

Gendering Political Participation in Germany and Beyond: Should Quotas Ensure Gender Parity in Parliaments?



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Abstract The underrepresentation of women in parliaments indicates the political empowerment gap underlying the gender gap and is a symbol of their de facto inequality. Electoral laws that ensure gender parity are therefore on the agenda. This is also the case in Germany (both on the state and federal level) and in the EU in relation to the European Parliament. Gender parity laws typically require political parties to submit zipped lists with an equal number of alternating female and male candidates. The first two gender parity laws of German states were, however, struck down as unconstitutional by the state constitutional courts. According to the Federal Constitutional Court, the Basic Law does not require the enactment of gender parity laws, despite the constitutional obligation to promote the actual implementation of equal rights for women and men. But the FCC has not yet determined what limits the Basic Law may place on voluntarily enacted federal or state gender parity laws. The European Court of Human Rights has accepted gender quotas regarding electoral lists as permissible in the ECHR system. Soft law rules of the Council of Europe favour the use of such quotas. The Convention on the Elimination of All Forms of Discrimination of Women supports and perhaps requires gender quotas in political representation.

Keywords Gender parity laws · Political empowerment gap · Structural discrimination · Zipped electoral lists · De facto equality of women

1 Introduction: The Gender Gap in Political Empowerment

This chapter focusses on gender as a cross-cutting issue with increasing political and legal relevance. Gender-mainstreaming, i.e. the consistent inclusion of the gender perspective in order to eliminate discrimination and gender-based disadvantages and promote equality between women and men throughout, both de jure and de facto,

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has become a legal requirement.¹ The time has therefore come to extend gender-mainstreaming to legal education in the sense of including the gender perspective in the teaching of all legal subjects.² How this can be done is demonstrated below using an example from constitutional law—demands for election reform that ensures gender parity in parliaments.³ The topic of gendering political participation is currently on the agenda in many jurisdictions around the globe, including the EU. It is hotly contested in particular in Germany. That topic also provides a vivid example of the long, hard and sometimes bitter political and legal struggles that need to be fought in parliaments and courts in order to achieve progress in favour of traditionally disadvantaged members of society. It further demonstrates the bottom-up and top-down (i.e., vertical) interaction of the different levels in the multilevel system of government in Europe. It also emphasises the value of comparative law (i.e., horizontal interaction) in solving legal problems that simultaneously arise in different jurisdictions. It finally encourages the inclusion of social reality in legal arguments so that law does not become detached and gradually loses its social relevance.

More than 25 years ago, the Beijing Declaration and Platform for Action of the Fourth World Conference on Women was adopted by 189 Member States of the UN.⁴ There the importance of gender equality in political participation was explained thus: “Equality in political decision-making performs a leverage function without which it is highly unlikely that a real integration of the equality dimension in government policy-making is feasible. In this respect, women’s equal participation in political life plays a pivotal role in the general process of the advancement of women. Women’s equal participation in decision-making is not only a demand for simple justice or democracy but can also be seen as a necessary condition for women’s interests to be taken into account. Without the active participation of women and the incorporation of women’s perspective at all levels of decision-making, the goals of equality, development and peace cannot be achieved.”⁵ This statement is aptly borne out by experience.

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

¹ See, e.g., Art. 8 of the Treaty on the Functioning of the European Union (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL&from=EN>); Art. 3 (2) sentence 2 of the German Constitution of 1949 (Basic Law—English translation available at https://www.gesetze-im-internet.de/englisch_gg/).

² The first comprehensive textbook: Vujadinović/Fröhlich/Giegerich (2023).

³ An earlier online version of this paper (Giegerich (2021)) is available at https://jean-monnet-saar.eu/wp-content/uploads/2021/05/Symposium-Gender-Parity_updated-version_II.pdf.

⁴ <https://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>.

⁵ *Id.*, para. 181.

women in elective and non-elective public positions in the same proportion and at the same levels as men ...”⁶

We have obviously not come far enough in the last quarter of a century. The following finding in the World Economic Forum’s Global Gender Gap Report (2021)⁷ aptly describes the problem we are still facing: “The gender gap in Political Empowerment remains the largest of the four gaps tracked,⁸ with only 22% closed to date, having further widened since the 2020 edition of the report by 2.4 percentage points. Across the 156 countries covered by the index, women represent only 26.1% of some 35,500 parliament seats and just 22.6% of over 3,400 ministers worldwide. In 81 countries, there has never been a woman head of state, as of 15th January 2021. At the current rate of progress, the World Economic Forum estimates that it will take 145.5 years to attain gender parity in politics. Widening gender gaps in Political Participation have been driven by negative trends in some large countries which have counterbalanced progress in another 98 smaller countries. Globally, since the previous edition of the report, there are more women in parliaments, and two countries have elected their first female prime minister (Togo in 2020 and Belgium in 2019).”⁹ The numbers in the World Economic Forum’s Global Gender Gap Report (2022)¹⁰ are hardly more promising. While the overall gender parity rose from 67.9% in 2021 to 68.1% in 2022, the gap in political empowerment remained at 22%.¹¹ “The Political Empowerment subindex registered significant advance towards parity between 2006 and 2016, fluctuating until 2021, after which it stalled below its 2019 peak. At this rate, it will take 155 years to close the Political Empowerment gap.”¹²

The gender gap denotes the gender-related difference between theory and practice: For decades, the prohibition of discrimination on ground of sex and equal rights of women and men have been clearly established in national, supranational and international law,¹³ but the inequality of women in fact still persists worldwide in many important areas, including political participation, and seems poised to stay for further generations, unless developments are accelerated. Although the reasons for

⁶ Id., para. 190 (a) and (b).

⁷ http://www3.weforum.org/docs/WEF_GGGR_2021.pdf.

⁸ The other three gender gaps are in economic participation and opportunity, educational attainment as well as health and survival.

⁹ See note 7, 5.

¹⁰ https://www3.weforum.org/docs/WEF_GGGR_2022.pdf.

¹¹ Id., 5.

¹² Id., 13.

¹³ See, e.g., Art. 3 (2) of the German Basic Law; Arts. 1 (3), 55 lit. c, 56 of the UN Charter; Art. 2, 7 of the Universal Declaration of Human Rights of 10 December 1948 (<https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf>); Arts. 1–16 of the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 (<https://www.ohchr.org/sites/default/files/cedaw.pdf>); Art. 14 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950 (<https://rm.coe.int/1680a2353d>); Art. 1 of Protocol No. 12 to the ECHR of 4 November 2000 (<https://rm.coe.int/1680080622>); Arts. 20, 21, 23 of the Charter of Fundamental Rights of the EU (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL&from=EN>).

