equality, development and peace cannot be achieved.”² This statement is aptly borne out by experience.

Already at Beijing in 1995, the participating governments committed themselves to “establishing the goal of gender balance in governmental bodies ... including, inter alia, ... implementing measures to substantially increase the number of women with a view to achieving equal representation of women and men, if necessary through positive action, in all governmental ... positions; ... [t]ake measures, including, where appropriate, in electoral systems that encourage political parties to integrate women in elective and non-elective public positions in the same proportion and at the same levels as men ...”³

We have obviously not come far enough in the last quarter of a century. The following finding in the World Economic Forum’s Global Gender Gap Report 2021⁴ aptly describes the problem we are still facing: “The gender gap in Political Empowerment remains the largest of the four gaps tracked,⁵ with only 22% closed to date, having further widened since the 2020 edition of the report by 2.4 percentage points. Across the 156 countries covered by the index, women represent only 26.1% of some 35,500 parliament seats and just 22.6% of over 3,400 ministers worldwide. In 81 countries, there has never been a woman head of state, as of 15th January 2021. At the current rate of progress, the World Economic Forum estimates that it will take 145.5 years to attain gender parity in politics. Widening gender gaps in Political Participation have been driven by negative trends in some large countries which have counterbalanced progress in another 98 smaller countries. Globally, since the previous edition of the report, there are more women in parliaments, and two countries have elected their first female prime minister (Togo in 2020 and Belgium in 2019).”⁶

The gender gap denotes the gender-related difference between theory and practice: For decades, equal rights of women and men have been clearly established in national, supranational and international law,⁷ but the inequality of women in fact still persists worldwide in many important areas, including political participation, and seems poised to stay for further generations, unless developments are accelerated. Although the reasons for the cleavage

² Id., para. 181.

³ Id., para. 190 (a) and (b).

⁴ March 2021, available at http://www3.weforum.org/docs/WEF_GGGR_2021.pdf (accessed: 03.05.2021).

⁵ The other three gender gaps are in economic participation and opportunity, educational attainment as well as health and survival.

⁶ See note 1, p. 5.

⁷ See, e.g., Art. 3 (2) of the German Constitution (Basic Law); Arts. 1 (3), 55 lit. c, 56 of the UN Charter; Art. 2, 7 of the Universal Declaration of Human Rights; Arts. 1 – 16 of the Convention on the Elimination of All Forms of Discrimination against Women; Art. 14 of the European Convention on Human Rights; Arts. 20, 21, 23 of the Charter of Fundamental Rights of the EU.

between de jure equality and de facto inequality of women are well known, they have not yet been properly acted upon and therefore need to be recalled:

“There are many factors which lead to women’s under-representation in politics. The most important factor is probably the decade-old backlash against women’s rights. In Europe, societies remain characterised by attitudes, customs and behaviour which disempower women in public life, discriminate against them, and hold them hostage to prescribed role-models and stereotypes according to which women are “not suited” to decision making and politics. Unsocial meeting hours and a lack of child-care facilities for politicians can further deter women candidates – politics is tailored to fit men who do not bear even a minimum share of family responsibilities and who rely on their wives to keep the household running.”⁸ Another factor is the male networks which still dominate many bodies and organisations, including political parties, and tend to perpetuate themselves.

For those who consider 145.5 years as too long to achieve effective gender equality in the political arena, the introduction of mandatory quotas in favour of women may be the instrument of choice to accelerate developments. This raises a number of questions such as whether gender quotas for political participation are permissible or even required from a constitutional, supranational and international perspective and – if permissible – whether they are appropriate and advisable: If the adequate representation of women in parliament is a legitimate objective, why not the adequate representation of LGBTI persons, persons with disabilities, young voters, religious and national minorities, persons with a migration background? All these groups have long been victims of discrimination including with regard to political representation. That slippery slope argument can of course be countered by reference to the fact that an express constitutional mandate such as in Art. 3 (2) sentence 2 of the German Constitution (Basic Law) to “promote the actual implementation of equal rights for women and men”⁹ does not exist for any of the other disadvantaged groups.¹⁰ The legitimate question whether we would need similar constitutional affirmative action mandates in their favour is beyond the scope of this paper. Suffice it to recall that of all those disadvantaged groups only women make up more than half of the population.

Finally, one needs to remember that

⁸ Parliamentary Assembly of the Council of Europe (PACE), Resolution 1706 (2010) of 27 January 2010, para. 3 (available at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17809&lang=en>, accessed 03.05.2021).

⁹ English translation available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0026 (accessed: 03.05.2021). See also the more specific Art. 1 (2) of the French Constitution (“La loi favorise l’égal accès des femmes et des hommes aux mandats électoraux et fonctions électives ...”) and further the contribution by Philippe Cossalter below p. 5.

¹⁰ See, e.g., Hahn, Robert, Practicing Parity, Verfassungsblog of 7 July 2020 (available at <https://verfassungsblog.de/practicing-parity/>, accessed 03.05.2021).

“... changing the electoral system is not enough: to be really effective, this change must be accompanied by measures such as gender-sensitive civic education and the elimination of gender stereotypes and “built-in” bias against women candidates, in particular within political parties, but also within the media. In some Council of Europe member states, constitutions also need to be changed in order to accompany gender equality and anti-discrimination provisions with the necessary exception allowing positive discrimination measures for the under-represented sex, without them being considered a violation of the equality principle.”¹¹

The following contributions which have already been posted on this Blog are republished in unchanged version in this Saar Expert Paper.

¹¹ PACE (note 8), para. 5.

Gender quotas for political participation in Europe : the case of France

Philippe Cossalter

According to article 1 paragraph 1 of the French Constitution of 1958 : "France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs."

The indivisible character of the Republic, which is the first of its peculiarities, finds multiple expressions. It implies that no part of the French population can be distinguished within a uniform whole. There is no Corsican or Breton people within it. French has been the sole language of the administration since 1539. And of course, no distinction can be made between men and women.

This was in any case the position of French constitutional law at the turn of the millennium and it has largely evolved since then. Let me explain in ten minutes how.

A. The principle of equality

So let us start with the principle of equality in French law. It is guaranteed by numerous constitutional provisions.

It is first guaranteed by the Declaration of the Rights of Man and of the Citizen and as such is one of the main achievements of the French Revolution. Article 1 of the Declaration contains the general expression of the principle of equality: "Men are born and remain free and equal in rights. Social distinctions can only be based on the common good".

The principle of equality appears in many other provisions. This is firstly the case in the Preamble to the 1946 Constitution, paragraph 1 of which reiterates the general principle of equality by stating that "each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights ". Paragraph 3 of the same Preamble guarantees equality between women and men.

