THE

CONSTITUTIONALITY OF

ELECTORAL QUOTAS

FOR WOMEN

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A B S T R A C T

This thesis explores the constitutionality of compulsory electoral quotas for women imposed by law. The central question this thesis attempts to answer is what makes these quotas constitutional or unconstitutional in a given jurisdiction. A double methodology was employed to answer this question: theoretical and comparative. From a theoretical perspective, it is proposed that the constitutionality of electoral quotas for women depends on the approach that domestic legal orders adopt to four issues: political representation, equality, affirmative action and political rights. An additional crosscutting factor that influences the constitutionality of these quotas is gender, mainly through its effects on the understanding of political representation and equality. From the comparative law perspective, three jurisdictions were analysed: France, Spain and Mexico. After exploring these systems' approaches to political representation, equality, affirmative action and political rights, the process of adoption of electoral quotas for women is discussed, particularly the constitutional litigation about quota laws. Finally, the relationship between the theory and the practice of assessing the constitutionality of electoral quotas for women is analysed, concluding that although courts use a theoretical framework formed by political representation, equality, affirmative action and political rights, they adopt a somewhat simplistic approach to these issues, using only one of these theoretical factors as the primary determinant, often side-stepping the most controversial issues connected with these factors, and almost completly ignoring the particularities of the target group (women). Additionally, in each jurisdiction the decisions of the courts are also influenced by domestic political and legal factors.

T A B L E O F C O N T E N T S

TABLE OF CASES

1. France

Conseil Constitutionnel (Constitutional Court)

2. Spain

***Tribunal Constitucional* (Constitutional Court)**

3. Mexico

***Corte Suprema* (Supreme Court)**

Acción de Inconstitucionalidad

4. United States

Supreme Court

5. European Court of Human Rights

6. European Court of Justice

7. Inter-American Court of Human Rights

TABLE OF STATUTES

1. France

2. Spain

Islas Baleares

País Vasco

3. Mexico

TABLE OF

OTHER PRIMARY LEGAL SOURCES

I N T R O D U C T I O N

This thesis is about electoral quotas for women, and particularly about the debates concerning their compatibility with selected domestic constitutional orders.

Since women's right to vote and to stand for election were first recognised, there has always been a clear gap between the number of male and female parliamentary representatives.[1] Although the proportion of women representatives has gradually increased, the increase has been painstakingly slow. Thus, the idea emerged of implementing a 'fast track' to gender balanced representation through the adoption of electoral quotas for women.[2]

This radical proposal surged as a response to multiple claims. A first claim was that the representativeness and the legitimacy of the political system were compromised as a consequence of the exclusion of women from parliament. A second claim was about equality: despite being half of the population, by the beginning of the present century women amounted to a world average of only 13% of the members of national legislative chambers.[3] These lower numbers were used to prove systematic discrimination against women, as well as political oppression by a 'male aristocracy'. Other claims behind the

[1] The causes behind this phenomenon have been extensively discussed. See Joni Lovenduski, *Feminizing Politics* (Polity 2005) ch 3; Mercedes Mateo, *Representing women? : female legislators in West European parliaments* (ECPR 2005) pt I.

[2] See Drude Dahlerup and Lenita Freidenwall, 'Quotas as a 'Fast Track' to Equal Representation for Women' (2005) 7 International Feminist Journal of Politics 26.

[3] IPU, <www.ipu.org/wmn-e/arc/world250100.htm> accessed 9 January 2012.

idea of electoral quotas for women were the need to advance a 'women's agenda', and the infringement of several rights of women such as the right to equal treatment and to political participation.

These claims, although not equally influential or compelling across jurisdictions, put pressure on the political *milieu* of several countries to improve the presence of women in parliaments. There are multiple mechanisms to pursue this aim. Some of them target the 'supply' of women candidates, such as by increasing training programmes and improving child-care. Others pointed more towards the 'demand' for women candidates, such as by introducing financial incentives for political parties to include more women in their lists. It is also possible to reform the electoral system so as to render it more amenable to women. Quotas, however, are increasingly popular because they are perceived as more effective and more capable of producing noticeable effects in the short run.

There are three main types of electoral quotas.[4] The first type consists of voluntary quotas adopted by political parties establishing a minimum percentage of women in their electoral lists. This model was successfully tried in Scandinavian countries, and has spread extensively worldwide, although with mixed results. The second type consists of the establishment by law of compulsory quotas for women in electoral lists. These quotas were initially introduced in Latin America (Argentina passed its 'Quota Law' in 1991 and since then many Latin American countries have followed its example), and were later imported by several European, African and Asian countries. The third type of quota involves establishing in the Constitution a number of 'reserved seats' for women in the parliament.

[4] Cf. Drude Dahlerup and Lenita Freidenvall, 'Gender Quotas in Politics - A Constitutional Challenge' in Susan H Williams (ed), *Constituting Equality* (CUP 2009) 30 ff; Mona Lena Krook, 'Quota Laws for Women in Politics: Implications for Feminist Practice' (2008) 15 Social Politics 345, 346-351.

This is the most radical option because the minimum percentage of women is not applied to candidates, but to elected representatives. This model has been introduced in African and Asian countries such as Afghanistan and Rwanda. *This thesis is about the second type of quota, ie compulsory (not voluntary) electoral quotas for women imposed by law (not in the Constitution)* (hereinafter 'EQW').

Although the introduction of EQW is a worldwide trend, legal scholarship has so far fallen short of giving appropriate attention to this phenomenon, largely assuming it to be a mere variation of 'traditional' (usually US-based) forms of affirmative action. Even though this gap in the legal scholarship has been partly addressed by European feminist scholarship, it has done so instrumentally in order to stress the 'unique' relevance of the 'gender factor' involved in EQW. Moreover, feminist scholarship is not usually focused on legal issues.

From a legal perspective, however, the adoption of EQW is deeply controversial and raises several difficulties. This thesis is particularly concerned about one such difficulty – probably the most fundamental – which is the compatibility of EQW with domestic constitutional orders. This is a highly contentious matter, and different countries have reached contrasting conclusions. Thus, the central question this thesis attempts to answer is what is that makes EQW constitutional or unconstitutional.

To address this question, both theoretical and comparative approaches are employed, which respectively inspire Part I and Part II of the thesis. Part I proposes that the constitutionality of EQW relates to four main theoretical factors: political representation, equality, affirmative action and political rights. The selection of these factors was partly drawn from a preliminary research of the arguments and reasoning utilised in the jurisdictions where the constitutionality of EQW had been expressly resolved by the courts

as of 2009 (Colombia, France, Italy, Mexico, Spain, Switzerland and Venezuela). Each of these four factors is discussed, setting up the conceptual tools needed to analyse properly the case studies in Part II, and presenting the main issues associated with each of these factors. There is an additional, crosscutting factor that influences the constitutionality of EQW, which is gender. EQW are quotas for women only, and this colours the consideration of the theoretical factors identified, particularly political representation and equality. This issue is addressed particularly at the end of chapters 1 and 2.

Part II of the thesis turns from a theoretical to a more comparative legal approach, analysing the issue of the constitutionality of EQW in three legal systems: France, Spain and Mexico (Chapters 5, 6 and 7, respectively). These jurisdictions were selected from the small pool of countries whose constitutional court has explicitly considered the constitutionality of EQW. Additional selection criteria included adequate access to legal sources and regional diversity. Moreover, from the Latin American comparative law perspective (the tradition from which I come), these are probably the most influential cases. The French and Spanish legal systems and constitutional theories have had, and still retain, a longstanding and profound influence over Latin America, whereas Mexico is the most well-known Latin American case.

Part III briefly discusses the relationship between the theory and practice of assessing the constitutionality of EQW, identifying the main inconsistencies and providing tentative explanations for these (Chapter 8). This part of the thesis also analyses the results of EQW in the case studies, and whether these results confirm certain assumptions of both the theory and practice of assessing the constitutionality of EQW about the efficacy of EQW to generate gender balance political representation, and also about the connection between the success of EQW and certain characteristics of the electoral systems.

Thus, the main contribution of this thesis is the development of a holistic legal framework to address the constitutionality of EQW, one that is capable of taking full account of the complexity and multidimensionality of this phenomenon from a double perspective: theoretical and comparative. Its aim is not to attempt to develop constitutional arguments that are mechanically applicable in all states, but to provide guidance for those jurisdictions that have not yet resolved the issue of the constitutionality of EQW, particularly in Latin America. Those jurisdictions will see that there are common constitutional principles applicable to EQW, which although they are interpreted and applied differently across jurisdictions, and are subject to diverse domestic contextual factors, raise similar problems.

Finally, there are some caveats. First, this is not primarily a thesis about the relationship between quotas and electoral systems.[5] Although the latter is a relevant contextual factor that influences the design and success of the EQW, its impact on the constitutionality of EQW is only indirect. Nevertheless, a brief explanation is given in each case study about the domestic electoral system, and Chapter 8 refers to their compatibility with EQW. Second, all the case studies are Civil Law systems where legal scholarship (the French '*doctrine*' or the Spanish and Mexican '*doctrina*') enjoys substantial importance as a source of law. This is reflected in the selection of the sources for Chapters 5 to 7. Third, the notions of sex and gender have generally been used interchangeably. Although there is some discussion about whether EQW should be considered as sex quotas based on gender considerations, this debate did not seem to be relevant for the purposes of this thesis.

[5] See Stina Larserud and Rita Taphorn, *Designing for Equality* (2 edn, International IDEA 2007).

P A R T I

T H E O R Y

CHAPTER 1

POLITICAL REPRESENTATION

1.1 Introduction

The aim of electoral quotas for women is to obtain appropriate gender balanced *political representation*. This aim is easy to understand and, in general terms, is persuasive. It provides EQW with a powerful theoretical basis, additional to equality, one that enjoys democratic and constitutional pedigree. The notion of political representation, however, has many meanings.[1] This is partly because representation is such a complex phenomenon that it can be addressed from several perspectives simultaneously. Moreover, conceptions of political representation are usually entangled with views about representative government and democracy. This chapter, therefore, attempts to identify and discuss the notions of political representation that are associated with EQW. After briefly presenting certain features of political representation, this concept is analysed from several perspectives, recognizing the main typologies and debates that emerge, explaining how they relate to

[1] Historical and general approaches in Monica Brito and David Runciman, *Representation* (Polity 2008); Heinz Eulau, 'Changing Views of Representation' in I de Sola (ed), *Contemporary Political Science* (McGraw-Hill 1967); Nadia Urbinati, *Representative Democracy* (University of Chicago Press 2006); Thomas Schwartz, 'The Paradox of Representation' (1995) 57 The Journal of Politics 309; Isaac Kramnick, 'An Augustan Debate: Notes on the History of the Idea of Representation' in J Ronald Pennock and John W Chapman (eds), *Representation* (Atherton Press 1968); Frank Rudolf Ankersmit, *Political Representation* (Stanford University Press 2002).

EQW, and including consideration of the specificities of the political representation of women.

1.2 Certain Particularities of Political Representation

"*Political* representation" is a species of the genus "representation". Although the possibility of defining the latter is contested, its etymological roots points towards 'the making present *in some sense* of something which is nevertheless *not* present literally or in fact'[2]. Several consequences follow from this definition. First, there are three parties involved: the represented (the one that is not present), the representative (the one that makes the represented present), and the audience (for whom the representative makes the represented present).[3] Second, there are many possible ways (*senses*) to represent someone or something (eg representation in court, artistic representation). Third, the represented is never *really* present, but is considered to be so, thus introducing an element of fiction in the concept of representation.

All these elements apply also to *political* representation. Political representation, however, has its own particularities. From a functional perspective, it allows a few to decide for many, creating a link between them that is capable of giving legitimacy to the decisions of the former and ensuring the acquiescence of the latter.[4] More ambitious views

[2] Hanna Fenichel Pitkin, *The Concept of Representation* (University of California Press 1967) 8-9.

[3] B J Diggs, 'Practical Representation' in J Ronald Pennock and John W Chapman (eds), *Representation* (Atherton Press 1968) 35-36; Brito and Runciman (n 1); Andrew Rehfeld, 'Towards a General Theory of Political Representation' [2006] The Journal of Politics 1.

[4] Eg Donald E Stokes, 'Political Parties in the Normative Theory of Representation' in J Ronald Pennock and John W Chapman (eds), *Representation* (Atherton Press 1968) 151; Anthony Harold Birch, *Representation* (Macmillan 1971) 108.

would add functions such as political integration[5], political deliberation[6] and the effective control of the government.[7] In any case, the functions performed by political representation are essential for democracy.

Political representation is simultaneously *dyadic* and *systemic*. It encompasses both the relationship between individual members of the representative assembly and their particular constituencies, and also the relationship between the electorate as a whole and governmental institutions, particularly the representative assembly. Moreover, political representation is normally expected to be *dynamic*, ie a flexible, evolving and interacting relationship.[8] Ideally, it assumes creative and cyclic communication between the represented and the representative.[9] It also entails a minimum of *responsiveness*: the representative's actions and decisions should to some degree be attuned to the will and interests of the represented.[10] The specific content of such obligation, however, is debatable, ranging from the mere will to be responsive to committed advocacy[11]. It may

[5] Carl J Friedrich, *Constitutional Government and Democracy* (Ginn 1950) 262 and 297.

[6] Jane Mansbridge, 'Rethinking Representation' [1999] 97 The American Political Science Review 515, 525-526; Ankersmit (n 1) 115; Friedrich (n 5) 324.

[7] Stokes (n 4) 151; Birch (n 4) ch 7; Friedrich (n 5) 259. Other functions in Ankersmit (n 1) 115-118; Friedrich (n 5) 297; Schwartz (n 1) 3; Melissa S Williams, *Voice, Trust, and Memory* (Princeton University Press 1998) 24-25.

[8] Marek Sobolewski, 'Electors and Representatives: a Contribution to the Theory of Representation' in J Ronald Pennock and John W Chapman (eds), *Representation* (Atherton Press 1968) 106; Iris Marion Young, *Inclusion and Democracy* (OUP 2000) 125; Urbinati (n 1) 23 and 51-52.

[9] Young (n 8) 129.

[10] Eg Philip E. Converse and Roy Pierce, *Political Representation in France* (Belknap Press 1986) 501; Birch (n 4) 107; Giovanni Sartori, 'En Defensa de la Representación Política' [1999] (91) Claves 2, 4.

[11] Cf. Converse and Pierce (n 10) 501 and 664; Urbinati (n 1) 44ff.

also be extended beyond policy-making decisions to include, for example, acting as an agent of the represented and his or her interests before bureaucrats.[12]

In certain countries, such as France, Spain and Mexico, much of the confusion surrounding political representation comes from its equivocal relationship with private law representation, which is often used as a 'baseline' (at least by some lawyers) for evaluating the former. Private law representation is the legal institution in virtue of which the legal consequences of the actions executed by a person *in lieu* of another are attributed directly and exclusively to the latter, as if the latter had acted himself.[13] Its source is normally a private contract called a 'mandate'. By using the same name, political representation became undesirably bound into the private law notion of contractual mandate, adopting much of its nomenclature (eg principal, agent, holding to account), sometimes with odds results.[14]

Notwithstanding the frequency with which the analogy is made, there are significant differences between these two kinds of representation. In political representation the representative can do things that the represented cannot do (eg legislate).[15] Consequently, there is no delegation of powers (one can only delegate powers that one has), and the represented cannot dismiss the representative in order to 'reassume' these functions

[12] Heinz Eulau and Paul D Karps, 'The Puzzle of Representation: Specifying Components of Responsiveness' (1977) 2 Legislative Studies Quarterly 233, 241ff.

[13] Léon Duguit, *L'État, les gouvernants et les agents* (Dalloz 2005) 6ff; Maurice Duverger, *Institutions Politiques*, vol 1 (Presses Universitaires de France 1971) 100.

[14] Cf. Duguit (n 13) 48-49; E Stein (F Sainz tr), *Derecho Político* (Aguilar 1973) 22; M Duverger (E Aja tr), *Instituciones Políticas y Derecho Constitucional* (Ariel 1980) 73; A Esmein, *Éléments de Droit Constitutionnel Francais et Comparé* (Recueil Sirey 1927) 337-338; Brito and Runciman (n 1) ch 3; J L Stocks, 'Representation' [1931] 6 The Journal of the British Institute of Philosophical Studies 405, 412; José A Portero, 'Sobre La Representación Política' [1991] (10) Revista del Centro de Estudios Constitucionales 89, 106; Sartori (n 10) 2-3.

[15] A Phillips Griffiths and Richard Wollheim, 'How Can One Person Represent Another?' (1960) Supplementary 34 Proceeding of the Aristotelian Society 187, 203.

personally.[16] None of this applies to the contractual mandate. Whereas private law representation is normally voluntary and the selection of the representative is an autonomous prerogative of the represented, political representation take place disregarding the actual will of the represented (a winning candidate would also represent those who did not wish to be represented, did not vote, or voted for other candidates).[17] Whereas the contractual mandate assumes that the representative is instructed by the represented, this is contested in political representation, and could be highly impractical (eg the represented may have conflicting opinions, or may even have no opinion regarding certain issues).[18] In private law representation, accountability is essential and includes measures such as the premature dismissal of the representative and the payment of compensation to the represented. In political representation accountability is usually limited and equated with the re-election process ('recall' is exceptional), which, however, is not always available (not all representatives run for re-election), does not allow an issue-by-issue analysis, and only works *ex-post*. Moreover, electors' decisions are influenced by several factors with the past deeds of the representative being only one of them.[19]

In sum, political representation shows a far more complex relationship between the representative and the represented than private law representation, and is also more

[16] Even in the legal systems that have the mechanism of 'recall', the represented do not reassume the functions of the representative but a new representative is appointed.

[17] Converse and Pierce (n 10) 526; Griffiths and Wollheim (n 15) 202-203; Rehfeld (n 3) 10.

[18] Cf. Julius Cohen, 'Commentary: Representation and the Problem of Identity' in J Ronald Pennock and John W Chapman (eds), *Representation* (Atherton Press 1968) 47-48; Sobolewski (n 8) 106; Converse and Pierce (n 10) 525; Eulau and Karps (n 12) 236; Bernard Manin, *The Principles of Representative Government* (Cambridge University Press 1997) 222.

[19] Cf. Eulau (n 1) 78.

ambiguous regarding the identity of the represented and the aspects that are represented. The next section will address these issues in the context of EQW.

1.3 What kind of Political Representation is reflected by EQW?

a) Who is represented?

The notion of political representation varies depending on the entity represented, which may be individuals, the Nation, groups or political parties. Considering that supporters present EQW as a partial solution for the political underrepresentation of women as a group, this section discusses the political representation of groups.

The idea of group representation is an old one, and has been applied, *inter alia*, to social classes, economic actors and those who live in particular geographic localities. In present times, three main additional trends are relevant. One development has been attempts to advance the political representation of groups disadvantaged by some status other than social class (eg African Americans, women); another development focuses on the representation of interest-groups (eg employers, consumers); and the last points towards the representation of ethnic or religious communities, part of which is seeking political autonomy (consociationalism). Although these trends may partially overlap, they are distinct because their concept of group differs, and also because they frame the problem of representation in different ways.[20] This thesis is only concerned with the first trend.

[20] The second trend respond to the idea of 'faction', a flexible and voluntary association focused on particular interests (see Iris Marion Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' in Anne Phillips (ed), *Feminism and Politics* (OUP 2001)). Political representation is seen primarily as advocacy in the processes of arbitration and conciliation between organized competing interests

As regards the political representation of 'disadvantaged groups', these are defined around a label that often assumes a common identity as a group. This is assumed not only because group identity is itself a contested notion, but also because the label could be imposed from the outside and not freely accepted by the members of the group.[21] However, real or not, imposed or not, some degree of identity is commonly assumed and distinguishes these groups from voluntary associations and other social aggregates.[22] Although membership of these groups is said to be absolute or dichotomic, involuntary and immutable,[23] this is not always the case.

Group representation is defended on diverse grounds. A generic argument rests on the relevance of group membership for human beings. Thus, group membership helps shape individual identities, interests and perspectives both about life in general and political issues in particular.[24] Moreover, individuals deal with society and politics not only as isolated entities, but also as members of various groups. When political representation is granted to those groups *as groups*, individuals gain representation in dimensions additional to those involved in individual representation.

(Cf. Birch (n 4) 78ff) Consociationalism's idea of group is closer to the first trend, but only considers groups that represent a fundamental political cleavage within a society, which are also capable of certain degree of self-government. Consociationalism's approach towards political representation is, however, closer to that of the second trend (see Arend Lijphart, 'Consociational Democracy' (1969) 21 World Politics 207; Brendan O'Leary, 'Debating Consociational Politics: Normative and Explanatory Arguments' in Sid Noel (ed), *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies* (McGill-Queen's University Press 2005).

[21] Cf. Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (n 20) 411; Paul Brest and Miranda Oshige, 'Affirmative Action for Whom?' (1995) 47 Stanford Law Review 855, 875-877.

[22] Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (n 20) 411.

[23] Williams (n 7) 54-55.

[24] Eg Young, *Inclusion and Democracy* (n 8) 99-102; Cohen (n 18) 47; Williams (n 7) 22.

There are also specific reasons for the representation of *disadvantaged* groups. Although it depends on the nature of the disadvantage, members of those groups may not have the same political influence as other people within their societies. Through group representation, that anomaly could be corrected, at least partially.[25] Additionally, the political system would be improved because there would be better deliberation and a broader knowledge base if more perspectives and experiences are taken into account in the political debate.[26] It may also help to reinforce the system's legitimacy, particularly among the members of the disadvantaged groups,[27] and the system's biases could be exposed by those affected by them (eg false neutrality, the partiality of the 'general' interest).[28]

Group representation, however, faces several difficulties. A fundamental problem is the lack of a common understanding about what constitutes a group. It certainly comprehends a collection of individuals, but other factors are more debatable, such as the degree of identification of the 'members' with the group, or the interdependence between members (ie what affects one member also affects – to some extent - all members). Other elements to take into account are the stability of the group over time, the immutability of the membership, and the recognition of the group as an entity distinct from its members.[29] More complexity is added by the fact that all these factors may appear in different degrees.

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[25] Cf. Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (n 20) 413-416; Urbinati (n 1) 40-41.

[26] Cf. Robert E. Goodin, 'Representing Diversity' [2004] British Journal of Political Science 453, 456 and 463ff; Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (n 20) 416; Jane Mansbridge, 'Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"' [1999] The Journal of Politics 628, 634.

[27] Williams (n 7) pass; Mansbridge, 'Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"' (n 26) 650ff.

[28] Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (n 20) 415.

[29] Cf. Owen M Fiss, 'Groups and the Equal Protection Clause' (1976) 5 Philosophy and Public Affairs 107, 148-149.

A further difficulty is how to transform varied – and sometimes incompatible – individual interests into the groups' interests. One option is to establish an appropriate procedure, a 'social decision function'[30], but this solution faces many uncertainties: How and who should define this function? Should it be aggregative or deliberative? Should it comprise procedural rules only or should it include substantive limitations to avoid certain kinds of results?

A different approach is to assume that all members of the group have the same interests, at least with regard to certain matters.[31] This position, however, is criticised as involving 'essentialism', ie the assumption that each group has 'fixed essences given once and for all, with traits that are homogeneously distributed among all the group members'[32]. Essentialism is generally rejected as biological or social determinism, a false and dangerous oversimplification that denies personal autonomy, plurality of identities, and diversity within the group.[33] In other words, essentialism assumes an implausibly - and dangerously - unique way of being 'black' or 'a woman'.[34] To avoid essentialism, common interests among group members are sometimes explained in 'relational' terms: as the result of shared experiences of discrimination and oppression by others who attribute negative meanings to

[30] Ronald Rogowski, 'Representation in Political Theory and in Law' (1981) 91 Ethics 395, 397. See also Brito and Runciman (n 1) 87ff.

[31] Cf. Lani Guinier, 'Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes' (1993) 71 Texas Law Review 1589, 1617.

[32] Carol C. Gould, 'Diversity and Democracy: Representing Differences' in Seyla Benhabib (ed), *Democracy and Difference* (Princeton University Press 1996) 182.

[33] Cf. Williams (n 7) 6; Gould (n 32) 182-183; Young, *Inclusion and Democracy* (n 8) 82-91; Mansbridge, 'Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"' (n 26) 637-639.

[34] Sujit Choudhry, 'Distribution vs. Recognition: The Case of Anti-Discrimination Laws' (2000) 9 George Mason Law Review 145, 173.

one or more common characteristics of the group.[35] Other scholars deny the existence of common interests, but accept the reality of common perspectives, ie that there are particular ways of looking at certain issues that derive from a shared social background.[36]

Another criticism of group representation is that it may cause the enhancement and ossification of differences between groups and the subsequent fragmentation of society ('balkanisation').[37] A response to this concern is that the phenomena of separation and societal fragmentation are not created by group representation but are prior to it;[38] only by acknowledging these differences can the problem of the appropriate representation of disadvantaged groups be properly addressed.[39] Moreover, difference and diversity should not be objected to, but rather re-valued as positive for societies.[40] Furthermore, some argue that such group representation should, in any event, be transitory,[41] thus moderating the dangers of social fragmentation in the longer term.

An additional difficulty of group representation is that it may affect individuals' autonomy insofar as political agency is taken from them and attributed to the group.[42] It has been suggested in response to this criticism that sharing a common identity should ensure sufficient homogeneity among the members of the group that they would be comfortable

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[35] Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (n 20) 412. Cf. Gould (n 32) 183; Williams (n 7) 6 and ch 4.

[36] Young, *Inclusion and Democracy* (n 8).

[37] Eg Anne Phillips, *The politics of presence* (Claredon Press 1998) 22; Williams (n 7) 7-8.

[38] Phillips (n 37) 22.

[39] Cf. Williams (n 7) 197-198.

[40] Cf. Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (n 20) 421.

[41] Eg Mansbridge, 'Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"' (n 26) 652; Gould (n 32) 184. Contrast with Young, *Inclusion and Democracy* (n 8).

[42] Cf. Williams (n 7) 178.

with this lack of autonomy.[43] This argument seems unconvincing, however, especially in cases where the individual belongs simultaneously to different groups with opposite views on certain issues, or where the representative claims to represent several groups. Nevertheless, it could be argued that group representation should not necessarily preclude individual political action, particularly if appropriate electoral rules are in place (eg women should be able to vote for women or men, ethnic minorities should not be compelled to register and vote as such).

Group representation is also criticised for imposing a model of politics where deliberation and the common good are not central. Each group attempts to advance its own pre-defined interests by striking bargains with each other with no regard to the consequences for the rest of society. A response to these concerns is that the common good has been too often identified with the good of the privileged, thus reinforcing the bias of the social system. Moreover, group politics could improve deliberation by forcing discussion and rational argumentation among different groups, including those traditionally excluded.

A further problem of group representation is its feasibility. There may be too many groups claiming political representation. Potentially, the number of these groups would be a function of the politically relevant cleavages (eg race, religion); the categories identified under those cleavages (gender identifies two; religion could identify many); and how those cleavages cut across each other in a particular society.[44] Moreover, some of these groups may be highly heterogeneous, in which case each subgroup may demand its own

[43] Ibid, 197.

[44] Cf. Goodin (n 26) 461.

representatives. In sum, the total number of group representatives could be unmanageable.[45]

The response to this kind of criticism is that not all disadvantaged groups have equally strong claims to political representation. Although the criteria used to evaluate those claims is controversial, some factors have been identified in the literature, such as the existence of a shared identity (or, to avoid essentialism, a shared set of perspectives)[46] arising from similar experiences. The formation of this shared identity (or perspectives) seems to be facilitated when group membership is difficult to change. Another possible requirement for a group to qualify would be actual discrimination (general, or at least electoral),[47] which involves an objective dimension (the factual reality of discrimination) and a subjective dimension (sufficient awareness of this discrimination).[48] Historical discrimination may also be required and may help in proving structural inequality (ie inequality reproduced over time even without discriminatory intentions).[49] This also has two complementary dimensions: an objective one (evidence of the discrimination suffered in the past and its relation to actual discrimination),[50] and a subjective one ('the meaning the past has for members of those groups'[51]). A related criterion is the political

[45] Cf. Ibid, 459-461.

[46] Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (n 20) 428.

[47] Cf. Williams (n 7) ch 6; Mansbridge, 'Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"' (n 26) 639; Samuel Issacharoff, 'Groups and the Right to Vote' (1995) 44 Emory Law Journal 869, 872.

[48] Helen Mayer Hacker, 'Women as a Minority Group' (1951) 30 Social Forces 60, 60.

[49] Cf. R H Fallon Jr and Paul C Weiler, 'Firefighters v. Stotts: Conflicting Models of Racial Justice' [1983] The Supreme Court Review 1, 35ff and 47; Brest and Oshige (n 21) 855; Williams (n 7) 176ff.

[50] Cf. R H Fallon Jr and Weiler (n 49) 35ff. and 47.

[51] Williams (n 7) 177.

underrepresentation of the group, considering not only the number of representatives but also the political context as a whole.

We can also identify a more controversial set of considerations. One is programmatic visibility, which 'arises from group members' efforts to connect their group-based identities with a particular political interest or program.'[52] This requirement is debatable, *inter alia*, because it excludes non-rational elements involved in group identity, and also because it assumes that political interests are defined prior to the political process of deliberation. Minority status is usually not a criterion, mainly because well-organized minorities may wield considerable political power. Conversely, context could be a determinant factor (eg the size of the beneficiated group vis-à-vis the total population or the size of other groups; the notoriety of the group; the intensity of the discrimination suffered by the group).[53]

We can see, therefore, that identify the criteria for determining which groups should be accorded group representation involves highly controversial issues. Even if a set of criteria could be agreed upon, the problem would remain of who should decide which groups meet these criteria to such a degree as to warrant special political representation. Ultimately, there seems to be little option but to leave this decision to the political process.[54]

A final difficulty of group representation is whether it should be confined only to issues directly related to the group, or go beyond these. From a theoretical perspective, it depends on the view of democracy that is adopted. A deliberative view would propose that

[52] Kathryn Abrams, 'The Supreme Court, Visibility, and the "Politics of Presence"' (1997) 50 Vanderbilt Law Review 411, 414.

[53] Cf. Brest and Oshige (n 21) 873.

[54] Cf. Williams (n 7) 202.

the voices of disadvantaged groups should be appreciated in any discussion. A more bargaining-competitive view of democracy would highlight the fact that groups - as people - do not have interests regarding every single public policy. From a practical perspective, however, this 'limited representativeness' might be impossible to manage. Who would define which policies may be discussed and voted by group representatives? What would be the consequences of these representatives acting *ultra vires*?

b) What is represented?

The understanding of political representation varies depending on the specifics that are represented by the representative, the most common alternatives being interests, wishes, opinions and perspectives. Interests may be generally defined as 'what affects or is important to life prospects of individuals, or the goals of organizations'[55]. An interest is not something that merely draws our attention, but something that connects with personal or social advancement and well-being.[56] Interests derive from previous decisions and preferences based on rational or irrational grounds (values, prejudices, opinions, etc.). A distinctive feature of interests is their 'objectivity'.[57] This does not mean that they necessarily have an external dimension reflected in observable attitudes;[58] but interests exist whether the represented is aware of them or not. Although the views of the

[55] Young, *Inclusion and Democracy* (n 8) 134.

[56] Cf. Diggs (n 3) 30; J Roland Pennock, 'Political Representation: An Overview' in J Ronald Pennock and John W Chapman (eds), *Representation* (Atherton Press 1968) 13.

[57] Contrast with Brito and Runciman (n 1) 76-79 and 104.

[58] Robert H Salisbury, 'Interest Representation: The Dominance of Institutions' [1984] 78 The American Political Science Review 64, 65. Cf. Pitkin (n 2) 156ff.

represented about what their interests are is important, these views are not accorded exclusive authority. Thus, a representative may go against the declared interests of his or her constituency by arguing that he or she is pursuing the constituency's 'real' interests. Interests are also abstract[59] and capable of being rationalized. This is important because it allows discussion, transaction, argumentation, etc. In Phillips' wording, it makes possible a 'politics of ideas.'[60]

Wishes should be regarded as preferences or desires: what I consciously *want*. In contrast with interests, wishes are not 'objective', ie there must be sufficient awareness of them by the represented. Wishes are also concrete and cannot be always rationalized or argued about because they may incorporate feelings and other non-strictly-rational factors. Another difference with interests is that wishes are firmly located in the present. They tend to be short-term and subject to significant variations over time. Conversely, interests normally add a more medium or long-term perspective to their present reality, and are less variable over time.

Opinions are ideas, stances and judgements about political issues: what I *think* about them. Like interests, they derive from factors such as principles and values. Even though they may remain internal, they should be capable of external expression, therefore requiring more rationality than wishes and variable levels of abstraction. However, opinions are not 'objective', ie they can only exist insofar as the representative is conscious of them. Regarding stability over time, opinions are more variable than interests but less variable than wishes.[61]

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[59] Pitkin (n 2) 156.

[60] Phillips (n 37) 1.

[61] Cf. Birch (n 4) 89.

Perspectives are points of view, ways of looking at issues and of addressing problems.[62] They are not what I think or want, but *from where* I think or want. Perspectives could derive from various factors, either generic (ie applicable to all or most political issues) or specific (ie applicable to some political issues). Traditional generic factors are the geographical location, ideology and social class. More recently, 'identity politics' has proposed new generic factors, such as race. Perspectives are 'objective' in the sense that they exist irrespective of the degree of consciousness of the individual who possesses them. They cannot be entirely rationalised, and are stable over time (certainly more than wishes and opinions).

TABLE 1: Characteristics of What is Represented

	Interests	**Wishes**	**Opinions**	**Perspectives**
Objective (existence irrespective of awareness)	Yes	No	No	Yes
Subject to abstraction and rationalization	Yes	No	Yes	No
Stability over time	Yes (medium or long term perspective)	No (short-term perspective)	More than wishes / less than interests	Yes

[62] Cf. Young, *Inclusion and Democracy* (n 8); Brito and Runciman (n 1) 115. See also Williams (n 7) ch 4.

There is no inherent incompatibility between these four categories. Good representation would ideally include all of them.[63] Although conflicts may arise, long-standing clashes should be considered as a sign that something is amiss.[64]

Regarding EQW, although most of the scholarly literature focuses on the representation of women's *interests* (this will be discussed at the end of this chapter), quotas seem to have more affinity with the representation of *perspectives*. The more capable of abstraction and rationalization the category is, the less important are the actual characteristics of the representative in order to be able to represent the constituency appropriately. If the interests and opinions of women can be identified 'objectively', representing and defending these could be carried out by anyone, including men.[65] Conversely, because perspectives are only partially rational and communicable, the actual characteristics of the representative become crucial for accurately conveying these perspectives to others. Moreover, perspectives seem to be prior - and rather impervious- to the political process, whereas the others are arguably at least partially formed by that process. Therefore, electing women to represent women interests, wishes and opinions would make less sense because, at the time of the election, these categories are not defined exclusively by group membership, and thus men could be better representatives in certain contexts. Additionally, the stability over time of perspectives helps the claim that women candidates may be relied upon to perform better as women representatives during their

[63] Young, *Inclusion and Democracy* (n 8).

[64] Interests are the most likely to clash with the others because of their objective nature (the representative could define interests differently than the represented, increasing the chances of a misfit with the latter's wishes, etc.), and their emphasis on the long-term. Wishes and opinions are less likely to diverge, although they may due to the contrast between the irrational contents of the former and the rational approach of the latter. Perspectives are the least likely to enter into conflict with the other categories, simply because they do not focus on the political issues at stake (as the other categories do), but only on the way of looking at them.

[65] Phillips (n 37) 69.

terms in office. Finally, perspectives are the only category that, *per se*, assumes group representation by members of the group, which is precisely the idea behind EQW.

c) What is the relationship between the represented and the representative?

Although traditionally regarded as the focal point of any theory of representation, the discussion about the relationship between the represented and the representative has usually been reduced to the determination of whether the latter is a delegate or a trustee of the represented. Whereas under the first view the representative is only an agent that must follow the instructions of the represented, in the second model the representative is entrusted to act autonomously. The delegate view is more directly inspired by the model of representation in private law. It is also closer to more radical ideas of democracy and popular sovereignty, and to a notion of political representation as the advocacy of competing interests. The trustee perspective is more distrustful of factions and more akin to views of representation as a deliberative process to achieve the common good.

Notwithstanding the popularity of the dichotomy between delegate and trustee, this dichotomy is unhelpful in the context of political representation, because neither approach can be adopted to the exclusion of the other. On the one hand, it would be impossible for the representative to follow instructions in everything he does. It would also cease to be representation in any meaningful way: the representative would disappear and the represented would be acting directly, albeit using the representative as a mere tool. On the other hand, the total autonomy of the representative would impede the represented being present in any sense, severing the connection between the two sides of the representative

relationship.[66] In real life, representatives must act as both trustees and delegates. Consequently, the trustee-delegate distinction should not be presented as a dichotomy, but rather as a flexible continuum within a single notion of representation.[67] Representatives move between these two poles according to several factors such as the relevance of certain issues for their constituencies, the pressure of their political parties, and the voice of their own conscience.[68]

As the trustee-delegate dichotomy loses its relevance, other models and typologies of the relationship between the representative and the represented have emerged. This section discuses two of them, one focused on what it is that makes the representative representative, and the other on what the representative should do in order to represent.

The first typology follows Pitkin's fourfold classification, although modified in some respects. The first category is *formalistic* representation,[69] where the relationship between the representative and the represented is one of prior authorization (the representative 'has been given a right to act which he did not have before, while the represented has become responsible for the consequences of that action as if he had done it himself'[70]) or ex-post accountability ('a representative is someone who is to be held to account, who will have to answer to another for what he does'[71]). The former is normally associated with elections, and the latter with re-election processes. Evidently, formalistic representation follows

[66] Cf. Pitkin (n 2) 153.

[67] Cf. Converse and Pierce (n 10) 494; Schwartz (n 1) 24ff.; Stocks (n 14) pass.

[68] Converse and Pierce (n 10) ch 21; Pitkin (n 2) 219ff.

[69] Pitkin (n 2) ch 3; Eric A Nordlinger, 'Representation, Governmental Stability, and Decisional Effectiveness' in J Ronald Pennock and John W Chapman (eds), *Representation* (Atherton Press 1968).

[70] Pitkin (n 2) 38-39.

[71] Ibid, 55.

closely the approach in private law representation. The principal problem of formalistic representation is its hollowness: the representative *acts for* the represented, but the substance of his actions does not matter as long as the formalities have been completed.[72] Consequently, there is no substantive standard to assess the representation as good or bad. An additional criticism is that, in certain circumstances, it is obvious that representation exists in reality, irrespective of the lack of authorization or accountability (eg a dictator or a monarch standing for their country in the international context).

A second alternative is *descriptive* representation.[73] Here the relationship is of likeness or reflection: the represented *is like* the represented in one or more relevant ways (they share an attribute, a characteristic). He or she *stands for* the represented. Although what he or she actually does is theoretically not relevant (he or she represents by being who he or she is, not for doing something), there is usually an expectation of substantive representation (as defined below).[74] Descriptive representation produces a 'microcosm effect': the legislature becomes a reflection of the political community,[75] and it is normally associated with the acknowledgment of diversity and the integration of groups which have been discriminated against.[76]

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[72] Eg Francisco J Laporta, 'Sobre la Teoría de la Democracia y el Concepto de Representación Política: Algunas Propuestas para el Debate' <www.cervantesvirtual.com/servlet/SirveObras/01361620813462839088024/cuaderno6/Doxa6_06.pdf> accessed 16 November 2010, 146.

[73] Pitkin (n 2) ch 4. It may be also called *typical* (Nordlinger (n 69) 115); *sociological* (Sartori (n 10) 2; Duguit (n 13) 104-105), or *identity representation* (Brito and Runciman (n 1) 80 and 110ff).

[74] Eg Joni Lovenduski, *Feminizing Politics* (Polity 2005) 179; Kimberly Cowell-Meyers and Laura Langbein, 'Linking Women's Descriptive and Substantive Representation in the United States' (2009) 5 Politics and Gender 491, 492; Karen Beckwith and Kimberly Cowell-Meyers, 'Sheer Numbers: Critical Representation Thresholds and Women's Political Representation' [2007] 5 Perspective on Politics 553, 553.

[75] Cf. Pitkin (n 2) 75.

[76] Eg Mansbridge, 'Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"' (n 26) 648ff; Brito and Runciman (n 1) 116.

The third type is *symbolic* representation.[77] Although in this case the relationship between the representative and the represented is rather vague, it is partly based on non-rational beliefs and affective responses.[78] There may or may not be a rational connection or a common feature between the representative and the represented, but what is essential is that the former is considered by the latter to be his representative (this phenomenon is not necessarily 'passive': the representative may encourage this 'symbolic' connection). Symbolic representation typically applies to representatives of the political community as a whole (eg the monarch). As with descriptive representation, symbolic representation is a *standing for* another person (the representative represents just by being what he is, not by his actions). The evaluation of symbolic representation depends on the same psychological and emotional factors that created it in the first place. Pitkin links this type of representation with the function of political integration.

Finally, *substantive* representation assumes that the representative's role is one of autonomous but potential policy responsiveness.[79] The representative *acts for* the represented, furthering their interests, even if occasionally entering into conflict with them about their wishes. The representative relationship assumes deliberation, rational justification for actions, and a final assessment by the represented. It is a model which adopts an intermediate position in the continuum between trustee and delegate. It also

[77] Pitkin (n 2) ch 5; Birch (n 4) 15. Contrast with Griffiths and Wollheim (n 15) 189.

[78] Pitkin (n 2) 110.

[79] Cf. Ibid, ch 6 and 110; Urbinati (n 1) 44ff; Leslie A Schwindt-Bayer and William Mishler, 'An Integrated Model of Women's Representation' [2005] 67 The Journal of Politics 407, 409. See also Raquel Pastor, *Género, Élites Políticas y Representación Parlamentaria en España* (Tirant Lo Blanch 2011) 78ff.

provides a standard of evaluation for representatives, that is, it enables one to assess their performance *vis-à-vis* the specific purposes of the representation.[80]

The four notions of representation offered by Pitkin may be compatible, and even closely related. Ideally, good representatives should fulfil a minimum level of each aspect.[81] However, it may also be the case that these types of representation collide, particularly when taken to the extreme,[82] or that one or more of these dimensions is excluded by a political system (eg we shall consider in Chapter 5 the traditional French rejection of descriptive representation).

EQW may reflect all the notions of representation described above. Thus, it assumes formal representation, insofar as women representatives have to be elected initially (authorization), and eventually subject to re-election (accountability). EQW are also akin to symbolic representation[83] but do not guarantee it. The essential association of EQW, however, is with descriptive representation,[84] which would ideally entail some degree of substantive representation. In fact, EQW's goal is precisely to install more women in Parliament so as to reflect more accurately the gendered composition of the population, and it is hoped, to advance pro-women policies. Moreover, EQW assume group representation, which is a requirement for descriptive representation.

Descriptive representation has many positive aspects. It could be very useful in improving political integration and political equality, insofar as it allows all (or at least

[80] Cf. Rehfeld (n 3) 5-6 and 17-20.

[81] Cf. Schwindt-Bayer and Mishler (n 79) 410; Phillips (n 37) 24-25.

[82] Cf. Pitkin (n 2) 226-227.

[83] See Schwindt-Bayer and Mishler (n 79) 414.

[84] Cf. Mercedes Mateo, *Representing women? : female legislators in West European parliaments* (ECPR 2005) 19.

more) views to be taken into account in the political process. The legitimacy of the political system may well be increased by reflecting the Nation in its diversity, and it has been argued that the institutional climate of debates changes (partly by calling into question discriminatory practices and assumptions).[85] Even more fundamentally, Phillips argues that descriptive representation responds to the impossibility of the delegate view of representation. Given that most policy decisions cannot be resolved in advance during elections, representatives will always have considerable autonomy. Therefore, their personal characteristics become important to the represented: 'new problems and issues always emerge alongside unanticipated constraints, and in the subsequent weighing of interpretations and priorities it can matter immensely who the representatives are'[86]. Mansbridge adds that descriptive representatives may be particularly useful when they respond to group-relevant issues with greater concern that non-members, or when they allow a better communication with both members and non-members of the group (eg when there is a past that has created mistrust between members and non-members, or when the interests of the group are not sufficiently defined).[87]

However, descriptive representation and, consequently, EQW face many problems and criticisms, some of them coming directly from the links between descriptive representation and group representation, bringing with it the accusation of essentialism.[88]

[85] Lovenduski (n 74).

[86] Phillips (n 37) 44.

[87] Jane Mansbridge, 'Quota Problems: Combating the Dangers of Essentialism' (2005) 4 Politics and Gender 622, 624-625.

[88] Cf. Phillips (n 37) pass (eg 52-53); Mansbridge, 'Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"' (n 26) 637-639; Guillaume Tusseau, 'Problemas y contradiccinoes del derecho anti-discriminatorio aplicado al cambo de la representación política de la mujer: Una visión comparatista' (2008) 9 Anuario de Derechos Humanos Nueva Época 547, 577; Williams (n 7) 5-6.

Although some scholars try to temper this objection (eg by denying that any member of the group would do equally well as a descriptive representative),[89] the fact remains that descriptive representation not only assumes a 'shared something' between the representative and the represented, but also that the political actions of representatives would be determined by the feature that renders them alike to their constituency (eg their race, or sex). A further weakness of descriptive representation's association with group representation is the potentially controversial identification of the representative as part of the group since the views of the represented and the representative may differ on this.[90]

There are several other problems with descriptive representation. One is that it excludes - or at least diminishes – some types of accountability, because the representative's actions are not relevant *per se*.[91] No matter what he does, he will remain a descriptive representative. It may be argued that descriptive representatives are elected like any other representatives, and thus they are subject to the same accountability mechanisms, basically the re-election process.[92] However, this argument is not entirely convincing, because group constituencies are more diluted and may have more difficulties in holding their representatives accountable than 'normal' (ie geographical) constituencies. A related difficulty of descriptive representation is that it encourages political passivity among the represented, because it is assumed that no coercion by an organized community is

[89] Eg Gould (n 32) 184; Suzanne Dovi, 'Preferable Descriptive Representatives: Will Just Any Women, Black, or Latino do?' [2002] 96 American Political Science Review 729.

[90] Cf. Friedrich (n 5) 319. Dovi (n 89) 735 ff, has proposed that an evaluative criterion for descriptive representatives should be the degree of acknowledgment that both represented and representative have of the latter's belongingness to the group.

[91] Pitkin (n 2) 89-90; Mansbridge, 'Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"' (n 26) 640. See also Phillips (n 37) ch 6.

[92] Cf. Williams (n 7) 231.

necessary to ensure that the represented's interests are advanced, insofar as the representative is already supposed to share those interests.[93] Moreover, descriptive representation seems to be incompatible with the development of evaluation criteria to assess the representatives' performance, unless an essentialist approach is used. But a paradox arises in this regard: the more that such an 'essential way to be X' is defined, the less a descriptive representative is needed because everyone could 'follow the book' and be a good representative for the group, even if not a member of it.[94]

Additionally, descriptive representation does not fit comfortably with certain theories of democracy. On the one hand, its relationship with a deliberative view of democracy is equivocal: although it allows the incorporation of previously excluded groups into the political discussion, it also fixes the positions and ideas of the representatives, thus obstructing effective deliberation.[95] On the other hand, from an adversarial perspective of democracy, descriptive representation would be legitimate only regarding those policies relevant to the group or where the voice of the group is important (the range of issues would depend on the 'depth' of the group difference).[96]

Taken to the extreme, descriptive representation may lead to absurd conclusions and unintended results. Representatives may be limited to the representation of very small groups, because the representation of larger numbers would be impeded by barriers such as sex, race, religion, etc.[97] Moreover, political representation by non-members of the group

[93] Cf. James L Franke and Douglas Dobson, 'Interest Groups: The Problem of Representation' (1985) 38 The Western Political Quarterly 224, 225.

[94] Dovi (n 89) 732-733.

[95] Cf. Griffiths and Wollheim (n 15) 212ff; Phillips (n 37) ch 6.

[96] Cf. Griffiths and Wollheim (n 15) 207.

[97] Cf. Phillips (n 37) 9.

becomes impossible, even if they are more efficient in, or committed to, advancing the interests of the group.[98] A further problem is that representatives of a disadvantaged group cannot represent other disadvantaged groups.[99] Additionally, descriptive representation may be seen as justifying random sampling representation, which is widely rejected.[100] Finally, although descriptive representation hopes to achieve substantive representation, this is far from guaranteed and the effective results could be disappointing.[101]

We turn now to consider what the representative should do in order to represent. Mansbridge proposes four categories.[102] The first is *promissory* representation. This is the classical model where the representative must keep the electoral promises, allowing evaluation and accountability at the next election. The second type is *anticipatory* representation, where the representative must do what 'their constituents will approve next election.'[103] The representative should focus not on his past electoral promises but on the represented's present and future wishes. Communication and deliberation between the representative and the represented become fundamental, because the former needs to know what the latter's present wishes are, so he or she can infer (and eventually change) what they will be at the next election.[104] The third category is *gyroscopic* representation. Here the representative must follow his or her own 'conceptions of interest, "common sense",

[98] Cf. Williams (n 7) 242; Gould (n 32) 184.

[99] Mansbridge, 'Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"' (n 26) 637.

[100] Cf. Pitkin (n 2) 73ff; Ankersmit (n 1) 117.

[101] Eg Brito and Runciman (n 1) 112-116; Williams (n 7) 228. See n 135-136.

[102] Mansbridge, 'Rethinking Representation' (n 6).

[103] Ibid 515.

[104] Cf. Judith Squires, 'The Constitutive Representation of Gender: Extra--Parliamentary Re--Presentations of Gender Relations' (2008) 44 Representation 187, 191.

and principles derived in part from the representative's own background'[105]. Although it may be the case that a member of a group is selected as a gyroscopic representative precisely for being part of the group (as in descriptive representation), gyroscopic representatives may also be chosen from outside the group. In fact, gyroscopic representation is equally applicable to both group and individual representation. In any case, accountability is replaced by predictability about what the representative will do, and therefore the selection process is crucial (the represented need to know in advance who the representative is and what he thinks on a range of matters). Finally, there is *surrogate* representation: 'legislators represent constituents outside their own districts'[106], eg a Muslim MP elected by a constituency in London is the surrogate representative of the Muslim community throughout England. Because the represented do not elect the representative, their control over the latter is very limited and accountability is virtually non-existent. Surrogate representatives are expected to voice the perspectives of the represented (they should be conscious of such representation and be active about it).[107] On highly conflicted issues, Mansbridge affirms that proportional representation of such perspectives should be required.[108] This notion of surrogate representation is similar to previous ideas about 'virtual representation' expressed by Burke, who also stressed its limitations, ie it is not a substitute for *real* representation (electoral relationship), and it is not extendable to all groups (impossible when the group's interests are incompatible with

[105] Mansbridge, 'Rethinking Representation' (n 6) 515.

[106] Ibid, 515. See also Manon Tremblay, 'The Substantive Representation of Women and PR: Some Reflections on the Role of Surrogate Representation and Critical Mass' (2006) 2 Politics and Gender 502.

[107] Tremblay (n 106) 507.

[108] Mansbridge, 'Rethinking Representation' (n 6) 524.

those represented in Parliament).[109] Mansbridge adds that the relationship between these four types of representation is complex: they are partly complementary and partly incompatible. In practice, representatives would normally mix and move fluently between them.

Although EQW interact with all four categories, it appears to be based on *surrogate representation*. The goal of EQW is to have more women in Parliament; they would represent women as a national group, disregarding their geographical origin and even their electoral accountability. Therefore, it would not really matter if there is an electoral relationship between women electors and women representatives. As regards promissory and anticipatory representation, although they would be ideally included in the conception of representation adopted by those elected under EQW, these types of representation would only play a secondary role, and may even present theoretical and practical difficulties. Thus, if EQW are defended on the basis of the existence of a common female perspective, it seems evident that such a perspective is not easily reducible to promises or opinions about particular issues, making promissory and anticipatory representation partly impossible and also less relevant. Moreover, there appears to be no case where EQW rest on gender-segregated districts, and therefore, insistence on promissory and anticipatory representation would strongly bind women representatives to the male component of their constituencies as well, probably affecting their responsiveness to women. Finally, gyroscopic representation is compatible with EQW only if the representative and the

[109] Cf. Edmund Burke, 'The Roman Catholics of Ireland' (1792) <http://webcache.googleusercontent.com/search?q=cache:MojYMy2UNXIJ:www.ourcivilisation.com/smartboard/shop/burkee/extracts/chap18.htm+virtual+representation+burke&cd=1&hl=en&ct=clnk> accessed 13 October 2010. See also Pitkin (n 2) 177-178 and 522; James Conniff, 'Burke, Bristol, and the Concept of Representation' (30) 3 The Western Political Quarterly 329; Rogowski (n 30) 402; Birch (n 4) 51; Guinier (n 31) 1607ff.

represented belong to the same group, and if that common membership defines the representative's political behaviour. In other words, gyroscopic representation must be equated to descriptive representation. Additionally, gyroscopic representation is more suitable for visions of EQW that focus on descriptive representation only. Conversely, the more substantive representation is demanded, the more policy responsiveness is required, which seems to be alien to gyroscopic representation.

1.4 The Political Representation of Women and EQW

This section discusses the particularities of the political representation of women, focusing on certain assumptions made by supporters of EQW, and also in the impact that this 'gender factor' has over the types of political representation associated with EQW.

a) The assumptions of EQW

EQW assume that *women could be politically represented as a group*. This assumption involves two controversial and intertwined issues: whether sex defines political behaviour, and whether women have common political interests. As regards the first issue, some supporters of EQW seem to assume the relevance of sex for political behaviour, but only to a moderate extent and only as one among many other factors, such as ideology.[110] This also relates to the fact that quotas target candidates and not MPs, thus allowing other

[110] Eg Phillips (n 37) 68-69; Jeffrey A Karp and Susan A Banducci, 'When politics is not just a man's game: Women's representation and political engagement' (2008) 27 Electoral Studies 105, 114; Mary Lou Kendrigan, *Political Equality in a Democratic Society* (Greenwood Press 1984) 4; Mala Htun, 'Is Gender like Ethicity? The Political Representation of Identity Groups' [2004] Perspective on Politics 439, pass.

factors to influence the selection of political representatives. Significantly, it may be the case that the relevance of sex varies depending on the specific political issue at stake,[111] which evidences the link between the political importance of sex and the notion of women's interest.

As regards whether women have common political interests, responses vary from strong affirmation (normally equating these interests with the advancement of women's emancipation, equality and autonomy),[112] to rejection of this assumption as a form of essentialism.[113] An intermediate standpoint argues that there are certain policies that are seen differently by men and women, and which have particular relevance for women, eg childbirth and healthcare (this relates to the also contentious notion of 'women's issues').[114] Importantly, this position seems to partly shifts the focus of representation from interests to perspectives.

In any case, the controversial nature of women's interests means that it is unclear whether they could be regarded as a factor salient enough to give political relevance to sex. Moreover, supporters of EQW have suggested that the notions of 'women's interests', 'women's issues', and even 'women's perspectives', may be double-edged insofar as they

[111] Eg Joni Lovenduski and Pippa Norris, 'Westminster Women: The Politics of Presence' (2003) 51 Political Studies 84.

[112] Ibid; Kathleen A Bratton, 'Critical Mass Theory Revisited: The Behavior and Success of Token Women in State Legislatures' (2005) 1 Politics and Gender 97, 107; Anna G Jónasdóttir, 'On the Concept of Interest, Women's Interests, and the Limitations of Interest Theory' in Kathleen B Jones and Anna G Jónasdóttir (eds), *The Political Interests of Gender* (Sage 1988) 38; Kendrigan (n 110) 4-7. But this is controversial, see Karen Celis, 'Studying Women's Substantive Representation in Legislatures: When Representative Acts, Contexts and Women's Interests Become Important' (2008) 44 Representation 111, 111-112.

[113] Eg Tusseau (n 88) 568; Judith Squires, 'Quotas for Women: Fair Representation?' (1996) 49 Parliamentary Affairs 71, 85.

[114] Cf. Blanca Rodríguez and Ruth Rubio-Marin, 'The gender of representation: On democracy, equality, and parity' (2008) 6 Int J Constitutional Law 287, 303; Phillips (n 37) 67; Beckwith and Cowell-Meyers (n 74) 554-556; Bratton (n 112) 105-107; Susan H Williams, 'Equality, Representation, And Challenge to Hierarchy' in Susan H Williams (ed), *Constituting Equality* (CUP 2009) 61.

limit the range of actions open to female MPs in certain policy areas, and involve the representation of the female electorate only.[115]

A different perspective is offered by Jónasdóttir, who argues that interests have a dual dimension: a formal one, understood as a demand for participation in the decision-making process, and a substantive dimension, focused on 'those substantive values that politics puts into effect and distributes'.[116] Although Jónasdóttir is inconclusive about the existence of women's interests in the substantive dimension, her approach is interesting because it provides a less controversial understanding of women's interests (the formal-participatory dimension), which in turn serves to enhance the political importance of gender. Additionally, her categories fit with the notions of descriptive and substantive representation.

Another assumption of supporters of EQW is that *women are a unique group*. Thus, advocates of EQW do not regard women as another minority or disadvantaged group, and in certain contexts have opted for a sharp disentangling of women from these groups (see the case of France in Chapter 5). They argue, as further explained in Chapters 2 and 5, that gender discrimination is different from other kinds of systemic discrimination (eg it is present in any society and within every social group), and that women are more than a group: they are half of the humanity. This argument is not only quantitative but also – and more controversially - qualitative: there are two ways of being human, male and female. Sex is presented as the most important personal feature, which serves as the primary

[115] Eg Mona Lena Krook, 'Quota Laws for Women in Politics: Implications for Feminist Practice' (2008) 15 Social Politics 345, 359-360; Aileen McHarg, 'Quotas for Women! The Sex Discrimination (Election Candidates) Act 2002' (2006) 33 Journal of Law and Society 141, 155-156.

[116] Jónasdóttir (n 112) 40.

building block of personal identity. Thus, the suppression of sexual difference is neither possible nor desirable.[117] These arguments will be further explained in the case studies.

Advocates of EQW have taken special care in distinguishing the situation of women from disadvantaged racial (and ethnic) groups. Beyond certain similarities (involuntariness, immutability, visibility), it is argued that membership of a racial group is less 'objective' and more open to controversy than what sex a person belong to. Moreover, disadvantaged racial groups are often minorities (though with notable exceptions), whereas women are a numerical majority.[118] More importantly for EQW, it is stressed that usually sex defines political options to a substantially lesser extent than race.[119] Thus, whereas women's votes are fairly evenly divided among political parties, race has the potential to align itself according to party divisions.[120] Consequently, sex would be more compatible with 'normal politics', ie ideologically-based politics. Moreover, many racial groups tend to concentrate (or be concentrated) geographically, raising several political and electoral issues that are not equally applicable to women, such as vote dilution and gerrymandering.

A further common assumption of EQW is that *women are a uniquely politically relevant group*, with particularly urgent needs in terms of political representation.[121] As mentioned before, the criteria to assess claims to special political representation are

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[117] Cf. Dominique Rousseau, 'Los derechos de la mujer y la constitucion francesa' in Enrique Álvarez (ed), *Mujer y constitución en España* (Centro de Estudios Políticos y Constitucionales 2000) 109; Mary E Becker, 'Prince Charming: Abstract Equality' [1987] The Supreme Court Review 201; Anne Peters, *Women, quotas and constitutions : a comparative study of affirmative action for women under American, German, EC and international law* (Kluwer Law International 1999) 105.

[118] The concept of minority is not exclusively numerical. Eg Hacker (n 48)

[119] Htun (n 110) pass. Cf. Guinier (n 31); Heather Gerken, 'Understanding the Right to and Undiluted Vote' (2001) 114 Harvard Law Review 1663. But class may eclipse both race and sex, see Phillips (n 37) 171-178.

[120] Htun (n 110) pass.

[121] Eg Williams (n 7) 63.

controversial. In the case of women, the fulfilment of such criteria is subject to further controversy, particularly the existence of a shared identity (or shared perspectives) and programmatic visibility, not only due to women's diversity but also because of the debatable existence of 'women's interests' and 'women issues'. Regarding the feasibility of women's political representation, although sex is a simpler category to administer (it only produces two groups), and membership is generally easy to establish, women's heterogeneity and lack of alignment with other social cleavages could raise important difficulties.

b) Women and the types of political representation associated with EQW

The fact that EQW are exclusively for women impacts on the types of political representation associated with these quotas, ie group, descriptive, substantive and surrogate representation.

Regarding group and descriptive representation, all the difficulties and debates examined above apply to women and EQW, although many of them are magnified or moderated by the specific characteristics of women's representation. For example, supporters of EQW highlight how women's representation does not raise the problem of balkanization (women do not form isolated ghettos capable of fragmenting society, but live intimately intertwined with men), and that membership in the group is straightforward and stable. Conversely, opponents of EQW stress, *inter alia*, that the high heterogeneity of women makes the development of a 'shared identity' less plausible, rendering the accurate mirror representation of women's subgroups virtually impossible. Moreover, descriptive

representation assumes that the political actions of the representatives would be determined by the feature that renders them alike, which in the case of sex is particularly contested.

