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

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Men and women are equal, but parliaments are dominated by men. In Europe, there has been a debate since the 1990s how to change this and promote gender parity in parliamentary representation. This contribution presents the approaches taken and discussed in Germany and France, and the considerable constitutional obstacles on the way to achieving this goal.

**Keywords:** Gender Parity in Parliamentary Representation in Germany and France, gender equality, freedom of political parties, equal opportunities of political parties, free and equal elections, democracy, mandatory gender quota for electoral lists, public funding of political parties, self-commitment of political parties to gender parity.

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## Introduction

Men and women are equal, but in most countries the parliaments as the most powerful institutions of the state are strongly dominated by men; thus, in the law-making, the male perspective prevails. In Europe in the 1990s, this has triggered a debate about the ways, how to promote gender parity in democratic representation, which has led to different results in different countries, but remains vivid everywhere today. The following contribution presents the various approaches taken and discussed in Germany and France. It aims to sharpen the understanding of which approaches are effective and which are not, and what are the significant constitutional obstacles making it difficult to implement effective approaches.

## 1. Backgrounds

To understand the context of the gender parity politics and discussion, it is important to consider some backgrounds:

### 1.1. The European focus on gender equality instead of women's rights

The European view on gender issues differs from that in most other parts of the world. In most countries, in the twenties of the 21<sup>st</sup> century, "women's rights" are an important, much-discussed topic. Not so in Europe: Since women and men are

equal (an aspect of human dignity), there is no reason for specific “women’s rights”. With the exception of maternity protection, there are no such rights in the European human rights treaties, the Charter of Fundamental Rights of the European Union, the Basic Law for the Federal Republic of Germany (= BL) or the Constitution of the French Republic of 1958 (= Const. 1958), but instead these documents contain a firm commitment to non-discrimination and equal rights of men and women.<sup>1</sup>

While legal discrimination has been eliminated in the course of the 20<sup>th</sup> century, 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.<sup>2</sup> The public discussion focuses on this aspect instead of “women’s rights”.

## 1.2. The active promotion of gender equality under European Union law and national constitutional law

The European Union and its member states are committed to an active promotion of gender equality. Under the international treaties, on which the Union is based,<sup>3</sup> the Union must in all its activities aim to eliminate inequalities between men and women, promote equality and combat discrimination. Far-reaching legislation serves this purpose.<sup>4</sup> 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, added in 1994, 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 the matters related to gender equality, in particular before personnel decisions. To fill the positions, where women are underrepresented, it is a 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

<sup>1</sup> 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, 2019/2020. Available: [www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz\\_HRNM-II\\_Children's-rights-gender-equality-Europe.pdf](http://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://Schmitz_HRNM-II_Non-discrimination-gender-equality-Germany.pdf) [last viewed 07.03.2023].

<sup>2</sup> In the Gender Equality Index 2020 of 28.10.2020 of the European Institute for Gender Equality (<https://eige.europa.eu/gender-equality-index/2020/country/DE>), Germany ranks 12<sup>th</sup> in the EU, with a score slightly below the EU’s score, while France ranks 3<sup>rd</sup> in the EU (<https://eige.europa.eu/gender-equality-index/2020/country/FR>).

<sup>3</sup> 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.

<sup>4</sup> 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).

members to appoint at least one woman to the board.<sup>5</sup> 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*) excluded in a decision of 2020 any premature conclusion that Art. 3(2) phrase 2 BL obliges the legislator to take such measures.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

### 1.3. The still male-dominated parliaments in Germany and France

Despite this normative background, the parliaments are still male-dominated. In Germany, before the federal elections of 2021, the female quota in the *Deutsche Bundestag* (the federal parliament) was only ca. 31%. It was even lower in almost half of the parliaments of the *Länder*.<sup>9</sup> In the biggest faction in the *Bundestag*, the Christian Democrats (CDU/CSU) of Federal Chancellor Angela Merkel, it was only ca. 21%.<sup>10</sup> After the election of 2021, the situation in the *Bundestag* has only slightly improved, with a female quota of ca. 35% overall, ca. 23% in the Christian Democrat faction (which now forms the opposition) and ca. 42%, resp. 59% and 25% in the factions of the governing coalition, the Social Democrats (SPD), Greens and Liberals (FDP).<sup>11</sup> At the level of local government, there is also much room for

<sup>5</sup> 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.