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

There are many factors which lead to women's under-representation in politics. The most important factor is probably the decade-old backlash against women's rights. In Europe, societies remain characterised by attitudes, customs and behaviour which disempower women in public life, discriminate against them, and hold them hostage to prescribed role-models and stereotypes according to which women are "not suited" to decision making and politics. Unsocial meeting hours and a lack of child-care facilities for politicians can further deter women candidates – politics is tailored to fit men who do not bear even a minimum share of family responsibilities and who rely on their wives to keep the household running."¹⁴ Another factor is the male networks which still dominate many bodies and organisations, including political parties, and tend to perpetuate themselves. Women's underrepresentation in politics is a particularly striking "manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women."¹⁵

For those who consider 155 years as too long to achieve effective gender equality in the political arena, the introduction of mandatory quotas in favour of women may be the instrument of choice to accelerate developments. This raises a number of questions such as whether gender quotas for political participation are permissible or even required from a constitutional, supranational and international perspective and—if permissible—whether they are appropriate and advisable: If the adequate representation of women in parliament is a legitimate objective, why not the adequate representation of LGBTI persons, persons with disabilities, young voters, religious and national minorities, persons with a migration background? All these groups have long been victims of discrimination including with regard to political representation. That slippery slope argument can of course be countered by reference to the fact that an express constitutional mandate such as in Art. 3 (2) sentence 2 of the German Basic Law to "promote the actual implementation of equal rights for women and men" does not exist for any of the other disadvantaged groups.¹⁶ The legitimate question whether we would need similar constitutional affirmative action mandates in their favour is beyond the scope of this paper. Suffice to recall that of all those disadvantaged groups only women make up more than half of the population—establishing their *de facto* political equality in the form of equal political representation therefore is an absolute democratic must. The assumption is not far-fetched that women's right to equal political participation and effective political influence is not fully realised until their underrepresentation in parliaments is remedied.¹⁷

Finally, one needs to remember that

... changing the electoral system is not enough: to be really effective, this change must be accompanied by measures such as gender-sensitive civic education and the elimination of

¹⁴ Parliamentary Assembly of the Council of Europe (PACE), Resolution 1706 (2010) of 27 January 2010, para. 3 (<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17809&lang=en>).

¹⁵ The quote is taken from the 9th recital of the preamble of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence of 11 May 2011 (<https://rm.coe.int/168008482e>). It there refers to violence against women.

¹⁶ See, e.g., Hahn (2020).

¹⁷ See in this sense Laskowski (2023), 35 f., 89 ff.

gender stereotypes and “built-in” bias against women candidates, in particular within political parties, but also within the media. In some Council of Europe member states, constitutions also need to be changed in order to accompany gender equality and anti-discrimination provisions with the necessary exception allowing positive discrimination measures for the under-represented sex, without them being considered a violation of the equality principle.¹⁸

2 Enactment of Political Gender Parity Laws at Constituent State Level in Germany

2.1 *Unsuccessful Attempts in Thuringia and Brandenburg in 2019*

In 1918, Germany introduced women’s suffrage, earlier than many of its European neighbours.¹⁹ More than a hundred years later, the ratio of women parliamentarians in Germany is comparatively low, both on the federal and constituent state (*Länder*) levels. In order to increase the number of women parliamentarians, two *Länder* enacted gender parity laws in 2019, requiring political parties to include 50% women in their electoral lists, interchangeably with men (zipped lists). Non-binary or third-gender persons could freely be included in those lists instead of women or men.²⁰ In both *Länder*, the parties’ electoral lists are rigid (closed lists) in the sense that voters have to accept them as they are without possibility of cumulation of votes or cross-voting (panachage). If parties do not place enough women in promising positions on their lists, women will thus necessarily be underrepresented in the elected state parliament.²¹ That still too many parties disadvantage women when drawing up their electoral lists is due to male dominance in party politics.

On the application of right-wing parties and parliamentarians, the pertinent laws of Thuringia and Brandenburg were struck down by the Thuringian and Brandenburg State Constitutional Courts.²² These courts found violations of the respective state constitutions, in particular of the constitutional rights of political parties (freedom to

¹⁸ PACE (note 14), para. 5.

¹⁹ See the *Verordnung über die Wahlen zur verfassunggebenden deutschen Nationalversammlung* (Regulation on the Election of the Constituent German Assembly) of 30 November 1918 (*Reichsgesetzblatt* p. 1345) that was enacted by the revolutionary Council of People’s Deputies after the demise of the monarchy.

²⁰ This is required pursuant to the case law of the FCC according to which non-binary persons are protected from discrimination because of their non-binary gender identity (BVerfGE 147, 1).

²¹ See Hahn (2020).

²² Thuringian Constitutional Court, judgment of 15 July 2020 (VerfGH 2/20), available at [http://www.thverfgh.thuringen.de/webthfj/webthfj.nsf/8104B54FE2DCDADDC12585A600366BF3/\\$File/20-00002-U-A.pdf?OpenElement](http://www.thverfgh.thuringen.de/webthfj/webthfj.nsf/8104B54FE2DCDADDC12585A600366BF3/$File/20-00002-U-A.pdf?OpenElement) (in German); Brandenburg Constitutional Court, two judgments of 23 October 2020 (VfGBbg 9/19 and VfGBbg 55/19), available at https://verfassungsggericht.brandenburg.de/verfgbbg/de/entscheidungen/entscheidungssuche/detail-entscheidung/~23-10-2020-vfgbbg-919_4041 and https://verfassungsggericht.brandenburg.de/verfgbbg/de/entscheidungen/entscheidungssuche/detail-entscheidung/~23-10-2020-vfgbbg-5519_4042 (in German).

decide about composition of election lists) as well as voters (freedom to vote without state interference; eligibility without gender discrimination). While the eligibility of both men and women as a group is equally affected by the gender parity requirement, individual candidates can only run for every second place on the list, in accordance with their sex.²³ The two courts further determined that the gender parity laws could not be justified—neither by the constitutional principle of democracy nor by the State constitutional mandates requiring the legislature to ensure the equality of women and men in public life by effective measures.

With regard to the principle of democracy, the courts explained that German constitutional law did not include the mirror-image concept to the effect that parliaments had to reflect a reduced-size image of the actual composition of civil society. Rather, each and every parliamentarian represented the people as a whole, irrespective of gender, age, party affiliation, profession, wealth, ethnic or social background etc.²⁴ While this may be true in theory, the utterly unrepresentative composition of a parliament will undermine its representative function and the legitimacy of its decisions in practice. If elected male parliamentarians represent females no less than males, the alleged underrepresentation of women in parliaments is but a pseudo problem—in truth, there is no relation between the political empowerment gap and the gender gap ...

Or is there? All those male parliamentarians having for decades equally represented females have arguably not cared enough about closing the gender gap, although ensuring women's de facto equality has long ago been transformed into an international, supranational and constitutional obligation.²⁵ Gender parity in parliaments may after all be a necessary ingredient to the empowerment of women, the latter having been recognised as an indispensable means of effectively eliminating their discrimination and ensuring their de facto equality. There is an obvious connection between the political empowerment gap and the gender gap. The persistent gender gap in most areas can be used as *prima facie* evidence that male-dominated parliaments do not care enough about ensuring the de facto equality of women, because male parliamentarians are socialised as males so that their decision-making is shaped by male experiences, perspectives and interests.²⁶ The *prima facie* evidence is strong enough for a shift of the burden of proof in the sense that those who deny the necessity of gender parity in political representation for achieving women's de facto equality bear the burden of proof.

