

Approaches to Promote Gender Parity in Parliamentary Representation in Germany and France

I. Backgrounds

1. The European focus on gender equality instead of women's rights
 - The European view on gender issues differs from that in other parts of the world: Since women and men are equal (an aspect of *human dignity*), there is no reason for specific "women's rights". Except maternity protection, there are no such rights in the European human rights treaties, the Charter of Fundamental Rights of the European Union², the Basic Law for the Federal Republic of Germany (= BL) or the Constitution of the French Republic of 1958 (= Const. 1958) but instead a firm commitment to non-discrimination and equal rights of men and women.³
 - While legal discrimination has been eliminated, some countries, such as Germany, still have a lot of catching up to do to achieve effective (actual) gender equality in professional and political life. The public discussion focuses on this aspect, not on "women's rights".
2. The active promotion of gender equality under European Union law and national constitutional law
 - The EU and its member states are committed to an active promotion of gender equality. Under the Treaties, on which the Union is based,⁴ it must in all its activities aim to eliminate inequalities between men and women, promote equality and combat discrimination. Far-reaching legislation serves this purpose.⁵ Art. 23 ChFR, which anchors the fundamental right of equality between men and women at Union level, insists that "equality ... must be ensured in all areas" and explicitly allows "measures providing for specific advantages in favour of the under-represented sex".
 - In Germany, art. 3(2) phrase 2 BL follows a similar approach, requiring that "the state shall promote the actual implementation of equal rights for women and men and *work towards eliminating existing disadvantages*". Similar clauses can be found in the constitutions of some of the Länder. This goes beyond the prohibition of discrimination in art. 3(3) BL: It establishes a *positive obligation to equal rights* and extends it to the *social realities*. It entitles the legislator to compensate for actually existing disadvantages, which typically affect women, by favouring regulations. Thus, in the civil service sector, federal and Land *gender mainstreaming laws* have introduced *Equal Opportunities Officers* [Gleichstellungsbeauftragte] in all public institutions, which must be consulted in all matters related to gender equality, in particular before personnel decisions. For the filling of positions where women are underrepresented, it is common practice to *favour female applicants over equally-qualified male applicants*. As to the private sector, in June 2021 the German Bundestag has passed a law requiring *listed companies* with more than three board members to appoint *at least one woman to the board*.⁶ Measures promoting gender parity in the democratic representation in the parliaments and at the local level would be well in line with this development, although the Federal Constitutional Court [Bundesverfassungsgericht] recently excluded any premature conclusion that art. 3(2) phrase 2 BL obliges the legislator to take such measures.⁷ *The question is not if but how to promote gender parity.*
 - The French Constitution already stipulates in its first article that the law shall "promote equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility". On this basis, in 2012 mandatory gender quotas for decision-making positions in the civil service were introduced.⁸ Unlike in Germany, the constitutional mandate explicitly extends to the political sphere and is flanked by a constitutional obligation of the political parties to "contribute to the implementation of the principle ... as provided for by statute" (cf. art. 4(2) Const. 1958). This makes it easier to overcome obstacles that other constitutional norms may pose. Both provisions were introduced by constitutional amendment in 1999 and relocated and partially reformulated in 2008. France was one of the first countries to take this path.
3. The still male-dominated parliaments in Germany and France
 - Despite this normative background the parliaments are still male-dominated. The female quota is at present only ca. 31 % in the Deutsche Bundestag (the federal parliament) and even lower in almost half of the parliaments of the Länder.⁹ In the biggest theatre in the Bundestag, the Christian Democrats (CDU/CSU) of Federal Chancellor Angela Merkel, it is only ca.

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² Underlined text passages indicate links to relevant internet resources. Just click on the link in the pdf file!

³ See my lecture materials on gender equality under European law and the German Basic Law (p. 2 f.) from the course Human Rights Norms and Mechanisms II at Universitas Gadjah Mada, Semester 2, 2019/20, www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_HRNM-II_Children's-rights-gender-equality-Europe.pdf and [/Schmitz_HRNM-II_Non-discrimination-gender-equality-Germany.pdf](http://www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_HRNM-II_Non-discrimination-gender-equality-Germany.pdf).