<sup>6</sup> Cf. BVerfGE 156, 224, 259 ff. [Decisions of the Federal Constitutional Court, Vol. 156, p. 224 ff., cited passage at p. 259 ff.], English press release. Available: [www.bverfg.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-011.html](http://www.bverfg.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-011.html) [last viewed 07.03.2023].

<sup>7</sup> Jacquemart, A., Revillard, A., Bereni, L. Gender quotas in the French bureaucratic elite: the soft power of restricted coercion. *French Politics*, Vol. 18, issue 1, 2020, p. 50 ff.

<sup>8</sup> See for an overall assessment of the – existing but limited – effect of this new constitutional approach Achin, C. Lévêque, S., Mazur, A. Twenty Years of Parité under the Microscope in France: Parties Play with rather than by the Rule. In: Lang, S., Meier, P., Sauer, B. (eds). *Party Politics and the Implementation of Gender Quotas*, 2023, p. 211 ff.

<sup>9</sup> Cf. Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (ed.). *Atlas zur Gleichstellung von Frauen und Männern in Deutschland* [Atlas on Gender Equality in Germany], 2020. Available: [www.bmfsfj.de/bmfsfj/service/publikationen/4-atlas-zur-gleichstellung-von-frauen-und-maennern-in-deutschland-160358](http://www.bmfsfj.de/bmfsfj/service/publikationen/4-atlas-zur-gleichstellung-von-frauen-und-maennern-in-deutschland-160358), p. 8 [last viewed 07.03.2023].

<sup>10</sup> Cf. Statista (ed.). *Anteil der Frauen im Bundestag nach Fraktionen in Deutschland im Jahr 2021* [Proportion of women in the Bundestag by factions in Germany in 2021], January 2021. Available: <https://de.statista.com/statistik/daten/studie/1063172/umfrage/frauenanteil-im-bundestag-nach-fraktionen-in-deutschland> [last viewed 07.03.2023].

<sup>11</sup> Cf. Statista (ed.). *Anteil der Frauen im 20. Deutschen Bundestag nach Fraktionen im Jahr 2022* [Proportion of women in the 20<sup>th</sup> German Bundestag by factions in 2022], March 2022. Available: <https://de.statista.com/statistik/daten/studie/1063172/umfrage/frauenanteil-im-bundestag-nach-fraktionen-in-deutschland> [last viewed 07.03.2023].

improvement.<sup>12</sup> France had already achieved a female quota of ca. 40% in the National Assembly, but it decreased to 38% with the 2022 elections, mainly due to the lack of female deputies of the traditional conservative party *Les Républicains*; the female quota in the Senate is 35%.<sup>13</sup>

## 2. 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:

### 2.1. 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 distort the free political process and, thus, jeopardize democracy; this also applies to any criteria for the admission to election.

### 2.2. 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 includes the right of the political parties to freely nominate candidates and propose lists.

### 2.3. 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 – even if traditionally there are more men than women among the members of parliament. In this context, it must also be taken into account that in all the political parties presented in the *Bundestag* there are more male than female party members.<sup>14</sup>

### 2.4. The principle of equal opportunities for political parties (Art. 21(1) read together with Art. 38(1) phrase 1 BL)

This principle is fundamental for any democratic order. It requires the state to treat the political parties equally, regardless of their policies or attitudes. This

<sup>12</sup> For more details, see the Atlas on Gender Equality in Germany (note 8), p. 10 ff.

<sup>13</sup> Cf. Institute for Democracy and Electoral Assistance (IDEA) (ed.). Gender Quota Database. Country Data France, as updated in February 2021 and January 2023. Available: [www.idea.int/data-tools/data/gender-quotas/country-view/86/35](http://www.idea.int/data-tools/data/gender-quotas/country-view/86/35) [last viewed 07.03.2023]; Le Monde, Rejuvenated French Assemblée sees increase in middle-class and young members, drop in women, 23.06.2022. Available: [www.lemonde.fr/en/politics/article/2022/06/23/rejuvenated-french-assemblee-sees-increase-in-middle-class-and-young-members-drop-in-women\\_5987722\\_5.html](http://www.lemonde.fr/en/politics/article/2022/06/23/rejuvenated-french-assemblee-sees-increase-in-middle-class-and-young-members-drop-in-women_5987722_5.html) [last viewed 07.03.2023].