B. The meanings of the principle of equality

Let me explain the meaning of the principle of equality in French law.

Although the principle of equality is appearing in various constitutional provisions, its definition is in principle unequivocal. In French law, the principle of equality prohibits treating identical situations differently, but it does not prevent different situations from being treated differently. The principle of equality obviously does not mean that the legislator or the regulatory authority must treat every situation in the same way. Differences in treatment may, however, only be based on criteria that are related to the purpose of the norm. The Constitutional Council sometimes specifies that the criteria must be 'an objective and rational criteria with regard to the aim pursued by the legislator'.

Differences in treatment for the access to health services may, for instance, be based on differences in income¹².

C. The prohibition of treating certain situations differently

However, some situations, even if they are objectively different, cannot under any circumstances justify a difference in treatment. These are mainly those referred to in Article 1, sentences 1, 2 and 3 of the Constitution: "France is an indivisible, secular, democratic and social Republic. It ensures the equality before the law of all citizens without distinction of origin, race or religion. It respects all beliefs [...]".

Neither ethnicity nor religion can be the basis for any difference between individuals.

The same was true of gender, before the Constitution was amended to provide that the law should promote equal access of women and men to elected office. Prior to this, the Constitutional Council was seized on several occasions of Statutes providing for Women's quotas in some elections. The first decision on this issue, "Quotas par sexe", dates from 18 November 1982¹³. The legislator had provided that lists of candidates for municipal elections could not contain more than 75% of persons of the same gender. Referring to Article 3 of the Constitution and Article 6 of the Declaration of the Rights of Man and of the Citizen, the Constitutional Council considered that, according to the combination of these texts "the status of citizen grants the right to vote and to stand for election under identical conditions to all those who are not excluded from it for reasons of age, incapacity or nationality, or for a reason tending to preserve the liberty of the voter or the independence of the elected representative; ... these

¹² CE, Decision n° 57435 of 20 November 1964, *Ville de Nanterre*, rec. 562.

¹³ CC, Decision n° 82-146 DC of 18 November 1982, *Loi modifiant le code électoral et le code des communes et relative à l'élection des conseillers municipaux et aux conditions d'inscription des Français établis hors de France sur les listes électorales* ("Quotas par sexe").

constitutional principles are opposed to any division of voters or eligible persons into categories", in particular because of their gender.

In a decision of 14 January 1999, known as "Quotas par sexe II" (Gender Quotas II), the Constitutional Council censured a Statute imposing parity between men and women on the lists of candidates for a Regional election¹⁴.

In order to make positive gender discrimination possible, an amendment to the Constitution was necessary. A constitutional law of 8 July 1999 introduced a paragraph 5 to Article 3 of the Constitution, according to which "The law shall promote equal access of women and men to electoral mandates and elective functions". Paragraph 5 of Article 3 was deleted and replaced by Article 1 paragraph 2 of the Constitution¹⁵, which now provides that "The law shall promote equal access of women and men to electoral mandates and elective functions, as well as to professional and social responsibilities". The new wording adds equal access to professional and social responsibilities to political functions.

It was on the basis of the new provisions that the Constitutional Council recognised, in its 2000 decision 'Quotas par sexe III' (Gender Quotas III), the constitutionality of a law designed to promote women's access to elective office by introducing gender-balanced political lists for municipal elections¹⁶.

D. Current legislation on gender equality in the political field

There is now a plethora of legislation concerning gender equality in the political sphere, including nine laws, some of which have been amended several times¹⁷.

¹⁴ CC, Decision n° 98-407 DC of 14 January 1999, *Loi relative au mode d'élection des conseillers régionaux et des conseillers à l'Assemblée de Corse et au fonctionnement des Conseils régionaux* ("Quotas par sexe II").

¹⁵ By virtue of Article 1 of the Constitutional Act n° 2008-724 of 23 July 2008 on the modernisation of the institutions of the Fifth Republic.

¹⁶ CC, Decision n° 2000-429 DC of 30 May 2000, *Loi tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives* ("Quotas by sex III").

¹⁷ - Law n° 2000-493 of 6 June 2000 to promote equal access of women and men to electoral mandates and elective functions;

- Act n° 2000-641 of 10 July 2000 on the election of senators, which applies the principle of parity to the election of senators by proportional list voting in departments where three or more senators are elected. This law was amended by Law n° 2003-697 of 30 July 2003 on the reform of the election of senators, which limited the application of the proportional list system to departments where more than four senators are elected;

- Act n° 2003-327 of 11 April 2003 on the election of regional councillors and representatives to the European Parliament and on public aid to political parties;

- Law n° 2003-1201 of 18 December 2003 relating to parity between men and women on the lists of candidates for the election of members of the Assembly of Corsica;

- Act n° 2007-128 of 31 January 2007 to promote equal access of women and men to electoral mandates and elective functions;

These provisions can be distinguished according to whether they concern list elections, or first-past-the-post voting.

For list elections, the implementation of parity is easy.

Law No. 2007-128 of 31 January 2007 on promoting equal access of women and men to electoral mandates and elective functions, which has been amended several times, imposes an obligation of strict alternation between women and men in the composition of the lists for the election of the executive of regions and municipalities of 1,000 inhabitants or more.

Imposing parity in single-member elections is more difficult. The election of members of parliament is traditionally carried out by a two-round first-past-the-post system, and not by a list ballot. It is not possible to impose parity in this case. However, the law of 6 June 2000 provides for financial sanctions for political parties that do not respect parity of candidatures at national level.

But this law has had limited effect due to two factors. Firstly, it is possible to run female candidates in difficult or unwinnable electoral districts and men in more winnable electoral districts. Secondly, candidates are not always affiliated to a party for an election.

However, the feminisation of the political staff is clearly improving.

According to statistics from the High Council for Equality between Women and Men, a body reporting to the Prime Minister, as of 1 January 2019, 51.5% of the 66.9 million people living in France are women. Women represent 52.3% of the voters registered on the electoral roll. Since the last legislative elections, the National Assembly has 224 women out of 577, or 38.7%. The proportion was only 26.9% in 2012.

The Senate is composed of 110 female senators out of 348, or 31.6%, compared to 25% in 2014 and 22.1% in 2011.

- Act n° 2008-175 of 26 February 2008 facilitating equal access for women and men to the office of general councillor;
- Act n° 2013-403 of 17 May 2013 on the election of departmental councillors, municipal councillors and community delegates, and modifying the electoral calendar;
- Law n° 2013-702 of 2 August 2013 on the election of senators;
- Law n° 2014-873 of 4 August 2014 for real equality between women and men, concerning legislative elections.