²³ The question whether that amounts to an interference in the freedom and/or equality of eligibility is not easy to answer—see Möllers (2021), 340f.

²⁴ These court decisions evoked numerous positive and negative comments in the legal literature, e.g. by Gersdorf (2020), Klafki (2020), Hecker (2020), Friehe (2021), Volk (2021), Edinger (2021); Möllers (2021) and Röhner (2022). See also the critical contributions to a symposium of the Verfassungsblog, starting with Hailbronner and Marín (2020).

²⁵ See Art. 3–5, 7 ff. CEDAW; Art. 2, 3 (3) subpara. 2 TEU; Art. 8 TFEU; Art. 23 CFR; Art. 3 (2) sentence 2 BL.

²⁶ See Laskowski (2023), 35 f., 89ff.

With regard to the justifying force of the State constitutional provisions requiring the legislature to ensure equality of women and men in public life, the State constitutional courts resorted to a historical interpretation—they invoked the lack of a respective intention by the framers to permit gender parity laws. They also argued that those provisions formulated only State objectives and not fundamental rights on a par with the fundamental rights that were infringed by the gender parity laws. This approach reveals the obvious endeavour by both courts to minimise the legal effect of the constitutional precepts to establish the *de facto* equality of women. The approach may be tenable, but it is certainly not cogent.

Another important aspect that was neglected by the two State constitutional courts is the apparent structural discrimination of female candidates in the nomination processes of political parties which violates their right to equal opportunities. This right can be derived from the general State and federal constitutional provisions setting forth that men and women shall have equal rights,²⁷ and more specifically from the provisions guaranteeing passive electoral equality,²⁸ i.e. equality in standing as candidates without gender-based discrimination.²⁹ According to Art. 3 (2) sentence 2 BL, the competent legislature is constitutionally obliged to remedy the situation in order “to promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.” This federal constitutional provision directly binds the State legislatures.³⁰ Conforming State constitutional provisions remain applicable,³¹ while conflicting State constitutional provisions will be void.³²

2.2 *A New Advance in Bavaria in 2023*

Recently, a new advance has been made in Bavaria to enact a “Half the Power Law” which ensures parity in the composition of the State parliament.³³ Currently, only 26.8% of members of the Bavarian State parliament are women which is the lowest percentage of female members in all German State legislatures. The Bill, which was introduced on 16 February 2023 by the Greens Party, provides for several amendments to the Bavarian State Constitution. The two most important ones are additions to Art. 118 and Art. 43 of that Constitution. In its current version, Art.

²⁷ Art. 3 (2) sentence 1 BL.

²⁸ Art. 38 (1) sentence 1 BL for federal elections.

²⁹ See in this sense Laskowski (2023), 55f.

³⁰ See Art. 1 (3) BL and BVerfGE 97, 298 (314 f.).

³¹ Art. 142 BL.

³² Art. 31 BL. See Laskowski (2023), 59 ff. on a potential conflict between Art. 3 (2) BL and Art. 118 of the Bavarian State Constitution.

³³ Gesetzentwurf der Fraktion BÜNDNIS 90/DIE GRÜNEN zur Änderung der Verfassung des Freistaates Bayern und das Landeswahlgesetz—Hälfte-der-Macht-Gesetz (LT-Drs. 18/27073, <https://katharina-schulze.de/wp-content/uploads/2023/02/0000017323.pdf>).

118 (2) of the State Constitution (which is almost identical with Art. 3 (2) BL) reads as follows: “Women and men shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.” The “Half the Power Bill” proposes the addition of the following sentence: “The legislature shall realise the equal access of women and men to elective office and public office.” This would constitutionally require concrete legislative steps to eliminate the underrepresentation of women in parliament. The Bill also proposes the addition of the following sentence to Art. 43 (2) on the composition of the State government (executive): “At least half the members of the State government shall be female.” This would introduce a strict 50% quota concerning composition of the State’s executive leadership.

The Bill tries to achieve equal access of women and men to the State parliament by a two-part reform of State electoral law. Firstly, political parties are required to nominate a pair of candidates for each electoral district, one female and one male. Voters have two votes one of which must be cast for a female candidate and the other one for a male candidate. The female candidate and the male candidate who obtain the most votes each will be elected in each district. This will ensure that one half of the State parliament’s seats are held by an equal number of female and male parliamentarians. The Bill provides that persons who cannot be assigned to either the male or the female gender (i.e., non-binary or third-gender persons) are free to decide whether to run as female or male candidates.

With regard to the other half of the seats which are allocated to candidates on party lists, the second part of the reform proposal comes in. It provides that these seats shall be distributed among the candidates according to the number of votes they receive, but based on the female and male gender of the candidates. Gender equality in the allocation of seats is ensured by the requirement that the seats be alternately distributed to the female candidate and then to the male candidate with the highest number of votes in each case. If a third-gender person has the highest number of votes and is therefore allocated a seat, the equal distribution of seats will be continued with the female or third-gender candidate with the next highest number of votes. If a gender-equal distribution of the seats is no longer possible because there are too few women or men on the party list, the distribution of seats shall be terminated. Taken together, the two parts of the reform will ensure gender parity in the composition of the Bavarian State parliament.

It is uncertain whether this “Half the Power Bill” will ultimately be enacted, all the more since constitutional amendments require a two-thirds majority in the State parliament and affirmation by referendum.³⁴ The State government has already rejected the Bill as “unconstitutional nonsense”.³⁵ If ever enacted, there will also probably be court battles regarding the constitutionality of the two-part electoral reform (despite the accompanying constitutional amendments) and perhaps even

³⁴ See Art. 75 (2) of the Bavarian State Constitution.

³⁵ Buchholz and Zimmermann (2023).

regarding the admissibility of these amendments themselves.³⁶ The only decision of the Bavarian Constitutional Court concerning gender quotas in political representation dates back to 2018.³⁷ But then the Court only decided that the legislature was not constitutionally required to introduce gender quotas in order to ensure gender parity in elected representative bodies. It did not determine potential constitutional limits of an actually enacted gender parity law, let alone one that is connected with a supportive constitutional amendment. It is therefore unclear how the Court would deal with the “Half the Power Law”, if it were actually enacted.³⁸

3 Federal Constitutional Limits on Gender Quotas at Constituent State Level?

There have been some initial steps toward introducing gender quotas with regard to the federal parliament (*Deutscher Bundestag*). Currently, only 34.7% of its members are female. Sec. 55 of the Federal Electoral Law³⁹ provides for the establishment of a reform commission which is to present its results by 30 June 2023 at the latest. On 16 March 2022, the *Bundestag* established a Commission on Reform of Electoral Law and Modernisation of Parliamentary Work, consisting of 13 Members of Parliament and 13 external experts.⁴⁰ The Commission was primarily charged with making proposals for effectively reducing the size of the *Bundestag* and sustainably prevent its growth.⁴¹ Its second task was to develop “proposals in conformity with the constitution on how equal representation of women and men in the German *Bundestag* can be achieved. To this end, it should examine possibilities, for example, in the nomination and the selection of candidates.”⁴² The constitutionality of gender parity laws was controversial within the Commission,⁴³ no less than outside. In its recent final report the topic is treated extensively.⁴⁴ The majority of the Commission determined that the proportion of women in the German *Bundestag* should be increased but that there was disagreement within the Commission regarding the

³⁶ According to Art. 75 (1) sentence 2 of the Constitution, constitutional amendments that contradict the fundamental democratic ideas of the Constitution are inadmissible.

