THE CONSTITUTIONALITY OF PARLIAMENTARY GENDER QUOTA AND PARITY LEGISLATION IN FRANCE, SPAIN, AND GERMANY

by Robert Hahn

LLM Capstone Thesis in Comparative Constitutional Law

Supervisor: Mathias Möschel

Central European University

7 June 2020

Table of Contents

Abstract

In 2019, the parliaments of two of the German *Länder*, Brandenburg and Thuringia, passed parity acts. These mandate that electoral lists will have to consist of alternating female and male candidates, in an effort to increase the share of women in parliaments. Although parliamentary gender quotas are a growing international phenomenon, the constitutionality of the two acts is controversial and litigation is underway.

This comparative analysis examines which arguments on the constitutionality of parity laws have been discussed in France and Spain, how they resemble or differ from and how they can inform the debate taking place in Germany. In France, quotas were originally found unconstitutional, but parity is now enshrined in the constitution. In Spain, however, a 40 percent "flexible parity" passed constitutional muster.

Opponents of gender quotas contend that they are incompatible with a universalist notion of representation, which prescribes making any distinctions between voters or candidates. The universalist concept of representation is, however, challenged by descriptive and pluralists accounts. Gender quotas are moreover widely perceived to compromise electoral equality, but when they are gender-neutral, they do not affect formal equality between women and men. They do, however, severely limit the freedom of voters and candidates in the candidate selection process, as well as the autonomy of political parties.

Some proponents of parity argue that it is a requirement of democracy properly understood, relying on an alleged fundamental division of humanity into men and women, on feminist insight into the male construction of the political sphere, or on the necessity of effective political participation of women, respectively. Like universalist representation, however, such concepts of parity democracy build less on posited constitutional law than on politico-legal theories. Other supports of gender quota rely on substantive gender equality, viewing quotas as affirmative action instrument. Such an approach leads to a proportionality analysis and the

constitutionality of gender quotas depends on how disadvantages of women in the political sphere are perceived and how substantive equality in this field is weighed against electoral freedom and party autonomy.

For Germany, it seems most likely that the courts will follow the predominant position in German legal scholarship and find gender quotas to be in violation of constitutional law. Like their French counterparts, parity proponents in Germany would then have to elevate their advocacy to the level of constitutional amendment, which comparative perspective shows would not be in conflict with democracy.

1 Introduction

On 31 January 2019, the Landtag (i.e. parliament) of Brandenburg (one of the 16 *Länder* of Germany) passed the so-called Parity Act[1]. The Act foresees that electoral lists put forward by political parties for Landtag elections will have to consist of alternating female and male candidates, thus ensuring a more equal number of women and men in the parliament. The Landtag of Thuringia followed suit with a similar act[2] on 5 July. The passage of the two acts was motivated by the fact that, 100 years after the introduction of female suffrage in Germany, women still hold significantly lower numbers of seats than men in all of Germany's 17 parliaments.[3] The percentage of women in the German Bundestag had even fallen, after the 2017 election, to 30.7 percent, the lowest level since 1998,[4] due to the rightward shift of the electorate.[5]

Since the plans for parity legislation transpired, an intense debate about their merits and constitutional permissibility, often intertwined, took place in Germany. Several parties vowed to file suit against the acts in the constitutional courts of Brandenburg and Thuringia, respectively, and some have since done so.[6] The Thuringian court is scheduled to issue its

[1] Zweites Gesetz zur Änderung des Brandenburgischen Landeswahlgesetzes – Parité-Gesetz vom 12. Februar 2019 [Second Act to Change the Brandenburg Electoral Code – Parity Act of 12 February 2019]

[2] Siebtes Gesetz zur Änderung des Thüringer Landeswahlgesetzes – Einführung der paritätischen Quotierung vom 30. Juli 2019 [Seventh Act to Change the Thuringia Electoral Code – Introduction of Parity Quotas of 30 July 2019]

[3] For an overview of the number of women in the Landtage as of November 2019, see Dörr/Poirot/Ilg, `Frauen in den Länderparlamenten´ [Women in Länder Parliaments] (Landeszentrale für politische Bildung Baden-Württemberg) https://www.lpb-bw.de/frauenanteil-laenderparlamenten accessed 4 April 2020

[4] Bundeszentrale für politische Bildung, `Frauenanteil im Deutschen Bundestag´ [Share of Women in the German Bundestag] (15 November 2017) https://www.bpb.de/gesellschaft/gender/frauen-in-deutschland/49418/frauenanteil-im-deutschen-bundestag accessed 4 April 2020

[5] Two parties with a particular low share of women among their deputies, the pro-market FDP and the radical right AfD, had failed to enter the Bundestag in 2013 but got in in 2017.

[6] Piratenpartei Brandenburg, `Verfassungsbeschwerde und Organklage gegen Paritätsgesetz eingereicht´ [Constitutional Complaint and Inter-Organ Action Against Parity Act Filed] (21 May 2019) https://www.piratenbrandenburg.de/2019/05/verfassungsbeschwerde-und-organklage-gegen-paritaetsgesetz-eingereicht/ accessed 4 April 2020; Süddeutsche Zeitung, `AfD-Klage gegen neues Thüringer Paritätsgesetz´ [AfD Files Suit Against New Thuringian Parity Law] (11 February 2020) https://www.sueddeutsche.de/politik/landtag-erfurt-afd-klage-gegen-neues-thueringer-paritaetsgesetz-dpa.urn-newsml-dpa-com-20090101-200211-99-871492 accessed 4 April 2020

ruling on July 15 2020.[7] I perceive a majority of German legal scholarship to be convinced of the unconstitutionality of legislative gender quotas in general and the parity acts in particular.[8] This is also apparent in the very skeptical position of the research services of several German parliaments.[9] Some scholars even deem the acts to be contrary to the unamendable principle of democracy enshrined in the Basic Law's famous "eternity clause"[10], although some find them permissible[11] or even constitutionally imperative.[12] At the same time, though, gender quotas for parliaments are internationally quite common and a growing phenomenon. The German parity movement relies heavily on the example of France in particular, where parity legislation was adopted in 2000.[13]

In this comparative analysis, I will try to answer the questions, which arguments on the constitutionality of parity laws have been discussed in France and Spain, how they resemble or

[7] Constitutional Court of Thuringia, Press Release, http://www.thverfgh.thueringen.de/webthfj/webthfj.nsf/22F03DE37D9EACDFC125856C00433357/$File/20-00002_Medieninformation_6-2020_Ank%C3%BCndigung%20VK.pdf?OpenElement accessed 01 June 2020

[8] Udo Di Fabio, interview (Der Spiegel, 28 December 2018) https://www.spiegel.de/panorama/udo-di-fabio-ich-kaeme-nie-auf-die-idee-eine-frau-mit-kollege-anzureden-a-00000000-0002-0001-0000-000161577204 accessed 3 April 2020; Ingwer Ebsen, `Quotierung politischer Entscheidungsgremien durch Gesetz?´ [Legal Quotas in Political Decision-Making Bodies] (1989) 44(12) JuristenZeitung, 553, 557; Alexander Hobusch, `Wahlrechtliche Irrwege in Brandenburg´ [Electoral Law Gone Astray in Brandenburg] (Legal Tribune Online, 4 February 2019) https://www.lto.de/recht/hintergruende/h/paritaetsgesetz-brandenburg-verfassungswidrig-quoten-wahlrecht-geschlecht-landesliste/ accessed 29 March 2020; Wolfgang Rüfner, `Art. 3´ in Kahl/Waldhoff/Walther (eds) *Bonner Kommentar* (C.F. Müller), ref. 819; Antje von Ungern-Sternberg, `Parité-Gesetzgebung auf dem Prüfstand des Verfassungsrechts´ [Parity Legislation Put to the Test of Constitutional Law] (2019) JuristenZeitung 525, 528

[9] Bundestag, Expert Opinion WD 3 – 3000 – 287/14 of 16 December 2014; Expert Opinion WD 3 – 008/08 of 29 January 2008; Thüringer Landtag, Expert Opinion 6/5765 of 24 June 2019; Landtag Brandenburg, Expert Opinion of 18 Oktober 2018; Abgeordnetenhaus von Berlin, Expert Opinion of 27 June 2018

[10] Jörg Burmeister and Holger Greve, `Parité-Gesetz und Demokratieprinzip: Verfassungsauftrag oder Identitätsverstoß?´ (Parité Act and the Principle of Democracy: Constitutional Mandate or Violation of Identity?] (2019) ZG 154, 165-172; Monika Polzin, `Parité-Gesetz in Brandenburg – Kein Sieg für die Demokratie´ [The Parity Statute in Brandenburg – Not a Victory for Democracy] (Verfassungsblog, 8 February 2020) https://verfassungsblog.de/parite-gesetz-in-brandenburg-kein-sieg-fuer-die-demokratie/ accessed 29 March 2020

[11] Frauke Brosius-Gersdorf, `Auf dem Tandem ins Parliament. Zu Sinn und Unsinn von Quoten für Wahlen´ [Into Parliament on a Tandem. On the Sense and Nonsense of Electoral Quotas] (2019) Zeitschrift des deutschen Juristinnenbundes 57, 59; Christine Hohmann-Dennhardt, `Parité´ (Süddeutsche Zeitung, 8 February 2019) https://www.sueddeutsche.de/politik/aussenansicht-parite-1.4322053 acccessed 3 April 2020; Hans Meyer, `Verbietet das Grundgesetz eine paritätische Frauenquote bei Listenwahlen zu Parlamenten?´ [Does the Basic Law Prohibit a Parity Women Quota for Parliamentary Elections Using Candidate Lists?] (2019) Neue Zeitschrift für Verwaltungsrecht 1245

[12] Silke Laskowski, `Zeit für Veränderungen: Ein paritätisches Wahlrecht jetzt!´ [Time for Change: Parity in Electoral Law Now!] (2018) Recht und Politik 54(4) 391

[13] Sabine Lang, `Quota Contagion in Germany – Diffusion, Derailment, and the Quest for Parity Democracy´ in Éléonore Lépinard and Ruth Rubio-Marín (eds) *Transforming Gender Citizenship – The Irresistible Rise of Gender Quotas in Europe* (Cambridge University Press 2018) 279, 289-290; Laskowski (2018), footnote 12, 403

differ from and how they can inform the debate taking place in Germany. It is not a sociological or legal realist inquiry into the reasons why courts have decided as they have,[14] but focuses on normative questions of constitutional law. It will nevertheless be supplemented with insights from political science and gender studies.

As comparators, I have chosen France and Spain, since they are both part of the "European Legal Space" and have introduced gender parity legislation, yet have taken very different paths. France is the country where both the ideas of a legislative gender quota for parliament and of gender parity have originated, yet they required constitutional change to implement. Spain, on the other hand, is an example where quota legislation has been successfully introduced without a constitutional amendment.

As to terminology, when I use the terms quotas or gender quotas, I refer to rules requiring a certain share of women (or of any gender) on electoral candidate lists, including 50 percent (or close to 50 percent) parity quotas. When some aspect is specific to parity quotas, I will use the terms parity or parity quotas.

I will first provide background information and gender quotas internationally as well as in France and Spain. I will then examine the constitutional objections brought forward against gender quotas, that is their incompatibility with universalism and universal representation as well as their alleged violation of constitutionally guaranteed equality rights and freedoms. Next, I will explore justifications for the constitutionality of gender quotas, namely the notions of "parity democracy" and substantive equality. Lastly, I will try to draw some conclusions for the current debate in Germany.

