

## CONSTITUTIONAL JUSTIFICATION OF PARITY DEMOCRACY\*

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### INTRODUCTION

The question of legally sanctioning gender parity in political representation has often been lumped together with the related question of legally-sanctioned representation quotas.<sup>1</sup> Both questions raise a variety of constitutional issues: Are quotas, or is parity, incompatible with, or on the other hand required by, the principle of gender equality? Is either compatible with the right of male candidates to stand for elections? Are they both compatible with the political freedom of political parties, on the one hand, and of the electorate, on the other? Are they consistent with the system of general and unitary representation that underlies political representation in modern states? These and possibly other issues can in turn be confronted

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1. We distinguish parity measures—understood as measures to achieve an even, balanced, or comparable presence of both sexes (for example, approximately proportionate to the gender distribution in the population)—from quota measures that seek to guarantee a minimum presence of women in representative bodies (for example, a minimum of 25 or 30%).

from different constitutional standpoints. Broadly speaking, they can be approached as issues of constitutional rights or as issues of democratic representation. Each of these two standpoints allows for variations.

Indeed, constitutional reasoning regarding legally-sanctioned quotas or parity in political representation has often centered on a rights debate (notably one focusing on the right to equality) about whether the political sphere allows for substantive equality and, if so, what implications this has. Questions concerning the right to vote and stand for elections, as well as the question of the model of constitutionally-sanctioned democratic representation, have also been raised in connection with equality. The autonomy of political parties has been at the center stage of the debate, too. The importance it has been given depends, however, on whether what is brought to the fore is the notion of political parties as just one more type of private association needing protection from state interference, or rather their nature as associations put to the service of a democratic system. When the latter is the case, the debate surrounding the autonomy of political parties and that around the constitutionally-sanctioned model of democracy becomes entangled.

The chart below tries to capture possible approaches to gender quotas and to gender parity in political representation and the different responses the approaches offer to the constitutionality of quotas and parity.

	RIGHTS: EQUALITY/ SUFFRAGE		DEMOCRATIC REPRESENTATION MODEL			
	I. Formal	II. Substantive	III. Elected representation	IV. Deliberative Democracy	V. Mirror Representation	VI. Parity Democracy
<b>QUOTAS</b>	NO	YES, but why only sex?	NO	YES, but why only sex?	NO	NO
<b>PARITY</b>	NO	NO, because not strictly necessary	NO	NO, because not strictly necessary	YES, but why only sex?	YES

This Article examines the range of possible constitutional approaches to legally imposed gender parity and gender electoral quotas relying on some of the most recent cases brought concerning such types of measures in several countries including France, Italy, Colombia and, most recently, Spain. Emphasis is placed on the decisions of the Colombian Constitutional Court and the Spanish Constitutional Court as missed opportunities

to articulate the idiosyncratic logic and justification of parity democracy. This Article also argues that gender parity in political representation has its own distinctive logic and contends that this logic is best captured under a model of democratic representation we labeled “Parity Democracy.” The implications of this model’s logic are specified in Column VI and are analyzed below. Before going into this model and its implications in any depth however, we analyze the other possible approaches to parity and quotas in political representation presented in the chart above.

### I. THE RIGHTS MODELS

As shown in Column I, constitutional reasoning that centers on the notion of formal equality is incompatible with either quotas or parity insofar as it aspires to a legal system that does not draw distinctions based on suspect criteria, including sex. This is so, in particular, when the enjoyment of fundamental rights is at stake, such as the rights to vote and stand for elections.

It is common to find the right to formal equality in political representation discussed jointly with the traditional model of democratic elected representation. Indeed, in the political domain, the right to formal equality and the right to vote appear as defining elements of a representation model in which every citizen has one, and only one, vote and can freely choose among citizens who freely and equally enjoy their right to run for office without constraints of any sort. This general, abstract, unitary, and procedural model of representation is reflected under Column III and, as shown, is not easy to reconcile with either electoral quotas or parity.

An eloquent implementation of the idea that formal equality should prevail in political representation, as part and parcel of the general, unitary model of representation, is the decision of the French Conseil Constitutionnel on gender quotas from 1982.<sup>2</sup> In this decision the Conseil was for the first time confronted with the constitutionality of mandatory electoral gender quotas. After a decade of discussions in France, and after the French Socialist Party had adopted the first voluntary gender quotas in the 1970s, Parliament passed an act in 1982 that obliged electoral ballots in municipal elections to have at least 25% of candidates of each gender.<sup>3</sup> Sixty delegates from the opposition challenged the Act before the Conseil

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2. See CC decision no. 82-146DC, Nov. 18, 1982, J.O. 3475. For a thorough discussion of the French debate see Ruiz & Marín, *supra* note \*, at 287–93.

3. La loi modifiant le code électoral et le code des communes et relative à l’élection des conseillers municipaux et aux conditions d’inscription des Français établis hors de France sur les listes électorales [Act Amending the Electoral Code and the Code of Municipalities Concerning the Election of Municipal Councillors and the Conditions for Inclusion in Electoral Registers of French Nationals Residing outside France], Law No. 82-974 of Nov. 19, 1982, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Nov. 20, 1982, at 3487.