⁴ See art. 3(3) sub-sect. 2 of the Treaty on European Union and art. 8, 10 of the Treaty on the Functioning of the European Union.

⁵ See in particular the Equal Treatment Directive (Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation).

⁶ See the Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst [Act for the equal participation of women and men in management positions in the private and public sectors], as amended 2021.

⁷ Cf. Federal Constitutional Court, Decision of 15.12.2020, 2 BvC 46/19, no. 96 ff., www.bverfg.de/e/cs20201215_2bvc004619.html.

⁸ Alban Jacquemart, Anne Revillard, Laure Bereni, Gender quotas in the French bureaucratic elite: the soft power of restricted coercion, *French Politics*, 18(1), 2020, p. 50 ff.

⁹ Cf. Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (editor), Atlas zur Gleichstellung von Frauen und Männern in Deutschland [Atlas on Gender Equality in Germany], 2020, www.bmfsfj.de/bmfsfj/service/publikationen/4-atlas-zur-gleichstellung-von-frauen-und-maennern-in-deutschland-160358, p. 8.

21 %.¹⁰ At the level of local government, there is also much room for improvement. In France, the female quota is ca. 40 % in the National Assembly and 35 % in the Senate.¹¹

II. Constitutional standards limiting the measures to promote gender parity in parliamentary representation (explained by the example of Germany)

- While the aim is legitimate and even encouraged by the constitution, it is difficult to achieve because a couple of constitutional norms limit the range of means:
 1. The principle of freedom of political parties (art. 21(1) phrases 1, 2 BL)
 - The freedom to establish and to run political parties includes the *freedom of election proposals*, i.e. to nominate candidates and propose lists of candidates. Any interference with this freedom would be under high pressure of justification, since it could easily jeopardize democracy; this also applies to any criteria for the admission to election.
 2. The principle of free elections (art. 38(1) phrase 1 BL)
 - This essential condition for any democratic election requires that the will of the people will be formed by the people with the help of elections which are *free from any influence of the state or its institutions*. This applies already in the run-up to the elections and also includes the right of the political parties to freely nominate candidates and propose lists.
 3. The principle of equal elections (art. 38(1) phrase 1 BL)
 - This special, strictly formal manifestation of the general principle of equality (cf. art. 3(1) BL) requires equal conditions not only for the right to vote [aktive Wahlgleichheit] but also for the right to stand as a candidate in an election [passive Wahlgleichheit]. In particular, a man must have the same chance to become a candidate as a woman.
 4. The principle of equal opportunities for political parties (art. 21(1) read together with art. 38(1) phrase 1 BL)
 - This principle requires the state to treat the political parties equally, regardless of their policies or attitudes. This excludes a "steering practice" in the providing of facilities, grants or other public benefits. Moreover, *measures* to promote gender equality *must not affect the equal opportunities of the parties politically*. This could happen if the specifications for the creation of the lists of candidates result in fact in the exclusion of important candidates, for example if a requirement of equal gender representation compels a small feminist party to reserve important positions for men or an explicit "men's party" to reserve them for women.
 5. Equal rights of men and women and the prohibition of differentiation by gender (art. 3(2, 3) BL)
 - The German Basic Law guarantees equal rights of men and women (art. 3(2) phrase 1) and strictly prohibits differentiations by gender ("sex", art. 3(3) phrase 1). It allows them only exceptionally if they are imperative (absolutely necessary) for the solution of problems which by their nature may arise only for men or only for women. This is usually only the case if there are biological reasons. Apart from this, an unequal treatment can only be legitimized by the way of thorough balancing in the case of a serious collision with other constitutional values. It is questionable if and to what extent a mere reference to the very general mission of "working towards eliminating existing disadvantages" (art. 3(2) phrase 2 BL) can suffice.
 6. Principle of democracy?
 - The principle of democracy does not generally bar measures to promote gender parity. True, all members of the parliament represent the entire people and, thus, also the male members represent the women. The *parliament's composition does not need to reflect that of the population* in its many diverse groups (men and women, old and young, heterosexuals and LGBT, ethnic groups etc.). However, this only allows the conclusion that democracy does not require such measures but not that it excludes them.