The substantive representation of women is highly controversial and is linked with discussions about the existence and content of 'women interests' and 'women issues', and whether they pre-exist, or are articulated by, the political process.[122] From a functional perspective, the substantive representation of women is normally understood as female MPs voting for women-friendly policies. This approach, however, has been criticised as too narrow,[123] partly because male MPs may also substantively represent women, particularly if women's interests are objectively identifiable. Moreover, there are other ways to advance women's interests besides voting for certain policies, such as participation in committees, agency before the bureaucracy, and raising of awareness in public opinion. In fact, substantive representation of women may also be undertaken by non MPs (eg 'femocrats').[124]

Descriptive representation usually includes an expectation of substantive representation. For this purpose, descriptive representation can be divided into two elements. Whereas the qualitative factor stresses the sort of women that representatives should be, the quantitative factor demands minimum numbers of women MPs. The qualitative factor is relevant because female MPs could show variable understandings or

[122] Eg Karen Celis and others, 'Rethinking Women's Substantive Representation' (2008) 44 Representation 99, 106; Suzanne Dovi, 'Theorizing Women's Representation in the United States' (2007) 3 Politics and Gender 297, 304-305; Linda Zerilli, 'Feminist Theory and the Canon of Political Thought' in John S. Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (OUP 2006) 112-113.

[123] Eg Celis and others (n 122) 104-107.

[124] See Squires, 'The Constitutive Representation of Gender: Extra--Parliamentary Re--Presentations of Gender Relations' (n 104) 192ff.

commitment with the 'women's cause'.[125] Potentially in conflict with the above, the qualitative factor could also be understood as requiring female representatives to be a diverse group so as to increase their collective representativeness of women.[126]

The quantitative factor strongly relates with the notion of *critical mass*. This concept emerged in studies about the behaviour of women in environments where they were a small minority, ie in corporations and parliaments.[127] Although more complex in its origins, the critical mass theory became very simple: drawing from nuclear physics, it affirmed that women's effectiveness as substantive representatives of women jumped irreversibly when a minimum percentage of female representatives was reached, thus linking descriptive and substantive representation. Despite some variation and more fine-grained distinctions, the 'magical number' was thought to be around 30%. Thus, the notion of critical mass offered a clear goal and was commonly used to campaign worldwide for EQW. It also worked as an explanation in cases where female MPs did not fulfil expectations (more women were needed to bring about real change).

The critical mass theory, however, has been subject to increasingly sceptical scrutiny,[128] even by supporters of EQW. Apart from the lack of sufficient empirical support, this theory has been criticised as too simple. Although the number of female MPs

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[125] Cf. Mateo (n 84) 20; Marian Sawer, 'Parliamentary Representation of Women: From Discourse of Justice to Strategies of Accountability' (2000) 21 International Political Science Review 361, 374.

[126] Cf. Dovi, 'Theorizing Women's Representation in the United States' (n 122) 315.

[127] See Drude Dahlerup, 'From a Small to a Large Minority: Women in Scandinavian Politics' (1988) 11 Scandinavian Political Studies 275; Drude Dahlerup, 'The Story of the Theory of Critical Mass' (2006) 2 Politics and Gender 511; Sarah Childs and Mona Lena Krook, 'Critical Mass Theory and Women's Political Representation' (2008) 56 Political Studies 725. See also See Rosabeth Moss Kanter, 'Some Effects of Proportions of Group Life: Skewed Sex Rations and Responses to Token Women' (1977) 82 The American Journal of Sociology 965.

[128] Eg Thomas Sowell, *Affirmative Action Around the World* (Yale University Press 2004) 142ff.

may be relevant, substantive representation would depend on several additional cumulative factors[129] such as ideology, party discipline, 'critical acts' (those that 'will change the position of the minority considerably and lead to further changes'[130]), and the qualitative factor involved in descriptive representation (it should not be assumed that women would always act women-friendly).[131] Moreover, history seems to prove that no numerical goal is irreversible.[132]

More generally, the impact of having more women in parliaments is still controversial.[133] Thus, even though there may be evidential support of increasing substantive representation of women on specific matters (eg expansion of welfare policies, more attention to bills about family, children and women),[134] most scholars seem to regard descriptive representation as only one among many factors that foster the substantive representation of women.[135]

Finally, surrogate representation of women also raises distinct issues. Women's numbers and heterogeneity may impact negatively over general surrogate representation,

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[129] Cf. Beckwith and Cowell-Meyers (n 74); Sandra Grey, 'Numbers and Beyond: The Relevance of Critical Mass in Gender Research' (2006) 2 Politics and Gender 492; Bratton (n 112); Childs and Krook (n 127); Sara Childs, 'Should Feminist Give Up on Critical Mass?' (2006) 2 Politics and Gender 522; Mona Lena Krook, Susan Franceschet and Jennifer M Piscopo, 'The Impact of Gender Quotas: A Research Agenda' (First European Conference on Politics and Gender, Belfast, January) 12-14; Tremblay (n 106) 509; Pastor (n 79) 84ff.

[130] Dahlerup, 'From a Small to a Large Minority: Women in Scandinavian Politics' (n 127) 296.

[131] Cf. Cowell-Meyers and Langbein (n 74).

[132] Dahlerup, 'The Story of the Theory of Critical Mass' (n 127) 513-514.

[133] Eg Lovenduski (n 74) ch 6; Judith Squires, *The New Politics of Gender Equality* (Palgrave Macmillan 2007) 97-98; Celis (n 112) 115; Cowell-Meyers and Langbein (n 74) pass. See also Mateo (n 84).

[134] Eg Catherine Bolzendhal and Clem Brooks, 'Women's Political Representation and Welfare State Spending in 12 Capitalist Democracies' (2007) 85 Social Forces 1509, pass; Bratton (n 112) 111 and pass.; R Darcy, Susan Welsh and Janet Clark, *Women, Elections and Representation*, vol I (2 edn, University of Nebraska Press 1994) 181-184.

[135] Eg Celis (112) 115; Phillips (n 37) 188.

encouraging a more specialised kind, ie between subgroups or individual female representatives and similar constituencies (eg white-leftist women; black-gay women). An additional consideration is that surrogate representation is stronger and more necessary when the number of representatives remains small.[136] Thus, the more successful EQW are in increasing the numbers of female MPs, the more surrogate representation of women loses its relevance. A further curiosity is that the identification between female MPs and women electors may be stronger among male MPs and public opinion than among the parties to the representative relationship.

1.5 Conclusions

One of the fundamental theoretical components of the debate about EQW is the notion of political representation. EQW reflect specific ideas of political representation, such as group representation (assuming women to be a unique politically-representable group), descriptive representation (only women can represent women), substantive representation (women representatives as responsive to women's interests), and surrogate representation (female MPs representing women beyond their geographic constituencies). Consequently, the controversies and debates related to those understandings of political representation also apply to EQW, in some cases being aggravated or lessened by the fact that the represented are women. In Part II of this thesis, the compatibility between the notions of political representation reflected by EQW and particular legal systems will be tested, as a criterion for assessing the constitutionality of EQW in those systems. In the next

[136] Tremblay (n 106) 507.

chapter, another fundamental theoretical component of the debate about EQW will be discussed, which is the idea of 'equality', exploring the understandings of equality that underpin EQW, and how the particularities of women affect these understandings.

CHAPTER 2

EQUALITY, SEX DISCRIMINATION, AND ELECTORAL QUOTAS FOR WOMEN

2.1 Introduction

Equality is one of the major theoretical issues involved in discussions about EQW: both proponents and opponents of EQW have grounded some of their main arguments on different understandings of equality. Consequently, the constitutionality of EQW strongly depends on the notion of constitutional equality that prevails in a particular legal system. Constitutional equality, however, is a multi-dimensional and equivocal concept.[1] This chapter attempts to identify different conceptions of constitutional equality, discussing their principal theoretical difficulties, and how they relate to EQW. It also reflects on the particularities of the discrimination suffered by women, and on the notions of equality that had been used to fight against it.

[1] See Douglas Rae, *Equalities* (Harvard University Press 1981); Peter Westen, *Speaking of Equality* (Princeton University Press 1990); John Wilson, *Equality* (Hutchinson 1966); Louis P Pojman and R Westmoreland (ed) *Equality. Selected Readings* (OUP 1997).

2.2 Constitutional Equality

Constitutional law frequently proclaims human beings as intrinsically and fundamentally equal. In other words, a prescriptive approach is adopted that seeks to make equality the general rule between individuals. Two main corollaries follow from this. One is that equality '*requires similar treatment and only permits differential treatment if this can be justified by competing reason*'[2], and the other that in case of doubt, equality should be preferred over inequality. Both corollaries have been labelled, separately or jointly, as 'the presumption of equality'.[3]

Consequently, constitutional equality does not prohibit all kinds of different treatment, but only *insufficiently justified different treatment*, which is usually labelled as *discrimination*.[4]

Notwithstanding the apparent simplicity of the above, problems arise from the fact that constitutional systems have developed not a single, but multiple and co-existing understandings of equality. Consequently, there are different criteria to evaluate whether unequal treatment is or not justified. Those simultaneous legally valid notions are partly overlapping and complementary, but also partly antagonistic. Because the compatibility of

[2] Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002) 273.

[3] Westen (n 1) ch Ten; Hugo Adam Bedau, 'Egalitarianism and the Idea of Equality' in J Roland Pennock and John W Chapman (eds), *Equality* (Atherton Press 1967) 19ff.

[4] Cf. Nicola Lacey, 'Legislation Against Sex Discrimination: Questions from a Feminist Perspective' (1987) 14 Journal of Law and Society 411, 416; David Feldman, *Civil Liberties and Human Rights in England and Wales* (2 edn, OUP 2002) 135ff.

those understandings with EQW varies, the next sections will briefly explain them based on the practical-oriented classification offered by McCrudden and Prechal.[5]

a) General equality

According to McCrudden and Prechal, this notion is founded on the traditional Aristotelian understanding of equality, ie to treat like cases/people alike and un-like cases/people unalike.[6] Whereas the first prong demands identical treatment to ensure equality, the second requires different treatment to achieve the same goal. To avoid being considered as arbitrary, deviations from these rules need to be justified as rational.[7] This conception of equality is normally associated with constitutional clauses of general scope (eg 'all individuals are born equal'), so is not limited to specific grounds such as race or sex. It is also a self-standing notion of equality, ie it can be invoked directly as a right in itself and there is no need to do it conjointly with another right. Remarkably, general equality serves as both a 'starting point' and as an 'underpinning principle' for other constitutional approaches towards equality.

General equality seems to be the most established constitutional understanding of equality, and also the most popular and the easiest for the courts to apply.[8] It derives directly from the fundamental idea that the law considers individuals as essentially equal,

[5] Christopher McCrudden and Sacha Prechal, 'The Concepts of Equality and Non-Discrimination in Europe: A practical approach' <ec.europa.eu/social/BlobServlet?docId=4553&langId=en > accessed 8 April 2011.

[6] Ibid 11ff.

[7] Cf. Alexy (n 2) 273.

[8] Cf. Owen M Fiss, 'Groups and the Equal Protection Clause' (1976) 5 Philosophy and Public Affairs 107, 118.

and thus deserving of equal treatment.[9] In certain jurisdictions (eg France, Spain, Mexico), this notion of equality was originally conflated with the *generality* of the legal rules, ie norms ensured equal treatment insofar as they were not directed to specific individuals or groups but to the population as a whole. This also relates to the notion of 'blindness of the law', ie personal features should be, as a general rule, legally irrelevant.

General equality, however, has several shortcomings. It has often been equated with 'formal equality', which may be considered as rather empty or tautological,[10] partly because it does not provide substantive standards to determine likeness or unlikeness.[11] Nor does it offer any guidance about how to prioritize between competing standards of comparison. Thus, it may be just as valid to say that two people are equal because of the colour of their eyes as for the brand of their cars or their religious beliefs, not only from a descriptive perspective but also from a normative one. Moreover, if the results of the application of those criteria differ, there is no way to know if the individuals compared are equal or unequal.

In other words, the Aristotelian formula tells us what to do once we know that two things are equal or unequal, but they do not help us in the prior process of resolving whether they are equal or unequal. The selection of the comparative standard that will answer that fundamental question precedes the application of the Aristotelian rules, and is dependent not on equality itself, but on what may be called *meta-principles*. These are principles that, going beyond equality, fill it out with a substantive component capable of

[9] Stanley I Benn, 'Egalitarianism and the Equal Consideration of Interests' in J Roland Pennock and John W Chapman (eds), *Equality* (Atherton Press 1967) 63. Contrast with Westen (n 1) 123.

[10] Westen (n 1) ch Nine.

[11] Cf. Alexy (n 2) 264-265; Cass R Sunstein, 'The Anticaste Principle' (1994) 92 Michigan Law Review 2410, 2422ff.

performing at least two functions: to limit the number of normatively relevant comparative standards, and to provide guidance in the prioritization of competing comparative standards. The identification of such meta-principles is controversial, partly because they can be formulated at different levels of abstraction. The more abstract the perspective, the fewer the meta-principles. Examples of meta-principles are the notions of dignity,[12] justice (including its various facets, eg social justice, fairness, distributive justice),[13] solidarity,[14] autonomy,[15] and participation.[16] Equality is a necessary condition for all of them, but each one would 'inject' equality with a somewhat different content.

Although meta-principles may solve the emptiness of formal equality, they also give rise to further difficulties. To begin with, we have seen that there are several competing candidates to become the meta-principle. This is a problem because the application of alternative meta-principles may give rise to different results when performing the functions mentioned above. Furthermore, the question arises as to how to select among competing meta-principles. There seem to be three strategies available. The first is to select one meta-principle as having an absolute or across-the-board priority (dignity seems to be the most obvious option). A second choice is to establish relative priorities, ie different meta-principles would rule in specific contexts, with the obvious difficulties of mismatches and overlapping zones. The third way is a maximizing approach

[12] Cf. Denise G Réaume, 'Discrimination and Dignity' (2003) 63 Lousiana Law Review 645; Feldman (n 4) ch 3; Christopher McCrudden, 'Introduction' in Christopher McCrudden (ed), *Anti-Discrimination Law* (Ashgate 2004) xx-xxii; Sandra Fredman, 'Combating Racism with Human Rights: The Right to Equality' in Sandra Fredman (ed), *Discrimination and Human Rights The Case of Racism* (OUP 2001) 21.

[13] Bedau (n 3) 18. Contrast with Derek Browne, 'Nonegalitarian Justice' (1978) 56 Autralasian Journal of Philosophy 48.

[14] Cf. Fredman (n 12) 3.

[15] See John Gardner, 'Liberals and Unlawful Discrimination' (1989) 9 Oxford Journal of Legal Studies 1.

[16] Cf. Fredman (n 12) 21-22.

where competing meta-principles are all simultaneously applied as far as they are compatible to the situation at hand. Such an approach is the most difficult to implement and is deeply problematic (for example, should meta-principles be weighed against each other? should there be a minimum level of respect for every meta-principle?). This is further complicated by their following characteristics: they may be formulated at different levels of abstraction; they are heavily value-laden and subject to controversial ideological and philosophical influences; and they tend to be open-textured notions whose exact meaning may not be easy to identify and apply in a given context.

A further discussion about general equality touches on the rationality test that is used to justify deviations from it. One issue is that this test may be subject to relevant variations across jurisdictions. Whereas in some contexts simply putting forward any reason may be enough to rebut arguments of capriciousness, in other jurisdictions more is required, such as the plausibility of the reasons given, or the reasonableness of the justification. The structure of the rationality test may also vary. Thus, it may be divided into two prongs, one dealing with the causal relationship between the deviation and the goals or aims pursued by it, and the other with the relationship between the criteria or standard used to determine the likeness or unlikeness of two things and the consequent deviation. Alternatively, the test may be applied as a simultaneous analysis of the relationship between three elements: who is affected by the deviation, the nature of the deviation, and its purposes. Additionally, dissimilar methodologies may be used to identify standards of comparison, purposes, causality, etc. In sum, it may be misleading to think of rationality as a homogenous test, beyond the simpler idea that it is a relatively unexacting standard, particularly if compared with the proportionality test. A particularly relevant function that the rationality test does not perform is weighting and choosing between those comparative

standards that would result in the equality of two things, and those that would result in the inequality of the same things. In other words, it cannot help in deciding whether the reasons for treating two persons differently are stronger or weaker than those for treating them similarly. The logic of the test works differently: equal treatment is the normal standard, and to escape from it only rationality is needed. Moreover, rationality does not require a close 'fit' between the criteria or standards used to differentiate, the deviation provided, and the goals pursued by it. Over and under-inclusiveness are tolerated, as well as a variable degree of causality. Additionally, with regard to the goals, even if a stricter rationality test may go beyond declared purposes, identifying the 'real' goals, they would not be weighted or prioritized, but only accepted insofar as they are legitimate and sufficiently connected with the deviation and the distinguishing criteria. Therefore, as an overall evaluation, it can be said that rationality is a very deferential test.[17]

Another difficulty of the first prong of general equality is that it may be disappointingly undemanding insofar as it is an entirely relational notion, ie as far as the treatment is equal, it does not matter how good or bad it may be.[18] Regarding the second part of the Aristotelian formula, although it seems to allow more progressive interpretations of constitutional equality (by taking into account relevant differences between persons that would render identical treatment unequal),[19] there is a remarkable little elaboration of how

[17] Cf. McCrudden and Prechal (n 5) 11ff; Frank Michelman, 'The Meanings of Legal Equality' [1986] The BlackLetter Journal 24, 26-27.

[18] Fredman (n 12) 18.

[19] Cf. Rae (n 1) ch V.

to treat un-likes differently, ie in what sense and how differently should they be treated, and what the limits are there for diverse legal treatment of un-likes.[20]

b) Protection of prized public goods

This notion of constitutional equality focuses on the distribution of special kinds of 'goods', such as fundamental rights.[21] Equality ceases to be a self-standing right and becomes attached to another good: the rationale is to ensure 'equality of something'. Deviations from this notion of equality are normally subject to a stricter scrutiny than rationality. This idea of equality can be found as a general constitutional clause (eg equality in the exercise of all constitutional rights), or in the form of several explicit provisions linked to as many specific 'goods'.

This version of equality is not antithetical to general equality; it shares its foundations (ie there is an essential equality between individuals, and deviations from equal treatment need to be justified). However, in the second notion of equality the nature of the associated public good plays several key roles. Thus, it provides criteria to evaluate likeness or unlikeness of treatment. This is because public goods would probably have an identifiable core and other less important or accessory contents, and only the denial of the core should constitute unequal treatment. For example, equal protection of the right to free movement will be violated if a person is unlawfully detained for a month, but it will not be so breached if an individual cannot use a street for a couple of hours because it is being reserved for the use of public authorities. In other words, the question of whether a

[20] Fredman (n 12) 17.

[21] McCrudden and Prechal (n 5) 17ff.

difference has enough legal relevance to be considered as unequal treatment is addressed and resolved *from the perspective of the right*. Additionally, the scrutiny of the deviation would be partly determined by the nature of the particular good to be distributed unevenly (generally, the more important the good, the stricter the scrutiny would be). Similarly, the nature of the public good would also restrict the personal features that can be used as grounds for distinctions between people. For example, an equal right to vote may permit age limits, which is not the case of the equal right to life. Finally, depending on whether the right is conceived in a formalistic or substantive way, this second notion of equality may go beyond formal equality and securing *de facto* equality.

c) Non-discrimination on specific grounds associated with group membership

This notion of constitutional equality forbids making distinctions based on certain characteristics that define groups (eg race, sex, religion).[22] Deviations from this kind of equality are subject to heightened scrutiny, the strictness of which, nonetheless, may vary according to the specific characteristic involved (eg the use of race is generally subject to stricter scrutiny than age).

According to McCrudden and Prechal, this kind of equality framed the development of the doctrines of direct and indirect discrimination as further elaborations of the Aristotelian maxims of treating likes alike and un-likes unalike.[23] Direct discrimination occurs when an individual receives less favourable treatment on the grounds of a personal

[22] Ibid 23ff. Cf. Michelman (n 17) 27ff.

[23] Cf. McCrudden and Prechal (n 5) 28ff.

characteristic such as race or sex.[24] This kind of discrimination was the first to be legally forbidden,[25] perhaps because it is usually the most evident and easier to prove. Its wrongness is so clear that intention should not (but may) be required, and a general justification would not be allowed.[26]

A later development was the notion of indirect discrimination[27] (similar to 'disparate impact' in the U.S.), which 'prohibits practices that formally apply to all from having the effect of disadvantaging individuals of particular protected groups, unless those practices can be shown to be *objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*'.[28] Although having the intention to discriminate is a controversial requirement for establishing indirect discrimination, a possible rationale behind the prohibition of this kind of discrimination is precisely the smoking out of hidden prejudice.[29] Difficulties may arise, however, with regard to statistical evidence; the identification of the relevant comparator and the appropriate baseline; the exactness of the scrutiny applied to possible justifications, and its eventual

[24] See Christopher McCrudden, *Equality in Law between Men and Women in the European Community* (Martinus Nijhoff 1994) 2-20.

[25] Cf. Sunstein (n 11) 2449-2450.

[26] But see John Finnis, 'Equality and Differences' (2011) 56 American Journal of Jurisprudence 17, 29-30, who argues that the inclusion of novel forbidden grounds, such as age and disability, requires the acceptance of direct discrimination if it is a proportionate means to pursue a legitimate aim.

[27] See McCrudden, *Equality in Law between Men and Women in the European Community* (n 24) 20-31; Westen (n 1) 108-113; Fredman (n 12) 23ff.

[28] McCrudden and Prechal (n 5) 35.

[29] Eg Paul Brest, 'In Defense of the Antidiscrimination Principle' (1976) 90 Harvard Law Review 1, 26-31; Sunstein (n 11) 2449-2450; Anne Peters, *Women, quotas and constitutions : a comparative study of affirmative action for women under American, German, EC and international law* (Kluwer Law International 1999) 87-93. Other possible rationales are to compensate for the effects of past discrimination; preventing future discrimination; avoidance of group harm; accommodation of group diversity; providing justice for some groups, and redistribution (Cf. Fredman (n 12) 24; Brest (n 29) 48; Gardner (n 15) 1-2 and 9-12).

application in the private context.[30] Moreover, although 'group inspired', indirect discrimination retains an individualistic ethos. This is often evident in its remedial structure (ie claims may be advanced only by victims against the direct responsible of the harm, and if the claim succeeds, the usual outcome is individual compensation).[31]

The fundamental rationale behind this third idea of constitutional equality is the protection of disadvantaged groups, thus impeding the existence of castes and second-class citizens.[32] There is a special concern about the harm suffered by those who are stigmatized by their group membership.[33] Consequently, this notion of equality may not reject all distinctions based on 'forbidden' grounds, but only those that reinforce the vulnerability of disadvantaged groups, with the consequential damage to the dignity of their members.[34] Thus, special treatment based on forbidden grounds that is beneficial for disadvantaged groups may be subject to a less exacting scrutiny (it does not cause stigma to 'superior' groups, and it would help to make disadvantaged groups less of a caste).[35] In other words, this understanding of equality proposes a scrutiny of inequalities focused in ends and goals:[36] whether such inequalities reinforce or weaken the caste-status of a group; whether they stigmatize a disadvantaged group or not;[37] how the removal of caste-status is weighted

[30] Cf. McCrudden and Prechal (n 5) 35-37; Mary E Becker, 'Prince Charming: Abstract Equality' [1987] The Supreme Court Review 201, 228; Feldman (n 4) 149-150 and 171; Fredman (n 12) 25; Michelman (n 17) 32ff.

[31] Fredman (n 12) 24-26.

[32] Cf. Sunstein (n 11); Michelman (n 17) 27-28; Peters (n 29) 79-81.

[33] Brest (n 29) 48ff; Fiss (n 8) 157ff; Sunstein (n 11) 2428-2433.

[34] Cf. McCrudden and Prechal (n 5) 35.

[35] Brest (n 29) 16ff. Cf. Sunstein (n 11) 2439ff and 2452.

[36] Fiss (n 8) 153.

[37] Sunstein (n 11) 2429; Brest (n 29) 16ff.

against other competing legitimate goals.[38] Following the same ends-centred rationale, it is the nature of the goal that defines the depth of the scrutiny.[39] This is an important contrast with the first notion of equality,[40] which is not focused on goals, but on the means to achieve them and in the relation between means and goals.

Consequently, it may be said that the third approach to equality has gone further in the process of filling out the original 'emptiness' of equality. This is not only because it rules out some standards of comparison, but mainly because it provides a clear and specific substantial criterion: the prevention of status-harm or caste-like situations.[41]

A key element for this third notion of equality is the idea of a group, which is problematic (as discussed in Chapter 1). Basically, there is no common understanding about what constitutes a group. The notion of group is also negatively associated with essentialist rationales, which in the context of equality are rejected, *inter alia*, for not being sensitive enough to individual uniqueness and personal identity (because they are based on stereotypes),[42] and for being simultaneously under-inclusive and over-inclusive.[43] There is also the problem of multi-dimensional discrimination (discrimination suffered by individuals who are members of two or more disadvantaged groups), and the question about what groups should be entitled to unequal treatment.

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[38] Fiss (n 8) 165ff; Brest (n 29) 15.

[39] Cf. Fiss (n 8) 153.

[40] Ibid 162-163.

[41] Cf. Ibid 158; Sunstein (n 11) 2429.

[42] Sujit Choudhry, 'Distribution vs. Recognition: The Case of Anti-Discrimination Laws' (2000) 9 George Mason Law Review 145, 148.

[43] Ibid 164ff.

This third understanding of equality is normally associated with specific constitutional or statutory provisions as opposed to general constitutional clauses. Whereas the latter refers to equality with little if any particularization (eg 'all individuals are born equal'), the former enumerate 'forbidden grounds', ie features that should not be used to establish distinctions between individuals, such as race, sex and religion. However, the use of specific constitutional or statutory provisions raises two issues of interpretation. One is whether the enumerated features should be specified using an open or closed list. If an open list is used, the next question is what other grounds could be included, which in turn presupposes the identification of criteria that could be used to expand the existing list to new grounds. Examples of such criteria are historical disadvantage, pervasive discrimination, minority status, immutability, and the protection of human dignity.[44] The second interpretative issue raised by specific clauses is their relationship with general equality clauses: are they symbolic iterations of the general rule in particular contexts, or do they have a distinct normative content? Could they be regarded as an exception to the general equality provision? Although different legal systems provide diverse answers to these questions, it is not uncommon to associate specific equality clauses with a heightened kind of judicial scrutiny in comparison with general equality provisions.[45] In other words, because the law demonstrates special concern about employing 'forbidden grounds' for making distinctions, the use of such grounds should be particularly well justified. In other cases, specific equality clauses may be seen as a way of moving towards a more substantive

[44] Eg Réaume (n 12) 660-661; Grant Huscroft, 'Discrimination, Dignity, and the Limits of Equality' (2000) 9 Otago Law Review 697, 704.

[45] McCrudden and Prechal (n 5) 23-35.

form of equality when general equality clauses are regarded as requiring only formal equal treatment.

d) Positive duty to promote equality of opportunity and *de facto* equality

According to McCrudden and Prechal, a fourth approach to constitutional equality demands the active promotion of equality of opportunity for groups and *de facto* equality.[46] This understanding of equality is usually linked with specific constitutional or other statutory clauses that expressly use terms such as substantive equality, equality of opportunity, promotion of equality, *de facto* equality, or similar.

A key concept in this fourth approach is equality of opportunity. Unfortunately, within the conceptual maelstrom that characterizes the discussion about equality, equality of opportunity seems to be a highpoint of confusion, to the extent of being labelled as 'an intellectual and moral chaos' that should be abandoned as a concept.[47] Nonetheless, despite this conceptual disorder, it seems relatively uncontroversial to say that equality of opportunity has two core elements. The first is the idea of careers open to talents.[48] The

[46] Ibid 41ff.

[47] Janet Radcliffe, 'Equality of Opportunity' (1997) X Ration 253, 278. See also Philip Green, *Equality and Democracy* (New Press 1998) 41-42; Westen (n 1) ch Eight.

[48] Green (n 47) 42; Allen Buchanan, 'Equal Opportunity and Genetic Intervention' (1995) 12 Social Philosophy and Policy Foundation 105, 123-124; James W Nickel, 'Equal Opportunity in a Pluralistic Society' in Ellen Frankel Paul (ed), *Equal Opportunity* (Basil Blackwell 1987) 111; Radcliffe (n 47) 261; John Plamenatz, 'Diversity of Rights and Kinds of Equality' in JR Roland Pennock and John W Chapman (eds), *Equality* (Atherton Press 1967) 87. Cf. Choudhry (n 42) 153.

second refers to the removal of at least some of the obstacles faced by individuals when pursuing their goals.[49]

The idea of careers open to talents is, chronologically, the first element to arise,[50] and it is closely tied with the notion of merit.[51] Because in any society there will be a limited number of better positions, those positions should be assigned to the best qualified.[52] In other words, chances to get such positions should depend on individual talent or merit, not on social stratification, nepotism or capriciousness.

The second element of equality of opportunity arises from the premise that individuals pursue multiple goals. In their quests, they face different obstacles. Equality of opportunity requires that individuals pursuing the same goal face the same relevant obstacles. Consequently, obstacles that only affect one or some (but not all) agents should be removed.[53]

The two core elements just mentioned, however, may be understood in different ways, encompassing very little or a great deal depending on the ideological perspective that is adopted.[54] More specifically, the critical question seems to be how far the equalization of

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[49] Cf. Alan H Goldman, 'The Justification of Equal Opportunity' in Ellen Frankel Paul (ed), *Equal Opportunity* (Basil Blackwell 1987) pass.; Westen (n 1) ch Eight.

[50] Buchanan (n 48) 19-20; Nickel (n 48) 111.

[51] Green (n 47) 31ff; Terry H Anderson, *The Pursuit of Fairness* (Oxford University Press 2004) 89ff; Rae (n 1) 59; Westen (n 1) 53.

[52] Cf. Goldman (n 49) 91-92; Nickel (n 48) 107.

[53] Cf. Westen (n 1) ch Eight; Ángel Puyol, *El Discurso de la Igualdad* (Crítica 2001) 118; Goldman (n 49) 102.

[54] Thus, equality of opportunity can be understood as the 'absence of undeserved deprivation'(Buchanan (n 48) 132); a 'substantial floor of opportunities' (Nickel (n 48) 111); 'equal chance to realize potential capabilities' (Green (n 47) 104); equal prospects of success (Radcliffe (n 47) 268-269); 'equal rewards for equal performances' (John H Schaar, 'Equality of Opportunity, and Beyond' in R Pennock and John W Chapman (eds), *Equality* (Atherton Press) 229); equal life chances (James Fishkin, 'Liberty Versus Equal Oppportunities' in Ellen Frankel Paul (ed), *Equal Opportunity* (Basil Blackwell 1987) 36-37); non-

opportunities should go (eg from ensuring the availability of the same instruments and tools to obtain a goal, to guaranteeing the same probability of obtaining it;[55] from the eradication of certain social inequalities, to the abolition of most of them and the compensation of natural inequalities). This is a sensitive issue because equality of opportunity may easily become a slippery slope starting with formal equality and ending in full equality of results.[56]

Additional confusion arises from the diverse meaning attributed to the notion of opportunity,[57] and from the fact that opportunities may be valued not only because they allow us to reach a goal, but also because they are a good in themselves.[58] Moreover, it is debatable whether equal opportunity requires giving everyone the same opportunity, or rather 'equally good' opportunities (assuming it is possible to measure and compare this objectively).[59] Finally, opportunities may be regarded as scarce goods subject to competition, or as a minimum to be guaranteed across the board.[60]

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discrimination (Cf. Green (n 47) 42; Buchanan (n 48) 121-123; Choudhry (n 42) 153); a 'middle ground between equal treatment and equality of results'(Fredman (n 12) 20), etc. See also Puyol (n 53) 113ff.

[55] Rae (n 1) ch 4.

[56] Radcliffe (n 47) 255; Wojciech Sadurski, 'Majority Rule, Legitimacy and Political Equality' <http://ssrn.com/abstract=891087> accessed 2 February 2011, 3.2. Sometimes the confusion between equality of opportunity and equality of results becomes manifest, eg Alda Facio and Martha I Morgan, 'Equity or Equality for Women? Understanding CEDAW's Equality Principles' (2009) 60 Alabama Law Review 1133, 1147.

[57] See Radcliffe (n 47) 274; D A Lloyd Thomas, 'Competitive Equality of Opportunity' (1977) LXXXVI Mind 388, 388; Westen (n 1) 169; Puyol (n 53) 118; Goldman (n 49) 91.

[58] Cf. Radcliffe (n 47) 271-273.

[59] Thomas (n 57) 389.

[60] Ibid 390ff.

Concluding, it can be said that equality of opportunity, being a very attractive concept, presents several difficulties. First, it is remarkably ambiguous[61] (a feature that may, nevertheless, be the source of its political popularity and rhetorical power[62]). Second, it tends to conflict with other values: whereas weak notions of equality of opportunity are compatible with high levels of inequality,[63] strong versions may be irreconcilable with liberty, family, and even personal identity.[64] Third, complete equality of opportunity is utopian.[65] Fourth, it is generally considered as an individualistic notion insofar as talents, obstacles, fair competition, discrimination, etc., are all regarded from the perspective of the individual.[66]

In the context of the fourth approach to constitutional equality, at least the first difficulty mentioned above (ambiguity) is partly addressed by emphasising the notion of *de facto* equality. As already mentioned, formal equality is related to the first notion of constitutional equality, which assumes values such as neutrality and impartiality. However, this perspective is considered insufficient when it fails to produce equality in 'real life'. In practice, formal equal treatment may increase, decrease or leave untouched the inequalities existing in a society.[67] Thus, it is argued that formal equality should be complemented by a

[61] Westen (n 1) 174-175.

[62] Cf. Ibid 164 and 178-179.

[63] Schaar (n 54) 231ff and 238, affirms that equal opportunity is 'a 'demand for an equal right and opportunity to become unequal'. Cf. Thomas (n 57) 400-401; Westen (n 1) 176-177.

[64] Cf. Rae (n 1) 75-76; Buchanan (n 48) pass.; Fishkin (n 54); Thomas (n 57) 401-404; Barry R Gross, 'Real Equal Opportunity' in Ellen Frankel Paul (ed), *Equal Opportunity* (Basil Blackwell 1987) pass.; Goldman (n 49) 96-97; Schaar (n 54) 238-239.

[65] Cf. Gross (n 64).

[66] Cf. Schaar (n 54) 247; Lacey (n 4) 417.

[67] Eg Green (n 47) 43.

differentiated treatment that ensures more 'real' equality or *de facto* equality.[68] The focus of the fourth notion of constitutional equality on factual equality implies that equal opportunity, in this context, should be understood as a strong one, assuming demanding notions for its two core elements. Factual equality, however, presents its own difficulties. Being a very open-textured notion, it could mean very different things and be measured according to dissimilar standards.[69] Moreover, evidence about the effects of factual equality policies could be very controversial. Additionally, if factual equality is used to justify a deviation from general equality, it ceases to be covered by the presumption in favour of equality. In other words, it has to be justified, and the grounds for its claims proved.[70]

2.3 Electoral Quotas for Women and Constitutional Equality

EQW may relate to all four ideas of equality explained above. General equality may *permit* EQW given the deferential nature of the rationality test it applies. Conversely, it is very unlikely that general equality *requires* EQW unless the second prong of the Aristotelian formula is construed in an unusually demanding way.[71] This would not be the case if general equality is understood as formal equality, which is committed to legal neutrality and 'legal blindness', and insensible to the *de facto* inequalities that justify EQW.

[68] See Alexy (n 2) 280ff.

[69] Cf. Ibid 282.

[70] Cf. Ibid 283.

[71] Fredman (n 12) 18.

Moreover, formal equality follows an individualistic model[72] that renders it quite unreceptive to ideas of group equality, whereas EQW are linked with the notions of groups and inter-group equality. This link may be rendered obvious when identifying the goals of EQW, as required by the rationality test (eg political equality of women). All things considered, general equality is far from being the best fit for EQW.

Notwithstanding the above, our case studies show that EQW have been occasionally presented as fully responding to notions of formal equality. This occurs when the quota applies in the same terms to both sexes. This argument, however, transforms the original understanding of formal equality, applying it not to individuals, but to groups (ie men and women *as groups* are treated the same, not their individual members).

The second notion of constitutional equality (protection of prized public goods) is also somewhat in tension with EQW, mainly because the latter would amount to a discriminatory distribution of the right to be a candidate. Because deviations from this notion of equality are subject to a scrutiny that is higher than rationality, EQW may not survive. Additionally, this second idea of equality reflects many of the non-EQW-friendly characteristics of general equality, such as its focus on formal equality and its individualistic ethos (remedies are individually-based and claims are normally formulated as breaches of individual rights). It might be argued, nonetheless, that the second notion of equality is highly dependent on the content of the good that is being protected, and therefore, if the women's right to be candidate is conceived in a more substantive way than the mere formal chance to be nominated, EQW may be compatible with this notion of

[72] Ibid 17. Cf. Christopher McCrudden, 'International and European Norms Regarding National Legal Remedies for Racial Inequality' in Sandra Fredman (ed), *Discrimination and Human Rights The Case of Racism* (OUP 2001) 253-255.

constitutional equality. This is, however, improbable, as discussed in Chapter 4 and further confirmed by the case studies. Thus, in practice, the second understanding of constitutional equality is not a good fit for EQW.

The third notion of constitutional equality (non-discrimination on grounds associated with group membership) is ambivalent regarding EQW. On the one hand, this notion stresses the existence of 'forbidden grounds' to distinguish between people, among which is sex. Although this prohibition is normally not absolute, exceptions are subject to the strictest scrutiny, thus rendering the case of EQW less plausible. On the other hand, when emphasis is given to the anti-caste rationale behind this notion of equality, EQW appear as a powerful tool to dismantle what can be seen as the *political* domination of women by men.[73] In fact, the case of political castes could be particularly compelling because they are barred from the chance of changing the system from the inside, using political power to reshape social reality.[74] Moreover, it may be argued that EQW do not damage the dignity of men, and therefore they should not be subject to the heightened level of scrutiny that applies when forbidden grounds are used. Finally, this third notion of equality has been traditionally opened not only to individuals, but also to groups. In sum, this notion of constitutional equality seems to be significantly more compatible to EQW than the previous ones.

Regarding the fourth notion of constitutional equality (as the positive duty to promote equality of opportunity and *de facto* equality), its emphasis on 'real-life' results, as

[73] See Susan H Williams, 'Equality, Representation, And Challenge to Hierarchy' in Susan H Williams (ed), *Constituting Equality* (CUP 2009).

[74] Cf. Peters (n 29) 100-101. This relates with the US notion of 'discrete and insular minorities'. See the famous footnote 4 of *United States v. Carolene Products Co* 304 US 144 (1938) USSC. See also Richard H Pildes, 'Diffusion of Political Power and the Voting Rights Act' (2001) 24 Harvard Journal of Law & Public Policy 119.

well as its strong view about equality of opportunity, would not only permit but even require positive action that goes beyond formal equal treatment.[75] Thus, at first sight, this fourth notion of equality seems particularly compatible with EQW. This statement, however, requires certain qualifications. From the perspective of equality of opportunity, it would be controversial to say that EQW would advance the notion of careers open to all: although EQW may open political/electoral careers to women, they may also close it to certain men, particularly those who are less powerful (eg young male politicians). Moreover, EQW would not respond to the idea of careers open to talent or merit, because political representation and elections are not meritocratic, at least in the traditional sense, as further explained in Chapter 3. Conversely, EQW fit more comfortably with the second component of equality of opportunity, ie the removal of relevant obstacles to reach certain goals, in this case, the resistance of political elites and political parties to placing women in electoral lists so they can be elected to Parliament in sufficient numbers.

In any case, the relationship between EQW and equality of opportunity appears to be less controversial than the relationship between the latter and quotas in other contexts. Quotas in other spheres are normally accused of being a tool for equality of results and not for equality of opportunity.[76] This is because quotas do not seem to provide chances to get something, but to impose an automatic distribution of that something according to pre-determined ratios. However, in political representation such imposition of results may endanger democratic values (this is one of the main problems faced by reserved seats as an

[75] Cf. McCrudden and Prechal (n 5) 41ff.

[76] Eg Rae (n 1) 76-81 and ch 4. Contrast with Drude Dahlerup, 'Electoral Gender Quotas: Between Equality of Opportunity and Equality of Result' (2007) 43 Representation 73.

alternative to electoral quotas).[77] Thus, quotas in the electoral context are limited to the process: EQW increase the chances of women to be elected to Parliament by removing an obstacle that disproportionally affects women (ie insufficient presence in the ballot), but they do not ensure gender-egalitarian results.[78] This issue will be further discussed in Chapter 3.

For the same reasons given above, EQW could not claim a strong and direct relationship with *de facto* (political) equality, but only a mediated and limited one. Although inspired by the notions of equal participation and equal political power for women within political institutions, EQW only provide means (equal access to the ballot) to reach them, but no guarantees. Even when EQW are stringently designed so as to ensure gender balanced parliaments, there are no assurances that political power would be effectively equally divided between male and female representatives. Moreover, EQW impact almost exclusively on the composition of Parliaments, leaving other political bodies or authorities intact.

[77] About reserved seats and EQW see Mala Htun, 'Is Gender like Ethicity? The Political Representation of Identity Groups' [2004] Perspective on Politics 439; Yvonne Galligan, 'Bringing Women In: Global Strategies for Gender Parity in Political Representation' (2006) 6 University of Maryland Law Journal of Race, Religion, Gender and Class 319, 327-329; Mona Lena Krook, 'Quota Laws for Women in Politics: Implications for Feminist Practice' (2008) 15 Social Politics 345, 346-351; Aili Mari Tripp and Alice Kang, 'The Global Impact of Quotas: On the Fast Track to Increased Female Legislative Representation' (2008) 41 Comparative Political Studies 338, pass.; Medha Nanivadekar, 'Are Quotas a Good Idea? The Indian Experience with Reserved Seats for Women' (2006) 2 Politics and Gender 119, 119-125.

[78] This fits with the views of Sadurski (n 56) 3.3, who affirms that equality of opportunity in the political context is more than the possibility of communicate a political message and less than the ability to convince the audience. Presence in the ballot is precisely between such ends. See also Rae (n 1) ch 4, and how the categories of prospective-regarding and means-regarding equality of opportunity (both between blocks or groups) may be applicable to EQW, the former with regards to the access to the ballot and the latter to political representation in parliament.

2.4 Equality and Women

From the perspective of equality, EQW are primarily regarded as a policy to combat discrimination against women. Therefore, a theoretical analysis of EQW needs to reflect on the characteristics of sex discrimination, as well as on the notions of equality that have been used to fight against it.

a) The particularities of sex discrimination

Discrimination against women is often described using superlative terms: 'the oldest and most persistent over time, the most extended, the one with the most diverse manifestations (from simple brutal violence to more subtle patronizing attitudes), affecting the highest number of people and the most primary'.[79] In other words, sex discrimination seems to be special. This section attempts to identify the particularities of sex discrimination that are relevant from the perspective of EQW.

A first particularity is that discrimination against women exists in every jurisdiction. Whereas, for example, structural racial and religious discrimination has emerged in certain societies only, and whereas the presence of specific discriminated-against races or religions may vary from one country to another, sex discrimination is present in all societies, and women are always the primary group that is discriminated against. Thus, the claim is made that sex discrimination is *universal*, partially overshadowing the relevance of particular domestic contexts. This *universality* has been used to support the particular weight and

[79] Fernando Rey, 'El Derecho Fundamental a No ser Discriminado por Razón de Sexo' <www3.uva.es/tsocial/documentos/Derecho_funda.pdf> accessed 18 February 2010, 1, free translation.

urgency of women's claims, and to distinguish them from other disadvantaged groups. It may also explain the rapid spill over of EQW across jurisdictions (the shared nature of the problem of sex discrimination renders attempts to solve it readily 'exportable'),[80] as well as the increasing attention given to EQW by international organisations (eg CEDAW, Council of Europe, UN-Women).

A further characteristic of discrimination against women is that it exists within every social group, ie race, class, religion. This feature, however, has ambivalent consequences for EQW. On the one hand, it reinforces the notion of universality mentioned above, stressing both the existence of a commonality between all women (even women belonging to privileged groups are subject to sex discrimination) and the wide scope of the problem. Moreover, this allows women to argue that their cause transcends other social barriers imposed by race, class or religion. On the other hand, as discussed in Chapter 1, the category of 'women' is not homogeneous, partly because women's interests and experiences are also defined by membership in other groups.[81] From the perspective of sex discrimination, this fact is significant because women's 'other memberships' may bring about more and different discrimination. In fact, women who are also members of other disadvantaged groups are victims of cumulative or multi-dimensional discrimination, which requires an intersectional approach, capable of simultaneous consideration being given to all the discriminations suffered by a person.[82] This is not about 'adding up' discriminations, but about adopting a perspective that regards the interaction of discriminations as

[80] See Quota Project, <www.quotaproject.org> accessed 9 January 2012.

[81] Cf. Evelyn M Simien, 'Doing Intersectionality Research: From Conceptual Issues to Practical Examples' (2007) 3 Politics and Gender 264, 267.

[82] Lisa García, 'Intersections of Inequality: Understanding Marginalization and Privilege in the Post-Civil Rights Era' (2007) 3 Politics and Gender 232, 235; Simien (n 81) pass.

'constitutive' of a particular status.[83] Furthermore, discrimination suffered by certain sub-groups of women may require solutions that go beyond, or are even in partial conflict with, measures demanded by other sub-groups. Likewise, generic women-friendly policies may not favour, or may even harm, multi-discriminated against women. All these considerations weaken the case for EQW, because they cannot ensure an adequate reflection of women's heterogeneity in the electoral lists, let alone Parliaments. Although this could be partly corrected by implementing special quotas for specific sub-groups of women, the comparative experience has clearly opted for the simpler model of a single quota for all kinds of women.

A related issue is that women may suffer particular types of discrimination according to their family-roles. Thus, the statuses of mother, wife, sister and daughter may have several specificities (and discriminations) ascribed to them.[84] Again, EQW cannot guarantee the appropriate reflection of such differences in electoral lists or Parliaments, thus jeopardising its ability to deal with specific kinds of sex discrimination.

Another peculiarity of discrimination against women is that it is sometimes embedded in social practices or legal dispositions originally aimed to 'protect' women (eg women were allowed to work fewer hours).[85] Whereas some of these norms are clearly patronising and discriminatory, others may reflect good faith attempts to accommodate certain particularities of being a woman, such as pregnancy. Thus, from the perspective of

[83] See Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] University of Chicago Legal Forum 139, pass.; Julia S Jordan-Zachery, 'Am I a Black Woman or a Woman Who is Black? A Few Thoughts on the Meanings of Intersectionality' (2007) 3 Politics and Gender 254, pass.

[84] Cf. Helen Mayer Hacker, 'Women as a Minority Group' (1951) 30 Social Forces 60, 62.

[85] Cf. Melissa S Williams, *Voice, Trust, and Memory* (Princeton University Press 1998) 121.

constitutional adjudication, the category of 'benign' discrimination is challenging insofar as it may be difficult to distinguish plain sex discrimination from reasonable accommodation or affirmative action. Consequently, existing judicial standards about sex discrimination could be inappropriate as the basis for assessing EQW.

A further 'uniqueness' of sex discrimination vis-à-vis discrimination against other groups, is that the former does not involve social distance: women live their lives intermingled with men.[86] This partly explains why EQW should not raise the concerns about balkanization associated with quotas favouring racial or religious groups. Moreover, women are in no danger of 'cultural extermination', which is normally a crucial concern when dealing with racial or religious groups that are discriminated against. In fact, culture is generally shared by both sexes. A relevant consequence of this is that many of the debates associated with multiculturalism, including the dilemma between recognition and assimilation, only marginally touch upon women (and EQW).[87]

Another issue to consider is that one source and the fundamental context of sex discrimination is private and family life,[88] which is in several respects beyond the reach of the law.[89] This has been one of the main claims of feminists, and partly explains their famous slogan 'the personal is political',[90] which attempts to collapse the public/private

[86] As Hacker (n 84) 63-65, points out, the 'social distance test' applicable to other kinds of discrimination does not work for women, because it considers marriage as the ultimate level of no-social distance.

[87] Although a link could be explored between certain kinds of feminism (basically 'equality feminism' and 'difference feminism', as explained in the next section), and the strategies of recognition and assimilation.

[88] Eg Chatarine A MacKinnon, 'The Liberal State' in Mona Lena Krook and Sara Childs (eds), *Women, Gender, and Politics: A Reader* (OUP 2010).

[89] *Mutatis mutandi*, Glenn C Loury, 'Why Should We Care About Group Inequality?' (1987) 5 Social Philosophy and Policy 249, 256-259.

[90] See MacKinnon (n 88) 293-294: ´Gender is a social system that divides power. It is therefore a political system.'

distinction.[91] At first sight, this feature may count against EQW, insofar as these quotas target the public space, thus rendering them inappropriate to deal with the core of sex discrimination. However, it may be argued that achieving equality is normally a process where advancement in the public sphere predates and influences progress in the private context.[92] Moreover, the nature of the national legislature as a centre of political power may allow the implementation of policies that impact on the private sphere. In fact, intervention by the public sphere into the private sphere may be seen as a more expedient and faster way to advance towards sex equality.

Finally, discrimination against women has a particular relationship with social conventions, which is one of the main sources of discrimination, together with prejudices, stereotypes and preferences. Prejudices are the attribution of less moral worth to certain individuals due to personal characteristics[93] (mutable or not[94]) that are relevant for their identity.[95] Stereotypes are simplifications of the reality consisting in the 'use of personal or group-related traits as proxies or markers for other skills'[96] or characteristics. They can be rational (based on statistical evidence) or irrational (based on error, overbroad

[91] Eg Carole Pateman, 'Feminst Critiques of the Public/Private Dichotomy' in Anne Phillips (ed), *Feminism and Equality* (Blackwell 1987). But this may be rejected by other disadvantaged groups. See, Richard Delgado, 'The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?' (1987) 22 Harvard Civil Rights - Civil Liberties Law Review 301.

[92] Aileen McHarg, 'Quotas for Women! The Sex Discrimination (Election Candidates) Act 2002' (2006) 33 Journal of Law and Society 141, 153.

[93] Choudhry (n 42) 152.

[94] Cf. Robert C Post, 'Prejudicial Appearances: The Logic of American Antidiscrimination Law' (2000) 88 California Law Review 1, 8.

[95] Réaume (n 12) 680.

[96] Choudhry (n 42) 155.

generalization or weak statistical correlation).[97] Preferences are feelings of inclination or repulsion to certain personal characteristics, and may be consciously or unconsciously rooted on biases or stereotypes.[98] Social conventions are socially-enforced practices that are perceived by individuals as unwritten norms of conduct, and may also be rooted in conscious or unconscious prejudices or stereotypes. Although sex discrimination comes from all these sources, social conventions play a particularly important role, thus limiting the impact of state and individual attempts to overcome it. Such conventions often appeal to the notion of women as 'different' - not necessary as inferior - to men, [99] and also to ideas about the 'natural role' of each sex.[100] This emphasis on social conventions may negatively affect the case for EQW, insofar as the latter are formal institutional measures that may not have a direct impact on informal social practices.

As mentioned in Chapter 1, the particularities of sex discrimination, even if not always helpful for the cause of EQW, have been used to support the claim that women are unique as a disadvantaged group. In certain contexts, as in France, this uniqueness has been understood as an exceptional desert of electoral quotas.

b) Women and equality

Women have employed different notions of equality in their fight against discrimination. For our purposes, two main stages can be identified. A first stage was

[97] Larry Alexander, 'What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies'' (1992) 141 University of Pennsylvania Law Review 149, 167-170; Choudhry (n 42) 155ff.

[98] Cf. Alexander (n 97) 176-183.

[99] Cf. Peters (n 29) 105.

[100] Cf. Alexander (n 97) 163-165; Green (n 47) 80.

focused on formal equality: women and men were essentially alike, and therefore they should be granted the same treatment.[101] Adopting the liberal rhetoric, personal features such as sex were subsumed in the abstract human being.[102] This phase required the reinterpretation of the concept of 'men' (as appeared in most legal texts) as 'human being' (male and female), and sometimes the adoption of explicit provisions regarding the equality of men and women. During this first stage, the focus was on general equality and on equality as protection of prized public goods (including political rights). This stage also coincided, in its final period, with the feminist movement called 'liberal' or 'equality feminism'.[103]

However, the focus on formal equality was later challenged due to two main causes. First, it was too limited and unable to solve sex discrimination.[104] It might have even damaged women (particularly the most disadvantaged), by reinforcing patterns of existing inequality and imposing a male-centred perspective.[105] Second, there were relevant social and biological differences between men and women that should be taken into account by the legal system if discrimination against women is to be overcome (and necessary accommodations made).[106] The rationale behind this second phase responded to a new wave of feminism that may be called 'difference' feminism, which, however, did not totally

[101] Eg. Williams (n 85) 119ff.; Johanna Kantola, 'Gender and the State: Theories and Debates' in Mona Lena Krook and Sara Childs (eds), *Women, Gender, and Politics: A Reader* (OUP 2010) 299.

[102] Cf. Rae (n 1) 88.

[103] Eg Kantola (n 101) 299.

[104] Eg Becker (n 29) 206ff.

[105] Ibid 206ff.

[106] Eg Lacey (n 4) 413.

supplant equality feminism but overlapped with it.[107] Thus, a new stage in the fight against sex discrimination began, where women adopted a notion of equality closer to the third and fourth approaches explained in this chapter (non-discrimination on specific grounds associated with group membership, and positive duties to promote equality of opportunity and de facto equality). In fact, the recognition of women as a distinct group, together with the universal nature of sex discrimination and its high visibility, rendered women obvious candidates for the third notion, which is precisely focused on the anti-caste or anti-group-subordination principle.[108] And as regards the fourth notion of equality, it has been boosted by the international community's increasing emphasis on 'real' sex equality and the use of 'special measures' to achieve it (eg CEDAW, Council of Europe),[109] as well as by feminists' stress on equality of results,[110] or at least in a strong and interventionist conception of equality of opportunity.

EQW emerged during the second stage described above, and thus it is no surprise that the equality claim behind EQW points to the third and fourth notions of constitutional equality. It was not unexpected either that the reaction of 'equality feminists' towards EQW ranged from fierce opposition, to disapprobatory silence, to acceptance for strategic reasons only (see the French experience in Chapter 5). This was so despite the efforts made by

[107] The equality-difference dichotomy is a simplification of a much more complex debate among feminists regarding the relation between women and the state. See, Kantola (n 101).

[108] The notion of women as a caste can be found, for example, in Hacker (n 84) 65ff; Peters (n 29) 79.

[109] Eg Committee of Ministers of the Council of Europe, Declaration on Equality of Women and Men of 16 November 1988 <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=609520&SecMode=1&DocId=699020&Usage=2>, accessed 9 October 2012; Committee of Ministers of the Council of Europe, Declaration Making Gender Equality a Reality, of 12 May 2009 <https://wcd.coe.int/ViewDoc.jsp?id=1441675&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>, accessed 9 October 2012.

[110] Eg Mary Lou Kendrigan, *Political Equality in a Democratic Society* (Greenwood Press 1984) 76ff.

some EQW supporters to harmonise the approaches of equality feminists and difference feminists.[111] What may be surprising, however, is that most difference feminists, particularly in France, would rather emphasise the other claims behind EQW (discussed in the Introduction, such as the necessary improvement of representative democracy or the advancement of a women's agenda) than the equality claim.[112] This may reflect strategic considerations, including the desire to avoid direct conflict with equality feminists.

2.5 Conclusions

Equality is the second fundamental theoretical component of the debate about EQW, which show variable degrees of compatibility with different notions of constitutional equality. Although general equality is not opposed *per se* to EQW, notions of equality as an anti-caste principle or as *de facto* equality are significantly more sympathetic to EQW. Regarding the idea of equality as protection of prized public goods, its compatibility with EQW is highly dependent on the content that is accorded to the right to be candidate. In any case, whereas certain particularities of sex discrimination support the suitability of EQW to foster sex equality, other particularities are more of a mismatch with EQW, demanding complementary measures and an evolving understanding of constitutional equality. In Part II of this thesis, the compatibility between the notions of constitutional equality reflected by EQW and particular legal systems will be tested, as a criterion for assessing the constitutionality of EQW in those systems. In the next chapter, another theoretical

[111] Cf. Irene Tinker, 'Quotas for women in elected legislatures: Do they really empower women?' (2004) 27 Women's Studies International Forum 531, 533-534; Joni Lovenduski, *Feminizing Politics* (Polity 2005) 29-30; Williams (n 85) 131ff.

[112] Judith Squires, *The New Politics of Gender Equality* (Palgrave Macmillan 2007).

component of the debate about EQW will be analysed, which is the notion of affirmative action, discussing its relationship with EQW and how the particularities of the latter impact on the affirmative action debate.

CHAPTER 3

ELECTORAL QUOTAS FOR WOMEN AND THE AFFIRMATIVE ACTION DEBATE

3.1 Introduction

Discussion of the constitutionality of EQW is often set in the context of the affirmative action debate. Subsuming EQW within affirmative action, however, has particular consequences: it associates EQW with the forms and limits of constitutional equality that lie behind and constrain affirmative action; it defines the aims that should inspire the design and implementation of EQW, and more significantly, it makes EQW subject to the fierce legal (and political) controversy that has surrounded affirmative action for decades. Considering that the relationship between EQW and equality was explored in the previous chapter, this chapter discusses the aims of affirmative action and the main arguments about its legality, turning then to analyse how the specificities of EQW impact on these issues.

3.2 Affirmative Action[1]

The term 'affirmative action' is applied to a wide range of public policies.[2] This chapter, however, adopts a rather restricted meaning of affirmative action as those policies that grant special treatment to members of disadvantaged groups. Probably the best known among these are quotas, ie policies that require the achievement of specific non-flexible figures or ratios in the participation of disadvantaged groups in a given good.

a) Aims

Affirmative action policies have been justified as serving several purposes across time and jurisdictions.[3] Thus, affirmative action has sometimes been said to provide compensation for past discrimination against some groups whose members still suffer the consequences of such discrimination.[4] This aim would authorise the transfer of goods from members of historically advantaged groups to historically disadvantaged groups, disregarding whether the individual members involved in such transfer practiced or suffered directly from discrimination in the past.

[1] Part of this section is based on my previous work J M Díaz de Valdés, 'Reflexiones Previas y Necesarias para un Análisis Jurídico de la Discriminación Positiva (Affirmative Action)' (2007) 9 Actualidad Jurídica 195.

[2] See Christopher McCrudden, 'A Comparative Taxonomy of 'Positive Action' and 'Affirmative Action' Policies' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089374> accessed 18 October 2012, 2-8.

[3] Ibid 8-12.

[4] Ira Katznelson, *When Affirmative Action Was White* (Norton 2005); Samuel Issacharoff, 'Can Affirmative Action Be Defended?' (1998) 59 Ohio State Law Journal 669, 679-682; Paul Brest and Miranda Oshige, 'Affirmative Action for Whom?' (1995) 47 Stanford Law Review 855, 865-867.

Affirmative action has also been seen as addressing currently existing discrimination suffered by disadvantaged groups.[5] Here the emphasis is not on the past, but on the present and the future (even if discrimination ceases to exist, its consequences will linger on, and therefore, equal treatment would not be enough to solve the problem).[6]

Another way to regard affirmative action has been as an attempt to address the underrepresentation of disadvantaged groups in a given context, even when this underrepresentation is not caused by discrimination.[7] This aim may be inspired by rationales of redistribution and/or recognition,[8] or even social utility (eg taking full advantage of the capacities of each individual and group).[9]

A further aim of certain affirmative action policies, particularly in the context of higher education, has been said to be the promotion of diversity. Diversity is valued, *inter alia*, as capable of improving the educational experience in universities, fostering multiculturalism and inter-group understanding, promoting power distribution, and combating stereotypes.[10] Under the diversity rationale, each group should have enough

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[5] Barbara R Bergmann, *In Defense of Affirmative Action* (Basic Books 1996) 9 and chs Two-Three.

[6] Cf. Philip Green, *Equality and Democracy* (New Press 1998) 121-122; Glenn C Loury, 'Why Should We Care About Group Inequality?' (1987) 5 Social Philosophy and Policy 249, 256-257; R H Fallon Jr and Paul C Weiler, 'Firefighters v. Stotts: Conflicting Models of Racial Justice' [1983] The Supreme Court Review 1, 33-34; John Hart Ely, 'The Constitutionality of Reverse Racial Discrimination' (1974) 41 The University of Chicago Law Review 723, 738-739.

[7] Cf. Brest and Oshige (n 4) 856; Loury (n 6) 252-253 and pass.; Bergmann (n 5) 7; Anne Peters, *Women, quotas and constitutions : a comparative study of affirmative action for women under American, German, EC and international law* (Kluwer Law International 1999) 61-64; Sandra Fredman, *Human Rights Transformed* (OUP 2008) ch 7. See also, C-158/97 *Badeck v Hessischer Ministerprasident* [2000] ECR I-1875; C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051; and less clearly, C-409/95 *Marschall v Land Nordhein- Westfalen* [1998] ECR I-6363.

[8] See Fredman (n 7) 177. Cf. McCrudden (n 2) 10.

[9] Cf. William Bowen and Derek Bok, *The Shape of the River* (Princeton University Press 1998) chs 2-3.

[10] Cf. Eugene Volokh, 'Diversity, Race as Proxy and Religion as Proxy' (1996) 43 UCLA Law Review 2059, pass.; Brest and Oshige (n 4) 862-865; Bergmann (n 5) 9-10 and 106-108; Terry H Anderson, *The Pursuit of*

representatives in a given context so as to enable them to present the views and perspectives of the group (this relates to the concept of 'critical mass' discussed in Chapter 1). Mere 'symbolic' presence or 'tokenism' would not do.

Additionally, affirmative action may be seen as seeking the formation of leaders within disadvantaged groups, capable of being role models and showing the way to achieve full social integration.[11] More generally, benefits received by these individuals would be multiplied because they would impact on the group as a whole.[12] Finally, the overcoming of stereotypes and the upholding of social cohesion have also been identified as possible aims for affirmative action.[13]

b) Legal debate

Affirmative action, particularly in its strongest forms, has been subject to a long and sophisticated discussion about its utility and its constitutional permissibility. This is partly because the adoption of certain affirmative action policies has meant challenging cherished legal notions such as neutrality and 'blindness' (ie the general moral and legal irrelevance of individual characteristics such as race or sex).[14] Affirmative action is not neutral, because its declared attempt is to give special treatment only to some members of the

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Fairness (Oxford University Press 2004), 220ff; Bowen and Bok (n 9) ch 8; Barbara A Perry, *The Michigan Affirmative Action Cases* (University Press of Kansas 2007) 137.