In conclusion, a word can be said about parity in government. No text imposes parity within the government. But for the past twenty years, the search for a form of parity has marked the composition of governments. Some sovereign ministries are held by women, such as the Ministry of Defence. But this evolution is still imperfect.

There has only been one woman prime minister in France: Edith Cresson in 1991. She had to resign after 6 months. With this exception, the last woman to hold a political office of importance was Marie de Medici, mother of King Louis XIII, who was ousted by her son in 1617. The French monarchical tradition, which has strongly marked the figure of the President of the Republic, was based on the principle of male primogeniture. Apart from the regencies of Catherine and Marie de Médici 400 and 500 years ago, no woman has ever ruled France, whose political tradition dates back to the 5th century.

As we know, things could change in the next presidential elections, where Marine Le Pen is not without a chance to win. This is the paradox of the situation, where the victory of a woman would also mark the return of the far right to power.

Gender quotas and women's political agency – Sweden

Maria Jansson

A. Introduction

In 1921 Swedish women could for the first-time vote on the same conditions as men. The long struggle for women's suffrage in Sweden, which was the last Nordic country to grant women the right to vote, include activism, petitions and demonstrations. However, the story also displays strong resistance and arguments against women's vote which resemble the rhetoric in many other European countries.¹⁸

In the 1921 elections, one woman was also elected to the parliament's first chamber. However, it took until 1947 before the first woman took a seat in the cabinet. Research about the pioneer women in the cabinet reveals how they had to struggle against sexism and male conspiracies to get rid of them.¹⁹ This very brief history tells us that women's presence in political assemblies does not come automatically. Suffrage did not result in hordes of women entering parliament and taking seats in the cabinet. It also tells us that women's presence is not enough, the conditions under which women are present are equally important. Do women have access to the prestigious and powerful positions on equal conditions as men? Can women act politically from the platforms they are elected to on the same conditions as men? These are questions we need to answer in order to understand women's political agency beyond numbers.

B. Quotas in Sweden

The discussion about political quotas to increase women's representation in the 1980s as the number of women in parliament did not increase. In 1987 a public committee report on the topic was published. The debate about gender quotas was occasionally intense, and the arguments against quotas were similar to the ones heard against women's franchise. Quotas will result in that not the one most suited and merited will be elected, is perhaps the most common argument.²⁰

However, in the 1991 elections for parliament, there was a decrease in women elected for parliament. As a reaction to this a "secret feminist network" called the "Supportstockings" (Sw: Stödstrumporna) was formed. The name alluded to the Danish organization Red stockings, which was a common way of speaking of second-wave organized women in Sweden in the

¹⁸ *Rönnbäck, Josefine*, Politikens genusgränser: Den kvinnliga rösträttsrörelsen och kampen för kvinors politiska medborgarskap, 1902-1921, 2004.

¹⁹ *Hirdman, Yvonne*, Det tänkande hjärtat: boken om Alva Myrdal, 2021; *Karlsson, Gunnel*, En kvinna i regeringen Statsrådet Ulla Lindströms liv och arbete, 2020.

²⁰ see for an overview of arguments against quotas: *Dahlerup, Drude/Freidenvall, Lenita*, Judging gender quotas: predictions and results, Policy & Politics 38(3)/2010.

1970s. When two members of the Support Stockings – journalist Maria-Pia Bøethius and literature professor and former women’s activist Ebba Witt-Brattström – were interviewed on a popular TV-show they revealed the network and threatened to form a women’s party, unless the already existing political parties would see to it that more women were elected. This pushed several political parties to introduce a voluntary quota on their lists for parliament in the 1994 elections.²¹

There are many different forms of quotas used in the world – some of them are legislated and mandatory, others are legislated but voluntary, and finally a third category, such as the Swedish quotas which are completely voluntary and independent of legislation and used only if the parties have decided internally to do so. Further, quotas differ in how they are designed, which in turn depends on the design of the voting system (e.g. individual votes, or party lists etc.).²²

In Sweden, votes are cast on party lists. This means that the political parties are gatekeepers when it comes to elections. To be elected you need to be nominated as a candidate on the party’s list. This means that the nomination process is in the hands of parties. Research has shown that ideas about merits and competence in the parties rest on male norms, and men’s networks have functioned to put men on the lists.²³ In that respect, the voluntary quotas adopted by most parties has been key to increase the number of women. Parties to the right, such as the Neoliberal/Conservative party called Moderaterna, the conservative Christian Democrats and the right-wing populist, xenophobic Sweden Democrats have not adopted quotas.

In the elections after the Support Stockings’ threat, the share of women MPs has been over 40 percent in the Swedish parliament. At the moment, there are 46 percent women in the Riksdag. In local parliaments (municipalities) the share of women is slightly lower – 43 percent. Looking beyond numbers there is still a gender division in politics, both horizontally and vertically. Women are more active in social issues, health care and culture, while there are more

²¹ *Eduards, Maud*, Förbjuden handling: om kvinnors organsiering och feministisk teori, 1. Aufl. 2002; *Törnqvist, Maria*, Könspolitik på gränsen: debatterna om varannan damernas och Thamprofessorerna, 2006; *Thomsson, Ulrika Myrvang*, Systerskapets strategier. Om kvinnopolitiska praktiker i svensk demokrati, 2015.

²² *Dahlerup, Drude/Freidenvall, Lenita*, Quotas as a ‘fast track’ to equal representation for women: Why Scandinavia is no longer the model, *International feminist journal of politics* 7(1)/2005; see also Gender Quotas Database for information on quotas around the globe.

²³ *Freidenvall, Lenita*, Vägen till Varannan damernas: om kvinnorepresentation, kvotering och kandidaturval i svensk politik 1970-2002, 2006.

men when it comes to infrastructure, defense, and trade.²⁴ There is also a difference when it comes to top positions in municipalities as well as to chairs in parliamentary committees.²⁵

C. Women's conditions as elected

Beside horizontal and vertical gender division the conditions for women and men in politics differ. A recent survey showed that women, especially younger women and women of foreign descent are more likely to be exposed to threats and harassments connected to their political positions.²⁶ Further the #metoo movement revealed the extent of sexual harassment which is prevalent also in sphere of political parties and political bodies.²⁷

In addition, research by professors Hanna Bäck and Marc Debus²⁸ has studied seven European parliaments and found that women speak less than men and especially when the topic of the debate is coded as masculine. They also found that within party groups female members of parliament take the floor less often when they are members of parties with many female representatives.

I think that these findings of continuous gender separation both horizontally and vertically and the division of speaking time indicates that gender equality is more than counting numbers, women's presence must be complemented with analyzing the conditions for women's political agency once elected, if one wants to understand the dynamics of gender in politics.