III. Effective but unconstitutional without a specific constitutional basis: mandatory gender quotas for electoral lists

1. The most effective but controversial instrument to achieve gender parity
 - Mandatory gender quotas as admission requirements for electoral lists are the most effective and fastest instrument to achieve gender parity if they are designed properly (e.g. mandatory alternate filling of positions [zipper system] or equal gender ratio for groups of candidates on the list). The instrument can also be used for a limited approach which only excludes severe distortions (demanding a low minimum ratio for groups of candidates on the list) or a rather symbolic approach (demanding a minimum ratio for the whole list only, thus allowing to concentrate the male candidates on top).
 - In the political debate, mandatory gender quotas have been proposed again and again. All of them stand, however, for a *state intervention into the free pre-electoral process* which limits the freedom of the political parties and, thus, the free competition of ideas in the democracy and therefore have raised significant constitutional concerns among constitutional law scholars and the scientific services of the parliaments.¹²

¹⁰ Cf. Statista (editor), Anteil der Frauen im Bundestag nach Fraktionen in Deutschland im Jahr 2021 [Proportion of women in the Bundestag by factions in Germany in 2021], 01.2021, <https://de.statista.com/statistik/daten/studie/1063172/umfrage/frauenanteil-im-bundestag-nach-fraktionen-in-deutschland>.

¹¹ Cf. Institute for Democracy and Electoral Assistance (IDEA) (editor), Gender Quota Database. Country Data France, last updated 02.2021, www.idea.int/data-tools/data/gender-quotas/country-view/86/35.

¹² See the references at Thuringian Constitutional Court, judgement of 15.07.2020, VerFGH 2/20 (note 16), p. 24 f.; see in particular the reports of the *Scientific Services of the German Bundestag*, Möglichkeiten einer paritätischen Besetzung des Bundestages mit beiden Geschlechtern [Possibilities for equal representation of both genders in the Bundestag], WD 3 - 008/08, 2008, www.bundestag.de/resource/blob/407352/7b82e7f0b642586935a86275cfd500c9/wd-3-008-08-pdf-data.pdf, and of the *Ministry of Justice and Equality of the Land of Saxony-Anhalt*, Rechtsgutachten: Verfassungsrechtlicher Rahmen und verfassungsrechtliche Grenzen mit Bezug auf ein Paritätsgesetz für die Landes- und Kommunalebene [Legal opinion: Constitutional framework and constitutional limits with reference to a parity law for the Land and municipal level], 2020, https://mj.sachsen-anhalt.de/fileadmin/Bibliothek/Politik_und_Verwaltung/MJ/MJ/gutachten/gutachten-paritaetsgesetz.pdf.