[11] Cf. Brest and Oshige (n 4) 869-870; Bowen and Bok (n 9) pass.

[12] Brest and Oshige (n 4) 899.

[13] Cf. Ibid, 871-872; McCrudden (n 2) 9 and 11.

[14] Jerome McCristal, 'Color Blind Remedies And The Intersectionality Of Opresión: Policy Arguments Masquerading As Moral Claims' (1994) 69 New York University Law Review 162, 166; Green (n 6) 126; Loury (n 6) 253-259.

society. It is not 'blind' either, because entitlement to such special treatment derives precisely from personal characteristics such as race or sex. Affirmative action provides several justifications for this radical stance. *Prima facie* neutral norms, when applied, can have effects that are anything but neutral. These 'uneven' results may be caused by the content of the norm, or by its interpretation and implementation by state agents (eg judges, executive officers), whose decisions may be influenced by prejudice or stereotyping. Moreover, neutrality and blindness may be dangerous illusions that, in practice, have the effect of reinforcing the dominant views imposed by the advantaged groups (and therefore, indirectly, allowing discrimination to continue).[15] In the past, legal rules have not been normally enacted for members of the excluded groups, but for members of the privileged strata. Hence, even leaving aside discriminatory intention, legal rules have been made from the dominant groups' perspective, equating what is 'normal' with the dominant group's experiences and views. Legal norms regard whiteness, maleness, etc. as the standard, and the excluded groups become what are considered as different, alien or abnormal.[16] Consequently, it is likely that apparently 'neutral' or 'blind' legal norms enshrine a set of prejudices against disadvantaged groups, or at the very least such norms may not be as responsive to the needs of disadvantaged groups as they are to those of the dominant groups. Moreover, assimilation becomes the only way out from exclusion,[17] which is precisely what minority groups may want to avoid. A further consideration is that legal

[15] Eg Mary E Becker, 'Prince Charming: Abstract Equality' [1987] The Supreme Court Review 201, pass.; Denise G Réaume, 'Discrimination and Dignity' (2003) 63 Lousiana Law Review 645, 672.

[16] See Cecil J Hunt, 'The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence' (2006) 11 Michigan Journal of Race and Law 477, pass.

[17] Cf. Sandra Fredman, 'Combating Racism with Human Rights: The Right to Equality' in Sandra Fredman (ed), *Discrimination and Human Rights The Case of Racism* (OUP 2001) 16-17.

'blindness' may be a mistake because personal characteristics could not be ignored in the real world where legal rules and public policies must be applied.[18] Moreover, absolute blindness is a logically impossible notion, particularly regarding biological factors such as race or sex, because, as stated by Hunt: 'Not only are there no unraced people, but there is no model or paradigm to dictate how to imagine one'[19]. Conversely, in some contexts it is convenient to take into account factors such as race, sex or religion. At the cost of certain degree of stereotyping, those factors may help define the adequacy of a person for a job by providing information about their relevant life experiences, or even by predicting their capacity to do certain jobs.[20]

Affirmative action policies, at least of the strongest types (such as quotas), also challenge the notion of merit.[21] This is because they seem to substitute 'non-meritocratic' personal characteristics, such as race or sex, for more traditional talents or capacities as the decisive factor in the allocation of goods. Supporters of affirmative action have argued that it is not clear what should be regarded as merit (eg biological abilities; acquired skills; knowledge; experience; productivity; psychological features; physical attributes; achievements; desert; moral virtues).[22] For them, merit seems to be a highly contextualized notion, ie its definition strongly depends on the specific circumstances where it is invoked, particularly the nature of the desired good or position. Further problems noted by

[18] Cf. Robert C Post, 'Prejudicial Appearances: The Logic of American Antidiscrimination Law' (2000) 88 California Law Review 1, 12-16; Becker (n 15) 214ff.

[19] Hunt (n 16) 527.

[20] Ibid 528. Cf. Christopher McCrudden, 'Merit Principles' (1998) 18 Oxford Journal of Legal Studies 543, 565-566.

[21] McCrudden, 'A Comparative Taxonomy of 'Positive Action' and 'Affirmative Action' Policies' (n 2) 6-8.

[22] Cf. McCrudden, 'Merit Principles' (n 20); Green (n 6) 31-40.

supporters of affirmative action concern how merit is to be measured and how far the merit of one person can be compared with that of another (even when some kind of 'objective' test exists, it could hide biases and/or reinforce established patterns of social domination), which in turns points toward the broader topic of procedural fairness in the determination and evaluation of merit.[23] Additionally, it has been argued that a meritocracy may not be particularly egalitarian or redistributive.[24] In fact, merit is unequally distributed in the population and not every talent is appreciated as such (every society will value only a number of attributes as meritorious), and many of the attributes rewarded are simply those that a person gains by luck rather than effort. Consequently, meritocracy could become a rather conservative notion, capable of reinforcing existing patterns of inequality. In addition to all these issues, there is also a more 'philosophical' objection that challenges the assumption that merit is a *sine qua non* requirement of fairness for all kind of allocation processes.

Notwithstanding all of the above, it would be wrong to see a complete standoff between affirmative action and merit. Because the latter is such a flexible and contextualized notion, in some circumstances it may even include factors such as race or sex, and therefore allocation of goods according to those characteristics would not be a breach of the meritocratic rationale. Additionally, it can be argued that affirmative action could help meritocracy to develop, because it would fight discrimination, which among its many evils, makes meritocracy impossible.[25]

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[23] Cf. James Fishkin, 'Liberty Versus Equal Oppportunities' in Ellen Frankel Paul (ed), *Equal Opportunity* (Basil Blackwell 1987) 35; Bergmann (n 5) 102ff.

[24] Cf. John H Schaar, 'Equality of Opportunity, and Beyond' in R Pennock and John W Chapman (eds), *Equality* (Atherton Press 1967) 230.

[25] Cf. Bergmann (n 5) 13 and 20-23.

In any case, given all the characteristics of affirmative action just sketched out, it is not surprising that it has been the subject of a furious legal debate. A simple - and morally appealing - argument against affirmative action is that the end does not justify the means, ie it would be unacceptable to solve discrimination against one group by discriminating against another group, particularly on the basis of 'impermissible grounds' such as race or sex. The principle of legal blindness, which allowed the anti-discrimination and civil rights movement historically to capture the high moral ground, should not be abandoned.[26] The problem would be especially serious when analysed from an individualistic perspective, because it seems that affirmative action not only breaches equal treatment,[27] but also imposes disproportionate burdens upon members of advantaged groups in order to improve the situation of the members of disadvantaged groups.[28] Those 'victims' are, contrary to the Kantian prescription, treated not as ends in themselves but only as means to achieve further egalitarian goals. Worse still, such victims may belong to other disadvantaged groups, or to the worse off subgroups within advantaged groups (eg lower class white males).

The response of affirmative action's supporters to these arguments is varied and tends to coincide with the very reasons to implement such policies (eg the inability of traditional anti-discrimination measures to eradicate certain kinds of pervasive discrimination and to protect minorities). Additionally, there is a particularly compelling argument against the assumption that affirmative action is a form of discrimination on

[26] See Terry Eastland, *Ending Affirmative Action. The Case for Colorblind Justice* (BasicBooks 1997) ch Two; Morris Abram, 'Affirmative Action: Fair Shakers and Social Engineers' (1986) 99 Harvard Law Review 1312, pass.

[27] Cf. *Marschall v Land Nordhein- Westfalen*; *Kalanke v Freie Hansestadt Bremen*; although the more recent *Badeck v Hessischer Ministerprasident* does not confirm this specific point.

[28] Cf. R H Fallon Jr and Weiler (n 6) 37ff.

impermissible grounds. The criterion used by affirmative action to discriminate is not sex, race, etc., ie the ground originally used to discriminate against the beneficiaries of affirmative action, *but the discrimination or disadvantage that is currently or was in the past suffered by them*. In other words, people are not being specially treated because of their race, sex, etc., but because, for example, they have been, or are being, discriminated against. Consequently, beyond superficial similarity, there is a world of difference between the original discrimination (based on morally irrelevant grounds such as race) and affirmative action (based on a morally relevant factor: discrimination, or disadvantage).[29] This argument, however, is closely related to the notion of past or present discrimination, and it is not equally applicable to all the other aims of affirmative action that have been claimed, such as the achievement of diversity or the promotion of role-models.

An additional kind of criticism of affirmative action focuses on its aims, which are regarded as confusing, eventually incompatible with each other, and of dubious constitutionality. Particularly controversial has been the aim of compensation for past group discrimination, which raises concerns not only about its feasibility,[30] but also the constitutional legitimacy of transferring responsibility for and benefits of past misdeeds without a clear link shown between individuals in the present day and those responsible in the past (eg present whites being responsible for, and present blacks being entitled to benefits due to, discrimination against past generations of blacks practiced by past generations of whites): simply belonging to the same group should not be enough. It also seems counterintuitive to punish all members of the advantaged groups for practices they did not participate in, particularly in the case of those members genuinely opposed to such

[29] James W Nickel, 'Discrimination and Morally Relevant Characteristics' (1972) 32 Analysis 113.

[30] Cf. Fishkin (n 23) 43-44; Loury (n 6) 260-261.

practices. Moreover, past discrimination is mostly *past*, ie it has been already overcome, or nearly so.[31]

Affirmative action supporters respond to these criticisms by arguing that systemic discrimination is essentially group-based and should be dealt with from that perspective: all members of the advantaged and disadvantaged groups have had their direct or indirect share in the benefits and harms. Present whites do benefit from past discrimination in their favour, as present blacks suffer the consequences of it.[32] Thus, past discrimination is not really *past* insofar as its consequences are currently felt: the present world has been modelled and defined by it. However, it must be noticed that sometimes the aim of compensation for past discrimination is 'individualized' so as to cope with the criticism explained in this paragraph. This may be done by two complementary mechanisms: by compensating only individuals who have suffered verifiable past discrimination, and by allowing the adoption of affirmative action policies only by those who have discriminated in the past against the group that is now being favoured.[33]

The aim of achieving diversity through affirmative action is also highly contested, and has been criticised for, *inter alia*, being a rather obvious mask for the proportional representation of groups.[34] The diversity argument has also been challenged due to the inconsistency between its theoretically broad scope and its application in practice virtually

[31] Katznelson (n 4) 167.

[32] Ibid pass.

[33] Cf. Peters (n 7) 53ff.

[34] See the Chief Justice Rehnquist's opinion in *Grutter v. Bollinger* 539 US 306 (2003) USSC. See also Samuel Issacharoff, 'Law and Misdirection in the Debate over Affirmative Action' [2002] The University of Chicago Legal Forum 11.

only to race or ethnicity. Its incompatibility with time limits has also been highlighted.[35] Moreover, the beneficial effects of diversity are called into question not only for lacking empirical testing and confirmation, but also for not being clearly defined. Similarly, the concept of 'critical mass' is particularly contested as only conjectural (see Chapter 1). Finally, fostering diversity is not entirely compatible with the aims of addressing present discrimination or compensating for past discrimination. This is evident as regards the identification of target groups: diversity is much more comprehensive and can be applied along many different groups that may not be normally understood as subject to unfair discrimination (eg geographical origin; city-countryside residency; artistic/sporting interests). Moreover, a diversity rationale may not consider groups discriminated against in the past as targets for diversity, or it may extend affirmative action to so many groups that its benefit to for the discriminated-against community may become of little value. Even more important, the application of diversity may require a highly individualized assessment of the pool of candidates so as to determine in how many ways and to what extent each one improves the diversity of the institution (actually, the process would be very demanding insofar as it would require simultaneous consideration of each applicant and of possible compositions of the institution as a whole).[36] The past or present discrimination rationale, on the other hand, is not concerned with the individuality of the candidate, but only with one of his or her personal characteristics. Thus, the approach is different and also simpler to apply, because it assumes the use of a limited number of proxies, eg race, sex. A further example of this incompatibility of aims is the fact that diversity would not necessarily

[35] Eg Issacharoff, 'Law and Misdirection in the Debate over Affirmative Action' (n 34) 35-36; Eastland (n 26) ch Four and 109ff.

[36] Cf. Eastland (n 26) 82; Bowen and Bok (n 9) 277; Issacharoff, 'Can Affirmative Action Be Defended?' (n 4) 678.

require proportional representation. Actually, a marginal-utility principle applies: after the first black, Muslim, women, etc., is selected, the introduction of further members of this group contributes less and less to diversity. Thus, even accepting a threshold imposed by the notion of critical mass, affirmative action based on diversity fails short of the proportional integration of, at least, the largest disadvantaged groups.[37]

A different set of criticisms of affirmative action focuses on the identification of the beneficiaries. As explained in Chapter 1, although the development of certain criteria is possible, the final decision about what groups 'deserve' affirmative action is always political, with the consequent risk of promoting a harsh kind of interest, or identity, politics[38] that may not benefit the most disadvantaged (who are often the least capable of exerting political pressure). Moreover, it is one thing to identify which groups should be entitled to affirmative action measures and a different one to determine the membership of those groups (how much 'racial purity' would be necessary? is religion a matter of self-definition?). There is also the issue of intersectionality or multi-dimensional discrimination. As mentioned in Chapter 2, individuals may belong to two or more disadvantaged groups simultaneously.[39] Thus, policies that may benefit one such group may disfavour the

[37] Cf. Anne Phillips, *The politics of presence* (Claredon Press 1998) 67.

[38] Eg Abram (n 26) 1320-1321.

[39] See Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] University of Chicago Legal Forum 139; Lisa García, 'Intersections of Inequality: Understanding Marginalization and Privilege in the Post-Civil Rights Era' (2007) 3 Politics and Gender 232; Ange-Marie Hancock, 'Intersectionality as a Normative and Empirical Paradigm' (2007) 3 Politics and Gender 248; Julia S Jordan-Zachery, 'Am I a Black Woman or a Woman Who is Black? A Few Thoughts on the Meanings of Intersectionality' (2007) 3 Politics and Gender 254; Evelyn M Simien, 'Doing Intersectionality Research: From Conceptual Issues to Practical Examples' (2007) 3 Politics and Gender 264.

others.[40] Or policies may favour a disadvantaged group as a whole (eg blacks), but not sub-groups within that larger group which are subject to an additional kind of discrimination (eg black women). Or they may simply fail to grasp the unique complexity of a multidimensional disadvantaged status so as to properly address it. Moreover, the evolving nature of discrimination poses interesting questions, such as when it can be said that a group has started to be discriminated against, or has overcome such discrimination. Against all these difficulties, supporters of affirmative action stress that not all groups have equally strong claims to special treatment, and that it is possible to develop *legal* and not only *political* criteria to identify those groups (as discussed in Chapter 1 regarding the political context). With regard to the other objections mentioned above, they may be considered as relevant but not fatal, demanding careful policy design and implementation that may be difficult but is not impossible to achieve.

A further type of criticism of affirmative action (particularly applicable to quotas) has being quite successful before certain courts such as the European Court of Justice and the U.S Supreme Court. This criticism relates to the insufficient consideration given to the uniqueness of each individual in affirmative action programmes.[41] Because only a single personal characteristic is taken into account, individuals are said to be 'reduced' to their race, sex, religion, etc. In addition to its conceptual and philosophical problems, this approach may cause negative practical consequences insofar as there may well be other crucial factors to establish discrimination or the necessity of affirmative action. Thus,

[40] See Owen M Fiss, 'Groups and the Equal Protection Clause' (1976) 5 Philosophy and Public Affairs 107, 163-164.

[41] See Justice Powell's opinion in *Regents of the University of California v. Bakke* 438 US 265 (1978) USSC; *Gratz v. Bollinger* 539 US 244 (2003) USSC; *Badeck v Hessischer Ministerprasident*; *Marschall v Land Nordhein- Westfalen*; *Kalanke v Freie Hansestadt Bremen*.

problems of under-inclusiveness and over-inclusiveness arise, because neither all the members of disadvantaged groups are in fact disadvantaged nor all the disadvantaged are members of disadvantaged groups. A related problem is the phenomenon known in India as the problem of the 'creamy layer', ie affirmative action policies tend to benefit the most advantaged subgroups within the disadvantaged group that is favoured with special treatment.[42] This may result in benefits being allocated to individuals who are actually better off than some less well-off members of the advantaged groups, or even more problematic, it may lead to opportunities being transferred directly from the latter to the former. Although some kinds of affirmative action may be sensitive to these concerns (eg they may consider race or sex only as a final tie-break), the inflexibility of quotas makes them particularly objectionable under these arguments.

A defence of quotas would highlight, *inter alia*, the human and financial costs associated with individualized assessments and even the impossibility of carrying them out in certain contexts. It would also emphasize the importance of careful design and implementation so as to select good proxies for discrimination that avoid, as much as possible, over or under inclusiveness.

Other criticisms that arise when affirmative action is seen not only as a policy but also as a 'right', object to its reliance on the highly contested notion of group rights, ie the idea that groups have their own distinct rights, which are '*irreducible to the sum of the rights of the respective group members.*'[43] Several legal traditions consider that only

[42] Eg Thomas Sowell, *Affirmative Action Around the World* (Yale University Press 2004), ch 2 and 186-187; Abram (n 26) 1323; Eastland (n 26) 76-77. See also Mark Tushnet, 'Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action' (2004) 36 Connecticut Law Review 649, 655-661.

[43] Dimitrina Petrova, 'Racial Discrimination and the Rights of Minority Cultures' in Sandra Fredman (ed), *Discrimination and Human Rights The Case of Racism* (OUP 2001) 66.

individuals have legal rights, and that groups *as such* have no further rights beyond those of their individual members. From this perspective, affirmative action rhetoric about group rights is inherently wrong, albeit strategic, because it muddles the fact that strong forms of affirmative action (especially quotas) give the rights of some individuals 'automatic' precedence over the rights of others.[44] A related issue, which arises irrespective of whether affirmative action is seen to be a right or not, is that the 'group rhetoric' allows affirmative action to capture the high moral ground. This is because the interests of those negatively affected by affirmative action are confronted with the interests of a whole group of people, who also happen to be disadvantaged. In other words, the conflict ceases to be between individual X and Y, and becomes a problem between the presumably advantaged individual X and the group of disadvantaged Ys (eg women, blacks). This in turn allows the attribution of labels such as 'selfishness' or 'social good' to the respectively motives of each side of the conflict.

The main response to these criticisms is that affirmative action does not necessarily rely on a notion of group rights. Although membership in certain groups may be regarded as a proxy for discrimination, this is not to say that the group as such has rights, and the focus could perfectly well remain on the protection of the individual rights of the members of discriminated groups. Moreover, it seems clear that affirmative action deals with a kind of discrimination that disfavours people not because of their individuality, but because of their membership in a disadvantaged group.[45] Therefore, it is possible to say that the group as a whole is wronged and requires protection, and all its members should be regarded as victims entitled to special treatment. Although these ideas turn the notion of group into an

[44] Cf. Ibid, 66-67.

[45] Cf. Ibid, 67-68.

essential component of affirmative action policies, it does not necessarily require the idea of group rights.

Affirmative action is also criticised for its consequences and results. A first claim is that affirmative action has not been able to eradicate pervasive discrimination against disadvantaged groups, questioning the figures, data and evidence advanced by supporters of affirmative action, or downplaying their importance as only circumstantial, or valid exclusively for specific and limited contexts. The case that is typically invoked is that of the African-American in the US. Supporters of affirmative action, however, insist that it does work. Although such policies may have been insufficient, or may have suffered from deficient design, implementation and enforceability, there has been relevant progress.[46] Examples of this progress that are frequently cited are: the improvement in the socio-economic and cultural achievements of the members of disadvantaged groups, or at least of the individuals favoured by affirmative action programmes; the impact of those favoured upon their respective communities as role models and leaders; the reduction of stereotypes thanks to the 'forced coexistence' of members of advantaged and disadvantaged groups, and the improvement in the development of the potentialities not only of particular individuals, but of the population as a whole.[47]

A related criticism touches upon the fact that affirmative action has been traditionally, although not unanimously, conceived as time-limited.[48] Noting that its goals

[46] Cf. Bergmann (n 5) 52ff.

[47] Bowen and Bok (n 9) pass.; Ronald Dworkin, *Sovereign Virtue* (Harvard University Press 2000) ch 11; Kim Forde-Mazrui, 'Taking Conservatives Seriously: A Moral Justification for Affirmative Action Reparations' (2004) 92 California Law Review 685.

[48] Eg *Grutter v. Bollinger*; Bergmann (n 5) 97; M A Barrère, *Discriminación, Derecho antidiscriminatorio y acción positiva en favor de las mujeres* (Civitas 1997) 30; R H Fallon Jr and Weiler (n 6) 53.

remain far from fulfilled, critics argue that affirmative action has become permanent thanks to its own failure to bring about the promised change.[49] Thus, it would make no sense to continue with an anomalous policy that has not been able to perform the tasks it was created to achieve. Supporters of affirmative action, however, may respond that time-limited is not the same that short-lived. Moreover, after centuries of across-the-board discrimination against some groups,[50] it may be argued that granting a few decades of affirmative action in certain areas should not be considered as excessive.

A further argument is that affirmative action stresses precisely those differences and personal characteristics that should be irrelevant, such as race, sex or religion. Thanks to affirmative action, they would remain visible and important, consolidating and freezing the social divisions created around them.[51] Even worse, affirmative action may cause a negative response in the population at large, and particularly among those directly disfavoured by such policies.[52] Hostility may arise against those favoured by affirmative action and, all in all, social peace may be adversely affected. Against these arguments, supporters of affirmative action, as already explained, denounce the dangers involved in the ideas of legal blindness and neutrality. As regards the hostility caused by affirmative action, some scholars deny it,[53] whereas others consider it to be a price worth paying, at least from the disadvantaged's perspective.[54]

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[49] Cf. Eastland (n 26) 14-17; Sowell (n 42) 3-7 and pass.

[50] Cf. Hunt (n 16) 536-543; Katznelson (n 4).

[51] Eg Abram (n 26) 1322-1323.

[52] Eastland (n 26) 87; Sowell (n 42) 16-19; Anderson (n 10) 228ff; Loury, 267.

[53] Eg Bowen and Bok (n 9) 266-269. Cf. Bergmann (n 5) ch Six.

[54] Eg. Bergmann (n 5) 132-138.

Affirmative action has been also accused of lowering the standards of the institutions that use such policies, particularly (but not exclusively) in the higher education context.[55] This is because merit considerations would be left aside, or at least tempered, by non-meritocratic factors such as race, sex, etc., and therefore institutions would not get 'the best' individuals they could (ie those hired if affirmative action policies were not in place). A related criticism of affirmative action states that people who are favoured by it may not be capable of performing adequately in the institutions they were accepted by,[56] and also that they may not be able to compete with those who obtained their positions 'normally'. Supporters of affirmative action would object, as explained before, that the meritocratic argument itself faces severe difficulties, and also that there is no absolute opposition between merit and the consideration of factors such as race or sex.[57] They may also deny that the lowering of standards or the loss of competitiveness take place,[58] or the lack of capability of those favoured by affirmative action to cope with the demands imposed on them.[59] And even if all such evils were true, it is said, affirmative action would have advantages that would still outweigh its disadvantages.

An additional negative consequence of affirmative action is its alleged reinforcement of the image of the targeted groups as inferiors. Thus, affirmative action would be self-defeating: although it attempts to eradicate traditional patterns of discrimination based on the notion of certain groups being less worthy, it also reinforces

[55] Eastland (n 26) 72-73; Abram (n 26) 1319-1320.

[56] Loury (n 6) 267-268; Sowell (n 42) 145-152.

[57] Bowen and Bok (n 9) 278ff.

[58] Cf. Harry J Holzer and David Neumark, 'What Does Affirmative Action Do?' (2000) 53 Industrial and Labor Relations Review 240, 264-265 and 269-270; Bergmann (n 5) 20-23.

[59] Bowen and Bok (n 9) 256-265.

such patterns by stigmatising those favoured by it. In fact, those favoured by affirmative action would be seen by the non-favoured as requiring 'special aid' to achieve what they won by themselves, and therefore as being less capable and inferior. A related problem is said to be that affirmative action policies cast a shadow of doubt over the capacities and merits of all the members of the disadvantaged group,[60] irrespective of whether they have been actually favoured by affirmative action or not. Supporters of affirmative action deny all of the above, mostly arguing that those favoured by such policies do not have a sense of stigma,[61] feeling perfectly comfortable within the respective institutions and with their achievements.[62] Moreover, it is argued that a clear majority of the members of disadvantaged groups supports affirmative action, which would not be the case if the problems mentioned above were as serious as opponents of affirmative action suggest.[63] It must be said, however, that these arguments do not address the core of the issues raised above, because they refer to a different line of criticisms against affirmative action: those focused on its negative impact over the disadvantaged groups' self-esteem and self-confidence. However, what really counts for the anti-affirmative action arguments analysed here is not what the members of discriminated groups think or feel, but what the members of *dominant* groups think or feel with regards to them. This is because the crux of the discrimination problem is the lower worth attributed by the dominant groups to the disadvantaged groups. Therefore, it is the former's perception that really matters in this context. Thus, a more precise pro-affirmative action argument would be, as already stated,

[60] Eg Eastland (n 26) 85-86.

[61] Cf. Hunt (n 16) 545.

[62] Cf. Bowen and Bok (n 9) chs 7-8.

[63] Bergmann (n 5) 143-147; Hunt (n 16) 545. But contrast with Eastland (n 26) 157-158 and 184.

that ‘forced coexistence’ of members of advantaged and disadvantaged groups may be the best way to overcome negative stereotypes and inferiority images.

Litigation about affirmative action has frequently revolved around the arguments summarized above, although it has also paid attention to the particularities of the policy that is being challenged. Examples of this are: the flexibility of the policy (eg whether it provides for individualized consideration or its application is rather automatic; whether it requires a minimum level of competence or ‘merit’ of the beneficiaries); its duration; its formulation as ‘neutral’ or one-sided (eg quotas for each sex or just for women); the availability of less harsh alternatives; and the seriousness of the burden imposed on the ‘victims’. [64] A further issue that has been central to affirmative action cases is the determination of the level of scrutiny that should be applied to such policies.

3.3 The Relationship between EQW and Affirmative Action

Many legal scholars consider EQW as species of the genus affirmative action,[65] and therefore the scholarly discussion about the constitutionality of the former usually follows the debate about strong forms of the affirmative action explained above (this will

[64] See supra 41 and also *Méndez Pérez v. Spain* App no 35473/08 (ECtHR, 4 October 2011); *Parents Involved in Community Schools v. Seattle School District No 1* 551 US 701 (2007) USSC; *Grutter v. Bollinger*. See also Peters (n 7) pass.

[65] Eg Aileen McHarg, ‘Quotas for Women! The Sex Discrimination (Election Candidates) Act 2002’ (2006) 33 Journal of Law and Society 141, pass.; Drude Dahlerup, ‘Electoral Gender Quotas: Between Equality of Opportunity and Equality of Result’ (2007) 43 Representation 73, 78; Manon Tremblay, ‘Democracy, Representation, and Women: A Comparative Analysis'’ (2007) 14 Democratization 533, 538; L Favoreu (P Bravo tr), ‘Principio de Igualdad y Representación Política de las Mujeres: Cuotas, Paridad y Constitución’ [1997] (50) Revista Española de Derecho Constitucional 13, pass; McCrudden, ‘A Comparative Taxonomy of 'Positive Action' and 'Affirmative Action' Policies’, 15-16; Carla M Zoethout, ‘Paritary Rights for Women in France: Yes to the Final Result, But Not to the Underlying Principle’ [2001] Ius Gentium 155, pass.

be further illustrated in the case studies). EQW, however, present certain particularities that should not be overlooked.

First, not all the aims relied on by affirmative action policies are readily applicable to EQW. For example, compensation for past discrimination is rarely if ever present in the discussion about EQW.[66] The aim of achieving diversity is not entirely convincing either, for several reasons. EQW can only appeal to a very restricted notion of diversity, namely gender diversity. We have discussed in previous chapters how supporters of EQW often insist that these quotas should not be extended to other groups, highlighting women's uniqueness and the exceptional relevance of gender, a narrow view of diversity that may weaken the case for diversity as a whole. This is even more evident when women's *internal* diversity is considered (as discussed in chapter 1, women are a very heterogeneous group, and in certain contexts the differences between women may well outweigh their similarities). Simply stated, invoking diversity as a rationale to put more women in legislatures, but not including other groups, or ensuring the representation of different sub-groups of women, seems inconsistent. Drawing on Ferrajoli's analysis (see Chapter 7), this may be a case of *legal differentiation between differences*, ie certain differences are valued whereas others are devalued, thus creating a hierarchy between different identities. A further consideration is that the aim of diversity has been associated with the concept of critical mass (discussed in Chapter 1), which is only partially applicable in the case of EQW. Although it may help in justifying the adoption of EQW due to the absence of enough women in Parliaments, it may also work as an inconveniently low ceiling. In other words, the notion of critical mass may support the claims of small minorities demanding

[66] Cf. Peters (n 7) 108.

numbers of representatives beyond their proportion in the population. But women account for more than 50% of the population, and current EQW normally demand between 30% and 50% of the electoral slots (the gradual development of the notion of 'parity democracy', further explained in Chapter 5, has pushed EQW 'upwards'). Thus, the notion of critical mass becomes redundant, or even harmful if the quota is close to 50%, because it would be difficult to justify that women need a level of presence that high to be fully effective as substantive representatives of women.

The affirmative action aims that provide a best fit for EQW are those that address current discrimination (against women in politics), and the underrepresentation of disadvantaged groups (women) in a given context (political). However, regarding the latter, the debate about EQW has not closely followed the discussion about the different (and partly conflicting) rationales that underpin this aim (eg redistribution, recognition, social utility). Although the EQW debate draws certain issues from this discussion (eg the inclusion of women in politics as a contribution to the common good), it has a distinctive content coming from theories of political representation, as discussed in Chapter 1.

A fundamental innovation of the EQW debate, which is often alien to 'conventional' discussion about affirmative action, is the employment of traditional concepts of constitutional theory, such as representation and citizenship, to justify these measures. This doctrinal innovation has strategic advantages. First, it may discourage the intervention of the courts, which are usually reluctant to resolve between different views about what representation or citizenship are or should be, or when these notions are 'real' or 'effective', or how to resolve conflicts between these notions and individual rights.[67]

[67] But see *Sejdić and Finci v. Bosnia and Herzegovina* 28 BHRC 201.

This reluctance may respond to several rationales such as the political nature of these matters, separation of powers considerations, lack of appropriate standards, or rejection of judicial activism. Second, using this 'political discourse' allows EQW to benefit from the continuing criticism of representative democracy. Thus, EQW present themselves as an improvement of the political system, a necessary evolution towards better forms of democracy, something that is alien to 'traditional' affirmative action. Third, in jurisdictions where the traditional affirmative action discourse is rejected or deeply suspect, EQW can resort to a novel set of justifications and rationales.

Another issue that may help the case of EQW vis-à-vis 'traditional' affirmative action is that, although EQW are quotas, they seem to be 'softer' than many quotas existing in other contexts. EQW do not apply automatically, ie excluding consideration of the particularities of the individuals affected by them. Although gender is paramount in granting access to the ballot, the mere fact of being in the electoral list is not the final objective of EQW, but only a means to achieve the goal of having more female representatives. However, EQW do not force this outcome (unless they are formulated in a very stringent way), but preserve the electorate's freedom to choose male or female representatives. Once the candidates are defined, the electorate remains free to take into account an array of qualities and personal features of the candidates (eg political affiliation, age, agenda, values). Sex becomes one factor among many, and its relevance will depend on each voter's views. This individualized analysis is not available in many other quotas contexts, where a given proxy (such as sex) is a necessary and sufficient condition for a certain outcome (eg mandatory sexual quotas in the composition of companies' boards).

The importance of this difference can be seen by comparing a strict quota in the employment context with a hypothetical quota similar to EQW in the same context. A strict

employment quota would require that the company hires a minimum percentage of women for top executive positions within the company. A quota similar to EQW would demand, in contrast, that every list of candidates for such positions that is presented to the selection board has a minimum percentage of women. Thus, the *process* of selection is more gender balanced, but the final decision is not necessarily related to the sex of the candidates, and the body that makes the decision can give individualized consideration to all candidates. Summing up, it can be said that EQW are a softer type of quota because they do not impose sex as the decisive factor in the final decision about who the political representatives will be.

A further peculiarity of EQW is that, whereas quotas in other contexts are often regarded as incompatible with traditional understandings of merit (see discussion above), EQW avoid that confrontation. This is because notions of merit are not regarded as preeminent in the electoral context, and the political world is not a meritocracy.[68] Although demanding approaches towards citizenship and certain theories about elitist democracy may suggest something different, in practice it is not possible to enforce meritocracy in the political context, as may be done, for example, in the employment context. Again, it is useful to distinguish between two stages in the electoral process: access to the ballot, and the actual election. The selection of candidates is primarily made by political parties, which take into consideration factors that are more politically relevant than traditional merit, such as charisma, popularity and political influence. This ability to choose candidates on the basis of characteristics that are not conventionally meritocratic in one sense is part of the

[68] Cf. Alfonso Ruiz, 'Paridad Electoral y Cuotas Femeninas' [1999] (1) Aequalitas 44, 49; Danièle Loschak, 'Les hommes politiques, les << sages >> (?)…et les femmes (a propos de la decisión du Conseil constitutionnel du 18 novembre 1982)' [1983] (2) Droit Social 131, 135; José García, 'Representación Política de las Mujeres y Cuotas' [2002] Derechos y Libertades 345, 369.

autonomy accorded to political parties. Moreover, as further discussed in Chapter 4, access to the ballot is not usually considered as an individual right to be candidate, and therefore, claims of individual talent or desert to be candidate are barely relevant. What matters is that 'others' (the ones that select the candidate within political parties) *want* to include that individual in the ballot. However, that desire may rest on reasons quite different from merit considerations. And even if the 'others' do want to select candidates on meritocratic grounds, there is no clear answer to what 'merit' would be in this context. This may be different for each of the individuals involved in the selection process, and may even include the sex of the candidate. Something similar happens in the next stage of the electoral process, when electors select representatives: they have complete freedom to vote for whomever they want and for whatever reason (or none) they deem sufficient, whether related to traditional understandings of merit or not. Moreover, electors are under no obligation to justify their decision. In sum, EQW do not challenge meritocracy because the latter is not a relevant or enforceable feature of electoral processes. This is a sharp contrast with other contexts, such as employment, where merit is expected to be the main (if not the only) factor in selection processes, and where the selecting body should be able to justify its decisions on meritocratic grounds.

Another particularity of EQW is that, although there are electoral quotas that favour other groups, the overwhelming majority of these arrangements (worldwide) target women. Consequently, the doctrine and discourse supporting EQW have been developed by agents who are not the same as those who created 'traditional' affirmative action doctrine and discourse. The former are mostly women working in different variations of feminist theories about the state and the political system, and whose particular views and goals become entrenched in their arguments and explanations. Thus, the EQW discourse

evidences a transformation of traditional affirmative action arguments, which are usually reshaped, supplemented or even superseded by feminist considerations (eg the sexual duality of humankind as *the* starting point for equality claims). Additionally, a set of novel notions is developed and occupies a central stage, such as 'parity democracy' and 'couple-discourse' (see Chapter 5). The tight connection between electoral quotas, women and feminism is rendered evident when supporters of EQW claim that electoral quotas are only appropriate for women and not for other disadvantaged groups. This also relates to some women's strong reluctance to be considered as a 'social group' equivalent to racial, ethnic or religious minority groups.[69] This seems to be an additional deviation from conventional affirmative action discourse, which is precisely focused on group membership and minority status.

Finally, another difference between EQW and 'traditional' affirmative action is that whereas the latter is regarded as temporary, EQW have evolved towards a rather permanent status. This is not only due to its constitutionalisation in some countries (such as France, Belgium and Portugal), but also to the increasingly common view of parity as an inalienable, constitutive feature of contemporary democracy.

3.4 Conclusions

EQW have often been uncritically regarded as affirmative action (of the strong kind), thus exposing it to the legal and political controversy that surrounds the latter. However, the particularities of EQW render some of the constitutional objections against

[69] See Helen Mayer Hacker, 'Women as a Minority Group' (1951) 30 Social Forces 60.

strong forms of affirmative action less compelling, particularly because these quotas do not impede individualised consideration of candidates, and also because EQW are more compatible with traditional approaches to merit. Moreover, the theoretical framework of EQW includes traditional concepts of constitutional theory (such as representation), which allow EQW to distance themselves from traditional affirmative action. In Part II of this thesis, the compatibility between strong forms of affirmative action and particular legal systems will be tested, as a criterion for assessing the constitutionality of EQW in those systems. In the next chapter, the final theoretical component of the debate about EQW will be discussed, which is political rights.

CHAPTER 4

POLITICAL RIGHTS AND ELECTORAL QUOTAS FOR WOMEN

4.1 Introduction

Political rights are entitlements to political participation. They are also basic requirements of political equality,[1] a dimension of equality that focuses on how political power should be distributed and what forms of political participation should exist in a political system.[2] The discussion about the constitutionality of EQW usually involves consideration of their relationship with political participation and political rights, mainly because electoral quotas are seen as a controversial limitation of the latter. Considering that political participation and political rights normally enjoy a preeminent position in the constitutional hierarchy within legal systems, their compatibility with EQW is a fundamental issue in assessing the constitutionality of EQW in particular jurisdictions. In order to be able to assess the relationship between EQW and the right to political participation

[1] Cf. John Rees, *Equality* (Pall Mall 1971) 50; Jonathan W Still, 'Political Equality and Elections Systems' (1991) 91 Ethics 375, pass.; Carl J. Friedrich, 'A Brief Discourse on the Origin of Political Equality' in J Roland Pennock and John W Chapman (eds), *Equality* (Atherton Press 1967) 218-221.

[2] Ronald Dworkin, *Sovereign Virtue* (Harvard University Press 2000) ch 4; Charles R Beitz, *Political Equality* (Princeton University Press 1989) 19; Rees (n 1) 37.

involves. This chapter analyses the principal features of the right to political participation: the right to vote, and the right to stand for public office, and discuss their compatibility with EQW.

4.2 The Right to Vote

The right to vote has traditionally been considered as the most important element in the right to political participation.[3] Besides expressive and symbolic considerations,[4] voting is important because of its political consequences, including the selection of political representatives. Moreover, the right to vote serves as a guarantor of other rights;[5] it may determine the content of other rights, and it may even solve conflicts between rights.[6] The remarkable importance of voting makes it a fundamental constitutional right – and sometimes a duty[7] - in democracies,[8] even if it is only implicitly acknowledged by the

[3] Eg Sidney Verba, 'Would the Dream of Political Equality Turn out to Be a Nightmare?' [2003] Perspective on Politics 663, 664; Robert Blackburn, 'The Right to Vote' in Robert Blackburn (ed), *Rights of Citizenship* (Mansell 1993) 75.

[4] Cf. Dworkin (n 2) 187; Jeremy Waldron, 'Participation: The Right of Rights' (1998) 98 Proceeding of the Aristotelian Society 307, 316-319.

[5] Eg James A Gardner, 'Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote' (1997) 145 University of Pennsylvania Law Review 893, 903-903. Contrast with Josehph Fishkin, 'Equal Citizenship and the Individual Right to Vote' (2011) 86 Indiana Law Journal 1289, 1354-1355.

[6] See Waldron (n 4) 321ff.

[7] Cf. Blackburn (n 3) 81-83.

[8] Eg Dennis W Arrow, 'The Dimensions of the Newly Emergent, Quasi-Fundamental Right to Political Candidacy' (1981) 6 Oklahoma City University Law Review 1, 24ff; Richard H Pildes, 'The Future of Voting Rights Policy: From Anti-Discrimination to the Rigth to Vote' (2006) 49 Howard Law Journal 741, 758-759; Joshua A Douglas, 'Is The Rigth to Vote Really Fundamental?' (2009) 18 Cornell Journal of Law and Public Policy 143, pass; Claude Leclercq, *Droit Constitutionnel et Institutions Politiques* (8 edn, Litec 1992) 618ff; Conor Gearty, *Civil Liberties* (OUP 2007) 61.

constitutional text. Moreover, its regulation or limitation is usually subject to a heightened level of scrutiny.[9]

The functions attributed to the vote vary, depending on different theories of democracy. Consensus is more likely when these functions are formulated at a high level of abstraction, such as controlling political power and the implementation of democratic government.[10] However, a closer look will show more diversity when these functions are formulated at a somewhat lower level of abstraction. Thus, 'liberal/individualistic' theories of political participation stress functions such as the protection of individual rights and the advancement of personal interests. In contrast, more 'communitarian' theories highlight the creation of a political community in pursuit of the common good, the definition and development of individual and group identities through the political process, and the demonstration of full membership in the political society.[11]

The specific content of the right to vote is also the subject of controversy. A traditional view equates it with enfranchisement: the entitlement to vote for the candidate I want, for whatever reason, or lack or reason, I deem sufficient.[12] More ambitious perspectives see the right to vote as a 'right to representation', which could be understood in different ways: a right to elect candidates and 'have presence' in political institutions, a

[9] Eg Douglas (n 8) pass.

[10] Cf. Blackburn (n 3) 75; Joseph Alois Schumpeter, *Capitalism, Socialism and Democracy* (6 edn, Unwin Paperbacks 1987) ch XXII; Gardner (n 5) 897.

[11] Douglas (n 8) pass.; Frank Michelman, 'Conceptions of Democracy in American Constitutional Argument: Voting Rights' (1989) 41 Florida Law Review 443, pass; Gardner (n 5) 967-968; Fishkin (n 5) 1332ff.

[12] Eg Blackburn (n 3) 83; Pamela S. Karlan, 'The Rights to Vote: Some Pessimism About Formalism' (1993) 71 Texas Law Review 1705, 1709.

right to substantive representation (ie policy responsiveness, as explained in Chapter 1), or a right to effective influence over the political process and its outcomes.[13]

Even the traditional meaning of the right to vote (as enfranchisement) imposes a number of requirements for its appropriate exercise: the vote has to be universal, free, secret and equal. Universality requires that exceptions to the franchise are very restricted.[14] Such justified limits normally include age, mental capacity, citizenship and residency. It also requires the avoidance of *de facto* disenfranchisement or the production of *wasted votes*.[15] Voting freedom refers not only to the absence of coercion, but also to a context where political freedoms are fully respected and promoted (eg freedom of expression and association), and there is real choice for the elector. Secrecy is also understood as a condition for voting to be free.[16] Equality, or the right to an equal vote (usually equated with the rule 'one man, one vote'), means that the value of the vote should be roughly the same for all.[17]

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[13] Cf. Lani Guinier, 'No Two Seats: The Elusive Quest for Political Equality' (1991) 77 Virginia Law Review 1413, 1414-1416 and pass.; Karlan (n 12) 1712ff; Samuel Issacharoff, 'Groups and the Right to Vote' (1995) 44 Emory Law Journal 869, 883; Adam B Cox, 'The Temporal Dimension of Voting Rigts' (2007) 93 Virginia Law Review 361, 362-366; Mary Lou Kendrigan, *Political Equality in a Democratic Society* (Greenwood Press 1984) 91ff.

[14] Eg Rees (n 1) 50; Still (n 1) 378.

[15] Cf. Lani Guinier, 'Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes' (1993) 71 Texas Law Review 1589, 1606 and pass; Blackburn (n 3) 92.

[16] Gearty (n 8) 68.

[17] Still (n 1) has refined this requirement distinguishing between equal share ('Each voter has the same "share" in the election, defined as what that voter voted on divided by the number of voters who voted on it', 378); equal probability ('Each voter has the same statistical probability of casting a vote which decides the election', 380), and anonymity ('The result of the election is the same under all possible distributions of the voters among the positions in the structure of the election system', 383). Each of these requirements would assume the previous ones, 386. Still also adds majority rule and proportional group representation when applicable (383-385).

A further issue is whether the right to vote should be considered as an individual or as a group right.[18] Scholars have focused on different factors to answer this question, such as the way the right is exercised, its aims, who has a claim to it, who suffers the harm when it is breached, and what kind of remedies are available in that case and for whom.[19] A more illuminating approach, however, is centred on the content of the right, insofar as this content defines the other factors mentioned above. Moreover, this content-focused perspective shows that there is no dichotomy, but rather a continuum, between the notions of voting as an individual or a group right. The more is restricted the content given to the right to vote, the more individual the right seems to be, and vice versa. Thus, enfranchisement is highly 'personalised': its exercise is atomized; no delegation is possible; it is closely related to personal autonomy,[20] self-expression, and personal fulfilment;[21] and claims and remedies are normally centred on specific individuals. But, even in this limited sense, voting has a group component. In fact, enfranchisement has always been granted to groups of people, and therefore its progressive extension has been a group claim (eg by women, minorities). More fundamentally, casting a vote only makes sense regarding collective decisions, and its exercise is never entirely autonomous: elections assume many voters exercise their voting rights simultaneously and reach collective decision in a co-ordinated way.[22] If we move towards more ambitious notions of voting, ie as substantive representation or impact over policy outcome, the group component becomes stronger. This

[18] See Gardner (n 5) 897 and fn 37.

[19] Eg. Cox (n 13) 365-366; Heather Gerken, 'Understanding the Right to and Undiluted Vote' (2001) 114 Harvard Law Review 1663, 1721ff.

[20] Douglas (n 8) 177.

[21] Arrow (n 8) 2-3.

[22] Cf. Waldron (n 4) 308ff.

is because representatives are elected by a plurality of individuals and there is no individual right to have an exclusive representative.[23] Moreover, the representative's actions and agenda should not reflect the interests and opinions of individual electors, but an aggregate of them.

The individual/group distinction may also be relevant for the justiciability of the right to vote. It may argued, at least in some jurisdictions, that a more traditional individual rights' framework renders courts more willing to intervene in voting claim's cases,[24] albeit only regarding a limited set of issues directly related to voting being universal, free, secret and equal. Conversely, attempts to formulate voting claims as group rights may have less success before courts in these jurisdictions,[25] thus encouraging claims that are disguised as individual rights claims (eg the gerrymandering and vote-dilution litigation in the U.S).

A concluding consideration is that the right to vote, as with other political rights, has a dual nature: it is both an individual (and, allegedly, a group) right and also an indispensable element of the democratic political system. Sometimes these aspects seem to collide, and courts are called to resolve disputes about the constitutionality of the restrictions imposed on the individual right to vote, restrictions that aim to foster the systemic or 'structural' functions of voting.[26] This happens in spite of the inherent political

[23] Cf. Dimitrina Petrova, 'Racial Discrimination and the Rights of Minority Cultures' in Sandra Fredman (ed), *Discrimination and Human Rights The Case of Racism* (OUP 2001) 66.

[24] Eg Samuel Issacharoff, 'Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence' (1992) 90 Michigan Law Review 1833, 1856-1858.

[25] Cf. Gerken (n 19) 1718ff. Contrast with Cox (n 13) 374-375.

[26] See Fishkin (n 5); Richard H Pildes, 'The Theory of Political Competition' (1999) 85 Virginia Law Review 1605.

nature of these controversies, and questions about the courts' ability to develop manageable standards,[27] which together make courts uneasy about exercising this jurisdiction.[28]

EQW

Whether EQW are compatible with the right to vote is contested. It seems, however, that it all depends on how the right to vote is understood. In other words, it can be said that supporters of the constitutionality of EQW assume a particular vision of the right to vote that is compatible with EQW, and vice versa. Which contested vision is prevalent in a particular constitutional system is therefore also a central topic of concern.

The 'EQW-friendly' vision of the right to vote highlights the importance of this right as the key to gain influence within the political system, and through it, to pursue social change. In other words, the right to vote is valued as an instrument for bringing about systemic change, and therefore its 'structural' nature and functions are stressed over its nature as individual right. Additionally, the right to vote is regarded not only as mere enfranchisement, but at least as substantive representation. A consequence of adopting such an ambitious understanding of the right to vote is that the right becomes more a group right than an individual right, which seems particularly applicable to the understanding of voting that lies behind EQW. Similarly, communitarian perspectives about the functions of the vote seem to be closer to EQW than individualist/liberal views (eg the development of political identities and the recognition of membership in the political community). This

[27] Eg Issacharoff, 'Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence' (n 24) 1859-1860.

[28] Eg Gardner (n 5) 957ff.

does not mean, however, that the individualist ethos is obliterated, or that the EQW's vision of voting could not encompass liberal/individualistic ideologies. In fact, EQW are partly shaped and limited by such an individual ethos, insofar as they fall short of denying the right of individual electors to vote for the candidates of their choice, being women or men. Likewise, typical liberal functions of voting, such as the advancement of personal interests, are not rejected by EQW.

According to the same 'EQW-friendly' view, most of the traditional requirements for appropriate voting are redefined, in a process that can be presented as 'deepening' those requirements from a 'gender-based' perspective. For example, it is argued that the vote's universality and equality have only formally benefited women, since their votes have not had the impact over women's lives they were assumed to have. Thus, EQW would provide a more substantive dimension to the universality and equality of the vote. A more defensive (and less persuasive) approach has been adopted by the Venice Commission, which has declared that EQW 'should not be considered as contrary to the principle of equal suffrage if they have a constitutional basis'.[29] Disregarding the fact that the compatibility between EQW and the right to vote is rendered entirely dependent on the constitutional status of the former, which seems unconvincing, this statement begs the question about the compatibility between EQW and the right to vote when the former has no constitutional status. The structure of the text (using a conditional phrase) seems to suggest that they may be incompatible.

[29] Venice Commission, Code of Good Practice in Electoral Matters <http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.pdf> accessed 24 September 2012, 8.

The most relevant constitutional discussion in this area, however, is about voters' freedom. Opponents of EQW affirm that since some prospective candidates would not be allowed into the electoral lists because of their sex, the range of available alternatives would be reduced, thus affecting the electors' freedom to choose their representatives. Supporters of EQW argue that the right to vote is not absolute, and justified limitations are permitted. EQW should be allowed because they respond to a legitimate and pressing aim (gender equality in political representation), and impose a relatively modest limitation on the right to vote. Moreover, voting is usually subject to a set of more stringent limitations contained in the electoral regulations (eg blocked electoral lists, compulsory registration). An additional argument stresses the systemic value of the right to vote, and how the fulfilment of its structural functions may justify some restrictions on its exercise, such as those imposed by EWQ. In this respect, however, 'communitarian' views on such structural functions are more helpful than 'individualistic' views.

4.3 The Right to Stand for Public Office or 'Candidacy Right'

There seems to be a relative lack of scholarly interest in analysing this right, and consequently, a set of unresolved questions remains. Until recently, it was not uncommon to regard the right to stand for public office as part of the right to vote, being sometimes referred as 'passive suffrage'. A more contemporary approach, however, seems to acknowledge the candidacy right as a distinct kind of entitlement, located within the ambit of rights to political participation. All these rights are intimately related: they are

functionally inseparable and what affects one of them normally impacts on others.[30] Moreover, all these rights have the dual nature of being both individual rights and fundamental elements of democracy.[31] Within this common context, however, the right to stand for public office has its own identity, even as regards voting rights. Thus, the latter is essentially a right to choose, to express and to control, whereas the former is a right to compete and to acquire political power. The right to vote seems to be important to a wider pool of citizens; it is more commonly exercised, and may relate to the aims of belonging and self-definition. Conversely, the right to stand for public office is only exercised by a small minority, and is primarily an opportunity for leadership and public service. Although it seems that the more ambitious the content given to the right to vote is, the more instrumental the candidacy right becomes for its fulfilment, instrumentality should not be equated with indistinctiveness.

A further question is whether the right to stand for public office is a fundamental right, such as the right to vote, or only a 'minor' or 'accessory' right. This seems to be a contested issue, particularly in jurisdictions where there is no express constitutional provision about it (eg the U.S.).[32]

On the one hand, it is argued that this right is not sufficiently related to individual autonomy and self-government (as the right to vote is), but to other secondary personal

[30] Cf. Michael A Bragg, 'Adams v. Askew: The Right to Vote and the Right to be a Candidate - Analogous or Incongrous Rights?' (1976) XXXIII Washington and Lee Law Review 243, 252-254; Gary Ahrens and Nancy Hauserman, 'Fundamental Election Rigths: Association, Voting adn Candidacy' (1980) 14 Valparaiso University Law Review 465, 465 and 480ff; Arrow (n 8) 17-18 and 27-28; Mark E Dreyer, 'Constitutional Problems with Statutes Regulating Ballot Position' (1988) 23 Tulsa Law Journal 123, 130-131.

[31] Cf. Bragg (n 30) 253.

[32] See Nicole A Gordon, 'The Constitutional Right to Candidacy' (1976) 91 Political Science Quartely 471; Arrow (n 8); Kevin Cofsky, 'Pruning the Political Thicket: The Case for Strict Scrutiny of State Ballot Access Restrictions' (1996) 145 University of Pennsylvania Law Review 353; Ahrens and Hauserman (n 30).

goals such as the acquisition of political power. Moreover, this is a very qualified right. The legislator has been allowed wide discretion in regulation, imposing several restrictions on the grounds of a number of state interests such as ballot integrity (preventing fraud and voters' confusion), political stability (discouraging factionalism while keeping the field open to political challenge), ensuring the candidates' minimum competence (although this has been increasingly questioned, because it is assumed that voters should judge on these matters), and sometimes even administrative convenience.[33] Additionally, the status of candidate may be considered as 'semi-public', and therefore unable to serve as a source of fundamental rights in their original meaning (ie as individual trumps against the State).[34] In fact, this particular status would reinforce the idea that the fulfilment of structural or systemic goals would take precedence over the candidate's individual entitlements.[35]

On the other hand, the right to candidacy may be regarded as fundamental precisely because of its systemic importance. Democracy is not only the government of the people, but also by the people, and thus the right to vote is not enough to secure a democratic form of government. In addition, certain international human right texts, when fleshing out the specific content of the right to political participation, guarantee both the right to vote and the right to stand for public office, thus acknowledging both as crucial components of a fundamental right to political participation, and consequently, as fundamental rights in themselves.[36] Furthermore, although the candidacy right is not as closely related to personal

[33] Cf. James S Jardine, 'Ballot Access Rights: The Constitutional Status of the Right to Run for Office' [1974] Utah Law Review 290, 303-307; Arrow (n 8) 5ff; Cofsky (n 32) 412-418; Leclercq (n 8); Gordon (n 32) 485.

[34] Cf. Pildes, 'The Theory of Political Competition' (n 26) 1623-1624.

[35] Cf. Ibid 1623-1624.

[36] Article 25 of the International Convenant on Civil and Political Rights; Article 23 of the American Convention on Human Rights.

autonomy as the right to vote, it may still be highly relevant for individual fulfilment, political expression, and the crystallization of political identity. Finally, the right to stand for public office and the right to vote are so closely related that it makes little sense to acknowledge only one of them as a fundamental right.

The definition about whether the right to stand for political office is a fundamental right may have several consequences, particularly regarding the availability and forms of judicial protection; the standards of scrutiny applied to its limitations and restrictions, and its chances when conflicting with other rights, principles or state interests. Thus, for example, uncertainty or scepticism about the fundamental nature of this right may force plaintiffs to disguise their claims under the appearance of the violation of other right. This is especially common as regards to the right to vote,[37] the argument being that a restriction on the candidacy right indirectly imposes a burden on the voters, because the latter's freedom of choice is impaired[38] (the Spanish case is illustrative, as further explained in Chapter 6).

A further issue is whether the right to stand for public office is an individual or a group right. The latter alternative may be defended on the basis that the exercise of this right requires the active support of other individuals, groups or political parties. Moreover, its systemic importance for democracy and the 'semi-public' status of the candidates would weaken the individual component of the candidacy right. Additionally, this right is closely associated with the crystallization of the political identities of the groups.

None of these arguments, however, seems conclusive. The support of other individuals, albeit in varied forms, is a general condition applicable to most – if not all -

[37] Freedom of expression has also been used for these purposes. See Gordon (n 32) 474-478.

[38] Cf. Ibid 478-481; Jardine (n 33) 302; Dreyer (n 30) 130-131.

rights. The same can be said about the systemic relevance of rights. Furthermore, it is a mistake to invoke the social effects of the exercise of a right as a proof of its group nature, because most rights have such effects, albeit in different degrees of importance and visibility. Additionally, the right to stand for public office could be primarily understood as a right to compete, acquire political power, exercise leadership, and allow personal expression and self-fulfilment, all very individualistic goals. More formally, its inclusion in international texts protecting individual rights would confirm its individual nature. Lastly, in the case of the right to vote, it appeared that the more limited its content, the more individual the right seemed to be, and vice versa. This is not applicable to the candidacy right, because there is no similar discussion about its essential content (the entitlement to be on the ballot). In other words, there is no 'more comprehensive' views about this right that may invoke stronger group elements, as was the case regarding the right to vote.

As regards limitations on the candidacy right, they vary to a great deal. Gordon classifies them into two groups: those 'directly involving a candidate's personal qualifications' (eg property, residence, or age requirements), and those 'indirectly restraining candidates because they regulate the electoral process' (eg filing fees, prohibition of multiple-office holding).[39] The former group should be closely scrutinized because in a democracy the final judgement about the candidates' personal capacities should be left to the voters.[40] The second group relates to the systemic function of the candidacy right, and a possible criterion for assessing their legitimacy is whether they have the effect of protecting the status quo or, conversely, opening the political system to new challenges and actors.

[39] Gordon (n 32) 471.

[40] Cf. Ibid 485.

EQW

The compatibility between EQW and the right to candidacy appears even more doubtful than their compatibility with the right to vote. EQW could effectively bar some individuals from appearing on the electoral lists, which seems to be the core of this right. As in the case of the right to vote, supporters of EQW deny such incompatibility by appealing to a particular vision of the right to candidacy. Under this vision, its facet as an individual right is strongly downplayed, focusing on its systemic dimension as an essential factor of the democratic system. Thus, if a right at all, the right to candidacy should not be considered as a fundamental right directly linked with human dignity, but only as a rather weak - or 'merely political' - right, which would then be easily trumped by systemic considerations as the ones behind EQW.[41] Consequently, this right could be subject to extensive regulation, which in turn should be only leniently scrutinized by the judiciary. Such soft scrutiny could also be justified on the grounds that, following Gordon's criteria, EQW would be a limitation of the candidacy right that only indirectly restrains candidates while regulating the electoral process, and it would certainly not freeze the political status quo but rather the opposite. A further feature of the 'EQW-friendly' vision of the right to candidacy is considering the latter more as a group right instrumental in achieving substantive representation than as an individual right focused on personal fulfilment. Moreover, the core of the right to candidacy could not be the actual inclusion in the electoral list, because this does not depend on the will of the candidate only, but on several

[41] Cf. Pildes, 'The Theory of Political Competition' (n 26) 1608 and pass.

factors beyond his or her control, such as the willingness of political parties to adopt him or her as a candidate.

Although convenient, the notion of the right to candidacy offered by EQW is not entirely convincing insofar as it makes the former almost irrelevant as an individual right. In other words, one aspect of the right to candidacy - as an element of democracy - is exaggerated to the extent of severely diminishing an alternative dimension - as an individual right. This is not surprising because, as further explained in Chapter 8, it fits within a general strategy deployed by supporters of EQW that shifts the focus of the constitutional discussion from individual rights to fundamental systemic political concerns. A further difficulty of the vision of the right to candidacy offered by supporters of the constitutionality of EQW is that the requirement that a person of a specific sex is to be included in the ballot seems to be closer to those limitations imposed on the candidacy right that directly relate to personal qualifications than to those only indirectly affecting candidates as a result of regulating the electoral process. If that is so, EQW should be subject to a stringent kind of scrutiny.

4.4 Conclusions

The compatibility between EQW and the rights to vote and to stand for public office is contested. Supporters of EQW seem to have adopted particular visions of these rights that would render them compatible with EQW. This vision emphasises the systemic functionality of political rights over their nature as individual rights, and their group aspects over their individual aspects. Moreover, whereas the right to vote is given an ambitious content that comprehends substantive representation, the right to stand for public office is

downplayed, challenging its nature as a fundamental right and allowing its extensive regulation subject to lenient scrutiny. In Part II of this thesis, the compatibility between EQW and the notions of the rights to vote and to candidacy that prevail in particular jurisdictions will be tested, as a criterion of assessing the constitutionality of EQW in those legal systems.

P A R T I I

P R A C T I C E

CHAPTER 5

FRANCE

Cette nuit-là, tous les privilèges liés à la naissance disparurent par le libre consentement d'une Assemblée qui s'était déclarée constituante de la France nouvelle. Tous sauf un : celui conféré au sexe masculine de représenter l'Homme (l'humanité) dans sa totalité.[1]

5.1 Introduction

The problem of women's underrepresentation in politics was particularly acute in France, and was commonly referred as 'the French exception' to the relatively better position of women in other Western Europeans countries.[2] This situation caused sharp criticism and even national shame. Thus, after years of fierce discussion, France adopted EQW in 2000. It did not, however, simply follow other countries' experiences, but developed its own 'French way'. It was called *parité.*

[1] 'That night, all privileges of birth were abolished by the free will of an Assembly that had declared itself as constitutive of the new France. All privileges but one: that granted to males of representing Men (humankind)' (free translation), Francoise Gaspard, Claude Servan-Schreiber and Anne LeGall, *Au pouvoir, citoyennes! : liberté, égalité, parité* (Seuil 1992) 44.