³⁷ Bayerischer Verfassungsgerichtshof, Entscheidung vom 26.3.2018, Vf. 15-VII-16 (<https://www.bayern.verfassungsgerichtshof.de/media/images/bayverfgh/15-vii-16.pdf>).

³⁸ Laskowski (2023), 53 ff. considers the Bill to be compatible with both the State Constitution of Bavaria and the BL.

³⁹ Bundeswahlgesetz as amended (<https://www.gesetze-im-internet.de/bwahlg/BWahlG.pdf>).

⁴⁰ BT-Drs. 20/1023.

⁴¹ The regular size of the *Bundestag* is 598 members, but it has grown to 736 members.

⁴² Id., under II.2.b)—translation by the author.

⁴³ Interim Report of 30 August 2022, BT-Drs. 29/3250, p. 32 ff. (<https://dserver.bundestag.de/btd/20/032/2003250.pdf>).

⁴⁴ Deutscher Bundestag (2023), Kommission zur Reform des Wahlrechts und zur Modernisierung der Parlamentsarbeit—Abschlussbericht, BT-Drs. 20/6400 of 12 May 2023, p. 12–37.

concrete need for action.⁴⁵ The parliamentary groups of the Social Democrats and Alliance 90/The Greens considered a parity law to be constitutionally required and imperative. The parliamentary group of the Free Democrats rejected gender parity provisions in the electoral law and considered them unconstitutional. The Christian Democrat parliamentary group proposed to adopt a package of measures below the threshold of a binding (rigid) quota regulation in order to increase the proportion of women in the *Bundestag*. The Leftist parliamentary group advocated the enactment of a binding gender parity law which they considered as constitutionally justifiable. It is obvious from this that any federal gender parity law, if enacted in whatever form, will definitely be challenged before the Federal Constitutional Court (FCC).

One way to enable the (re-)introduction of gender parity laws at *Länder* level would be to include provisions in state constitutions which expressly permit such laws. This is part and parcel of the new Bavarian advance. Even if that suffices to ensure the law's compatibility with the State constitution, it will bring in the federal level because, pursuant to Art. 28 (1) BL, "[t]he constitutional order in the *Länder* must conform to the principles of a republican, democratic and social state governed by the rule of law within the meaning of this Basic Law. In each *Land*, county and municipality the people shall be represented by a body chosen in general, direct, free, equal and secret elections ..."⁴⁶ According to Art. 28 (3) BL, "[t]he Federation shall guarantee that the constitutional order of the *Länder* conforms ... to the provisions of paragraphs (1) ...". We do not know for certain what the principle of democracy and/or the freedom and equality of *Land* parliamentary elections require in that regard because there is no definite decision by the FCC yet concerning the constitutional permissibility of gender quota or gender parity laws on either the *Länder* or the federal level.

4 Federal Constitutional Court Cases on Gender Quotas Concerning Political Participation

In 2015, the FCC held that the BL did not prevent political parties from voluntarily introducing gender quotas with regard to party offices and electoral lists. This was a permissible exercise of a party's freedom to adapt its internal organisation (which under Art. 21 (1) sentence 3 BL must conform to democratic principles) to their own political agenda and objectives.⁴⁷ More recently, the FCC was confronted with what may be called a mirror-image case to the aforementioned state constitutional court cases: Voters challenged the results of the last federal parliamentary election which had reduced the ratio of women parliamentarians in the *Bundestag* from 36.3 to 30.7%. The voters complained that the federal legislature had *not* enacted a law before

⁴⁵ Id., p. 31.

⁴⁶ Translation available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0148.

⁴⁷ FCC (Chamber), Order of 1 April 2015 (2 BvR 3058/14), margin note 25.

that election requiring political parties to observe gender parity in their electoral lists.⁴⁸ The FCC dismissed the complaint as inadmissible because the complainants had not adequately demonstrated that the legislature was constitutionally required to impose gender parity on political parties. While the FCC did not take a clear position on whether the legislature would have been constitutionally permitted to do so, one senses that the court is critical in this regard. The Bavarian State Constitutional Court, having to decide a similar mirror-image case in 2018, made it abundantly clear that there could be no constitutional obligation to introduce a gender parity requirement because that would violate the state constitution.⁴⁹ The Bavarian court more or less anticipated the later reasoning of its Thuringian and Brandenburg counterparts.

Constitutional complaints against all three state constitutional court decisions were lodged with the FCC. Two of them have meanwhile been dismissed as inadmissible by a Chamber of the FCC for being insufficiently substantiated.⁵⁰ The FCC referred to the constitutional autonomy of the German *Länder* in particular with regard to the organisation of their elections, which limited FCC interference. It also criticised the complainants for not sufficiently addressing the principle of overall representation according to which each and every Member of Parliament represents the people as a whole,⁵¹ irrespective of age, profession, education, wealth, ethnic origin, religion, political affiliation—and also gender. The complainants had not sufficiently demonstrated that the principle of democracy required gender parity in the composition of parliaments.

Assuming that the FCC will in the future be seized with an admissible application concerning the constitutionality of a federal or state gender parity law, it would also have to consider the effect of Art. 3 (2) sentence 2 BL. According to that provision, “[t]he state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.” The state constitutional courts have refused to accept similar provisions in the state constitutions as sufficient justification for gender parity laws, not least because these provisions were quite general and not specifically geared toward ensuring equal representation in parliament. This is why the aforementioned new Bavarian “Half the Power Bill” proposes to add a sentence expanding the affirmative action part of the equal rights provision of the State Constitution. If enacted, it would require the legislature to take concrete steps for eliminating the underrepresentation of women in parliament.⁵² One can only speculate how the FCC would assess the constitutionality of gender parity laws in the light of Art. 3 (2) sentence 2 BL, if they were properly brought

⁴⁸ FCC, Order of 15 December 2020 (2 BvC 46/19). Penz (2021).

⁴⁹ Bavarian Constitutional Court, decision of 26 March 2018 (Vf. 15-VII-16), available at <https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2018-N-5484> (in German).