²⁴ Säll, Line, Kvinnor har det tuffare än män inom politiken, Jämställdhetsmyndigheten 2019:7, <https://www.jamstalldhetsmyndigheten.se/files/2019/07/kvinnor-har-dettuffareanmaninompolitiken2019-10-24.pdf>, (29.04.2021).

²⁵ Säll, Line, Kvinnor har det tuffare än män inom politiken, Jämställdhetsmyndigheten 2019:7, <https://www.jamstalldhetsmyndigheten.se/files/2019/07/kvinnor-har-det-tuffare-an-man-inom-politiken2019-10-24.pdf>, (29.04.2021).

²⁶ Erikson, Josefina/Josefsson, Cecilia, Jämställdhet i riksdagen – en enkätstudie. Sveriges riksdag, 2017.

²⁷ Regné, Åsa, et.al., "I maktens korridorer ser vi oss över axeln", Aftonbladet, 18. November 2017.

²⁸ Bäck, Hanna/Debus, Marc, When do women speak? A comparative analysis of the role of gender in legislative debates, *Political Studies*, 67(3)/2019; Bäck, Hanna/Baumann, Markus/Debus, Marc/Müller, Jochen, The unequal distribution of speaking time in parliamentary-party groups, *Legislative Studies Quarterly* 44(1)/2019.

Women's Right to Equal Political Participation and Gender Parity in Parliaments – Is Germany Falling Behind?

Thomas Giegerich

A. Unsuccessful Enactment of Gender Parity Laws at Constituent State Level

In 1918, Germany introduced women's suffrage, earlier than many of its European neighbours.²⁹ More than a hundred years later, the ratio of women parliamentarians in Germany is comparatively low, both on the federal and constituent state (*Länder*) levels. In order to increase the number of women parliamentarians, two *Länder* enacted gender parity laws in 2019, requiring political parties to include 50 per cent women in their electoral lists, interchangeably with men (zipper-mode gender parity). In both *Länder*, the parties' electoral lists are rigid in the sense that voters have to accept them as they are without possibility of cumulation of votes or cross-voting (panachage). If parties do not place enough women in promising positions on their lists, women will thus necessarily be underrepresented in the elected state parliament.³⁰

On the application of right-wing parties and parliamentarians, the pertinent laws of Thuringia and Brandenburg were struck down by the Thuringian and Brandenburg State Constitutional Courts.³¹ These courts found violations of the respective state constitutions, in particular of the constitutional rights of political parties (freedom to decide about composition of election lists) as well as voters (freedom to vote without state interference; eligibility without gender discrimination). The two courts further determined that the gender parity laws could not be justified – neither by the constitutional principle of democracy nor by the State constitutional mandate requiring the legislature to ensure the equality of women and men in public life by effective measures. With regard to the principle of democracy, the courts explained that German constitutional law did not include the mirror-image concept to the effect that parliaments had to reflect a reduced-size image of the actual composition of civil society. Rather, each and every

²⁹ See the *Verordnung über die Wahlen zur verfassunggebenden deutschen Nationalversammlung* (Regulation on the Election of the Constituent German Assembly) of 30 November 1918 (*Reichsgesetzblatt* p. 1345) that was enacted by the revolutionary Council of People's Deputies.

³⁰ See *Hahn*, Practicing Parity, available at: <https://verfassungsblog.de/practicing-parity/>.

³¹ Thuringian Constitutional Court, VerFGH 2/20, judgment of 15 July 2020, available at [http://www.thverfgh.thueringen.de/webthfj/webthfj.nsf/8104B54FE2DCDADDC12585A600366BF3/\\$File/20-00002-U-A.pdf?OpenElement](http://www.thverfgh.thueringen.de/webthfj/webthfj.nsf/8104B54FE2DCDADDC12585A600366BF3/$File/20-00002-U-A.pdf?OpenElement) (in German); Brandenburg Constitutional Court, VfGBbg 9/19 and VfGBbg 55/19, judgments of 23 October 2020, available at: https://verfassungsgericht.brandenburg.de/verfgbbg/de/entscheidungen/entscheidungssuche/detail-entscheidung/~23-10-2020-vfgbbg-919_4041 and https://verfassungsgericht.brandenburg.de/verfgbbg/de/entscheidungen/entscheidungssuche/detail-entscheidung/~23-10-2020-vfgbbg-5519_4042 (in German).

parliamentarian represented the people as a whole, irrespective of gender, age, party affiliation, profession, wealth, ethnic or social background etc.³²

One way to enable the (re-)introduction of gender parity laws at *Länder* level would be to include provisions in state constitutions which expressly permit such laws.³³ This would bring in the federal level because, pursuant to Art. 28 (1) of the German federal constitution (Basic Law [BL]), “[t]he constitutional order in the *Länder* must conform to the principles of a republican, democratic and social state governed by the rule of law within the meaning of this Basic Law. In each *Land*, county and municipality the people shall be represented by a body chosen in general, direct, free, equal and secret elections ...”³⁴ According to Art. 28 (3) BL, “[t]he Federation shall guarantee that the constitutional order of the *Länder* conforms ... to the provisions of paragraphs (1) ...”. We do not know for certain what the principle of democracy and/or the freedom and equality of *Land* parliamentary elections require in that regard because there is no definite decision by the Federal Constitutional Court (FCC) yet concerning the constitutional permissibility of gender quota or gender parity laws on either the *Länder* or the federal level.

B. Federal Constitutional Court Cases on Gender Quotas Concerning Political Participation

In 2015, the FCC held that the BL did not prevent political parties from voluntarily introducing gender quotas with regard to party offices and electoral lists. This was a permissible exercise of a party’s freedom to adapt its internal organisation (which under Art. 21 (1) sentence 3 BL must conform to democratic principles) to their own political agenda and objectives.³⁵ More recently, the FCC was confronted with what may be called a mirror-image case to the aforementioned state constitutional court cases: Voters challenged the results of the last federal parliamentary election which had reduced the ratio of women parliamentarians from 36.3 per cent to 30.7 per cent. The voters complained that the federal legislature had *not* enacted a law before that election requiring political parties to observe gender parity in their electoral lists.³⁶

³² These court decisions evoked numerous positive and negative comments in the legal literature, e.g. by *Gersdorf*, Das Paritätsurteil des Thüringer Verfassungsgerichtshofes springt doppelt zu kurz, DÖV 2020, p. 779 ff.; *Klafki*, Parität – Der deutsche Diskurs im globalen Kontext, DÖV 2020, p. 856 ff.; *Hecker*, Auf der schiefen Bahn: Die Paritätsgesetzgebung nach der Entscheidung des Verfassungsgerichts Brandenburg, available at: <https://verfassungsblog.de/auf-der-schiefen-bahn/>; *Friehe*, Wir sind ein Volk – Die Landesverfassungsrechtliche Rechtsprechung zur Parité, NVwZ 2021, p. 39 ff. See also the critical contributions to a symposium of the Verfassungsblog, starting with *Hailbronner/Rubio Marín*, Gender Parity in Parliaments – An Introduction, available at: <https://verfassungsblog.de/gender-parity-in-parliaments-an-introduction/>.