[2] Janine Mossuz-Lavau, *Femmes/hommes : pour la parité* (Presses de Sciences Po 1998) 23ff; Katherine Opello, *Gender quotas, parity reform, and political parties in France* (Lexington Books 2006) ch 2; Mariette Sineau, *Profession : femme politique : sexe et pouvoir sous la Cinquième République* (Presses de la Fondation nationale des sciences politiques 2001) 241ff.

Parité presents several remarkable features. Quantitatively, it is a very ambitious goal: half of the political representatives should be women. Qualitatively, it attempts to re-define representative democracy so as to put the sexual difference at its core. Comparatively, it tries to distinguish itself for affirmative action and electoral quotas. Internally, it caused a vibrant discussion that captured the attention of the general public. Legally, the implementation of *parité* has been extraordinarily complex, requiring the passing of numerous laws (including two constitutional amendments), and several decisions of the Constitutional Council (the '*Conseil*').

The central thesis of this chapter is that *parité* gave rise to fundamental tensions with the French constitutional system, principally because the former reflected notions of political representation that were rejected by the latter. Additionally, the French approach towards equality, affirmative action and political rights were also difficult to reconcile with EQW. To fully illustrate this tension, this chapter will discuss certain features of the French context, as well as the French views on political representation, equality, affirmative action and political rights, and how they relate to EQW. Then, it will explain the *parité* movement and the debates it caused, to finally analyse the progressive introduction of *parité* into French legal order.

5.2 The French Context

a) The influence of the French Revolution

The French legal system is deeply influenced by several doctrines developed during the French Revolution, which are regarded as precious elements of the French heritage.

Particularly relevant is the idea of 'abstract universalism', according to which the French people is indivisible and is composed of individuals who are 'abstract' and indistinguishable from each other.[3] Together with other 'revolutionary ideas', such as the notions of Republic and citizen (explained later in this chapter), abstract universalism rejects all kinds of divisions within the political community, and ignores 'concrete' personal features such as race and sex.

These notions explain the French visceral rejection to what has been called 'American communitarianism'.[4] This is roughly equated with identity politics, which is considered to be deeply divisive and impermissibly grounded on personal features. This cluster of ideas also explains the French traditional rejection of minority rights. The 'revolutionary' view is that 'there are no minorities in France' but only 'French citizens'.[5] These 'revolutionary ideas' were a formidable hurdle for *parité*, not least because they were incompatible with considering women as a politically distinguishable section of the French people.

[3] Eric Millard, 'Paritary Rights for Women and Universal Human Rights in France' [2001] Ius Gentium 5; John Wallach Scott, *Parité! : sexual equality and the crisis of French universalism* (University of Chicago 2005) 1; Marthe Fatin and Rouge Stefanini, 'Les "discrimination positives" en matière electorale aux États-Unis et en France' [2007] 23 Cahiers du Conseil Constitutionnel 86.

[4] Eg Eric Fassin, 'La parité sans théorie: retour sur un débat' (2002) 15 Politix 19, 27; Bruno Perreau, 'L'Invention Républicaine. Éléments d'une Herméneutique Minoritaire' (2004) 111 Revue Française D'Etudes Constitutionnelles et Politiques 41, 45-47.

[5] '[T]he Constitution recognises only the French people, made up of all French citizens regardless of origin, race or religion', CC 91/290. See also CC 99/412.

b) The electoral system

According to the Constitution and the Electoral Code, Parliament is composed of the National Assembly and the Senate. The former has 577 members elected by direct suffrage, whereas the latter has 348 members elected by indirect suffrage. Members of the National Assembly (*députés*) are selected through a first-past-the-post system with two rounds of voting. Of the 348 members of the Senate, 326 are selected by *ad-hoc* county (*départements)* assemblies mostly composed of municipal councillors. Ten additional senators are elected by similar bodies in the overseas territories, and twelve senators are elected by the Assembly of French Citizens Resident Abroad. Whereas the third group is selected through proportional representation, the first two groups may be elected either by proportional representation using closed lists (in counties electing at least 4 senators)[6] or by a first-past-the-post system with two rounds and open lists (in counties electing up to 3 senators). Thus, the Senate is elected roughly half by proportional representation and half by majority representation.

It should be noted that *parité* is also applied to other political elections. Some of these elections are proportional (eg elections to the European Parliament), some are first-past-the-post with two rounds (eg Cantons, Municipal Councils in small communities), and some are a unique combination of both systems (eg Municipal Councils in medium and large communities; Regional Councils).

[6] The modality used if the 'highest average', which 'means calculating for each list what would be the average of votes obtained per seat allocated if each one were hypothetically granted an extra seat. The list which obtains the highest average gets a seat. The operation is repeated as many times as there are still seats to be filled' (www.diplomatie.gouv.fr/en/france/institutions-and-politics/elections-in-france/> accessed 4 May 2012).

5.3 Theoretical Framework

a) Political representation[7]

During the Revolution, there was a clash between two distinct views of representation. The 'rousseaunean view' rejected representative government because it believed in popular sovereignty, ie sovereignty was divided into equal parts, one belonging to each citizen, who was unable to delegate his share. To be sovereign was essentially to have supreme political *will*, and the representative could not will for the represented. However, if practical reasons impeded the citizens from directly exercising their sovereignty (eg in large states with huge populations), they could appoint *delegates* who would be under a revocable and imperative mandate (similar to the private law notion of representation).[8]

The second view was inspired by Montesquieu and intertwined with the notion of national sovereignty. The Nation is neither the people nor the electorate, but a distinct and indivisible moral entity that includes not only the French people currently alive, but also past and future generations.[9] Under this second view, the Nation was the sovereign and had its own will, but because it was a moral entity without corporal reality, it needed a

[7] A critical historical approach to the French discussion on representation can be found in Pierre Rosanvallon, *Le peuple introuvable* (Gallimard 1998).

[8] Eg Georges Burdeau, *Droit Constitutionnel et Institutions Politiques* (19 edn, Librairie Générale de Droit et de Jurisprudence 1980) 132ff; Benoît Jeanneau, *Droit constitutionnel et institutions politiques* (7 edn, Dalloz 1987) 27-28.

[9] Pierre Brunet, *Vouloir pour la nation* (L.G.D.J 2004) 30-31; Claude Leclercq, *Droit Constitutionnel et Institutions Politiques* (8 edn, Litec 1992) 43-44; Maurice Duverger, *Institutions Politiques*, vol 1 (Presses Universitaires de France 1971) 101; Dominique Turpin, *Droit Constitutionnel* (4 edn, PUF 1999) 165.

representative to express its will.[10] That representative was the National Assembly as a whole, not individual deputies.[11] The members of the Assembly were selected by the people, who were trusted as capable of recognising the most suitable citizens.[12]

Although there has been some discussion on the issue,[13] the doctrine of national sovereignty seems to have been the dominant theory throughout French constitutional history. Consequently, the ideas of national representation were adopted with the following characteristics:[14]

i) That which is represented is the Nation, not individuals, let alone groups or political parties.

ii) What is represented is the national or general interest, which is not the mere aggregation of individual interests.

iii) Political representation is systemic, not dyadic, ie there is no representative relationship between a constituency and an MP, but only between the National Assembly and the Nation.

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[10] Brunet (n 9) 30; Francine Demichel, 'Aparts égales: contribution au débat sur la parité' [1996] Recueil Dalloz Sirey 95, 96.

[11] Léon Duguit, *L'État, les gouvernants et les agents* (Dalloz 2005) 172; Burdeau (n 8) 134.

[12] Baron de Montesquieu, 'The Spirit of the Laws' <www.constitution.org/cm/sol_11.htm> accessed 13 June 2012, XI 6.

[13] Although Article 3 of the 1958 Constitution mixes the doctrines of national and popular sovereignty ('*National sovereignty shall vest in the people*...'), the mainstream scholarship seems to support the prevalence of the doctrine of national sovereignty. This doctrinal stance appears to be confirmed by other provisions of the 1958 Constitution (Preamble and Article 4). See Jeanneau (n 8) 27ff; Leclercq (n 9) 45; Turpin (n 9) ch III; Duverger (n 9) 100-101.

[14] Cf. L Favoreu et al, *Droit constitutionnel* (14 edn, Dalloz 2011) 50; Burdeau (n 8) 133-137; Duguit (n 11) 161ff; Leclercq (n 9) 45-47; Turpin (n 9) 165-166; A Esmein, *Éléments de Droit Constitutionnel Francais et Comparé* (Recueil Sirey 1927) 331-339; Michel-Henry Fabre, *Principes Républicains de Droit Constitutionnel* (4 edn, L.G.D.J. 1984) 206-207; Duverger (n 9) 101-104; Jeanneau (n 8) 29-31. See also William Benessiano, 'Le Vote Obligatoire' (2005) 1 Revue Française de Droit Constitutionnel 73, 76ff.

iv) Imperative mandate is rejected.[15] If electors are not represented by legislators, and the powers bestowed upon the latter belong to the Nation and not to the electors, it does not make sense to have electors instructing legislators. Similarly, responsiveness and accountability to the electors is disregarded.

v) Voting is not considered a right but a duty, performed by the citizens in the service of the Nation (selecting the Nation's representative).

The French theory of political representation also relates to particular conceptions of the Republic and citizenship. The Republic is a moral and political idea that encompasses a set of values, principles and symbols that are found throughout the French political system.[16] It strongly relates to equality as an overriding value, particularly equal treatment (discussed in Chapter 2), and to the idea of 'indivisibility',[17] which includes the uniform application of the law throughout the territory[18] and the impossibility of dividing the French people into specific categories. The concept of the Republic is at least partially justiciable, and its relationship with the notion of democracy is controversial. For example, it may be considered as an improved form of democracy (high standards of civic virtue), or as an alternative to Anglo-Saxon 'communitarian' (group-based) democracy.

The Republic is a political community composed of citizens. A citizen is a human being located in the public sphere, where personal features are irrelevant (eg race, religion)

[15] Article 27 of the 1958 Constitution.

[16] See André Viola, *La Notion de République dans la Jurisprudence du Conseil Constitutionnel* (L.G.D.J 2002).

[17] Article 1 of the 1958 Constitution. See also TS Renoux and M De Villiers, *Code Constitutionnel* (3 edn, Litec 2004) 330.

[18] An exception to this legal uniformity is the situation of Nouvelle Calédonie, which required the introduction of a constitutional reform in 1998 (Loi n° 98-610).

and only those characteristics shared by all human beings matter (eg their autonomy, and rationality).[19] All citizens are equal, because each citizen is an 'abstract' being (ie stripped of 'concrete' characteristics), indistinguishable from, and interchangeable with, any other citizen.[20] Citizenship is the fundamental source of political standing: it makes the individual part of the Republic, entitling him to be elector or representative.

The notions of Republic and citizen make the French theory of political representation theoretically incompatible with group representation, because both notions are 'blind' to the features that distinguish groups. Moreover, the indivisibility of the Republic impedes the fractioning of the French people into politically relevant groups. Similarly, these notions reject links between each deputy and his or her constituency, because the electors in one district should be indistinguishable from the electors in any other district, and also because the French people, as the Nation, cannot be divided in categories.

The *Conseil Constituionnel's jurisprudence* (case-law), has generally supported the traditional doctrines mentioned above. Thus, it has acknowledged the indivisibility of the Republic,[21] the unity of the French people,[22] and the idea of national sovereignty[23] as principles of constitutional status, rendering them justiciable through limited constitutional review. For example, the acknowledgment of the Corsican people as a distinct group within the French people was declared to be incompatible with the principle of the unity of the

[19] Eg Rosanvallon (n 7) 13ff and 89.

[20] Eg Jean Boulouis, 'La loi n° 82-974 du 19 novembre 1982' [1983] Actualité juridique droit administratif 74, 80.

[21] CC 76/71; 84/177; 84/178; 82/138; 99/412.

[22] CC 99/412; 91/290.

[23] Cf. CC 99/412; 76/71.

French people.[24] The *Conseil* has also enforced the traditional theory of political representation.[25] Thus, the representatives represent the Nation, not just their constituencies;[26] group representation is rejected; and the public/private dichotomy is strongly enforced so as to exclude personal characteristics from the public sphere.[27]

Nevertheless, the French theory of political representation is not entirely consistent. Problems arise from the occasional application of the private law representation theory to political representation (see Chapter 1),[28] as well as from the development of certain practices, such as voluntary voter registration and the increasing link between individual deputies and political parties, local constituencies or interest groups.[29] Additionally, there are institutional arrangements that fit uncomfortably with the French theories, such as the bicameral Parliament, and the President of the Republic's position as 'representative of the Nation'.[30]

Pitkin's categories (discussed in Chapter 1) apply awkwardly to France, if at all. It may be said that political representation is formalistic, because the emphasis is on the previous authorization given by the Nation to the National Assembly to represent it (which, nonetheless, is a fiction). It may also be symbolic, because the National Assembly seems to

[24] CC 91/290.

[25] Viola (n 16). Although in some contexts it has moderate such doctrine, particularly regarding the EU, Corsica, and overseas territories. See CC 76/71; 91/290; 99/410.

[26] CC 99/410; 91/290; 2004/490; 2007/547; 2008/573. Contrast the Algerian and Alsacian precedents in Burdeau (n 8) 135-136.

[27] Cf. CC 99/412.

[28] Eg Turpin (n 9) 168; Maurice Hariou, *Principios de Derecho Público y Constitucional* (Carlos Ruiz tr, Comares 2003) 244ff.

[29] Cf. Jeanneau (n 8) 32-34; Burdeau (n 8) 139-140; Duverger (n 9) 107; Frank L Wilson, *Interest-group politics in France* (CUP 1987).

[30] Brunet (n 9) 312ff; Jean-Yves Guiomar, *L'idéologie nationale* (Champ Libre 1974) 104ff.

stand for the Nation not only in the law but also in the psychology of the French. What is certain is that descriptive representation is utterly incompatible with the French doctrines of sovereignty and political representation. Similarly, politically relevant groups (which are a prerequisite for descriptive representation) are antithetical to the ideas of the citizen and the Republic. Uniformity is understood as a prerequisite to achieve political equality, so individuals are represented for what they have in common, not for what differentiate them.[31] In fact, the demand for group representation has been regarded as a usurpation of sovereignty by a section of the people.[32] As regards substantive representation, the national sovereignty doctrine disregards responsiveness and accountability. In fact, it is impossible to assess whether the representative (the National Assembly) is being responsive to the represented (the Nation), because the former 'declares' (forms) the will of the latter. Accountability is still more nonsensical in this context.

Under Mansbridge's categories (also discussed in Chapter 1), promissory and anticipatory representations are excluded because they assume a representative relationship between the electors and the elected (dyadic representation), including accountability and responsiveness, which is expressly rejected in France. Surrogate representation is also discarded because of the 'nonexistence' of groups. Gyroscopic representation may be applicable insofar as it is not necessarily group or descriptive representation, and also because it excludes instructions.

The French traditional theory of political representation is in principle incompatible, therefore, with EQW. Its overriding concern for unity and political integration impedes all

[31] Turpin (n 9) 173.

[32] This was the case of the *mouvement ouvrier* [workers movement] during the nineteenth century, which aspired to install workers in the National Assembly that acted as 'deputies of the workers'. See Rosanvallon (n 7) 67ff and 351.

kind of distinctions within the community. Moreover, the very grounds for such distinctions are rejected, insofar as citizens are abstract and uniformity is a prerequisite to achieve political equality. Additionally, female representatives must represent the Nation - not women - and advance the general interest - not women's. Yet, despite this, France is now a leader in adopting EQWs. This is the paradox that we now need to consider.

b) Equality

Since the Revolution, equality has become one of the most fundamental values of French constitutionalism,[33] as demonstrated by the very first Article of the 1789 Declaration of the Rights of Man and of the Citizen (the 'Declaration'):[34] 'Men are born and remain free and equal in rights'.[35] Similarly, Article 6 of the Declaration states: '[the law] must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law (...).'[36] Article 1 of the 1958 Constitution declares that France 'shall ensure the equality of all citizens before the law, without distinction of origin, race or religion.'[37] Thus, *equality before the law* is a general principle of constitutional status,[38] enforced as such by the *Conseil Constitutionnel* since 1973.[39]

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[33] Anne Levade, 'Discrimination positive et príncipe d'égalité en droit Français' (2004) 111 Revue Française D'Etudes Constitutionnelles et Politiques 55, 56ff; Guy Carcassonne, 'The Principle of Equality in France' (1998) St Louis-Warsaw Transatlantic LJ 159, pass; John Bell, *French Constitutional Law* (Clarendon 1992) 200; Ferdinand Mélin-Soucramanien, 'Le principe d'égalité dans la jurisprudence du Conseil constitutionnel. Quelles perspectives pour la QPC?' [2010] 29 Nouveaux Cahiers du Conseil 89, 89.

[34] The Declaration has constitutional status in France, CC 81/132.

[35] Translation available at <http://www.hrcr.org/docs/frenchdec.html> accessed 17 April 2012. This provision has been only rencently used by the Conseil in equality cases (Mélin-Soucramanien (n 33) 92; L Favoreu et al (n 14) 1001.

[36] Translation available at <www.hrcr.org/docs/frenchdec.html> accessed 17 April 2012.

[37] Translation availble at <www.assemblee-nationale.fr/english/8ab.asp> accessed 17 april 2012.

Equality before the law has been generally understood as comprising the first prong of the Aristotelian formulae (discussed in Chapter 2): treat like people/cases alike.[40] The second prong – treat different people/cases differently – is accepted (as long as the difference is related to the purpose of the law) although not required.[41] Different treatment is also possible if justified by the general interest.[42] Thus, equality before the law is basically a negative obligation, a prohibition of arbitrary discrimination.[43] This prohibition particularly applies to certain grounds, such as race, origin and religion (Article 1 of the Constitution).[44] Multi-dimensional discrimination seems to be rarely considered.[45] Different treatment is subject to (a rather deferential) rationality-based scrutiny, unless it affects a constitutionally 'suspect' category, a specific constitutional equality provision (eg voting equality), or a fundamental right, in which case a more strict scrutiny applies.[46] The focus of the scrutiny is the relationship between the different treatment and the aim of the regulation.

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[38] Legal sources of general scope applicable even without express textual reference to them. See Gilles Pellissier, *Le principe d'egalité en droit public* (L.G.D.J 1996) 16.

[39] CC 73/51. See also Gilles Lebreton, *Libertés Publiques et Droits de l'Homme* (7 edn, Dalloz 2005) 160-161; Pellissier (n 38) 7 and 17; Mélin-Soucramanien (n 33) 89; Claude Leclercq, *Libertés Publiques* (5 edn, Litec 2003) 186-187.

[40] Cf. Lebreton (n 39) 160; Levade (n 33) 60.

[41] Eg CC 79/107; 80/128; 87/232; 89/266; 91/290; 91/291; 92/316; 2007/557; 2011/222. See also Dominique Rousseau, *Droit du Contentieux Constitutionnel* (7 edn, Montchrestien 2006) 443ff ; Stéphanie Hennette-Vauchez, 'France' (Evolution in Equality and Law Theory, Florence, 29 January 2010) 11 and 15; Pellissier (n 38) 31-33.

[42] See (n 41).

[43] Pellissier (n 38) 17 and 41. Cf. Lebreton (n 39) 158ff.

[44] Pellissier (n 38) 52-55; Levade (n 33) 64.

[45] But see Réjane Sénac-Slawinski, 'De la parité a la diversité: entre *Deuxème* sexe et discrimination seconde' (2010) 18 Modern & Contemporary France 431, 437.

[46] Mélin-Soucramanien (n 33) 93-96; L Favoreu et al (n 14) 1004-1005; Bell (n 33) 200, 202, 222-224; Hennette-Vauchez (n 41) 15-16; Carcassonne (n 33) 166.

The scope of application of the principle of equality before the law has evolved.[47] At the beginning, it was only equality in the application of the law.[48] Then it became equality *in* the law, as a requirement enforced by the *Conseil* upon the legislator.[49] Although originally associated with general and neutral norms (and therefore with a formal notion of equality), this understanding of equality could also accept legislative distinctions insofar as they were not arbitrary.[50] Later, equality before the law has been also applied to the relations between private actors, mainly through antidiscrimination regulations.[51] The prohibition of discrimination evolved from specific grounds (eg handicapped persons)[52] or contexts (employment),[53] to more general approaches. In 2008, French law was 'updated' according to EU antidiscrimination law,[54] incorporating definitions of direct and indirect discrimination, and allowing the possibility of granting favourable treatment to women due to maternity.

Some scholars have pressed for a further development of equality, towards achieving equality *by* the law, ie the adoption of a positive obligation of achieving de facto equality through the law, including by the use of different treatment, if necessary.[55] This is partly a

[47] Cf. Louis Favoreu, 'The Principle of Equality in the Jurisprudence of the *Conseil Constitutionnel*' (1992) 21 Capital University Law Review 165, 169ff.

[48] Pellissier (n 38) 25-26. Cf. Hennette-Vauchez (n 41) 7.

[49] Cf. Hennette-Vauchez (n 41) 7-8.

[50] Pellissier (n 38) 26-29; Lebreton (n 39) 158; Hennette-Vauchez (n 41) 3.

[51] Cf. Hennette-Vauchez (n 41) 9-10.

[52] Lois n° 90-602; 2005-102.

[53] Loi n° 2001-1066.

[54] Loi n° 2008-496.

[55] Cf. Lebreton (n 39) 158-159; Pellissier (n 38) 29-30 and 35-37; Levade (n 33) 69-70; Favoreu (n 47) 169-170 and 173-174.

reaction against the incapacity of formal equality to deal with certain systemic discriminations (eg racial, ethnic). It was traditionally argued that factual equality lacked clear constitutional support (despite the declaration of France as a 'social Republic' in Article 1).[56] However, as a result of the introduction of *parité*, a new second paragraph was added to Article 1 declaring: 'Statutes shall promote [favour] equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility'[57]. This text, nonetheless, may be construed as mandating equality by the law only in matters of sex equality regarding prized public goods (see Chapter 2). In any case, even the traditional formalistic French understanding of equality gave some space for the consideration of factual inequalities, for example, as the legislator's justification for introducing different treatment.[58]

Concerning sex equality, in addition to Article 1, the Preamble of the 1946 Constitution states 'The law guarantees women equal rights to those of men in all spheres'.[59] Given the constitutional value given by the *Conseil* to this Preamble,[60] sex should be considered as a 'suspect' ground for discrimination, thus triggering a stricter scrutiny.[61] More specifically, there have been legislative attempts to secure equal payment

[56] Cf. Lebreton (n 39) 172-173.

[57] Translation available at <www.assemblee-nationale.fr/english/8ab.asp> accessed 22 January 2013. In this context, however, 'favour' seems to be a better translation than 'promote' for the French word *favorise*.

[58] Bell (n 33) 225; Carcassonne (n 33) 164.

[59] Translation available at <www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst3.pdf> accessed 22 January 2013.

[60] CC 71/44. See also Louis Favoreu and Loïc Philip, *Les Grandes Décisions du Conseil Constitutionnel* (13 edn, Dalloz 2005) 250ff.

[61] Mélin-Soucramanien (n 33) 92-96.

for men and women, 'professional' or 'career' equality between the sexes, and non-discrimination in specific areas.[62]

Regarding the notions of constitutional equality explored in Chapter 2, France seems to be much closer to the first and second understandings. General equality and equal treatment remains as the core of the French notion of equality (even recent laws inspired in the notion of equality of opportunity keep a commitment to equal treatment),[63] which still retains much of its traditional formalism. The idea of equality as equal access to prized goods is also relevant insofar as equality is primarily about guaranteeing equal rights for citizens. The third idea of equality, as non-discrimination on specific grounds associated with group membership, is resisted in France as incompatible with 'revolutionary ideas' such as abstract universalism. Finally, *de facto* equality has some incipient acknowledgment, although it seems to be far from being a powerful notion in the French legislative order. Equality of opportunity is more commonly invoked, but its meaning is obscure beyond the fact of being more demanding than the first two approaches to equality.[64] This lack of clarity is reflected in the 2006 equal opportunity law, which mixes incentives, affirmative action and antidiscrimination policies.[65]

The French notion of equality is not, therefore, particularly welcoming towards EQW. This is not only because of its traditional formalism, but due to its rejection of the third notion of equality and the hostility to the idea of equality of groups. On the other

[62] Lois n° 72-1143; 2006-340; 83-635; 2001-397; 2008-496.

[63] Eg Lois n° 2006-396; 2004-1486.

[64] Conseil de Etat, *Sur le Principe d'égalité* (Etudes et Documents N° 48, La Documentation Francaise, 1996) 19. See also Comité de Réflexion sur le Préambule de la Constitution, *Redécouvrir le Préambule de la Constitution. Rapport au Président de la République* (2008) 64.

[65] Loi n° 2006-396.

hand, there is an emphasis on sex equality that is more compatible with the cause of EQW, and the notion of equality of opportunity (particularly in connection with the equal rights of the citizen) may partly compensate for the still weak development of *de facto* equality.

c) Affirmative action

At first sight, there is a traditional and widespread rejection in France of affirmative action, which is seen as a feature of 'American communitarianism' and incompatible with the principles of universalism and equality before the law.[66] A closer analysis, however, suggests that this hostility is mostly directed against strong forms of affirmative action that challenge traditional understandings of merit (see Chapter 3), or against those policies that single out groups identified by factors such as race, ethnicity or religion.[67] Thus, the most well-known examples of affirmative action in France are rather 'soft',[68] such as the use of 'priority educational zones' (where those living in particularly disadvantaged areas are entitled to schools with special characteristics such as additional funding) and programmes for the improvement of disadvantaged neighbourhoods.[69] In the context of sex equality, special measures to protect maternity have also been accepted.[70]

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[66] Perreau (n 4) pass; Alain-Gérard Slama, 'Contre la Discrimination Positive. La Liberté Insupportable' (2004) 111 Revue Française D'Etudes Constitutionnelles et Politiques 133, 133-134; Levade (n 33) 55-60; Fatin and Stefanini (n 3) 86.

[67] Cf. Patrick Simon, 'La stratégie de la discrimination positive: Sarkozy et le débat français sur l'égalité' (2009) 17 Modern & Contemporary France 435, 444; Françoise Stasse, 'Pour Les Discriminations Positives' (2004) 111 Revue Française D'Etudes Constitutionnelles et Politiques 119, 121.

[68] Examples in Comité de Réflexion sur le Préambule de la Constitution (n 64) 57ff.

[69] See Thomas Kirszbaum, 'La Discrimination Positive Territoriale: De L'Égalité des Chances à la Mixité Urbaine' (2004) 111 Revue Française D'Etudes Constitutionnelles et Politiques 101. A stronger version of affirmative action is the special admission system used for certain elite universities, see Bernard Toulemonde,

Affirmative action policies in France have particular characteristics. They are rarely presented and justified as affirmative action, or only belatedly so. They do not target identity groups as such, although in practice these policies impact disproportionally to the benefit of members of those groups (eg benefits for poor neighbourhoods primarily advantage immigrants).[71] The grounds for special treatment are not personal features such as race or religion, but 'objective' indicators associated with social disadvantage (eg income, educational underachievement) or geographical location.[72] Compensation for past discrimination is alien to French affirmative action.[73] Lastly, special treatment is time-limited.

Parité did not fit with most of the features discussed above. It targeted women as a group. The ground for special treatment was a personal feature (sex). Whether it was time-limited was controversial. However, even this 'blunter' kind of affirmative action had certain precedents in France, some of them accepted by the *Conseil*. Thus, in 1960 the *Conseil,* although without discussing the core of the matter, allowed a legal quota within

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'La Discrimination Positive Dans L'Education: Des ZEP À Sciences Po' (2004) 111 Revue Française D'Etudes Constitutionnelles et Politiques 87.

[70] See Francoise Dekeuwer-Défossez, *L'egalite des sexes* (Dalloz 1998) 70-73.

[71] Cf. Gwénaële Calvès, 'Les Politiques Françaises de Discrimination Positive : Trois Spéficités' (2004) 111 Revue Française D'Etudes Constitutionnelles et Politiques 29, 30-31; Simon (n 67) 444-445; Daniel Sabbagh, 'Affirmative Action à la Française: A Color-Blind Option or Subterfuge?' <http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/6/4/2/1/pages64218/p64218-1.php> accessed 14 June 2012, 9-10.

[72] Eg CC 94/350 (special tax regime applicable to Corsica); CC 84/178 (special regulations for Nouvelle-Calédonie). See also Jacqueline Costa-Lascoux, 'Les Échecs de L'Integration, Un Accroc Au Contrat Social' (2004) 111 Revue Française D'Etudes Constitutionnelles et Politiques 19, 22-23; Levade (n 33) 63-64; Gwénaële Calvès, 'Affirmative Action in French Law' (1998) XIX The Tocqueville Review 167, 173-175; Sabbagh (n 71) 1.

[73] But see Calvès, 'Les Politiques Françaises de Discrimination Positive : Trois Spéficités' (n 71) 32-34, who sees a relationship between some affirmative action policies and the French colonialist past.

the judiciary for French citizens of Algerian origin who were Muslim.[74] Similar quotas seem to have been applied to the Army and 'administrative functions' between 1958 and 1962.[75] Later, in 1987, the Labour Code was amended so as to reserve 6% of jobs for handicapped persons in companies with at least 20 employees.[76] In 1997, the *Conseil* upheld the EC Treaty,[77] Article 141 of which allowed Member States to adopt specific advantages for the under-represented sex in the professional sphere (although the scope and effects of the *Conseil* decision on this matter is controversial).[78]

In 2008, the President of the Republic appointed a committee to discuss whether the Preamble of the 1958 Constitution should be modified so as, *inter alia*, to allow the adoption of affirmative action measures. The response of the committee was negative, because it deemed that the current state of the French law allowed affirmative action, albeit subject to certain limitations, mainly the inability to target groups on the grounds of race, origin or religion (at least directly).[79] The Commission also stressed that these policies would be more permissible where their aim was the general interest or a constitutional goal, and the means were adequate and proportional to this aim.[80] French law has evolved, therefore, from frontal attack towards a more progressive acceptance of affirmative action, an evolution that seems to have been encouraged by the introduction of *parité*.

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[74] CC 60/6 DC. See also Levade (n 33) 64-65; Calvès, 'Affirmative Action in French Law' (n 72) 172.

[75] Perreau (n 4) 49.

[76] Loi n° 87-517.

[77] CC 97/394.

[78] Contrast Jean Pierre Camby, 'Article 1. L' Égalité Des Hommes et Des Femmes: Une Égalité Par La Loi' in JP Camby et al (ed), *La Révision de 2008: Une Nouvelle Constitution?* (L.G.D.J. 2011) 22 with Bertrand Mathieu and Michel Verpeaux, *Droit Constitutionnel* (Presses Universitaires de France 2004).

[79] Comité de Réflexion sur le Préambule de la Constitution (n 64) 52-64.

[80] Ibid, 61.

d) Political rights

Although the 1958 Constitution does not contain a catalogue of rights and liberties, it acknowledges political rights either expressly or implicitly (as arising from the status of citizen). Article 3 of the Constitution renders the right to vote as a derivative of citizenship. It also provides that the vote must be universal, equal and secret. The content of the right appears to be equated with franchising (not substantive representation or effective influence over public policies, as discussed in Chapter 4), and is never considered as a group right. Special relevance has been given to the 'universalisation' of the vote[81] and voter equality. The latter comprises matters such as the 'one man, one vote' principle, equal vote weight, appropriate/balanced districting, and electoral systems.[82] Voter equality is considered as a particularly important constitutional concern, and therefore derogations from it are subject to a specially heightened scrutiny.[83]

The right to stand for office is normally referred as 'eligibility' or the 'right to be eligible' (and occasionally as passive voting),[84] and seems to be regarded as a corollary of the right to vote.[85] This does not affect, however, its constitutional status and the

[81] Eg Julien Laferrière, 'Nature des Droits Attachés à la Nationalité' [2007] 23 Cahiers du Conseil Constitutionnel 82, 82-83.

[82] Eg Pierre Avril, 'Un Homme, Un Voix?' (2007) 120 Revue Française D'Etudes Constitutionnelles et Politiques 123; Rousseau (n 41) 366ff; Bell (n 33) 205ff; Turpin (n 9) 221ff.

[83] Pellissier (n 38) 62-64; Rousseau (n 41) 357-361. But see possible exceptions in CC 85/196; 86/208.

[84] Eg L Favoreu et al (n 14) 963.

[85] Cf. Ibid, 968.

exceptional nature (and restrictive interpretation) of any limitations applying to it.[86] The main concern regarding the right to stand for office appears to be the equal treatment of candidates, focussing on eligibility requirements and campaign regulations (eg public funding, access to mass media). Equality is seen as necessary to ensure the right to an equal and free vote,[87] and any derogations are subject to strict scrutiny.[88]

Regarding the status of political parties, the 1958 Constitution expressly acknowledges them in Article 4: 'Political parties and groups shall contribute to the exercise of suffrage. They shall be formed and carry on their activities freely. They shall respect the principles of national sovereignty and democracy.'[89] In 1999, a second paragraph was added imposing on parties the obligation of contributing to the implementation of *parité.* Article 4 reflects a compromise: parties are accorded a public role (particularly in elections) and granted autonomy, but they are not given a monopoly of political participation and their activities are limited by a Republican anti-factions ethos. This seems to reflect a historical and political shift from parlamentarism and 'group-interests politics' towards presidentialism and 'general-interest politics'.[90] Significantly, political parties seem to have an especially bad image in France.[91]

From the EQW's perspective, the view of political rights in France is not particularly welcoming. Political rights are not seen as group rights at all, their systemic dimension is

[86] Cf. CC 69/18; Rousseau (n 41) 361ff.

[87] Cf. Pellissier (n 38) 63-64; Rousseau (n 41) 365.

[88] Pellissier (n 38) 64.

[89] Translation availble at <www.assemblee-nationale.fr/english/8ab.asp> accessed 23 January 2013.

[90] Cf. Hugues Portelli, 'La Ve République et les Partis' (2008) 126 Revue Française D'Etudes Constitutionnelles et Politiques 61, 61; Pierre Brechon, 'Les Partis Politiques dans L'Expression du Suffrage' (2007) 120 Revue Française D'Etudes Constitutionnelles et Politiques 109, 110.

[91] Brechon (n 90) 113.

not well-developed, and the main concern seems to be about ensuring formal equality in their exercise, all of which is hard to reconcile with EQW. Concerning political parties, the introduction of a special constitutional provision about *parité* may evidence a previous incompatibility between their autonomy and EQW.

5.4 The Introduction of *Parité* [92]

a) Failed attempts

The French movement for EQW developed in three waves. The first started in the 1970s and its goal was to force political parties to establish internal quotas for women. Its success was very limited,[93] generating a strong resistance among French parties. The second wave started later in the 1970s and continued into the 1980s. Its aim was to impose EQW in municipal elections. The focus on municipal elections could be seen either as a 'testing', or as aiming to the creation of a 'breeding ground' for female politicians that would render quotas at other elections unnecessary. After a failed attempt in 1980, a law was passed in 1982 establishing that electoral lists for municipal elections in towns of at least 3,500 people could not have more than 75% of candidates of the same sex.[94] The sanction for non-compliance was the non-registration of the lists. There were no placement

[92] Historical accounts in Scott (n 3); Gill Alwood and Khursheed Wadia, *Women and politics in France 1958-2000* (Routledge 2000) ch 8; Gaspard, Servan-Schreiber and LeGall (n 1) pt 3; Raylene Ramsay, *French women in politics* (Berghahn 2003) ch 3; Janine Mossuz-Lavau, 'La Parité en Politique, Histoire et Premier Bilan' [2002] (7) Travail, Genre et Sociétés 41; Sineau (n 2).

[93] The only major political party to adopt a quota was the Socialist Party.

[94] Loi n° 82-974.

mandates, and the wording of the quota was neutral (ie it applied to both sexes) so as to reduce the risk of unconstitutionality.[95] This quota seems to have been conceived as a temporary measure.[96]

During the parliamentary discussion, there was much hesitation about the constitutionality of the quota.[97] Supporters stressed the need to correct the exclusion of women from representative institutions, presenting quotas as a pragmatic measure to advance political equality. Opponents alleged the incompatibility between quotas and the notion of abstract universalism, as well as the danger of communitarianism. Eventually, the law was passed, but it was immediately challenged by a group of deputies before the *Conseil* (Article 61 of the Constitution allowed sixty members of each Chamber, among other authorities, to challenge the constitutionality of a statute already approved by the Parliament), who contested a provision of the law that had no relation with the quota. Although the *Conseil* rejected their claim, it decided, *proprio motu*,[98] to declare the quota to be unconstitutional:[99]

> citizenship confers the right to vote and stand for election on identical terms on all those who are not excluded on grounds of age, incapacity or nationality, or on any ground related to the preservation of the liberty of the voter or the independence of the person elected; these constitutional principles preclude any division

[95] See L Favoreu (P Bravo tr), 'Principio de Igualdad y Representación Política de las Mujeres: Cuotas, Paridad y Constitución' [1997] (50) Revista Española de Derecho Constitucional 13, 14.

[96] Cf. Danièle Loschak, 'Les hommes politiques, les << sages >> (?)…et les femmes (a propos de la decisión du Conseil constitutionnel du 18 novembre 1982)' [1983] (2) Droit Social 131, 132.

[97] Mossuz-Lavau, *Femmes/hommes : pour la parité* (n 2) 31; Scott (n 3) 43; Loschak (n 96) 132-133.

[98] The authority of the *Conseil* to act *proprio motu* was controversial at the time. Contrast Loschak (n 96) 133-134 with J.-M. Marchand, 'Lois Et Reglements' [1983] Semaine Juridique N° 19946, I.

[99] CC 82/146.

> of persons entitled to vote or stand for election into separate categories; this applies to all forms of political suffrage, in particular to the election of municipal councillors[100]

The *Conseil* grounded this decision in Article 3 of the Constitution[101] and the second part of Article 6 of the Declaration.[102]

At first sight, the *Conseil* seems primarily concerned with the rights to vote and to stand for election. However, it is not the substantive content of these rights that is at stake (as in Spain), but equality in their exercise (which is usually the main French concern regarding these rights). In other words, the decision appears to focus on equality before the law (thus the reference to Article 6 of the Declaration),[103] but as applied to political rights. This equality is formal ('identical terms') and not *de facto* (the factual bases for the egalitarian exercise of political rights are totally overlooked).[104]

However, in the background the *Conseil* seems to be enforcing fundamental notions related with political representation, such as abstract universalism, national sovereignty,

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[100] Translation available at <www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/82-146DC-a82146dc.pdf> accessed 23 January 2013.

[101] 'National sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum. No section of the people nor any individual may arrogate to itself, or to himself, the exercise thereof. Suffrage may be direct or indirect as provided for by the Constitution. It shall always be universal, equal and secret. All French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided for by statute.' Translation available at <www.assemblee-nationale.fr/english/8ab.asp> accessed 23 January 2013.

[102] 'All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.' Translation available at <www.hrcr.org/docs/frenchdec.html> accessed 23 January 2013.

[103] Cf. Marchand (n 98), I; Favoreu (n 47) 172.

[104] National Assembly - Committee on Constitutional Amendments Legislation and General Administration of the Republic, *Rapport N° 1240* (1998); Eléonore Lépinard and Laure Bereni, 'La Parite ou le Mythe d'une Exception Francaise'' (2004) 111 Revue Française D'Etudes Constitutionnelles et Politiques 73, 79-80;

citizenship and, particularly, the indivisibility of the French people.[105] A telling detail is that despite the conciseness of its decision, the *Conseil* transcribed Article 3 complete (which deals with sovereignty, French universalism and the indivisibility of the French people) and not only the provisions concerning the right to vote. The relevance of these 'background considerations' is also evidenced by the fact that, although equality before the law appears to be the central issue, there is in this decision none of the reflections of the *Conseil* common in equality cases, such as whether there was a general interest involved, or the declaration of sex as a forbidden ground for making distinctions. Consequently, it would not be appropriate to label the *Conseil*'s scrutiny in this case either as rationality or strict.

The systemic nature of these 'background considerations' may also explain why the *Conseil* did not treat this case as a conflict of fundamental rights. In fact, the political rights of women are not even mentioned, and a discussion about the proportionality of the quota is entirely avoided. Moreover, equal political rights are labelled as 'principles of constitutional value', shifting the focus from an individual rights' problem towards a systemic constitutional issue.

The *Conseil* decision was severely criticised by EQW advocates. Concerning the sources quoted by this decision, it was said that the Declaration should not be literally construed. Its spirit was the abolition of privileges, and the quota was precisely trying to eliminate men's privileges in municipal representation.[106] Moreover, both constitutional sources were incompatible with the exclusion of women from politics: men, being a section

[105] Cf. Boulouis (n 20) 80; L Favoreu (P Bravo tr) (n 95) 24-26; Dominique Rousseau, 'Los derechos de la mujer y la constitucion francesa' in Enrique Álvarez (ed), *Mujer y constitución en España* (Centro de Estudios Políticos y Constitucionales 2000) 107; Mathieu and Verpeaux (n 78) 40-41.

[106] Cf. Scott (n 3) 44; Loschak (n 96) 136.

of the people, had monopolized political power (violating Article 3 of the Constitution), and sex determined access to public office (violating Article 6 of the Declaration).[107] Additionally, the *Conseil* omitted the Preamble of the 1946 Constitution ('The law guarantees women equal rights to those of men in all spheres'), in circumstances that EQW could have been regarded as an enforcement of such provision.[108]

Further criticism concentrated on the 'exceeding importance' given to political rights. Thus, it was stressed that such rights were already subject to plenty of restrictions, many of them more severe than electoral quotas, such as closed electoral lists.[109] It was also argued that the political and electoral systems were so hostile to women being candidates, that EQW would enhance both the voting rights of those citizens that may want to vote for women and the right of women to be candidates.[110] Regarding the right to stand for office, it was also stressed that it could not be conceived only as an individual right, insofar as the law required the support of political parties or political groups.[111] Moreover, EQW did not prevent men from being candidates. Criticism also targeted the *Conseil*'s formal understating of equality, oblivious to the need of overcoming the *de facto* inequality suffered by women.[112] And if formality was so relevant, then it should have been taken into account that the quota applied to both men and women equally. Other criticisms concerned

[107] Gaspard, Servan-Schreiber and LeGall (n 1) 150-152.

[108] Cf. National Assembly - Committee on Constitutional Amendments Legislation and General Administration of the Republic (n 104); Alwood and Wadia (n 92) 207; Rousseau, 'Los derechos de la mujer y la constitucion francesa' (n 105) 107-108.

[109] Loschak (n 96) 134-135; Gaspard, Servan-Schreiber and LeGall (n 1) 162.

[110] Cf. Gaspard, Servan-Schreiber and LeGall (n 1) 153ff.

[111] Loschak (n 96) 134.

[112] Cf. National Assembly - Committee on Constitutional Amendments Legislation and General Administration of the Republic (n 104); Lépinard and Bereni (n 104) 80.

the 'inability' to understand that women were unique and not a category similar to racial or religious groups, the *Conseil*'s view that national sovereignty was relevant to local elections, and the Conseil's unwillingness to acknowledge the existence of other forms of affirmative action in French legislation.[113]

Whatever the merits of this decision, it became a formidable hurdle for any future attempt to introduce EQW. It forbade all kinds of divisions of both voters and candidates (pre-emptively closing the door to minorities' claims); it could be understood as a prohibition of all kinds of affirmative action in the electoral sphere (not only quotas), and it was expressly applicable to all political elections. On the other hand, the *Conseil* only forbade explicitly electoral quotas, without resolving if they were permissible in other contexts.

b) *Parité*

The political reaction to the 1982 decision not only targeted the Conseil itself. Additional criticism targeted deputies and senators; in particular, their weak reaction to the *Conseil*'s decision raised suspicions that they approved the quota only to win women's favour, knowing that the *Conseil* would strike it down.[114] However, a new (and partly successful) wave in the adoption of EQW started at the end of the 1980's under the slogan

[113] Cf. Loschak (n 96) 135-136.

[114] Ibid, 13-133; Scott (n 3) 43; Gaspard, Servan-Schreiber and LeGall (n 1) 137; Mossuz-Lavau, *Femmes/hommes : pour la parité* (n 2) 31.

of *parité*.[115] The aim of the *parité* movement was simple: to achieve 'the numerical equality of men and women in the elected institutions'[116].

Parité was introduced as a new and fresh ideal, and was consistently distinguished from traditional ('American') affirmative action measures, such as quotas. Moreover, supporters of *parité* argued that they were not advocating group rights but re-defining 'the universal'. They proposed that the abstract citizen was gendered, thus introducing a uniquely concrete feature in the abstractedness of the concept. They also asserted that women were different from other groups (using most of the arguments discussed in Chapters 1 and 2), and that *parité* was therefore not applicable to minority groups.[117]

Although *parité* was increasingly seen as a permanent foundation of democracy, the *parité* movement was quintessentially pragmatic: *parité* was a strategy to advance women, not an end in itself.[118] Thus its theoretical and philosophical foundations were never entirely clear. Similarly, the discourse of the *parité* movement was not always fully consistent, and the concept could mean different things to different people. This was mainly because of the lack of a hierarchical leadership inside the movement (a rather loose coalition of pre-existing factions and new *parité*-focused groups), its rhetorical evolution

[115] The term 'parity' seems to have emerged first in the European context (Sandrine Dauphin and Jocelyne Praud, 'Debating and Implementing Gender Parity in French Politics' (2002) 10 Modern & Contemporary France 5, 5).

[116] Alwood and Wadia (n 92) 2.

[117] Eg Mossuz-Lavau, *Femmes/hommes : pour la parité* (n 2) ch 3; Gaspard, Servan-Schreiber and LeGall (n 1) 165-167; Carcassonne (n 33) 169.

[118] Cf. Yves Sintomer, 'Gender and Political Representation: the Question of Parité in France'' <www.sintomer.net/publi_sc/documents/genderandpoliticalrepresentation.pdf> accessed 19 may 2010, 11-12; Alwood and Wadia (n 92) 214; Scott (n 3) 122-123; Noelle Lenoir, 'The Representation of Women in Politics: From Quotas to Parity in Elections' [2001] (50) International and Comparative Law Quartely 217, 241-242.

over time,[119] the cohabitation inside the movement of different approaches towards women's inequality problem,[120] and its nature as a political movement and not a doctrinal one.[121]

A crucial fact in favour of the *parité* cause was that it enjoyed a steadily high level of public support.[122] Even though this enthusiasm was far from being shared by the political party elites,[123] it eventually forced them to take a stance on the issue. This was particularly the case in the presidential election of 1995,[124] which resulted in the creation of the *Observatoire de la Parité*, a Governmental institution that became a powerful ally to the *parité* movement. The *parité* campaign also benefited from an increasingly strong rhetorical support from the international community (eg the Council of Europe, the United Nations and the European Union).[125] But, *parité* also gathered strong opposition not only among political elites, but also in certain feminist and intellectual circles. In fact, the public

[119] Scott (n 3) ch 4-5; Eléonore Lépinard, 'Identity without Politics: Framing the Parity Laws and Their Implementation in French Local Politics' [2006] Social Politics 30, 37-38.

[120] Scott (n 3) ch 4-5.

[121] Ibid 57.

[122] Manon Tremblay, 'Les élites parlamentaires francaises et la parité: sur l'evolution d'une idée' (2002) 10 Modern & Contemporary France 41, 44; Joelle Godard, 'Women in politics in France: is parite the best way to redress the balance?' [2006] Public Law 124, 137; Ramsay (n 92) 80.

[123] Alwood and Wadia (n 92) 200; Tremblay (n 122) 44-45.

[124] Jane Freedman, 'Increasing Women's political representation: the limits of constitutional reform' [27] (1) West European Politics 104, 112-113; Mossuz-Lavau, *Femmes/hommes : pour la parité* (n 2) 51ff; Sineau (n 2) 165ff; Rose-Marie Lagrave, 'Une étrange défaite. La loi constitutionnelle sur la parité' (2000) 13 Politix 113, 118ff.

[125] Sainte-Croix Rauzduel, 'Du cens à la parité: la conquête électorale féminine pour le droit de vote selon l'exemple de la France' [2000] (41) Les Cahiers de Droit 745, 763ff; Mona Lena Krook, 'National Solution or Model from Abroad? Analyzing International Influences on the Parity Movement in France' [2007] (5) French Politics 3, 11-14; Lagrave (n 124) 115-116; Lépinard and Bereni (n 104) 74-76; Scott (n 3) 48.

debate about *parité* was passionate, generating colourful and bitter arguments, and was extensively covered by the press.[126]

The *parité* movement interacted with three important discussions taking place in France in the 1990's. The first involved the debate about the nature of democracy and representation.[127] There was a widespread feeling that something was wrong with the political system and politicians were regarded as a distant and corrupted caste. The *parité* movement took advantage of this situation, arguing that the crisis was related with the exclusion of women from the political elite. Moreover, the inclusion of women was presented as part of the solution, bringing 'new air' to the political milieu and re-connecting it with the 'real world'.[128]

Simultaneously, the discussion of a bill regulating homosexual partnerships had a profound impact over the discourse of the *parité* movement.[129] Since its early stage, there were different views inside the movement about the importance of sex. According to some, sex was relevant only because it was the cause of the exclusion of woman. Once the universal citizen is redefined as sexed, the chances of each person in the political process would not be affected by sex, which would become irrelevant. Other supporters of *parité* considered sex as the permanent core and unique foundation of personal identity.

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[126] See Micheline Amar, *Le piège de la parité: arguments pour un débat* (Micheline Amar ed, Hachette 1999); Lagrave (n 124) 121-123.

[127] Freedman (n 124) 112; Scott (n 3) 31-34; Laure Bereni and Eléonore Lépinard, 'Les Femmes Ne Sont Pas Une Categorie: Les Strategies de Legitimation de la Parite en France' [2004] Revue Française de Science Politique 71, 84-85; Darren Rosenblum, 'Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions' [2006] UC Davis Law Review 1119, 1143-1144.

[128] Eg Bereni and Lépinard (n 127) 85; Sintomer (n 118) 5; Alwood and Wadia (n 92) 214; Rosenblum (n 127) 1144-1145.

[129] See Scott (n 3) ch V; Marie-Blanch Tahon, 'La Parité en débat au-delà de Versailles' (2002) 10 Modern & Contemporary France 25, 26ff.

According to Scott,[130] during the first stage of the movement there was a compromise, even though it was closer to the former vision. The discussion regarding homosexuality changed this, because it provoked the emergence of the 'couple discourse'. According to this, the complementarity of the sexes was the irreplaceable building block of personal identity, society and civilization itself.[131] For pragmatic supporters of *parité* this discourse was highly appealing: the universally successful complementarity of the sexes ought to be applied to the political context. Many advocates of *parité* jumped on this boat, and therefore the *parité* movement become more 'essentialist', and also more distant from other disadvantaged groups.

Also during the 1990s, there was a discussion about minorities' rights.[132] Some communities pressed to be acknowledged and treated as such. However, these group claims were mostly seen as a direct attack on the notion of abstract universalism and other related 'revolutionary ideas'. Illustratively, the approach towards immigration was centred on the integration of each immigrant into the French Nation, with no recognition of communitarian identities.[133] This discussion put pressure on the *parité* movement, which had to reinforce its claim that *parité* was not applicable to minorities but only to women.

[130] Scott (n 3) ch V.

[131] This also related with the French idea that men and women had an especially good relationship in France. Eg Alwood and Wadia (n 92) 7.

[132] Scott (n 3) ch I.

[133] This has evolved to some extent, see Simon (n 67) 438ff; Costa-Lascoux (n 72).

c) The debate

The *parit*é movement attracted criticisms from different sectors (feminists, conservatives, republicans) and disciplines (political science, philosophy, law). The most important theoretical obstacle was the idea of abstract universalism.[134] Critics affirmed that the ideas of the *parit*é movement where both nonsense and dangerous. Nonsense, because 'sexing the universalism' was tantamount to the concretization of the abstract,[135] and also because there were not two different ways to be human; 'humanness' was only one and was shared by all human beings.[136] In fact, sex was not necessarily more important than other distinctions between individuals.[137] The ideas of the *parit*é movement were also dangerous, because abstract universalism was the cardinal guarantee of equality before the law: the Republic should ignore differences among individuals as the only way to treat them equaly. If these principles had not worked so far in certain contexts, it was due to the lack of sufficient enforcement, but they should not be abandoned.[138]

Supporters of *parit*é responded by downplaying the importance of theory, stressing that *parité* was a pragmatic strategy.[139] Simply stated, women would be better off if *parité* was adopted. Additionally, while reaffirming their commitment to abstract universalism,

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[134] Eg Mossuz-Lavau, *Femmes/hommes : pour la parité* (n 2) 65ff; Lépinard (n 119) 37.

[135] Elisabeth Badinter, 'La Parité est une Régression' in Micheline Amar (ed), *Le piège de la paritè: arguments pour un débat* (Hachette 1999).

[136] Cf. Robert Badinter, 'Séance au Sénat' in Micheline Amar (ed), *Le piège de la paritè: arguments pour un débat* (Hachette 1999) 35.

[137] Cf. Fethi Benslama and Michel Surya, 'Différence et souveraineté' in Micheline Amar (ed), *Le piège de la paritè: arguments pour un débat* (Hachette 1999) 109-110; Dekeuwer-Défossez (n 70) 94.

[138] Cf. Dominique Schnapper, 'La transcendance par le politique' in Micheline Amar (ed), *Le piège de la paritè: arguments pour un débat* (Hachette 1999) 113; Scott (n 3) 72.

[139] See (n 118).

they argued that, in its traditional form, it was only a screen for 'male universalism'.[140] It needed to be redefined (as sexed) to be truly universal so as not to exclude women. Advocates of *parité* also tried to justify the view that sex was the uniquely legitimate distinction that was tolerated by abstract universalism. They supported this argument on anthropological grounds (sex precedes any other human distinction), on legalistic grounds (sex had already been established as relevant by law and acknowledged by the State), and on statistical grounds (women were more than half of the electorate).[141]

Similarly, *parité* was criticised for advancing the 'wrong' theory of representation[142] (mirror or descriptive representation) and creating 'categories' of representatives.[143] As mentioned, descriptive representation was at odds with the theory of national sovereignty and other 'revolutionary ideas', according to which neither the electorate nor the candidates could be divided into categories. Moreover, women could not be regarded as a homogenous category; they had diverse concerns, values, political ideas, etc.[144] Therefore, they would not be better 'reflected' in parliament just because it included more women, and female representatives could not claim to represent all women. The *parité* movement responded again with pragmatism, affirming that neither women nor the political system could afford to continue with the exclusion of women from political

[140] Rousseau, 'Los derechos de la mujer y la constitucion francesa' (n 105) 104-106; Mossuz-Lavau, *Femmes/hommes : pour la parité* (n 2) 67.

[141] Bereni and Lépinard (n 127) 80-84.

[142] Cf. Odile Dhavernas, 'La parité, enfant bâtard de la Sofres et du Suffrage?' in Micheline Amar (ed), *Le piège de la paritè: arguments pour un débat* (Hachette 1999) 185-188; Evelyne Pisier, 'Des impasses de la parité' in Micheline Amar (ed), *Le piège de la paritè: arguments pour un débat* (Hachette 1999) pass.

[143] Dekeuwer-Défossez (n 70) 91-92.

[144] See Alwood and Wadia (n 92) 201ff. Examples of this criticism in Lucy Ferry, 'La parité et les <<valeurs féminines>>' in Micheline Amar (ed), *Le piège de la paritè: arguments pour un débat* (Hachette 1999) 128-131; Pisier (n 142) 202-203.

assemblies.[145] Regarding differences existing among women, advocates of *parit*é 'did not claim that women would represent only women; nor did they suggest that all women elected to office would act in the same way. They argued just the reverse: women were as capable as men of representing the nation and they were as varied in their opinions and assessments as men'[146].

A related criticism was the accusation of communitarianism '*a la Americaine*'. *Parité* was seen as only a fancy and confusing word for quotas, which were regarded as importing identity politics and opening Pandora's Box, because many other factions would follow women's example, demanding quotas in political representation.[147] Sex was not so different from other factors as to prevent such a development. The *parité* movement responded by insisting that sex was unique, thus setting women aside from other disadvantaged groups. This in turn generated new criticism, not only from the members of other disadvantaged groups (who considered that by committing so strongly to anti-communitarianism, women were selfishly damaging their cause) but also from those who thought that abstract universalism was a major obstacle for the advance of social justice in France.[148] The latter's strategy was to directly confront the concept, but supporters of *parité*, by redefining abstract universalism so as to include women in it, reinforced the concept and divided the forces opposed to it.

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[145] Lépinard (n 119) 38-40. See also (n 119).

[146] Scott (n 3) 55.

[147] See Amar (n 126), where several authors refer to this argument (eg 18, 24, 46, 58, 64, 91, 147, 161-162, 176). See also Dekeuwer-Défossez (n 70) 94; Rousseau, 'Los derechos de la mujer y la constitucion francesa' (n 105) 108.

[148] See Catherine Lloyd and Leah Bassel, 'Bridging Differences of Building Silences? *Parité* and the Representation of 'Women' in French Political Life' (2008) 16 Journal of Contemporary European Studies 99.

Regarding the relationship between quotas and *parité*, the *parité* movement insisted that they were different, although not always consistently. Whereas quotas were too little, and quickly transformed into ceilings, *parité* was more ambitious, reclaiming full equality between women and men. Whereas quotas were tantamount to communitarianism and group identity, supporters of *parité* not only denied that women were a faction, but also sought to transcend group identity by redefining abstract universalism.[149] Some advocates of *parité* argued that quotas caused conflict by emphasising power relations between factions and their specific virtues and vices. Conversely, *parité* was not conflictual because it focused on perfecting democratic representation.[150] Other supporters of *parité* stated the opposite: *parité* was different from quotas because it was primarily centred on the redefinition of the individual citizen as sexed and not on the representativeness of political institutions.[151] Finally, it was argued that quotas stressed concrete and measurable results, and were normally complemented by policies such as special training and financial aids. *Parité*, for all its pragmatism, focused its discourse on the symbolic and theoretical sphere, and was not concerned (at least originally) with complementary policies.[152]

A further criticism against *parité* was that behind its penchant for 'slogan'[153] and 'spectacularism,'[154] there was much ambiguity and dangerousness. Many feminists accused the *parité* movement of 'essentialism', of putting sex in the centre again, after decades of

[149] Gaspard, Servan-Schreiber and LeGall (n 1) 164-167.

[150] Bereni and Lépinard (n 127) 86-87.

[151] Freedman (n 124) 109-110.

[152] Cf. Bereni and Lépinard (n 127) 88-91.

[153] Pisier, 'Universalité contre parité', 15.

[154] Henri Pena-Ruiz, 'Eloge de l'abstraction' in Micheline Amar (ed), *Le piège de la paritè: arguments pour un débat* (Hachette 1999) 74.

fighting to make it irrelevant.[155] *Parité* was denounced as naturalism and biological determinism, which have historically caused discrimination against women.[156] Thus, *parité* was a dangerous regression.[157] Moreover, the idea of a distinct 'female essence' and 'feminine values' was built upon old and hazardous stereotypes, and was rebutted by the actual practice of politics, where women and men behave similarly.[158] Analogous criticisms were directed to the 'couple discourse'.

Most supporters of *parité* denied being essentialists.[159] In fact, their response was that women's exclusion from politics was a form of essentialism, because it rested on a social and political understanding that women and men were different and should have distinct roles. Several advocates of *parité*, however, asserted that women would add something new to politics because of their previous experiences, which were different from those of their male colleagues, particularly for the exclusion they had suffered. Other supporters of *parité* went further, affirming that women would enrich the political world with their values, interests and capacities. In any case, the *parité* movement evolved. In its final stage it was certainly more essentialist than it would openly acknowledge, emphasising that women and men should complement each other in politics as in life (the 'couple discourse').

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[155] Francoise Duroux, '<<Parité? On connaît la chanson>>' in Micheline Amar (ed), *Le piège de la parité: arguments pour un débat* (Hachette 1999) pass; Badinter (n 135) 41-42; Mona Ozouf, 'Une bienheureuse abstraction' in Micheline Amar (ed), *Le piège de la parité: arguments pour un débat* (Hachette 1999) pass; Ramsay (n 92) 74ff.

[156] Liliane Kandel, 'Sexe, nature – et amnésie' in Micheline Amar (ed), *Le piège de la parité: arguments pour un débat* (Hachette 1999); Robert Redeker, 'La parité ou la revanche de Joseph de Maistre' in Micheline Amar (ed), *Le piège de la parité: arguments pour un débat* (Hachette 1999).

[157] Cf. Badinter (n 135); Kandel (n 156)

[158] Cf. Rousseau, 'Los derechos de la mujer y la constitucion francesa' (n 105) 108-109; Ferry (n 144) pass.

[159] See Scott (n 3) 63-66.

The focus of the *parité* movement in legal reform also raised concerns. It was regarded as naïve because of its faith in the law to bring about instantaneous social change.[160] Moreover, it was argued that inequality in political representation was the consequence of deeper socio-economic inequalities. Correcting these problems was more urgent, and they would not be solved by achieving equality in political representation,[161] an effort that could distract and divide. Supporters of *parité* answered that the law had already intervened through the 1982 decision of the *Conseil.* Thus, the law had become an obstacle and had to be changed. Moreover, given the resistance of the political parties, legal imposition was seen as the only way forward.[162] Additionally, many advocates of *parité* seemed confident that law could indeed change social reality.[163] They also viewed political representation as lagging notoriously behind other areas in terms of women participation, therefore requiring special attention.[164]

Finally, many intellectuals complained that to discriminate in order to end discrimination was morally wrong and antithetical to republican values,[165] and that strategies could not override principles.[166] Others highlighted that all discrimination

[160] H Hirata et al, 'Parité ou mixité' in Micheline Amar (ed), *Le piège de la parité: arguments pour un débat* (Hachette 1999) 14.

