

Parity Laws in Germany

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Recently, the Thuringian State Supreme Court sided with the populist, far-right Alternative for Germany's (AfD), declaring Thüringen's new parity electoral law gender quota [unconstitutional](#). Many of the AfD's and the male-dominated court's arguments against the law are [common](#) worldwide in debates about quotas. In an increasing number of [democracies around the globe](#), however, quotas have not only survived constitutional challenges but have come to be seen as an essential mechanism for achieving political equality. Empirical research has determined many common concerns about quotas are unfounded. Here I provide some responses to the AfD's and the Court's worries about the law, drawn from the extensive political science literature on gender quotas.

Free elections and parties' freedom of action

The Court found the parity law unconstitutional because it clashed with the constitutional imperative of free elections and parties' freedom of action, arguing that "elections cannot be influenced by coercion and pressure from the state and that the process of interest aggregation must occur 'free of the state'." (*Das Paritätsgesetz beeinträchtigt das Recht auf Freiheit ... der Wahl (Art. 46 Abs. 1 ThürVerf) sowie das Recht der politischen Parteien auf Betätigungsfreiheit... (Art. 21 Abs. 1 GG ... dass Wahlen nicht durch Zwang und Druck von staatlicher Seite beeinflusst werden und dass der Prozess der Willensbildung des Volkes „staatsfrei“ verläuft*)

Both the AfD and the Court make much of the facts that the parity law would limit the number of candidates on a party list, curtail the ability of voters to influence the composition of a party list, and constrain who parties could nominate for their lists. Opponents of quotas in other contexts have similarly argued that parity policies restrict freedom by setting limits about who can appear on a ballot. The status quo electoral law is perceived as neutral, natural, or "free" and these changes a novel limit on freedom.

Such objections resemble citizen complaints [currently being made in the United States](#) about public policies requiring masks to be worn in stores and other public places. Protestors argue their freedom is being taken away because the government has begun to require them to don certain articles of clothing in public; however, the legal status quo already limits these freedoms. Laws requiring people to wear shoes in stores and banning public nudity are common; rules against indoor smoking and other public health-related policies are also in place having survived legal challenges. New mask requirements are simply a variation on well-established limits to public behavior.

Similarly, although it is easy (especially for men) to imagine German democracy in the absence of quotas as completely free, electoral laws in the Federal Republic

already constrain the actions of both voters and political parties. The AfD argues quotas limit the number of men they could place on their party list and curtail their freedom to select additional excellent male candidates for public office. However, the *Erststimme* component of [Germany's federal and state mixed electoral laws](#) already constrains the number of men a political party can place on a portion of the ballot, limiting the party to only one candidate. Most parties certainly could locate more than one excellent candidate to represent their electoral district – indeed closely-contested battles take place within many local party organizations when an incumbent retires and a new candidate to represent the district must be selected. No matter how many good men a party would like to select to represent their *Wahlkreis*, however, current German electoral law allows them to select only one for the ballot. State imposed limits to parties' freedom of action already exist.

The Court's decision additionally claims the parity law unfairly constricts political parties by forbidding them to place certain people (men) in certain places (women's places) on their lists. Parties would still, however, be free to place those men elsewhere on their list.¹⁾ This logic is also extended to citizens who would like to run for elective office, arguing their freedom to compete for a particular spot on the party list would be denied. Again, however, these individuals' right to compete for other spots on the list would not be impinged upon. German citizens are already limited in the offices for which they can compete; see the remainder of this paragraph for examples. In contrast, current law forbids political parties from placing certain candidates *anywhere* on their list. [Thüringen's state electoral law](#) bans candidates who are under 18 years of age, have not lived in the state for a year, or who belong to another elected body such as the Bundestag. Existing electoral law already completely curtails parties' freedom to include people in these categories on their list — even if party members desire them as representatives.

Similarly, the argument that requiring men and women to alternate places on a party list is unconstitutional because it violates citizens' freedom to determine individual representatives is an argument at odds with Germany's long-time use of closed party lists for national and most state level elections. Under the electoral system used since the founding of the Federal Republic (and in Thüringen since 1990), ordinary voters have never been able to impact the composition and rank order of party lists in a national election. The state has already deprived them of this freedom.