<sup>14</sup> Cf. Statista (ed.). Anteil der Frauen an den Mitgliedern der politischen Parteien in Deutschland am 31. Dezember 2021 [Proportion of women among members of political parties in Germany as of 31 December 2021], 2023. Available: <https://de.statista.com/statistik/daten/studie/192247/umfrage/frauenanteil-in-den-politischen-parteien> [last viewed 07.03.2023].

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.

### **2.5. 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.

### **2.6. 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. As the Bavarian Constitutional Court (*Bayerischer Verfassungsgerichtshof*) explained in 2018,<sup>15</sup> 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.

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

### **3.1. 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. Almost complete gender parity is achieved by a mandatory alternate filling of positions (the so-called zipper system). Another, slightly less strict but still effective solution consists of a mandatory 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, for example, by demanding a low minimum ratio for groups of candidates on the list. The instrument can even be used for a rather symbolic approach with little practical effect, for example, by demanding a minimum ratio for the whole list only, which would still allow to concentrate the male candidates on top.

<sup>15</sup> Cf. Bavarian Constitutional Court, judgement of 26/03/2018, Vf. 15-VII-16, No. 110 ff. (p. 49 ff.). Available: [www.bayern.verfassungsgerichtshof.de/media/images/bayverfgh/15-vii-16.pdf](http://www.bayern.verfassungsgerichtshof.de/media/images/bayverfgh/15-vii-16.pdf) [last viewed 07.03.2023].

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.<sup>16</sup>

### **3.2. 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 %.<sup>17</sup>

However, in the way of preventive constitutional review, the Constitutional Council (*Conseil constitutionnel*) declared these provisions unconstitutional pursuant to violation of Art. 3 Constit. 1958 (here: the principle of universal and equal elections) and of 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”<sup>18</sup>.

### **3.3. 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<sup>19</sup>, 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.

<sup>16</sup> See the references at Thuringian Constitutional Court, judgement of 15/07/2020, VerfGH 2/20 (note 20), 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. Available: [www.bundestag.de/resource/blob/407352/7b82e7f0b642586935a86275cfd500c9/wd-3-008-08-pdf-data.pdf](http://www.bundestag.de/resource/blob/407352/7b82e7f0b642586935a86275cfd500c9/wd-3-008-08-pdf-data.pdf) [last viewed 07.03.2023], 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. Available: [https://mj.sachsen-anhalt.de/fileadmin/Bibliothek/Politik\\_und\\_Verwaltung/MJ/MJ/gutachten/gutachten-paritaetsgesetz.pdf](https://mj.sachsen-anhalt.de/fileadmin/Bibliothek/Politik_und_Verwaltung/MJ/MJ/gutachten/gutachten-paritaetsgesetz.pdf) [last viewed 07.03.2023].

<sup>17</sup> See the Loi modifiant le code électoral et le code des communes et relative à l'élection des conseillers municipaux et aux conditions d'inscription des Français établis hors de France sur les listes électorales [Law amending the Electoral Code and the Municipalities Code and relating to the election of municipal councillors and the conditions of registration of French citizens established outside France on electoral lists], which had been adopted on 27.07.1982.

<sup>18</sup> Constitutional Council, decision No. 82-146 DC of 18.11.1982, recital No. 7. Available: [www.conseil-constitutionnel.fr/decision/1982/82146DC.htm](http://www.conseil-constitutionnel.fr/decision/1982/82146DC.htm) [last viewed 07.03.2023], with English translation.

<sup>19</sup> 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 electoral offices].