[161] Eg Catherine Kinztler, 'La parité, ou le retour de la << nature >>' in Micheline Amar (ed), *Le piège de la parité: arguments pour un débat* (Hachette 1999) 88-89; Danièle Sallenave, 'Qui sont les << bourges >>' in Micheline Amar (ed), *Le piège de la parité: arguments pour un débat* (Hachette 1999) 99-100.

[162] Scott (n 3) 54-55; Freedman (n 124) 105. See also Lépinard and Bereni (n 104) 81-84.

[163] Cf. Scott (n 3) 124.

[164] Cf. Gaspard, Servan-Schreiber and LeGall (n 1) 28-29; Lagrave (n 124) 114. Cf. Scott (n 3) 46.

[165] Eg D De Ton, 'Mirobolant' in Micheline Amar (ed), *Le piège de la parité: arguments pour un débat* (Hachette 1999) 62.

[166] Cf. Slama (n 66) 133.

eventually turns against the discriminated.[167] Many feminists argued that *parité* was insulting and even humiliating.[168] Other stressed its reductionist approach.[169] *Parité* was also labelled as political elitism, because the only beneficiaries would be an aristocracy of women capable of taking political chances.[170] A few critics also mentioned the 'victim argument' in connection to the rights to vote and stand for election.[171]

d) The legal path

In 1999, a law was passed mandating parity in electoral lists for regional representative assemblies,[172] understood as half of the slots in the lists for each sex. The sanction for non-compliance was the non-registration of the list. This law was challenged by a group of senators[173] invoking the 1982 decision of the *Conseil*. The Government's defence was weak,[174] stressing that 'this time' the legislator 'did not think that it was

[167] Badinter, 'Non aux quotas de femmes' 20-21; Slama (n 66) 91-92.

[168] D De Ton (n 165) 62; Badinter, 'Non aux quotas de femmes' (n 167) 20-21. See also Rousseau, 'Los derechos de la mujer y la constitucion francesa' (n 105) 109.

[169] Kandel, 'La <<moitié du ciel>>...et celle du Parlement' 176. Régine Dhoquois and Gilda Nicolau, 'Les femmes et les enfants d'abord!' in Micheline Amar (ed), *Le piège de la parité: arguments pour un débat* (Hachette 1999) 140-141; Nathalie Heinich, 'Le fins, les moyens, les príncipes: trois lignes de clivage' in Micheline Amar (ed), *Le piège de la parité: arguments pour un débat* (Hachette 1999) 146.

[170] Eg Duroux (n 155) 165.

[171] Eg Slama (n 66) 134.

[172] Loi n° 99-36.

[173] Available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1999/98-407-dc/saisine-par-60-senateurs.103527.html> accessed 23 January 2013.

[174] Available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1999/98-407-dc/observations-du-gouvernement.103528.html> accessed 23 January 2013.

creating categories among candidates, but implementing the conditions for a more real equality between women and men'. The 'real equality' argument was supported with references to the factual situation of France in the EU context. Taking a leaf from the *parité* movement's book, the Government also argued that *parité* gave 'real content' to the sex equality provision of the Preamble of the 1946 Constitution.

The *Conseil* struck down the parity clause 'for the reasons announced in the previous decision of 18 November 1982'[175] declaring that 'no distinctions may be made between voters and candidates on grounds of gender'. Although it only referred to gender, the rationale of the decision was still applicable to other distinguishing grounds. In any case, the *Conseil* reaffirmed its 1982 holding 'in the current situation', thus hinting that the passing of a constitutional reform about *parité* (at the time under discussion by the Parliament) could change the state of affairs. And, indeed, the same year as the *Conseil*'s 1999 decision, a constitutional amendment concerning *parité* was passed,[176] aiming to eliminate the obstacles imposed by the *Conseil*'s decisions. A final paragraph was added to Article 3 of the Constitution providing: 'Statutes shall promote [favour] the equal access of women and men to elective offices and posts [*aux mandats électoraux et fonctions électives*]'[177]. Article 4 of the Constitution was also complemented by a final paragraph: 'They [political parties] shall contribute to the implementation of the principle set out in the last paragraph of article 3 as provided by the law'[178].

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[175] CC 98/407. Translation available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/98-407DC-a98407dc.pdf> accessed 23 January 2013.

[176] Loi n° 99-569.

[177] Translation available at <www.assemblee-nationale.fr/english/8ab.asp> accessed 30 may 2012 (currently Article 1).

[178] Translation available at <www.assemblee-nationale.fr/english/8ab.asp> accessed 30 may 2012 (although the cross-reference is currently made not to Article 3 but to the second paragraph of Article 1).

The decision to amend Article 3 of the Constitution had enormous symbolic importance.[179] This provision dealt with crucial constitutional concepts such as sovereignty, abstract universalism and the indivisibility of the French people. The insertion of parity in this particular article demonstrated not only the political importance given to *parité*, but also that it has overcome its main theoretical obstacle. In fact, the *travaux préparatoires*[180] suggest that Parliament accepted the *parité* movement's demand of 'redefining' abstract universalism as 'sexed universalism'. The addition to Article 3 kept the 'neutral' language adopted since 1982, but innovated in speaking not of 'sexes' but of 'women and men', thus reflecting the 'couple discourse'. This wording also made obvious the inapplicability of *parité* to other groups. In fact, the *travaux préparatoires* show a quasi-obsessive insistence in rejecting any kind of present or future 'communitarianism'.

The *travaux préparatoires* also reveal that, although there was some discussion regarding the expressions *mandats électoraux* [electoral mandates] and *fonctions électives* [electives functions], it soon became clear that the law would only apply to political representation. The Government supported this narrow scope arguing that this law was only necessary because of the *Conseil*'s case-law, which would apply exclusively to political representation.[181] In other words, there was no constitutional objection to *parité* outside the political context, rendering a constitutional amendment superfluous.

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[179] Cf. Sineau (n 2) 192; Bereni and Lépinard (n 127) 90. The Senate, however, would not have modified Article 3, which was also the position of many feminists and intellectuals (eg Elisabeth Fontenay, 'L'abstraction du calcul contre celle des principes' in Micheline Amar (ed), *Le piège de la parité: arguments pour un débat* (Hachette 1999) 78-79; Badinter (n 136) 38).

[180] Available at <www.assemblee-nationale.fr/11/dossiers/parite/lc99_569.asp> 23 January 2013.

[181] See the *exposé des motif* of this bill at <www.assemblee-nationale.fr/11/projets/pl0985.asp> accessed 24 January 2013.

The amendment of Article 4 had been required by the Senate, for whom political parties were mainly responsible for the exclusion of women. Consequently, any solution to that problem should target parties as its principal agents.[182] The *travaux préparatoires* also show that the legislators' thoughts were fixed on political parties, to the point of expressly declaring their expectations of future legislation imposing financial penalties to compel parties to enforce *parité.*

A curious feature of the 1999 constitutional amendment was that although it was the '*parité* amendment', there was a political agreement to exclude the word *parité*.[183] There was concern in the political elite about the exact meaning of this concept and what it would require if inserted in the Constitution. Moreover, certain legislators considered that *parité* was too rigid an objective, impossible to accomplish in practice, and therefore the law would risk being discredited.[184] It was also argued that the legislator should keep enough freedom to decide, case by case, what was the best way to achieve the final goal, which was real equality between the sexes.

This constitutional amendment was simultaneously criticised for doing too much and too little.[185] Too much, because it was not necessary to modify Article 3 (causing serious damage to the precious notion of abstract universalism) to allow *parité.* Too little, because it was unsuitable for direct application and left the 'substantial businesses' to the legislator,

[182] Tremblay (n 122) 50-52.

[183] Cf. Sineau (n 2) 191.

[184] See National Assembly - Committee on Constitutional Amendments Legislation and General Administration of the Republic (n 104).

[185] See Alwood and Wadia (n 92) 208-211; Sineau (n 2) 191-192.

giving it too much discretion.[186] The use of the verb *favorise* (favour) was particularly controversial. Its ambiguity could give the *Conseil* undue power to decide whether a particular law was favourable enough, or even excessively favourable. More importantly, *favorise* might be interpreted 'too softly', enabling the legislator to adopt only weak measures.[187] Thus, it was not clear if *favorise* allowed the adoption of compulsory positive discrimination (ie quotas) associated with sanctions, or only incentive measures to increase equal opportunities.[188]

This amendment was also criticised for leaving many issues unsolved, such as whether it permitted or required the legislator to act; whether a 50% quota should be enforced in all kind of elections, and whether the legislator could impose parity obligations to agents other than political parties. Further criticism targeted the effects of the constitutional amendment on other groups. Whereas some argued that the damage caused to abstract universalism would necessary encourage more groups to advance similar demands, others saw the specific wording of the amendment as a terrible blow against the claims of other disadvantaged groups.[189]

Shortly after the passing of this constitutional reform, in 2000, a law was enacted applying *parité* to several elections.[190] Its main provisions were the following:

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[186] Cf. Georges Vedel, 'La parité mérite mieux qu'un marivaudage législatif!' in Micheline Amar (ed), *Le piège de la paritè: arguments pour un débat* (Hachette 1999) 27.

[187] Cf. Rousseau, 'Los derechos de la mujer y la constitucion francesa' (n 105) 110.

[188] Cf. Alwood and Wadia (n 92) 210-211.

[189] Cf. Catherine Achin, '« Représentation miroir » vs parité. Les débats parlementaires relatifs à la parité revus à la lumière des théories politiques de la représentation' (2001) 1 Droit et société 237, 255-256.

[190] Loi n° 2000-493. A complementary statute was simultaneously passed applying *parité* to the regional assemblies of three overseas territories (Loi n° 2000-612).

i) In National Assembly elections, the difference between the total numbers (nationwide) of candidates of each sex should not exceed 2%.

ii) As regards senators elected by the proportional system and in European Parliament elections, the difference between the number of women and men in each list could not exceed one. Strict alternation of women and men was required within the lists.

iii) Senators elected by the first-past-the-post system, some municipal elections, and cantonal elections were all exempted.

iv) In regional and municipal (medium and larger communities) elections, the difference between the number of women and men in each list could not exceed one. Within each group of six candidates, there must be equal number of candidates of each sex.

The common sanction for non-compliance was non registration of the lists. However, in the case of elections for the National Assembly, parties would instead forfeit part of its public financial aid. Under French law, parties receive two kinds of public financing.[191] One is linked to the number of votes obtained in elections for the National Assembly,[192] and the other to the number of elected *députés*. According to the 2000 parity law, the first source was reduced by a percentage equal to half of the difference between the percentage of women and men nominated by the party. For example, if a party presented 70% men and 30% women, the difference is 40 and the penalty would amount to 20% of the first source

[191] Article 8 Loi n°88-227.

[192] From 2014, votes for the *conseillers territoriaux* will also be taken into account (Loi n° 2010-1563).

of public funding. For this sanction to apply, the difference between the sexes had to exceed 2%.[193]

As is clear from the *travaux préparatoires,*[194] this law was presented as simple (although it established almost as many ways to apply *parité* as political elections existed in France), pragmatic, and as much as could be done without making the electoral system more proportional (this was a limitation agreed upon during the discussion of the 1999 constitutional amendment).[195] Remarkably, this law applied *parité* to a first-past-the-post election (the National Assembly). Although several alternatives were discussed (eg to pair electoral districts so citizens could vote for a man and a woman), the monetary sanction was perceived as simpler and more effective. It also reflected more accurately the spirit of the 1999 constitutional reform, because it applied the new paragraph added to Article 4, and also because this measure was explicitly discussed during the passing of that reform. Funding reduction could also be regarded as a token of flexibility in the application of *parité*. The same reason might justify the 2% margin allowed to political parties,[196] which also reinforced the position that *parité* was not an across-the-board 50% quota, but a principle to be applied by the legislator case-by-case.

During the parliamentary discussion of the 2000 law, some legislators stressed that it was not the *parité* principle itself that was being discussed, but only how it should be implemented. However, even though the discussion was mostly 'technical', there were still

[193] An explanation of the public funding of political parties (at that time of the 2000 law) at <www.assemblee-nationale.fr/11/rapports/r2103.asp> accessed 23 January 2013.

[194] Available at <www.assemblee-nationale.fr/11/dossiers/992012.asp> accessed 23 January 2013.

[195] See National Assembly - Committee on Constitutional Amendments Legislation and General Administration of the Republic, *Rapport N° 2103* (2000).

[196] The Government also mentioned the need to anticipate possible errors.

plenty of references to the fundamental constitutional principles that were debated during the 1999 constitutional reform (eg abstract universalism). Moreover, deep disagreements appeared regarding the exact content and spirit of that reform (particularly between the National Assembly and the Senate), which the 2000 law was supposed to be enforcing. In fact, this law answered several questions left open by the 1999 constitutional reform. Regarding the means allowed to achieve *parité*, the constitutional reform left open whether only incentives could be adopted or also compulsory measures; the law answered that it was the second. As regards the 'quota issue', the legislator appeared to consider that it was entitled to impose a 50% quota if it wanted to, but was not forced to do it, or to apply them to all elections. Concerning the question about equality of opportunity versus equality of results, the 2000 law was itself not conclusive (the discussion in the *travaux préparatoires* was generally supportive of equality of opportunity, but the law applied *parité* to certain elections in such a strict way so as to almost guarantee equal results).

The 2000 law was criticised for several reasons. A first concern was its limited scope. It only focused on the composition of the electoral lists, ignoring other structural hurdles for women's representation such as the simultaneous holding of more than one electoral mandate by the same person. Moreover, this law did not apply to all elections. Executive positions were excluded, as well as inter-municipal bodies, the councils of small municipalities, cantons, and part of the Senate. The funding reduction sanction was regarded as too mild. This was not only because of the 50% maximum, but mainly because it did not apply to both sources of public funding. Large parties, which were certain about winning a relevant amount of parliamentary seats (which is the second, eventually bigger, and not-linked-to-*parité* source of public funding), might be willing to take the risk of violating *parité* to have better chances to elect more representatives, thus more than

compensating for the funding punishment.[197] Furthermore, the reduction should have been progressive. Additionally, the '3 in 6' rule was attacked because it would easily result in women being put at the bottom of each group of six candidates. Strict alternation should have been adopted.

A group of senators challenged this law before the *Conseil*, arguing that it had exceeded the limits fixed by the 1999 constitutional reform.[198] Drawing from the *travaux préparatoires* of the constitutional amendment, they argued that the new constitutional clauses were 'not normative' (ie fully enforceable), but only identified the aims to be progressively achieved by the legislator, who could only 'favour' and not 'force' through compulsory measures (like quotas) or sanctions (like funding reduction). The Senators also argued that other constitutional principles, such as the ones that grounded the previous decisions of the *Conseil*, were not affected by the 1999 constitutional reform. Among them, senators expressed especial concern for the freedom of the electors to choose. They also considered that the funding reduction was incompatible with Article 4 of the Constitution, which guaranteed freedom to political parties with the sole limitation of respecting national sovereignty and democracy.[199] Moreover, this was not a 'strictly necessary sanction', as was required by article 6 of the Declaration, neither was it proportional to the aim of favouring equal access to women, because what was punished was the lack of *parité* in

[197] Cf. Mariette Sineau, 'La parité législative en France, 2002-07 : Les stratégies partisanes de contournement de la loi' [2008] Swiss Political Science Review 741, 742-743.

[198] Available at < http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2000/2000-429-dc/saisine-par-60-senateurs.100794.html> accessed 23 January 2013. See also <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2000/2000-429-dc/replique-par-60-senateurs.100796.html> accessed 23 January 2013.

[199] The impact on the autonomy of political parties seems to have been generally overlooked by the French scholars. But see Carla M Zoethout, 'Paritary Rights for Women in France: Yes to the Final Result, But Not to the Underlying Principle' [2001] Ius Gentium 155, 161-163; Dekeuwer-Défossez (n 70) 92.

candidacies and not in the electoral results. Finally, senators denounced perverse consequences of the law, such as the prohibition of all-women (and all-men) lists, and the incentive to create splinter lists to avoid the effects of the law.[200]

The Government stressed that the 1999 constitutional reform was a direct consequence of the *Conseil*'s 1982 decision, and that this rendered the previous case-law of the *Conseil* obsolete. It also stated that the legislator (not the *Conseil*) should decide how to reconcile new and old constitutional provisions. The Government insisted that the new constitutional text was normative, and that it was clear from the *travaux préparatoires* that the legislator was authorized to impose obligations on parties and political groups. The law was not excessive but necessary to apply the *parité* aim, and the funding reduction was not a sanction, but a modification of the way public aid was being given to political parties. It was impossible to link such modification to the elected, as opposed to the candidates, because the former depended on the choice of the electors.

The *Conseil* rejected most of the senators' claims.[201] After acknowledging that the 1999 constitutional reform had rendered its case-law inapplicable, it drew from the *travaux préparatoires* of the 1999 constitutional reform a legislative intention that the scope of the authorisation vested in the legislator to pursue *parité* was broad, including both incentive and compulsory measures. Thus, it declared that in this case the legislator was acting within its permissible scope. Moreover, it acknowledged that it was for the legislator to reconcile new and old constitutional provisions. Regarding the funding restriction, it agreed with the Government that its nature was a modification of the way public aid was being given to

[200] A male candidate who might be the third in his party's list would create a new list to be in the first slot.

[201] CC 2000/429. See also Jean-Eric Schoettl, 'Le Consei Constitutionnel et l'egal accès des femmes et des hommes aux mandats électoraux et aux fonctions électives' [2000] L'Actualité Juridique - Droit Administratiff 653; Nathalie Jacquinot, 'Parité Homme-Femme' [2001] Le Dalloz 1837.

political parties, and an incentive to apply the equal access principle. Finally, the *Conseil* declared unconstitutional some secondary provisions of the law, mostly due to formal or procedural reasons.[202] In sum, this litigation, which was primarily about the contents and limits of the 1999 constitutional reform, showed that the *Conseil* was satisfied by that amendment, and that it acknowledged a wide margin to the legislator in *parité* issues, deferring to its interpretation regarding the 1999 constitutional reform.

Although the broad lines of the Conseil's position was thus clear, there was nevertheless significant subsequent litigation surrounding the details of *parité*. In 2001 the *Conseil* struck down a law imposing *parité* in the composition of the Supreme Council of the Judiciary,[203] arguing that the 1999 constitutional reform only applied to 'elections to political mandates and offices'.[204] 'Non-political' public offices were strictly subject to the equal access principle (article 6 of the Declaration), which excluded sex as a legitimate distinguishing factor. The *Conseil* founded its decision on the *travaux préparatoires* of the 1999 constitutional reform, and also in the fact that *parité* was included in Article 3 of the Constitution (which dealt with sovereignty, representation and elections). Conversely, in 2002 the *Conseil* upheld a law requiring the 'balanced representation of women and men' in the compositions of the boards charged with validating practical experience for the purposes of obtaining a professional title or equivalent.[205] Although Article 6 of the Declaration was applicable, the new provision was deemed constitutional insofar as it was

[202] Basically the extension of *parité* (and a different electoral system) from towns of 3,500 people to towns of 2,500 people, and its applicability to the *Conseil Supérieur des Français de l'Etranger*.

[203] This council 'assists the President of the Republic in guaranteeing the independence of the Judiciary, with nominations, and internal discipline' <www.conseil-superieur-magistrature.fr/> accessed 14 January 2010.

[204] CC 2001/445. See also Rousseau, *Droit du Contentieux Constitutionnel* (n 41) 364.

[205] CC 2001/455.

interpreted as having neither as an objective nor as effect to make sex prevail over competences, aptitudes and qualifications. The 2001 and 2002 cases illustrate both the tendency of the legislator to extend *parité* beyond its original goals, and the resistance of the *Conseil* to apply the 1999 constitutional reform outside the electoral context.

In 2003, an amendment was passed to the electoral system of regional councils and the European Parliament.[206] From a *parité* perspective, it was an ambivalent statute. Although it replaced the '3 in 6' rule for strict alternation in regional elections, these elections became less proportional (most scholars affirm that women do better in proportional systems[207]), mainly by raising the threshold of votes required to elect representatives. Moreover, the previously unique national constituency for the European Parliament elections was divided into eight constituencies, thus providing parties more chances to put men before women in electoral lists. The *travaux préparatoires*[208] demonstrate that the debate was focused not on *parité* but on the reduction of the proportionality of the electoral system. Nonetheless, two clauses about *parité* were challenged before the *Conseil*.

The first issue was the exclusion of the Corsican Assembly from the new *parité* regulations applicable to regional assemblies, consisting in the replacement of the '3 in 6' rule for strict alternation. The Government justified the difference invoking the particularities of the Corsican electoral system, basically the absence of 'sections' (in regional elections each county constitutes a 'section', and the seats allotted to each list are

[206] Loi n° 2003-327.

[207] Eg Rainbow Murray, 'How Parties Evaluate Compusory Quotas: A Study of the Implementation of 'Parity' Law in France' (2007) 60 Parliamentary Affairs 568, 574; Rauzduel (n 125) 766-769; Opello (n 2) 11ff.

[208] Available at <www.assemblee-nationale.fr/12/dossiers/conseillers_regionaux.asp#030574> accessed 23 January 2013.

assigned to sections in proportion of the votes of the list in each section).[209] Claimants argued that equality was affected because the chances of Corsican women vis-à-vis other French women were diminished. [210] Moreover, the absence of sections did not impede the application of strict alternation. The *Conseil* decided that equality was breached because there was no local particularity or reason of public interest that justified the dissimilar treatment accorded to Corsica.[211] However, it refused to declare the replacement of the '3 in 6' rule for the rest of the country unconstitutional, because it would negatively impact on the objective of *parité* fixed by the Constitution. Thus, it only ordered that the next law regarding the Corsican Assembly should correct such inequality.

The second contested issue was the division of France into eight constituencies for the European Parliament elections. The claimants argued that the 1999 constitutional reform impeded the legislator from doing anything that could worsen the electoral situation of women. The Government responded that the legislator was free to determine how to advance *parité* in each type of election, even changing previous rules. Moreover, Article 3 of the Constitution could not be read as forbidding any change in the electoral system that might cause the election of fewer women. In fact, it was not clear that the new rules would negatively impact on women. The *Conseil* upheld the new rules affirming - as in the 2002 decision - that, 'by themselves', it was neither their object nor their effects to reduce the proportion of women elected. Moreover, strict alternation was kept in each of the eight new circumscriptions.

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[209] Article 338 Electoral Code.

[210] Available at <www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2003/2003-468-dc/decision-n-2003-468-dc-du-03-avril-2003.856.html> accessed 23 January 2013.

[211] CC 2003/468.

This decision illustrates the importance that *parité* had acquired for assessing the constitutionality of electoral rules. In fact, a more exacting *parité* provision was kept even in the face of a patent breach of equality (the Corsican Assembly issue). Nonetheless, this decision also clarified that *parité* could not be considered as an overriding concern when dealing with electoral systems, and that the *Conseil* allowed the legislator considerable discretion to regulate both electoral systems and *parité*. A troublesome aspect of this decision, however, was the absence of any explicit basis on which to assess the potential effects of the law. A further concern was whether the *Conseil* would consider in the future the potential effects of electoral regulations on women to assess its constitutionality.

In 2006, the *Conseil* declared again that the 1999 constitutional reform only applied to political representation.[212] Therefore, it could not be used to impose *parité* to advisory and representative bodies of legal entities, either public or private. The *Conseil* did not necessarily reject all kind of 'sexually-conscious' incentives, but firmly forbade the imposition of sex over individual capacities and the common utility (Article 6 of the Declaration).

In 2007, new legislation further developed *parité.*[213] In National Assembly elections, the funding reduction was increased from half to three quarters of the difference between the percentage of female and male candidates. *Parité* (including strict alternation) was also extended to the election of municipal and regional executives.[214] Cantonal elections were subject to the more lenient obligation that each candidate ought to have an alternate of

[212] CC 2006/533. See also Camby (n 78) 21-23.

[213] Loi n° 2007-128.

[214] Some parity obligations were also extended to French overseas territories, and to the election of the Assembly of the French Living Abroad.

different sex ('paritarian ticket'). Regarding municipal council elections, the '3 in 6' rule was replaced by strict alternation.

The *travaux préparatoires*[215] of this law show that the debate about fundamental constitutional principles was left almost completely behind, either by conviction or by resignation. Nevertheless, a strong debate was caused by the inclusion of sunset clauses in the original proposal regarding municipal and regional executive elections. Supporters argued that, besides being the request of the Association of French Mayors, these clauses would force a careful evaluation at the end of the original period, allowing the extension of *parité* if needed. Opponents claimed that this was absurd considering that the 1999 constitutional reform, which this law was trying to give further application, was permanent. Moreover, the previous legislation on *parité* was not temporary, showing this exception to be unreasonable. Additionally, the term (two elections) was too short considering that the 2000 law was still far from producing satisfactory results. It was also considered as confusing, and even as a dangerous signal of lack of commitment to *parité.* Finally, the Senate eliminated the sunset clauses. This discussion, however, proved that relevant differences subsisted about how *parité* was understood: Was it a mean to achieve sexual political equality or a goal in itself? Was it a transitory measure or a permanent foundation of democracy? The application of sunset clauses exclusively to executive offices may have also reflected a resistance to extend *parité* beyond its original strategic objectives (ie representative bodies).

[215] Available at <www.assemblee-nationale.fr/12/dossiers/egal_fonctions_electives.asp> accessed 23 January 2013.

In 2008, a constitutional amendment was passed regarding institutional modernization.[216] *Parité* was not a central concern of the reform, and not even appeared in the original proposal.[217] Notwithstanding, the final version of the amendment added a new paragraph to Article 1 of the Constitution: 'Statutes shall promote [favour] equal access by women and men to elective offices and posts as well as to position of professional and social responsibility'.[218] This new paragraph was a direct result of the restrictive case-law of the *Conseil*, and gave the legislator express authorization to expand *parité* beyond the political context.[219]

Taking into account the *Conseil*'s decision of 2001, this reform moved the constitutional recognition of *parité* from Article 3 to Article 1 (the former's focus on sovereignty was hardly compatible with a notion of *parité* that was also applicable to the professional and social context). From a symbolic point of view, the inclusion of *parité* in Article 1 is remarkable, not the least because this provision contains the fundamental definitions of the French Republic. Moreover, by placing equality and *parité* in the same article of the constitution, a strong signal was given regarding the compatibility of both concepts.

After 2008, *parité* has continued to expand without serious constitutional challenges. In 2010, a law was passed reforming the internal political division of France.[220] The new 'territorial councillors' will be elected in 2014 and will be subject to *parité* (more than 2%

[216] Loi n° 2008-724.

[217] Available at <www.assemblee-nationale.fr/13/projets/pl0820.asp> accessed 23 January 2013.

[218] Translation available at <www.assemblee-nationale.fr/english/8ab.asp> accessed 23 January 2013.

[219] Eg Mathieu and Verpeaux (n 78) 43.

[220] Loi n° 2010-1563.

of difference between the number of men and women candidates will trigger financial sanctions for political parties, which will increase after the first renewal of these councilors). In 2011, *parité* was applied to companies' boards, which shall seek a balanced representation of both sexes.[221] By 2013, larger companies' boards should have at least 20% of members of each sex. This percentage will rise to 40% in 2017. Finally, in 2012 *parité* was applied to several boards within the Civil Service (they should have at least 20% of members of each sex in their next composition, and 40% in their subsequent composition).[222]

In conclusion, the constitutionality of *parité* is no longer controversial in France, although certain uncertainties remain regarding its nature and permanency. Moreover, its increasing application beyond the political context may have a relevant impact on its theoretical and practical evolution (eg more emphasis in equality of results, dissociation from the political representation rationale).

5.5 Conclusions

The introduction of EQW in France was highly unlikely due to their incompatibility with the French approach towards political representation, which was largely defined by fundamental principles coming from the French Revolution. These principles rejected the division of the French people into politically relevant categories, such as women, and disregarded concrete individual features, such as sex. Accordingly, the French theory of

[221] Loi n° 2011-103.

[222] Loi n° 2012-347.

political representation was incompatible with descriptive and surrogate representation, refusing the representation of groups and the link between specific constituencies and legislators. Moreover, the French constitutional understanding of equality was mostly as formal equal treatment, indifferent to group equality and aggressively opposed to affirmative action. Concerning political rights, the emphasis on their individual nature and on formal equality in their exercise were also unfriendly for EQW.

To overcome these formidable obstacles, France developed parité, an ambitious, original and pragmatic proposal that aspired to transform French's approach towards political representation by redefining 'revolutionary ideas' such as abstract universalism and citizen, so as to render them 'sexed' and inclusive of women (and not of other disadvantaged groups). Parité also helped in the transformation of equality into a less formal and more de facto notion, contributed to the increasing acceptance of affirmative action, and argued for a more substantive and systemic understanding of political rights. None of this, however, was enough to render parité compatible with the French Constitution, and thus the Constitution had to be amended so as to incorporate the new idea. In the process, parité was transformed from a temporary strategy to advance women equality into a permanent foundation of the French political system.

CHAPTER 6

SPAIN

La discriminación sufrida por las mujeres es la más antigua y persistente en el tiempo, la más extendida en el espacio, la que más formas ha revestido (…), la que afecta al mayor número de personas y la más primaria, porque siempre se añade a las demás discriminaciones[1]

6.1 Introduction

Spain introduced a national electoral quota for women in 2007. The reasons for this innovation were similar to those advanced in France: the limited presence of women in politics was considered to be a serious problem for political representation, democracy, and equality. The adoption of EQW in Spain, however, did not raise the fierce controversy that the introduction of *parité* caused in France. Although there were doubts about the constitutionality of EQW, particularly considering the original rejection of these quotas by the French Constitutional Council and the Italian Constitutional Court, a strong majority of scholars supported EQW as constitutional. Moreover, the debate was unmistakably legal in nature, not as in France, where the discussion was interdisciplinary, including not only lawyers but also political scientists, sociologists, anthropologists and philosophers.

[1] 'Discrimination against women is the most ancient and persistent, the most extended, the most multifaceted (…) the discrimination that affects most people and the most primary, because it is always added to other discriminations' (free translation), Fernando Rey, 'El Derecho Fundamental a No ser Discriminado por Razón de Sexo' <www3.uva.es/tsocial/documentos/Derecho_funda.pdf> accessed 18 February 2010, 1.

The central thesis of this chapter is that the Spanish constitutional order was mostly compatible with the introduction of EQW, particularly because of the importance given to substantive equality. To fully illustrate this compatibility, this chapter will discuss certain features of the Spanish context and electoral system, as well as the constitutional approaches towards political representation, equality, affirmative action and political rights, and how they related to EQW. Then, it will explain the historical background of electoral quotas in Spain and the constitutional debate these quotas caused, before turning to consider the current legislation about EQW and the case-law of the *Tribunal Constitucional* (Constitutional Court).

6.2 The Spanish Context

a) General features

Spain is a regional state, ie the central Government shares power with the regions or *Comunidades Autónomas* (CCAA) in a way that is considered to be almost federal.[2] Each CCAA has its own legislative assembly and electoral law, and the implementation of EQW took place at both the national and the regional level. Although this chapter focuses on the former, it will occasionally refer to the latter insofar as regional developments impacted on the national discussion about the constitutionality of EQW. Additionally, given the centrifugal tendency of the regional state, the debate about EQW has to be framed in an

[2] About the regional state, see José Luis Meilán, *La Ordenación Jurídica de las Autonomías* (Editorial Tecnos 1988); Juan Ferrando, *Formas de Estado desde la Perspectiva del Estado Regional* (Instituto de Estudios Jurídicos 1965).

institutional context that was highly sensitive towards issues such as the division of the electorate and the development of identity politics.

Spain is a recent democracy (the transition process started in 1975). This may explain the emphasis given during the 70's and 80's to transitional issues over 'secondary' concerns such as women's political equality. Moreover, the autocratic regime (1939-1974) seems to have encouraged the exclusion of women from the political space.[3] It was not a surprise then that, until recently, women were quite rare in political assemblies, including the one that drafted the 1978 Constitution.[4] This situation changed dramatically in the 90's, and so prior to the adoption of EQW, women had already achieved relatively high numbers in political assemblies.[5] This was remarkable not only because of the historical background, but also because Spain showed some characteristics that were commonly regarded as negative for the advancement of women in politics (eg strong *machismo*, Roman Catholicism as the dominant religion, and levels of education that were not particularly high[6]). This improvement in women's political equality, however, was used against EQW, which were seen as unnecessary and belated.[7]

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[3] Monica Threlfall, 'Explaining Gender Parity Representation in Spain: The Internal Dynamics of Parties' (2007) 30 West European Politics 1068, 1068; Luis López, 'Igualdad, No Discriminación y Acción Positiva en la Constitución de 1978' in *Mujer y Constitución en España* (Centro de Estudios Políticos y Constitucionales 2000) 19-20.

[4] IPU, <www.ipu.org/parline-e/reports/2293_arc.htm> accessed 16 November 2011; IPU, <www.ipu.org/parline-e/reports/2294_arc.htm> accessed 16 November 2011; Julia Sevilla, 'Democracia Paritaria y Constitución' <www.democraciaparitaria.com/administracion/documentos/ficheros/28112006125125JULIASEVILLA%20democracia%20paritaria%20y%20constitucion.pdf> accessed 21 February 2010, 17.

[5] In the eve of the introduction of legal quotas, the presence of women in the Spanish lower chamber ranked 8th in the world: <www.ipu.org/wmn-e/arc/classif280207.htm> accessed 29 November 2012.

[6] Cf. Threlfall (n 3) 1070.

[7] Cf. Remedio Sánchez, 'Las Mujeres en las Cortes Generales y en los Parlamentos de las Comunidades Autónomas' in *Mujer y Constitución en España* (Centro de Estudios Políticos y Constitucionales 2000) 225-

Although the expressions 'EQW' and 'parity' were used in Spain almost without distinction, the latter could also mean several other things, and did not necessarily refer to the French experience. In any case, it was clear from the beginning that – in contrast with France - parity demands were not limited to the political sphere. Particularly relevant were the employment context and the private sphere (children's care, household duties, etc.).[8] Certain scholars argued, however, that equality in political representation was special - and deserved priority attention - because it was the most difficult to conquer,[9] and also because it would serve as a platform to bring about a broader social change.[10]

b) The electoral system

According to the Constitution and the *Ley Orgánica 5/1985, de 19 de junio, del Régimen Electoral General* (General Electoral Law), the Spanish Parliament or *Cortes* is composed of the Chamber of Deputies and the Senate. The former is made up of 350 members elected by 50 *provincias* (counties) and the overseas cities of Ceuta and Melilla. Each *provincia* elects at least two deputies (Ceuta and Melilla elect one each). The remaining seats are distributed among the 50 *provincias* according with their population.

226; Fernando Rey, *Discriminación por razón de género y sistema electoral en Europa y España* (Tribunal Electoral del Poder Judicial de la Federación 2009) 41-43.

[8] Cf. Jane Jenson and Celia Valiente, 'El movimiento a favor de la democracia paritaria en Francia y España' [2001] Revista Española de Ciencia Política 79, 105; Milagros Candela, 'Democracia Paritaria: Recorrido Histórico y Planteamiento Actual. Presentación' in *Hacia una Democracia Paritaria Análisis y Revisión de las Leyes Electorales Vigentes* (CELEM 1999) 41.

[9] Octavio Salazar, 'Las Cuotas Femeninas en cuanto Exigencia de la Igualdad en el Acceso a los Cargos Públicos Representativos' [2000] (48-49) Revista de Derecho Político 411, 447.

[10] Cf. Alfonso Ruiz, 'La Representación Democrática de las Mujeres' [2001] Anales de la Cátedra Francisco Suárez 239, 244-246; María Luisa Balaguer, 'Desigualdad Compensatoria en el Acceso a Cargos Representativos en el Ordenamiento Jurídico Constitucional Español. Situaciones Comparadas' in *Mujer y Constitución en España* (Centro de Estudios Políticos y Constitucionales 2000) 386-394.

The electoral system is proportional (d'Hondt[11]) with a minimum threshold of 3% of the vote for candidates to be elected. Lists are closed and blocked.

Senators are elected using two different systems. The first group is elected by direct vote: four senators by each *provincia*, plus 20 senators elected by certain islands. Electors can vote for up to three candidates, and the candidates with more votes are elected (lists are open and voluntary). The second group of senators is elected indirectly. The legislative assembly of each CCAA selects one senator, plus one additional senator for each million of inhabitants. The electoral system varies in each CCAA, but it has to be proportional.

All other elections (regional, provincial, municipal and European) are proportional (using the d'Hondt system), although the CCAA have certain leeway in defining the specificities of their electoral systems.

As a whole, the Spanish electoral system seems to be women-friendly, particularly due to its proportionality and the use of closed and blocked lists.[12] This may partly explain the considerable presence of women in politics even before the introduction of EQW. Similarly, the lower presence of women in the Senate may be linked with the exceptionality of its electoral system (eg only partly proportional and with open lists).

[11] 'This requires the number of votes for each party to be divided successively by a series of divisors, and seats are allocated to parties that secure the highest resulting quotient, up to the total number of seats available.' Pippa Norris, *Electoral Engineering, Voting Rules and Political Behaviour* (CUP 2004) 51.

[12] The convenience of proportional electoral systems for women remains controversial, eg Irene Delgado, 'Sistema Electoral y Representación de las Mujeres en el Congreso de Diputados' in Irene Delgado (ed), *Alcanzando el Equilibrio El Acceso y la Presencia de las Mujeres en los Parlamentos* (Tirant Lo Blanch 2011) 85-86. See also Asunción Ventura, 'Sistema Electoral y Género' [1999] (8) Corts: Anuario de Derecho Parlamentario 379, 391 and 396, who affirms that the Spanish electoral system works in practice as majoritarian.

6.3 Theoretical Framework

a) Political representation

From a French perspective, the Spanish theory of political representation seems to reflect the doctrine of national sovereignty,[13] although softened by certain elements of popular sovereignty[14] (see Chapter 5). Thus, the imperative mandate is expressly rejected (Article 67.2);[15] political representation is not dyadic (constituency-MP); those represented are the Spanish people (Article 66.1), and voting is not a mere function but a right (Article 23.1).

A closer look to the Spanish theory of political representation, however, shows that it is very eclectic, borrowing from different theoretical frameworks (mainly French and German).[16] Consequently, it is unsurprising that both Spanish scholars and the *Tribunal Constitucional* are less committed to preserve the 'purity' of the traditional French doctrine of national representation. For example, some scholars give political representation a content that goes beyond the electoral relationship, requiring a connection between the

[13] The notion of national sovereignty appears intermittently in the Spanish constitutions since 1812. See Ricardo Chueca, 'Veinticinco Años de Representación Política' [2003-2004] (58-59) Revista de Derecho Político 75, 79; Fernando Garrido et al, *Comentarios a la Constitución* (Civitas 1980) 30.

[14] Although Spain also mixes national and popular sovereignty (Article 1.2 of the Constitution), this seems to have little significance for the theory of political representation.

[15] See Ángel Garrorena, 'Mandato Representativo' in Manuel Aragón and César Aguado (eds), *Organización General y Territorial del Estado*, vol II (2nd edn, Thomson Reuters 2011) 141.

[16] Eg Francisco Caamaño, 'Mandato Parlamentario y Derechos Fundamentales' [1992] 36 Revista Española de Derecho Constitucional 123; Angel Manuel Abellan, 'Notas sobre la Evolución Histórica del Parlamento y de la Representación Política' [1996] (92) Revista de Estudios Políticos 163; Ricardo Chueca, 'Sobre la Irreductible Dificultad de la Representación Política' [1987] (21) Revista Española de Derecho Constitucional 177; José A Portero, 'Sobre La Representación Política' [1991] (10) Revista del Centro de Estudios Constitucionales 89; Fernando Garrido et al (n 13) 691 and 713-714; Javier Pérez, *Curso de Derecho Constitucional* (7 edn, Marcial Pons 2000) 642.

representatives and the represented.[17] Similarly, the 1978 Constitution has provisions regarding political representation that are not easily reconcilable. According to Article 66.1, the representative is the Spanish Parliament and the represented is the Spanish people (considered as a whole, as in France). However, Article 23 states that the representative is the individual MP, and the represented are the citizens (individually considered).[18] This inconsistency may be explained by the co-existence in the 1978 Constitution of two visions of political representation:[19] on the one hand, the traditional and systemic notion that links the people with the Parliament (article 66), and on the other hand, the idea of political representation as a means of fulfilling an individual right to political participation (article 23 in connection with articles 6, 9, and 48)[20]. Another constitutional inconsistency touches on the role of political parties. Article 6 provides:

> '*Political parties are the expression of political pluralism, they contribute to the formation and expression of the will of the people and are an essential instrument for political participation* (…)'[21]

Even though this text links parties with political representation, the bond between parties and MPs is not even mentioned. Moreover, article 67.2 strictly forbids imperative

[17] Eg María Luz Martínez, *Cuota Electoral de Mujeres* (Senado - Congreso de los Diputados 2006) 162-171; Javier García, 'Los Derechos de los Representantes: Una Regla Individualista de la Democracia' [2000] Parlamento y Constitución 9, pass.

[18] Portero (n 16) 111.

[19] Cf. Miguel Ángel Presno, 'La Representación Política como Derecho Fundamental' [2004] Fundamentos 1; Francisco Bastida, 'Derecho de Participación a través de Representantes y Función Constitucional de los Partidos Políticos' [1987] (21) Revista Española de Derecho Constitucional 199, pass.; Chueca, 'Veinticinco Años de Representación Política' (n 13) 83.

[20] The location of articles 66.1 and 23 in the 1978 Constitution reinforces this theory: whereas the former is in the chapter dedicated to the *Cortes*, the latter is in the section devoted to individual liberties.

[21] Congreso de Diputados, <www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf> accessed 5 December 2012.

mandate, and article 23 stresses that the people's principal vehicle of indirect political participation is the MP, not the party. Thus, the constitution's views on political parties seem to be paradoxical: necessary for democracy and political participation, but harmful for the work of representatives and entirely secondary to the relationship between the representatives and their represented.

Spanish scholars seem to be more aware than their French colleagues of the incongruities between the constitutional theory of representation and political reality. They acknowledge that political parties have positioned themselves between the represented and the representative, ie electors vote for political parties that, in turn, control the representatives.[22] This would allow the people to have, indirectly through the parties, a more effective influence over their representatives between elections.[23] Notwithstanding this, the control of MPs by political parties is not complete (partly due to the constitutional prohibition of the imperative mandate). Thus, MPs keep their seats when leaving their parties,[24] and MPs' pre-dated resignations are of no consequence.[25]

As regards German doctrines of political representation, the most influential seem to have been the 'Theory of the Organ', according to which the represented is neither the people nor the Nation, but the State. Because the State is a legal entity without corporal reality, it requires individuals to express its will. Those individuals are not the State's

[22] Cf. Garrorena (n 15) 142-143; Fernando Garrido et al (n 13) 695; P De Vega, 'Significado Constitucional de la Representación Política' [1985] (44) Revista de Estudios Políticos 25, 38-40; Portero (n 16) 113ff; García (n 17) 16-29.

[23] Ángel Rodríguez, 'Un Marco para el Análisis de la Representación Política en los Sistemas Democráticos' [1987] (58) Revista de Estudios Políticos 137, 183ff.

[24] P De Vega (n 22) 45; Antonio Torres, 'Crisis del Mandato Representativo en el Estado de Partidos' [1982] (14) Revista de Derecho Político 7, 22-23; Bastida (n 19) 216-219. Cf. Garrorena (n 15) 142-143.

[25] P De Vega (n 22) 40-44; Torres (n 24) 20-22; Fernando Garrido et al (n 13) 714.

'agents' but its 'organs', ie one or more individuals that, according to the legal order, are an integral part of a legal entity (in this case, the State), who are capable of expressing its will. Both people and Parliament are among these organs. This theory is incompatible with the traditional French doctrine of representation in several ways: i) it substitutes national and popular sovereignty with 'constitutional sovereignty'; ii) there are not two distinct parties in the representation relationship, because the organ is not something separate from the legal entity but an integral part of it, and iii) it modifies the purpose of representation, ie allowing a legal entity (the State) to express its will and to act in the legal world. Other German influences over the Spanish theory of political representation are the attention given to the role of political parties, and the critical view of the representative mandate, which is considered as incapable of creating legal obligations (thus contrasting with private law representation).[26]

Finally, a strictly 'French' reading of the Spanish constitution is impossible insofar as several French 'revolutionary ideas' are not apparently strong in Spain, or are given a different application (eg when the Constitution declares the indivisibility of the Nation (Article 2), it does so in relation to the regional state and its limits).

The case-law of the *Tribunal*, at first sight, seems to be committed to the (French) traditional notions of political representation. This is particularly the case regarding the prohibition of the imperative mandate. Thus, the *Tribunal* has declared that representatives cannot be removed from office by their political party, and therefore they retain their seats even if they leave (or are expelled from) their parties.[27] This is seen as necessary to preserve the autonomy of the representatives. Moreover, citizens elect individuals, not

[26] Cf. Portero (n 16) 89-90. See also Martínez (n 17) 143ff.

[27] STC 5/1983; 10/1983; 298/2006; 185/1993.

political parties[28] (and the right to participate belongs to the citizens and not to the political parties[29]). Similarly, the representatives' constitutional right to equal access to public functions (Article 23.2), which encompasses the right not to be illegally deprived of these functions, would be devoid of content if parties could remove representatives at will.[30]

Nevertheless, the *Tribunal* has adopted several innovations that are alien to the original French doctrines. Thus, it has acknowledged the importance of political parties for the representative government and political representation, declaring that membership of a political party has legal/constitutional consequences (the contents of which, however, remain vague).[31] Furthermore, the *Tribunal* understands political representation as a vehicle through which the represented exercise their right to political participation.[32] This view of political representation as an individual right allowed the *Tribunal* to develop the *mirror doctrine*,[33] according to which a violation of the right to political participation of the represented, as exercised through their representatives, may occur each time the representative is deprived of his/her office or impeded from exercising his/her functions.[34] This doctrine was developed to give more extensive protection to the rights of the representatives, although it is not without its critics.[35] Disregarding its merits, it is certainly

[28] STC 10/1983; 167/1991.

[29] STC 5/1983.

[30] Cf 5/1983.

[31] STC 32/1985.

[32] Cf. STC 5/1983.

[33] Ricardo Chueca, 'Representación y Constitución' in Miguel Ángel García (ed), *Constitución y Democracia 25 Años de la Constitución Democrática de España*, vol 1 (Universidad del País Vasco 2005) 165-166.

[34] STC 10/1983; 32/1985; 169/2009 (quoting several other decisions).

[35] Eg Caamaño (n 16) 135. See also the minority vote in STC 5/1983.

a further deviation from traditional French political representation theory, insofar as the represented is not the Nation but the specific constituency, and the relationship between electors and the elected is conceived as continuous over time, thus allowing the constant exercise of the right of political representation of the represented through their representatives.[36] Additionally, the *Tribunal* has highlighted the importance of elections, making it an essential element of political representation.[37] Although this is not opposed *per se* to the traditional national sovereignty doctrine, it responds to a different *ethos*: the democratic principle embedded in the 1978 Constitution. Finally, certain inconsistencies can be found in the case law of the *Tribunal*, particularly in connection with the identity of the parties to the representative relationship. Thus, the *Tribunal* has sometimes affirmed that the represented is the people as a whole, and that the representative is the Parliament.[38] However, the *Tribunal* has also said that the representative relationship is between the *diputados* and the Spanish People.[39] Moreover, as explained before, the *mirror* doctrine implies that each MP is the representative of his constituency. The *Tribunal* has also identified the represented as the electorate as a whole;[40] the citizens,[41] and the electors of the representative's constituency.[42]

Concerning Pitkin's categories (Chapter 1), all of them can be found in the Spanish mixed theoretical context. There is formalistic representation insofar as Spanish scholars

[36] Cf. Ibid, 138; Bastida (n 19) 226.

[37] Cf STC 10/1983.

[38] Eg STC 103/2008.

[39] STC 119/1990.

[40] STC 10/1983; 32/1985.

[41] STC 5/1983.

[42] STC 32/1985.

follow, to some degree, the French idea that there is a previous authorization given by the people to the *Cortes* to decide for them. There is also the notion that, at least through the political parties, representatives are continuously subject to accountability. Symbolic representation of the Spanish people by the *Cortes* and the King is enhanced due to the regional state. Descriptive representation, although at odds with classical national representation theory, has been deemed to be constitutionally acceptable, and even a necessity of the political system according to both scholars and the *Tribunal*. Finally, a meaningful degree of substantive representation seems to be assumed, particularly due to the notion of representation as a means of fulfilling the represented's right to political participation.

In contrast with France, none of Mansbridge's categories (Chapter 1) seem to be excluded *a priori* in Spain. The acknowledgement of a relationship between the electors and the elected allows both promissory and anticipatory representation to emerge. In fact, promissory representation is used to justify political parties' internal discipline insofar as it may ensure the MPs' commitment to the electoral programme. Anticipatory representation is also boosted by political parties, acting as mediators between the electors' wishes and the representatives' decisions. As regards gyroscopic and subrogate representation, the diluted understanding of the national sovereignty doctrine in Spain makes these a possibility.

In brief, the Spanish theory of political representation has diluted its French origins, mixing it with other theoretical and practical components. Although confusing, this eclecticism makes the Spanish theory of political representation more amenable to innovations such as group representation, descriptive representation, subrogate representation and substantive representation. This, in turn, facilitates the case for EQW.

b) Equality

Equality is a central concern of the Spanish Constitution, and is simultaneously regarded as a value, as a principle, and as a right. As a value, it serves as the basis, guidance and standard of evaluation of the legal system. As a principle, it operates as an interpretative criterion, as a source of law, and also as a standard of evaluation of norms. As a right, it not only imposes limits on the activity of public authorities, but also requires the latter's active promotion.[43]

There are three general clauses in the Constitution concerning equality:

Article 1.1

> Spain is hereby established as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality and political pluralism as highest values of its legal system.[44]

Article 9.2

> It is the responsibility of the public authorities to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective, to remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life.[45]

[43] Further explanation of this tridimensionality in Ramón Martínez, *Igualdad y Razonabilidad en la Justicia Constitucional Española* (Universidad de Almería 2000) Chapter II; Antonio Enrique Pérez, *Dimensiones de la Igualdad* (2 edn, Dykinson 2007) 84ff.

[44] Congreso de Diputados, <www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf> accessed 5 December 2012.

[45] Ibid.

Article 14

> Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.[46]

Whereas Article 1.1. reflects equality as a value, Article 9.2 acknowledges equality as a principle, and Article 14 identifies it both as a principle and as an autonomous individual right.[47] The latter is also commonly considered as the basic equality provision. It has two main components: a general guarantee of equal treatment and a prohibition of discrimination (direct and indirect[48]). The first is mainly regarded as formal equality (discussed in Chapter 2).[49] It binds all public authorities, including the legislator,[50] but is only exceptionally enforced in private relations.[51] This general guarantee is basically conceived as a prohibition of unjustified (ie not objectively reasonable) unequal treatment.[52] According to the *Tribunal*, however, Article 14 permits unequal treatment under certain conditions:[53] i) unequal factual situations; ii) a constitutionally legitimate goal (either a constitutionally promoted goal (in which case the legislator must provide the treatment that best guarantee the achievement of the goal), or a constitutionally admissible

[46] Ibid.

[47] Eg Martínez (n 43) 81-84.

[48] Eg STC 253/2004. Indirect sex discrimination was acknowledged by the *Tribunal* in STC 145/1991. See also López (n 3) 27; Elviro Aranda, *Cuota de Mujeres y Régimen Electoral* (Dykinson 2001) 33ff.

[49] Eg Martínez (n 43) 42ff.

[50] STC 22/1981; 34/1981; 49/1982. See also Octavio Salazar, *Cartografías de la Igualdad. Ciudadanía e Identidades en las Democracias Contemporáneas* (Tirant Lo Blanch 2010) 76-77; Luis María Díez-Picazo, 'Sobre La Igualdad Ante La Ley' in *La Democracia Constitucional* (Congreso de Diputados et al 2002) 469-471.

[51] Cf. Díez-Picazo (n 50) 473; Martínez (n 43) 85.

[52] Eg STC 22/1981; 34/1981; 200/2001. See also Díez-Picazo (n 50) 472 and 477.

[53] Cf. STC 209/1988; 200/2001. See also Aranda (n 48) 24ff.

goal, ie one does do not clash with constitutional principles (in which case the legislator has more leeway)); iii) passing the proportionality test (although whether the *Tribunal* applies rationality or proportionality appears to be controversial[54]), which seems to require a legitimate aim, adequate means to achieve that aim, and no manifest disproportion in the allocation of benefits and obligations. It may also require that the means are necessary to achieve the aim, and that the benefits outweigh the adverse effects of unequal treatment. It has to be noted, however, that the *Tribunal* has understood Article 14 as guaranteeing equal treatment for equals, but there is no right for unequals to be treated differently.[55] In fact, Article 14's equality relates (at least originally) to the 'abstractness and generality' of the law.[56]

The second part of Article 14 identifies 'suspect' grounds of distinction, including sex.[57] Although not completely forbidden, the use of these categories is subject to a stricter standard of review.[58] Moreover, the list of grounds could be regarded as a constitutional recognition of groups historically subject to systematic discrimination, and also as a sign to

[54] Cf. Rey, 'El Derecho Fundamental a No ser Discriminado por Razón de Sexo' (n 1) 13.

[55] STC 86/1985; 20/1986; 16/1994. See also Martínez (n 43) 44-46 ; David Giménez, *Juicio de Igualdad y Tribunal Constitucional* (Bosch 2004) 331-333.

[56] Pérez (n 43) 22-24.

[57] Eg María Antonia Trujillo, 'La Paridad Política' in *Mujer y Constitución en España* (Centro de Estudios Políticos y Constitucionales 2000) 359; Rodrigo Bustos, 'Hacia la Igualdad Sustancial: Reflexiones a Raíz de la Ley Orgánica Para la Igualdad Efectiva de Mujeres y Hombres' in A Figueruerlo et al. (ed), *Igualdad ¿Para Qué? (A Propósito de la Ley Orgánica Para la Igualdad Efectiva de Mujeres y Hombres)* (Universidad de Salamanca 2007) 85-86; Aranda (n 48) 45.

[58] STC 200/2001 (quoting several precedents). See also María Salvador, 'Las Medidas de Acción Positiva. Principio de Igualdad y Derechos Fundamentales' in Santiago Sánchez (ed), *En Torno a la Igualdad y la Desigualdad* (Dykinson 2009) 37; Bustos (n 57) 86; Aranda (n 48) 18. Contrast with Díez-Picazo (n 50) 477-478.

the legislator to have particular concern in the eradication of those grounds of discrimination.[59]

Article 9.2 relates to substantive equality,[60] and can be seen as a 'flexibilization' of Article 14's formal equality and its demand of 'abstract and general' laws.[61] It not only acknowledges the relevance of *de facto* inequalities, but also imposes on the State the duty of active intervention to foster real equality, particularly in certain contexts such as political participation. It also connects with the conception of Spain as a 'social State' (Article 1 of the Constitution), which would demand a high level of substantive equality.[62] Article 9.2 is a mandate to the legislator and is not a directly justiciable individual right[63] (although the notion of substantive equality has been applied by the *Tribunal* in the constitutional review of statues[64]). Moreover, the legislator enjoys considerable latitude to fulfil this mandate, particularly in the selection of means and target groups.

The Spanish notion of equality is, therefore, more welcoming towards EQW than the French notion of equality. Despite Article 14's emphasis on formal equality and its demand of a stricter scrutiny of the use of sex as a distinguishing factor, Article 9.2 provides a powerful textual basis for the active promotion of factual equality (particularly in the context of political participation), which is, as explained in Chapter 2, a notion of

[59] Cf. STC 200/2001. See also Martínez (n 43) 51-54; Salvador (n 58) 37.

[60] Eg STC 216/1991. See also Salvador (n 58) 34ff; Salazar, 'Las Cuotas Femeninas en cuanto Exigencia de la Igualdad en el Acceso a los Cargos Públicos Representativos' (n 9) 431.

[61] STC 98/1985.

[62] Giménez (n 55) 305ff.

[63] Cf. Ibid, 309-310 and 334-335; Martínez (n 43) 77.

[64] STC 3/1983. See also Giménez (n 55) 311.

equality akin to EQW. Moreover, as a general trend, the *Tribunal* is said to have evolved from a formalistic understanding of equality towards a more substantive notion.[65]

c) Affirmative action

The generic term for affirmative action is *acción positiva* (positive action), understood as formal unequal treatment to favour groups discriminated against, with the aim of achieving substantive equality.[66] There is also the notion of *discriminación inversa* (reverse discrimination), which is distinguished from *acción positiva* because it causes direct detriment to specific individuals.[67]

The constitutional foundation of affirmative action is Article 9.2, because it mandates the legislator to adopt positive measures, including unequal treatment, to promote real or substantive equality.[68] This mandate is particularly compelling regarding the groups identified in Article 14.

The constitutionality of affirmative action measures depends on issues such as:[69] i) whether the target group is subject to actual and real discrimination (past discrimination in not sufficient), a consideration that renders these policies inherently temporary; ii) whether the target group has certain characteristics: it should be regarded as disadvantaged by the

[65] Sevilla (n 4) 39-40.

[66] Cf. José García, 'Representación Política de las Mujeres y Cuotas' [2002] Derechos y Libertades 345, 347-353; María Antonia Castro and Diego Álvarez, *La Igualdad Efectiva de Mujeres y Hombres a Partir de la Ley Orgánica 3/2007, de 22 de Marzo* (Thomson 2007) 92-94; Díez-Picazo (n 50) 480-482.

[67] López (n 3) 36-37; Trujillo (n 57) 360; Germán Gómez, 'Acciones positivas a favor de la mujer en España: doctrina, jurisprudencia y legislación' [2008] Anuario de Derechos Humanos 379, 384; Aranda (n 48) 45-47.

[68] Cf. STC 216/1991; 28/1992; 3/1993; 269/1994. See also Bustos (n 57) 89; Salazar, *Cartografías de la Igualdad. Ciudadanía e Identidades en las Democracias Contemporáneas* (n 50) 82; Sevilla (n 4) 48.

[69] Eg Salvador (n 58) 46ff; Aranda (n 48) 46ff; Martínez (n 17) 117.

Constitution (albeit not necessarily in Article 14, as it is the case of the disabled), who is a member of the group should be 'transparent' (ie evident and non-forgeable), and membership to the group should be involuntary and permanent; iii) whether the affirmative action measure applies in contexts where the disadvantage of the group is evident; and iv) whether the affirmative action measure is capable of surviving the proportionality test (in this context, the efficacy of the measure seems to be particularly relevant).

Discriminación inversa is subject to stricter scrutiny[70] (the *Tribunal* had only accepted it regarding the equal access of disabled people to public functions[71]). It has also been argued that the goal behind these measures should not only be constitutionally admissible, but also constitutionally desirable.[72] In the case of quotas, in addition to temporariness,[73] a degree of flexibility improves their chances of being constitutional (eg avoidance of rigid percentages and deadlines, and the use of minimum qualification requirements).[74]

EQW are overwhelmingly regarded in Spain as a form of affirmative action, either as *acción positiva*[75] or as *discriminación inversa*.[76] Consequently, EQW are widely

[70] Cf. Aranda (n 48) 48-49.

[71] STC 269/1994.

[72] Aranda (n 48) 48-49.

[73] Cf. Ibid, 55.

[74] Cf. Giménez (n 55) 330-331.

[75] Eg Ignacio Torres, 'Las SSTC 12/2008, de 29 de enero, y 13/2009, de 19 de enero, sobre las cuotas electorales' [2009] (24) Aequalitas 30, 31.

[76] Eg Aranda (n 48) 84-85; Martínez (n 17) 118.

considered to be temporary[77] (although there is less agreement in the case of neutral quotas, ie those applicable to women and men[78]), and responding to demands of substantive equality.[79]

Regarding sex as the ground for different legal treatment, the *Tribunal* has evolved from adopting a 'sex-blind' approach to qualified approval.[80] Thus, it has distinguished between constitutionally acceptable *acciones positivas* that fought against sex discrimination, from unacceptable 'paternalistic protections' that reinforced stereotypes.[81] It has also affirmed that Article 14 should not be read as a total ban, but as rendering sex a suspect category, thus imposing a more rigorous constitutional examination (the exact meaning of which is controversial).[82] Moreover, both sexes are protected from discrimination and disadvantaged groups should not be frozen into such status.[83] This may be read as an indication that *acciones positivas* should be neutral and temporary.[84]

[77] Eg Alfonso Ruiz, 'En defensa de las cuotas electorales para la igualdad de las mujeres' [2007] (20) Aequalitas 60, 66; García (n 66) pass.; Salazar, 'Las Cuotas Femeninas en cuanto Exigencia de la Igualdad en el Acceso a los Cargos Públicos Representativos' (n 9) 448 and 451; Martínez (n 17) 178.

[78] Eg Balaguer (n 10) 399; María Macías, 'La democracia representativa paritaria' [2008] (23) Aequalitas 22, 33.

[79] Eg Oscar Sánchez, *La Igualdad de Oportunidades en las Competiciones Electorales* (Centro de Estudios Políticos y Constitucionales 2007) 151.

[80] Eg STC 128/1987; 19/1989 y 229/1992. An analysis of the case-law of the *Tribunal* in Rey, 'El Derecho Fundamental a No ser Discriminado por Razón de Sexo' (n 1).

[81] Eg STC 128/1987; 229/1992; 317/1994; 28/1992.

[82] Eg López (n 3) 25-26; Trujillo (n 57) 359; Rey, 'El Derecho Fundamental a No ser Discriminado por Razón de Sexo' (n 1) 12-13.

[83] Magdalena Lorenzo, 'La igualdad real y efectiva desde la perspectiva del género en jurisprudencia del tribunal constitucional federal alemán y el tribunal constitucional español' [2007] Anuario Jurídico y Económico Escurialense 181, 191; López (n 3) 34-35.