[14] For some such analysis of the French Constitutional Council's decisions on gender quotas see Jill Lovecy, `"Citoyennes à part entire"? The Constitutionalization of Gendered Citizenship in France and the Parity Reforms of 1999-2000´ (2000) Government and Opposition 35 (4) 439, 458; Mathias Möschel, ´"Gender Quotas" in French and Italian Public Law. A Tale of Two Overlapping and Then Diverging Trajectories´ (2018) German Law Journal 19 (06) 1489

2 Background Information

2.1 International Overview

Internationally legal gender quotas for parliaments have become quite commonplace. Since the 1990s, there has been a global trend towards gender quotas.[15] It has been called a "gender quota revolution"[16] and "golden era for gender quotas"[17]. According to the *Gender Quotas Database* of International IDEA, the Inter-Parliamentary Union and Stockholm University, 57 countries worldwide have some form of legislated candidate quotas, with another 25 countries having reserved seats in parliament for women.[18] Evidence suggests that quotas have diffused both globally and regionally under the influence of both domestic activism and international advocacy.[19] International organizations such as the United Nations, the Council of Europe, the European Union and others facilitated the spread of gender quotas and parity in particular.[20]

In Europe, the debate on gender quotas for parliaments has generally been "highly juridified" and quotas have been met with substantial constitutional objections[21] not only in Germany, yet there is a "clear and mostly irreversible trend" towards gender quotas to more countries as well as to domains beyond the legislature, for example to corporate oversight boards or university bodies.[22]

[15] Virginie Dutoya and Yves Sintomer, `Defining Women's Representation: Debates around Gender Quotas in India and France´ (2019) Politics and Governance 7 (3), 124, 126; Pippa Norris and Drude Dahlerup, *On the Fast Track: The Spread of Gender Quota Policies for Elected Office* (Harvard Kennedy School Research Working Paper 2015-041)
[16] Eléonore Lépinard and Ruth Rubio-Marín, `Introduction´ in *Transforming Gender Citizenship – The Irresistible Rise of Gender Quotas in Europe* (Cambridge University Press 2018) 1
[17] Eléonore Lépinard, *Gender quotas and transformative politics* (Robert Schuman Centre for Advanced Studies Policy Papers 2014/06), 2
[18] https://www.idea.int/data-tools/data/gender-quotas accessed 4 April 2020
[19] Norris/Dahlerup, footnote 15
[20] Lépinard/Rubio-Marín, footnote 16, 1-4; Ruth Rubio-Marín, `A New European Parity-Democracy Sex Equality Model and why it won't Fly in the United States´ (2012) 60 American Journal of Comparative Law 99, 106-107
[21] Eléonore Lépinard and Ruth Rubio-Marín, `Conclusion´ in *Transforming Gender Citizenship – The Irresistible Rise of Gender Quotas in Europe* (Cambridge University Press 2018) 424, 438-445; Ruth Rubio-Marín, `Women's political citizenship in new European constitutionalism: between constitutional amendment and progressive interpretation´ in Helen Irving (ed.) Constitutions and Gender (Edward Elgar 2017) 323
[22] Lépinard/Rubio-Marín, footnote 21, 454-455

2.2 History of Gender Quotas for Parliaments in France and Spain

In France, a first attempt at an electoral gender quota was made in 1982: The law stipulated that electoral lists for municipal councils should not contain more than 75 percent of persons of the same gender, in effect establishing a 25 percent quota. The Constitutional Council (*Conseil Constitutionnel*), however, declared the law unconstitutional.[23] After a successful grassroots campaign, the constitution was amended in 1999 and parity legislation was adopted the following year.[24] The Constitutional Council approved the parity law, noting that it had no authority to review amendments to the Constitution and that the law did no more than what had been intended by the constituent power.[25]

However, since the French scheme can partly be circumvented due to the majoritarian electoral system, and can even be disregarded with only modest financial consequences, the parity legislation does not ensure fully equal numbers of male and female legislators.[26] Over the years, the scheme was incrementally tightened.[27] Currently, 40 percent of members of the National Assembly and 33 percent of members of the Senate are women.[28] From the electoral area, parity has spread to other areas of society and France has been called "the land of gender quotas"[29], not without hesitation and opposition by the judiciary.[30]

[23] Decision 82-146 DC of 18 November 1982
[24] Loi n° 2000-493 du 6 juin 2000 tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives [Act No. 2000-493 of 6 June 2000 to promote equal access of women and men to electoral mandates and elective offices]
[25] Decision 2000-429 DC of 30 May 2000, ref. 6-8
[26] Claudie Baudino, `Parity Reform in France: Promises and Pitfalls´ (2003) Review of Policy Research 385, 393-397; Rainbow Murray, `Parity in France: A "Dual Track" Solution to Women's Under-Representation´ (2012) West European Politics 35 (2) 343, 353-355; Joan Wallach Scott, *Parité!: Sexual Equality and the Crisis of French Universalism* (The University of Chicaco Press 2005) 127-129
[27] Éléonore Lépinard, `The French Parity Reform – The Never-Ending Quest for A New Gender Equality Principle´ in Lépinard and Ruth Rubio-Marín (eds) *Transforming Gender Citizenship – The Irresistible Rise of Gender Quotas in Europe* (Cambridge University Press 2018) 62, 73-77
[28] International IDEA, Interparliamentary Union and Stockholm University, `Country Data: France´ https://www.idea.int/data-tools/data/gender-quotas/country-view/86/35 accessed 05 March 2020
[29] Eléonore Lépinard, The adoption and diffusion of gender quotas in France (1982-2014), European University Institute Department of Law Working Paper 2015/19, 1
[30] Lépinard (2015), footnote 29, 3-5; Lépinard (2018), footnote 27, 77-79 & 86-88; Möschel, footnote 14, 1495-1503; Rubio-Marín (2017), footnote 21

In Spain, a quota for candidate lists was introduced in 2007 as part of the comprehensive Act for Effective Equality between Men and Women[31], popularly known as the Equality Act, after an earlier proposal was rejected by parliament in 2003[32]. Candidate lists must have a "balanced composition between women and men", which means a quota of 40 percent for candidates of each gender. This has been called "parity with a margin of flexibility".[33] That quota does not only apply to the lists as a whole, but to each sequence of five positions.

The Constitutional Court of Spain (*Tribunal Constitucional de España*) approved the law in early 2008.[34] By now, 44 percent of members of the House of Deputies and 39 percent of members of the Spanish Senate are women.[35] The Equality Act allows autonomous communities to go beyond the 40 percent quota and mandate higher percentages of women for elections to their legislative assemblies, which some communities have since done with the approval by the Constitutional Court.[36]

3 Constitutional Objections to Gender Quotas

The constitutionality of gender quotas has been challenged in France, Spain and Germany. The arguments for their impermissibility include claims of incompatibility with fundamental structural principles of constitutionalism, notably democratic universalism, as well as alleged violations of constitutionally protected equality rights and freedoms.

[31] Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres
[32] Celia Valiente, `The women's movement, gender equality agencies and central-state debates on political representation in Spain´ in Joni Lovenduski (ed) *State Feminism and Political Representation* (Cambridge University Press 2005) 174, 187-191
[33] Blanca Rodríguez-Ruiz and Ruth Rubio-Marín, `The Gender of Representation: On Democracy, Equality, and Parity´(2008), 6 International Journal of Constitutional Law 287, 297; Blanca Rodríguez-Ruiz and Ruth Rubio-Marín, `Constitutional Justification of Parity Democracy´ (2009) 60 Alabama Law Review 1171, 1189
[34] Judgement 12/2008 of 29 January 2008
[35] International IDEA, Interparliamentary Union and Stockholm University, `Country Data: Spain´ https://www.idea.int/data-tools/data/gender-quotas/country-view/103/35 accessed 10 March 2020
[36] Judgement 13/2009 of 19 January 2009 (Basque Country); Judgement 40/2011 of 31 March 2011 (Andalusia)

3.1 Democratic Universalism

3.1.1 Universalism and Representation: The Case against Gender Quotas

The French Constitutional Council reached its original verdict on the basis of a "combined reading" of several constitutional provisions: Article 3 of the Constitution, which contained the principle of National Sovereignty belonging to the whole people as well as universal and equal suffrage for "either sex", and Article 6 of the 1789 Declaration of the Rights of Man and of the Citizen, which contains the right to equal access to public positions. From these provisions, the Council inferred "the right to vote and stand for election on identical terms" and a constitutional prohibition against dividing voters into categories.[37] The Council confirmed this position in 1999 and made clear that it applied to parity measures, striking down such a provision for elections to regional councils.[38]

The 1999 constitutional amendment added a provision to what was then Article 3 and is now Article 1, according to which "statutes shall promote equal access by women and men to elective offices and posts", accompanied by an addition to Article 4 proclaiming that political parties "shall contribute to the implementation" of that principle. In later decisions, the Council made clear that it considered the constitutionally sanctioned parity in political mandates and offices an exception to the general rule and struck down parity provisions for elections to the High Council of the Judiciary and for corporate boards, relying in its reasoning on equality provisions.[39] The position is shared by the Council of State.[40] In 2008, the constitution was further amended to enable parity legislation outside of the electoral area.

[37] Decision 82-146 DC of 18 November 1982, ref. 6-7
[38] Decision 98-407 DC of 14 January 1999, ref. 12
[39] Decision 2001-445 DC of 19 June 2001, ref. 56-59; Decision 2006-533 DC of 16 March 2006, ref. 12-16; Julie C. Suk, `Gender parity and state legitimacy: From public office to corporate boards´ (2012) International Journal of Constitutional Law 10(2) 449, 458
[40] Lépinard (2018), footnote 27, 86-87; Möschel, footnote 14, 1502-1503

Scholars see the Council's position rooted in the legacy of French history: the French Revolution had been directed against the division of society into different categories (the estates), hence the unity and indivisibility of the body politic was of central importance.[41] Universalism, "understood as a refusal to distinguish by using categories" [42], is a common trope in French constitutional law[43] and political discourse[44]. As Joan Wallach Scott put it, "the nation's integrity depended on unity: it could not recognize difference."[45]

According to the universalist notion of representation, "elected representatives must not represent specific interests or groups but the whole nation, and individuals are represented as abstract subjects with no social identity or membership in a social group."[46] On the Spanish Constitutional Court, a very similar argument was entertained: Dissenting judge Jorge Rodríguez-Zapata Pérez would have held that the quota adversely affected the unity and homogeneity of the citizenry, in a manner incompatible with traditional notions of representative democracy.[47]

In Germany, the universalist notion of representation has been very prominent in the debate surrounding the parity laws: Each member of parliament is seen as representing, or even embodying, the people as a whole and is supposed to act in pursuit of the general will or the general welfare.[48] A unitary people must elect a unitary representative organ.[49] Consequently,

[41] Baudino, footnote 26, 386; Eric Millard, `Constituting Women, the French Ways´ in Beverley Baines and Ruth Rubio-Marín (eds) The Gender of Constitutional Jurisprudence (Cambridge University Press 2005) 122, 125; Möschel, footnote 14, 1516; Darren Rosenblum, `Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions´ (2006) U.C. Davis Law Review 39 (3) 1119, 1153; Scott, footnote 26, 44
[42] Millard, footnote 41, 131
[43] Lépinard (2015), footnote 29, 4-5
[44] Scott, footnote 26, 21
[45] Scott, footnote 26, 45
[46] Eléonore Lépinard, `The Contentious Subject of Feminism: Defining Women in France from the Second Wave to Parity´ (2007) Signs 32 (2) 375, 390; similar Scott, footnote 26, 13
[47] Judgement 12/2008, Individual vote ref. 2
[48] Friederike Wapler, `Politische Gleichheit: demokratietheoretische Überlegungen´ [Political Equality: Reflections Regarding Theories of Democracy] (2019) 67 Jahrbuch des öffentlichen Rechts der Gegenwart 427, 436-437; Jasper von Altenbockum, `Liberté, Égalité, Parité?´ (Frankfurter Allgemeine Zeitung, 31 January 2019) https://www.faz.net/aktuell/politik/inland/kommentar-zur-paritaet-liberte-egalite-parite-16018243.html?premium accessed 03 April 2020; Polzin, footnote 10
[49] Burmeister/Greve, footnote 10, 162-163

any distinctions within the electorate threatens this concept of representation.[50] This is the position of the Bavarian Constitutional Court[51] and it has been employed in the legal challenges against the parity laws.[52] Some even speak of quotas as creating estates-like structures reminiscent of the *Ancien Régime*[53] or characterize parity as a limitation of the principle of general elections.[54]

The universalist approach is connected to another common argument against parity: The danger of the slippery slope: If women must be represented proportionally to their share of the population, must not the same be true for other disadvantaged groups? Would this not lead to a splintering of society into its components, to "communitarianism"?[55] Although the Constitutional Council did not expressly mention this concern, it was very much present in the French debate on parity.[56] It was also mentioned by judge Rodríguez-Zapata in his dissent to the Spanish Constitutional Court's decision[57] and it is very common in Germany.[58]