³³ I leave aside the question whether these constitutional amendments might violate state constitutional provisions prohibiting certain amendments. But see below under II. on the comparable problem on the federal constitutional level.

³⁴ Translation available at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0148.

³⁵ FCC (Chamber), 2 BvR 3058/14, Order of 1 April 2015, margin note 25.

³⁶ FCC, 2 BvC 46/19, Order of 15 December 2020.

The FCC dismissed the complaint as inadmissible because the complainants had not adequately demonstrated that the legislature was constitutionally required to impose gender parity on political parties. While the FCC did not take a clear position on whether the legislature would have been constitutionally permitted to do so, one senses that the court is critical in this regard. The Bavarian State Constitutional Court, having to decide a similar mirror-image case in 2018, made it abundantly clear that there could be no constitutional obligation to introduce a gender parity requirement because that would violate the state constitution.³⁷ The Bavarian court more or less anticipated the reasoning of its Thuringian and Brandenburg counterparts. Since currently several constitutional complaints are pending regarding all three state constitutional court decisions,³⁸ the FCC may soon clarify its position concerning gender parity laws at the *Länder* level.

Assuming that the FCC will in the future be petitioned to assess the constitutionality of a gender parity requirement concerning parties' electoral lists which could be introduced by way of constitutional amendment in a *Land* or by the federal legislature concerning federal elections, it would also have to consider the effect of Art. 3 (2) sentence 2 BL. According to that provision, "[t]he state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist." The state constitutional courts have refused to accept similar provisions in the state constitutions as sufficient justification for gender parity laws, not least because these provisions were quite general and not specifically geared toward ensuring equal representation in parliament.

Assuming further that the FCC would come to the conclusion that gender parity laws are incompatible with the BL, the next question would be if such laws could be made possible by a constitutional amendment specifically permitting them, provided the necessary two-thirds majorities in the two chambers of the federal parliament could be mustered.³⁹ That would bring in Art. 79 (3) BL according to which "[a]mendments to this Basic Law affecting ... the principles laid down in [Article] ... 20 shall be inadmissible." The pertinent principle possibly affected would be the principle of democracy, laid down in Art. 20 (2) BL, that also played a role in the aforementioned state constitutional court decisions. Instead of speculating how the FCC would answer the question, I venture a look at other European countries, the European regional level and the global level of government. For German constitutional law and practice do not develop in isolation, but in constant exchange with comparable constitutional systems and international human rights law.

³⁷ Bavarian Constitutional Court, Vf. 15-VII-16, decision of 26 March 2018, available at: <https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2018-N-5484> (in German).

³⁸ See Hecker, Anmerkung zu BVerfG, NVwZ 2021, p. 479, 480.

³⁹ See Art. 79 (2) BL.

C. Gender Quotas in other European Countries and on the European Regional Level of Government

I. France, Sweden, Italy and Spain

In other parts of this paper, Philippe Cossalter delineates the situation in France and Maria Jansson the situation in Sweden in terms of gender quotas regarding political representation. In both countries, such quotas are by now well established, have improved the ratio of women in parliaments significantly and are considered as constitutionally permissible.

Additionally, one can mention Italy and Spain.⁴⁰ In Italy there are quota rules concerning electoral lists on all levels of government (except with regard to the Senate) which are generally accepted as constitutional. In Spain, the Constitutional Court considered a 40 per cent quota in favour of both genders with regard to electoral lists on all governmental levels, including elections for the European Parliament, as constitutional already in 2008. It did not find any interference with the basic principles of electoral law, but only with the rights of the political parties which were, however, justified with a view to the general constitutional provision obliging public power to ensure real and effective implementation of freedom and equality for all.⁴¹ In sum, of the 27 EU Member States, eleven have gender parity laws.⁴²

II. No Gender Parity Rule in EU Law

There is no gender-quota or parity requirement in current EU law concerning elections to the European Parliament, *i.e.*, the Electoral Act.⁴³ The EU has no power to impose gender quotas on Member States concerning their national parliamentary elections. The general power of the EU to combat discrimination based on sex in Art. 19 (1) TFEU does not seem to cover the introduction of mandatory quotas in favour of women regarding those elections, all the more since they are part of the Member States national constitutional identity in the sense of Art. 4 (2) TEU. The EU does, however, have power to regulate municipal elections pursuant to Art. 22 (1) TFEU, but that power extends only to regulating the details of national treatment in

⁴⁰ See *Klafki* (note 32), p. 864 f.; *Möschel*, „Gender Quotas“ in French and Italian Public Law: A Tale of Two Overlapping and Then Diverging Trajectories, *German Law Journal* 19/6 (2018), p. 1489 ff., available at: <https://www.cambridge.org/core/journals/german-law-journal/article/gender-quotas-in-french-and-italian-public-law-a-tale-of-two-overlapping-and-then-diverging-trajectories/33243C66A1E063AB012DAED3E8CFC212>.

⁴¹ *Klafki* (note 32), p. 864 f.

⁴² *Klafki* (note 32), p. 863.

⁴³ See the Act concerning election of the members of the European Parliament by direct universal suffrage, as amended, consolidated version available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01976X1008\(01\)-20020923&qid=1618756563275&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01976X1008(01)-20020923&qid=1618756563275&from=EN).

favour of citizens of other Member States. It would probably not support the imposition of gender quotas.

With regard to elections to the European Parliament, the regulatory power of the EU goes further because, in addition to Art. 22 (2) TFEU on national treatment, Art. 223 (1) TFEU sets forth that the EU “shall lay down the necessary provisions”. This would in general include power to introduce gender parity requirements which Member States would have to implement when they conduct the European election within their territory. But since such gender parity provisions would have to be enacted by the Council acting unanimously after obtaining the consent of the European Parliament and enter into force only after ratification by all Member States in accordance with their respective constitutional requirements, this is unlikely to happen any time soon. The most recent amendments to the Electoral Act by Council Decision (EU, Euratom) 2018/994 of 13 July 2018,⁴⁴ which has not yet entered into force, does not include any quota rule.