[84] Cf. STC 128/1987.

d) Political rights

A special feature of the Spanish Constitution is that it has acknowledged a 'right to political participation', and thus the 'classical' political rights became instrumental to the fulfilment of this general entitlement. This is particularly so in the case of the right to vote, as evidenced by Article 23.1: 'Citizens have the right to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage.'[85] Considering that the represented exercise their right to political participation partly through their representatives, interfering with the functions of the latter can be regarded as a violation of the right to political participation. This is the rationale behind the 'mirror doctrine' explained before.

Concerning the right to vote, it has a double nature as a basic mechanism of democracy and also as an individual right.[86] The second dimension, however, seems to take precedence, and thus compulsory voting is rejected.[87] Moreover, voting is regarded as a fundamental right, which is individual (even though its exercise is inherently collective).[88] Regarding its content, the doctrine of the right to political participation would foster an ambitious understanding of the right to vote, at least as substantive representation (see Chapter 3).

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[85] Congreso de Diputados, <www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf> accessed 5 December 2012.

[86] Eg Manuel Aragón, 'Democracia y Representación. Dimensiones Subjetiva y Objetiva del Derecho de Sufragio' in Jesús Orozco (ed), *Memoria del III Congreso Internacional de Derecho Electoral*, vol I (UNAM-IIJ 1999) 13-15.

[87] María Vicenta García, *Elementos del Derecho Electoral* (3 edn, Tirant Lo Blanch 1999) Lección 3; Luis López, *Derecho Constitucional*, vol I (4th edn, Tirant Lo Blanch 2000) Lección 14.

[88] Eg García (n 87) Lección 3.

The right to stand for office is commonly referred as 'passive voting', and is protected by Article 23.2: 'They [citizens] also have the right to accede under conditions of equality to public functions and positions, in accordance with the requirements laid down by the law'.[89] This is complemented by Article 68.5: 'All Spaniards entitled to the full exercise of their political rights shall be electors and may be elected'.[90] Although closely related to the right to vote, the right to 'passive voting' is distinct and has its own content. This refers to procedural equality in the electoral process (as in France), the right of the representative to remain in his/her post and to perform his/her duties without undue intervention, and the protection of the entitlements and rights associated with that office.[91] The *Tribunal* has repeatedly highlighted that this right belongs to individuals and not to political parties[92] (although its exercise requires the support of political parties or political associations[93]). The 'fundamentality' of passive voting, however, is more controversial,[94] and Article 23.2 gives the legislator ample discretion to regulate this right[95] as long as a 'constitutional core' is preserved, which according to the *Tribunal*, relates to the legislative and governmental-controlling functions of the right.[96] Similarly contentious is weather

[89] Congreso de Diputados, <www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf> accessed 5 December 2012.

[90] Ibid.

[91] García (n 17) 32-33; López, *Derecho Constitucional* (n 87) Lección 14. See also STC 32/1985.

[92] STC 53/1982; 5/1983; 23/1983; 61/1987.

[93] Art. 44 Ley Orgánica 5/1985, de 19 de junio, del Régimen Electoral General.

[94] Cf. Aranda (n 48) 75.

[95] Eg STC 75/1985; 169/2009.

[96] STC 38/1999; 27/2000.

Article 23.2 refers only to formal equality (in the access to public functions) or also to real or substantive equality.[97]

A related consideration regarding political participation is the constitutional status of political parties, which are dealt with in Article 6 (partly transcribed above). The express constitutional recognition of parties, however, does not transform them into public authorities exercising public functions.[98] They remain private entities, but are entrusted with functions that are crucial for the public interest, thus allowing the State to impose conditions and controls over the activities of political parties.[99] According to the *Tribunal*, parties have a dual nature, as a necessary mechanism of democracy, and also as a means by which individuals exercise their right of association.[100] Whereas the former entitles the legal system to regulate political parties, the latter imposes limits on this regulation.[101]

From the perspective of EQW, considering political participation as a right seems to be convenient because it leads to a more demanding understanding of the right to vote, and also because it stresses the substantive nature of political rights. On the other hand, this view also emphasises political rights as *rights* (not just as essential mechanisms of the democratic system) that are unmistakably individual (not of groups), which is less compatible to EQW (as discussed in Chapter 4). Regarding the right to stand for office, however, the doubts about its fundamentality, together with the legislator leeway to regulate it, are sympathetic to EQW.

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[97] Cf. García (n 17) 40-41; Sánchez (n 79) 33-34.

[98] STC 48/2003.

[99] Cf. STC 3/1981. See also Antonia Navas and Florentina Navas, *Derecho Constitucional. Estado Constitucional* (Dykinson 2005) 117-121.

[100] STC 48/2003.

[101] Cf. Martínez (n 17) 189 ff.

6.4 The Introduction of Electoral Quotas for Women

a) Previous evolution

In the 1980's, women started to demand access to political power in a more organised way.[102] The key group seems to have been feminists who were simultaneously active members of political parties, and sometimes also part of governmental agencies.[103] They found relevant allies in the *Instituto de la Mujer* (women's national agency),[104] and in the international *milieu*, where the European Union, the Council of Europe, the Inter-Parliamentary Union and the United Nations increasingly fostered women's participation in politics.[105]

In 1986, *Izquierda Unida* (IU), a far-left coalition, introduced a 35% quota in its electoral lists. The *Partido Socialista Obrero Español* (PSOE) followed in 1988, expressly acknowledging parity democracy as an objective, and establishing a 25% quota. The other major national party, the *Partido Popular* (PP), explicitly rejected EQW, but started to include significantly higher numbers of women candidates.[106] This 'contagious'

[102] Sánchez (n 7) 206.

[103] Cf. Threlfall (n 3) pass.

[104] See Celia Valiente, *El Feminismo de Estado en España: el instituto de la mujer (1983-2003)* (Universitat de València 2006).

[105] Rey, *Discriminación por razón de género y sistema electoral en Europa y España* (n 7) 31-33; Cristina Alberdi, 'Propuesta de Modificación de la Ley Electoral Española para Introducir la Democracia Paritaria' in *Hacia una Democracia Paritaria Análisis y Revisión de las Leyes Electorales Vigentes* (CELEM 1999); Sevilla (n 4) 4-8.; Esther González, 'Una reflexión técnica al hilo de las leyes de paridad electoral' [2003] (3) Asamblea 163, 169-173.

[106] Cf Threlfall (n 3) 178-179; Valiente (n 104) 100-102.

phenomenon seemed to account for the results of the 1989 elections, considered a genuine 'turning point' for the presence of women in politics.[107]

During the 1990's, several political parties gradually increased women's quotas, which also became more sophisticated. For example, allocation rules were included (eg a proportion of women was required within each segment of the electoral lists), and numerical targets were defined in accordance to the proportion of women among the members to the party. Despite uneven compliance, women's presence in the parties' internal structures (including the committees charged with the selection of candidates) also improved.[108] Simultaneously, the original 'women-centred' language was replaced for a 'neutral' one,[109] and expressions such as 'sexual balance' and 'parity democracy' found their way to parties' by-laws, apparently as permanent principles (as opposed to temporary measures).[110] Thus, at the turn of the century, Spain had achieved respectable levels of feminization in politics, and women accounted for 28.29% of the Chamber of Deputies[111] and 24.32% of the Senate.[112]

Shortly before, at the end of the 1990's, a new stage in the path towards parity started, seeking the introduction by law of compulsory electoral quotas for women of at least 40%. This goal transcended feminists' groups,[113] becoming a 'political raising star'

[107] Eg Sánchez (n 7) 207.

[108] Cf. Jenson and Valiente (n 8) 103.

[109] Cf. Ventura (n 12) 389-390.

[110] Threlfall (n 3) 1082; Trujillo (n 57) 375-376.

[111] IPU, <www.ipu.org/parline-e/reports/arc/2293_00.htm> accessed 22 November 2012.

[112] IPU, <www.ipu.org/parline-e/reports/arc/2294_00.htm> accessed 22 November 2012.

[113] Jenson and Valiente (n 8) 101.

that motivated political parties to present several legislative proposals.[114] However, the national government was in the hands of the PP since 1996. Considering the PP's invariable opposition to quotas, all legal initiatives on the topic were rapidly rejected, and governmental policies dropped fixed numerical goals to adopt the more ambiguous concept of 'balanced representation'.[115]

During this period, supporters of EQW began to discuss, rather reluctantly, the constitutionality of quotas. Considering the French and Italian experiences, where EQW had been declared unconstitutional, constitutional reform was regarded by some as the only way forward. Most supporters of EQW, however, disagreed, primarily because the Spanish Constitution presented unique features (mainly Article 9.2, which was construed as a mandate to promote real equality in the political context).[116]

Simultaneously, although the CCAA had been lagging behind in terms of parity democracy, the resistance of the national Government to EQW pushed some CCAA to take the lead.[117] In 2002, Islas Baleares[118] and Castilla-La Mancha[119] approved ambitious parity laws imposing strict alternation between sexes ('zipping system'). Both laws were

[114] See Macías (n 78) 35-39.

[115] Valiente (n 104) 101-102.

[116] Eg García (n 66) 350-351 and 363; Micaela Navarro, 'Propuesta de Modificación de la Ley Electoral Española para Introducir la Democracia Paritaria' in *Hacia una Democracia Paritaria Análisis y Revisión de las Leyes Electorales Vigentes* (CELEM 1999) 261.

[117] Cf. Rosario Serra, 'El Acceso de las Mujeres al Parlamento. Democracia Paritaria Voluntaria y Exigencia Legal de Equilibrio de Sexos' in Irene Delgado (ed), *Alcanzando el Equilibrio El Acceso y la Presencia de las Mujeres en los Parlamentos* (Tirant Lo Blanch 2011) 59-67; Sánchez (n 7) 218-220 and 233; Irene Delgado and Miguel Jerez, 'Mujer y política en España: un análisis comparado de la presencia femenina en las asambleas legislativas (1977-2008)' [2008] (19) Revista Española de Ciencia Política 41, 51-52; Ruiz, 'La Representación Democrática de las Mujeres' (n 10) 242.

[118] Ley 6/2002.

[119] Ley 11/2002.

challenged by the national Government before the *Tribunal*, who suspended them while the issue was being resolved. Nonetheless, these laws seemed to have considerable impact and parity laws began to be discussed in other CCAA.[120] País Vasco and Andalucía passed parity laws in 2004[121] and 2005,[122] respectively. The former established a minimum of 50% for women in electoral lists (all-women lists were allowed), and also within each section of six candidates in the lists. The latter fixed a virtual 50% quota by enforcing a strict zipping system. Both were challenged by the PP (now out of power) before the *Tribunal*, but no suspension was granted.[123] Arguably as a result of these parity laws, the CCAA overtook the national Government in terms of female participation[124] (to this day, there are more women in the regional assemblies than in the national Parliament).[125]

Finally, in 2004 the PSOE returned to the national Government. Included in a cluster of measures (eg parity Cabinet and the dropping of the pending procedures against the CCAA's parity laws), the new Government introduced an EQW bill that was approved by the Parliament in 2007.

[120] González (n 105) 165. Cf. Macías (n 78) 36-39.

[121] Ley 2/2005.

[122] Ley 5/2005.

[123] Under Article 161.2 of the Constitution, a challenge filled by the national Government may suspend a CCAA's resolution while its constitutionality is resolved by the *Tribunal.*

[124] Delgado and Jerez (n 117) 51.

[125] After the general election of 2011, women accounted for the 36% of the Chamber of Deputies and the 33,33% of the Senate. That same year, the average percentage of women in the regional assemblies was 43,14%. *Instituto de la Mujer*, <www.inmujer.gob.es/estadisticas/consulta.do?area=8> accessed 10 December 2012.

b) The constitutional debate

The emphasis in the discussion about the constitutionality of EQW was primarily on the concept of equality. Supporters of EQW argued that the significant absence of women on representative bodies attested to pervasive discrimination against women, which violated article 14. Thus, the introduction of EQW was required by article 9.2 of the Constitution, which allowed, or even demanded (according to the notion of the 'social State' proclaimed in Article 1 of the Constitution), the adoption of affirmative action to achieve substantive equality when formal equal treatment was insufficient.[126]

Opponents argued that EQW were the nemesis of equal treatment, and also a direct violation of the prohibition of discrimination based on sex. They emphasised that article 9.2 could not be construed as derogating from or as an exception to article 14. A holistic approach should be adopted, meaning that policies aimed at achieving substantive equality adopted under article 9.2 would not breach equal treatment or the prohibition of sex discrimination. A softer version of this argument was that even if article 9.2 could be read as giving enough constitutional support to measures of *acción positiva* (because they did not violated article 14), that could not be extended to policies containing *discriminación inversa* (which was incompatible with article 14).

Proponents responded that EQW were not incompatible with article 14. Equal treatment was not an absolute right and some kind of unequal treatment may be required to fulfil other constitutional aims.[127] In fact, the second part of Article 14 expressly commanded the elimination of discrimination, and the electoral process was plagued by sex

[126] Eg Trujillo (n 57) 378. See also (n 71).

[127] Sevilla (n 4) 19.

discrimination.[128] EQW would then be a remedial measure required by Article 14, which in any case should not be read as a total ban on the use of gender as a legal distinction, but only as rendering sex a suspect category, thus imposing more rigorous constitutional examination. Moreover, quotas' use gender classifications to include women, not to discriminate against them (resembling the 'benign discrimination' argument discussed in Chapter 3).[129] Finally, quotas could be designed as 'neutral', thus providing formally equal treatment for women and men.

A related debate turned on whether EQW would foster equality of opportunities or equality of results.[130] This topic connected with larger and controversial issues, such as whether the notion of equality of opportunities was useful to advance women equality, whether the focus should be on parliamentary seats or on places in the electoral lists, and whether EQW should be considered as an instrument for higher ends or as a goal in itself.[131]

Another dimension of the constitutional debate over EQW touched on political rights. Concerning the right to vote, opponents argued that since some prospective candidates would not be allowed onto the electoral lists because of their sex, the range of available alternatives would be reduced, thus affecting the electors' freedom to choose their representatives.

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[128] Cf. Ibid, 50.

[129] Castro and Álvarez (n 66) 93.

[130] Rey, 'El Derecho Fundamental a No ser Discriminado por Razón de Sexo' (n 1) pass.; Aranda (n 48); 89; Alfonso Ruiz, 'Paridad Electoral y Cuotas Femeninas' [1999] (1) Aequalitas 44, 50. See also the opinion of the *Consejo de Estado* [State Council] N° 2090/2002.

[131] Eg Candela (n 8) 40; Valiente (n 104) 99-100; Ignacio Álvarez and Ignacio Torres, 'Iguales, pero separados. Las cuotas electorales ante el Tribunal Constitucional (STC 12/2008, de 29 de enero)' [2008] (7) Repertorio Aranzidi del Tribunal Constitucional 13, 36-37.

Supporters responded that the electors' freedom to choose was already subject to several limitations imposed both by law and 'reality', some of them more severe than EQW (eg closed and blocked lists).[132] Moreover, the right to vote was not absolute, and the limitation imposed by EQW had a justifiable aim (ie equality, which is more important than other aims invoked in this context, such as the strengthening of political parties), it was rational, and it did not affect the core of the right.[133]

Regarding the right to stand for public offices, EQW were condemned as effectively impeding some individuals from appearing on electoral lists. Although the law imposed many other requirements to be a candidate (eg age, nationality), those were different, because their aim was to ensure the electors' freedom or the autonomy of the elected, and because they were not permanent.[134]

Supporters of quotas stressed that EQW did not amount to a 'definitive and automatic exclusion of male candidates'[135] but only to an 'organisational rule' or 'condition' to exercise this right.[136] Additionally, the right to candidacy was a 'legally configured' right: the legislator enjoyed wide discretion to set down requirements for its

[132] Cf. Salazar, 'Las Cuotas Femeninas en cuanto Exigencia de la Igualdad en el Acceso a los Cargos Públicos Representativos' (n 9) 449; Cristiane Aquino, 'Las Cuotas Electorales y los Derechos Fundamentales' [2011] Universitas 37, 43.-46; Trujillo (n 57) 381; Ruiz, 'La Representación Democrática de las Mujeres' (n 10) 249-250.

[133] Cf. Ruiz, 'En defensa de las cuotas electorales para la igualdad de las mujeres' (n 77) 65-66; Aquino (n 132) 44; Salazar, 'Las Cuotas Femeninas en cuanto Exigencia de la Igualdad en el Acceso a los Cargos Públicos Representativos' (n 9) 449.

[134] Rey, *Discriminación por razón de género y sistema electoral en Europa y España* (n 7) 23.

[135] González (n 105) 171 (free translation).

[136] Cf. Ruiz, 'Paridad Electoral y Cuotas Femeninas' (n 130) 49; Salazar, 'Las Cuotas Femeninas en cuanto Exigencia de la Igualdad en el Acceso a los Cargos Públicos Representativos' (n 9) 449.

exercise, as long as the core of the right was preserved,[137] ie there was a due correlation between the will of the electorate and the elected.[138] It was also argued that this was a 'political right', ie an entitlement deriving from the status of citizen not directly linked to human dignity,[139] and therefore the legislator's freedom to regulate it was particularly large. Moreover, in reality, this right was already heavy regulated (eg campaign regulations, limitations on who could be a candidate). Supporters of EQW also affirmed that the right to stand for office would not confer a 'right to be on the list',[140] which was a 'privilege',[141] partly subject to the will of the political parties.[142] Furthermore, the right to stand for office only protected situations that may happen *after* the electoral lists had been officially registered and/or published,[143] whereas EQW acted before this point. It was also argued that Article 23.2's reference to 'accede under conditions of equality' to public office, was not alluding to equal treatment, but to real or factual equality,[144] which was precisely the

[137] Eg STC 45/1983; 154/2003. See also Salazar, 'Las Cuotas Femeninas en cuanto Exigencia de la Igualdad en el Acceso a los Cargos Públicos Representativos' (n 9) 440; Marta Carballo, 'El principio de igualdad y la tutela contra la discriminación en la Ley Orgánica de 22 de marzo de 2007 para la Igualdad Efectiva de Mujeres y Hombres' [2006] (3) Administración y Ciudadanía 9, 22-23; María Vicenta García, 'El Principio de Presencia Equilibrada en el Art. 44 Bis de la LOREG y el Derecho de Acceso a los Cargos Públicos en Condiciones de Igualdad: Análisis Crítico de la Última Reforma de la LOREG' (2008) (12) Feminismo/s 135, 138-139. Contrast with Álvarez and Torres (131) 36.

[138] STC 71/1989.

[139] Sevilla (n 4) 23.

[140] Cf. Ibid, 24; Fernando Rey, 'La presentación equilibrada en los partidos políticos' [2007] (20) Aequalitas 69, 73.

[141] García (n 66) 369.

[142] Cf. Trujillo (n 57) 381.

[143] García, 'El Principio de Presencia Equilibrada en el Art. 44 Bis de la LOREG y el Derecho de Acceso a los Cargos Públicos en Condiciones de Igualdad: Análisis Crítico de la Última Reforma de la LOREG' (n 137) 137-139. Cf. Sevilla (n 4) 234-25.

[144] Cf. Sevilla (n 4) 22-23; Salazar, *Cartografías de la Igualdad. Ciudadanía e Identidades en las Democracias Contemporáneas* (n 50) 108.

aim of EQW. And even if equal treatment was demanded, quotas could be drafted in neutral terms, so as to treat men and women alike.[145]

Concerning the status of political parties, EQW were said to infringe their autonomy (and the freedom of association of their members) while conducting one of their most essential activities: the selection of candidates.[146] Additionally, EQW would reduce political pluralism because it will forbid all-males and all-females electoral lists that could respond to political ideologies.[147] This may also amount to a breach of freedom of expression.[148]

Supporters of quotas responded (although only occasionally and rather superficially) that political parties do not have fundamental rights,[149] and that their freedoms and autonomy were not absolute.[150] In fact, the law established several limitations on political parties, many of which were specifically applicable to the selection of candidates (eg incompatibilities). Moreover, political parties enjoyed a special constitutional status as the

[145] Cf. García (n 66) 369.

[146] Enrique Belda, 'La Paridad Electoral como Finalidad Disociada de las Acciones Positivas en favor de un Sexo: Comentario Legislativo de Interés Autonómico' (2007) Parlamento y Constitución 181, 196; García, 'El Principio de Presencia Equilibrada en el Art. 44 Bis de la LOREG y el Derecho de Acceso a los Cargos Públicos en Condiciones de Igualdad: Análisis Crítico de la Última Reforma de la LOREG' (n 137) 141-142; Paloma Biglino, 'Variaciones sobre las Listas Electorales de Composición Equilibrada' [2008] (83) Revista Española de Derecho Constitucional 277, 291.

[147] Cf. Rey, *Discriminación por razón de género y sistema electoral en Europa y España* (n 7) 23; Aquino (n 132) 55-56.

[148] Cf. Ruiz, 'La Representación Democrática de las Mujeres' (n 10) 251.

[149] Cf. Ángela Figueruelo, 'Representación política, derecho de asociación y democracia paritaria' (2008) 18 Letras Jurídicas <www.letrasjuridicas.com/Volumenes/18/figueruelo18.pdf> accessed 19 March 2010, 8; Enriqueta Chicano, 'Propuesta de Modificación de la Ley Electoral Española para Introducir la Democracia Paritaria. Presentación' in *Hacia una Democracia Paritaria Análisis y Revisión de las Leyes Electorales Vigentes* (CELEM 1999).

[150] Cf. Rafael Naranjo, 'Fomento de la Participación Política de la Mujer y Régimen Constitucional de los Partidos Políticos' [2005] (63) Revista de Derecho Político 149, 155ff; Ruiz, 'Paridad Electoral y Cuotas Femeninas' (n 130) 49.

main vehicles of citizens' political participation. That status comprehended both privileges (eg public financing) and duties, such as their active collaboration in improving democracy, even by accepting limitations on their independence in selecting candidates.[151]

An alternative defence of EQW stressed that Article 6, which protected political parties' freedoms and autonomy, included the express mandate of internal democracy regarding their structure and functioning.[152] Parity regulations were democratic demands, and therefore could not be regarded as limitations of the 'rights' of political parties (or the rights of their members), because they were interwoven in the very nature of such 'rights'.[153] Consequently, a full proportionality analysis was not required, given the legislator wide discretion in the matter.

Against this approach, it was pointed out that Article 6 has been always construed in a 'light and formalistic or procedural way'[154], which would be at odds with the imposition of substantive requirements emerging from notions of parity democracy. Moreover, neither the Constitution nor the electoral law had so far regulated the selection of candidates within political parties, and not even parties' by-laws contained much regulation on the topic.[155] Additionally, the rapid association between quotas and democracy could be contested,

[151] Cf. Sevilla (n 4) 42-43.

[152] Cf. Naranjo (n 150) 164ff. See also Ascensión Martín, *El Contenido Esencial del Derecho de Asociación* (Congreso de Diputados 2009) 328ff.

[153] Cf. Salazar, *Cartografías de la Igualdad. Ciudadanía e Identidades en las Democracias Contemporáneas* (n 50) 111; Eva Martínez, 'La Legitimidad de la Democracia Paritaria' [2000] (107) Revista de Estudios Políticos 133, 144; Trujillo (n 57) 374.

[154] Rey, 'La presentación equilibrada en los partidos políticos' (n 140) 74.

[155] Cf. Trujillo (n 57) 374; Salazar, 'Las Cuotas Femeninas en cuanto Exigencia de la Igualdad en el Acceso a los Cargos Públicos Representativos' (n 9) 444.

particularly when the number of female members of a party is lower than the assigned quota.[156]

The objection regarding political pluralism was deemed as serious due to its status as a 'superior value' of the legal system (Article 1 of the Constitution), but it was stressed that not all ideologies were constitutionally protected,[157] and that compliance with EQW should not been equated with supporting them (in fact, parties comply with the rules of the electoral system even if they are ideologically opposed to them).[158] Others claimed EQW were enforcing 'real' pluralism through the inclusion of women.[159] Nonetheless, even certain supporters of EQW considered that a serious violation of either pluralism or freedom of expression was possible, and suggested the inclusion of an exception for all-men and all-women lists.[160]

An issue that cut across many of the debates noted above referred to the proportionality test. As even supporters of EQW accepted, if quotas were deemed to affect the right to equality or political rights, they should pass the proportionality test if they were to be constitutional. Supporters of EQW affirmed that they passed the test,[161] and noticed that the *Tribunal* was highly deferential when applying the proportionality test to statutory legislation.[162] Opponents denied that EQW would pass the proportionality test for varied

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[156] Cf. Rey, 'La presentación equilibrada en los partidos políticos' (n 140) 73; Macías (n 78) 41.

[157] Jasone Astola, 'La igualdad de mujeres y hombres: algunos aspectos de la Ley Orgánica 3/2007' <www.laguachimana.org/content/ncc/la-igualdad-de-mujeres-y-hombres-algunos-aspectos-de-la-ley-organica-32007> accessed 22 February 2010, 4. Cf. Carballo (n 137) 23.

[158] Sánchez (n 79) 153.

[159] Macías (n 78) 33.

[160] Eg Ruiz, 'La Representación Democrática de las Mujeres' (n 10) 251.

[161] Cf. Aquino (n 132) 58-66; Naranjo (n 150) 159ff; Sánchez (n 79) 154.

[162] Cf. Martínez (n 17) 200-218.

reasons that will be explained in the next section (eg the factual assumption of sexual political inequality was rapidly weakening as women reached increasingly higher levels of political presence).

A further constitutional discussion, similar to what happened in France, was whether EQW fractured the unity of the electorate. Opponents claimed that they would, and that the fracture would be multiple, because other groups would follow women's example, demanding quotas for themselves ('Pandora's Box' argument). This would threaten representative democracy, restoring a kind of 'organic democracy' or 'corporatism' (which was linked with the authoritarian regime that existed in Spain between 1939 and 1975).[163]

Supporters argued that EQW would not divide the electorate, because quotas classified candidates, not electors: women and men could vote for male or female candidates, and the elected representatives would represent the electorate as whole.[164] Moreover, the 'divisive danger' was less significant if EQW were conceived as transitory.[165] Concerning the Pandora's Box argument, they argued that the women's case was unique, resorting to the arguments discussed in Chapters 1 and 2 (eg women were half of humankind and were present (and discriminated against) within all other social groups, and they do not have a collective identity), although not with the same vehemence or sophistication as occurred in France. Additionally, certain scholars (mostly those influenced by the French *parité* movement), challenged the notion of the indivisibility of the electorate, together with other concepts born out of the French Revolution, such as

[163] Eg Álvarez and Torres (n 131) 29 and 37-39; Belda (n 146) 184.

[164] Cf. Serra (n 117) 78; Martínez (n 153) 146; Carballo (137) 22.

[165] See (n. 85 and 86).

universalism and sovereignty, as too 'masculine', and thus in need of reformulation so as to include women.[166]

Other aspects of the Spanish constitutional debate about EQW referred to typical questions about the relationship between political representation and women (discussed in Chapter 1) such as: whether women are better representatives of other women; whether women advance different policies (or do politics in a different way); whether a 'critical mass' of women was necessary; and whether women were a group with similar interests and concerns.[167]

Additional and well-known arguments against EQW (discussed in Chapter 3) were: the contradiction involved in discriminating to end discrimination;[168] the attack on meritocracy;[169] the unsuitability of sex as a criterion to allocate rights;[170] the paternalism and social interventionism inherent in this measures;[171] the automatism and rigidity of quotas; [172] the excessive faith in the power of the law to bring about social change;[173] a

[166] Cf. Martínez (n 153); Rosa Cobo, 'Democracia Paritaria y Sujeto Político Feminista' [2002] (36) Anales de la Cátedra Francisco Suárez 29.

[167] Eg María Teresa Gallego, 'Democracia Paritaria: Recorrido Histórico y Planteamiento Actual' in *Hacia una Democracia Paritaria Análisis y Revisión de las Leyes Electorales Vigentes* (CELEM 1999) 59-60; Rey, *Discriminación por razón de género y sistema electoral en Europa y España* (n 7) 25; Jenson and Valiente (n 8) 105; Raquel Pastor, *Género, Élites Políticas y Representación Parlamentaria en España* (Tirant Lo Blanch 2011) 89-90; Cobo (n 166) 40ff; Aranda (n 48) 64ff.

[168] Pedro Francisco Gago, 'Acerca de la Sentencia 12/2008 del Tribunal Constitucional sobre la Ley Orgánica para la Igualdad Efectiva de Hombres y Mujeres (3/2007)' [2008] (8) Foro 221, 226.

[169] Ibid, 232.

[170] Aranda (n 48) 87.

[171] Rey, *Discriminación por razón de género y sistema electoral en Europa y España* (n 7) 21-22, 27 and 45-46; Gago (n 168) pass.

[172] Cf. Gago (n 168) 237; Sánchez (n 7) 223.

[173] Cf. Marina Subirats, 'Democracia Paritaria: Recorrido Histórico y Planteamiento Actual' in *Hacia una Democracia Paritaria Análisis y Revisión de las Leyes Electorales Vigentes* (CELEM 1999) 45; Ruiz, 'La Representación Democrática de las Mujeres' (n 10) 245-246.

possible 'boomerang effect' in which 'female inferiority' is reinforced, casting doubts on the merits of all woman, and causing resentment among men;[174] the 'creamy layer' effect, in which only the better-off women are benefitted;[175] and the prioritisation of quantitative goals over qualitative goals.[176]

c) The Sex Equality Law

In 2007, the *Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres* ('Sex Equality Law') was passed. This is a complex law that covers a wide range of policy areas. Its declared aim is to eliminate direct and indirect discrimination against women. It repeatedly commits to both equal treatment and equality of opportunity, and considers formal equality as insufficient, aiming to foster 'real' equality. Significantly, article 11 orders public authorities (and allows private parties) to adopt *acciones positivas* to correct evident factual inequalities suffered by women (only), which are subject to several requirements said to be drawn from the case-law of the *Tribunal* (eg they must be reasonable and proportionate to the specific goal, and subsist only as long as the situation that justifies them requires).[177]

Regarding EQW, article 14.4 establishes as a general principle of the Public Authorities' activity the balanced participation of women and men in electoral candidatures and decision-making. The 'balanced composition principle' is later defined as 'the presence

[174] Rey, *Discriminación por razón de género y sistema electoral en Europa y España* (n 7) 22.

[175] Cf. Sánchez (n 7) 211.

[176] Cf. Ibid, 212.

[177] Castro and Álvarez (n 66) 95 and 98-101; Gómez (n 67) 395; María Luisa Balaguer, *Igualdad y Constitución Española* (Tecnos 2010) 158.

of women and men in a way that, in the relevant group, people of each sex would not be more than sixty per cent or less than forty per cent'[178]. This principle applies to elections for the National Congress, European Parliament, legislative assemblies of the CCAA, and Municipalities (over 5000 people, and over 3000 since 2011). The 40% minimum applies to each 5-slot section of the lists. If the last section has fewer than 5 slots, the closest alternative to numerical equivalence should be adopted (without unbalancing the general 60/40 ratio for the whole list). A similar rule applies to the electoral lists for the Senate (although inclusion in a list is not compulsory for candidates for senator). All these rules also apply to alternate candidates. However, the CCAA are entitled to adopt measures that 'favour a higher presence of women candidates' in the elections of regional assemblies.[179]

Supporters of quotas were generally pleased with the Sex Equality Law, which reflected many of the suggestions previously advanced by scholars. Nonetheless, the lack of strict alternation within the list was criticized,[180] as well as the exclusion of small municipalities,[181] and the lack of an explicit sanction for non-compliance (although non-registration appeared to be the obvious consequence, *ex-post* adjustments may be tolerated).[182] Moreover, EQW did not apply to the political parties' internal structure[183] and was not linked with the number of female members of the party.[184]

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[178] *Disposición Adicional Primera* [First Additional Clause] (free translation).

[179] *Disposición Adicional Segunda* [Second Additional Clause] (free translation).

[180] Eg Macías (n 78) 42. Contrast with Ruiz, 'En defensa de las cuotas electorales para la igualdad de las mujeres' (n 77) 66.

[181] Belda (n 146) 195; García, 'El Principio de Presencia Equilibrada en el Art. 44 Bis de la LOREG y el Derecho de Acceso a los Cargos Públicos en Condiciones de Igualdad: Análisis Crítico de la Última Reforma de la LOREG' (n 137) 153-154.

[182] García, 'El Principio de Presencia Equilibrada en el Art. 44 Bis de la LOREG y el Derecho de Acceso a los Cargos Públicos en Condiciones de Igualdad: Análisis Crítico de la Última Reforma de la LOREG' (n 137) 147-148. Macías (n 78) 43.

Opponents focused, both during the parliamentary discussion[185] and after the passing of the law, on two issues: the law's dubious constitutionality and its perverse effects. The former was seen to arise from the law's violation of constitutional rights and freedoms (active and passive voting, association, and political parties' autonomy and ideological freedom),[186] but also from the alleged incompatibility of EQW with the constitutional principle of the indivisibility of the electorate and the notion of 'citizen', as well as from the legislator's lack of competence to amend the 'essential elements of representative democracy'.[187] Regarding the interference with constitutional rights and freedoms, it was argued that EQW would fail a proportionality test, because: i) quotas affected the essential core of some rights; ii) the disadvantaged position of women in electoral districts should be proved case by case (a general legal presumption would not do), and iii) there were other equally effective but less restrictive measures to foster parity, such as financial incentives.[188] Finally, concerning the negative consequences of EQW, the

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[183] Cf. Rey, *Discriminación por razón de género y sistema electoral en Europa y España* (n 7) 43-44.

[184] Macías (n 78) 41. Cf. Rey, 'La presentación equilibrada en los partidos políticos' (n 140) 73.

[185] Available at <www.congreso.es/portal/page/portal/Congreso/Congreso/Iniciativas?_piref73_2148295_73_1335437_1335437.next_page=/wc/servidorCGI&CMD=VERLST&BASE=IWI8&PIECE=IWI8&FMT=INITXD1S.fmt&FORM1=INITXLUS.fmt&DOCS=1-1&QUERY=%28I%29.ACIN1.+%26+%28IGUALDAD+MUJERES+HOMBRES%29.ALL.> accessed 30 November 2010.

[186] Rey, 'La presentación equilibrada en los partidos políticos' (140) 74; Belda (n 146).

[187] Belda (n 146) 184-188.

[188] Rey, 'La presentación equilibrada en los partidos políticos' (n 140) 74; Belda (n 146) 193-194. See also Naranjo (n 150) 169ff.

most common examples were the opening of a Pandora's Box (particularly regarding ethnic and racial groups)[189] and the prohibition of all-women lists.[190]

d) The *Tribunal* upholds EQW

The *Tribunal* upheld the constitutionality of EQW in two judgments, one concerning a national quota[191] and the other regarding a quota approved by the Basque Country (a CCAA).[192]

In 2008 the *Tribunal* upheld the quota included in the Sex Equality Law in a decision that involved two conjoined actions.[193] The involved a referral made by a judge of first instance. The PP had presented an all-women list in the municipality of Garachico and the Local Electoral Commission refused registration. The PP filed for judicial review (*recurso contencioso-electoral*), asking the judge to refer to the *Tribunal* the question of whether EQW were according to the constitution.

The Government intervened defending the quota. It argued that neither the electorate nor sovereignty were in danger of division, because women were not a category as any other (being inherent and unchangeable). Moreover, there was no division of the electorate by gender, or any obligation to vote for candidates of a particular sex, and the

[189] Eg Rey, *Discriminación por razón de género y sistema electoral en Europa y España* (n 7) 24-25; Álvarez and Torres (n 131) 29; Belda (n 146) 184. Cf. Ruiz, 'En defensa de las cuotas electorales para la igualdad de las mujeres' (n 77) 63-64.

[190] Belda (n 146) 196-197.

[191] STC 12/2008.

[192] STC 13/2009.

[193] *Cuestión de inconstitucionalidad* 4069-2007 and *recurso de inconstitucionalidad* 5653-2007.

elected would represent all electors. Regarding equality, the quota was neutral and was trying to advance equal opportunities (since strict formal equality was 'outdated'). The Government also stressed that Article 9.2 was far more committed to substantive equality than the French and Italian equivalents. Concerning the right to be elected, this did not include the right to be candidate, and the legislator had ample leeway to regulate it. Finally, the quota was proportional, being a minimal limitation to obtain parity, so although there were other alternatives, this one was not excessive.

Pending the decision of the *Tribunal*, a group of *diputados* filed a *recurso de inconstitucionalidad* (action for unconstitutionality) against the electoral quota. It claimed that Article 9.2 of the Constitution did not allow affirmative action in political representation, least of all when it violated fundamental rights (to vote, to access in equal conditions to representative positions, and to (sex) equality). Besides, the legislator was acting beyond its powers by affecting the indivisibility of the category 'citizen', and by introducing sex as an eligibility requirement. It also divided the electorate and opened Pandora's Box (other groups would follow women in seeking electoral quotas), thus reforming the political system in a way that would require a constitutional amendment (as in Italy, France, and Belgium). The limitation to the right to a passive vote would fail the proportionality test because EQW presumed discrimination against women in politics across the table, without being able to prove the accuracy of factual assumption. Freedom of association and the political parties' autonomy were also affected by this interference in their internal affairs. Ideological freedom and even freedom of expression were damaged because parties could not defend radical views about sex and representation. Finally, this was a rigid type of *discriminación inversa*, because its goal was equal results and not equal opportunities.

The *Tribunal* upheld the electoral quota. Its main ground was Article 9.2 of the Constitution, which was understood to refer to substantive equality. This provision was regarded as 'unique' (ie different from similar French and Italian provisions) because it expressly covered political participation, and also because it added a positive duty to promote substantive equality. Moreover, the quota was not *discriminación inversa* because it did not favour one sex whilst harming the other. In fact, it was not differential treatment either because the quota was the same for both sexes (satisfying the neutrality principle). Nor was it 'parity', because it amounted only to 40% and not to 50%.

A crucial aspect of the judgment was the decision that no fundamental right was violated because the quota was addressed to political parties[194] - not to individuals – and they were not holders of the rights to active and passive voting. Moreover, political parties could be legitimately used to advance substantive equality in political representation (as required by Article 9.2), particularly because Article 6 of the Constitution declares that they are 'instrument for political participation'. Their freedom to nominate candidates is not absolute, and the legislator can impose conditions on this freedom (such as eligibility requirements and blocked electoral lists). Furthermore, the specific limitation imposed by the quota on the political parties' 'entitlements' (not rights) was constitutional because: i) it had a legitimate aim (effective equality in political participation); ii) it was a reasonable measure (it was only 40%, it did not require strict alternation between the sexes, and it included exceptions and deferrals); and iii) it was harmless to fundamental rights (since its addressees – political parties – did not have such rights). The *Tribunal* added that parties'

[194] Although the Equality Law 2007 also affected 'groups of electors' (ephemeral associations of citizens created with the sole aim of presenting electoral candidates), the Court dealt with them in similar way to political parties.

ideological freedom was not affected, because they could still be against equality and parity, and also defend the superiority of one sex. And even if this freedom (and also freedom of expression) could be considered as limited by the new legal provision, that limitation would be proportional for the same reasons explained above. The *Tribunal* also noted that the historical imbalance that could have justified all-women lists would be solved by the quota.

Complementing the above, this judgment declared that individuals' political rights were not infringed, because the right to vote does not include a right to have lists of candidates of a certain composition, and the right to stand for office does not encompass the right to be appointed candidate.

Regarding gender, the *Tribunal* declared that it was special because it divided universally the society into two equivalent groups (this was not a majority-minority cleavage). Being half of the population, democracy demanded women's inclusion so as to achieve as much 'identity' as possible between the people and their representatives (this argument showed a descriptive understanding of representation). Moreover, sexual balance 'is determinant to define the content of rules and deeds' (thus pointing towards a substantive understanding of representation).

Finally, concerning political representation arguments, the *Tribunal* rejected the argument that quotas amounted to a division of the sovereign people. The 'people' should not be confused with the 'electorate'. The former was the sovereign and expressed its will through the latter. Whereas the people were 'above' the legal order, the electorate was 'under' it (including in respect of legal quotas). Additionally, EQW did not divide the electorate into sexual categories, because representatives would be elected by – and would represent – the electorate as a whole and not only electors of his/her own sex.

The only dissenting judge argued that, in this case, the quota damaged women, because it prohibited an all-women list. He also accused quotas of dividing the electorate, substituting abstract and interchangeable citizens for distinct female and male citizens. Regarding Article 9.2, he asserted that it was inspired by Article 3.2 of the Italian Constitution,[195] and that its real aim was to foster incentive measures to advance substantive equality, not to allow parity, which was a much later development. Additionally, the dissenter denounced the quota as designed to achieve equal results and not equality of opportunities, and rejected its neutrality because of the provision allowing more women-friendly CCAA's regulations. Criticising the judgment's stress on political parties as principal addresses of EQW, the dissenter argued that this quota violated the right to passive voting of the excluded candidates.

From a critical perspective, it seems evident that, although the *Tribunal*'s paramount concern was the constitutional mandate to advance substantive equality (Article 9.2), it adopted a formalistic stance that limited the importance of substantive equality. This formalism had two aspects. First, the *Tribunal* declared that because the quota was designed as 'bidirectional' or 'neutral', it did not amount to unequal treatment (and therefore this was not proper case of affirmative action).[196] As a consequence, the right to equality was not affected, and no proportionality test was required. Second, the *Tribunal* considered that quotas were addressed to political parties only, not to individuals, thus refusing again to conduct a proper proportionality analysis. This approach disregarded the

[195] "It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, there by impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country." <www.quirinale.it/qrnw/statico/costituzione/pdf/costituzione_inglese_01.pdf> accessed 30 November 2012.

[196] Cf. Álvarez and Torres (n 131) 35; Biglino (n 146) 286.

consequences of EQW for candidates, and was also oblivious to their indirect effects on the affiliates to political parties.[197] As a consequence of this formalism, the *Tribunal* did not need to use substantive equality as an 'overriding' concern capable of interfering with rights, but only as sufficient justification to impose restrictions on political parties.[198] Thus, the *Tribunal* fell short of acknowledging constitutional pre-eminence to substantive equality in the quota debate.

It might be said that the *Tribunal* adopted this formalistic view in order to avoid a 'conflict of rights' approach to the case that would render the constitutionality of quotas less likely. It is true that the *Tribunal* used parts of the proportionality test throughout its decision, but it did so only partially and very deferentially. Whereas the selectivity in the element chosen could be explained because of the formal absence of an infringement of a constitutional right, the deference may be attributed to the political nature of the measure and the separation of powers doctrine.[199] Significantly, certain scholars affirmed that, if proper proportionality had been applied, electoral quotas would have failed the test. EQW were seen as not necessary (there were other equally efficient but less restrictive means, such as financing incentives),[200] and as causing more damage than benefit (substantive equality could not be advanced by sacrificing other rights or principles);[201] particularly in

[197] Cf. Martínez (n 17) 197.

[198] Cf. Biglino (n 146) 287.

[199] Cf. María Luz Martínez, 'Comentario a la Sentencia del Tribunal Constitucional 12/2008, de 29 de Enero, sobre la Ley Orgánica para la Igualdad Efectiva de Mujeres y Hombres' [2008] (2) Teoría y Realidad Constitucional 605, 617-618; Biglino (n 146) 290-291.

[200] Cf. Rey, *Discriminación por razón de género y sistema electoral en Europa y España* (n 7) 46-47; Martínez, *Cuota Electoral de Mujeres* (n 17) 198; Aranda (n 48) 89-90.

[201] Cf. Martínez, 'Comentario a la Sentencia del Tribunal Constitucional 12/2008, de 29 de Enero, sobre la Ley Orgánica para la Igualdad Efectiva de Mujeres y Hombres' (n 199) 619ff; Aranda (n 48) 84 and 89-90.

the Spanish context, women had already achieved respectable numbers within the Parliament.[202]

Another criticism was that Article 9.2 was used as a 'wild card', unduly 'forcing' the interpretation of other constitutional provisions, and enabling the imposition of unacceptable restrictions on other rights, such as the general right to equality (Article 14). Substantive equality had become the all-encompassing goal, justifying all.[203]

The *Tribunal* was also accused of not giving enough weight to the autonomy of political parties and to freedom of (political) association.[204] EQW would affect the core of political parties' self-organization powers because the construction of electoral lists was one of their most relevant activities.[205] Besides, other legal regulations (eg closed lists) were not nearly as restrictive as electoral quotas.[206] Consequently, freedom of (political) association was certainly affected and a proportionality test should have been applied.[207]

The way in which the *Tribunal* dealt with the alleged infringement of pluralism was criticized even by quota supporters. Its contention that all-women lists would not be necessary to solve the historical imbalance of the sexes in politics, because the implementation of quotas would make that imbalance impossible, was considered both reductionist and mistaken. In fact, the imbalance was not the unique justification for all-

[202] Cf. Martínez, 'Comentario a la Sentencia del Tribunal Constitucional 12/2008, de 29 de Enero, sobre la Ley Orgánica para la Igualdad Efectiva de Mujeres y Hombres' (n 199) 622. See also (n 7).

[203] Álvarez and Torres (n 131) 28-30.

[204] Ibid, 32-33. Cf. Martínez, 'Comentario a la Sentencia del Tribunal Constitucional 12/2008, de 29 de Enero, sobre la Ley Orgánica para la Igualdad Efectiva de Mujeres y Hombres' (n 199) 616ff.

[205] See (n 151).

[206] Álvarez and Torres (n 131) 33.

[207] Eg Martínez, 'Comentario a la Sentencia del Tribunal Constitucional 12/2008, de 29 de Enero, sobre la Ley Orgánica para la Igualdad Efectiva de Mujeres y Hombres' (n 199) 617; Aquino (n 132) 58.

women lists, which may embody a radical feminist ideology, or even a symbolic move. Thus, the law was at least 'nudging' political parties towards more widely accepted ideas.[208] The *Tribunal* was also mistaken because the quota would not instantaneously solve the sexual imbalance in politics all by itself.[209]

Additionally, the *Tribunal* did not resolve certain issues, such as whether quotas should be reviewed in the future,[210] and which standards would be used to assess the constitutionality of eventual 'more favourable' EQW passed by the CCAA.

In brief, although this decision upheld the constitutionality of EQW, the *Tribunal*'s arguments and rationales were rather weak and formalistic, leaving substantial issues unresolved.

In 2009, the *Tribunal* revisited the constitutionality of EQW.[211] The Basque Parliament passed a legal quota that established a minimum of 50% of women in electoral lists, and also within every 6-slots section of the lists. [212] This law was challenged by the *diputados* of the PP, and their arguments (as well as the counter-arguments provided by the Basque Parliament and the Basque Government) were essentially similar to those advanced against the Sex Equality Law. The *Tribunal* ruled that, although the competence to regulate this matter belonged to the central State (not to the CCAA), the Sex Equality Law expressly authorised the CCAA to implement more favourable regulations for women (the fact that the Basque EQW preceded the Sex Equality Law was not considered as problematic).

[208] Cf. Ibid 620-621; Gago (n 168).

[209] Cf. Biglino (n 146) 292-293.

[210] Cf. Martínez, 'Comentario a la Sentencia del Tribunal Constitucional 12/2008, de 29 de Enero, sobre la Ley Orgánica para la Igualdad Efectiva de Mujeres y Hombres' (n 199) 610-611.

[211] STC 13/2009.

[212] Ley 4/2005, de 18 de febrero, para la Igualdad de Mujeres y Hombres.

Regarding the constitutionality of EQW, the *Tribunal* referred to its previous decision of 2008, quoting it extensively (as did the minority vote). Nevertheless, the 'neutrality' argument failed in the case of the Basque EQW, because only women had a 50% minimum guaranteed. The *Tribunal* downplayed this fact by asserting that men also had a guaranteed minimum in the Sex Equality Law. Even though a difference remained (40% guaranteed for men versus 50% for women), it was justified because this 'positive discrimination' aimed to correct the historical discrimination against women in public life, it was reasonable and proportional (tailored to its ends and did not impose the unnecessary sacrifice of a fundamental right), and it was not excessive (although the decision offered no further elaboration on these issues). In other words, the *Tribunal* was forced to acknowledge quotas as an exception to equal treatment, and therefore a proportionality analysis - albeit deferential and lenient - was required.

The *Tribunal* also declared that EQW were justifiable only as long as the factual basis considered by the legislator to adopt it (sexual imbalance in political representation) continued. Thus, the success of EQW should cause its disappearance.

In conclusion, although the *Tribunal* twice upheld EQW, its decisions have addressed only some of the relevant constitutional issues involved. The pursuit of substantive equality seems to have been the most successful argument in supporting EQW. In contrast, there is not enough elaboration regarding the impact of EQW on political rights, and concerns about political representation and related constitutional notions (eg citizenship, indivisibility of the electorate) were only summarily dealt with.

e) The European Court of Human Rights

A later development was the decision in 2011 of the European Court of Human Rights (ECtHR) about the EQW imposed by the Sex Equality Law.[213] The plaintiffs of the first case decided by the *Tribunal*, where all-women lists were banned, brought their case before the ECtHR. They alleged a violation of their freedom of expression (Article 10 of the European Convention on Human Rights, hereinafter the 'Convention') and association (Article 11 of the Convention), as well as an infringement of the State's obligation to hold free elections under conditions that 'ensure the free expression of the opinion of the people in the choice of the legislature' (Article 3 of Protocol 1 of the Convention), and the prohibition of discrimination on the grounds of sex (Article 14 of the Convention and Article 1 of Protocol 12 of the Convention). The ECtRH declared this application inadmissible as manifestly ill founded. The unique substantial argument given by the ECtHR was that the Spanish EQW did not amount to unequal treatment, insofar as an all-men list would be also banned. In other words, both men and women were treated the same by the law (the neutrality argument). Moreover, the ECtHR observed that Article 1 of Protocol 12 was not in force at the time of the alleged infringement, and Article 14 was not a self-standing right but complementary to the other rights guaranteed by the Convention. The court also declared that the infringement of the freedoms of expression and association was not established, and that the plaintiffs were not affected by the EQW in their activities as members of political parties. Additionally, the duty to hold elections applied to the legislature, not to municipal elections.

[213] *Méndez Pérez v. Spain* App no 35473/08 (ECtHR, 4 October 2011).

This was the first decision of the ECtHR about EQW, and the declaration of inadmissibility of the application may predict a tolerant approach of the ECtHR to this kind of quotas. In fact, this decision shows significantly more deference towards national legislatures than previous cases in the European Court of Justice about quotas in the employment context, where judgments were delivered which included stricter analyses of means and ends (and the adequacy between them).[214] The main problem of the ECtHR decision, however, is its use of the neutrality argument, which confuses individual and group considerations. Although 'neutral' quotas treat men and women the same *as groups*, *individual* men and women are treated different, eventually infringing their rights, and therefore requiring a more detailed analysis of the compatibility between the quota and the Convention, the primary purpose of which is precisely the protection of *individual* rights.

6.5 Conclusions

The introduction of EQW in Spain was less controversial than in France. Although the constitutional understanding of political representation was apparently incompatible with EQW, this theoretical factor did not have enough force and coherency in Spain so as to outlaw EQW. Moreover, the increasing importance of sex equality and the partial acceptance of sex as a legitimate distinguishing factor – albeit in need of strict justification, together with the explicit constitutional mandate to promote substantive equality in political participation, and the evolution of the Tribunal from formal equality towards real equality, were decisive in leading the Tribunal to accept EQW. Curiously, although the scholarly

[214] C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051; C-158/97 *Badeck v Hessischer Ministerprasident* [2000] ECR I-1875; C-409/95 *Marschall v Land Nordhein- Westfalen* [1998] ECR I-6363.

debate about the compatibility between EQW and political rights was important, the Tribunal simply avoided the issue when resolving the constitutionality of EQW. Furthermore, the Tribunal used a formalistic approach that left crucial issues unsolved, such as whether EQW passed the proportionality test, and how important it was for quotas to be neutral and temporary.

CHAPTER 7

MEXICO

Tenemos que ponernos muy listas
Para quedar en las listas
Para quedar incluidas en las listas
Mujeres, las listas
Somos mujeres muy listas.[1]

7.1 Introduction

The adoption of electoral quotas for women in Mexico surprised many due to the widespread stereotypes about the Mexican *macho* male, and also because Mexican society, at least until recently, had been fairly tolerant of discriminatory practices.[2] However, the Mexican case has to be seen as part of a larger Latin-American trend, in which several countries, sometimes taking advantage of transitional democratisation processes, have adopted EQW.

Mexico is not an easy case in which to study EQW. Although the arguments in favour and against EQW were essentially the same as in other jurisdictions (relating to

[1] Song composed for the Women in Contemporary Mexican Politics II Conference, 1996, in Victoria E Rodríguez, *Women's Participation in Mexican Political Life* (Victoria E Rodríguez ed, Westview 1998) v. The song plays with the double meaning of the word 'listas' in Spanish as the adjective for smart (only applicable to females) and also as electoral lists. A free translation would be: *We have to be smart to be included in the electoral lists. To be included in the electoral lists. Women, the smart* (or the electoral lists?). *We are very smart women.*

[2] Cf. Miguel Carbonell, 'La Perspectiva de Género en el Análisis Constituccional. Comentario a la Ley Federal para Prevenir y Eliminar la Discriminación' in Juan A Cruz and Rodolfo Vázquez (eds), *Debates Constitucionales sobre Derechos Humanos de las Mujeres* (Fontamara 2010) 43.

notions of merit, equality, right to candidacy, etc.), public discussion was scarce and superficial. In sharp contrast with France, opposition to EQW was rarely voiced openly,[3] particularly among legal scholars. Moreover, Mexican case-law about EQW is not entirely straightforward about its rationales and arguments. Notwithstanding these difficulties, Mexico offers interesting insight into how EQW have been adopted outside Europe, particularly in a country that not only shares the Civil Law system with France and Spain, but also in which constitutional theories resemble several French and Spanish theories.

The central thesis of this chapter is that the Mexican legal order was mostly compatible with the introduction of EQW, particularly because of the incremental adoption of a substantive notion of equality. To fully illustrate this compatibility, this chapter will discuss certain features of the Mexican context and its electoral system, as well as Mexican constitutional approaches towards political representation, equality, affirmative action and political rights, and how they related to EQW. It will then explain the historical background of electoral quotas in Mexico, before finally analysing the current legislation about EQW and the case-law of the Supreme Court and the Federal Electoral Tribunal.

7.2 The Mexican Context

a) General features

Similarly to Spain, Mexico can only recently be considered a proper democracy. During most of the twentieth century the country was governed by a hegemonic party

[3] Eg Victoria E Rodríguez, 'The Emerging Role of Women in Mexican Political Life' in Victoria E Rodríguez (ed), *Women's Participation in Mexican Political Life* (Westview 1998) 10-11.

(*Partido Institucional Revolucionario* or 'PRI'). Although regular elections took place, they were manipulated by the PRI, which normally gave only token recognition to the opposition. Thus, the introduction of EQW should be viewed as part of a broader political process of democratization of the political system, where the setting up of a reliable electoral system (including credible electoral institutions) was a key factor.[4] EQW were not the main concern of democratic and electoral reforms, which may explain the limited discussion they generated.

Concerning the political system, Mexico is a presidential republic where the head of state is also the political leader who effectively runs the country. Given that the President is the principal political figure, the political power of the Parliament is inevitably reduced. Because EQW apply only to parliamentary elections, these quotas appear to be less relevant than in non-presidential systems such as Spain (France, being a semi-presidential system, would be an intermediate case). Not surprisingly, then, the discussion in Mexico was not limited to the application of quotas to Parliament, but also to political parties and to public entities, in particular those related to the electoral process (ie the Federal Electoral Institute[5] and the Federal Electoral Tribunal).[6]

[4] Cf. Noe Corzo, 'Los Derechos Político-Electorales del Ciudadano en el Contexto del Sistema Mexicano de Partidos: Evolución, Retos y Perspectivas desde el Punto de Vista Jurisdiccional' (2009) 1 Justicia Electoral 81, 87ff; Lisa Baldez, 'Obedecieron y Cumplieron? The Impact of the Gender Quota Law in Mexico' <www.wfu.edu/politics/conference/pub/Chapter%2014%20Baldez.pdf> accessed 23 November 2011, 12ff; Miguel Carbonell, 'Democracia y Representación en México: Algunas Cuestiones Pendientes' in Jesús Orozco (ed), *Demoracia y Representación en el Umbral del Siglo XXI*, vol I (IIJ-UNAM 2011) 82-85.

[5] An autonomous public body in charge of the organization and administration of federal elections. See <www.ife.org.mx/portal/site/ifev2/IFE_Nature_and_Attributions/> accessed 28 March 2012.

[6] Cf. Víctor Alarcón, 'La Equidad de Género en el Ámbito Electoral Mexicano. De la Ley a los Resultados' in Enrique Ochoa (ed), *Equidad de Género y Derecho Electoral en México* (Tribunal Electoral del Poder Judicial de la Federación 2009) 107. See also the case SUP-JDC-028/2010.

An additional feature of the Mexican political system is its federalism.[7] Although this chapter will focus on the national level, certain references will be made to the states' experiences, which show significant variations due to the wide discretion accorded to the states' in this matter.[8]

In relation to Mexican society, the first issue to consider is that it remains strongly *machista*, ie women and men are prescribed strict and distinct roles. Thus, although EQW seem to have enjoyed public support,[9] they have not necessary altered deeper structures of *machismo*, particularly (but not exclusively) in private life.[10] This may also explain the distinction of sexual roles within legislative assemblies.[11] Additional relevant features of Mexican society are its high level of social inequality,[12] and the presence of several aboriginal groups. Consequently, problems of class, poverty and racism reinforce, and sometimes overshadow, sex discrimination.[13] Discrimination against aboriginal groups seems to be the most sensitive kind, and has been only recently addressed by the legal

[7] About the Mexican federalism see Ignacio Burgoa, *Derecho Constitucional Mexicano* (20 edn, Porrúa 2010) 421ff and Chapter Ten.

[8] Information about states' quotas can be found in María del Pilar Hernández, 'Género y Representación' (Género, Indígenas y Elecciones, Morelia, 2002) 415ff; Isabel Zapata, 'Las Cuotas de Género en México: Alcances y Retos' in Juan A Cruz and Rodolfo Vázquez (eds), *Debates Constitucionales sobre Derechos Humanos de las Mujeres* (Fontamara 2010) 254ff; Pär Zetterberg, 'The Downside of Gender Quotas? Institutional Constraints on Women ini Mexican State Legislatures' (2008) 61 Parliamentary Affairs 442, 446ff; Blanca Olivia Peña, 'La Paridad de Género en el Estado de Sonora' (2011) III Tribuna Sonot 63.

[9] Lisa Baldez, 'Elected Bodies: The Gender Quota Law for Legislative Candidates in Mexico' (2004) XXXIX Legislative Studies Quarterly 231, 248.

[10] Cf. Marta Lamas, 'Con la Cultura en Contra. Algunas Consideraciones sobre los Obstáculos que las Mexicanas Enfrentan para Ejercer sus Derechos Políticos-Electorales' in Tribunal Electoral del Poder Judicial de la Federación (ed), *Género y Derechos Políticos La Protección Jurisdiccional de los Derechos Políticos-Electorales* (Tribunal Electoral del Poder Judicial de la Federación 2009).

[11] Cf. Zetterberg (n 8) 456.

[12] See OECD, 'Country Statistical Profiles - 2011 Edition : Mexico ' <http://stats.oecd.org/Index.aspx?DatasetCode=CSP2011> accessed 5 January 2011.

[13] Cf. Lamas (n 10) 58; Carbonell, 'Democracia y Representación en México: Algunas Cuestiones Pendientes' (n 4) 77-80.

order.[14] Article 2 of the Constitution was reformed in 2001 so as to guarantee several rights to aboriginal groups (including limited self-determination and the imposition of positive obligations on the state to promote equal opportunity and prevent discrimination). Although there is no legal quota for indigenous groups, certain political parties have adopted them.[15] Significantly, the Federal Electoral Tribunal[16] considered EQW as a relevant precedent when dealing with party quotas for indigenous groups.[17] Despite this apparent overlap with electoral quotas, there is no clear evidence of alliances between women and other disadvantaged groups. Moreover, women are rarely mentioned as a 'minority', a term that is normally reserved for indigenous people.[18]

Unlike other countries where external influences were sometimes critical in leading to the adoption of EQW, this does not seem to have been critical in Mexico. The relevance of international influences for the Mexican discussion about EQW is debatable (eg the effect of the 1995 Beijing Conference).[19] Concerning comparative experiences, though

[14] Cf. Manuel González, 'Equidad de Género en el Derecho Electoral' (2007) 1 Justicia Electoral 25, 26.

[15] Cf. Mary Telma Guajardo, 'Democracia, Igualdad de Género e Impartición de Justicia Electoral en México: Avances y Retos' (Justicia Electoral y Equidad de Género Voto y Elegibilidad: Por el Derecho a Ser Electas,Ciudad de México, 8-9 March) 14.

[16] Created by Article 99 of the Constitution, this is 'the highest [judicial] authority on electoral matters[s] and is a specialized organ of the Federal Judicial Branch.' (<http://portal.te.gob.mx/node/377>, accessed 28 March 2012). The decisions of the Federal Electoral Tribunal are final. However, if a contradiction arises with the case-law of the Supreme Court, the latter has the final word, Burgoa (n 7) 895.

[17] SUP-JDC-484/2009- SUP-JDC-492/2009 (joint); SUP-JDC-488/2009.

[18] See the concurrent vote in SUP-JDC-484/2009 - SUP-JDC-492/2009 (joint); SUP-JDC-488/2009.