Only by joining a political party and actively taking part in pre-election [candidate selection meetings](#) can a citizen shape the composition of a party list. Moreover, in larger parties not all party members, only a few people who have been “deputized” by their local party organization, take part in the selection meetings – meetings in which the party leadership generally presents a previously constructed list for the rank-and-file's consideration. Under the parity law, this tiny fraction of the German citizenry would still be free to determine which men in which rank order and which women in which rank order to place on a party list. If a citizen cannot find a party with which she agrees, or cannot afford the dues or the time to devote to active party membership, or is a party member not “deputized” to attend such a meeting, her ability to shape a party list and her individual representatives has already been curtailed by German electoral law.

Quota opponents' argument that the parity electoral law introduces unheard of restrictions on parties and voters into otherwise neutral and "staatsfrei" elections finds little empirical support.

Fair elections and equal chances for parties

The court further found the parity law unconstitutional because it violated the constitutional imperative of fair elections and equal chances for parties. (*Das Paritätsgesetz beeinträchtigt das Recht auf ... Gleichheit der Wahl (Art. 46 Abs. 1 ThürVerf) sowie das Recht der politischen Parteien auf ... Chancengleichheit (Art. 21 Abs. 1 GG)*)

The AfD and the court argue the parity law would place parties with low numbers of female members at a competitive disadvantage because they would be unable to locate qualified female candidates to run on their electoral lists, artificially curtailing the length of their list and hence the number of candidates from their party who could be elected. Moreover, this school of thought maintains, parties attempting to appeal to male voters by running male-heavy lists (or vice versa) would be denied this opportunity to gain an electoral edge. Around the world, opponents of quotas have agreed with the AfD's concern that quotas would force parties both to select unqualified female candidates to fill women's slots and to shunt qualified male candidates aside, rendering them less competitive.

Extensive empirical [research](#) has determined these concerns to be unfounded. Where quotas are implemented elected officials became [more qualified](#), not less. Rather than a gender-balanced ticket being an electoral liability, citizens have greater [trust](#) in gender-balanced groups of legislators and perceive them as more [legitimate](#) than bodies dominated by men. [CSU](#) party leader Horst Seehofer recognized this logic a decade ago, leading his party to adopt quotas for inner-party offices to stem ballot box losses. It is notable that despite the AfD's claims that parity would hurt their electoral chances, the party voluntarily chose to act as if it had a quota in the 2017 German national election, mimicking the Greens and the Left party's quotas in their choice of a "[Spitzenduo](#)" to lead their election campaign.

In the twentieth century, members of the Social Democratic Party (SPD) and Christian Democratic Union ([CDU](#)) – like the Court — also feared that if their parties were to voluntarily adopt gender quotas for electoral lists they would be unable to fulfill them due to a dearth of (qualified) women. These concerns were in part driven by the observation (shared by the Court) that only a minority of party members were women. These fears did not materialize and German parties have largely [complied](#) with their quota promises²⁾ My [research](#) finds the main instances where parties are routinely unable to fulfill quotas occur in elections to local councils in small communities where a given party does not have a large membership. Limiting the number of candidates from a party that cannot attract a lot of members is hardly an example of unfair electoral competition.; Hilde Coffe's and my [analysis](#) of party lists for the 2017 Bundestag election found no shortage of women competing for electable list places in parties where quotas are used. Parties with voluntary quotas developed mentoring and training programs now enjoyed by both female

and male aspirants for public office. Parties employing voluntary quotas also began casting a broader net for potential candidates. For example, because county councils often oversee hospitals, before adopting quotas parties recruited (male) doctors as candidates; quotas led them to begin recruiting (female) nurses for their lists. Rather than putting them at a competitive disadvantage, more diverse lists enabled parties to reach a wider range of potential constituents and to better represent the concerns of hospitals as well. Declaring a law unconstitutional due to concerns about some parties' inability to compete with other parties that have developed broader ways of identifying and training candidates who more completely reflect the underlying citizenry is a strange way of promoting fair elections. A better response to this concern would require an amendment to the law gradually phasing in the quota over several electoral periods.

Political parties' programmatic freedom

Thirdly, the Court argues against the parity law maintaining that it has a negative impact on political parties' programmatic freedom. (*Das Paritätsgesetz beeinträchtigt ... das Recht der politischen Parteien auf Programmfreiheit (Art. 21 Abs. 1 GG)*)

The internal logic supporting this position in both the Court's decision and the AfD's challenge to the law is contradictory. On the one hand, both maintain the law is unconstitutional because it improperly divides the citizenry / potential candidates into groups based on sex when the representatives' job is to represent the citizenry (*das Volk*) as a whole rather than a subset of the population. (*"Die Abgeordneten sind nicht einem Land, einem Wahlkreis, einer Partei oder einer Bevölkerungsgruppe, sondern dem ganzen Volk gegenüber verantwortlich; sie repräsentieren das Volk grundsätzlich in ihrer Gesamtheit."* "Gruppenrepräsentation sei mit dem Demokratieprinzip unvereinbar.") On the other hand, however, the Decision argues that the parity law deprives parties of their programmatic freedom to try and appeal especially to male voters (by running many male candidates) or to try and win over female voters (by running a plethora of female candidates).