Assuming for the sake of argument that an amendment to the Electoral Act introducing gender parity rules would enter into force, the question arises whether it would be compatible with primary Union law, and in particular Art. 14 (3) TEU as well as Arts. 12, 21, 23 and 39 of the Charter of Fundamental Rights. It should be remembered in this context that the Court of Justice of the EU struck down absolute and automatic preferences for women in recruitment and promotion as incompatible with the Equal Treatment Directive.⁴⁵ It is therefore unclear whether it would accept gender quotas in European election law. In EU law, Art. 23 (2) CFR specifically sets forth that “[t]he principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.” Also, according to Art. 3 (3) subpara. 2 TEU and Art. 8 TFEU, the EU shall promote equality between women and men in all its activities. Perhaps the Court would consider these provisions as sufficient to justify gender parity rules in European election law.

That said, there is no provision in either primary or secondary Union law that would require Member States to introduce a gender quota or gender parity rule in their national election laws. If Member States do that on their own initiative, they cannot rely on any Union law provision to justify their initiative and overcome national constitutional impediments by invoking the primacy

⁴⁴ Council Decision (EU, Euratom) 2018/994 of 13 July 2018 amending the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, OJ L 178, 16.07.2018, p. 1.

⁴⁵ ECJ, C-450/93, *Kalanke v. Freie Hansestadt Bremen*, judgment of 17 October 1995; C-409/95, *Marschall v. Land Nordrhein-Westfalen*, judgment of 11 November 1997; C-93/19 P, *EEAS v. Hebberecht*, judgment of 19 November 2020.

of EU law.⁴⁶ Art. 23 (2) CFR is addressed to Member States only when they are implementing Union law.⁴⁷ But when Member States regulate their national parliamentary elections, they certainly do not implement Union law. The other aforementioned provisions are addressed only to the EU.

No specific steps toward introducing gender quotas or gender parity requirements are planned by the EU. In the Gender Equality Strategy 2020-2025, the European Commission states that in the 2019 European elections, 39% of elected MEPs were women, compared to 37% of MEPs in 2014. It then explains: “Equal opportunity in participation is essential for representative democracy at all levels – European, national, regional and local. The Commission will promote the participation of women as voters and candidates in the 2024 European Parliament elections, in collaboration with the European Parliament, national parliaments, Member States and civil society, including through funding and promoting best practices. European political parties asking for EU funding are encouraged to be transparent about the gender balance of their political party members.”⁴⁸ The Commission’s instruments of choice are promotion and encouragement, not legal obligations. The same applies even more to the elections at national level. In that regard, the Commission only quite generally “calls ... on the Member States to ... develop and implement strategies to increase the number of women in decision-making positions in politics and policy-making.”⁴⁹

III. European Court of Human Rights and Council of Europe

1. European Court of Human Rights Accepts Gender Quotas

Art. 3 of the Additional Protocol to the European Convention on Human Rights⁵⁰ enshrines the right to free elections but leaves States parties a wide margin with regard to election regulation, in view of the many differences in this regard between the Convention States.⁵¹ The ECtHR has several times accepted gender quotas pertaining to electoral lists as permissible in the ECHR system.

⁴⁶ See the Declaration (No. 17) concerning primacy in the annex to Final Act of the Intergovernmental Conference of Lisbon, OJ 2016 C 202, 13 December 2007, p. 344.

⁴⁷ Art. 51 (1) CFR.

⁴⁸ A Union of Equality: Gender Equality Strategy 2020-2025, COM (2020) 152 final, Communication of 5 March 2020, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152&from=EN>, p. 14.

⁴⁹ *Id.*, p. 15.

⁵⁰ Of 20 March 1952 (ETS No. 9).

⁵¹ See, e.g., ECtHR (GC), No. 58278/00, *Ždanoka v. Latvia*, judgment of 16 March 2006, para. 103.

In the most recent case of *Zevnik v. Slovenia*⁵² concerning a 35 per cent gender representation requirement in favour of males and females, a three-member committee of the ECtHR held as follows: “The Court reiterates that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe (see *Staatkundig Gereformeerde Partij v. the Netherlands* (dec.), no. 58369/10, § 72, 10 July 2012) and that its institutions consider the lack of gender balance in politics to be a threat to the legitimacy of democracy and a violation of the right of gender equality ... Consequently, the Court considers that the interference in question pursued the legitimate aim of strengthening the legitimacy of democracy by ensuring a more balanced participation of women and men in political decision-making.”

The section of the ECtHR even considered that the rejection of entire lists of candidates for non-compliance with the gender quota requirement was proportionate to the legitimate aim pursued. It explained in this context that “[h]elpful guidance [could] be obtained from the relevant instruments adopted by the Council of Europe institutions, in which they not only allow but also encourage member States to adopt gender quotas into their electoral systems coupled with strict sanctions for non-compliance ... The Court also attaches weight to the view of the [Slovenian] Constitutional Court that prior awareness of the fact that political parties would not be able to participate in elections unless they ensured gender-balanced representation on their lists of candidates provided the strongest impetus to satisfying gender quotas ...”

In the *Zevnik* case, the applicants did not claim violations of the freedom of expression (Art. 10 ECHR), the freedom of association (Art. 11 ECHR) or the prohibition of discrimination (Art. 14 ECHR) so that the Court did not have to take any position in that regard. In an earlier Spanish case, however, it did not find any interference in the freedoms of expression or association of potential candidates who were not included in electoral lists because of their gender: “La Cour ne décèle rien dans le dossier lui permettant de constater que les requérantes ont été empêchées de poursuivre leurs activités en tant que membres ou sympathisantes du parti politique en question.”⁵³ Since none of the applicants was a political party, the Court did not consider the potential interference in the freedom of political parties to compile electoral lists in accordance with their own political agenda. But there is little doubt that such interference would have been justified pursuant to Art. 11 (2) ECHR as necessary in a democratic society for the protection of the rights and freedoms of others, namely the underrepresented women.

⁵² No. 54893/18, Decision of 12 November 2019: Declaration declared inadmissible for being manifestly ill-founded (Art. 35 (3) lit. a ECHR). See *Toplak*, *The ECHR and Gender Quotas in Elections*, available at: <https://www.ejiltalk.org/the-echr-and-gender-quotas-in-elections/>.

⁵³ ECtHR, No. 35473/08, *Méndez Pérez v. Spain*, decision of 4 October 2011, para. 29.