2. The 1982 French approach to require a minimum of 25 % of women/men on the electoral lists for the local government elections
 - A law adopted in 1982 limited the allowed gender ratio on the electoral lists for municipal councils of communes of 3.500 and more citizens to 75/25 %.
 - However, in the way of preventive constitutional review, the *Constitutional Council* [Conseil constitutionnel] *declared these provisions unconstitutional* for violation of art. 3 Const. 1958 (here: principle of universal and equal elections) and art. 6 of the Declaration of the Rights of Man and of the Citizen of 1789 (equality of the citizens in the eyes of the law) so that they could not enter into force. The Constitutional Council reasoned that "these principles of constitutional value are opposed to any division of voters or eligible persons into categories; this is the case for all political suffrage, in particular for the election of municipal councillors"¹³.
3. The 2000 French approach to require gender-balanced electoral lists for all proportional representation elections on a special constitutional basis
 - In 1999, France introduced by constitutional amendment the clauses which now are art. 1(2) and 4(2) Const. 1958. In 2000, it adopted on this basis the *Parity Law*¹⁴, which amended the Electoral Code to the effect that it requires the political parties to present gender-balanced lists filled alternately with women and men in the zipping way for the regional, parts of the senatorial and the European Parliament elections and lists with equal gender ratio for each group of six candidates for the municipal elections in communes of 3.500 and more citizens.
4. The 2019 Brandenburg and Thuringian approach to require alternately filled gender-balanced lists
 - In 2019, after a controversial debate and despite the concerns of their Scientific Services, the parliaments of the Länder Brandenburg and later also Thuringia amended without a special constitutional basis the Land Electoral Laws to the effect that henceforth only gender-balanced electoral lists following the zipping system were admitted to the Land parliamentary elections.¹⁵ In Thuringia, a list partially correct would be partially admitted (until the position from which the requirements were no longer met). The parties remained only free in the decision whether a woman or a man should hold the first place on the list. Moreover, in Thuringia, in exceptional cases the list positions reserved for women could also be filled by men if not enough female candidates stood for election, and vice versa.
 - In 2020, first the Thuringian Constitutional Court¹⁶ and three months later also the Constitutional Court of the Land Brandenburg¹⁷ declared these laws void.
 - a) The *Thuringian Constitutional Court* [Thüringer Verfassungsgerichtshof] considered the *right to free and equal elections* under art. 46 of the Thuringian Constitution violated, as well as the *right of political parties to freedom of activity and program and to equal opportunities* (as federal constitutional law incorporated in the Land constitutional law). The Court explained that the parity rules would restrict the voters' freedom to influence the gender distribution in the parliament by electing a list on which only or predominantly men or women were listed. Moreover, the party members would no longer have the freedom to choose the candidates regardless of their gender and to apply for each list position themselves. The parties would be restricted in their freedom to underpin their program with a specifically gender-related composition of their electoral list. They could also suffer disadvantages by not being able to list the personal they deem the most suitable. Furthermore, if a party whose list was partially rejected were to achieve fewer mandates as a result than it would have been entitled to with regard to the votes for it, the practical effect of the votes for this party would be reduced and, thus, the equal practical effect of all votes not anymore guaranteed.¹⁸

Such interferences are not absolutely excluded but must be constitutionally justified, those affecting electoral equality even by imperative reasons legitimised by the constitution that can hold the balance. The principle of democracy did not serve this purpose since it does not require the parliament's composition to mirror the composition of the people (see above II.6.) but its party-political preferences. The Land's obligation under art. 2(2) phrase 2 of the Thuringian Constitution to "promote and ensure the actual equality of women and men in all areas of public life through appropriate measures" did neither, although this norm goes further than the corresponding art. 3(2) phrase 2 BL (see above, I. 2) and may principally serve to justify measures affecting the freedom and equality of elections: Neither the norm's open and unclear wording nor its genesis allow the conclusion that it intends to justify such intense measures as rigid mandatory gender quotas.¹⁹
 - b) The *Constitutional Court of the Land Brandenburg* [Verfassungsgericht des Landes Brandenburg] considered the same rights under the Brandenburg Constitution affected and also denied any constitutional justification for that. It emphasized that the parliament represents the people as a whole [Gesamtrepräsentation] and not specifically its diverse groups and explained in detail that democracy and equal democratic participation of male and female citizens do not require equal gender representation in the parliament and that no mandate follows from the principle of democracy to ensure a mirroring of the proportion of men and women in parliament. It also explained that from the gender mainstreaming clause in the Brandenburg Constitution (art. 12(3) phrase 2), which corresponds to those in Thuringia and the Basic Law, no authority

¹³ *Constitutional Council*, decision no. 82-146 DC of 18.11.1982, recital no. 7, www.conseil-constitutionnel.fr/decision/1982/82146DC.htm [with English translation].

¹⁴ *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* [Law no. 2000-493 of 6 June 2000 to promote equal access of women and men to electoral mandates and elective offices].