---

[50] Cara Röhner, `Unitäres Volk oder Parität? Für eine materiale Perspektive auf die Demokratie´ [Unitary People or Parity? Towards a Substantive Perspective on Democracy] (Verfassungsblog, 4 January 2019) https://verfassungsblog.de/unitaeres-volk-oder-paritaet-fuer-eine-materiale-perspektive-auf-die-demokratie/ accessed 29 March 2020; Friederike Wapler, `Die Crux mit der Quote – Paritätsgesetze und demokratische Repräsentation´ [The Crux of the Quota – Parity Laws and Democratic Representation] (2019) Analysen und Argumente 369, 8

[51] Bavarian Constitutional Court (BayVerfGH), Decision of 26 March 2018 (Vf. 15-VII-16), ref. 111-114

[52] Piratenpartei Brandenburg, lawsuit against the Brandenburg parity law, (15 May 2019) https://wiki.piratenbrandenburg.de/images/1/19/PIRATEN_Brandenburg_VERFASSUNGSBESCHWERDE_%2B_ORGANSTREIT_15.05.2019_%28beA%29.pdf accessed 15 March 2020, 24-25

[53] Altenbockum, footnote 48; Burmeister/Greve, footnote 10, 171; Di Fabio, footnote 8; Ebsen, footnote 8, 557; Klaus F. Gärditz, `Keine Normen gegen röhrende Platzhirsche´ [No Legal Rules Against Roaring Stags] (Legal Tribune Online, 19 November 2018) https://www.lto.de/recht/hintergruende/h/frauenquote-parlament-wahlrecht-selbstbestimmung/ accessed 29 March 2020; Alexander Hobusch, `Parité statt egalité? Weitere Gedanken zur Idee der geschlechtlichen Parität´ [Parité Instead of Egalité? Further Thoughts on the Idea of Gender Parity] (Zur Geschäftsordnung, 15 February 2019) http://zurgeschaeftsordnung.de/parite-statt-egalite/533626/ accessed 29 March 2020; Martin Morlok and Alexander Hobusch, `Ade parité? – Zur Verfassungswidrigkeit verpflichtender Quotenregelungen bei Landeslisten´ [Ade parité? – On the Unconstitutionality of Mandatory Quotas for Electoral Lists] (2019) DÖV 14, 17; Polzin, footnote 10

[54] Ungern-Sternberg, footnote 8, 528

[55] Scott, footnote 26, 70-71

[56] Dutoya and Sintomer, footnote 15, 129; Lovecy, footnote 14, 460; Murray, footnote 26, 348-349; Scott, footnote 26, 72

[57] Judgement 12/2008, Individual vote ref. 2

[58] Altenbockum, footnote 48; Brosius-Gersdorf, footnote 11, 59; Burmeister/Greve, footnote 10, 163; Di Fabio footnote 8; Edward Martin and Mathias Honer, `Neue Kleiderordnung statt Wahlrechtsreform – Eine Erwiderung auf Cara Röhner´ [New Dresscode Instead of Electoral Reform – A Rejoinder to Cara Röhner] (Verfassungsblog, 18 January 2019) https://verfassungsblog.de/neue-kleiderordnung-statt-wahlrechtsreform-eine-erwiderung-auf-cara-roehner/ accessed 29 March 2020; Piratenpartei, footnote 52, 40-41; Polzin, footnote 10

3.1.2 Counter-Arguments to the Universalist Objection

The universalist argument against gender quotas has been countered both within the framework of universalism as well as with criticism of universalist conceptions of representation. The Constitutional Court of Spain argued that the quota did not violate the unitary nature of citizenship or the unity of the people, since it did not create a compartmentalization of the electoral body, and deputies continued to represent the whole electorate. The electorate was not identical to the people and electoral rules therefore did not affect the unity of the people.[59] This position has also been taken by some scholars from all three countries. They contend that having a legally fixed number of men and women in the legislature doesn't necessarily mean that the women represent only women and the men only men; like the voting age, it is simply a pragmatic technical rule not affecting the nature of representation.[60] Under this approach, gender quotas are compatible with universalism.

More radically, universalism is often criticized from a feminist perspective as disregarding both historical and structural inequalities[61], reproducing social inequalities[62] and leaving women marginalized in the public sphere.[63] Some authors have contemplated whether there is a case for more quotas beyond gender.[64] They would be in the spirit of descriptive representation, i.e. the notion that parliaments should be a mirror of society[65], a concept very much at odds with the universalist notion of representation. It rests on the assumption that specific groups have

[59] Judgement 12/2008 ref. 10
[60] Noelle Lenoir, `The Representation of Women in Politics: from Quotas to Parity in Elections´(2001) International & Comparative Law Quarterly 50(2) 217, 242-244; Meyer, footnote 11, 1249; Millard, footnote 41, 143; Rodríguez-Ruiz/Rubio-Marín (2008), footnote 33, 302; Maximilian Steinbeis, `Among the Free and Equal´ (Verfassungsblog, 2 February 2019) https://verfassungsblog.de/among-the-free-and-equal/ accessed 29 March 2020; Wapler (Quota), footnote 50, 17
[61] Murray, footnote 26, 346
[62] Millard, footnote 41, 133
[63] Dutoya and Sintomer, footnote 15, 128
[64] Benedikt Peters, `Der Bundestag braucht eine Quote´ [The Bundestag Needs a Quota] (Süddeutsche Zeitung, 1 August 2018) https://www.sueddeutsche.de/politik/migration-mikrozensus-kommentar-1.4077485 accessed 3 April 2020
[65] Rodríguez-Ruiz/Rubio-Marín (2009), footnote 33, 1180; Erik Sollmann, `Liberté, Égalité, Parité?´ (JuWissBlog, 5 February 2019) https://www.juwiss.de/13-2019/ accessed 29 March 2020; Wapler (Equality), footnote 48, 439;

specific experiences and needs, which need to be actually present in parliament to be adequately taken into account.[66] Critics argue that such a concept of representation diminishes the voluntative nature of democracy by reducing parliamentarians to ambassadors of special interest, essentializes those group identities recognized as relevant and obliterates internal differences of interests as well as multiple affiliations.[67] Courts adhering to universalist principles have explicitly rejected the notion that parliaments should mirror society.[68]

In Germany, critics of the universalist mainstream contend that the Basic Law doesn't say much about the nature of representation and opponents of parity rely more on their personal view of political theory than on law.[69] They point out that a unitary understanding of representation is hardly compatible with democratic politics, which explicitly rely on representatives attuning to the interests, values and wishes of particular segments of the constituency, i.e. their voters.[70] Moreover, the unitary people, general will and general welfare are purely fictitious concepts, which mask the real-world distinctions within society.[71]

These scholars put forward pluralist or deliberative concepts of representation which acknowledge these differences and conceptualize parliaments as the place where the different interests within society come together – as such, they should be elected in a democratic process under conditions as free and equal as possible to ensure that everybody can decide who they want to be represented by.[72] In such a framework, a numerical under-representation of certain

[66] Rodríguez-Ruiz/Rubio-Marín (2009), footnote 33, 1180; Wapler (Quota), footnote 50, 8-9
[67] Brosius-Gersdorf, footnote 11, 59; Andreas Fisahn and Jana Maruschke, `Gutachten zur Verfassungskonformität einer Geschlechterquotierung bei der Aufstellung von Wahllisten´ [Expert Opinion on the Constitutionality of Gender Quotas for Drawing Up Electoral Lists] 27 September 2018, 17; Mehrdad Payandeh, `Quoten für den Budestag?´ [Quotas for the Budestag?] (2018) Zeitschrift für Rechtspolitik 189; Wapler (Equality), footnote 48, 440-443; Wapler (Quota), footnote 50, 9-10; Ungern-Sternberg, footnote 8, 532
[68] BayVerfGH, footnote 51, ref. 110, 123
[69] Meyer, footnote 11, 1250
[70] Christoph Möllers, `Die Krise der Repräsentation´ [The Crisis of Representation] (Frankfurter Allgemeine Zeitung, 13 February 2019) https://www.faz.net/aktuell/feuilleton/debatten/ist-die-frauenquote-in-brandenburg-verfassungswidrig-16037714.html?premium accessed 3 April 2020
[71] Wapler (Equality), footnote 48, 436-437; Wapler (Quota), footnote 50, 8
[72] Brosius-Gersdorf, footnote 11, 59; Fisahn/Maruschke, footnote 67, 14-15; Gärditz, footnote 53; Wapler (Quota), footnote 50, 10-11

group is not in itself a problem, but can point to underlying problems in the equal political participation of that group.[73] These theories, situated between universalist and descriptive conceptions of representation, are convincing and move the issue of permissibility of quotas from abstract concepts to more concrete questions of equality and freedom of the vote.

3.2 Electoral Equality

The equality of voters and candidates (electoral equality) is a central element of democracy. Many scholars have characterized the position of the French Constitutional Council as enforcing formal equality of candidates.[74] The Council does cite constitutional provisions of equality for its position, particularly in later decisions, but I would argue that its "the unitary concept of citizenship"[75], i.e. its absolute refusal to allow distinctions being made in the name of universalism, is a quite particular interpretation of equality. If one accepts the distinction between genders as given fact of reality (although a socially constructed one), the constitutional question of equality is not whether the law recognizes men and women, but whether it treats them the same.

Although to some, quota provisions "unquestionably" affect equality,[76] it can be argued that gender-neutral quotas do not even touch upon formal equality because the law applies to both genders equally.[77] In fact, one could say that parity is not unequal treatment on the basis of gender, but enforced equal treatment on the basis of gender.[78] This was the position of the Spanish Constitutional Court, which repeatedly noted that the Spanish parity quota is not discriminatory and refers equally to both genders.[79]

[73] Wapler (Equality), footnote 48, 446-447; Rodríguez-Ruiz/Rubio-Marín (2009), footnote 33, 1178-1179
[74] John Bell, *French Legal Cultures* (Butterworths 2001) 227; Lépinard (2015), footnote 29, 4; Lovecy, footnote 14, 457; Möschel, footnote 14, 1496; Rodríguez-Ruiz/Rubio-Marín (2009), footnote 33, 1173; Suk, footnote 39, 455; Ungern-Sternberg, footnote 8, 529
[75] Lenoir, footnote 60, 236
[76] Judgement 12/2008, Individual vote ref. 4 (translation by DeepL)
[77] Röhner, footnote 50; Steinbeis, footnote 60
[78] Fisahn/Maruschke, footnote 67, 23
[79] Judgement 12/2008 ref. 3, 5, 9

In Germany, it is regularly assumed that parity legislation adversely affects electoral equality,[80] often without explaining how so. Even ardent supporters of parity legislation assume that it affects electoral equality.[81] What seems to be meant is that individual candidates cannot be elected to specific positions on the electoral lists because of their gender.[82]

This perspective on the individual list position rather than on the nominating process as a whole appears to be artificially narrow, however. Electoral equality is only ever guaranteed within the logic of the electoral system.[83] Just like nobody's right to formal equal treatment is affected by the fact that they can only run on the list of one party or in one district, as long as all parties have the same chances and all districts the same size, equality seems not to be affected when they can only run for positions designated for one gender when both men and women receive the same number of positions. This is of course only true for symmetrical quotas that pertain equally to men and women. Quotas that single out one of the genders certainly affect the right to formal equal treatment.

Another take to explain how parity legislation would affect equality rights is that individual men will have worse chances of being chosen for a promising position on the list than individual women because there are more male than female candidates.[84] While this is true, it seems to be an uneasy charge to make for opponents of parity, who usually emphasize that electoral equality is to be understood in strictly formal terms,[85] as it would open the door to legislative considerations of equalizing electoral chances.

[80] BayVerfGH, footnote 51, ref. 84-85, 132; Brosius-Gersdorf, footnote 11, 58; Gärditz, footnote 53; Sollmann, footnote 65; for internal party quotas: Bonner Kommentar, footnote 8, ref. 814
[81] Laskowski (2018), footnote 12, 400-402
[82] Ebsen, footnote 8, 555; Hobusch (Brandenburg), footnote 8; Laskowski (2018), footnote 12, 401-402; Morlok/Hobusch, footnote 53, 15; Piratenpartei, footnote 52, 39 & 42; Ungern-Sternberg, footnote 8, 528
[83] Meyer, footnote 11, 1246
[84] Ebsen, footnote 8, 555; Burmeister/Greve, footnote 10, 157; Fisahn/Maruschke, footnote 67, 23; Morlok/Hobusch, footnote 53, 15
[85] Martin/Honer, footnote 58; Morlok/Hobusch, footnote 53, 19

Lastly, some scholars argue that gender quotas affect Article 3 (3) of the Basic Law, which provides that no person shall be favored or disfavored because of, among other things, sex/gender (*Geschlecht*). They read the provision as prohibiting not only discrimination, but any distinguishing between persons of different gender.[86]

3.3 Electoral Freedom

The freedom to vote and stand as candidate (electoral freedom) is no less central to democracy than equality. Yet for the French Constitutional Council, it seems to be irrelevant in deciding on gender quotas[87], even though the opposition raised such issues in their complaint against the parity act.[88] In Spain and Germany, however, electoral freedom plays an important role in the debate.