[19] Contrast, María Inés Aragón, 'De las Cuotas Electorales a la Paridad de Géneros. La Experiencia en el Estado de Sonora' (2011) II Tribuna Sonot 17, pass.; Rosa Icela Ojeda, 'Las Cuotas de Género para el Empoderamiento de las Mujeres' (2006) 21 El Contidiano 39, 43; Kathleen Bruhn, 'Whores and lesbians: political activism, party strategies, and gender quota in Mexico' (203) 22 Electoral Studies 101, 112 and 115, with Baldez, 'Elected Bodies: The Gender Quota Law for Legislative Candidates in Mexico' (n 9) 236-237. See also Mónica Cacho, 'Fraude a las Cuotas Electorales de Género' (Ciclo de Conferencias con Perspectivas de Género, Toluca de Lerdo, June 2010) 77-78.

some Mexican scholars discussed the cases of France and Spain (and to a lesser extent, of Latin American countries such as Argentina), this was far from being a central concern.[20]

b) The electoral system[21]

The Mexican Federal Congress is composed of two chambers: the Chamber of Deputies and the Senate. The Chamber of Deputies has 500 *diputados* elected through two different electoral systems. Whereas 300 deputies are selected in majority-vote single-member districts, 200 deputies are elected by proportional representation. According to the latter, each party is entitled to the number of deputies equal to the national vote of the party divided by 200. For these purposes, the country is divided into five electoral regions, each one entitled to 40 deputies. Political parties present closed lists of candidates, but only if they have also registered candidates in at least 200 majority-vote single-member districts. Moreover, parties need to obtain a minimum of two per cent of the national total vote to be entitled to have deputies by proportional representation. No party may accrue more than 300 deputies, or have a percentage of the total number of deputies that exceeds by more than eight points its percentage of the national vote (unless this is a result of winning in majority-vote single-members districts).

[20] Eg, Miguel Carbonell, 'Las Cuotas Electorales de Género y el Principio de Igualdad: Concepto, Problemas y Aplicación en México' (Género, Indígenas y Elecciones, Morelia, 2002) 313-314; Baldez, 'Obedecieron y Cumplieron? The Impact of the Gender Quota Law in Mexico' (n 4) 2-3; Line Bareiro and Isabel Torres, 'Participación Política Igualitaria de las Mujeres: Deber ser de la Democracia' in J Reynoso et al. (ed), *La Democracia en su Contexto Estudios en Homenaje a Dieter Nohlen en su Septuagésimo Aniversario* (IIJ-UNAM 2011) 209 and 233-234.

[21] This section reflects the provisions of Chapter II of the Constitution and Volume I Title III of the Federal Electoral Code.

The Senate has 128 members. 96 senators are elected by the states: each state elects three senators, two by majority vote (each party presents two candidacies and the winning party takes both seats), whereas the third seat is given to the first candidate of the party that comes second in the election. The other 32 senators are elected by proportional representation in a unique national district. As with the deputies, these senators are appointed by the political parties, which present closed lists.

Under Mexican electoral law, each candidacy for a parliamentary seat is made up of two names: a principal (*propietario*) and an alternate (*suplente*), the latter serving as a permanent replacement of the former if need arrives. *Propietarios*, as well as *suplentes* that effectively took office to replace *propietarios*, cannot be re-elected for the following term either as *propietarios* or as *suplentes.*

A key feature of the Mexican electoral system is that it gives political parties a monopoly of the registration of candidates (ie independent candidates cannot run for office), thus reinforcing the role of the parties as 'gatekeepers' of the political system. Although criticised by some as unconstitutional and antidemocratic,[22] this measure was upheld by the Federal Electoral Tribunal[23] and also by the Inter-American Court of Human Rights, which deemed it as legal and proportional to promote the public interest of strengthening political parties.[24]

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[22] Alejandro Chanona, 'Derechos Políticos y Candidaturas Independientes: Asignatura Pendiente en la Transición Mexicana' [2008] Nueva Visión Socialdemócrata 23, pass.; José Luis Armendáriz, 'El Derecho al Sufragio Pasivo en la Legislación Electoral Mexicana' Cuaderno Electrónico N°4 <http://www.portalfio.org/inicio/repositorio//CUADERNOS/CUADERNO-4/Jose%20Luis%20Armendariz%20Gonzalez.pdf> accessed 11 January 2011, pass; María Elena Rebato, *Análisis Comparado México-España de los Derechos Político-Electorales*, vol 10 (Tribunal Electoral del Poder Judicial de la Federación 2011) 51ff.

[23] SUP-JDC-037/2001; SUP-JDC-713/2004.

[24] *Jorge Castañeda vs. Estados Unidos Mexicanos* Caso 12.535.

7.3 Theoretical Framework

a) Political representation

The Mexican doctrine of political representation is not entirely coherent. As in France and Spain, the Constitution mixes popular and national sovereignty. Thus, Article 39 declares that 'National sovereignty resides essentially and originally in the people'. The reasons for this wording are not clear (Article 39 was not subject to much debate because it only reproduced the text of the previous constitution (1857), which in turn resembles a cruder version of 1814[25]). Although not beyond discussion, the mainstream Mexican academic opinion seems to read Article 39 as acknowledging popular sovereignty.[26] Beyond the exact wording of the constitutional text, popular sovereignty would have been an essential factor of the Mexican political evolution that could not be denied.[27] Moreover, the Constitution is the result of a revolution, which, as in France, would have exalted the notion of popular sovereignty and resisted the 'counter-revolutionary' idea of national sovereignty.[28]

[25] Jorge Carpizo, *La Constitución Mexicana de 1917* (9 edn, Porrúa 1995) 177-180.

[26] Ibid, 175 and 179-180; Burgoa (n 7) 263-264.

[27] Cf. Burgoa (n 7) 271ff.

[28] Cf. Jorge Carpizo, *Estudios Constitucionales* (Universidad Nacional Autónoma de México 1980) 58. See also Burgoa (n 7) 266; José Ramón Cossío, 'La Representación Constitucional en México' in Diego Valadés and Miguel Carbonell (eds), *Constittucionalismo Iberoamericano del Siglo XXI* (IIJ-UNAM 2011) 66ff.

A consequence of considering sovereignty as 'essentially' residing in the people is that the latter could not delegate sovereignty.[29] This idea, however, sits rather oddly with Article 39's notion about sovereignty residing only 'originally' in the people, and also with Article 41, which declares that the people 'exerts' sovereignty through the powers of the Federation and the states. More important, the notion of popular sovereignty is inconsistent with many features of political representation in Mexico. In fact, the latter closely reflects the French perspective, which nevertheless is founded on the notion of national sovereignty as opposed to popular sovereignty. An example of this contradiction is Article 51 of the Constitution, which unambiguously provides that the Chamber of Deputies[30] will be constituted by 'representatives of the Nation', not of the people. Adding more confusion, this article makes clear that the representatives are the individual *diputados* and not the Chamber, and that they represent the nation as a whole and not individual citizens, specific districts, or the electors who voted for them.[31] Consequently, representatives stand for the national interest, not for particular ones. This is reinforced by the existence of proportional *diputados*, who are not linked to specific districts and their interests.[32] Another feature of political representation in Mexico, also opposed to popular sovereignty, is the rejection of the imperative mandate.[33] Similarly, there are no clear accountability mechanisms and the

[29] Carpizo, *La Constitución Mexicana de 1917* (n 25) 179. Cf. Burgoa (n 7) 269-270.

[30] Currently the link between the senators and the federal system would be all by gone, and therefore senators would share the general representativeness of the deputies. Cf. Carpizo, *Estudios Constitucionales* (n 28) 160-161.

[31] Carpizo, *La Constitución Mexicana de 1917* (n 25) 208-209 (although pointing out that residence requirements are in contradiction with these ideas); Burgoa (n 7) 527.

[32] Although Article 51 does not distinguish between majority-voted and proportional deputies, the character of the latter as representatives of the Nation is controversial. Contrast Carpizo, *La Constitución Mexicana de 1917* (n 25) 213 with Burgoa (n 7) 1047.

[33] Carpizo, *La Constitución Mexicana de 1917* (n 25) 208; ibid, 207. Cf. Burgoa (n 7) 524-527; Jaime Gerardo Baca, 'Reflexiones Sobre la Representación Política en el Sistema Jurídico Mexicano' (2009)

representative relationship cannot be ended by the represented (through a recall provision).[34]

To explain this theoretical mismatch, it may be suggested that whereas in France the notion of national sovereignty was fundamental in defining the features of political representation, in Mexico (as in Spain) it was not that important. In any case, Mexican scholars appear to be mostly unaffected by this doctrinal confusion, and their views of political representation seems to be rather critical of the system as being a poor second best to direct democracy.[35] In contrast, they show interest, as in France and Spain, in the distinction between private law representation and political representation.[36] In synthesis, it may be said that because political representation is a 'public-oriented' institution and not a 'private-interest' one, it is subject to different rules (eg non imperative mandate).[37]

A further factor to consider is the hegemonic domination of the PRI since the adoption of the Constitution in 1917 until 2000. This put the party at the heart of the representative system, *de facto* altering the notions analysed before. Thus, the PRI acted as *the* representative of the Mexican people, and exerted control and accountability over the *diputados* and *senadores*.

Other challenges to the Mexican notion of representation were posed by the indigenous movements. The latter's heterogeneous understanding of political representation has pressed for a broadening of traditional notions, so as to include the indigenous

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<www.monografias.com/trabajos76/representacion-politica-sistema-juridico-mexicano/representacion-politica-sistema-juridico-mexicano.shtml> accessed 23 November 2011, sec.4.

[34] Carpizo, *Estudios Constitucionales* (n 28) 159; Cf. Baca (n 33) sec. 6.

[35] Cf. Burgoa (n 7) 521; Carpizo, *Estudios Constitucionales* (n 28) 158.

[36] See Baca (n 33) pass. Cf. Burgoa (n 7) 674-675.

[37] Cf. Carpizo, *Estudios Constitucionales* (n 28) 159.

perspectives.[38] Moreover, the acknowledgment of indigenous communities as politically relevant actors inevitably leads to ideas such as group and descriptive representation (discussed in Chapter 1). Even the courts have occasionally acknowledged such notions (for example, encouraging as much accuracy as possible 'in the reproduction of the social body', or in the reflection of the 'the plural configuration of society'[39]).

In sum, the Mexican doctrine about political representation is deeply eclectic. Following Pitkin's categories (explained in Chapter 1), it may be said that Mexican political representation is slightly formalistic in the sense that members to the Federal Congress are representatives because there is an authorization mechanism in the form of democratic elections (or party nomination in the case of proportional *diputados* and *senadores*). However, the absence of imperative mandate, supported by the sharp distinction between private law mandate and political representation, renders such authorization thin. Accountability, the alternative version of formalistic political representation, is virtually discarded due to the ban on immediate re-election. As regards the descriptive notion of representation, although it is incompatible with the ideas of national representation and national interests, it seems to be taking root thanks to the political relevance of indigenous communities and, to a lesser extent, the debate about EQW. Elements of symbolic representation may be also present in Mexico, arguably boosted in the case of the national authorities because of the federal nature of the State, but no clear evidence has been found on this issue. Finally, notions of substantive representation may have been damaged in Mexico due to factors such as the semi-

[38] See Adrian Gimate-Welsh, 'La Representación en el Contexto de los Derechos y la Cultura Indígenas' (Segundo Congreso Internacional de la Cátedra Michel Focault).

[39] SUP-JDC-484/2009 - SUP-JDC-492/2009 (joint); SUP-JDC-488/2009.

autocratic regime of the PRI (policy responsiveness to the electorate is seriously devalued if the political party in power could remain so indefinitely), and the existence of proportionally-elected members to the Federal Congress (there is only indirect popular vote for them as the parties allocate these seats freely).

As regards Mansbridge's categories (Chapter 1), it has to be remembered that most of them are antithetical to the notion of political representation grounded in the idea of national sovereignty. However, Mexico's eclectic approach on this matter makes the application of Mansbridge's categories possible. This is not the case, however, with anticipatory representation, which is unlikely given the ban on immediate re-election. This ban may also damage promissory notions of representation due to the absence of its principal mechanism of accountability. Contrastingly, surrogate representation is more likely in Mexico due to the political importance of indigenous groups.

b) Equality

The Mexican Constitution does not have a general clause about equality, which is curious considering that it was supposed to incarnate the ideals of social justice and real equality of the Mexican Revolution.[40] Nonetheless, the Constitution does have clauses referring to the prohibition of discrimination and sex equality. The first was introduced in 2001 and can be found in Article 1.5. It forbids '*all discrimination, based on ethnic or national origin, gender, age, disabilities, social status, health condition, religion, opinions, sex orientation, civil status, or any other that harms human dignity and has the purpose of*

[40] Cf. Cossío (n 28) 75.

annulling or diminishing the individuals' rights and liberties.'[41] The wording of this clause suggests that human dignity is the ultimate value at stake. In other words, what makes an act discriminatory is its negative impact on human dignity. The final part of Article 1.5 is more problematic. Although probably explained by its location in a chapter devoted to the protection of individuals freedoms and rights, it seems to impose a further requirement for an act to be discriminatory that looks very much as subjective intent.

The main constitutional provision about sex equality is in Article 4.1: '*Men and women are equal before the law*'[42], and was introduced in 1974. The historical background suggests that it was considered, at least originally, as protecting formal equality,[43] and that it was closely related to the prohibition of sex discrimination (probably including indirect discrimination).[44] However, because the prohibition of sex discrimination is now in Article 1, it has been suggested that Article 4 should be read as a mandate to promote equality (and even as demanding equality of results).[45]

Other constitutional provisions about gender equality are located in Article 2 and Article 123. The former was introduced in 2001 as a step forward in the recognition of the multi-ethnicity of the Mexican people,[46] granting autonomy and several rights to the indigenous communities. Remarkably, women rights are established as limits to autonomy

[41] Free translation.

[42] Free translation.

[43] Aragón (n 19) 22.

[44] Cf. Miguel Carbonell, 'La Igualdad en la Constitución Mexicana' <www.juridicas.unam.mx/publica/librev/rev/jurid/cont/31/pr/pr21.pdf> accessed 3 January 2012, 345.

[45] Cf. José María Soberanes, *La Igualdad la Desigualdad Jurídicas* (Porrúa 2011) 105-106. Contrast with Carbonell, 'La Igualdad en la Constitución Mexicana' (n 44) 344.

[46] Soberanes (n 45) 93. A most limited constitutional acknowledgement of such multi-ethnicity was enacted in 1992, ibid, 105.

in two cases: i) communities could solve internal conflicts according to their own regulations insofar as, *inter alia*, they conform to the 'the dignity and integrity of women', and ii) the right to elect the communities' authorities and representatives according to their own practices has to be exercised guaranteeing 'the participation of women in conditions of equality vis-à-vis men'. Additionally, Article 123 contains a mandate of equal remuneration between men and women for equal, as well as specific provisions for women workers during their pregnancy, maternity leave and breastfeeding.

In sum, although the Constitution shows concern for sex equality, it does not seem to reflect notions of substantive or *de facto* equality but only of formal equality.[47] This is not, however, the current interpretation given by the Supreme Court, whose case-law shows an evolution from exclusively formal equality to more demanding approaches.[48] Initially, the Court enforced the guarantee of equality mainly as a requirement that laws were of general application and abstract. At the end of the twentieth century, the Supreme Court started to go beyond that approach, forbidding the legislator from making unjustified distinctions, although only as regards taxation.[49] Later on, the Supreme Court adopted as a general rule that 'the principle of equality should be understood as a constitutional demand of equal treatment for equals and unequal treatment for unequals', adding that legal distinctions ought to be justified as reasonable and objective according to the proportionality test.[50] This is also the notion that the Supreme Court adopted in the first EQW case in 2002, albeit arguably in a cruder version. By 2009, the line of cases regarding

[47] Contrast with ibid, 100, who sees some hints of substantive equality in Article 2 B of the Constitution.

[48] Ibid, 59ff.

[49] Ibid, 65-66.

[50] *Amparo Directo en Revisión* 988/2004; 537/2006; *Amparo en Revisión* 1959/2004; 1629/2004; 846/2006; 55/2006; ibid, 67.

EQW (analysed later in this chapter) made clear that the Supreme Court had adopted a more substantive view of equality. Those cases are particularly relevant considering the relatively scarce record of the Supreme Court concerning non-discrimination and sex equality.[51]

Mexican scholars also seem to believe that, despite the absence of express constitutional support,[52] equality should be understood as substantive or real.[53] Moreover, the core principle of treating equals equally and unequals unequally would demand the discarding of abstract notions of equality, stressing concrete circumstances such as socio-economic factors.[54] Particularly relevant for the Mexican doctrine has been the work of the Italian scholar Luigi Ferrajoli. He proposes four models of relationship between the law and factual differences, which result in as many notions of equality.[55] The first model is *legal indifference towards differences*, ie the latter are completely ignored (neither protected nor attacked). Under this model, there is no meaningful legal equality. The second model is *legal differentiation between differences*, ie certain differences are valued whereas others are devalued, thus creating a hierarchy between different identities. This would be the notion inspiring caste systems. It could also be found behind the liberal universalisation of

[51] See ibid, 101-104 and 113-116.

[52] Carbonell, 'Las Cuotas Electorales de Género y el Principio de Igualdad: Concepto, Problemas y Aplicación en México' (n 20) 305. But see Cacho (n 19) 77, who sees both a formal and a substantive component in the notion of equality contained in Article 4.

[53] Cf. Carbonell, 'La Perspectiva de Género en el Análisis Constituccional. Comentario a la Ley Federal para Prevenir y Eliminar la Discriminación' (n 2) pass.; Karla Pérez, 'Mas Allá de la Igualdad Formal: Dignidad Humana y Combate a la Desventaja' <http://www.bibliojuridica.org/libros/6/2834/27.pdf> accessed 6 January 2012, pass.

[54] Cf. Burgoa (n 7) 520.

[55] Luigi Ferrajoli, 'El Prinipio de la Igualdad y la Diferencia de Género' in Juan A Cruz and Rodolfo Vázquez (eds), *Debates Constitucionales sobre Derechos Humanos de las Mujeres* (Adrián Rentería tr, Fontamara 2010) 5ff.

the white man. Under this approach, legal equality is only for a privileged elite, which is taken to be the whole. The third model is *legal equalization of differences*, where all differences would be devalued in favour of a totally abstract notion of equality. This 'serialization' notion could be found in the extinct 'real socialism' systems but also in those liberal states that promote the assimilation of everything that is 'alien'. Thus, in the case of women, they would have the same rights as men insofar as they are considered to be like men: maleness is the standard. Under this model, legal equality becomes ineffective in reality because it does not take into account the impact of differences on social relations. Finally, Ferrajoli proposes a fourth model of *legal valorisation of differences*. According to this model, differences are not only a fact that should be acknowledged, but also valued, because they reflect personal identity. Differences should not be confused with inequalities, which refer to diverse economic and material conditions. Under this model, legal equality should be regarded as a normative notion mandating that people who are different must be respected and treated as equals. In addition to all of the above, Ferrajoli acknowledges the shortcomings of formal equality and the importance of addressing *de facto* discrimination, which may demand making differences irrelevant or relevant. The latter would be the case of affirmative action.

The influence of Ferrajoli can be found in the work of several Mexican scholars, particularly in their support for the fourth model of legal equality, which allows treating the different differently in order to achieve equality.[56] Difference is re-valued and reconciled

[56] Carbonell, 'La Igualdad en la Constitución Mexicana' (n 44) pass.; Blanca Olivia Peña, 'Impacto de la Cuota de Género en la Elección Federal de 2003' in Manuel Larrosa and Pablo Javier Becerra (eds), *Elecciones y Partidos Políticos en México, 2003* (Universidad Autónoma Metropolitana / Plaza y Valdés 2005) 57; Soberanes (n 45) pass. Cf. González (n 14) 32-33; María Yolanda Cortés, 'Un Reto Fundamental para la Democracia en México: La SJN frente a la Redefinición del Principio de Igualdad entre Hombres y Mujeres' <http://www.consorcio.org.mx/site/documentos_basicos/reto_democracia.pdf> accessed 23

with equality.[57] Thus, in the case of sex, maleness is rejected as a universal standard and replaced by the positive assertion of sexual diversity.[58]

Finally, the Mexican legislator has also understood equality in a substantive way.[59] For example, the *Ley General para la Igualdad entre Mujeres y Hombres*, 2003 (Sex Equality Law), declares 'substantive equality' as its goal through the empowerment of women. Similarly, the *Ley Federal para Prevenir y Eliminar la Discriminación*, 2003 (Antidiscrimination Law) adopts a far-reaching conception of equality, imposing ambitious duties on the state, such as 'promoting the conditions for real and effective personal freedom and equality', including the 'elimination of those obstacles that *de facto* limit their exercise (…)'[60]. Moreover, equal opportunity should be 'real'. The temporal proximity between these statutes and the introduction of EQW may suggest a generalised tendency of the Mexican legal order towards more substantive notions of equality.

Concluding, the Mexican notion of equality seems to be rather sympathetic to EQW. Although the constitutional text lacks the express acknowledgment and promotion of

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November 2011, 3-5; Karla María Macías, 'Las Cuotas de Género en Latinamérica. Una Apuesta Común' <http://www.te.gob.mx/ccje/Archivos/ponencias/Karla_Macias.pdf> accessed 9 january 2011, 3-5.

[57] Cf. Macías (n 56) 4-5; Bareiro and Torres (n 20) 214; Blanca Olivia Peña, *Equidad de Género y Justicia Electoral. La Alternancia de Géneros en las Listas de Representación Proporcional*, vol 33 (Tribunal Electoral del Poder Judicial de la Federación 2011) 33.

[58] Cf. Cortés (n 56) 3.

[59] Cf. Carbonell, 'La Perspectiva de Género en el Análisis Constituccional. Comentario a la Ley Federal para Prevenir y Eliminar la Discriminación' (n 2) 39; Daniela Cerva and Karina Ansolabehere, 'Trabajo Introductorio: Protección de los Derechos Políticos-Electorales de las Mujeres' in Tribunal Electoral del Poder Judicial de la Federación (ed), *Género y Derechos Políticos La Protección Jurisdiccional de los Derechos Políticos-Electorales* (Tribunal Electoral del Poder Judicial de la Federación 2009) 20. A critical view in Francisca Pou, 'Género y Protección de Derechos en México: Virtualidad y Límites de la Jurisdicción Constitucional' in Juan A Cruz and Rodolfo Vázquez (eds), *Debates Constitucionales sobre Derechos Humanos de las Mujeres* (Fontamara 2010) 50ff; Alarcón (n 6) 118.

[60] According to Carbonell, 'La Perspectiva de Género en el Análisis Constituccional. Comentario a la Ley Federal para Prevenir y Eliminar la Discriminación' (n 2), this article was inspired by article 9.2 of the Spanish Constitution and Article 3.2 of the Italian Constitution.

de facto equality of the Spanish Constitution, sharing the formalistic approach of the French constitutional text, the Mexican legal order appears to have firmly evolved towards a more substantive notion of equality. Moreover, there is a special concern for sex equality that may allow the expansive interpretation of certain constitutional provisions, such as Article 4, in order to support measures such as EQW.

c) Affirmative action

There seems to be little discussion in Mexico about the constitutionality of affirmative action. Although there is no express constitutional provision mandating or at least authorising affirmative action, Article 1 of the Constitution would only forbid 'negative' (ie dignity-harming) discrimination,[61] therefore allowing 'benign' forms of unequal treatment. Moreover, the constitutional understanding of equality as substantive would authorize, or even require, differential treatment under certain circumstances.[62] In any case, affirmative action is widely seen as temporary.[63]

Additionally, the Sex Equality Law expressly prescribes affirmative action as a tool to speed up *de facto* equality, as well as being a compensatory measure to reach 'equality of opportunities'. Significantly for EQW, this law imposes on the state the obligation of

[61] Eg, Cortés (n 56) 4. Cf. Bareiro and Torres (n 20) 212.

[62] Eg Cerva and Ansolabehere (n 59) 16 and 20.

[63] Cf. Jesús Rodríguez, *Iguales y Diferentes: La Discriminación y los Retos de la Demoracia Incluyente*, vol 17 (Tribunal Electoral del Poder Judicial de la Federación 2011) 105; Cortés (n 56) 7; Salvador Nava, 'Democracia, Igualdad de Género e Impartición de Justicia Electoral en México. Avances y Retos' (Justicia Electoral y Equidad de Género Voto y Elegibilidad: Por el Derecho a Ser Electas, Ciudad de México, 8-9 March 2010) 2; Cacho (n 19) 77; Blanca Olivia Peña, 'La Cuota de Género en la Legislación Electoral Mexicana' (Género, Indígenas y Elecciones, Morelia, 2002) 481; Carbonell, 'Las Cuotas Electorales de Género y el Principio de Igualdad: Concepto, Problemas y Aplicación en México' (n 20) 312-313; Zapata (n 8) 243.

encouraging balanced political participation and representation between men and women. Similarly, the Antidiscrimination Law specifies that 'positive' or compensatory policies 'that mandate differential treatment to promote real equal of opportunities' shall not be regarded as discrimination. The examples provided in this statute, nevertheless, are rather weak forms of affirmative action (eg the promotion of gender-mixed education, increasing child-care facilities).

Consequently, the approach of the Mexican legal order towards affirmative action seems to be unusually relaxed, thus favouring the case of EQW. In fact, these quotas are widely seen by the Mexican scholars as affirmative action,[64] and therefore subject to its inherent temporariness.[65] A minority, however, considers EQW as a permanent feature of a sexually-balanced democracy.[66]

d) Political rights

The Mexican Constitution guarantees all three main aspects of political participation – the right to vote, the right to stand for election, and freedom of association - together in Article 35, labelling them as 'prerogatives of the citizen'. These rights are also commonly referred as 'political-electoral rights'. Although downplayed during the hegemonic regime

[64] Eg Miguel Carbonell, 'La Reforma al Código Federal de Instituciones y Procedimientos Electorales en Materia de Cuotas Electorales de Género' [2003] Cuestiones Constitucionales 193, 194; Angélica Cazarín, *Democracia, Género y Justicia Electoral en México,* vol 2 (Tribunal Electoral del Poder Judicial de la Federación 2011) 31-32; Peña, 'Impacto de la Cuota de Género en la Elección Federal de 2003' (n 56) pass. Contrast with Alfonso Ruiz, 'La Constitucionalidad de las Cuotas Electorales en México' <www.trife.gob.mx/eventos/micrositio/alfonso_ruiz_miguel.pdf> accessed 6 January 2011, 20.

[65] Eg González (n 14) 44; Zapata (n 8) 243; Peña, *Equidad de Género y Justicia Electoral. La Alternancia de Géneros en las Listas de Representación Proporcional* (n 57) 39 and 41.

[66] Eg, Bareiro and Torres (n 20) 227-233; Cacho (n 19) 78ff; Cerva and Ansolabehere (n 59) 20. See also Guajardo (n 15) 11-12.

of the PRI,[67] today they are fully acknowledged as fundamental rights.[68] They are not absolute though,[69] and cannot be protected by the same judicial remedy as other constitutional rights and liberties.[70] Nonetheless, these rights may impose positive obligations on the State.[71]

The right to vote seems to be understood in a narrow way, ie as the capacity (which is always voluntary[72]) to express preferences for candidates.[73] Consequently, there is little discussion regarding the relationship between voting and EQW, or about other related issues such as whether voting should be considered a group right. However, a more demanding view of this right was defended during the *Juanitas* affair (explained bellow), where the replacement of resigning congresswomen by men was considered by some as damaging the right to vote of those who voted for a woman but ended up represented by a man.[74] Similarly, the Federal Electoral Tribunal has stressed the link between the right to stand for election and the right to vote. As in Spain, abridging an elected candidate's entitlement to access or hold office amounts to a breach of both rights.[75]

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[67] Corzo (n 4) 86-87.

[68] Héctor Fix, *Los Derechos Políticos de los Mexicanos* (Tribunal Electoral del Poder Judicial de la Federación 2005) 34-35.

[69] Eg SUP-JDC-117/2001; SUP-JDC-127/2001; SUP-JDC-128/2001.

[70] See Armando Cruz, 'Nota Introductoria' in *Comentarios a las Sentencias del Tribunal Electoral del Poder Judicial de la Federación*, vol 12 (Tribunal Electoral del Poder Judicial de la Federación 2008) 13-14; González (n 14) 42-43.

[71] Cf. Fix (n 68) 40.

[72] Leoncio Lara, *Derechos Humanos y Justicia Electoral* (Tribunal Electoral del Poder Judicial de la Federación 2003) 27

[73] Eg Fix (n 68) 48.

[74] Cf. Cacho (n 19) 82-83.

[75] Cf. SUP-JDC-098/2001; SUP-JRC-314/2001; SUP-JDC-135/2001.

The right to stand for election is also commonly referred as 'passive voting', as in Spain.[76] According to the Federal Electoral Tribunal, it includes the right to compete in electoral processes, to be proclaimed as elected, and to access and hold office (including the right to be removed only according to the law), all on equal conditions.[77] Although there is no further elaboration by the Federal Electoral Tribunal about what should be understood as discriminatory in this context, notions of formal equality seem to be tempered by certain references to substantive equality, eg the provision of enough 'material resources' so as to guarantee an 'equitable' competition.[78] Additionally, the Federal Electoral Tribunal has declared that the right to stand for election is not an absolute right, but a 'fundamental right of constitutional basis subject to legal configuration'[79], ie although it is a right of primary importance the legislator has considerable leeway to 'shape' it (as in Spain).[80] Nonetheless, legal regulations and limitations on the right must be rational, justified, proportional, compatible with the essence or core of the right, and directed to certain aims such as rendering it compatible with other rights or protecting other constitutional values (eg the strengthening of the political parties).[81] A conspicuous example of such regulations is the monopoly of political parties in presenting candidates. Thus, although the right to stand for

[76] Eg Armendáriz (n 22) pass.; Rebato (n 22) pass.; Fix (n 68) 54; Luis Efrén Ríos, 'El Transfuguismo Electoral. Un Debate Constitutcional en México' [2009] Cuestiones Constitucionales 251, pass.; Lara (n 72) 29.

[77] Cf. SUP-JDC-1711/2006; SUP-JDC-098/2001; SUP-JRC-314/2001; SUP-JDC-135/2001. See also Luis Octavio Vado, *La Delimitación del Derecho al Voto Pasivo*, vol 12 (Tribunal Electoral del Poder Judicial de la Federación 2008).

[78] SUP-JDC-1711/2006.

[79] SUP-JDC-037/2001, which makes reference to other precedents.

[80] Cf., Rebato (n 22) 43-44.

[81] SUP-JDC-037/2001; Cf. SUP-JDC-713/2004.

election is held by individuals and not by political parties,[82] the latter are absolutely necessary for exercising this right.[83]

It must also be noted that Article 35 of the Constitution provides that the right to stand for election or 'to be voted for' is subject to the condition of having the necessary 'qualities' as established by law. This refers, *inter alia*, to eligibility requirements and incompatibilities. On this matter, there has been conflicting case-law.[84] The Federal Electoral Tribunal, in upholding the monopoly of political parties in the nomination of political candidates, has argued that eligibility qualities are not limited to those inherent, natural or essential to a person.[85] Contrastingly, the Supreme Court struck down a state law that had forbidden candidates to run if they had been affiliated to a different party during the previous two years, precisely because affiliation (or non-affiliation) to a political party was not a natural or essential feature of a person, therefore falling outside the qualities allowed by Article 35.[86]

Regarding the right to political association, a distinction is made by the courts between the general freedom of association (Article 9 of the Constitution) and the specific right of political/electoral association (Article 35 of the Constitution).[87] Although both rights are acknowledged as 'fundamental', the latter was only added to the constitutional text in 1990. The specific right would be different from the general freedom of association

[82] But see Ríos (n 76) 283-284, who regards the candidacy as a joint entitlement between candidate and party.

[83] Rebato (n 22) 44 and 50-51.

[84] See Ríos (n 76) 264ff.

[85] SUP-JDC-713/2004. This judgment also mentioned that Article 35's qualities should be established for the common good or in the general interest.

[86] AC 158/2007- 159/2007- 160/2007- 161/2007-162/2007 (joint).

[87] Eg SUP-JDC-117/2001; SUP-JDC-127/2001; SUP-JDC-128/2001; SUP-JDC-57/2002.

because, inter alia, it could be held only by citizens; it would not tolerate simultaneous affiliation to more than one political party, and it would be protected through the electoral courts.[88] The right to political/electoral association is considered as both individual and collective. The individual aspect includes the capacity to join political organizations (basically political parties), stay in, or leave them.[89] It may also include the right to participate in the internal organisation of parties and to present candidacies.[90] The collective aspect of the right belongs to the political parties, protecting their continuity as well as the activities they perform in order to achieve their objectives.[91] It must be noted that political parties enjoy a particular status under Mexican law.[92] According to Article 41.I of the Constitution, parties are 'public interest' entities the main purposes of which are promoting the people's participation, helping in the 'integration of national representation', and rendering the access of citizens to political power possible. It is not surprising then that the courts have recognised political parties as intermediaries between the citizen and the public authorities.[93] Moreover, party autonomy is constitutionally protected, and therefore intervention by electoral authorities in their internal affairs requires express legal authorisation.[94] Complementing the special status of political parties, the Federal Electoral

[88] Eg, SUP-JDC-117/2001; SUP-JDC-127/2001; SUP-JDC-128/2001. Specifically referring to affiliation as exclusive, see SUP-JDC-055/2002; SUP-JDC-056/2002; SUP-JDC-57/2002; SUP-JDC-058/2002; SUP-JDC-078/2002; SUP-JDC-787/2002.

[89] Eg SUP-JDC-117/2001; SUP-JDC-127/2001; SUP-JDC-128/2001.

[90] Fix (n 68) 69, inferring from cases SUP-JDC-117/2001; SUP-JDC-127/2001; SUP-JDC-128/2001.

[91] Ibid, 70-73.

[92] Eg SUP-JDC-037/2001. A brief introduction to the evolution and regulation of political parties in Mexico and their regulations can be found in Burgoa (n 7) 538-554.

[93] Eg, SUP-JDC-117/2001; SUP-JDC-127/2001; SUP-JDC-128/2001.

[94] Also in Article 116IVf), as applied to the states' authorities.

Code grants them several rights, including the right to select their candidates to federal elections. It also declares the procedures and requirements to select pre-candidates and candidates to elective offices as 'internal affairs' of political parties (and thus protected from intervention unless express statutory authorisation is provided). This broad declaration, however, is qualified by the legislator's constitutional mandate to regulate certain issues of the parties' internal nomination processes, such as spending and time limits.

The harmonisation between the political parties' prerogatives and their members' political/electoral rights is a complex task. The trend appears to be towards the increasing protection of the latter,[95] and individuals may have recourse to the Federal Electoral Tribunal after exhausting the party's internal procedures (Article 99 of the Constitution). This applies to cases where citizens are denied inclusion in the party's candidate list.[96] Nevertheless, when intervening in parties' 'internal affairs', the Mexican legislation requires the Federal Electoral Tribunal to take into account the preservation of the parties' 'rights' to free political decision and self-organization.[97] Thus, although the individual's rights precede the mere 'derivative' prerogatives of political parties, the latter's autonomy is constitutionally guaranteed, and respect for political parties' decisions is crucial in

[95] Cf. Corzo (n 4) 97ff.

[96] See ibid, 98. See also Dulce Alejandra Camacho, 'Mujeres en Defensa de sus Derechos Político-Electorales. Un Atisbo del Derecho Electoral "En Acción"' in Tribunal Electoral del Poder Judicial de la Federación (ed), *Género y Derechos Políticos La Protección Jurisdiccional de los Derechos Políticos-Electorales* (Tribunal Electoral del Poder Judicial de la Federación 2009).

[97] Article 2.2 *Ley General del Sistema de Medios de Impugnación en Materia Electoral* 1996. The Supreme Court has also stressed the autonomy of political parties in these matters, eg AC 158/2007 - 159//2007 - 160/2007 - 161/2007 - 162/2007 (joint).

keeping internal discipline.[98] In sum, the electoral courts must walk a very fine line in these cases.

As a general assessment, the Mexican approach towards political rights seems compatible with EQW. The right to vote is conceived so narrowly that EQW do not limit it (and supporters of EQW may still argue that quotas increase the voter's freedom[99]). Moreover, intense regulation of the right to stand for election is widely accepted, particularly if directed to the protection of other constitutional values, which, in the case of EQW, would be sex equality. Furthermore, the requirement of access on equal conditions to political/electoral rights may enhance the case for EQW if it is construed in a substantive way. As regards the eligibility requirements allowed by Article 35 of the Constitution, quotas refer to an inherent, natural or essential feature such as sex (similar in this respect to age or mental capacity), which is the type that would fall within the non-controversial content of Article 35. The strength of the collective aspect of the right of political association, as well as the autonomous status of political parties, may have been powerful deterrents of EQW. However, the reality is that political parties adopted them voluntarily, and subsequent legal imposition seems to have been mostly uncontested, at least from the perspective of the parties' autonomy. In fact, the Federal Electoral Code repeatedly imposes obligations on the parties with regards to sex equality,[100] and thus EQW could be seen as a mere specification of more generally formulated obligations.

[98] Cf. Fix (n 68) 59 and 66ff.

[99] Cf. Macías (n 56) 7.

[100] Eg Article 4 declares that equal opportunity and equity between men and women to access elective offices is an obligation for political parties, and Article 25e) requires parties' declaration of principles to include the obligation of promotion of political participation 'in equal opportunity and equity between men and women'.

7.4 The Introduction of Electoral Quotas for Women[101]

EQW emerged as a goal for women-rights activists only in the 1990's,[102] and the process of their development can be roughly divided into three stages. The first stage consisted in the adoption by political parties of voluntary quotas for women. These quotas were applicable not only to electoral lists, but also to the internal organisation of political parties.[103] Although diverse in their characteristics (eg percentage, scope), during the 1990's all main parties adopted some kind of quotas for women (after the original resistance of *Partido Acción Nacional*). The reasons behind this 'contagion effect' remain controversial, but it may be related to the fact that the most important agents supporting EQW seem to have been party women across the political spectrum.[104]

The second stage saw the intervention of the legislator. As early as 1993, the following clause was introduced into Article 175.3 of the Federal Electoral Code: '[P]olitical parties will promote, as established in their internal regulations, a greater participation of women in the political life of the country, through their nomination for

[101] Historical accounts in Alfonsina Berta Navarro, 'El Derecho de Igualdad de la Mujer en México' (Género, Indígenas y Elecciones, Morelia, 2002) 429ff; Peña, 'La Cuota de Género en la Legislación Electoral Mexicana' (n 63) 482ff; Diego Reynoso and Natalia D'Angelo, 'Leyes de Cuotas y la Elección de Mujeres en México: ¿Contribuyen a disminuir la brecha entre elegir y ser elegida?' (XVI Congreso de la Sociedad Mexicana de Estudios Electorales, Torreón, 18-19 November 2004) 3ff; Patricia Garduño, 'Reformas a la Constitución Política de los Estados Unidos Mexicanos en Materia de Equidad de Género' (Reformas Constitucionales y Equidad de Género, Santa Cruz de la Sierra, February 2005) 2ff.; M Margarita Elizondo, 'Discriminación por Género' (Género, Indígenas y Elecciones, Morelia, 2002) 348; Francisco Javier Aparicio, *Cuotas de Género en México: Candidaturas y Resultados Electorales para Diputados Federales 2009*, vol 18 (Tribunal Electoral del Poder Judicial de la Federación 2011) 17ff; Hernández (n 8) 413-415.

[102] Cf. Lisa Baldez, 'Cuotas versus Primarias: La Nominación de Candidatas Mujeres en México' in Marcela Ríos (ed), *Mujer y Política* (Flacso-Chile/IDEA International/Catalonia 2008) 166.

[103] Bruhn (n 19) 109ff; Baldez, 'Elected Bodies: The Gender Quota Law for Legislative Candidates in Mexico' (n 9) 235ff; Diego Reynoso and Natalia D'Angelo, 'Las Leyes de Cuotas y su Impacto en la Elección de Mujeres en México' (2006) XIII Política y Gobierno 279, 302-304.

[104] Baldez, 'Elected Bodies: The Gender Quota Law for Legislative Candidates in Mexico' (n 9) 246. Cf. Bruhn (n 19) pass.

political office.'[105] Although not devoid of symbolic importance, this regulation did not include specific goals, timetables, or remedial procedures. Thus, it should be regarded as a legal recommendation[106] that did not transform the voluntariness of the first stage.

Conversely, the third stage consisted in the imposition by law of compulsory and specific EQW. This started in 1996,[107] when Article XXII Transitory[108] of the Federal Electoral Code was amended as follows: 'The national political parties will provide in their by-laws that the candidates to *diputados* and *senadores* do not exceed 70% of the same gender. Similarly, they will promote the greater political participation of women.'[109] This law, however, proved to be totally insufficient. The extreme austerity of its contents allowed political parties to find several ways to avoid compliance. The main one was based on the difference between *propietarios* and *suplentes*. Because the quota did not distinguish between them, political parties complied with the EQW by including most women as *suplentes*.[110] Moreover, women were placed at the bottom of the electoral lists,[111] or in

[105] Free translation.

[106] Baldez, 'Elected Bodies: The Gender Quota Law for Legislative Candidates in Mexico' (n 9) 235.

[107] That same year the State of Sonora approved an EQW establishing a ceiling of 80% of candidates of the same sex. See Aragón (n 19) 30-31.

[108] Transitory articles are provisional or time-limited legal provision that, in practice, may become permanent. They are usually created to regulate the entering into force of a new law, or as a temporary solution.

[109] Free translation.

[110] Baldez, 'Elected Bodies: The Gender Quota Law for Legislative Candidates in Mexico' (n 9) 241; Navarro (n 101) 453; Reynoso and D'Angelo, 'Las Leyes de Cuotas y su Impacto en la Elección de Mujeres en México' (103) 283.

[111] Baldez, 'Cuotas versus Primarias: La Nominación de Candidatas Mujeres en México' (n 102) 167; Bruhn (n 19) 117; Navarro (n 101) 453; Reynoso and D'Angelo, 'Las Leyes de Cuotas y su Impacto en la Elección de Mujeres en México' (n 103) 283.

districts where the party had small chances of winning.[112] Additionally, the 70% maximum for any sex was read as a 30% maximum for women.[113]

Increasing awareness about women's political and civic inequality led to constitutional reform in 2001. Sex discrimination was expressly forbidden and particular attention was given to the situation of women in indigenous communities. The same year, the *Instituto Nacional de la Mujer* (National Women Institute) was created, an autonomous governmental agency with the goal of promoting sex equality and women's participation. Simultaneously, one of the states – Coahuila - approved an EQW. The Supreme Court upheld this law in 2002, opening the field for more ambitious federal regulations on EQW, which were approved - almost unanimously - in the same year. Given the limited impact of the 1996 regulations, the 2002 reform to the Federal Electoral Code attempted to address the main problems of the previous rules. The 70% maximum for each sex was confirmed, but as applied to those candidates running as *propietarios.* In the case of proportionally-elected candidates, the lists of candidates should be divided into segments of three names each, and in the three first segments there should be one candidate of a different sex. A procedure was established in case of non-compliance, and the final sanction was non-registration of the 'corresponding candidates'. Majority-vote candidates, although subject to the 70% quota, could be excepted if nominated by 'direct vote' (understood as primary elections). Additionally, a transitory clause of the decree that was formally required to give full legal force to the electoral reform bill, established that the EQW would be applied to 'at least five federal elections'. Finally, Article 4 of the Federal Electoral Code was amended

[112] Navarro (n 101) 453; Reynoso and D'Angelo, 'Las Leyes de Cuotas y su Impacto en la Elección de Mujeres en México' (n 103) 283.

[113] Baldez, 'Elected Bodies: The Gender Quota Law for Legislative Candidates in Mexico' (n 9) 241.

so as to include a general clause proclaiming that 'equity' between men and women in access to elective offices was a citizen's right and also an obligation for political parties.

The 2002 regulations, however, contained several flaws. The placement mandate, although an improvement, was still insufficient, and most women candidates still found themselves at the bottom of the electoral lists.[114] The non-registration sanction was not entirely clear (it could refer to a mandatory replacement of the 'excessive' male candidates for women, a rejection of the whole list, random elimination until the permissible sexual ratio was reached, etc.).[115] Furthermore, the transitory clause seemed to be inconsequential insomuch as the legislator could change the Federal Electoral Code as frequently as it pleased (although this clause may have indicated that EQW were seen as a temporary institution[116]). The scope of the quota was also criticized, because the only disadvantaged group considered were women, and also because it applied to lists of congressional candidates only and not to the internal organisation of political parties.[117] The exception about candidates nominated through primary elections was regarded as a *candado*, ie a gap that allowed circumventing the law.[118] In fact, the abusive use of primary elections to avoid the application of EQW[119] was made worse by the lack of legal definition about what the

[114] Cf. Cazarín (n 64) 33.

[115] Cf. Baldez, 'Obedecieron y Cumplieron? The Impact of the Gender Quota Law in Mexico' (n 4) 13ff.

[116] Cf. Carbonell, 'La Reforma al Código Federal de Instituciones y Procedimientos Electorales en Materia de Cuotas Electorales de Género' (64) 200.

[117] Elizondo (n 101) 360 and 368-369. Cf. Peña, 'Impacto de la Cuota de Género en la Elección Federal de 2003' (n 56) 60.

[118] Eg Peña, 'Impacto de la Cuota de Género en la Elección Federal de 2003' (n 56) 59; Baldez, 'Cuotas versus Primarias: La Nominación de Candidatas Mujeres en México' (n 102) 158-159 and 172.

[119] The main parties hold primaries in roughly half of the majority-vote districts.

minimum requirements for 'direct vote' or primary election were.[120] Moreover, the Federal Electoral Institute seems to have accepted parties at their word, without exerting any meaningful control over the fact that primary elections had effectively taken place, or whether they had been truly democratic and not nominal-only processes.[121] But even if primary elections had not been used to avoid compliance with EQW, there was still an undeniable tension between both notions. This contradiction was apparent within political parties. In fact, successful implementation of EQW, particularly in its first stages, normally requires powerful party elites capable of strong intervention in the nomination of candidates, whereas primary elections are precisely about impeding that intervention, transferring power from party elites to its base.[122] Additionally, EQW cannot adopt a 'higher democratic moral ground' vis-à-vis primaries when both are widely seen as democratic advancements.

Notwithstanding its flaws, the electoral reform of 2002 caused a 'chain reaction' among the states of the Federation, and thus by 2003 almost three quarters of them had approved EQW.[123] That same year, the Federation passed a wide-ranging anti-discrimination law, which was followed in 2006 by the Sex Equality Law.

In 2008, new regulations concerning EQW were incorporated into the Federal Electoral Code. Current Article 218.3 declares that 'political parties will promote and guarantee equality of opportunity as well as attempt to achieve gender parity in political

[120] Cf. Zapata (n 8) 253.

[121] Baldez, 'Elected Bodies: The Gender Quota Law for Legislative Candidates in Mexico' (n 9) 251.

[122] Cf. Baldez, 'Cuotas versus Primarias: La Nominación de Candidatas Mujeres en México' (n 102) 161-163. But see Macías (n 56) 13; Bruhn (n 19) 116.

[123] Reynoso and D'Angelo, 'Las Leyes de Cuotas y su Impacto en la Elección de Mujeres en México' (n 103) 288.

life, through nominations to congressional seats'[124]. Similar provisions can be found in articles 4.1, 25e) and 38.1s), although the later extended the scope of the parties' obligations to the composition of their directive bodies. Article 219 establishes a minimum quota of 40% of candidates *propietarios* for each sex (although political parties should 'attempt to reach gender parity'). Article 220 mandates proportionally-elected candidates' lists to be divided into segments of five candidates each, and within each segment there must be two candidates of a different sex, alternating. Article 221 establishes increasing sanctions for non-fulfilment, the final penalty being the non-registration of the 'correspondent candidacies'. The exception for proportionally-elected candidates nominated through primaries was kept, although the expression 'direct vote' was replaced by candidacies that 'were the result of a democratic electoral process, according to the by-laws of each party' (Article 219.2). Finally, Article 78.1a)V required each political party to spend 2% of its public funding in the 'training, promotion and development of women's political leadership'[125].

The new regulations were more stringent for political parties, not only because the quota was increased to 40%, but also because of the more demanding placement mandates. However, Article 220 was not entirely clear about how 'alternation' should be understood, giving rise to at least three possible interpretations.[126] The Federal Electoral Tribunal resolved this matter by understanding alternation as a 'zipping' system within each five-slot segment (ie a candidate of one sex should be followed by a candidate of the opposite sex), so that parties could better fulfil the constitutional mandate about equality of opportunity

[124] Free translation.

[125] Free translation.

[126] Ruiz (n 64) 14ff; Guajardo (n 15) 8.

and gender parity in political life.[127] To avoid similar confusions regarding the sanction of non-registration of the 'corresponding candidates', the Federal Electoral Institute announced its intended policy on the matter. In the case of majority-vote candidates, members of the over-represented sex would be subject to a lottery so as to eliminate as many as needed to keep the 60% limit. For proportional candidates, non-alternating segments would be re-arranged with candidates of the underrepresented sex taken from slots below in the list. If this was not possible, or the general 60/40 target was not achieved, the last names on the lists would be scrapped until the legal ratio was achieved.[128]

Despite the advances, the present law is still victim to the political parties' inventiveness in order to avoid full compliance. The most scandalous case took place in 2009 and was widely known as the *Juanitas* affair.[129] Several newly elected *propietarias* congresswomen attempted to resign in order to assign their seats to their male *suplentes* (many of them spouses or relatives). However, such resignations needed the approval of the respective Chamber, which was indefinitely withheld due to the increasing opposition among congresswomen and public opinion. Many *Juanitas* decided then to stop attending Congress, so as to lose their seats as a sanction for their absenteeism. Eventually, and sometimes through judicial intervention,[130] the *Juanitas* were effectively replaced by their

[127] SUP-JDC-461/2009; SUP-JDC-471/2009.

[128] Available at <http://www.ife.org.mx/docs/IFE-v2/DS/DS-GacetasElectorales/gaceta-112/p28.pdf> accessed 19 January 2012.

[129] See José Woldenberg, 'Política y Gobierno' *Reforma* (Ciudad de México, 10 September 2009) <http://webkreator.com.mx/IETD/fraude_a_la_ley.html> accessed 4 January 2011; Cacho (n 19) 79ff; Cazarín (n 64) 35-38.

[130] SUP-JDC-3049/2009; SUP-JDC-3048/2009.

males *suplentes.* After this affair, it was proposed that *propietarios* and *suplentes* should be of the same sex so as to avoid fraud.[131]

Less notorious, but equally illegal, has been the lack of compliance with the spending mandate (2% of the public funding) in women leadership.[132] Additionally, old problems still remain, such as placing women in weak districts; less funding, and the use (and abuse) of scanty democratic primary elections.[133]

Judicial Decisions

There are four decisions of the Mexican Supreme Court about the constitutionality of EQW. All of them reached the Court as '*acciones de inconstitucionalidad*' ('action for constitutional review'), a special remedy against unconstitutional norms under the exclusive jurisdiction of the Supreme Court.[134] The leading case is the 2002 decision upholding the electoral law of the State of Coahuila (the 'Coahuila Law'),[135] which established a 70% cap for same-sex candidates (*propietarios* and *suplentes*). Coahuila's electoral system is mixed, being partly majority-vote and partly proportional. The 70% cap was fully applicable to the majority-vote candidates. In case of non-compliance, the only sanction was that the first proportionally-allocated seat was to be given to the under-

[131] Cacho (n 19) 84. Cf. Guajardo (n 15) 13.

[132] See Natividad Cárdenas, *El Financiamiento Público de los Partidos Políticos Nacionales*, vol 1 (Tribunal Electoral del Poder Judicial de la Federación 2011).

[133] Cf. Aparicio (n 101) 11, 27, 41 and 46; Cazarín (n 64) 33-34; Cárdenas (n 132) 14. Concerning primary elections, the Federal Electoral Institute attempts to flesh out the law in this point were disappointing. See <www.ife.org.mx/docs/IFE-v2/DS/DS-GacetasElectorales/gaceta-112/p28.pdf> accessed 19 January 2012.

[134] See Burgoa (n 7) 888.

[135] AC 2/2002.

represented sex. With regard to the proportional candidates, Coahuila's electoral law allowed political parties to choose between presenting a closed and blocked list of candidates, a formula to allocate those seats, or a mixture of both. The 70% cap applied only when parties opted to present a closed and blocked list, although candidates selected 'through democratic procedures' (ie primary elections), were exempted. Moreover, the lists of candidates ought to be divided in three-slot segments, each of them also subject to the 70% gender cap. The sanction for non-compliance was non-registration.

This law was challenged before the Supreme Court by the political party that at the time was in control of the federal government (*Partido Acción Nacional*). The central argument was that the electoral quota was a violation of constitutional equality (basically Article 4: 'Men and women are equals before the law'), understood as equal rights and obligations. The quota would affect the right to participate in electoral processes in equal legal conditions for men and women. In fact, EQW would be a form of sex discrimination, rendering unequal what was otherwise equal.

The Congress of Coahuila briefly argued that EQW would only fortify the principle of equality by allowing treating differently those who were different. It also highlighted the importance of the exception applicable to candidates selected through primary elections, without elaborating how this would affect the constitutionality of the Coahuila Law.

The *Governador* (chief of the executive) of Coahuila defended this law using Ferrajoli's categories. He rejected the plaintiff's idea of equality as 'legal indifference towards differences', urging the need to treat unequals differently to guarantee equality. The constitutional notion of equality would not mean the end of difference, but its preservation by distinguishing it from unjustified discrimination and inadmissible inequality.

The Federal Electoral Tribunal affirmed that constitutional equality would only be breached if the maximum percentage of the quota was less than 50%, and for one gender only. The Coahuila Law was therefore constitutional, particularly because the maximum was for both genders and was not compulsory to reach. Moreover, gender quotas would allow sex equality in political representation to be 'real and effective'.

The Attorney General (*Procurador General de la República*) affirmed that the Coahuila Law was constitutional because it did not distinguish between women and men, ie the quota applied to both and therefore the two genders were in equal circumstances.

The Supreme Court upheld the Coahuila Law by a majority of eight to two. Its decision began by clarifying that although the plaintiff's arguments focused on whether the law amounted to sex discrimination incompatible with Article 4 of the Constitution (sex equality), the constitutional analysis should start with Article 1 of the Constitution, which contained the principle of equality in its general form. The Court affirmed that the constitutional notion of equality enshrined in that article was not totally abstract insofar as it considered the specific situation of individuals which 'framed' their capacity to acquire 'the same rights and obligations'. Moreover, legal equality would mean equal treatment of those who were in the same factual situation, and therefore unequal treatment should be accorded to different factual situations. Unequal treatment was forbidden only when reasonably and objectively unjustified, according to 'the value judgments generally accepted'[136]. To assess the justification of the unequal treatment, the legal consequences of

[136] This expression is not explained in the judgment. It seems more as a part of the rationality test than as an additional requirement leading to a more demanding standard of scrutiny. The Court uses this expression in subsequent cases but does give no further clues about its meaning (eg *Amparo en Revisión* 1834/2004; 1207/2006; 1260/2006; 1351/2006; 1700/2006; AC 61/2009). Interestingly, this expression can also be found in the case-law of the Spanish Constitutional Court (STC 34/1981; STC 3/1983; STC 128/1987), where it seems to be part of the rationality test (Fernando Rey, 'El Derecho Fundamental a No ser Discriminado por Razón de Sexo' <www3.uva.es/tsocial/documentos/Derecho_funda.pdf> accessed 18 February 2010, 6 and

the law should be analysed, which must be conductive to achieving a legitimate goal, and proportionate. The Court turned then to analyse Article 4 (sex equality) and the history of its addition to the Constitution in 1974. After stressing that the notion of sex equality had evolved over time, the Court declared that the purpose of this constitutional amendment was to encourage the full participation of women in four contexts: education, work, family and politics, which should be achieved by the subsequent reformation of federal and local legislation according to the new constitutional provisions. In this context, the Court declared the Coahuila Law compatible with the principle of legal equality enshrined in Article 4.

Intriguingly, the Court also affirmed that the quota established for majority-vote candidates was not compulsory because non-compliance did not result in non-registration, and therefore it did not 'impede women and men from participating in an electoral race in equal circumstances'. Concerning proportional candidates, although in this case the sanction for non-compliance was non-registration, this only applied to one of the options that parties had as regards proportional candidates (ie closed and blocked lists), in which case there was also the exception in favour of democratically elected candidates. Without further elaboration, the Court declared that such considerations would 'allow both genders to participate in equal circumstances in an electoral race'.

The dissenting opinion filled by two members of the Court considered the EQW to be compulsory because non-compliance had relevant consequences for the party in relation to the election of proportional candidates, eventually altering the order of a list of

10-11; José García, 'Representación Política de las Mujeres y Cuotas' [2002] Derechos y Libertades 345, 357-358; Julia Sevilla, 'Paridad y Constitución' in Teresa Freixes and Julia Sevilla (eds), *Género, Constitución y Estatutos de Autonomía* (Instituto Nacional de Administración Pública 2005) 219-220.

candidates that may have been defined through a democratic procedure. This would 'considerably influence' the parties' decisions regarding candidates profiles. Moreover, Article 4 of the Constitution would mean that the law ought to be applied equally to all with no consideration of gender. Additionally, according to Articles 34 and 35 of the Constitution, to be a candidate to elective offices is a citizen's right, and therefore the law could not distinguish between citizens on the grounds of gender for these purposes. Finally, although gender balance in the elections was an ideal, it was a matter for political parties to decide autonomously.

Apart from its deficient phrasing and vague remarks, the Supreme Court decision is very awkward. Although the core of the discussion was about notions of constitutional equality, and in this respect the Court confirmed its recent interpretations (eg equality not as a totally abstract concept; permissibility of justifiable unequal treatment), it resolved the case basically by looking at the seriousness of the consequences of the Coahuila Law for political parties. In other words, the Court upheld the Coahuila Law because the quota was not regarded as stringent enough to force political parties to choose candidates on the basis of their sex, either because the penalty for non-compliance fell short of non-registration (majority-vote candidates) or because some 'safety valves' were in place (proportional candidates). In addition to the fact that the Court did not provide any sort of evidence to support its view about the impact of quotas on the behaviour of political parties, two main concerns can be raised. First, there seems to be contradictory logics behind the first and the second part of the decision. In the first part, the Court explains a vision of equality capable of encompassing different treatment of men and women when factual differences justify it. However, the Court stopped short of deciding the case on that logic (by saying, for example, that there were factual inequalities in the situation of women and men willing to

be candidates, and that EQW were an objectively rational and justifiable inequality in such context). On the contrary, the Court switched into a different logic, stressing that the Coahuila EQW was not compulsory, ie it did not force political parties to treat women and men differently, which was precisely the type of action that the notion of constitutional equality developed in the first part of the judgment would have allowed. Second, the Court adopted a very limited notion of compulsory quotas, setting the threshold so high that almost any kind of quota could be considered as non-compulsory. This provided an easy way out to avoid a clear decision on the core issue, ie whether EQW (the 'compulsory' kind) were or not compatible with the constitutional notion of equality.

Two further points deserve to be noted because of the contrast with the experience of other countries. The 'neutrality' argument advanced by the Federal Electoral Tribunal and the General Attorney was not considered by the Supreme Court (thus differing from the Spanish *Tribunal*). Nor did it refer to the minority vote's notion of citizenship as 'un-gendered' (a central aspect of the French *Conseil*'s original decisions).

Finally, it has to be noted that several of the actors involved in this case highlighted that political equality between the sexes was as a particularly pressing constitutional concern. Although this might have been a relevant factor behind the Court's decision, it was not articulated as such, and therefore its real importance remained uncertain.

Notwithstanding its confusing rationale, the Supreme Court decision to uphold the Coahuila Law seems to have been widely – and uncritically - regarded as a clear endorsement of EQW. Thus, it would have influenced the passing of the 2002 federal legislation that created a national compulsory maximum gender quota of 70%.[137]

[137] Baldez, 'Elected Bodies: The Gender Quota Law for Legislative Candidates in Mexico' (n 9) 246.

In 2009, the Supreme Court had the chance to revisit the constitutionality of EQW. That year the EQW enacted by the states of Tamaulipas, Veracruz and Chihuahua were challenged as unconstitutional. Although all three EQW were upheld, there were significant differences between the first of these judgments, and the other two.

In the Tamaulipas' case,[138] the national leader of the principal left-wing party (*Partido de la Revolución Democrática)* challenged the modifications of the electoral law enacted by the State of Tamaulipas, which included an electoral quota for women. This quota was impeached, rather weakly, for not being 'paritarian enough', ie its requirement of only one slot out of three (or even one out of six due to the dubious application of the quota to *suplentes*) for a different sex in proportional lists would fail short of the 40% quota demanded by the state's constitution and electoral law. The Court declared the Tamaulipas EQW as constitutional, although the Court's rationale was confusing. Instead of saying straightforwardly that the 40% quota – applicable to the total number of candidates - was compatible with the one-in-three placement mandate applicable only to proportional candidates, it based its decision on the more general assertions that EQW were compatible with constitutional equality, and that the state legislators enjoyed considerable freedom when designing EQW. The latter position was adopted because, and this is maybe the most crucial statement of the judgment, *there was no constitutional obligation to establish EQW*, and therefore the states' legislators were free to adopt them or not.