¹⁵ See the *Brandenburg Second Act to Amend the Brandenburg Land Electoral Law - Parité Law* of 12.02.2019 and the *Thuringian Seventh Act to Amend the Thuringian Land Electoral Law - Introduction of the Equal Quota System* of 30.07.2019.

¹⁶ *Thuringian Constitutional Court*, judgement of 15.07.2020, VerFGH 2/20, [www.thverfgh.thueringen.de/webthfj/webthfj.nsf/8104B54FE2DCDADDC12585A600366BF3/\\$File/20-00002-U-A.pdf?OpenElement](http://www.thverfgh.thueringen.de/webthfj/webthfj.nsf/8104B54FE2DCDADDC12585A600366BF3/$File/20-00002-U-A.pdf?OpenElement); see also the dissenting votes of the judges *Heßelmann*, p. 46 ff., and *Licht* and *Petermann*, p. 52 ff.

¹⁷ *Constitutional Court of the Land Brandenburg*, judgement of 23.10.2020, VfGBbg 9/19, https://verfassungsgericht.brandenburg.de/verfgbbg/de/entscheidungen/entscheidungssuche/detail-entscheidung/~23-10-2020-vfgbbg-919_4041; *Constitutional Court of the Land Brandenburg*, judgement of 23.10.2020, VfGBbg 55/19, /~23-10-2020-vfgbbg-5519_4042.

¹⁸ *Thuringian Constitutional Court* (note 16), p. 26 ff.

¹⁹ *Thuringian Constitutional Court* (note 16), p. 33 ff.; see for another interpretation of art. 2(2) phrase 2 of the Thuringian Constitution the dissenting votes of *Heßelmann*, p. 46 ff. and *Licht* and *Petermann*, p. 55 ff.

derives to amend the fundamental constitutional democratic structural principles by ordinary law. A modification of these principles is not totally excluded but *would need in any case a clear specific regulation in the constitution itself*.²⁰

IV. A milder alternative: the approach of making public funding of political parties contingent on gender parity in elections

1. Graduated public party funding as an equality lever
 - Linking public funding of political parties to the level of gender parity in the participation in elections may be a soft alternative to mandatory gender quotas. This instrument respects the freedom of the parties to choose their candidates but also creates an incentive for achieving more gender equality.
2. The 2000 French approach to reduce public party funding in case of an unequal number of male and female candidates for the election to the National Assembly
 - On the basis of art. 1(2), 4(2) Constit. 1958, the *Parity Law of 2000* also introduced the requirement of *gender parity for the majority election* to the National Assembly. If in these elections the numbers of male and female candidates of a political party differ by more than 2 %, a part of the public financial support for that party will be reduced.
 - The effect of these rules was initially low. The parties preferred to accept financial losses but continued to rely on male candidates. Some tended to nominate female candidates in constituencies where the party would not be successful anyway. Only after a reform in 2014 which doubled the reduction did the female quota in the National Assembly increase. This experience shows that financial sanctions to enforce gender parity must be sensible to be effective.
3. The discussion about linking party funding and gender parity in Germany
 - In Germany, the idea meets concerns with regard to the *principle of equal opportunities for political parties*, which requires a *strictly equal treatment* of all parties and excludes any "steering practice" of the state, in the providing of public benefits as well as in the regulation of party activities. While it allows for a graduated treatment according to the parties' political importance, measured by their electoral success, it is difficult to imagine general socio-political criteria as justifying reasons. A mere reference to the state's mission under art. 3(2) phrase 2 BL will not be enough: This approach will require a *special constitutional basis* as in France. The question has not yet been decided by the constitutional courts but the jurisprudence of the Thuringian and Brandenburg courts points into this direction.