According to the Constitutional Court of Spain, passive suffrage, i.e. the right to stand for elections, was not affected by quotas, since it did not entail a right to be chosen as a party's candidate. Conversely, the right to vote did not comprise a right to be able to vote for specific candidates.[89] This is also true in Germany.[90] Dissenting judge Rodríguez-Zapata called this technical reading of the constitution artificial, arguing that the right to vote for candidates who could not be on the ballot because of their gender is violated.[91]

In Germany, the freedom to vote and stand for elections is usually considered to apply to the process of selecting candidates in intra-party procedures because of its importance to the electoral system.[92] The reasoning of the Spanish Constitutional Court thus cannot be transferred to Germany. Moreover, the Basic Law requires parties to "conform to democratic principles"

[86] Morlok/Hobusch, footnote 53, 16
[87] Lenoir, footnote 60, 236
[88] Millard, footnote 41, 140; Rodríguez-Ruiz/Rubio-Marín (2008), footnote 33, 293
[89] Judgement 12/2008 ref. 9
[90] Hohmann-Dennhardt, footnote 11; Meyer, footnote 11, 1246
[91] Judgement 12/2008, Individual vote ref. 4
[92] Federal Constitutional Court, Decision of 20 October 1993, 2 BvC 2/91 ref. 40; BayVerfGH, footnote 51, ref. 135; Bonner Kommentar, footnote 8, ref. 814; Piratenpartei, footnote 52, 38

in their internal organizations in Article 21 (1), which includes electoral freedom.[93] Because of this, even internal party quotas met some constitutional concerns among German jurists[94] although they are by now regarded constitutional[95]. Against this background, it seems to be almost consensus that legislated quotas limit electoral freedom.[96] Some parity supporters argue, however, that the electoral freedom of voters in the general election is actually enhances, since it is now limited by "de-facto quota for men".[97]

In 2013, the Landtag of Rhineland-Palatinate had foreseen to print the percentage of women on all candidate lists as well as the sentence "men and women shall have equal rights" (a quote from the Basic Law) on regional election ballots. The measure was declared unconstitutional by the Land constitutional court as a state-sponsored plea to vote for specific parties (those with more women candidates), thus violating electoral freedom.[98] This decision cannot be directly transferred to gender quotas, since they apply to all parties equally, but it highlights how sensitive the German judiciary is to violations of electoral principles.

3.4 The Autonomy of Political Parties

In the analysis of the Spanish Constitutional Court, the central constitutional obstacle to gender quotas is the freedom of political parties based on Article 6 of the Spanish Constitution.[99] However, the Court qualifies this freedom in the name of the constitutional functions of parties, which it characterizes as instrumental for political participation. Because of the instrumentality of parties, it claims, it is "perfectly legitimate" for the lawmaker to regulate them in the name

[93] Bonner Kommentar, footnote 8 ref. 814
[94] Bonner Kommenatr, footnote 8 ref. 807-818; Bernd von Nieding, `Politische Wahlen und Frauenquote, Eine Betrachtung zur verfassungsrechtlichen Zulässigkeit von geschlechtsbezogenen Förderungsmaßnahmen in der Politik´ [Political Elections and Women Quota, A Reflection on the Constitutional Permissibility of Gender-Related Promotion Measures in Politics] 1994 NVwZ 1171
[95] Federal Constitutional Court, Decision of 01. April 2015, 2 BvR 3058/14 ref. 25; Hans Klein, `Art. 38´ in *Maunz/Düring* (C.H. Beck), ref. 108
[96] Brosius-Gersdorf, footnote 11, 58; Burmeister/Greve, footnote 10, 157; Fisahn/Maruschke, footnote 67, 32; Morlok/Hobusch, footnote 53, 15; Piratenpartei, footnote 52, 38-39; Ungern-Sternberg, footnote 8, 529
[97] Laskowski (2018), footnote 12, 402
[98] Constitutional Court of Rhineland-Palatinate, Decision of 13 June 2014, VGH N 14/14 & VGH B 16/14
[99] Judgement 12/2008 ref. 3

of constitutional objectives. It also stresses that party freedom is not a fundamental right but only a derivative of parties' functions, while the fundamental right of freedom of association is consumed by the specificity of parties.[100]

In Germany, where the autonomy of parties is protected by Article 21 of the Basic Law, the instrumental nature of parties is a major argument for the permissibility of gender quota's restriction on their freedom as well.[101] This is countered by the argument that parties are fundamentally non-governmental organizations that need to be autonomous from the state in order to fulfill their function.[102] In any way, there is a consensus that quotas limit party autonomy and therefore require justification.

The Constitutional Court of Spain reasoned that the quota did not infringe upon parties' ideological freedom or their freedom of expression, as it imposed no ideological position or values and did not prohibit parties opposing gender equality.[103] This is a common view in Germany as well.[104] Some argue, however, that a quota forces parties to act contrary to their ideological convictions[105] or that a quota would have an influence on parties' ideological stances, since program and personnel could not be separated.[106]

Moreover, it is argued in Germany that quotas have an influence on the competition between parties, since some parties, especially newer and smaller ones, have a more difficult task in

[100] Judgement 12/2008 ref. 5
[101] BayVerfGH, footnote 51 ref. 25; Burmeister/Greve, footnote 10, 158-159; Sven Jürgensen, `Die Versprechen der modernen Demokratie: zur Debatte parlamentarischer Parität´ [The Promises of Modern Democracy: on the Debate on Parliamentary Parity] (Verfassungsblog, 4 February 2019) https://verfassungsblog.de/die-versprechen-der-modernen-demokratie-zur-debatte-parlamentarischer-paritaet/ accessed 29 March 2020; Laskowski (2018), footnote 12, 402; Morlok/Hobusch, footnote 53, 15-16; Piratenpartei, footnote 52, 31-35
[102] BayVerfGH footnote 51, ref. 139-140
[103] Judgement 12/2008 ref. 6
[104] Laskowski (2018), footnote 12, 402
[105] BayVerfGH, footnote 51 ref. 143; Wapler (Quota), footnote 50, 13
[106] Bonner Kommentar, footnote 8, ref. 819; Gärditz, footnote 53; Hobusch (Brandenburg), footnote 8

finding qualified women candidates than others.[107] These effects exacerbate the significance of the limitation of party autonomy.

4 Constitutional Justifications of Gender Quotas

How then can these limitations on party autonomy, electoral freedom and, arguably, electoral equality be justified? Two distinct legal arguments for gender quotas can be discerned: The call for parity as a mandate of properly understood democracy, prominent among supporters of the constitutional amendment in France and also present in Spain, and quotas as positive measures in the name of substantive equality, as exemplified by the Spanish Equality Act. In Germany, both strains of argument are employed. The case for gender quotas would have to be rather strong, since the Federal Constitutional Court of Germany requires "special" and "compelling" reasons to justify limitations of electoral principles, that is reasons which are at least equally weighty to the compromised electoral principle.[108]

4.1 Parity Democracy

4.1.1 Parité à la française

The introduction of parity into the French Constitution was precipitated by a broad non-partisan feminist movement, which managed to push the idea into the center of political debate.[109] Many in that movement saw parity as an enhancement to the current state of democracy.[110] That partly meant to renew and feminize the discredited political elite[111], but also a fundamental re-thinking of what democracy meant. Central to the Parity movement was the 1992 book *Au Pouvoir,*

[107] BayVerfGH, footnote 51 ref. 143; Brosius-Gersdorf, footnote 11, 58; Burmeister/Greve, footnote 10, 159; Hobusch (Brandenburg) , footnote 8; Morlok/Hobusch, footnote 53, 16; Piratenpartei, footnote 52, 35-37
[108] Most recently: Federal Constitutional Court, Order of the Second Senate of 29 January 2019 - 2 BvC 62/14 -, para. 43
[109] Baudino, footnote 26, 388-390; Jane Jenson and Celia Valiente, `Comparing Two Movements for Gender Parity: France and Spain´ in Banaszak/Beckwith/Rucht (eds), *Women's Movements Facing the Reconfigured State* (Cambridge University Press 2003) 69, 74-83; Scott, footnote 26, 75-99
[110] Baudino, footnote 26, 387; Lépinard (2015), footnote 29, 5; Lovecy, footnote 14, 439; Rosenblum, footnote 41, 1142-1144; Suk, footnote 39, 455
[111] Rodrígue Ruiz/Rubio-Marín (2008), footnote 33, 292; Rosenblum, footnote 41, 1143; Scott, footnote 26, 49 & 78-79

Citoyennes! Liberté, Égalité, Parité (To Power, Female Citizens! Liberty, Equality, Parity) by Françoise Gaspard, Claude Servan-Schreiber and Anne Le Gall[112] – the subtitle of the book is still prominent today as a political slogan, especially in Germany.

This approach perceives human nature to be fundamentally defined by the binary anatomical difference between men and women, which is seen as different from and cutting across all other divisions within society.[113] It reflects a differentialist feminist theory prominent in France.[114] The claim that gender was the most fundamental, the primary division of human society – that thus women were not a group, community or category as any other,[115] that they were not only in a descriptive, but in a normative sense "half of humanity"[116] – could explain why parity would not lead to other electoral quota, leaving the universalist notion of society largely intact or even perfecting it.[117] Only occasionally was it argued in addition that women could bring a special perspective to parliaments.[118]

Scholars assert that the French constitutional reform has resulted in a "gendered citizenship"[119] or "gendered democracy"[120] reflecting the "duality of humankind"[121] and the gendered nature of every individual[122]. The placement of the amendment in Article 1 of the French Constitution is seen as a sign of its significance.[123] Others have, however, rejected claims that parity

[112] Scott, footnote 26, 58-63
[113] Baudino, footnote 26, 388; Mona Lena Krook, *Quotas for Women in Politics* (Oxford University Press 2009), 189; Lépinard (2007), footnote 46, 391; Scott, footnote 26, 62; Nadia Urbinati, `Why Parité Is a Better Goal than Quotas´ (2012) 10 International Journal of Constitutional Law 465, 476
[114] Lépinard (2007), footnote 46, 379-383; Rosenblum, footnote 41, 1160-1162; distinguishing the original concept of parity from conventional differentialism: Scott, footnote 26, 60-62
[115] Scott, footnote 26, 55
[116] Rodríguez-Ruiz/Rubio-Marín (2008), footnote 33, 301; see also Scott, footnote 26, 121
[117] Dutoya and Sintomer, footnote 15, 130; Lépinard (2007), footnote 46, 392; Lepinard (2013), 284-285; Lépinard (2015), footnote 29, 10; Lépinard (2018), footnote 27, 68-69; Murray, footnote 26, 349; Rosenblum, footnote 41, 1162-1164; Rodríguez-Ruiz/Rubio-Marín (2008), footnote 33, 302; Scott, footnote 26, 61
[118] Scott, 63-65, 81, 91
[119] Lovecy, footnote 14, 461
[120] Rosenblum, footnote 41, 1126
[121] Millard, footnote 41, 137; similar Rodríguez-Ruiz/Rubio-Marín (2008), footnote 33, 292: "duality of humanity"; Scott, footnote 26, 46: "duality of the individual"
[122] Rodríguez-Ruiz/Rubio-Marín (2008), footnote 33, 302; Scott, footnote 26, 49 & 60-61
[123] Rubio-Marín (2012), footnote 20, 112

fundamentally affected French democracy.[124] In any way, the relatively easy proliferation of parity into other spheres shows that parity in France is enjoying a "broad underlying consensus" among legislators.[125] But the Constitutional Council has made clear that the Constitution does not mandate, but merely allows parity legislation.[126]

In Spain, echoes of the French parity debate can be heard. The legislator, in the preamble to the new statute, had claimed it was an improvement of "the quality of […] representation and thereby of our own democracy".[127] However, it did – like the French legislator – deliberately refrained from using the word parity, opting for the less emphatic "balanced composition" instead.[128]

In the judgement of the Spanish Constitutional Court, some elements of this line of argumentation can be found as well:[129] The court distinguishes between differentiations "based on majority/minority criteria" such as race on one hand, and differentiations based on gender on the other hand, because the latter "universally divides each society in two groups which are balanced in percentage terms".[130] It also declares that "the democratic principle […] demands the best identity possible between those who govern and those who are governed"[131] and that "any political decision must be based [upon] the absolute equality between men and women."[132] The dissent expressly attributes to his colleagues the position that "the division of humanity into two sexes has more force and prevails over any other criterion of union or distinction of human beings".[133]

[124] Lenoir, footnote 60, 245
[125] Lépinard (2018), footnote 27, 83
[126] Decision 2015-465 QPC of 24 April 2015, ref. 13; Lépinard (2018), footnote 27, 88
[127] Judgement 12/2008 ref. 5
[128] Tània Verge and Emanuela Lombardo, `Gender Quotas in Spain – Broad Coverage, Uneven Treatment´ in Éléonore Lépinard and Ruth Rubio-Marín (eds) *Transforming Gender Citizenship – The Irresistible Rise of Gender Quotas in Europe* (Cambridge University Press 2018) 126, 134
[129] Rodríguez-Ruiz/Rubio-Marín (2009), footnote 33, 1189-90 ; Rubio-Marín (2017), footnote 21
[130] Judgement 12/2008 ref. 5
[131] Id.
[132] Judgement 12/2008 ref. 7
[133] Judgement 12/2008, Individual Vote ref. 2 (translation by DeepL)

Yet the Court stopped short of fully endorsing the notion of parity being a requirement of democracy: explicitly notes that the Spanish Constitution does not mandate an electoral quota.[134] Rather, it mixed together notions of parity democracy and substantive equality arguments (see below) to justify the Equality Act.