⁵⁰ FCC (Chamber), Order of 17.2.2021 (2 BvR 834/18), as paraphrased by Laskowski (2023), 17f. (concerning Bavaria); order of 6 December 2021 (2 BvR 1470/20), concerning Thuringia. The case concerning Brandenburg is still pending in the FCC.

⁵¹ See Art. 38 (1) sentence 2 BL.

⁵² See above II.2.

before it. While one senses a certain uneasiness with such laws in the aforementioned Chamber decisions, there is no clear indication how the full bench would decide.⁵³

Assuming further that the FCC concludes that gender parity laws are incompatible with the BL, the next question would be if such laws could be made possible by a constitutional amendment specifically permitting them, provided the necessary two-thirds majorities in the two chambers of the federal parliament (*Bundestag* and *Bundesrat*) could be mustered.⁵⁴ That would bring in Art. 79 (3) BL according to which “[a]mendments to this Basic Law affecting ... the principles laid down in [Article] ... 20 shall be inadmissible.” The pertinent principle possibly affected would be the principle of democracy, laid down in Art. 20 (2) BL, that also played a role in the aforementioned state constitutional court decisions. The question would then be if the constitutional mandate of Art. 3 (2) sentence 2 BL to promote de facto equality of women could justify modifications of democratic standards, if necessary to ensure women’s political empowerment which is an inherent aspect of the democratic principle. While the FCC has been ready to accept system-inherent modifications of unamendable constitutional principles,⁵⁵ it is unclear how the Court would assess a gender-parity amendment to the BL.

Since German constitutional law and practice do not develop in isolation, but in constant exchange with comparable constitutional systems and international human rights law, I venture a look at how other European countries, the European regional level and the global level of government have dealt with women’s political empowerment in general and gender parity laws in particular.

5 Gender Quotas in Other European Countries and on the European Regional Level of Government

5.1 France, Sweden, Italy and Spain

In France and Sweden, gender quotas regarding political representation are by now well established, have improved the ratio of women in parliaments significantly and are considered as constitutionally permissible.⁵⁶ Additionally, one can mention Italy and Spain.⁵⁷ In Italy there are quota rules concerning electoral lists on all levels of government (except with regard to the Senate) which are generally accepted as constitutional. In Spain, the Constitutional Court considered a 40% quota in favour of both genders with regard to electoral lists on all governmental levels, including elections for the European Parliament, as constitutional already in 2008. It did not find

⁵³ According to Meyer, Art. 3 (2) sentence 2 BL justifies gender parity laws (Meyer 2019).

⁵⁴ See Art. 79 (2) BL.

⁵⁵ BVerfGE 30, 1 (24 ff).

⁵⁶ See Cossalter (2021), 5ff. and Jansson (2021), 10ff.

⁵⁷ See Klafki (2020), 864f. and Möschel (2018).

any interference with the basic principles of electoral law, but only with the rights of the political parties which were, however, justified with a view to the general constitutional provision obliging public power to ensure real and effective implementation of freedom and equality for all.⁵⁸

In sum, of the 27 EU Member States, eleven have gender parity laws.⁵⁹

5.2 No Gender Parity Rule in EU Law Yet

5.2.1 No EU Law Requirement of Introducing Gender Parity Laws Concerning National Elections

The EU has no power to impose gender quotas on Member States concerning their national parliamentary elections. The general power of the EU to combat discrimination based on sex in Art. 19 (1) TFEU does not seem to cover the introduction of mandatory quotas in favour of women regarding those elections, all the more since the organisation of elections is part of the Member States national constitutional identity in the sense of Art. 4 (2) TEU. The EU does, however, have power to regulate municipal elections pursuant to Art. 22 (1) TFEU, but that power extends only to regulating the details of national treatment in favour of citizens of other Member States. It would probably not support the imposition of gender quotas. There is no provision in either primary or secondary Union law that would require Member States to introduce a gender quota or gender parity rule in their national election laws. If Member States do that on their own initiative, they cannot rely on any Union law provision to justify it and overcome national constitutional impediments by invoking the primacy of EU law.⁶⁰ Art. 23 (2) CFR on the permissibility of specific advantages in favour of the under-represented sex is addressed to Member States only when they are implementing Union law.⁶¹ But when Member States regulate their national parliamentary elections, they certainly do not implement Union law.

⁵⁸ Klafki (2020), 864f.

⁵⁹ Klafki (2020), 863.

⁶⁰ See the Declaration (No. 17) concerning primacy in the annex to Final Act of the Intergovernmental Conference of Lisbon of 13 December 2007 (OJ 2016 C 202, p. 344).

⁶¹ Art. 51 (1) CFR.

5.2.2 Election of Members of the European Parliament

Lex Lata

There is no gender-quota or parity requirement in current EU law concerning elections to the European Parliament, i.e., the Electoral Act.⁶² With regard to elections to the European Parliament, the regulatory power of the EU goes further than with regard to municipal elections because, in addition to Art. 22 (2) TFEU on national treatment, Art. 223 (1) TFEU sets forth that the EU “shall lay down the necessary provisions”. This would in general include power to introduce gender parity requirements which Member States would have to implement when they conduct the European election within their territory. But since such gender parity provisions would have to be enacted by the Council acting unanimously after obtaining the consent of the European Parliament and enter into force only after ratification by all Member States in accordance with their respective constitutional requirements, this is unlikely to happen any time soon. The most recent amendments to the Electoral Act by Council Decision (EU, Euratom) 2018/994 of 13 July 2018,⁶³ which has not yet entered into force because it has not yet been ratified by all Member States, does not include any quota rule.

In the Gender Equality Strategy 2020–2025, the European Commission states that in the 2019 European elections, 39% of elected MEPs were women, compared to 37% of MEPs in 2014. It then explains: “Equal opportunity in participation is essential for representative democracy at all levels—European, national, regional and local. The Commission will promote the participation of women as voters and candidates in the 2024 European Parliament elections, in collaboration with the European Parliament, national parliaments, Member States and civil society, including through funding and promoting best practices. European political parties asking for EU funding are encouraged to be transparent about the gender balance of their political party members.”⁶⁴ The Commission’s instruments of choice are promotion and encouragement, not legal obligations. The same applies even more to the elections at national level. In that regard, the Commission only quite generally “calls ... on the Member States to ... develop and implement strategies to increase the number of women in decision-making positions in politics and policy-making.”⁶⁵

⁶² See the Act concerning election of the members of the European Parliament by direct universal suffrage, as amended (consolidated version available at [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01976X1008\(01\)-20020923&qid=1618756563275&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:01976X1008(01)-20020923&qid=1618756563275&from=EN)).

⁶³ OJ 2018 L 178, p. 1.

⁶⁴ European Commission (2020), 14.

⁶⁵ Id., p. 15.