V. Helpful but insufficient: voluntary self-commitment of the political parties to gender parity

- Three parties represented in the German Bundestag have anchored a binding self-commitment to gender parity in the electoral lists in their statutes. Two of them (Bündnis 90/Die Grünen and Die Linke) apply the zipping system, while the third (Sozialdemokratische Partei) requires a minimum female quota of 40 %. The freedom of the political parties, understood in the light of the constitutional value to eliminate existing gender disparities, allows to do so. However, the biggest block (Christlich Demokratische Union and Christlich-Soziale Union) and two smaller parties (Freie Demokratische Partei and Alternative für Deutschland) have rejected this approach. This has eventually caused the low female quota in the Bundestag, which is not expected to improve considerably after the upcoming elections in September.
- The example shows that this approach is helpful but little effective if not all parties expected to be represented in the parliament are involved. It may be more effective if it was flanked by an *inter-party agreement on the common commitment to gender parity in political representation*. The refusal of a party to join this agreement could be made a topic in the electoral campaign.

VI. Flanking measures to encourage women's participation in politics

- Flanking measures to encourage women are less discussed but also important for achieving gender parity in politics:
1. Campaigns to mobilise women
 - Public institutions and the civil society could run campaigns to invite women to become active and inform them about the possibilities and conditions at the various (local, regional, national and European) levels. Cross-party networks of female politicians could support the campaigns. Retired female politicians could offer advice and coaching for newcomers. Such measures may not be relevant for the national and regional politics but helpful to revive the often abandoned local politics.
 2. More consideration for the needs of members of parliament with children
 - A better social infrastructure (e.g. *own day care centers and kindergartens of the parliaments*) and more social consideration for the specific needs of members of parliament with young children (e.g. *more tolerance towards breastfeeding in plenary and committee meetings*, family-friendly planning of meetings or day care support in the hometown allowing the spouse to continue his own activities), could eliminate practical obstacles that often hinder women in Germany from embarking on a political career.
 3. Resolute fight against misogynous cyberbullying, hate speech and fake news in the social media and the internet
 - In the recent years, misogynous attacks against women in the digital media have become more and more frequent. Often they amount to a concrete threat, are orchestrated by unknown forces in campaigns and specifically targeted against politically active women, in order to intimidate them. Without a vigorous prevention and criminal prosecution of these offences, the idea of equal political participation of women will remain an illusion.

²⁰ Constitutional Court of the Land Brandenburg (note 17), case VfGBbg 9/19, no. 130 ff., 165 ff.; case VfGB 55/19, no. 149 ff., 209 ff.

VII. Conclusion

- While mandatory gender quota will stay controversial because they seriously interfere with the free democratic process and may even practically exclude certain politics, the milder approach of linking public party funding and gender parity promises to also create pressure towards more gender parity but likewise respect the freedom of the political parties. However, this instrument will only be effective if the financial difference is sensible. Moreover, with regard to the principle of equal opportunities for all political parties in a democracy, it requires a specific constitutional basis which needs to be created by constitutional amendment. This presupposes a broad consensus in the society. On the other hand, voluntary self-commitments of the political parties are not a suitable alternative, since not all relevant parties will join.
- The role of flanking measures to encourage women's participation in politics should not be underestimated. The state must in particular fight misogynous cyberbullying, hate speech and fake news in the digital media - phenomena which are already discouraging many women from becoming or staying politically active.

Excerpt from the Constitution of the French Republic of 1958 (= Const. 1958)

Art. 1(2)

Statutes shall promote equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility.

Art. 4(2)

[Political parties and groups] ... shall contribute to the implementation of the principle set out in the second paragraph of article 1 as provided for by statute.

Sect. 3 of the preamble of the Constitution of 1946 (to which the preamble of the Const. 1958 refers)

3. The law guarantees women equal rights to those of men in all spheres.

Excerpt from the Basic Law for the Federal Republic of Germany of 1949 (= BL)

Art. 3(2, 3)

- (2) Men and women have equal rights. The state shall promote the actual implementation of equal rights for women and men and work towards eliminating existing disadvantages.
- (3) No one may be disadvantaged or favoured because of his sex ...

Art. 21(1)

- (1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. ...

Art. 38(1)

- (1) Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions and responsible only to their conscience.

Further Reading (selection in English)

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Opello, Katherine: Gender Quotas, Parity Reform, and Political Parties in France, 2005