4.1.2 Non-Differentialist Arguments for Parity Democracy

The parity democracy approach bears the danger of essentializing sexual difference and women,[135] as exemplified by the part of the French parity movement that veered into heteronormativity in the debate on legal recognition of homosexual partnerships, claiming a complementary nature of men and women.[136] The parity democracy approach precludes other marginalized groups from claiming guaranteed representation.[137] Moreover, it is accused of ignoring intersectional discrimination[138] and excluding non-binary genders[139]. Some critics argued that parity perpetuates a socially construed binary division between two genders[140] and that its advocates lost sight of structural discrimination and barriers for women and minorities in the French political system.[141] As to intersectionality, empirical research suggests that minority women do somewhat profit from legislative gender quotas, but less so than majority women.[142]

Some supporters of parity have developed non-essentialist theories of parity democracy, which are based not on a natural, but a culturally created sexual difference.[143] In English language

[134] Judgement 12/2008 ref. 8
[135] Eleonore Lépinard (2013), `For Women Only? Gender Quotas and Intersectionality in France´ (2013) 9 Politics & Gender 276, 285; Rosenblum, footnote 41, 1180-1181; Scott, footnote 26, 70 & 121-122
[136] Scott, footnote 26, 116-119
[137] Lépinard (2007), footnote 46, 395
[138] Lépinard (2007), footnote 46, 392; Lépinard (2013), footnote 135, 285-286; Rosenblum, footnote 41, 1164-1165
[139] Rosenblum, footnote 41, 1179-1180
[140] Dutoya/Sintomer, footnote 15, 129; Krook, footnote 113, 190; Scott, footnote 26, 67
[141] Lépinard (2014), footnote 17, 8
[142] Melanie M. Hughes, `Intersectionality, Quotas, and Minority Women's Political Representation Worldwide´ (2011) 105 American Political Science Review 604, 612
[143] Suk, footnote 39, 456

legal scholarship, parity is most forcefully advocated for by Blanca Rodríguez-Ruiz and Ruth Rubio-Marín. They claim that „a true democracy must be a parity democracy" and gender quotas are "a structural prerequisite of the democratic state".[144] They argue, based on Carole Pateman's theses, that the modern liberal state and its constitutional theory rest on a "sexual contract" ascribing a fundamentally unequal status to men and women: While men were regarded as autonomous and independent and thus qualified to be political subjects, women were dependent, subjugated and confined to the domestic realm. They were charged with managing all aspects of life that reflect human interdependence, thereby upholding the myth that the politically acting individual (man) is truly independent.[145]

Rodríguez-Ruiz and Rubio-Marín further contend that these conceptions are still essentially intact: Political participation requires independence and only those who can employ others to manage their interdependence can enter public life.[146] Parity democracy in their view introduces interdependence into the public realm, redefines autonomy and dismantles the sexual contract.[147] Moreover, its symbolism is an instrument of cultural transformation helping to dismantle traditional gender roles.[148] Parity is thus seen as ultimately "degendering" politics and citizenship, i.e. disentangling it from male biases and exclusions.[149] With this theoretical background, gender parity legislation has a distinct justification, not applicable to other marginalized groups[150] that aims to reconcile parity legislation with universalism.[151]

[144] Rodríguez-Ruiz/Rubio-Marín (2008), footnote 33, 289
[145] Rodríguez-Ruiz/Rubio-Marín (2008), footnote 33, 306-309; Rodríguez-Ruiz/Rubio-Marín (2009), footnote 33, 1180-1182; Rubio-Marín (2012), footnote 20, 101-103
[146] Rodríguez-Ruiz/Rubio-Marín (2008), footnote 33, 310-311
[147] Rodríguez-Ruiz/Rubio-Marín (2008), footnote 33, 311-312; Rodríguez-Ruiz/Rubio-Marín (2009), footnote 33, 1182; Rubio-Marín (2012), footnote 20, 103
[148] Rodríguez-Ruiz/Rubio-Marín (2008), footnote 33, 312 & 315
[149] Rubio-Marín (2012), footnote 20, 117
[150] Rodríguez-Ruiz/Rubio-Marín (2009), footnote 33, 1183
[151] Rodríguez-Ruiz/Rubio-Marín (2009), footnote 33, 1194

Having only some women in parliament is, they argue, not enough, since it will be only those women whose life comes close to that of the (male) ideal of independence.[152] However, it is not clear why this wouldn't be the same with parity, as the absolute number of female politicians would still be very small.[153]

More practically, Joan Wallach Scott claimed that parity has challenged the connection of masculinity with politics and facilitated a renewal of political life.[154] Similarly, Eléonore Lépinard has argued that gender quotas contribute to a broad transformation of the political sphere by challenging its supposed neutrality. She is, however, open for similar claims from other marginalized groups.[155]

4.1.3 Parity Democracy in the German Debate

In Germany, some activists and scholars have taken up the idea that real democracy required parity. The most active proponent of parity in the legal discourse is Silke Laskowski who is credited as the author of the initial bill for the parity law in Brandenburg sponsored by the Green Party caucus.[156] Without parity, she argues, half of the population cannot equitably partake in governance, so the principle of popular sovereignty is violated.[157] In 2016, a group of activists represented by Laskowksi filed an actio popularis in the Bavarian Constitutional Court, arguing that without parity, women did not have sufficient influence on parliamentary decisions.[158] In

[152] Rodríguez-Ruiz/Rubio-Marín (2008), footnote 33, 312-313
[153] Helen Irving, *Gender and the Constitution* (Cambridge University Press 2008), 116
[154] Scott, footnote 26, 144-146
[155] Lépinard (2014), footnote 17, 7-8
[156] Green Caucus in the Landtag of Brandenburg, Press Release, 27 February 2018, https://www.gruene-fraktion-brandenburg.de/themen/frauengender/buendnisgruene-landtagsfraktion-legt-paritegesetz-vor/ accessed 03 April 2020
[157] Silke Laskowski, `Wann bekommt Deutschland ein Parité-Gesetz?´ [When Will Germany Get a Parity Law?] STREIT 2/2015 51, 56; Laskowski (2018), footnote 12, 397-398
[158] BayVerfGH, footnote 51, ref. 22-23

addition to scholarly articles, she has also written expert opinions on parity for the Green Party caucuses in Thuringia[159] and, already in 2007, Schleswig-Holstein.[160]

Laskowski and the parliamentary sponsors of parity bills suggest that due to the underrepresentation of women in parliaments, the laws made by those parliaments are biased against women as well.[161] The German understanding of parity democracy therefore has a somewhat different rationale from the French one. It reminds of the "critical mass theory", according to which female legislators will act in the interest of women and a certain amount of them, often put at about 30 percent, will affect policy outcomes for women favorably – there is, however, no clear empirical evidence for this.[162] On a theoretical level, this approach downplays different interest among women.[163] Other authors see the equal presence of the formerly excluded as a democratic principle regardless of any substantive outcomes.[164]

Critics argue that the Basic Law does not contain any indication that it considers group representation an essential part of democracy, rather relying on political parties to organize the diverging interests within society.[165] They remind that the jurisprudence of the German Federal Constitutional Court is not very sympathetic to claims for group representation.[166] Some assail claims of parity democracy as essentialist and anti-pluralist "identity politics".[167] Like universalist representation, the concept of parity democracy rests on underlying politico-legal

[159] Silke Laskowski, `Zur verfassungsrechtlichen Zulässigkeit gesetzlicher Paritéregelungen für die Kommunal- und Landtagswahlen in Thüringen´ [On the Constitutional Permissibility of Statutory Parity Regulations for Local and Landtag Elections in Thuringia] 6 May 2014, https://www.gruene-thl.de/sites/default/files/umschlag_mit_gutachten_paritegesetz_0.pdf accessed 2 June 2020
[160] Landtag Schleswig-Holstein, Umdruck 16/2273
[161] LT-Drs. 6/8210 (Brandenburg), 26-27; LT-Drs. 6/6964 (Thuringia), 1; Laskowski (2015), footnote 157, 54-56; Laskowski (2018), footnote 12, 395-397
[162] Lépinard (2014), footnote 17, 3-4
[163] Lépinard (2014), footnote 17, 5
[164] Röhner, footnote 50
[165] Ungern-Sternberg, footnote 8, 530-531
[166] Ungern-Sternberg, footnote 8, 530
[167] Gärditz, footnote 53

theories rather than on positive constitutional law. Such approaches bear an enhanced risk of courts enshrining their personal theoretical convictions into the law.

4.2 Substantive Equality / Affirmative Action

Perhaps closer to conventional judicial thinking is the aim of pursuing substantive equality. The term substantive equality designates the notion that people do not only have equal rights formally, but that they can actually exercise those rights equally in reality. It rests on the recognition that in the face of an unequal reality, equal formal rights do not change, or may even reinforce, inequality. Substantive equality does not mean to obliterate differences between individuals or treat everyone identically, but rather to create conditions for everyone to use their rights as equals. This requires combatting structural inequalities, barriers and discrimination as well as facilitating equal opportunities, if necessary by affirmative action.[168] Some scholars point out, however, that affirmative action, and gender quotas in particular, often only remedy inequalities for some without tackling underlying causes.[169] In the context of elections, substantive equality means that men and women have the same real world chances to gain access to parliament and not just the same right to run.[170]

4.2.1 Substantive Equality Arguments in Spain and France

In Spain, the introduction of the 40 percent gender quota was, contrary to France, a largely partisan project, supported by the left and opposed by the right.[171] Its central justification – both politically and constitutionally, was the promotion of substantive gender equality.