### 3.4. 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 without a special constitutional basis amended 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.<sup>20</sup> In Thuringia, a partially correct list would be partially admitted (to the position from which the requirements were no longer met). The parties only remained 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 Court<sup>21</sup> and three months later also the Constitutional Court of the Land Brandenburg<sup>22</sup> 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 programme, 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 programme with a specifically gender-related composition of their electoral list. They could also suffer disadvantages by not being able to list the personnel they deem the most suitable. Furthermore, if a party whose list has been partially rejected, as a result were to achieve fewer mandates, 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 no longer guaranteed.<sup>23</sup>

Such interferences are not absolutely excluded, but they 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 has not

<sup>20</sup> See the *Zweites Gesetz zur Änderung des Brandenburgischen Landeswahlgesetzes – Parité-Gesetz* [Second Act to amend the Brandenburg Land Electoral Law – Parité Law] of 12.02.2019 and the *Siebtes Gesetz zur Änderung des Thüringer Landeswahlgesetzes – Einführung der paritätischen Quotierung* [Seventh Act to Amend the Thuringian Land Electoral Law – Introduction of the Equal Quota System] of 30.07.2019.

<sup>21</sup> Thuringian Constitutional Court, judgement of 15.07.2020, *VerfGH 2/20*. Available: <https://dejure.org/ext/60690371a8bf2c222f464ee528430339> [last viewed 07.03.2023]; see also the dissenting votes of the judges *Hefselmann*, p. 46 ff., and *Licht* and *Petermann*, p. 52 ff. A constitutional complaint against this decision before the Federal Constitutional Court has not been accepted for decision, cf. Federal Constitutional Court, decision of 06/12/2021, 2 BvR 1470/20. Available: [http://www.bverfg.de/e/rk20211206\\_2bvr147020.html](http://www.bverfg.de/e/rk20211206_2bvr147020.html) [last viewed 07.03.2023].

<sup>22</sup> Constitutional Court of the Land Brandenburg, judgement of 23.10.2020, *VfGBbg 9/19*. Available: [https://verfassungsgericht.brandenburg.de/verfgbbg/de/entscheidungen/entscheidungssuche/detail-entscheidung/~23-10-2020-vfghbg-919\\_4041](https://verfassungsgericht.brandenburg.de/verfgbbg/de/entscheidungen/entscheidungssuche/detail-entscheidung/~23-10-2020-vfghbg-919_4041) [last viewed 07.03.2023]; Constitutional Court of the Land Brandenburg, judgement of 23.10.2020, *VfGBbg 55/19*. Available: [https://verfassungsgericht.brandenburg.de/verfgbbg/de/entscheidungen/entscheidungssuche/detail-entscheidung/~23-10-2020-vfghbg-5519\\_4042](https://verfassungsgericht.brandenburg.de/verfgbbg/de/entscheidungen/entscheidungssuche/detail-entscheidung/~23-10-2020-vfghbg-5519_4042) [last viewed 07.03.2023].

<sup>23</sup> Thuringian Constitutional Court (note 20), p. 26 ff.



served 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.<sup>24</sup>

b) Concerning corresponding rights under the Brandenburg Constitution, **the Constitutional Court of the Land Brandenburg** (*Verfassungsgericht des Landes Brandenburg*) considered them affected and denied any constitutional justification for that, too. It emphasized that the parliament represented the people as a whole, and not specifically its diverse groups, and explained in detail that democracy and equal democratic participation of male and female citizens did not require an equal gender representation in the parliament, and that no mandate followed 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 corresponded to those in Thuringia and the Basic Law, no authority derived to amend the fundamental constitutional democratic structural principles by ordinary law. It did not entirely exclude a modification of these principles, but, in any case, would require a clear specific regulation in the constitution itself.<sup>25</sup>

Following these two decisions, the option of a parity law is still being discussed, but a serious new attempt is currently not in sight, neither at the federal level, nor in the *Länder*.

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

### 4.1. 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 according to their own ideas and politics, but nonetheless creates an incentive for achieving a greater gender equality.

### 4.2. The French approach of 2000 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

<sup>24</sup> Thuringian Constitutional Court (note 20), p. 33 ff.; see for another interpretation of Art. 2(2) phrase 2 of the Thuringian Constitution the dissenting votes of *Hefselmann*, p. 46 ff. and *Licht* and *Petermann*, p. 55 ff.

<sup>25</sup> Constitutional Court of the Land Brandenburg (note 21), case VfGBbg 9/19, No. 130 ff., 165 ff.; case VfGB 55/19, No. 149 ff., 209 ff.

differed by more than 2%, a part of the public financial support for that party would be reduced.