Regarding the prohibition of discrimination on the ground of sex in Art. 14 ECHR and Art. 1 of Protocol No. 12,⁵⁴ the Court held that the Spanish gender quota of 40% applied equally to both men and women, prohibiting electoral lists with more than 60% candidates of either the male or the female sex. This is why there was no discrimination based on sex.⁵⁵ The same can of course be said of a zipper-mode gender parity rule. However, the state constitutional courts of Thuringia and Brandenburg rejected that group-related approach to gender discrimination considering the entire electoral list and instead opted for an individualised approach with regard to each position on such list: If that is not open for a man or a woman because it is reserved for a woman or a man, there will be gender discrimination even if the overall chances of men and women to get on the list are equal.

The ECtHR has not yet been called upon to decide whether the ECHR and Protocols might impose an obligation on Member States to introduce gender quotas for electoral lists. While the Court has derived different kinds of positive obligations from various Convention rights such as duties to protect, to investigate and to prosecute,⁵⁶ it has not yet recognised any concrete positive action obligations in favour of women.

2. Soft Law by Political Bodies of the Council of Europe

The Committee of Ministers (CM) on 12 March 2003 adopted Recommendation Rec (2003) 3 on “balanced participation of women and men in political and public decision-making”.⁵⁷ In that document the governments of Member States are recommended to ensure balanced participation of women and men, *i.e.*, representation of both women and men amounting to at least 40%. The governments are specifically invited to “consider adopting legislative reforms to introduce parity thresholds for candidates in elections at local, regional, national and supra-national levels. Where proportional lists exist, consider the introduction of zipper systems”.⁵⁸ In the Recommendation CM/Rec (2007) 17 on gender equality standards and mechanisms,⁵⁹ the CM on 21 November 2007 further explained under B.4.31. that “[p]articipation in political and public life is a basic right of citizenship and must be enjoyed by women and men on a parity basis. The balanced participation of both sexes at all levels of political and public life, including

⁵⁴ Protocol No. 12 to the ECHR of 4 November 2000 (ETS No. 177).

⁵⁵ ECtHR (note 53), para. 34.

⁵⁶ See *Grabenwarter/Pabel*, *Europäische Menschenrechtskonvention*, p. 164 ff.; *Grabenwarter*, *European Convention on Human Rights – Commentary*, Art. 2 margin notes 16 ff.

⁵⁷ Available at: <https://rm.coe.int/1680519084> (with explanatory memorandum).

⁵⁸ *Id.*, Appendix, A.3.

⁵⁹ Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d4aa3.

at decision-making level, is therefore a requirement of human rights that can ensure the better functioning of a democratic society.”⁶⁰

The Parliamentary Assembly (PACE) on 27 January 2010 adopted Resolution 1706 (2010) on “increasing women’s representation in politics through the electoral system”.⁶¹ In it, PACE specifically recommended the introduction of a legal quota in favour of women and a zipper system for electoral lists:

“6. The Assembly considers that the lack of equal representation of women and men in political and public decision making is a threat to the legitimacy of democracies and a violation of the basic human right of gender equality, and thus recommends that member states rectify this situation as a priority by:

6.1. associating the gender equality and anti-discrimination provisions in their constitutions and their electoral laws with the necessary exception allowing positive discrimination measures for the underrepresented sex, if they have not done so already ...; ...

6.3. reforming their electoral system to one more favourable to women’s representation in parliament:

6.3.1. in countries with a proportional representation list system, consider introducing a legal quota which provides not only for a high proportion of female candidates (ideally at least 40%), but also for a strict rank-order rule (for example, a “zipper” system of alternating male and female candidates), and effective sanctions (preferably not financial, but rather the non-acceptance of candidacies/candidate lists) for non-compliance, ideally in combination with closed lists in a large constituency and/or a nation-wide district; ...

6.5. encouraging political parties to voluntarily adopt gender quotas and to take other positive action measures, also within their own decision-making structures, and especially in the party structure responsible for nomination of candidates for elections ...”

PACE referred to the European Commission for Democracy through Law (Venice Commission) that had approved both legally mandated and voluntarily adopted electoral gender quotas in 2009:

⁶⁰ The FCC in its aforementioned order of 2020 expressly left the question unanswered whether that recommendation was intended to create a legal obligation for Member States because the applicants had not made such a claim (see above note 36, margin note 119).

⁶¹ Available at: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17809&lang=en>.

“115. Electoral gender quotas are highly controversial in some countries. Given the profound under-representation of women, however, quotas should be viewed as compensation for existing obstacles to women’s access to parliament. They can help to overcome structural, cultural and political constraints on women’s representation.

116. Since legal quotas are mandatory by nature they seem to be preferable to party quotas. However, voluntary quotas can, additionally or alternatively, contribute to an increase of women’s representation, too.

117. In order to be effective, gender quotas should provide for at least 30% of women on party lists, while 40% or 50% is preferable.

118. Electoral quotas are more effective if they provide for strict ranking rules or placement mandates. “Zipper systems” can be considered the most effective method to ensure gender parity.

119. For being respected, moreover, gender quotas require effective monitoring and enforcement mechanisms.”⁶²

Germany has long delayed the implementation of these recommendations which are not legally binding as such. When the protagonist Thuringian and Brandenburg state legislatures closely followed them in introducing the zipper-mode gender parity requirements for electoral lists in 2019, the requirements were struck down by the state constitutional courts in 2020, as has already been explained.

The strategic objective 4 of the current Council of Europe Gender Equality Strategy 2018 – 2023⁶³ is to “[a]chieve balanced participation of women and men in political and public decision-making”.⁶⁴ After acknowledging that “[p]olitical activities and public decision-making remain male-dominated areas. Men set political priorities, and political culture continues to be structured around male behaviour and life experience”, the Strategy states that the Council of Europe will seek to “identify and support measures and good practices that promote gender equality in relation to: electoral systems, training of decision makers in both public institutions and political parties, gender-sensitive functioning of decision-making bodies, setting parity thresholds, adoption of effective quota laws and voluntary party quotas, and the regulation of political parties including public funding, in co-operation with relevant bodies of the Council of

⁶² Report on the Impact of Electoral Systems on Women’s Representation in Politics, Study No. 482/2008, CDL-AD(2009)029, 16 June 2009, p. 18, available at [https://www.venice.coe.int/web-forms/documents/default.aspx?pdffile=CDL-AD\(2009\)029-e](https://www.venice.coe.int/web-forms/documents/default.aspx?pdffile=CDL-AD(2009)029-e).

⁶³ Adopted on 7 March 2018 by the Committee of Ministers, available at: <https://rm.coe.int/strategy-en-2018-2023/16807b58eb>.

⁶⁴ Id., p. 27 ff.

Europe and with a view to achieving gender balance in decision making, combating gender stereotypes and to improve the gender-sensitiveness of decision-making environments”.⁶⁵

It remains to be seen how Germany will effectively achieve gender balance in political decision-making in a timely manner without mandatory gender quotas regarding electoral lists.