The legal touchstone of the Constitutional Court's assessment was Article 9.2 of the Spanish Constitution, which obliges public authorities to promote conditions ensuring real and effective

[168] For the whole paragraph: Wapler (Equality), footnote 48, 432-433; Dia Anagnostou, `Gender equality and parity in European national constitutions´ in Helen Irving (ed.) Constitutions and Gender (Edward Elgar 2017) 268, 273
[169] Lépinard (2014), footnote 17, 5-6
[170] Rodríguez-Ruiz/Rubio-Marín (2009), footnote 33, 1175
[171] Jenson/Caliente, footnote 109, 83-92

equality and "to facilitate the participation of all citizens in political, economic, cultural and social life". Already before the judgement, the Spanish Constitutional Court had a relatively progressive record on gender issues, among other things approving positive anti-discrimination measures for women on the basis of Articles 9.2 and 14.[172] Relying on this prior case-law, the Court emphasized the importance of substantive equality, which it describe as necessary to the free development of the personality as well as to the social and democratic state and the rule of law.[173] Additionally, the court relied on the effectiveness of Article 14, which contains equality before the law.[174] Several times, the court noted the historical discrimination against women in the political arena.[175]

The Spanish Constitutional Court performed an explicit proportionality analysis in regard to the autonomy of parties and came to the conclusion that the quota is reasonable and limited to 40 percent, approvingly noting the exceptions for small municipalities.[176] However, in later decisions it found strict parity legislation to be proportional as well.[177] The Court even sanctioned the parity law of the Basque autonomous community, which provides that electoral lists must contain *at least* 50 percent women, since it was as a reasonable and proportionate "positive discrimination" measure and men were guaranteed 40 percent of positions under the national legislation.[178]

Arguments based on substantive equality and affirmative action were not absent from the French parity movement.[179] Parity was described as "perfect equality" that extended from the legal world into reality.[180] French Constitutional Law provided a base for that, with the

[172] Ruth Rubio-Marín, `Engendering The Constitution – The Spanish Experience´ in Beverley Baines and Ruth Rubio-Marín (eds) *The Gender of Constitutional Jurisprudence* (Cambridge University Press 2004) 256, 259-260
[173] Judgement 12/2008 ref. 4
[174] Judgement 12/2008 ref. 5
[175] Judgement 12/2008 ref. 5, 6, 8, 9
[176] Judgement 12/2008 ref. 5, 8
[177] Judgement 13/2009 of 19 January 2009, ref. 11
[178] Id.
[179] Dutoya/Sintomer, footnote 15, 130; Scott, footnote 26, 120-121
[180] Scott, footnote 26, 77

preamble to the 1946 Constitution, which has the same constitutional position as the 1789 Declaration, calling for the law to guarantee to women equal rights with men, in all domains, a provision that was ignored by the Constitutional Council.[181]

The constitutional reform of 2000 deliberately avoided the term parity, rather calling for "equal access", which reminds more of classical equality arguments.[182] In line with this observation, Noelle Lenoir, a member of the Constitutional Council when it approved the first parity legislation, has interpreted parity as simply an "operational mechanism" to ensure substantive equality.[183] Even some of the "inventors" of parity democracy later saw parity foremost as a strategic step on the way to end masculine domination and achieve equality.[184] For Geneviève Fraisse, the concept of parity democracy was "philosophically false, but true in practice" as a tool to facilitate equality.[185] In recent debates, pragmatic anti-discrimination arguments were more common than recourses to parity democracy, although both strains were often merged together.[186]

4.2.2 Consequences of Adopting a Substantive Equality Approach

The logic of substantive equality and affirmative action opens the door to a proportionality analysis.[187] It has different consequences for electoral gender quotas in general and parity legislation in particular. Regarding gender quotas, it can be argued that a certain minimum presence of women in parliaments is necessary to ensure that women's special concerns are adequately discussed.[188] However, this argument does not necessarily extend to parity.[189]

[181] Krook, footnote 113, 194; Alec Stone Sweet, *Governing with Judges – Constitutional Politics in Europe* (Oxford University Press 2000), 106
[182] Lépinard (2015), footnote 29, 10-11 ; Rodríguez-Ruiz/Rubio-Marín (2009), footnote 33, 1174
[183] Lenoir, footnote 60, 245
[184] Scott, footnote 26, 123
[185] Cited by Dutoya/Sintomer, footnote 15, 130
[186] Lépinard (2015), footnote 29, 11-12; Lépinard (2018), footnote 27, 85-86; Scott, footnote 26, 127
[187] BayVerfGH, footnote 51 ref. 129; Ebsen, footnote 8, 556; Laskowski (2018), footnote 12, 400; Wapler (Quota), footnote 50, 16; critical towards using proportionality analysis on this issue: Meyer, footnote 11, 1246
[188] Rodríguez-Ruiz/Rubio-Marín (2008), footnote 33, 304; Sollmann, footnote 65
[189] Rodríguez-Ruiz/Rubio-Marín (2009), footnote 33, 1179

Under the premise that substantive equality means (only) equal chances, whether one thinks that substantive equality can legitimize parity or quotas more general, depends on how one perceives the empirical disadvantages women face in politics[190] and whether there are less intrusive measures that could combat those.[191] There is evidence that the structural disadvantages of women in politics are indeed substantial.[192] Even some opponents of parity legislation admit that.[193] Others, however, claim the opposite, arguing that women are actually overrepresented in parliaments when compared to their share of party membership.[194] In this framework, the constitutionality of parity legislation – and gender quotas more generally – ultimately depends on a balancing of competing constitutional values.[195]

Moreover, positive anti-discrimination measures would typically only be temporary[196] and asymmetric and it is hard to justify why they should apply solely to gender.[197] This was also pointed out by judge Rodríguez-Zapata in his dissent. [198] In fact, the Spanish Constitutional Court in its decision on the Basque parity law did find that the legislation was only justified as a temporary measure as long as discrimination against women persisted and that it would thus contribute to the ultimate disappearance of its own constitutional foundation.[199]

4.2.3 Substantive Equality in the German Debate

In Germany, the furtherance of substantive equality is the main legal case for parity legislation. Sometimes it is made alongside the parity democracy notion.[200] The argument rests on

[190] Perceiving them as significant: Brosius-Gersdorf, footnote 11, 58; Laskowski (2018), 393-395
[191] Fisahn/Maruschke, footnote 67, 28-29; Morlok/Hobusch, footnote 53, 19; Piratenpartei, footnote 52, 30; Rodríguez-Ruiz/Rubio-Marín (2009), footnote 33, 1194
[192] LT-Drs. 6/8210 (Brandenburg), 28-29; Jürgensen, footnote 101
[193] Piratenpartei, footnote 52, 40; Gärditz, footnote 53
[194] Burmeister/Greve, footnote 10, 161; Hobusch (Egalité), footnote 53; Morlok/Hobusch, footnote 53, 18-19
[195] On one side: Hobusch (Egalité), footnote 53; Morlok/Hobusch, footnote 53, 19-20; Ungern-Sternberg, footnote 8, 532; on the other side: Hohmann-Dennhardt, footnote 11; Laskowski (2015), footnote 157, 59-60
[196] Irving, footnote 153, 122-124
[197] Anagnostou, footnote 168, 274; Rodríguez-Ruiz/Rubio-Marín (2009), footnote 33, 1177 & 1192
[198] Judgement 12/2008, Individual vote ref. 3
[199] Judgement 13/2009 of 19 January 2009, ref. 11
[200] Laskowski (2015), footnote 157, 58-59

Article 3 (2) of the Basic Law, which declares that "men and women shall have equal rights" and that "the state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist", thus firmly positing a notion of substantive gender equality, and an obligation of the state to establish it,[201] in German constitutional law.[202] Activists have even claimed that the state is legally compelled to introduce parity legislation as a positive anti-discrimination measure.[203] The bills more (Brandenburg) or less (Thuringia) explicitly claimed that such an obligation existed.[204]

The two parity acts contain a number of provisions supposed to ensure the proportionality of parity: In Thuringia if a list does not conform to parity down-ballot, those positions on the list that do conform are allowed. In Brandenburg, there is an exception for parties which want to represent only one gender. Supporters further argue that parity in parliaments is an especially effective instrument to further substantive equality in other areas[205] or that it ensures the integrative function of elections[206].

It is, however, controversial, whether Article 3 (2) even applies in regard to electoral legislation[207] and what its relationship to the fundamental right to non-discrimination on the basis of gender is.[208] Historically, the committee that authored the provision was of the opinion that it does not allow ""rigid quotas".[209] Many German jurists further emphasize, like judge Rodríguez-Zapata in regard to Article 9.2 of the Spanish Constitution,[210] that the provision aims

[201] Meyer, footnote 11, 1247
[202] Anagnostou, footnote 168, 277-278
[203] BayVerfGH, footnote 51, ref. 20-21
[204] LT-Drs. 6/8210 (Brandenburg), 2, 32; LT-Drs. 6/6964 (Thuringia), 1
[205] Meyer, footnote 11, 1246
[206] Fisahn/Maruschke, footnote 67, 27
[207] Wapler (Quota), footnote 50, 14-15; in favor of applicability: Brosius-Gersdorf, footnote 11, 58; Meyer, footnote 11, 1249; against applicability: Hobusch (Egalié), footnote 53; Ungern-Sternberg, footnote 8, 533
[208] Fisahn/Marschuke, footnote 67, 34-35; Meyer, footnote 11, 1248
[209] Piratenpartei, footnote 52, 29-31
[210] Judgement 12/2008, Individual vote ref. 3

at equality of chances, not of outcome.[211] It has to be noted, however, that it is the closed nature of lists in Germany and Spain that causes parity on candidate lists to result in outcome parity.[212] It is apparent from this that the substantive equality justification meets a number of objections of its own.

5 Conclusions for the German Debate

How can the history of parity legislation in France and Spain inform the debate taking place in Germany and, ultimately, the judicial decisions which will have to be rendered?

5.1 The Constitutionality of Gender Quotas in Germany

In France, the debate around parity was centered around rather fundamental questions about the nature of representation and democracy. In Spain, the central themes instead were concrete constitutional rights such as equality, party autonomy and electoral freedom. In my opinion, the latter approach is the more appropriate one to grasp all relevant aspects of the issue while staying firmly grounded on constitutional law rather than political theory. Courts are better equipped in assessing competing rights than to make decisions about which theory of political representation should prevail. Although both fields of contestation are present in the German debate, it seems more likely to me that German courts will have the same inclination and their decisions will look rather than the decision by the Spanish Constitutional Court than that of the French Constitutional Council.

Whether they will come to the same conclusion as the Spanish Constitutional Court, however, is doubtful. While the Court's clear-sighted rejection of equality claims could serve as a model for German courts, its downplaying of party autonomy and narrow interpretation of electoral freedom are not compatible with precedent in Germany. The Constitutional Court's singling

[211] BayVerfGH, footnote 51 ref. 126; Brosius-Gersdorf, footnote 11, 58; Burmeister/Greve, footnote 10, 161; Di Fabio, footnote 8; Hobusch (Brandenburg), footnote 8; Morlok/Hobusch, footnote 53, 18; Polzin, footnote 10; Ungern-Sternberg, 532

[212] Brosius-Gersdorf footnote 11, 59; Rodríguez-Ruiz/Rubio-Marín (2008), footnote 33, 298

out gender for a quota from among all other societal divisions may be criticized for essentializing sexual difference, but in Germany, courts could solve this issue by simply pointing to posited law, as the Basic Law singles out gender in Article 3 (2). [213]

The Spanish Constitutional Court explains the difference between its endorsement of parity and its rejection as unconstitutional by the French and Italian apex courts with the existence of Article 9.2.[214] Some scholars agree that a constitutional provision explicitly referring to equality in political participation is decisive for courts to allow electoral quotas.[215] Article 3 (2) of the Basic Law is less clear in its scope. The doctrinal debates about the provision's applicability in the sphere of politics and its relation to the prohibition of discrimination might prove central to the fate of parity in Germany. Moreover, courts would have to find substantive equality "compelling" enough. The current debate in Germany suggests that a majority of German jurists would not be prepared to do so.