Lex Ferenda

A first step toward introducing gender parity requirements was made by the European Parliament in May 2022, when it adopted a legislative resolution on the proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage.⁶⁶ Art. 10 (1) of the Draft Regulation, that is based on Art. 223 (1) TFEU, obliges political parties and other entities, when nominating candidates, to “observe democratic procedures, transparency and gender equality”. Specifically, “[g]ender equality shall be reached depending on the Member States electoral systems and in any event in the Union-wide constituency by the use of zipped lists or quotas, without infringing the rights of non-binary people.”⁶⁷ Recital 3 of the Draft Regulation’s preamble underlines the EU’s duty of gender mainstreaming (Art. 8 TFEU) and recital 11 refers to the Commission’s Gender Equality Strategy 2020–2025. Recital W of the preamble of the Legislative Resolution criticises the differences in the nomination process of candidates for the elections to the European Parliament between Member States and political parties, also with regard to gender equality, even though “open, transparent and democratic procedures respecting gender equality for the selection of candidates are essential for building trust in the political system”.

The requirement of zipped lists or quotas (in an unspecified amount) in Art. 10 (1) of the Draft Regulation applies to the new Union-wide constituency for which only European political entities are permitted to submit one Union-wide candidate list each; for the national constituencies, however, the achievement of gender parity is made dependent on the electoral systems of the Member States. This gives them a certain discretion, for example with regard to the amount of the quota, although the ultimate objective—gender equality—seems to indicate a quota of around 50%. However, the gender quotas already introduced by eleven Member States for elections to the European Parliament vary widely.⁶⁸ Member States certainly have no *carte blanche* to omit gender-parity rules altogether because of constitutional concerns (Art. 4 (2) sentence 1 TEU). Elsewhere, recital 11 makes clear that gender equality “should apply to all lists of candidates in the elections to the European Parliament both in the national constituencies and in the Union-wide constituency.” The extent of the member states’ regulatory margin would ultimately have to be decided by the Court of Justice of the European Union (CJEU). The zipped list/quota requirement in Art. 10 (1) of the Draft Regulation has already provoked criticism, especially

⁶⁶ European Parliament legislative resolution of 3 May 2022 on the proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision (76/787/ECSC, EEC, Euratom) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that Decision [2020/2220(INL)–2022/0902(APP)], https://www.europarl.europa.eu/doceo/document/TA-9-2022-05-03_EN.html#sdocta1.

⁶⁷ In a system of zipped lists/quotas infringements of the rights of non-binary persons can only be avoided by giving non-binary persons the freedom of self-definition as either female or male. For an example in the new Bavarian advance see above II.2.

⁶⁸ European Parliament (2022), 5.

from Germany.⁶⁹ Since the Regulation can only be enacted by the Council acting unanimously after obtaining the consent of the European Parliament and enter into force only after ratification by all Member States in accordance with their respective constitutional requirements, it is quite uncertain if and when EU electoral law will include gender parity rules.⁷⁰

Assuming for the sake of argument that such rules would enter into force, the question arises whether they would be compatible with primary Union law, and in particular Art. 14 (3) TEU as well as Arts. 12, 21, 23 and 39 of the Charter of Fundamental Rights (CFR). It should be remembered in this context that the Court of Justice of the EU struck down absolute and automatic preferences for women in recruitment and promotion as incompatible with the Equal Treatment Directive.⁷¹ It is therefore unclear whether it would accept gender quotas in European electoral law. EU law does permit affirmative action: Art. 23 (2) CFR specifically sets forth that “[t]he principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.” Also, according to Art. 3 (3) subpara. 2 TEU and Art. 8 TFEU, the EU shall promote equality between women and men in all its activities. Perhaps the Court would consider these provisions as sufficient to justify gender parity rules in European electoral law.

The European Court of Human Rights does not consider gender quotas for electoral lists to be incompatible with the ECHR and the Additional Protocol.⁷² Democracy implies the freedom of the Union’s citizens to freely decide on their representatives in the EP,⁷³ but this freedom is pre-empted by the selection of candidates. Therefore, especially in the case of closed lists (as in Germany), the EU cannot leave the candidate selection process entirely to the political parties alone without violating its duty under Art. 8, 10 TFEU and Art. 23 CFR to combat discrimination and promote equality between women and men. For obviously gender parity in representation does not come about by itself. It is true that the proportion of women among MEPs increased after the 2019 European elections, in which 11 Member States had gender quotas, and at 39.5% is above the average of the Member State parliaments,⁷⁴ but it varies greatly both per parliamentary group and per Member State.

Finally, there is the question of how the zipped list/quota requirement is to be enforced. Art. 10 para. 2 of the Draft Regulation provides for a complaint procedure, which members of a political party, voters’ association or European electoral unit can initiate. Whether the European Electoral Authority or the national electoral

⁶⁹ Polzin (2022).

⁷⁰ During the first debate in the Council, the proposal met with strong resistance (see Gutschker 2022).

⁷¹ ECJ, judgment of 17 October 1995, Case C-450/93—Kalanke, ECR 1995, I-3051; judgment of 11 November 1997, Case C-409/95—Marschall, ECR 1997, I-6363; judgment of 19 November 2020, Case C-93/19 P—Hebberecht.

⁷² See below under 5.3.1.

⁷³ Polzin (2022).

⁷⁴ [https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/646189/EPRS_ATA\(2020\)646189_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2020/646189/EPRS_ATA(2020)646189_EN.pdf).

authorities may reject incompatible electoral lists *ex officio* is not regulated. If the provision is to be effective, such a power will have to be assumed.

5.3 *European Court of Human Rights and Council of Europe*

5.3.1 *European Court of Human Rights Accepts Gender Quotas*

Art. 3 of the Additional Protocol to the European Convention on Human Rights⁷⁵ enshrines the right to free elections but leaves States parties a wide margin with regard to election regulation, in view of the many differences in this regard between the Convention States.⁷⁶ The ECtHR has several times accepted gender quotas pertaining to electoral lists as permissible in the ECHR system.

In the most recent case of *Zevnik v. Slovenia*⁷⁷ concerning a 35% gender representation requirement in favour of males and females, a three-member committee of the ECtHR held as follows: “The Court reiterates that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe⁷⁸ and that its institutions consider the lack of gender balance in politics to be a threat to the legitimacy of democracy and a violation of the right of gender equality ... Consequently, the Court considers that the interference in question pursued the legitimate aim of strengthening the legitimacy of democracy by ensuring a more balanced participation of women and men in political decision-making.”

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

In the *Zevnik* case, the applicants did not claim violations of the freedom of expression (Art. 10 ECHR), the freedom of association (Art. 11 ECHR) or the prohibition of discrimination (Art. 14 ECHR) so that the Court did not have to take any position in that regard. In an earlier Spanish case, however, it did not find any interference in the freedoms of expression or association of potential candidates who were not included

⁷⁵ Of 20 March 1952 (ETS No. 9).

⁷⁶ See, e.g., ECtHR (GC), judgment of 16 March 2006 (Appl. No. 58278/00), *Ždanoka v. Latvia*, para. 103.

⁷⁷ Decision of 12 November 2019 (Appl. No. 54893/18): Declaration declared inadmissible for being manifestly ill-founded (Art. 35 (3) lit. a ECHR). See Toplak (2019).