If we accept the first premise as valid, then it is difficult to see how the parity law would limit the programmatic freedom of political parties. If representatives are truly neutral embodiments of the citizenry as a whole, women can easily represent a party platform designed to appeal to men. Indeed, women in the AfD have [spoken out](#) against quotas for women in politics; a parity quota would not limit their freedom to continue with this stance. Conversely, male leaders such as former US President Barak Obama have declared themselves [feminists](#) and fought to appeal to female voters. Alternating the sex of candidates on a party list does not limit the freedom of a party to select policy positions in its program.

If the latter premise, that men and women do bring separate and distinct programmatic attributes as candidates, is correct, then serious democratic harm is done by the current systematic underrepresentation of women on some party lists. Parity quotas correct this problem. Empirical evidence suggests that male and female members of the same political party hold slightly [different policy positions](#) and [prioritize different issues](#). Gender-imbalanced lists and in turn

the parliaments they produce systematically underrepresent the concerns of half the population. Where quotas have been implemented, the same political majorities [adopt different policy positions](#); spending on health, education, and welfare increase while fewer resources are devoted to security issues.

The AfD's challenge to the parity law makes very clear its unwillingness to represent the interests of women within its ranks. It opposes parity because it would "exercise pressure on parties to align their programs so that they would appeal both to women and men" (*"dass auf die Parteien mittelbar Druck ausgeübt werde, ihre Programme so auszurichten, dass diese sowohl für Frauen als auch für Männer attraktiv seien."*). This aversion by a political party toward appealing to half of the population is particularly concerning when it comes from a party already under [observation](#) for the Office of Constitutional Protection.

Political parties shall participate in the formation of the political will of the people

Finally, some thoughts on Article 21, Paragraph 1, to which the court paid special attention: Political parties shall participate in the formation of the political will of the people. ... Their internal organization must conform to democratic principles. (*"Die Parteien wirken bei der politischen Willensbildung des Volkes mit. ... Ihre innere Ordnung muß demokratischen Grundsätzen entsprechen."*)

In its decision, the Court stressed that these democratic principles are particularly important in terms of the process of forming political opinions and determining the will of the collective (*"die 'demokratischen Grundsätze' im Sinne des Art. 21 Abs. 1 Satz 3 GG auf das Verfahren der politischen Meinungs- und Willensbildung beziehen, also auf die Rückführbarkeit verbindlicher Normen auf den Willen eines kollektiven Subjekts."*). Indeed, parties were given their near-monopoly on candidate selection in Germany precisely because the founders of the Federal Republic believed that the large memberships of what were then truly *Volksparteien* were capable of channeling the political will of the people into parliament.

Seventy years later, my [research](#) and that of [others](#) finds German political parties in a very different condition than they were decades ago. Party membership has [plummeted](#) and today only approximately 1% of the German population (1.2 million people) has decided to join a political party. In all parties, a majority of members are men; even in the most gender-balanced party, the Greens, men comprise over 60% of party members. While [civically-engaged women](#) flock to social movements, charities, and other community organizations, parties remain unattractive clubs for them to join. Furthermore, other large segments of the German population, including men with low levels of education and income, young people, citizens with a migration background, Eastern Germans, and people employed in the private sector are reluctant to join parties. Today, these groups are dominated by older, educated, affluent ethnic Western German men who are self-employed or work in the public sector; in turn, such men are overrepresented in German legislatures. Over the past decades, parties' repeated attempts to increase and

diversify their membership to be more reflective of the German citizenry have failed. Political parties are increasingly unable to fulfill their constitutionally-mandated function of collective interest aggregation.

In light of *all* political parties' inabilities to attract broad memberships, and Article 3 of the Basic Law's requirement of the state to promote the actual implementation of equal rights for men and women, taking steps to eliminate disadvantages that now exist, parity quotas are a proportionate measure to promote gender equal participation in democracy.

References

- 1. This logic is also extended to citizens who would like to run for elective office, arguing their freedom to compete for a particular spot on the party list would be denied. Again, however, these individuals' right to compete for other spots on the list would not be impinged upon. German citizens are already limited in the offices for which they can compete; see the remainder of this paragraph for examples.
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