D. Global Level: The Convention on the Elimination of All Forms of Discrimination against Women

The first step on the global level toward gender equality in political participation was taken by the Convention on the Political Rights of Women.⁶⁶ Pursuant to Art. II, “[w]omen shall be eligible for election to all publicly elected bodies, established by national law, on equal terms with men, without any discrimination.” That provision simply prohibits gender-based restrictions on eligibility which constituted important progress at that time.

Art. 7 CEDAW⁶⁷ goes further in setting forth that the States Parties “shall take all appropriate measures to eliminate discrimination against women in the political ... life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) ... to be eligible for election to all publicly elected bodies ...” According to Art. 4 (1) CEDAW, “[a]doption by States Parties of temporary special measures aimed at acceleration de facto equality between men and women shall not be considered discrimination as defined in the present Convention ...”

Gender quotas or gender parity requirements for electoral lists certainly qualify as temporary measures aimed at acceleration of adequate female representation in parliaments and are therefore permitted by Art. 4 CEDAW. The treaty body of independent experts charged with monitoring CEDAW implementation, the Committee on the Elimination of Discrimination against Women, even stated that Art. 4 CEDAW (not only permitted but) “encourage[d] the use of temporary special measures in order to give full effect to articles 7 and 8.”⁶⁸

Is the imposition of mandatory gender quotas or gender parity requirements even made obligatory by Art. 7 CEDAW, because they are the most appropriate measure to eliminate the underrepresentation of women – a trace of their past discrimination – and ensure their substantive

⁶⁵ Id., para. 57 and 61.

⁶⁶ UNTS vol. 193, of 31 March 1953, p. 135.

⁶⁷ UNTS vol. 1249, of 18 December 1979, p. 13.

⁶⁸ General Recommendation No. 23 (1997): Political and Public Life, para. 15, available at: https://tbinetnet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_4736_E.pdf. See in this sense also UN General Assembly Resolution 66/130 of 19 December 2011, para. 9.

equality in political life? The CEDAW Committee has not spelt that out clearly. Rather, in 1997 it confined itself to observing that some political parties have adopted measures to ensure that there was a balance between the number of male and female candidates nominated for election and then demanding that “States parties should ensure that such temporary special measures are specifically permitted under anti-discrimination legislation or other constitutional guarantees of equality.”⁶⁹ Seven years later, the Committee stated that the “[p]ursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.”⁷⁰ While quota systems are mentioned as one possible kind of special measures,⁷¹ the Committee does not explicitly demand their use but rather leaves States parties a choice regarding the most appropriate means to promote gender equality.⁷²

Much more progressively, the CM of the Council of Europe has interpreted Art. 7 CEDAW in the sense that it imposes an obligation on European States “to ensure equal participation of women and men in political and public decision-making. Given that the traditional liberal notion of equality of opportunity has evolved to a demand for equality of results, states now have an obligation to ensure equality of outcomes, not only equal opportunities between women and men. This means that European states are obliged to ensure an equal representation of women and men in decision-making.”⁷³ Although quotas are not explicitly mentioned, there is practically no other way of quickly achieving equality of results with regard to representation of women in parliaments.

If one takes seriously the promise of effective equality of women in political life made by Art. 7 CEDAW and includes the long-lasting exclusion of women from that life in the equation, the interpretation ventured by the CM of the Council of Europe is reasonable. It is supported by the practice of the Human Rights Committee (HRC), the treaty body of the International Covenant on Civil and Political Rights (ICCPR),⁷⁴ regarding the political rights enshrined in Art. 25 ICCPR. This provision guarantees to every citizen the right and the opportunity, without any distinction of sex etc., to vote and to be elected. According to the HRC, “States parties must ensure that the law guarantees to women the rights contained in article 25 on equal terms with men and take effective and positive measures to promote and ensure women’s participation

⁶⁹ Id, para. 33.

⁷⁰ General Recommendation No. 25 (2004), para. 8, available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3733_E.pdf.

⁷¹ Id., para. 22.

⁷² Id., paras. 27 ff.

⁷³ Explanatory memorandum on Recommendation Rec (2003) 3 (note 57), p.15 (at the end of para. I.A.).

⁷⁴ UNTS vol. 999, of 16 December 1966, p. 171.

in the conduct of public affairs and in public office, including appropriate positive action. Effective measures taken by States parties to ensure that all persons entitled to vote are able to exercise that right should not be discriminatory on the grounds of sex. The Committee requires States parties to provide statistical information on the percentage of women in publicly elected office, including the legislature, as well as in high-ranking civil service positions and the judiciary.”⁷⁵

E. Conclusion: The European and International Soft Law on Political Gender Parity is Spreading and Hardening

In conclusion, there is not yet any hard and watertight international or supranational legal obligation for Germany to enact mandatory quotas or gender parity requirements in order to enhance the political representation of women. But the pertinent soft-law precepts on the European and global level are gradually spreading and hardening, not least because many close partner States have long ago introduced such quotas. It remains to be seen whether Germany will fall in line or rather fall behind because it proves unable to overcome State constitutional court resistance. That depends on how much women voters in Germany care about their right to equal representation enshrined in Art. 3 (2) BL, read together with and informed by Art. 7 CEDAW, and its effective implementation. According to a recent survey conducted in Germany, only a small minority (8%) of the respondents supported the introduction of mandatory gender quotas, with more female than male respondents answering positively.⁷⁶

Obviously, much more public debate of women’s political representation in Germany is necessary. Voters need to become aware that the underrepresentation of women in legislatures hinders the inclusion of a gender perspective in a critical sphere of influence.⁷⁷ Otherwise, Germany is in danger of falling behind developments on the European and global level concerning women’s political representation. If that happens, Germany will probably also stay behind with regard to gender equality in general and thus fail to adequately tap the hidden resources and talents of the better part of its population. That would be a competitive disadvantage.

⁷⁵ General Comment No. 28, 29 March 2000, para. 29, available at: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_21_Rev-1_Add-10_6619_E.pdf.

⁷⁶ *Coffé/Reiser*, *Unterstützen die Bürger*innen die Einführung von Quoten und andere Gleichstellungsmaßnahmen in Deutschland?*, MIP 26 (2020), p. 180 ff., available at: doi:10.25838/oaj-mip-2020180-185.

⁷⁷ See in this sense the Outcome of the 23rd special session of the UN General Assembly entitled “Women 2000: gender equality, development and peace for the twenty-first century”, 5 – 9 June 2000, p. 220, para. 23, available at: https://www.unwomen.org/-/media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf?la=en&vs=1203.

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