⁷⁸ See *Staatkundig Gereformeerde Partij v. the Netherlands* (dec.), no. 58369/10, § 72, 10 July 2012.

in electoral lists because of their gender: “La Cour ne décèle rien dans le dossier lui permettant de constater que les requérantes ont été empêchées de poursuivre leurs activités en tant que membres ou sympathisantes du parti politique en question.”⁷⁹ Since none of the applicants was a political party, the Court did not consider the potential interference in the freedom of political parties to compile electoral lists in accordance with their own political agenda. But there is little doubt that such interference would have been justified pursuant to Art. 11 (2) ECHR as necessary in a democratic society for the protection of the rights and freedoms of others, namely the underrepresented women.

Regarding the prohibition of discrimination on the ground of sex in Art. 14 ECHR and Art. 1 of Protocol No. 12,⁸⁰ the Court held that the Spanish gender quota of 40% applied equally to both men and women, prohibiting electoral lists with more than 60% candidates of either the male or the female sex. This is why there was no discrimination based on sex.⁸¹ The same can of course be said of a zipped-list gender parity rule. However, the state constitutional courts of Thuringia and Brandenburg rejected that group-related approach to gender discrimination considering the entire electoral list and instead opted for an individualised approach with regard to each position on such list: If that is not open for a man or a woman because it is reserved for a woman or a man, there will be gender discrimination even if the overall chances of men and women to get on the list are equal.

The ECtHR has not yet been called upon to decide whether the ECHR and Protocols might impose an obligation on Member States to introduce gender quotas for electoral lists. While the Court has derived different kinds of positive obligations from various Convention rights such as duties to protect, to investigate and to prosecute,⁸² it has not yet recognised any concrete positive action obligations in favour of women.

5.3.2 Soft Law by Political Bodies of the Council of Europe

The Committee of Ministers (CM) on 12 March 2003 adopted Recommendation Rec (2003) 3 on “balanced participation of women and men in political and public decision-making”.⁸³ In that document the governments of Member States are recommended to ensure balanced participation of women and men, i.e., representation of both women and men amounting to at least 40%. The governments are specifically invited to “consider adopting legislative reforms to introduce parity thresholds for candidates in elections at local, regional, national and supra-national levels. Where

⁷⁹ ECtHR, decision of 4 October 2011 (Appl. No. 35473/08), *Méndez Pérez v. Spain*, para. 29.

⁸⁰ Protocol No. 12 to the ECHR of 4 November 2000 (ETS No. 177).

⁸¹ ECtHR, decision of 4 October 2011 (Appl. No. 35473/08), *Méndez Pérez v. Spain*, para. 34.

⁸² See Grabenwarter and Pabel (2021), 164ff. and Grabenwarter (2021), Art. 2 margin notes 16ff.

⁸³ Available at <https://rm.coe.int/1680519084> (with explanatory memorandum).

proportional lists exist, consider the introduction of zipper systems”.⁸⁴ In the Recommendation CM/Rec (2007) 17 on gender equality standards and mechanisms,⁸⁵ the CM on 21 November 2007 further explained under B.4.31. that “[p]articipation in political and public life is a basic right of citizenship and must be enjoyed by women and men on a parity basis. The balanced participation of both sexes at all levels of political and public life, including at decision-making level, is therefore a requirement of human rights that can ensure the better functioning of a democratic society.”⁸⁶

In the Reykjavík Declaration (2023), the Heads of State and Government of the Council of Europe on 16–17 May 2023 somewhat less specifically stated: “We recall that gender equality and the full, equal and effective participation of women in public and private decision-making processes are essential to the rule of law, democracy and sustainable development.”

The Parliamentary Assembly (PACE) on 27 January 2010 adopted Resolution 1706 (2010) on “increasing women’s representation in politics through the electoral system”.⁸⁷ In it, PACE specifically recommended the introduction of a legal quota in favour of women and a zipper system for electoral lists:

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

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

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

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

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

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

⁸⁴ Id., Appendix, A.3.

⁸⁵ Available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d4aa3.

⁸⁶ The FCC in its aforementioned order of 2020 expressly left the question unanswered whether that recommendation was intended to create a legal obligation for Member States because the applicants had not made such a claim (see above note 48, margin note 119).

⁸⁷ Available at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17809&lang=en>.

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

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

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

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

119. For being respected, moreover, gender quotas require effective monitoring and enforcement mechanisms.⁸⁸

Germany has long delayed the implementation of these recommendations which are not legally binding as such. When the protagonist Thuringian and Brandenburg state legislatures closely followed them in introducing the zipper-mode gender parity requirements for electoral lists in 2019, the requirements were struck down by the state constitutional courts in 2020 and not saved by the Federal Constitutional Court in 2021, as has already been explained.

The strategic objective 4 of the current Council of Europe Gender Equality Strategy 2018–2023⁸⁹ is to "[a]chieve balanced participation of women and men in political and public decision-making".⁹⁰ After acknowledging that "[p]olitical activities and public decision-making remain male-dominated areas. Men set political priorities, and political culture continues to be structured around male behaviour and life experience", the Strategy states that the Council of Europe will seek to "identify and support measures and good practices that promote gender equality in relation to: electoral systems, training of decision makers in both public institutions and political parties, gender-sensitive functioning of decision-making bodies, setting parity thresholds, adoption of effective quota laws and voluntary party quotas, and the regulation of political parties including public funding, in co-operation with relevant bodies of the Council of Europe and with a view to achieving gender balance in decision making, combating gender stereotypes and to improve the gender-sensitiveness of decision-making environments".⁹¹

It is unlikely that Germany will effectively achieve gender balance in political decision-making in a timely manner without mandatory gender quotas regarding electoral lists. It remains to be seen how long their introduction will take.

⁸⁸ Venice Commission (2009), 18.

⁸⁹ Council of Europe (2018), adopted on 7 March 2018 by the Committee of Ministers.

⁹⁰ *Id.*, p. 27 ff.

⁹¹ *Id.*, para. 57 and 61.

6 Global Level: The Convention on the Elimination of All Forms of Discrimination Against Women

The first step on the global level toward gender equality in political participation was taken by the Convention on the Political Rights of Women.⁹² Pursuant to Art. II, “[w]omen shall be eligible for election to all publicly elected bodies, established by national law, on equal terms with men, without any discrimination.” That provision simply prohibits gender-based restrictions on eligibility which constituted important progress at that time.

Art. 7 CEDAW⁹³ goes further in setting forth that the States Parties “shall take all appropriate measures to eliminate discrimination against women in the political ... life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) ... to be eligible for election to all publicly elected bodies ...” According to Art. 4 (1) CEDAW, “[a]doption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention ...”.