As regards constitutional equality, the Court stated in a general way that equal treatment required treating unequals unequally if that was justified. It also provided a few vague hints that could be related to *de facto* equality ('the genuine sense of equality is to

[138] AC 21/2009.

put individuals in a situation where they could gain access to constitutionally acknowledged rights, which demand the elimination of manifestly unequal situations'). Furthermore, the Court accepted as legitimate the legal authorisation given to political parties to go beyond the legal quota, because the latter should be understood as a minimum and not as a ceiling.[139] Curiously, the Court also declared, in a rather off-handed manner, that EQW would be unconstitutional if established in favour of one sex only 'disregarding the capacity and personal characteristics of the candidates'. The Supreme Court here confused two different things: the neutrality argument and the concern that quotas work in an automatic way that disregards the specific characteristics of the individuals involved. The inclusion of the second factor is particularly baffling because that kind of argument was not advanced in the case, or in any other related case, or by any Mexican commentator. Moreover, the Court did not elaborate on it, thus leaving the matter unsettled. Finally, it may be interesting to note that this decision did not refer to the 2002 judgment at all. Speculating, the reason for this may be that the Tamaulipas case was about EQW being too lenient to be constitutional, thus assuming the inherent constitutionality of EQW, which in turn was the issue discussed in the 2002 decision.

The Veracruz and Chihuahua cases are similar,[140] not only as between each other but also in relation to the Coahuila Law case of 2002. In the first case, the EQW included in the novel electoral regulations for the State of Veracruz was challenged by the national leadership of the same party that impugned the Coahuila Law in 2002 (*Partido Acción Nacional*). In the Chihuahua case, the introduction of a EQW was challenged by a group of

[139] See also SUP-JDC-2027/2007, where the Federal Electoral Tribunal accepted that political parties could go beyond Federal Electoral Code, establishing in their by-laws more exacting EQW.

[140] AC 7/2009 - 8/2009 - 9/2009 (joint); AC 63/2009.

members of the state's legislative assembly. The Supreme Court upheld both quotas, although it gave relatively minor attention to the discussion about their constitutionality in its extensive judgments, particularly in the Veracruz case.[141] The Supreme Court did not refer to the issues discussed in its 2002 decision (or at least very little, as in the Chihuahua case), but simply declared that it had already validated 'compulsory quotas or percentage (affirmative action) to achieve gender equality in the nomination of candidates by political parties'. This statement is remarkable because, as already explained, the Coahuila Law was upheld because *it was not compulsory*, and the Tamaulipas case did not address the issue in a direct and conclusive way. In any case, the wording used by the Veracruz and Chihuahua decisions rendered the matter of EQW's constitutionality finally clear.

Additionally, the Supreme Court declared again (as in the Tamaulipas case) that although the Constitution allowed EQW, their adoption was not compulsory for the legislators (even though the wording of some passages is restricted to state legislatures, the wording of other passages, as well as the rationale used by the Court, strongly suggest that the freedom to establish EQW also applies to the federal legislature). In other words, EQW were 'optional measures' for achieving the constitutional goal of sex equality. Such deference towards the legislators' freedom explains the Supreme Court's permissible approach when analysing the constitutionality of the states' EQW. Thus, it accepted variable percentages (such as 50% or 70%), and the differing degrees of strictness in the sanctions for non-fulfilment. Moreover, at least in the Veracruz's case, the Supreme Court refused to adopt the federal EQW as a standard for assessing state EQW.

[141] This was probably because both unconstitutionality actions had several chapters, being EQW only one of the issues presented to the Supreme Court.

Both decisions also stressed the importance of the political parties' autonomy in designing their list of candidates, eventually suggesting the existence of constitutional limits for EQW on that account, particularly in relation to candidates nominated through primaries.

Finally, a minor distinction between both cases is that, in the Chihuahua case, the Court draws upon the neutrality argument. Even though this was done in a somewhat casual way, it cannot be ignored that the Court did something similar in the Tamaulipas case, thus indicating that the neutrality argument should not be underestimated.

Quite surprisingly, the 2009 judgments referred above do not, in the main, quote or even mention each other or the Coahuila decision. The only exception is the Chihuahua case, which refers to both the Coahuila case (reproducing word by word its reflections on equality) and the Veracruz case. Even for a Civil Law system, this is odd given the specificity of the matter and the fact that all are judgments given by the same court. Moreover, all three 2009 decisions were published barely more than three months apart.

A final stage in the discussion about EQW referred not to its constitutionality, but to the modalities of their application. In October 2011, the Electoral Federal Institute disclosed its *Acuerdo* (Agreement) CG327/2011, establishing that, to comply with the EQW, parties should 'attempt' to ensure that *propietarios* and *suplentes* were of the same sex. It also construed the expression 'democratic electoral process' contained in Article 219.2 of the Federal Electoral Code (this is the primary elections' exception to EQW) as those processes where 'the candidates are elected directly by the members to the party or by the citizens at large, or indirectly through a convention or assembly with an important

number of delegates elected *ex professo* by the members to the party.'[142] A group of women affiliated to diverse political parties challenged this *Acuerdo* before the Federal Electoral Tribunal. The Tribunal decided that,[143] to ensure the fulfilment of the 40% quota, *propietarios* and *suplentes* ought to be of the same sex, and therefore the 'recommendation' of the Institute should be replaced for a command. Moreover, the Institute had acted *ultra vires* because only the legislator could define 'democratic electoral process', and also because in its interpretation the Institute included indirect election, thus ignoring the express requirement of direct election imposed by Article 219.2, and unduly expanding the exception to EQW (which should be interpreted strictly). However, the most surprising aspect of this decision was that the Tribunal reinterpreted the EQW so as to make the primary elections' exception virtually irrelevant. Thus, parties were obliged, even when holding primary elections, to present a minimum of 120 candidates of each sex for the 300 majority-vote seats of the Chambers of Deputies (that is, 40%).[144] This decision provoked further litigation, where the main participants were the Federal Electoral Tribunal, the Federal Electoral Institute, political parties and frustrated candidates (particularly those who had been selected by primary elections, but were later turned down by political parties in order to comply with the quota).[145] Finally, the Federal Electoral Tribunal imposed its

[142] Free translation.

[143] SUP-JDC-12624/2011.

[144] This also applied to 26 seats of the Senate.

[145] See SUP-JDC-14855/2011; SUP-RAP-81/2012; SUP-JDC-475/2012; SUP-JDC-510/2012. See also the *Acuerdos* of the Federal Electoral Institute CG413/2011; CG94/2012; CG171/2012. An explanation of this litigation in IFE, 'Informe sobre la Evolución Normativa y las medidas afirmativas para la aplicación efectiva de las Cuotas de Género en el Proceso Electoral Federal 2011-2012' <http://genero.ife.org.mx/docs/ife-event_InfCuotas_ago2012.pdf> accessed 14 December 2012.

stricter interpretation of the EQW, which was complied with by all political parties (albeit some were ordered to adjust their lists) in the 2012 general election.

7.5 Conclusions

Although the introduction of EQW in Mexico was clearly less controversial than in France, there was ample litigation before the Supreme Court, whose case-law progressed from providing elusive answers about the constitutionality of EQW, to its eventual straightforward approval. The crucial factor was the evolution of the Mexican legal order from formal equality towards a more substantive understanding of equality and the express permissibility of affirmative action. Conversely, the constitutional theory of political representation, which was highly confusing and incoherent, was regarded as not relevant for the assessment of the constitutionality of EQW. Regarding political rights, although their strong protection could have been a serious difficulty for electoral quotas, this conflict was mostly avoided by the courts. The only effective obstacle to electoral quotas was the use of primary elections, an obstacle that was effectively removed by the Federal Electoral Tribunal before the last general election of 2012.

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CHAPTER 8

COMPARING AND CONTRASTING THE THEORY AND THE PRACTICE OF ASSESSING THE CONSTITUTIONALITY OF EQW

8.1 Introduction

Part I of this thesis suggests that assessing the constitutionality of EQW is a complex task that requires the consideration of several theoretical issues. Part II analyses case studies where the constitutionality of EQW has been assessed by constitutional courts. This chapter attempts to compare and contrast the theory and the practice of assessing the constitutionality of EQW. The central thesis is that, although the case studies follow the theoretical framework described in Part I, there are two main divergences between theory and the legal practice of the courts discussed: i) the latter is clearly more simplistic in its treatment of the theoretical issues than the former, and ii) contextual factors have a greater impact on the courts' decisions than is taken into account in the theory. These differences will be discussed in two separate sections, drawing from a comparative analysis of the constitutional courts' decisions explained in Chapters 5, 6 and 7. In one important respect, however, the theory and the practice of assessing the constitutionality of EQW are similar. They both tend to assume that EQW *'work'*, in the sense of producing significant increased

levels of political participation by women, and that their success depends on certain characteristics of the electoral system. The final section of this chapter empirically tests these common assumptions.

8.2 Does the Practice follow the Theory?

There is substantial common ground between the theory and the practice of assessing the constitutionality of EQW. The most important correlation between the two is that constitutional courts resolve this issue mostly based on the theoretical factors identified in Part I. This is crucial not only because it demonstrates that several jurisdictions share a common approach to the same problem, but also because it renders the practice of assessing the constitutionality of EQW sufficiently homogeneous so as to be compared, as a whole, with the theory of how this should be done.

The case studies show that the courts deal with the theoretical factors involved in the constitutionality of EQW in a 'systemic' way. This systemic approach focuses on the impact of EQW over the political and legal systems, and not on their compatibility with individual rights. This is confirmed by the avoidance of a 'conflict of rights' perspective, and also the avoidance of the proportionality test (or a test similar to that) to assess the impact of EQW on the individual rights of the people affected by them (whether rejected male candidates, members of political parties, or voters). This is very clear in the *Conseil*'s decision of 1982, where the apparent concern for political rights is rapidly transformed into the defence of 'principles of constitutional value' such as the indivisibility of the French people. Another illustration is the Spanish *Tribunal*'s strained logic to avoid conducting a proportionality test. We will return to this issue bellow.

Notwithstanding this general coincidence between theory and practice, all case studies show several departures from the theory about how the constitutionality of EQW should be assessed. The common theoretical framework to resolve EQW is not evenly adopted or applied by the courts. The most important of these divergences can be identified under two main categories: excessive simplification and the introduction of contextual factors, which will be explained in the next sections.

8.3 The Courts' simplistic approach towards EQW

The case studies show that the assessment of the constitutionality of EQW by courts has been simplistic in three main senses. First, the courts' have been simplistic in determining the factors that render EQW constitutional or unconstitutional. On the surface, the courts consider most of the theoretical aspects discussed in Part I (political representation, equality, affirmative action and political rights). But, instead of trying to weigh and weave together the different theoretical factors involved, in all three case studies one of those factors was determinant, relegating the others to an ancillary position. Courts also diverge on how many of the four theoretical factors are considered, how explicitly they do so, and also in the relative importance given to each of them. Whereas in France the *Conseil*'s express language on political rights is complemented by more or less implicit references to political representation and equality, in Spain the *Tribunal*'s explicit reliance on equality and – to a lesser extend – political representation, is supplemented to rather weak references to political rights, and in Mexico the clear dominance of the equality discourse in the Supreme Court's decisions is accompanied by some consideration of political participation. Thus, whereas in France the crucial factor was political

representation, in Spain and México equality took the central stage. Political rights, although mentioned by all courts in some way, were only accessory or instrumental to their decisions. Arguments about affirmative action, although usually relevant in the public and legal debate about EQW, were rarely invoked explicitly by the courts. Curiously, although certain issues linked with affirmative action can be found in Spain (eg the declaration that EQW were not *discriminación inversa* (reverse discrimination)) and Mexico (eg the rejection of quotas that disregard 'the capacity and personal characteristics of the candidates'), there are otherwise mostly absent in the courts' decisions.

The use by the courts of only one theoretical factor as the primary determinant in assessing the constitutionality of EQW forces the courts to articulate rather implausible arguments to take other theoretical factors out of the equation. For example, in Spain political rights were excluded by the *Tribunal* simply by declaring that political parties (which were regarded as the addressee of EQW) do not have rights, without offering any further justification of qualification for this bold statement, and without even referring to the rights of the individual members of political parties that might be affected by EQW. Similarly, in France the *Conseil* refused to consider the reduction of public funding applicable to political parties that did not comply with *parité* to be a sanction, but only a 'modification' of the way public aid was being given to parties, thus avoiding an assessment of *parité* as a possible infringement of the parties' autonomy. In Mexico, EQW were not considered as compulsory enough to affect the equal exercise of political rights. In Spain, the 'neutrality' of the quotas was used to discard equality problems.

A secondary, although significant, consequence of this concentration on one major theoretical factor is that it may restrict the extension of quotas for women beyond the electoral context. In other words, the permissibility of such extension seems to be related to

the theoretical factor that serves as principal basis for assessing the constitutionality of EQW. Thus, in France, the extension of EQW beyond the electoral context was resisted by the *Conseil* arguing that the political representation rationale (and the constitutional amendment about *parité*) was not applicable to other areas such as company boards. Conversely, in Spain, and less neatly, in Mexico, the dominant theoretical factor was equality, which could be more easily extendable beyond the electoral sphere.

The approach of the courts has also been simplistic in a second sense: they rarely engage in the crucial discussions that the theoretical factors explained in Part I would require. This phenomenon applies to all theoretical factors, although not with the same intensity. One of the clearest cases is political representation: even when this factor is regarded as the determining factor in assessing the constitutionality of EQW, as in France, the case studies show that courts do not elaborate on the content of the constitutional theory of political representation (eg who and what is represented, whether it is compatible with descriptive or substantive representation), and avoid virtually all of the issues discussed in Chapter 1, such as the problems posed by essentialism and group representation. Moreover, in all the case studies a certain degree of confusion appears from applying ideas of private law representation to political representation.

The case of equality is somewhat different. On the one hand, the courts' treatment of equality is also rather superficial, avoiding many of the key problems discussed in Chapter 2, such as the ambiguous content of equality of opportunity, the difficulties of over-inclusivity and under-inclusivity, the challenge posed by multidimensional discrimination, and the adequacy of EQW in fighting sex discrimination. On the other hand, there are certain substantive trends in the courts' approach to equality that deserve attention. Thus, the case studies not only confirm that formal equality, which may be a barrier to EQW,

remains an important concern for the courts (not only in France, but also in Mexico and even in Spain, as the neutrality argument shows), but also that EQW are more compatible with substantive or *de facto* understandings of equality. A further substantive trend is the correlation between the acceptance of EQW by the courts and the development by the legal system of a more robust stance about sex equality: whereas Spain and Mexico had passed ambitious statutes to promote sex equality before the constitutional litigation about EQW took place, France had not. Additionally, the courts show a general tendency towards an understanding of equality that values difference, as explained by Ferrajoli. In the case of Spain and Mexico, this innovative understanding of equality is expressly linked with political participation, which may then serve as a meta-principle (see Chapter 2) for equality, one which is certainly more favourable to EQW. Finally, the understanding of equality by the courts in EQW cases, at least in Spain and Mexico, is to see it more as a general principle or as a systemic value than as an individual right, and therefore the standard applied to justify deviations from it is lowered (constitutional principles or values seem to triumph more easily over the entitlements of the 'victims' than the individual rights of those benefited by EQW).

Despite the fact that the courts rarely referred expressly to the affirmative action theoretical framework when dealing with EQW, at first sight they did show an interest in some of the typical concerns raised in affirmative action cases elsewhere, such as the flexibility of the policy, its formulation as neutral or as benefiting only one category of people, whether less harsh alternatives were available, and the seriousness of the burden imposed by these policies over eventual 'victims'. A closer look at the courts' decisions, however, show that fundamental issues about affirmative action are often not discussed at all in EQW cases, or that they are only summarily mentioned. For example, although the

courts acknowledge the correction of the underrepresentation of women in politics as an aim of EQW, together with the overcoming of present sex discrimination, there is little elaboration on these. Moreover, there is no reference to issues such as the impact of EQW on the principle of merit, the existence of group rights, the 'creamy-layer' problem, or the tension with individual rights. More surprisingly, there is almost no discussion about the typical problems of quotas, such as whether they are too 'automatically' applied, proving to be incapable of providing individualised consideration. Similarly, there is no detailed analysis of the impact of quotas on the 'victims' and how this should be balanced against the benefits of a quota. A possible explanation for this lack of sophistication in the courts' decisions is that, in countries such as France and Mexico, the adoption of EQW preceded the discussion and implementation of strong forms of affirmative action. In those cases, instead of having an already defined doctrinal framework about affirmative action to apply to EQW, the courts had to create it. Thus, the introduction of EQW served as a testing case and fundamental precedent for subsequent affirmative action rather than the other way round.

Finally, although political rights appear in virtually all the judicial decisions about EQW, the courts avoid clarifying crucial issues such as whether these rights should be considered not only as individual rights but also as group rights, and whether (and how far) the right to stand for office protects candidates. Only in Spain is there an established view that political rights are tools protecting the right to participate in political affairs. Although the implications of this were not fully developed by the *Tribunal*, at least it provided a clear aim for political rights that, consequently, gave them a more substantive content (not only as enfranchising the voter, or as an entitlement to access elective offices, but as encompassing effective and real participation), which could be used to support EQW.

The courts considered in the case studies have been simplistic in a third sense: they have mostly ignored gender as a cross-cutting factor that interacts with the theoretical factors discussed in Part I, particularly with political representation and equality. The courts never distinguished between the constitutionality of electoral quotas in general, and the constitutionality of electoral quotas *for women*. Moreover, there was no express assessment of the claim that women require political representation as a group, and no comparison was conducted between their claim and those of other groups (beyond the Spanish *Tribunal*'s reference to sex as 'different' because humanity is divided into two and no majority-minority situation emerges). There was no discussion about the particularities of women's representation (eg the difficulties caused by their heterogeneity, or whether it is possible to identify 'women's interests') or the impact these should have on the constitutionality of EQW. Likewise, there was no discussion about the particularities of discrimination against women and how they related to EQW, or how sex equality interacted with the notions of constitutional equality, with the honourable exception of the Mexican Supreme Court, which at least attempted to locate sex equality in the general constitutional understanding of equality.

The over-simplistic way in which courts dealt with EQW cases may be due to several reasons. The use of one theoretical factor as the principal determinant for assessing the constitutionality of EQW, instead of employing a holistic approach that takes into account all the theoretical factors discussed in Part I, may be explained by the courts' avoidance of methodological complexity. Courts willing to consider all the theoretical factors involved in the discussion about the constitutionality of EQW, are confronted with a diversity of approaches that imposes a burden of combining different methodologies, including different types of scrutiny. Political representation invites courts to adopt a

'systemic' approach, where the main concern would probably be the proper functioning of political system and its doctrinal coherency. Equality and affirmative action could be approached from a systemic perspective (particularly when the former is considered as a legal value or principle and the latter does not directly affect specific individuals), or from the perspective of individual rights. Likewise, as discussed in Chapter 4, political rights can be seen as both systemic demands of democracy and also as individual rights.

The methodological-complexity explanation, however, is only partially convincing. As the practice shows, courts have adopted a systemic approach in EQW cases, avoiding the acknowledgement of conflicts of rights and the subsequent application of the proportionality test (or a test similar to that). Once the systemic approach has been chosen, the methodological complexity involved in weighting and weaving several theoretical factors (all from the systemic perspective), is reduced. Thus, it appears that a more likely reason for the courts' simplistic approach is their reluctance to decide between competing constitutional principles, or to negotiate their simultaneous application to EQW. In practice, it is not an uncommon that courts resort to one principle among many to resolve cases, despite their formal consideration of other principles.

An alternative explanation for the courts' apparently simplistic approach is the importance of the political and legal context in which the courts examined find themselves. For example, the cardinal importance of the principle of abstract universalism for French constitutionalism and its theory of political representation rendered any other countervailing considerations irrelevant. The next section will be devoted to discuss the importance of domestic contexts in more detail.

Regarding the reticence of the courts to engage with the 'hot issues' associated with each of the theoretical factors discussed in Part I, this seems to relate to how the courts

regard their own functions and limits.[1] Thus, courts may think that the time is not right, or the particularities of the case mean that the case is not right, in which make a decision on those 'hot issues'. Or they may feel unprepared to deal with those issues, some of which could be regarded as not strictly legal but as 'political' or 'sociological'. This is particularly apparent in France, where the *Conseil´*s decisions show a narrow, formalistic and syllogistic understanding of the law. Moreover, courts seem to believe that these issues are for the legislator to decide. In fact, courts have accorded considerable leeway to the legislator regarding EQW (good examples of this are the *Conseil*'s decision of 2000 and the Mexican cases of 2009). These quotas are viewed not as compulsory but as discretionary: the legislator may adopt them; they are an alternative at its disposal (with the possible exception of France). The legislator also has been accorded ample latitude in deciding about the specificities of their implementation, including the type of quota (such as a general percentage or strict alternation), sanctions for non-fulfilment (such as non-registration of the list or funding penalties), and exceptions (such as primary elections or local elections in small communities). Moreover, court decisions have not resolved whether EQW should be permanent or temporary, leaving the matter entirely to the legislator. Another example of the courts' deference towards the legislator is the *Conseil*'s refusal to invoke the duty of fostering *parité* to interfere with the freedom of the legislator to regulate the electoral system. In sum, besides the basic decision about whether EQW are or no compatible with the constitution, courts defer in almost everything else to the legislator, which includes the 'hot issues' associated with the theoretical factors explained in Part I.

[1] See Alexander M Bickel, *The Least Dangerous Branch* (2 edn, Yale University Press 1962) Ch 4.

Finally, the lack of express reference to gender as a cross-cutting factor that impacts on the theoretical factors described in Part I may be partly explained by the fact that the only kind of electoral quotas that has been subject to constitutional litigation in the case studies are for women. Therefore, the courts have been under no pressure to distinguish the parts of the theoretical framework used to decide the EQW cases that apply only to quotas for women, from those parts that are generally applicable to all electoral quotas. Additionally, most of the theoretical framework about EQW was developed by feminists, at least originally, thinking exclusively about quotas for women. In other words, the very notion of electoral quotas, at least in the countries considered in the case studies, was essentially linked with women and with no other group. Consequently, it was difficult to disentangle what part of the theoretical framework was only applicable to women, or how the 'gender factor' affected this framework. This state of confusion, however, is unsatisfactory, and may change under pressure by other groups to obtaining electoral quotas, as in the case of the Mexican indigenous community.

8.4 The Impact of Contextual Factors

The case studies show that domestic contextual factors drive courts to deviate from an assessment of the constitutionality of EQW based only in the four theoretical factors discussed in Part I. A clear example is the electoral system. At first sight, the adoption of EQW by France, Spain and Mexico, each one having multiple and diverse electoral systems, demonstrate that EQW are compatible with, if not all, many electoral systems. In fact, the courts in these countries have not *formally* related EQW to specific electoral systems (this was expressly rejected in the French case). However, electoral systems still

influence the debate about EQW in many ways, beyond the obvious fact that they provide the concrete framework for the application of electoral quotas. First, the particularities of the electoral system impact on the success of EQW (see section 5 below).[2] Second, the actual design of EQW varies according to the electoral system. Both points are important when assessing the constitutionality of EQW. The first because a failure to deliver by these quotas would impact on their ability to survive the possible application of the proportionality test (or a test similar to that), insofar as EQW may be considered as a non-adequate means to achieve the goal of sex equality in political representation. The second point – the actual design of the EQW – is also crucial because the courts have been sensitive to the specifics of the quota when assessing their constitutionality. Examples of this were the importance given by the courts to the sanctions in case of non-compliance with the EQW (France and México), and the neutrality of the quota (Spain). There is also a third, more pragmatic link between electoral systems and EQW: in certain countries the discussion about the latter cannot be disentangled from broader electoral debates. The best example is France, where the parliamentary discussion about EQW was frequently influenced by the debate about whether the electoral system should became more proportional or more strongly based on majority-voting. In Mexico, EQW were a relatively minor issue within a much deeper process of reform of the institutional dimension of the electoral system. Thus, whereas in France the constitutional litigation about EQW was partly inspired and caused by the debate about the electoral system, in Mexico the discussion about the constitutionality of EQW was overshadowed and even inhibited by the emphasis given to the electoral 'big institutional picture'.

[2] See Stina Larserud and Rita Taphorn, *Designing for Equality* (2 edn, International IDEA 2007).

Another relevant contextual factor relates to the 'Pandora's Box' issue. Although in all the jurisdictions studied there was a common fear that EQW may induce other groups to claim electoral quotas, in each country this fear has different 'faces' and intensity. In France that fear was very intense and deeply affected the cause of EQW. It was labelled 'American communitarianism', which was seen as giving rise to special claims by North-African migrants and other minorities, threatening the cherished French Revolutionary principles of abstract citizenship and equality before the law. In Mexico, the fear also had an ethnic twist: there was a large indigenous population divided into several ethnic communities, and each of them might make claims similar to those made by women. However, the intensity of this fear was low, thus facilitating the acceptability of EQW. In Spain, the main concern was the regional nationalism thriving in some *Comunidades Autonomas* (Spanish autonomous regions), and how EQW might endanger national unity. Although the fear of national disintegration was very intense, it was not as directly related to EQW as the French fear of 'American communitarianism' was, and therefore it did not seriously affected the cause of EQW. In any case, the practical experiences should lessen the Pandora's Box concerns, because so far in none of the case studies a group other than women has obtained compulsory electoral quotas established by law.

A further influential contextual factor is the differing roles and attitudes of political parties. The parties' attitudes towards EQW were important not only for the success of these quotas (the case studies show that parties could resort to several tactics to hinder electoral quotas, such as putting women candidates in the worst districts), but also for the litigation about the constitutionality of EQW. In fact, such litigation was mostly initiated by political parties that rejected quotas (as with the *Partido Acción Nacional* in Mexico and the *Partido Popular* in Spain). Another telling fact is that France, the only case study where

EQW were declared unconstitutional, was also the only country where most, if not all, political parties were reluctant or openly against the adoption of electoral quotas. There is another interesting connection: the countries where the constitution provided a more generous recognition of political parties' importance and autonomy were also the countries where the constitutionality of the EQW was more easily accepted (Spain and Mexico). At first sight, this correlation is surprising because EQW limit the autonomy of political parties. Speculating, it might be said that there is a common aim behind these phenomena: the special status granted to political parties is justified on the basis that they are necessary for a healthy democracy. That very same aim – to preserve a healthy democracy - serves to justify the limitation of the parties' autonomy so as to enforce EQW.

Another domestic factor that seems to be relevant for the constitutional assessment of EQW is the length and strength of the local democratic tradition. Both Spain and Mexico have only recently developed into full democracies, and therefore the adoption of EQW in these countries should be placed in a broader context of democratic transition, which in turn seems to have led the courts to downplay the importance of EQW and the constitutional problems they raised, viewing them as only one (and a relatively minor) technique among many other for bringing about that transition. This may have also discouraged open opposition to EQW, so as to avoid accusations of being 'anti-democratic'. In contrast, France has a longer and stronger democratic tradition that, to some extent, worked against EQW, because some components of this tradition were not compatible with electoral quotas, and also because there was no 'democratic shame' in opposing EQW.

An additional example of the importance of domestic particularities is that, in the non-unitary states (Spain and Mexico), sub-national units were pioneers in the adoption of EQW. This compelled courts, when assessing the constitutionality of sub-national EQW, to

deal more or less explicitly with issues such as the allocation of competences between the central state and sub-national units, and whether the national statutes about EQW serve as a compulsory framework for regional EQW. Moreover, the variation between the quotas adopted by each region or state has forced the courts to resolve issues of constitutionality that the national EQW did not give rise to. A good example of this is the 2009 decision of the Spanish *Tribunal* about the non-neutral EQW passed by the Basque Country. Furthermore, in the Mexican case, all the constitutional litigation was about sub-national EQW, and thus the national EQW was designed on the basis of the first decision of the Supreme Court about the EQW implemented by the state of Coahuila.

Finally, a contextual factor that *did not* seem to have affected the discussion about EQW was the type of democratic political system that was in force in each case study. Although Mexico is a presidential republic, France a semi-presidential republic, and Spain a constitutional monarchy, in none of these countries was this difference an issue when assessing the constitutionality of EQW. Nevertheless, it may be the case that the different power attributed to the Parliament and its members in each system may, *de facto*, influence the decision about adopting EQW, but this is not evident in the constitutional litigation of the case studies or in the related literature.

8.5 Do EQW Work?

The case studies show that the practice of assessing the constitutionality of EQW follows the theoretical assumption that these quotas *'work'*, ie that they are capable of, and do in practice, generate gender balanced political representation. Thus, the impact of EQW on the number of female representatives has not been assessed independently by the courts.

The opinion of the legislator about the effectiveness of EQW as a tool for improving the representation of women appears to have been readily accepted by the courts, without requiring further proof or conducting any independent analysis of the relevant literature and data. Likewise, the assumption that there is a strong link between the success of EQW and certain characteristics of the electoral systems has not been discussed by the courts either.

This section tests these assumptions, analysing the effects that EQW have had in France, Spain and Mexico, and whether the electoral systems of these countries help to explain the success, or lack of success, of EQW.

a) France

Following the classification used by the Institute for Democracy and Electoral Assistance (IDEA), the electoral system of the National Assembly is a 'Two-Round System', in which 'a second election is held if no candidate or party achieves a given level of votes (…) in the first election round'[3]. According to IDEA, this system provides an 'impossible or non-favourable' combination with EQW: if political parties present more than one candidate, the second candidate would normally be a weak one so as to avoid a dispersion of the party's vote, and if political parties present only one candidate, no quota could be applied.[4]

Regarding the dual electoral system of the Senate, at first sight, one part of this system could be labelled as a 'List Proportional Representation System' (in which 'each party or grouping presents a list of candidates for a multi-member electoral district, the

[3] Ibid 6.

[4] Ibid 14-15 and Annex.

voters vote for a party and the parties receive seats in proportion to their overall share of the vote'[5]), and the other part as a 'Two-Rounds System'.[6] According to IDEA, the former should offer a 'medium fit' combination with EQW, whereas the latter would be an 'impossible or non-favourable' combination.[7] This is deceptive, however, because the electoral system of the Senate is entirely indirect (as explained in Chapter 5, senators are elected by *ad-hoc* assemblies and not directly by the people), and therefore IDEA's typology and conclusions, which assume direct elections, are not applicable. In fact, the relationship between EQW and indirect elections remains unexplored.

In brief, the characteristics of the French electoral system predicted an unsuccessful implementation of the quota to the National Assembly, and an uncertain impact for the Senate. In practice, the results of EQW have evolved from a disappointing starting point, to a moderate success. The percentage of women in the National Assembly increased after the introduction of the EQW (2000) from 10.92% in 1997, to 12.31% in 2002, to 18.54% in 2007, to 26.86% in 2012.[8] In the Senate, the numbers of female members jumped from to 5.91% in 1998, to 10.90% in 2001, to 16.92% in 2004, to 15.79% in 2008, to 22.19% in 2012.[9] *Parité* has been more clearly successful in elections for regional and local assemblies (not so regarding regional and local executives), and the European Parliament.[10]

[5] Ibid 5.

[6] Ibid 5-6.

[7] Ibid 13-15 and Annex.

[8] IPU, <www.ipu.org/parline-e/reports/2113_A.htm> accessed 11 January 2012.

[9] IPU, <www.ipu.org/parline-e/reports/2114_A.htm> accessed 11 January 2012.

[10] Observatoire de la Parité, <www.observatoire-parite.gouv.fr/parite-politique/reperes-statistiques-47/> accessed 14 January 2012.

Moreover, *parité* has expanded beyond the electoral context to the Public Administration, and also to private companies' boards (see Chapter 5).

However, although there is an evident increase in the numbers of women representatives at the national level, this is still far from the 50% goal pursued by *parité*. In addition to the characteristics of the French electoral system, there are several possible explanations for these modest results. One is the unreceptive attitude of political parties.[11] A common practice is the allocation of women candidates to the party's worst districts.[12] In the case of the Senate, some incumbents, afraid to give up a second or fourth place in their party's electoral list, simply left their parties (at least during the election period), and run in separate lists (normally in the first place).[13] Other explanation for the modest results of *parité* is the lack of complementary measures, such as the absence of appropriate training and educational programs for women entering into politics.[14]

Others have identified problems with the system of sanctions. Although the modest success of *parité* in the elections for the National Assembly is, in part, attributable to the financial sanction for non-fulfilment, parties in the National Assembly – at least the largest - have been willing to incur the funding sanction instead of fulfilling their *parité*

[11] Cf. Jane Freedman, 'Increasing Women's political representation: the limits of constitutional reform' [27] (1) West European Politics 104, pass.; Eléonore Lépinard and Laure Bereni, 'La Parite ou le Mythe d'une Exception Francaise'' (2004) 111 Revue Française D'Etudes Constitutionnelles et Politiques 73, 81ff. See also Observatoire de la Parité, <www.observatoire-parite.gouv.fr/espace_presse/dossiers_de_presse/OPFH_elections_032008.pdf> accessed 20 January 2010.

[12] Joelle Godard, 'Women in politics in France: is parite the best way to redress the balance?' [2006] Public Law 124, 131; Mariette Sineau, 'La parité législative en France, 2002-07 : Les stratégies partisanes de contournement de la loi' [2008] Swiss Political Science Review 741, 750.

[13] John Wallach Scott, *Parité! : sexual equality and the crisis of French universalism* (University of Chicago 2005) 136-137; Godard (n 12) 133.

[14] Darren Rosenblum, 'Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions' [2006] UC Davis Law Review 1119, 1150.

obligations.[15] It is argued that the non-registration sanction, applicable to other elections, would achieve better results.[16] Nonetheless, the problem may be not the nature of the penalty, but its amount. This idea, however, finds little support in the 2012 elections: although the financial sanction was increased in 50%, the percentage of women candidates suffered a slight decrease.[17]

Regarding qualitative results, these too have been rather disappointing. Although there is little data available, there seems to be no general and palpable change in French politics. Moreover, most elected women refuse to be considered as 'the representatives of women', and declare that sex is only exceptionally a relevant consideration in their decision-making.[18]

A plausible explanation for this lack of substantive results is that women still lack enough power to bring about real change insofar as their numbers remain low, and female representatives are relegated to traditional 'female' topics (eg family) and kept away from most important '*macho*' issues and positions (eg chairman of the houses or their committees).[19] Some feminists have also argued that female candidates were rarely selected from feminist circles.[20] In fact, most women came from the same privileged ethnic and

[15] See Observatoire de la Parité, <www.observatoire-parite.gouv.fr/parite-politique/travaux-de-l-observatoire/article/montants-des-retenues-sur-la-85> accessed 14 January 2012.

[16] See Observatoire de la Parité, <www.observatoire-parite.gouv.fr/travaux/guide_modes_scrutin.htm> 20 January 2010.

[17] Observatoire de la Parité, <www.observatoire-parite.gouv.fr/parite-politique/actualites/article/40-0-de-femmes-candidates-aux> accessed 14 January 2012.

[18] A good description of this, although as applied to the local level, in Eléonore Lépinard, 'Identity without Politics: Framing the Parity Laws and Their Implementation in French Local Politics' [2006] Social Politics 30.

[19] Sineau (n 12) 760-761.

[20] Lépinard (n 18) 50.

social background as the male politicians.[21] Moreover, at least until the last general election, most women representatives simultaneously held a local political office,[22] thus demonstrating their membership in the political establishment (and their participation in one of the most unpopular practices of their male colleagues).

Another factor to consider is the *parité* movement itself and its discourse.[23] Few supporters of *parité* affirmed (at least strongly) that elected women would represent women's interests as such. Their statement was that women were as capable as men to represent the whole Nation, and that sex should not be important after enough women had reached positions of power. Therefore, the lack of identification of female representatives with women's interest and a women's agenda should not be a surprise.

b) Spain

According to IDEA, the electoral system of Chamber of Deputies is a 'List Proportional Representation System', in which 'each party or grouping presents a list of candidates for a multi-member electoral district, the voters vote for a party and the parties receive seats in proportion to their overall share of the vote'[24]. Moreover, lists of candidates are 'closed', ie 'the winning candidates are taken from the lists in the order of their position on them'[25] and that order cannot be changed by the electorate's preferences. According to

[21] Sineau (n 12) 759-760.

[22] Ibid 753ff.

[23] See Lépinard (18) pass.

[24] Larserud and Taphorn (n 2) 5.

[25] Ibid 5.

IDEA, and despite the lack of strict-alternation, this system provides a 'best-fit' combination with EQW, ie the introduction of the latter should produce excellent results in terms of the proportion of women elected. The only deviation would be in those provinces that elect one or two *diputados*, which would offer only a 'medium-fit' combination with EQW (ie quotas can be effective in such electoral environment if 'special attention' is given, which seems to translate into the electoral system having certain particular features).[26]

The electoral system of the Senate, however, is less amenable to EQW. According to IDEA's classification, directly elected senators use a 'Limited Vote System', which is 'candidate-centred' (as opposed to 'party-centred'), and where 'electors have more than one vote, but fewer votes than there are candidates to be elected. The candidates with the highest vote totals win the seats'[27]. This electoral system is only marginally 'medium-fit' with EQW, if not 'non-favourable' at all,[28] particularly because in Spain the quota applies only to those candidates that group in lists. Additionally, senators elected indirectly by the *Comunidades Autónomas* (Spanish autonomous regions) are not subject to the compulsory quota.[29]

In brief, the characteristics of the Spanish electoral system predicted a successful implementation of the quota in the Chamber of Deputies, but its impact in the Senate was uncertain.

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[26] Ibid 13-14 and Annex. Contrast with Irene Delgado, 'Sistema Electoral y Representación de las Mujeres en el Congreso de Diputados' in Irene Delgado (ed), *Alcanzando el Equilibrio El Acceso y la Presencia de las Mujeres en los Parlamentos* (Tirant Lo Blanch 2011) 104-111 and 115, who affirms that the number of seats allocated to the districts is virtually irrelevant.

[27] Larserud and Taphorn (n 2) 6.

[28] Cf. Ibid 13-15 and Annex.

[29] Although each CCAA could impose a similar quota for their senators.

In terms of qualitative results, the available data is insufficient to draw even preliminary conclusions,[30] but the quantitative data have shown the opposite pattern to that predicted. In the Senate, women jumped from 25.48% to 30.04% (2008), and to 33.5% (2011), although it is not clear whether the increase of female members was a consequence of the EQW or other factors, particularly given the limited 'fit' between quotas and the electoral system.[31]

The percentage of women in the Chamber of Deputies increased in the first election after the introduction of the EQW, in 2008, from 36% to 36.29%, but decreased to 36% in the 2011 elections.[32] Thus, the impact of the EQW on the number of women *diputadas* seems to be null. This may be the consequence of the attitude of political parties, which developed a series of manoeuvres to avoid full compliance with EQW.[33] Examples of this were the placement of women at the end of the electoral lists,[34] and the allocation of women to the worst districts of their political parties.[35] It have been argued, however, that although EQW did not produce spectacular results, at least kept the relatively high number

[30] But see Raquel Pastor, *Género, Élites Políticas y Representación Parlamentaria en España* (Tirant Lo Blanch 2011). See also Pablo Oñate, 'Cuotas, Cantidad y Calidad de la Representación de las Mujeres en España' in Irene Delgado (ed), *Alcanzando el Equilibrio El Acceso y la Presencia de las Mujeres en los Parlamentos* (Tirant Lo Blanch 2011) 127ff (CCAA's legislative assemblies).

[31] IPU, < http://www.ipu.org/parline-e/reports/2294_A.htm> accessed 15 February 2012.

[32] IPU, <www.ipu.org/parline-e/reports/2293_A.htm> accessed 15 February 2012.

[33] Cf. Octavio Salazar, *Cartografías de la Igualdad. Ciudadanía e Identidades en las Democracias Contemporáneas* (Tirant Lo Blanch 2010) 103-104.

[34] Ibid 103- 104; María Macías, 'La democracia representativa paritaria' [2008] (23) Aequalitas 22, 42-43; Delgado (n 26) 101.

[35] Cf. María Antonia Trujillo, 'La Paridad Política' in *Mujer y Constitución en España* (Centro de Estudios Políticos y Constitucionales 2000) 377.

of women *diputadas* steady, possibly counteracting other factors pressing against women candidates.[36]

Although the impact of EQW seems to have been stronger in the Spanish autonomous regions than in the national Parliament[37] - the best example is the Basque Country, which in 2005 elected more women than men for the regional assembly – the questionable results of EQW as applied to the most important political assembly (the Chamber of Deputies) has raised doubts about its efficacy. This might affect the analysis of constitutionality of EQW if the *Tribunal* decides to apply the proportionality test (as it did in the case of the EQW passed by the Basque Country), because EQW may not be considered as an adequate means to achieve the aim of (political) sex equality. Moreover, other indicators of political equality, besides the number of women in political assemblies, remain unsatisfactory (eg women seldom have leading positions within political assemblies).[38]

c) Mexico

According to IDEA, Mexico has a 'Mixed Member Proportional System',[39] which is defined as:

> a mixed system in which the choices expressed by the voters are used to elect representatives through two different

[36] Delgado (n 26) 95 and 114.

[37] Rosario Serra, 'El Acceso de las Mujeres al Parlamento. Democracia Paritaria Voluntaria y Exigencia Legal de Equilibrio de Sexos' in Irene Delgado (ed), *Alcanzando el Equilibrio El Acceso y la Presencia de las Mujeres en los Parlamentos* (Tirant Lo Blanch 2011) 75-77; Oñate (n 30) 134.

[38] Cf. Oñate (n 30) 127ff and 135.

[39] Larserud and Taphorn (n 2) Annex.

> systems – one (most often) a plurality/majority system, usually in single-member districts, and the other a List PR System [traditional proportional system where parties present lists of candidates in multi-member districts]. The PR seats are awarded to compensate for any disproportionality in the results from the plurality/majority system.[40]

IDEA suggests that 'Mixed Member Proportional Systems' would normally offer 'a medium-fit combination' with EQW, ie quotas can be effective in such electoral environment if 'special attention' is given, which seems to translate into the electoral system having certain particular features.[41] Although the proportional portion of the electoral system should work very well with EQW, its majority-vote single-member section would be rather impervious to EQW, primarily because each party presents only one candidate in each district. It must be said, however, that the Mexican electoral system has certain features that renders it friendlier to EQW than other 'medium-fit' systems, such as large districts, closed lists and zipper alternation.[42] As regards the majority-vote single-member portion, although the existence of a national minimum of 40% matches IDEA recommendations for this kind of electoral system to be more compatible with quotas,[43] the primary election's exception pulls in the opposite direction.

In practice, the implementation of EQW in Mexico seems to have improved the statistical representation of women. In the Chamber of Deputies, they jumped from 14.2% in 1997, to 16% in 2000, to 22.6% in 2003 and 2006, to 28.2% in 2009, to 36.8% in 2012. In the Senate, the presence of women increased from 12.5% in 1997, to 15.63% in 2000, to

[40] Ibid 6.

[41] Ibid 13-14 and Annex.

[42] Cf. Ibid 11, 13-14 and Annex.

[43] Ibid Annex.

17.9% in 2006, to 32.81% in 2012.[44] The greater impact seems to have been caused by the more exacting legislation implemented in 2002 (basically the introduction of placement mandates and the application of the quota to *propietarios*),[45] and also by the recent case-law of the Federal Electoral Tribunal regarding the *de facto* derogation of the primary elections' exception to EQW. As predicted by IDEA, most women are elected by the proportional system.[46] Another significant fact is that the Chamber of Deputies has consistently elected more women than the Senate.[47]

A relevant factor that conspires against the complete success of EQW in Mexico is that, despite formal compliance,[48] political parties still find several ways to prevent quotas from having their full effects.[49] The use of primary elections was particularly negative for

[44] IPU, <www.ipu.org/parline-e/reports/2211_A.htm> and <www.ipu.org/parline-e/reports/2212_A.htm> accessed 13 December 2012.

[45] Diego Reynoso and Natalia D'Angelo, 'Leyes de Cuotas y la Elección de Mujeres en México: ¿Contribuyen a disminuir la brecha entre elegir y ser elegida?' (XVI Congreso de la Sociedad Mexicana de Estudios Electorales, Torreón, 18-19 November 2004) 26-27.

[46] Francisco Javier Aparicio, *Cuotas de Género en México: Candidaturas y Resultados Electorales para Diputados Federales 2009*, vol 18 (Tribunal Electoral del Poder Judicial de la Federación 2011) 29; Diego Reynoso and Natalia D'Angelo, 'Las Leyes de Cuotas y su Impacto en la Elección de Mujeres en México' (2006) XIII Política y Gobierno 279 301; Gisela Zaremberg, '¿Cuánto y Para Qué?: Los Derechos Políticos de las Mujeres desde la Óptica de la Representación Descriptiva y Sustantiva' in Tribunal Electoral del Poder Judicial de la Federación (ed), *Género y Derechos Políticos La Protección Jurisdiccional de los Derechos Políticos-Electorales* (Tribunal Electoral del Poder Judicial de la Federación 2009) 91; Blanca Olivia Peña, *Equidad de Género y Justicia Electoral. La Alternancia de Géneros en las Listas de Representación Proporcional*, vol 33 (Tribunal Electoral del Poder Judicial de la Federación 2011) 50-51.

[47] IPU, <www.ipu.org/parline-e/reports/2211_arc.htm> and <www.ipu.org/parline-e/reports/2212_arc.htm> accessed 13 December 2012.

[48] Lisa Baldez, 'Elected Bodies: The Gender Quota Law for Legislative Candidates in Mexico' (2004) XXXIX Legislative Studies Quarterly 231, 249; Blanca Olivia Peña, 'Impacto de la Cuota de Género en la Elección Federal de 2003' in Manuel Larrosa and Pablo Javier Becerra (eds), *Elecciones y Partidos Políticos en México, 2003* (Universidad Autónoma Metropolitana / Plaza y Valdés 2005) 58.

[49] Possible causes of the resistance of political parties in Zaremberg (n 46) 119ff. See also Jacqueline Peschard, 'Quota Implementation in Mexico' in International Institute for Democracy and Electoral Assistance (ed), *The Implementation of Quotas: Latin American Experiences* (IDEA 2003) 103.

EQW prior to 2012 (although it varied notoriously between parties and even by the same party over time).[50]

In any case, EQW could also be seen as a 'speeding up factor' within a continuous process that started long before the introduction of quotas.[51] Moreover, other electoral factors, such as the position in the list, may be more crucial than the quota for the success of women candidates.[52]

As regards substantive representation, there is little information available. Although some congresswomen have introduced bills related to gender or women issues, there have not been many of those, and sometimes they reflect competing views about sex equality and gender roles.[53] What is clear is that congresswomen constitute a heterogeneous group,[54] and that they generally align along party lines and not according to gender.[55] Substantive representation may also be damaged by the lack of women in powerful

[50] See Lisa Baldez, 'Cuotas versus Primarias: La Nominación de Candidatas Mujeres en México' in Marcela Ríos (ed), *Mujer y Política* (Flacso-Chile/IDEA International/Catalonia 2008) 169ff.

[51] Cf. Reynoso and D'Angelo, 'Las Leyes de Cuotas y su Impacto en la Elección de Mujeres en México' (n 46) pass.; Isabel Zapata, 'Las Cuotas de Género en México: Alcances y Retos' in Juan A Cruz and Rodolfo Vázquez (eds), *Debates Constitucionales sobre Derechos Humanos de las Mujeres* (Fontamara 2010) 253; Aparicio (n 46) 20. See also de data in Victoria E Rodríguez, 'The Emerging Role of Women in Mexican Political Life' in Victoria E Rodríguez (ed), *Women's Participation in Mexican Political Life* (Westview 1998) 12.

[52] Aparicio (n 46) 42.

[53] Cf. Zaremberg (n 46) 100ff.

[54] Marta Lamas, 'Con la Cultura en Contra. Algunas Consideraciones sobre los Obstáculos que las Mexicanas Enfrentan para Ejercer sus Derechos Políticos-Electorales' in Tribunal Electoral del Poder Judicial de la Federación (ed), *Género y Derechos Políticos La Protección Jurisdiccional de los Derechos Políticos-Electorales* (Tribunal Electoral del Poder Judicial de la Federación 2009) 50.

[55] Cf. Blanca Olivia Peña, 'La Cuota de Género en la Legislación Electoral Mexicana' (Género, Indígenas y Elecciones, Morelia, 2002) 466 and 480; Zaremberg (n 46) pass.

positions inside the Federal Congress.[56] In fact, both 'quota women' and 'non-quota women' may still face the same obstacles within parliamentary assemblies such as marginalization and invisibility.[57]

8.6 Conclusion

The comparative analysis of the case studies shows that the practice of assessing the constitutionality of EQW follows the theory in part, but by no means completely. Although the courts use a theoretical framework formed by political representation, equality, affirmative action and political rights, they adopt a rather simplistic approach to these issues. Thus, courts mostly use only one of these theoretical factors as the major determinant, relegating the others to secondary considerations, side-stepping the most controversial issues connected with these factors, and mostly ignoring the particularities of women as target group. Moreover, the courts' decisions are significantly influenced by the domestic political and legal context. These deviations, however, can also be regarded as contributions of the practice to the theory: it may be argued that courts do not need to fully resolve intractable issues of political theory, equality, affirmative action and political rights to address the constitutionality of EQW, and that any theory about the assessment of the constitutionality of EQW must acknowledge the importance of these contextual factors, even as a wild cards. Finally, the results of EQW in France, Spain and México show that the assumptions about the effectiveness of EQW in achieving gender balanced political

[56] Cf. Peña, 'Impacto de la Cuota de Género en la Elección Federal de 2003' (n 46) 61; Pär Zetterberg, 'The Downside of Gender Quotas? Institutional Constraints on Women ini Mexican State Legislatures' (2008) 61 Parliamentary Affairs 442, 442ff.

[57] Cf. Zetterberg (n 56) 442ff.

representation, and the correlation between the success of EQW and the certain characteristics of the electoral system, are questionable. These results do indicate, however, that specific characteristics of the quotas, such as the inclusion of placement mandates for women and the imposition of strong sanctions for noncompliance, are important for the success of EQW.

C O N C L U S I O N S

The central question this thesis has attempted to answer is: what is that makes EQW constitutional or unconstitutional. A double approach was employed to answer this question: theoretical and comparative. From the theoretical perspective, it was concluded that the constitutionality of EQW depends on the approach that the domestic legal order adopts to four issues: political representation, equality, affirmative action and political rights. Additionally, gender acts as a cross-cutting factor that also influences the constitutionality of EQW through its effect on these primary issues. From the comparative law perspective, constitutional litigation about EQW was analysed in three countries (France, Spain and Mexico). It was concluded that, although the constitutional courts use a theoretical framework formed by political representation, equality, affirmative action and political rights, they adopted a somewhat simplistic approach to these issues. Thus, courts frequently use only one of these theoretical factors as the primary determinant, viewing the others as secondary considerations, ofthen side-stepping the most controversial issues connected with these factors, and almost completly ignoring the particularities of the target group (women). Moreover, courts frequently employ a systemic approach that focuses on the impact of EQW on the political and legal systems, rather than on the compatibility between EQW and individual rights. Courts also seem to accept unquestioningly the assumption that EQW would effectively generate gender balanced political representation.

Finally, in each jurisdiction the decisions of the courts are also influenced by domestic political and legal factors.

The first theoretical factor involved in the assessment of the constitutionality of EQW is political representation. The declared aim of EQW is to achieve gender balance in political representation. However, underpinning EQW there are controversial assumptions about what political representation is or should be. Thus, EQW assume notions of group representation, which is highly problematic due to practical difficulties (such as how to identify the interests of the group), and also because of it risks falling into 'essentialism', ie the attribution of a common and invariable essence to all the members of the group. EQW also risk assuming that political representation is descriptive (only women can represent women) and surrogate (women representatives represent all women, irrespective of whether they are or not part of the representative's geographic constituency). These notions are also controversial and, taken to the extreme, implausible. This is why certain advocates of EQW have stressed that descriptive and surrogate representation should be seen only as a complement of more traditional forms of political representation, and not as a substitute for them. Descriptive and surrogate representation, in turn, contain the expectation of some degree of substantive representation (women representatives are supposed to be responsive to women and their interests). These ideas, however, raise again the problem of essentialism, and presuppose the existence of women's interests, issues and agenda, all of which are severely contested. Moreover, the relationship between the number of women in Parliament and the actual development of substantive representation of women has been questioned: the latter depends on many factors, not the least the type of women who are elected.

In brief, EQW assert a theory of political representation that is controversial, not easily reconcilable with more traditional approaches, and plagued by practical problems. All of this augured a hostile attitude from constitutional courts towards EQW.

In practice, theories of political representation only blocked EQW in France, and not in Spain or in Mexico. The reason for this was that a particular theory of political representation was central to French constitutional law, partly due to historical reasons. This theory was coherent and had many essential incompatibilities with the theory of political representation advanced by EQW. In Spain and Mexico, however, theories of political representation were less important within the domestic constitutional framework. They lacked the coherence of the French theory, showing a dilution from its origins and a structural confusion with private law representation. All of this made the theory of political representation irrelevant, or at least very secondary, for the purposes of assessing the constitutionality of EQW in these two countries.

The second theoretical factor involved in the assessment of the constitutionality of EQW is equality. EQW respond to a sex equality claim. However, the notion of equality contained in that claim is not the traditional understanding of equality, and therefore the compatibility between EQW and a given legal system will depend on how far that system has gone beyond that traditional notion. The traditional understanding of equality is the idea of general equality, which follows the Aristotelian formulae of treating like cases/people alike and un-like cases/people unalike. Although the second prong of this formula is open to far-reaching interpretations that may provide special treatment for those who have been discriminated against, its individualistic ethos and the lack of elaboration of what exactly 'unalike treatment' entails, renders this notion of equality uncertain in terms of its compatibility with EQW. Moreover, this second prong has been relatively little developed

legally, whereas the first prong of the Aristotelian formulae has been particularly popular in constitutional courts. At least originally, these courts tended to apply the first prong as formal legal equality, ie the principle the law should be general and abstract, equally applicable to all individuals and 'blind' towards personal features such as sex and race. This understanding of equality is incompatible with EQW, which requires legal norms that address women as such (explicitly or implicitly), full awareness of gender as a legally-relevant status, in turn requiring a change from equality between individuals towards equality between groups, and the consideration of concrete circumstances over purely abstract considerations. Consequently, EQW are more compatible with those legal systems where equality has evolved towards notions of non-discrimination on specific grounds associated with group membership (which allows special treatment to overcome the existence of castes or permanently subordinate groups), or *de facto* equality (including far-reaching understandings of equality of opportunity). A significant difficulty, however, is that the concept of equality is under constant evolution, and that there are no clear-cut stages on this process. In fact, different understandings of equality normally co-exist and overlap within legal systems. A concrete problem caused by this co-existence is that courts employ, simultaneously, different standards to assess the permissibility of deviations from equality. This applies to gender: although the baseline test normally used under a notion of general equality is rationality, it may be applied very strictly to statutes using gender as a ground for differentiation, particularly if such a characteristic has been expressly identified by the legal order as 'suspect', ie prima facie discriminatory (something similar happens when the applicable test is proportionality). Although this heightened kind of scrutiny may be fatal for EQW, this is not necessarily so: there is also a further elaboration of the understanding of equality as non-discrimination on specific grounds associated with group

membership, which prescribes that strict scrutiny should only be applied to 'malign' discrimination and not to 'benign' discrimination, thus excluding EQW from such demanding scrutiny.

In practice, equality considerations helped the cause of EQW, with the important exception of France. Both the Spanish *Tribunal* and the Mexican Supreme Court took advantage of the EQW cases to push forward the evolution of a notion of equality that both courts had already begun. In other words, the EQW cases arrived at these courts at the right time, when the rigid traditional notion of formal equality had already been partially abandoned. In fact, in both countries the importance of substantive or *de facto* equality was highlighted. The case of France was different. Although the *Conseil* did not need to resort to equality considerations to strike down the EQW, the ideas of political representation and the principle of universalism used by the *Conseil* were intimately linked with a formal notion of equality that was hardly compatible with EQW.

The third theoretical factor involved in the assessment of the constitutionality of EQW is affirmative action. Scholarly literature and public opinion usually see EQW as a strong kind of affirmative action, and therefore the discussion about the constitutionality of EQW gets caught up in the highly divisive and longstanding debate about the constitutionality of affirmative action in general, and of quotas in particular. EQW, however, have special characteristics. The most notable difference is that EQW's discourse integrates traditional concepts of constitutional theory (such as representation and citizenship). Supporters of EQW (particularly feminists) resort to these concepts not only to distance themselves from the traditional affirmative action legal debate, but also to stress the systemic importance of EQW, which are presented as a democratic improvement. Additionally, EQW have certain particularities that render some of the traditional

constitutional objections against affirmative action less compelling as applied to them. For example, strong forms of affirmative action are usually regarded as incompatible with meritocracy (although this depends on the notion of merit that is assumed). EQW, however, apply to the political-electoral context, where traditional understandings of merit are unenforceable due to the ultimate freedom of the electors to vote according to what they deem convenient. Another example of EQW's specificities is that they are 'soft' quotas, because they do not impose *results* (ie a minimum percentage of women among the *elected* candidates), but only affect the electoral *procedure* in an intermediate stage. The final decision in the selection of the representatives remains on the voter, who is allowed an individualised consideration of the candidates, and who is free to contemplate (or not to contemplate) their sex as a factor for his/her decision.

In practice, it is far from clear whether the courts share the scholarly or popular view of EQW as a strong kind of affirmative action. Whereas scholars applied to well-known arguments taken from the affirmative action debate to EQW (such as its controversial morality and impact), courts used the affirmative action debate only as a general background, rarely and indirectly expressed in their decisions, and therefore did not refer to the controversial issues surrounding affirmative action in general, or quotas in particular.

An additional practical development is that, although in theory affirmative action is regarded as temporary (normally linked to the continuing existence of the systemic discrimination that justifies it), EQW appear to be increasingly evolving from being a temporary measure to becoming a permanent feature of the democratic system. From the theoretical perspective, this innovation only fits with French *parité*, which was not seen as justified because of the continuing existence of sex discrimination, but on the 'structural'

democratic need to reflecting the 'dual nature of humanity', which is of course permanent. However, the idea of permanent EQW is not exclusive to France and can also be found – more or less implicitly - in Spain and Mexico.

The fourth theoretical factor involved in the assessment of the constitutionality of EQW is political rights. EQW could be seen either as infringements of these rights, as acceptable limitations to them, or as means for achieving their *real* effectiveness. Consequently, the compatibility between political rights and EQW depends on the understanding of and content given to the idea of political rights in a particular legal system. Supporters of EQW adopted a vision of political rights that emphasised their role as a fundamental element of the democratic political system over their role as individual rights, and their group dimension over their individual dimension. Moreover, whereas the right to vote is given an ambitious content that comprehends substantive representation, the right to stand for public office is downplayed, challenging its nature as a fundamental right and allowing its extensive regulation by the legislator, subject to lenient scrutiny.

In practice, political rights have not been particularly important obstacles for the constitutionality of EQW. They appear in virtually all the courts' decisions about EQW, but are mostly understood in an ambiguous way that is flexible enough to accommodate EQW. Although the courts acknowledge political rights as individual rights entitled to protection, they are also willing to allow the extensive regulation and limitation of these rights, which may evidence the courts' preference for a vision of these rights as fundamental tools of democracy rather than as individual rights. Moreover, the right to vote is normally understood only as enfranchising voters, whilst the right to stand for office is mostly seen as lacking sufficient elaboration about its content and limits. Practice also shows that, although the autonomy of political parties (and the rights of their members) is affected by

EQW, they are widely considered as 'special' associations upon which measures such as EQW can be legitimately imposed for the improvement of the political system.

A crosscutting factor that colours the consideration of the four theoretical factors involved in assessing the constitutionality of EQW, particularly political representation and equality, is gender. These are quotas for *women*, who are presented as a unique group based on a mixture of strategic and theoretical reasons. Strategic reasons include the need to appease fears that other groups will claim similar quotas (the Pandora's Box fear). Theoretical reasons revolve around issues such as the distinctiveness of gender and its unmatched relevance for personal and political identity, the existence of women's interests and women's issues, and certain specific characteristics of sex discrimination. These reasons, however, are highly controversial, and risk estranging women from other disadvantaged groups. Moreover, the characteristics of women and sex discrimination are ambiguous for the cause of EQW: whereas some of them lessen problematic issues linked with the theoretical factors explained above (eg the social integration of women renders the fear of social fragmentation irrelevant), other intensify them (eg women's heterogeneity makes group representation less possible).

In practice, the courts' discourse has mostly ignored gender and its influence on EQW cases. Courts never distinguish between the constitutionality of electoral quotas in general and the constitutionality of electoral quotas for women, and no comparison is undertaken between the women's claim and those of other groups. A partial exception is Spain, where sex was labelled as 'different'. In any case, in all the case studies only women have successfully claimed electoral quotas, rendering the Pandora's Box fear (the idea that EQW may induce other groups to claim electoral quotas) purely academic. Thus, an interesting question is to what extent the discourse of EQW promoters about women's

uniqueness, and their strategy of distinguishing women from other disadvantaged groups, has rendered electoral quotas only suitable for women.

Finally, the domestic political and legal context is also relevant when assessing the constitutionality of EQW. Each jurisdiction has its own particularities, some of which influence the discussion about the constitutionality of EQW, such as the importance of the principle of abstract universalism in France, and the relatively recent democratisation processes occurred in Spain and Mexico. The domestic electoral system is always a relevant contextual factor, because it serves as a frame within which EQW are considered and also because it may explain the quota's design and success (or failure). The design of the quota is also important because it may aggravate or moderate constitutional concerns. For example, a stringent quota could be more effective, but it may also be less politically and constitutionally palatable. If the quota is too lenient, however, it risks underperforming, which in turn could result in its unconstitutionality as not being an adequate means to achieve the aim of sex equality in political representation.

In conclusion, assessing the constitutionality of EQW is a highly complex endeavour that requires courts to give simultaneous attention to many theoretical, practical and contextual factors, some of which rise intractable questions that may transcend the legal context. It is possible, however, to develop a framework to help in this endeavour. Even if its complexity may be daunting, this framework provides useful guidance for courts and legislators so that they avoid a deceptively simple approach that may result in accepting the constitutionality of EQW at the cost of disrupting the coherence of the legal order.

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