The effect of these rules was initially low.<sup>26</sup> The parties preferred to accept financial losses but continued to rely on male candidates.<sup>27</sup> 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.<sup>28</sup> This experience shows that financial sanctions to enforce gender parity must be sensible to be effective.

#### 4.3. 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 suffice: This approach will require a special constitutional basis, just like 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.

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

Three parties represented in the *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 so far rejected this approach. This has eventually caused the low female quota in the *Bundestag* and hindered a considerable improvement with the 2021 elections.

The example shows that this approach is helpful but of a little effect, if it does not involve all the parties expected to be represented in the parliament. 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. Moreover, the legislator could encourage to work on the problem by requiring the political parties to publish an

<sup>26</sup> See for a quantitative review of its impact *Achin, C.* The French Parity Law: A Successful Gender Equality Measure or a “Conservative Revolution”? In: *Auth, D., Hergenhan, J., Holland-Cunz, B.* (eds). *Gender and Family in European Economic Policy*, 2017, p. 179 ff.

<sup>27</sup> Cf. *Lépinard, E.* The adoption and diffusion of gender quotas in France (1982–2014), *EUI Working Paper Law 2015/2019*, p. 13.

<sup>28</sup> The highest female quota was achieved in the elections of 2017, cf. Reuters, France elects record number of women to parliament, 19.06.2017. Available: [www.reuters.com/article/us-france-election-women-idUSKBN19911E](http://www.reuters.com/article/us-france-election-women-idUSKBN19911E) [last viewed 07.03.2023].

annual gender parity report where they need to provide exact data and explain how they want to address the problem of gender imparity in their ranks.

## 6. 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:

### 6.1. 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.

### 6.2. More consideration for the needs of members of parliament with children

A better social infrastructure (e.g. family lounges, as well as own day care centres and kindergartens of the parliaments), and a greater social consideration for the specific needs of the members of parliament with young children (e.g. a higher 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.<sup>29</sup>

### 6.3. Resolute fight against misogynous hate speech, cyberbullying, cyberintimidation and fake news in the social media and the internet

In the recent years, in Europe, as elsewhere, 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.<sup>30</sup> The responses to this treat, both from the social media and the states, have so far been inadequate. Without a vigorous prevention and criminal prosecution of these offences, complemented by the introduction of strict liability of the social media under civil law for the offences of their users, professional support to the victims by specialised offices and civil society organisations and other specific measures, the idea of equal political participation of women will remain an illusion.<sup>31</sup>

<sup>29</sup> At least family-friendly measures are now being discussed in the Bundestag, see the documentation of the Scientific Services of the German Bundestag, Familienfreundliche Regelungen für Abgeordnete. Beispiele aus ausländischen Parlamenten [Family-friendly regulations for members of parliament. Examples from foreign parliaments], WD 9-3000-012/22, 2022. Available: [www.bundestag.de/resource/blob/893022/3402cae6f825fee117572826c06cdcbc/WD-9-012-22-pdf-data.pdf](http://www.bundestag.de/resource/blob/893022/3402cae6f825fee117572826c06cdcbc/WD-9-012-22-pdf-data.pdf) [last viewed 07.03.2023].

<sup>30</sup> See on this topic *Di Meco, L., Brechenmacher, S.* Tackling Online Abuse and Disinformation Targeting Women in Politics, 30.11.2020. Available: <https://carnegieendowment.org/2020/11/30/tackling-online-abuse-and-disinformation-targeting-women-in-politics-pub-83331> [last viewed 07.03.2023].

<sup>31</sup> See for a catalogue of solutions to respond to the new threats in the digital age *Schmitz, T.* New Threats to Democracy in the Era of Digitalisation, conference materials 2022/2023, p. 2 f. Available: [http://www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz\\_Democracy-in-Era-of-Digitalisation\\_Indonesia2022-23.pdf](http://www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_Democracy-in-Era-of-Digitalisation_Indonesia2022-23.pdf) [last viewed 07.03.2023].

## Summary

While a mandatory gender quota will stay controversial, because it seriously interferes 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 create pressure towards a greater gender parity, meanwhile respecting 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 a 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 follow this approach.

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 – the phenomena, which are discouraging many women from becoming or staying politically active.

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## Appendix

### Excerpt from the Constitution of the French Republic of 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

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.

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