Gender quotas or gender parity requirements for electoral lists certainly qualify as temporary measures aimed at acceleration of adequate female representation in parliaments and are therefore permitted by Art. 4 CEDAW. The treaty body of independent experts charged with monitoring CEDAW implementation, the Committee on the Elimination of Discrimination against Women, even stated that Art. 4 CEDAW (not only permitted but) “encourage[d] the use of temporary special measures in order to give full effect to articles 7 and 8.”⁹⁴

Is the imposition of mandatory gender quotas or gender parity requirements even made obligatory by Art. 7 CEDAW, because they are the most appropriate measure to eliminate the underrepresentation of women—a trace of their past discrimination—and ensure their substantive equality in political life? The CEDAW Committee has increasingly tightened its standards in this respect. In 1997 it had confined itself to observing that some political parties have adopted measures to ensure that there was a balance between the number of male and female candidates nominated for election and then demanding that “States parties should ensure that such temporary special measures are specifically permitted under anti-discrimination legislation or other constitutional guarantees of equality.”⁹⁵ Seven years later, the Committee stated that the “[p]ursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources

⁹² Of 31 March 1953, UNTS vol. 193, p. 135.

⁹³ Of 18 December 1979, UNTS vol. 1249, p. 13.

⁹⁴ General Recommendation No. 23 (1997): Political and Public Life, para. 15 (available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_4736_E.pdf). See in this sense also UN General Assembly Resolution 66/130 of 19 December 2011, para. 9.

⁹⁵ Id, para. 33.

and power between men and women.”⁹⁶ While quota systems are mentioned as one possible kind of special measures,⁹⁷ the Committee did not explicitly demand their use but rather leaves States parties a choice regarding the most appropriate means to promote gender equality.⁹⁸ Meanwhile the Committee has begun to recommend that quotas of up to 50% for the representation of women, including on electoral lists and in public office, be introduced and effectively enforced in a number of Concluding Observations on State reports.⁹⁹ It has also viewed the introduction of zipper systems as particularly effective.¹⁰⁰

In the Joint Call with the Inter-Parliamentary Union of 8 March 2021, the Committee urged parliaments and governments to adopt national plans of action in order to accelerate progress to reach gender parity by 2030, “including by ... [a]dopting electoral gender quotas to reach the gender parity target ... [a]dopting the target of parity ... in political and administrative, as well as executive, legislative and judiciary bodies, at both the national and subnational levels ...”.¹⁰¹

While the Committee, which has no power to impose legal obligations on States parties to CEDAW, has confined itself to making recommendations, the CM of the Council of Europe has interpreted Art. 7 CEDAW in the sense that it imposes an obligation on European States “to ensure equal participation of women and men in political and public decision-making. Given that the traditional liberal notion of equality of opportunity has evolved to a demand for equality of results, states now have an obligation to ensure equality of outcomes, not only equal opportunities between women and men. This means that European states are obliged to ensure an equal representation of women and men in decision-making.”¹⁰² Although quotas are not explicitly mentioned, there is practically no other way of quickly achieving equality of results with regard to representation of women in parliaments.

If one takes seriously the promise of effective equality of women in political life made by Art. 7 CEDAW and includes the long-lasting exclusion of women from that life in the equation, the interpretation ventured by the CM of the Council of Europe is reasonable. It is supported by the practice of the Human Rights Committee (HRC), the treaty body of the International Covenant on Civil and Political Rights (ICCPR),¹⁰³ regarding the political rights enshrined in Art. 25 ICCPR. This provision guarantees to every citizen the right and the opportunity, without any distinction of sex etc., to vote and to be elected. According to the HRC, “States parties must ensure that the law guarantees to women the rights contained in article 25 on equal terms with men and

⁹⁶ General Recommendation no. 25 (2004), para. 8 (available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/I_Global/INT_CEDAW_GEC_3733_E.pdf).

⁹⁷ *Id.*, para. 22.

⁹⁸ *Id.*, paras. 27 ff.

⁹⁹ Lembke (2022), Article 4, p. 208 f. and Wittkopp (2022), Article 7, p. 323 f.

¹⁰⁰ Wittkopp (2022), Article 7, p. 316.

¹⁰¹ Joint Call (2021).

¹⁰² Explanatory memorandum on Recommendation Rec (2003) 3 (note 83), p. 15 (at the end of para. I.A.).

¹⁰³ Of 16 December 1966, UNTS vol. 999, p. 171.

take effective and positive measures to promote and ensure women's participation in the conduct of public affairs and in public office, including appropriate positive action. Effective measures taken by States parties to ensure that all persons entitled to vote are able to exercise that right should not be discriminatory on the grounds of sex. The Committee requires States parties to provide statistical information on the percentage of women in publicly elected office, including the legislature, as well as in high-ranking civil service positions and the judiciary.”¹⁰⁴

7 Conclusion: Political Gender Parity and Legal Education

In conclusion, there is not yet any hard and watertight international or supranational legal obligation for States to enact mandatory quotas or gender parity requirements in order to enhance the political representation of women. But the pertinent soft-law precepts on the European and global level are gradually spreading and hardening, not least because many close partner States of Germany have long ago introduced such quotas. It remains to be seen whether Germany will fall in line or rather fall behind because it proves unable to overcome State constitutional court resistance. That depends on how much women voters in Germany care about their right to equal representation enshrined in Art. 3 (2) BL, read together with and informed by Art. 7 CEDAW, and its effective implementation. According to a recent survey conducted in Germany, only a small minority (8%) of the respondents supported the introduction of mandatory gender quotas, with more female than male respondents answering positively.¹⁰⁵

Obviously, much more public debate of women's political representation in Germany is necessary. Voters need to become aware that the underrepresentation of women in legislatures hinders the inclusion of the gender perspective in a critical sphere of influence.¹⁰⁶ Otherwise, Germany is in danger of falling behind developments on the European and global level concerning women's political representation. If that happens, Germany will probably also stay behind with regard to gender equality in general and thus fail to adequately tap the hidden resources and talents of the better part of its population. That would be a competitive disadvantage.

One way to raise awareness of the gender gap in general and the gender gap in political empowerment in particular is to promote gender-sensitive legal education. Law students will be trained to recognise *de jure* and *de facto* discrimination of women and learn to include social and political reality in their legal assessments. They

¹⁰⁴ General Comment No. 28, CCPR/C/21/Rev.1/Add.10, 29 March 2000, para. 29 (available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_21_Rev-1_Add-10_6619_E.pdf).

¹⁰⁵ Coffé and Reiser (2020).

¹⁰⁶ See in this sense UN General Assembly Resolution S-23/3 “Further actions and initiatives to implement the Beijing Declaration and Platform for Action” of 10 June 2000, para. 23 (available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/652/05/PDF/N0065205.pdf?OpenElement>).

will be informed about existing hard law and soft law rules as well as mechanisms of redress in favour of women. They will be made aware of the possible need for further rules and mechanisms in order to eliminate discrimination and gender-based disadvantages for good and promote de jure and de facto equality between women and men across the board. They will also learn how to lead the legal and political battles for a gender-equitable society in parliaments, the courts and the general public. Most importantly, however, gender-sensitive young lawyers will function as multipliers of gender equality and gender sensitivity in society at large.

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