In any case have the rights of non-binary people to be taken into account – the parity law in Brandenburg is not convincing in this regard since it forces them to sort themselves into male or female category, if only for a single purpose.[216]

5.2 Flexible Parity as a Lesson From Spain?

For constitutional legislators in other German *Länder* who consider introducing parity legislation, the Spanish "flexible parity" quota of 40 percent could warrant consideration. It might offer many of the benefits of a 50 percent quota while being less strict and thus more likely to be upheld in a proportionality framework. Moreover, a symmetrical 50 percent quota is inflexible[217], that is it doesn't allow a party to reflect its gendered voter base or its

[213] Jürgensen, footnote 101; Wapler (Quota), footnote 50, 9
[214] Judgement 12/2008 ref. 2
[215] Ungern-Sternberg, footnote 8, 533
[216] Piratenpartei, footnote 52, 25-28; Polzin, footnote 10; Wapler (Quota), footnote 50, 18
[217] Irving, footnote 153, 118

commitment to feminism with a higher share of women on its list, like the Green and Left Parties in Germany now do. In Europe, quotas of 30 or 40 percent are generally more common than full-fledged parity.[218] Even in France, parity in many fields now means a 40 percent quota.[219]

A quota of less than 50 percent might, however, lead to a "ceiling effect", i.e. the quota might be met, but never exceeded.[220] Moreover, a 40 percent quota – at least in combination with relatively small constituencies – makes it possible to place significantly less women than men on promising positions.[221]

5.3 Parity Without Constitutional Amendment?

A slightly different question from the constitutional permissibility of gender quotas or parity is whether their introduction without constitutional amendment is wise in terms of constitutional policy. Jorge Rodríguez-Zapata Pérez warned that structural changes in the democratic system should not be imposed by simple parliamentary majorities.[222] In Europe, Spain seems to be rather an outlier in that gender quotas were introduced without a constitutional amendment.[223] This is not surprising since legislative quotas touch upon fundamental notions of democratic representation and equality.[224] "Redefining the state"[225], which some advocated of parity have called for, usually requires constitutional change. Furthermore, it can be cautioned that any attempt to influence the outcome of elections, albeit in order to promote constitutional

[218] Ungern-Sternberg, footnote 8, 527
[219] Lépinard (2015), footnote 29, 10
[220] Lépinard (2018), footnote 27, 85; Millard, footnote 41, 137; Murray, footnote 26, 350
[221] Tània Verge, `Regulating Gender Equality in Political Office in Southern Europe: The Cases of Greece, Portugal and Spain´(2013) Representation 49(4) 439, 444
[222] Judgement 12/2008, Individual vote ref. 5
[223] Lépinard/Rubio-Marín, footnote 21, 443; Rubio-Marín (2017), footnote 21
[224] Rubio-Marín (2017), footnote 21; Uwe Volkmann, `Notizen aus der Provinz: Brandenburg gibt sich ein Paritätsgesetz´ [Footnotes from the Boondocks: Brandenburg Bestows on Itself a Parity Statute] (Verfassungsblog, 9 February 2020) https://verfassungsblog.de/notizen-aus-der-provinz-brandenburg-gibt-sich-ein-paritaetsgesetz/ accessed 29 March 2020
[225] Rodríguez-Ruiz/Rubio-Marín (2009), footnote 33, 1183

objectives, touches upon the voluntative nature of voting and thus the very core of democracy.[226]

In Germany, Christoph Möllers has suggested that the debate around parity would better have been placed on the level of constitutional amendment.[227] While I have great sympathy for this for the reasons just outlined, it would most likely mean that the introduction of a gender quota is implausible in the foreseeable future in light of the position of political parties on the issue.[228] Quite likely, forcing a debate on constitutional amendment will, in any case, be the only way left open to supporters of parity, if the parity acts of Brandenburg and Thuringia are found unconstitutional. They may find inspiration on how to turn such a defeat into a victory from their French role models.[229]

Some German scholars would find even a constitutional amendment impermissible, based on Article 79 (3) of the Basic Law, according to which amendments affecting the principle of democracy are impermissible. They argue that electoral gender quotas so heavily infringe on electoral equality and freedom that they are inconsistent with democracy and replace popular sovereignty with anti-pluralist, identarian conceptions that may lead to dictatorship or rule by algorithms.[230] A comparative perspective may give pause to proponents of such sweeping claims. It appears preposterous to assert that France and Spain have ceased to be democracies by adopting parliamentary parity. Rather, democracy is in constant development and it seems certain that a gendered perspective on the practice of democracy will remain present for the foreseeable future.

[226] Martin/Honer, footnote 58; Volkmann, footnote 224; Gärditz, footnote 53; Brigitte Zypries and Heiko Hoste, `90 Jahre Frauenwahlrecht in Deutschland – Geschichte, Bilanz, Perspektive´ [90 Years of Female Suffrage in Germany – History, Record, Perspective] 2008 Neue Juristische Wochenschrift 3400, 3402
[227] Möllers, footnote 70
[228] Cf. Green Party Caucus in the Bundestag, Press Release, 6 March 2020, https://www.gruene-bundestag.de/themen/frauen/grosse-koalition-blockiert-parite-kommission accessed 05 April 2020
[229] Scott, footnote 26, 75-99
[230] Burmeister/Greve, footnote 10; Polzin, footnote 10; arguments against this view: Ungern-Sternberg, footnote 8, 534

6 Conclusion

While gender quotas for parliaments are a growing phenomenon internationally, they frequently encounter constitutional objections. In France, quotas were originally found unconstitutional, but parity is now enshrined in the constitution. In Spain, however, a 40 percent "flexible parity" passed constitutional muster.

Opponents of gender quotas contend that they are incompatible with a universalist notion of representation, which prescribes making any distinctions between voters or candidates. The universalist concept of representation is, however, challenged by descriptive and pluralists accounts. Gender quotas are moreover widely perceived to compromise electoral equality, but when they are gender-neutral, they do not affect formal equality between women and men. They do, however, severely limit the freedom of voters and candidates in the candidate selection process, as well as the autonomy of political parties.

Some proponents of parity argue that it is a requirement of democracy properly understood, relying on an alleged fundamental division of humanity into men and women, on feminist insight into the male construction of the political sphere, or on the necessity of effective political participation of women, respectively. Like universalist representation, however, such concepts of parity democracy build less on posited constitutional law than on politico-legal theories. Other supports of gender quota rely on substantive gender equality, viewing quotas as affirmative action instrument. Such an approach leads to a proportionality analysis and the constitutionality of gender quotas depends on how disadvantages of women in the political sphere are perceived and how substantive equality in this field is weighed against electoral freedom and party autonomy.

For Germany, it seems most likely that the courts will follow the predominant position in German legal scholarship and find gender quotas to be in violation of constitutional law. Like their French counterparts, parity proponents in Germany would then have to elevate their

advocacy to the level of constitutional amendment, which comparative perspective shows would not be in conflict with democracy.

Bibliography

Cases

Bavarian Constitutional Court, Decision of 26 March 2018, Vf. 15-VII-16

Constitutional Court of Rhineland-Palatinate, Decision of 13 June 2014, VGH N 14/14 & VGH B 16/14

Federal Constitutional Court, Order of the Second Senate of 20 October 1993, 2 BvC 2/91

Federal Constitutional Court, Order of the Third Chamber of the Second Senate of 01 April 2015, 2 BvR 3058/14

Federal Constitutional Court, Order of the Second Senate of 29 January 2019, 2 BvC 62/14

French Constitutional Council, Decision 82-146 DC of 18 November 1982

French Constitutional Council, Decision 98-407 DC of 14 January 1999

French Constitutional Council, Decision 2000-429 DC of 30 May 2000

French Constitutional Council, Decision 2001-445 DC of 19 June 2001

French Constitutional Council, Decision 2006-533 DC of 16 March 2006

French Constitutional Council, Decision 2015-465 QPC of 24 April 2015

Spanish Constitutional Court, Judgement 12/2008 of 29 January 2008

Spanish Constitutional Court, Judgement 13/2009 of 19 January 2009

Spanish Constitutional Court, Judgement 40/2011 of 31 March 2011

Scholarly Articles and Books

Dia Anagnostou, `Gender equality and parity in European national constitutions´ in Helen Irving (ed.) Constitutions and Gender (Edward Elgar 2017) 268

Claudie Baudino, `Parity Reform in France: Promises and Pitfalls´ (2003) Review of Policy Research 385

John Bell, *French Legal Cultures* (Butterworths 2001)

Frauke Brosius-Gersdorf, `Auf dem Tandem ins Parliament. Zu Sinn und Unsinn von Quoten für Wahlen´ [Into Parliament on a Tandem. On the Sense and Nonsense of Electoral Quotas] (2019) Zeitschrift des deutschen Juristinnenbundes 57

Jörg Burmeister and Holger Greve, `Parité-Gesetz und Demokratieprinzip: Verfassungsauftrag oder Identitätsverstoß?´ (Parité Act and the Principle of Democracy: Constitutional Mandate or Violation of Identity?] (2019) ZG 154

Virginie Dutoya and Yves Sintomer, `Defining Women's Representation: Debates around Gender Quotas in India and France´ (2019) Politics and Governance 7 (3), 124

Ingwer Ebsen, `Quotierung politischer Entscheidungsgremien durch Gesetz?´ [Legal Quotas in Political Decision-Making Bodies] (1989) 44(12) JuristenZeitung 553

Klaus F. Gärditz, `Keine Normen gegen röhrende Platzhirsche´ [No Legal Rules Against Roaring Stags] (Legal Tribune Online, 19 November 2018) https://www.lto.de/recht/hintergruende/h/frauenquote-parlament-wahlrecht-selbstbestimmung/ accessed 29 March 2020

Alexander Hobusch, `Parité statt egalité? Weitere Gedanken zur Idee der geschlechtlichen Parität´ [Parité Instead of Egalité? Further Thoughts on the Idea of Gender Parity] (Zur Geschäftsordnung, 15 February 2019) http://zurgeschaeftsordnung.de/parite-statt-egalite/533626/ accessed 29 March 2020

Alexander Hobusch, `Wahlrechtliche Irrwege in Brandenburg´ [Electoral Law Gone Astray in Brandenburg] (Legal Tribune Online, 4 February 2019) https://www.lto.de/recht/hintergruende/h/paritaetsgesetz-brandenburg-verfassungswidrig-quoten-wahlrecht-geschlecht-landesliste/ accessed 29 March 2020

Christine Hohmann-Dennhardt, `Parité´ (Süddeutsche Zeitung, 8 February 2019) https://www.sueddeutsche.de/politik/aussenansicht-parite-1.4322053 acccessed 3 April 2020

Melanie M. Hughes, `Intersectionality, Quotas, and Minority Women's Political Representation Worldwide´ (2011) 105 American Political Science Review 604

Helen Irving, *Gender and the Constitution* (Cambridge University Press 2008)

Jane Jenson and Celia Valiente, `Comparing Two Movements for Gender Parity: France and Spain´ in Banaszak/Beckwith/Rucht (eds), *Women's Movements Facing the Reconfigured State* (Cambridge University Press 2003) 69

Sven Jürgensen, `Die Versprechen der modernen Demokratie: zur Debatte parlamentarischer Parität´ [The Promises of Modern Democracy: on the Debate on Parliamentary Parity] (Verfassungsblog, 4 February 2019) https://verfassungsblog.de/die-versprechen-der-modernen-demokratie-zur-debatte-parlamentarischer-paritaet/ accessed 29 March 2020

Hans Klein, `Art. 38´ in *Maunz/Düring* (C.H. Beck)

Mona Lena Krook, *Quotas for Women in Politics* (Oxford University Press 2009)

Sabine Lang, `Quota Contagion in Germany – Diffusion, Derailment, and the Quest for Parity Democracy´ in Éléonore Lépinard & Ruth Rubio-Marín (eds) *Transforming Gender Citizenship – The Irresistible Rise of Gender Quotas in Europe* (Cambridge University Press 2018) 279

Silke Laskowski, `Wann bekommt Deutschland ein Parité-Gesetz?´ [When Will Germany Get a Parity Law?] STREIT 2/2015 51

Silke Laskowski, `Zeit für Veränderungen: Ein paritätisches Wahlrecht jetzt!´ [Time for Change: Parity in Electoral Law Now!] (2018) Recht und Politik 54(4) 391

Noelle Lenoir, `The Representation of Women in Politics: from Quotas to Parity in Elections´(2001) International & Comparative Law Quarterly 50(2) 217

Eléonore Lépinard, `The Contentious Subject of Feminism: Defining Women in France from the Second Wave to Parity´ (2007) Signs 32 (2) 375

Eleonore Lépinard (2013), `For Women Only? Gender Quotas and Intersectionality in France´ (2013) 9 Politics & Gender 276

Eléonore Lépinard, *Gender quotas and transformative politics* (Robert Schuman Centre for Advanced Studies Policy Papers 2014/06)

Eléonore Lépinard, The adoption and diffusion of gender quotas in France (1982-2014), European University Institute Department of Law Working Paper 2015/19

Éléonore Lépinard, `The French Parity Reform – The Never-Ending Quest for A New Gender Equality Principle´ in Lépinard & Ruth Rubio-Marín (eds) *Transforming Gender Citizenship – The Irresistible Rise of Gender Quotas in Europe* (Cambridge University Press 2018) 62

Eléonore Lépinard & Ruth Rubio-Marín, `Introduction´ in *Transforming Gender Citizenship – The Irresistible Rise of Gender Quotas in Europe* (Cambridge University Press 2018) 1

Eléonore Lépinard & Ruth Rubio-Marín, `Conclusion´ in *Transforming Gender Citizenship – The Irresistible Rise of Gender Quotas in Europe* (Cambridge University Press 2018) 424

Jill Lovecy, `"Citoyennes à part entire"? The Constitutionalization of Gendered Citizenship in France and the Parity Reforms of 1999-2000´ (2000) Government and Opposition 35 (4) 439

Edward Martin and Mathias Honer, `Neue Kleiderordnung statt Wahlrechtsreform – Eine Erwiderung auf Cara Röhner´ [New Dresscode Instead of Electoral Reform – A Rejoinder to Cara Röhner] (Verfassungsblog, 18 January 2019) https://verfassungsblog.de/neue-kleiderordnung-statt-wahlrechtsreform-eine-erwiderung-auf-cara-roehner/ accessed 29 March 2020

Hans Meyer, `Verbietet das Grundgesetz eine paritätische Frauenquote bei Listenwahlen zu Parlamenten?´ [Does the Basic Law Prohibit a Parity Women Quota for Parliamentary Elections Using Candidate Lists?] (2019) Neue Zeitschrift für Verwaltungsrecht 1245

Eric Millard, `Constituting Women, the French Ways´ in Beverley Baines and Ruth Rubio-Marín (eds) The Gender of Constitutional Jurisprudence (Cambridge University Press 2005) 122

Christoph Möllers, `Die Krise der Repräsentation´ [The Crisis of Representation] (Frankfurter Allgemeine Zeitung, 13 February 2019) https://www.faz.net/aktuell/feuilleton/debatten/ist-die-frauenquote-in-brandenburg-verfassungswidrig-16037714.html?premium accessed 3 April 2020

Martin Morlok and Alexander Hobusch, `Ade parité? – Zur Verfassungswidrigkeit verpflichtender Quotenregelungen bei Landeslisten´ [Ade parité? – On the Unconstitutionality of Mandatory Quotas for Electoral Lists] (2019) DÖV 14

Mathias Möschel, ´"Gender Quotas" in French and Italian Public Law. A Tale of Two Overlapping and Then Diverging Trajectories´ (2018) German Law Journal 19 (06) 1489

Rainbow Murray, `Parity in France: A "Dual Track" Solution to Women's Under-Representation´ (2012) West European Politics 35 (2) 343

Bernd von Nieding, `Politische Wahlen und Frauenquote, Eine Betrachtung zur verfassungsrechtlichen Zulässigkeit von geschlechtsbezogenen Förderungsmaßnahmen in der Politik´ [Political Elections and Women Quota, A Reflection on the Constitutional Permissibility of Gender-Related Promotion Measures in Politics] 1994 NVwZ 1171

Pippa Norris and Drude Dahlerup, *On the Fast Track: The Spread of Gender Quota Policies for Elected Office* (Harvard Kennedy School Research Working Paper 2015-041)

Mehrdad Payandeh, `Quoten für den Budestag?´ [Quotas for the Budestag?] (2018) Zeitschrift für Rechtspolitik 189

Monika Polzin, `Parité-Gesetz in Brandenburg – Kein Sieg für die Demokratie´ [The Parity Statute in Brandenburg – Not a Victory for Democracy] (Verfassungsblog, 8 February 2020) https://verfassungsblog.de/parite-gesetz-in-brandenburg-kein-sieg-fuer-die-demokratie/ accessed 29 March 2020

Blanca Rodríguez-Ruiz and Ruth Rubio-Marín, `The Gender of Representation: On Democracy, Equality, and Parity´(2008), 6 International Journal of Constitutional Law 287

Blanca Rodríguez-Ruiz and Ruth Rubio-Marín, `Constitutional Justification of Parity Democracy´ (2009) 60 Alabama Law Review 1171

Cara Röhner, `Unitäres Volk oder Parität? Für eine materiale Perspektive auf die Demokratie´ [Unitary People or Parity? Towards a Substantive Perspective on Democracy] (Verfassungsblog, 4 January 2019) https://verfassungsblog.de/unitaeres-volk-oder-paritaet-fuer-eine-materiale-perspektive-auf-die-demokratie/ accessed 29 March 2020

Darren Rosenblum, `Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions´ (2006) U.C. Davis Law Review 39 (3) 1119

Ruth Rubio-Marín, `Engendering The Constitution – The Spanish Experience´ in Beverley Baines and Ruth Rubio-Marín (eds) *The Gender of Constitutional Jurisprudence* (Cambridge University Press 2004) 256

Ruth Rubio-Marín, `A New European Parity-Democracy Sex Equality Model and why it won't Fly in the United States´ (2012) 60 American Journal of Comparative Law 99

Ruth Rubio-Marín, `Women's political citizenship in new European constitutionalism: between constitutional amendment and progressive interpretation´ in Helen Irving (ed.) Constitutions and Gender (Edward Elgar 2017) 323

Wolfgang Rüfner, `Art. 3´ in Kahl/Waldhoff/Walther (eds) *Bonner Kommentar* (C.F. Müller)

Joan Wallach Scott, *Parité!: Sexual Equality and the Crisis of French Universalism* (The University of Chicaco Press 2005)

Erik Sollmann, `Liberté, Égalité, Parité?´ (JuWissBlog, 5 February 2019) https://www.juwiss.de/13-2019/ accessed 29 March 2020

Maximilian Steinbeis, `Among the Free and Equal´ (Verfassungsblog, 2 February 2019) https://verfassungsblog.de/among-the-free-and-equal/ accessed 29 March 2020

Alec Stone Sweet, *Governing with Judges – Constitutional Politics in Europe* (Oxford University Press 2000)

Julie C. Suk, `Gender parity and state legitimacy: From public office to corporate boards´ (2012) International Journal of Constitutional Law 10(2) 449

Antje von Ungern-Sternberg, `Parité-Gesetzgebung auf dem Prüfstand des Verfassungsrechts´ [Parity Legislation Put to the Test of Constitutional Law] (2019) JuristenZeitung 525

Nadia Urbinati, `Why Parité Is a Better Goal than Quotas´ (2012) 10 International Journal of Constitutional Law 465

Celia Valiente, `The women's movement, gender equality agencies and central-state debates on political representation in Spain´ in Joni Lovenduski (ed) *State Feminism and Political Representation* (Cambridge University Press 2005) 174

Tània Verge, `Regulating Gender Equality in Political Office in Southern Europe: The Cases of Greece, Portugal and Spain´(2013) Representation 49(4) 439

Tània Verge and Emanuela Lombardo, `Gender Quotas in Spain – Broad Coverage, Uneven Treatment´ in Éléonore Lépinard & Ruth Rubio-Marín (eds) *Transforming Gender Citizenship – The Irresistible Rise of Gender Quotas in Europe* (Cambridge University Press 2018) 126

Uwe Volkmann, `Notizen aus der Provinz: Brandenburg gibt sich ein Paritätsgesetz´ [Footnotes from the Boondocks: Brandenburg Bestows on Itself a Parity Statute] (Verfassungsblog, 9 February 2020) https://verfassungsblog.de/notizen-aus-der-provinz-brandenburg-gibt-sich-ein-paritaetsgesetz/ accessed 29 March 2020

Friederike Wapler, `Politische Gleichheit: demokratietheoretische Überlegungen´ [Political Equality: Reflections Regarding Theories of Democracy] (2019) Jahrbuch des öffentlichen Rechts der Gegenwart 67, 427

Friederike Wapler, `Die Crux mit der Quote – Paritätsgesetze und demokratische Repräsentation´ [The Crux of the Quota – Parity Laws and Democratic Representation] (2019) Analysen und Argumente 369

Brigitte Zypries and Heiko Hoste, `90 Jahre Frauenwahlrecht in Deutschland – Geschichte, Bilanz, Perspektive´ [90 Years of Female Suffrage in Germany – History, Record, Perspective] 2008 Neue Juristische Wochenschrift 3400

Other Sources

Abgeordnetenhaus von Berlin, Expert Opinion of 27 June 2018

Jasper von Altenbockum, `Liberté, Égalité, Parité?´ (Frankfurter Allgemeine Zeitung, 31 January 2019) https://www.faz.net/aktuell/politik/inland/kommentar-zur-paritaet-liberte-egalite-parite-16018243.html?premium accessed 03 April 2020

Bundeszentrale für politische Bildung, `Frauenanteil im Deutschen Bundestag´ [Share of Women in the German Bundestag] (15 November 2017) https://www.bpb.de/gesellschaft/gender/frauen-in-deutschland/49418/frauenanteil-im-deutschen-bundestag accessed 4 April 2020

Constitutional Court of Thuringia, Press Release, http://www.thverfgh.thueringen.de/webthfj/webthfj.nsf/22F03DE37D9EACDFC125856C00433357/$File/20-00002_Medieninformation_6-2020_Ank%C3%BCndigung%20VK.pdf?OpenElement accessed 01 June 2020

Deutscher Bundestag, Expert Opinion WD 3 – 3000 – 287/14 of 16 December 2014

Deutscher Bundestag, Expert Opinion WD 3 – 008/08 of 29 January 2008

Udo Di Fabio, interview (Der Spiegel, 28 December 2018) https://www.spiegel.de/panorama/udo-di-fabio-ich-kaeme-nie-auf-die-idee-eine-frau-mit-kollege-anzureden-a-00000000-0002-0001-0000-000161577204 accessed 3 April 2020

Dörr/Poirot/Ilg, `Frauen in den Länderparlamenten´ [Women in Länder Parliaments] (Landeszentrale für politische Bildung Baden-Württemberg) https://www.lpb-bw.de/frauenanteil-laenderparlamenten accessed 4 April 2020

Andreas Fisahn and Jana Maruschke, `Gutachten zur Verfassungskonformität einer Geschlechterquotierung bei der Aufstellung von Wahllisten´ [Expert Opinion on the Constitutionality of Gender Quotas for Drawing Up Electoral Lists] 27 September 2018

Green Caucus in the Landtag of Brandenburg, Press Release, 27 February 2018, https://www.gruene-fraktion-brandenburg.de/themen/frauengender/buendnisgruene-landtagsfraktion-legt-paritegesetz-vor/ accessed 03 April 2020

Green Caucus in the Bundestag, Press Release, 6 March 2020, https://www.gruene-bundestag.de/themen/frauen/grosse-koalition-blockiert-parite-kommission accessed 05 April 2020

International IDEA, the Inter-Parliamentary Union and Stockholm University, *Gender Quotas Database*, https://www.idea.int/data-tools/data/gender-quotas *accessed 4 April 2020*

Landtag Brandenburg, Expert Opinion of 18 Oktober 2018

LT-Drs. 6/8210 (Brandenburg)

LT-Drs. 6/6964 (Thuringia)

Silke Laskowski, Landtag Schleswig-Holstein, Umdruck 16/2273

Silke Laskowski, `Zur verfassungsrechtlichen Zulässigkeit gesetzlicher Paritéregelungen für die Kommunal- und Landtagswahlen in Thüringen´ [On the Constitutional Permissibility of Statutory Parity Regulations for Local and Landtag Elections in Thuringia] 6 May 2014, https://www.gruene-thl.de/sites/default/files/umschlag_mit_gutachten_paritegesetz_0.pdf accessed 2 June 2020

Benedikt Peters, `Der Bundestag braucht eine Quote´ [The Bundestag Needs a Quota] (Süddeutsche Zeitung, 1 August 2018) https://www.sueddeutsche.de/politik/migration-mikrozensus-kommentar-1.4077485 accessed 3 April 2020

Piratenpartei Brandenburg, `Verfassungsbeschwerde und Organklage gegen Paritätsgesetz eingereicht´ [Constitutional Complaint and Inter-Organ Action Against Parity Act Filed] (21 May 2019) https://www.piratenbrandenburg.de/2019/05/verfassungsbeschwerde-und-organklage-gegen-paritaetsgesetz-eingereicht/ accessed 4 April 2020

Piratenpartei Brandenburg, lawsuit against the Brandenburg parity law, (15 May 2019) https://wiki.piratenbrandenburg.de/images/1/19/PIRATEN_Brandenburg_VERFASSUNGSBESCHWERDE_%2B_ORGANSTREIT_15.05.2019_%28beA%29.pdf accessed 15 March 2020

Süddeutsche Zeitung, `AfD-Klage gegen neues Thüringer Paritätsgesetz´ [AfD Files Suit Against New Thuringian Parity Law] (11 February 2020) https://www.sueddeutsche.de/politik/landtag-erfurt-afd-klage-gegen-neues-thueringer-paritaetsgesetz-dpa.urn-newsml-dpa-com-20090101-200211-99-871492 accessed 4 April 2020

Thüringer Landtag, Expert Opinion 6/5765 of 24 June 2019