Constitutionnel, which declared the law unconstitutional. Faithful to the universalist notion of citizenship prevalent in France, the Conseil held that the principles of equality before the law, of national sovereignty, and the indivisibility of the electoral body, recognized in the French Constitution<sup>4</sup> and in the Declaration of the Rights of Man and the Citizen of 1789,<sup>5</sup> all preclude any person or group from claiming the exclusive exercise of national sovereignty and that they confer every citizen an equal right to vote and to stand for elections, without any qualifications or exceptions, other than those that may stem from such conditions as age or incapacity.<sup>6</sup>

The way to electoral gender quotas in France, indeed to gender parity, was opened in 1999, when the French Constitution was amended to allow for affirmative action seeking gender equality in political representation, thus introducing the logic of substantive equality in the political field.<sup>7</sup> After this constitutional amendment, the Law on Equal Access of Women and Men to Elective Offices and Functions was enacted on June 6, 2000, to introduce gender parity in political representation.<sup>8</sup> The law was chal-

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4. Article 3 of the French Constitution reads:

[1] National sovereignty resides in the people, who exercise it through their representatives and by means of referendum. [2] No one sector of the people or single individual shall claim its exercise. [3] Suffrage may be direct or indirect in the conditions set forth by the Constitution, and shall always be universal, equal and confidential. [4] According to the law, electors are all French nationals of both sexes, who are of age and enjoy full exercise of their civil and political rights.

1958 CONST. 3, *translated in* Ruiz & Marín, *supra* note \*, at 291.

5. Article 6 of the Declaration of the Rights of Man and the Citizen of 1789 reads:

The law is the expression of general will. All citizens have the right to contribute to its making, either personally or through their representatives. As all citizens are equal before the law, they are likewise all equally eligible for any public office, position or employment, according to their abilities and with no distinction other than their virtues and talents.

Déclaration des droits de l'homme et du citoyen de 1789 [Declaration of the Rights of Man and Citizen of 1789], art. 6, *translated in* Ruiz & Marín, *supra* note \*, at 291.

6. Based on this 1982 decision, in 1999 the Conseil Constitutionnel also invalidated the law regulating elections to the Corsican Assembly, which would have introduced strict parity on electoral ballots. *See* CC decision no. 98-408DC, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Jan. 20, 1999, at 1028.

7. The Constitutional Law No. 99-569 of July 8, 1999 introduced a fourth paragraph in Article 3 of the French Constitution, whereby "the law shall favor equality among women and men to have access to electoral mandates and hold elective office." It also amended Article 4 so as to provide that political parties "shall contribute to the application of the principle set forth in the last section of Article 3 in accordance with the provisions of the law." *See* Law No. 99-569 of July 8, 1999, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 9, 1999, at 10175.

8. Law No. 2000-493 of June 6, 2000, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], June 7, 2000, at 8560. This law required, under penalty of disqualification, that all parties in elections employing lists include 50% of candidates of each gender ( $\pm 1$ ) on their ballots. This included elections to municipal office (in towns of fewer than 3,500 inhabitants), regional office, the Corsican Assembly, the Senate (in those cases where the system of proportional representation applied), and the European Parliament. For legislative elections based on the system of single-member districts, the law stipulated a penalty in public financing proportionate to the degree of non-compliance for any party that failed to include an equal number of candidates of each gender (allowing for a 2% margin of error). The system established by this law has recently been perfected in the amendment. *See* Law No. 2007-128 of Jan. 31, 2007, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Jan. 31, 2007, at 1941 ("tendant à promouvoir l'égal accès des

lenged before the Conseil Constitutionnel, which this time upheld its constitutionality on the basis of the constitutional amendment, which, the Conseil stated, nuanced the principle of indivisibility of the electorate, inasmuch as it introduced a substantive understanding of the principle of equality and allowed for affirmative action to afford men and women equal access to representative positions.<sup>9</sup>

Indeed, substantive equality is more compatible with the adoption of electoral quotas. This is shown in Column II of the chart above. Supporters of quotas mostly rely on this notion of substantive equality, whereby the constitutional principle of equality is not conceived as ensuring a neutral legal system, but as grounding the state's duty to remove obstacles so that people can actually and equally enjoy the rights and freedoms formally granted to them. This can be done either by ensuring equality of opportunities in the starting position or, at least to some degree, by guaranteeing equality of results.<sup>10</sup> Applied to the political domain, substantive equality implies the state's duty to ensure that all, in our case men and women, have similar opportunities to access political power and not just the same formal right to run for office.

This logic was controlling in the January 2008 decision of the Spanish Constitutional Court on electoral gender quotas.<sup>11</sup> As shall be explained in further detail in Part IV, the Spanish Organic Law 3/2007, on Real Equality of Women and Men<sup>12</sup> introduced mandatory gender quotas on electoral ballots, whereby these must include not less than 40% of candidates of each gender. Relying on Article 9.2 of the Spanish Constitution,<sup>13</sup>

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femmes et des hommes aux mandats électoraux et fonctions électives" (to promote equality between women and men regarding access to electoral positions and functions)), *translated in* Ruiz & Marín, *supra* note \*, at 293.

9. CC decision no. 2000-429DC, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 30, 2000, at 8564.

10. As has been noted, "if the discussion of substantive equality is to be taken seriously, it is impossible to fully rule out that some variants of equality . . . may be based on measures in some way geared toward . . . the outcome." Antonio D'Aloia, *Le "quote" elettorali in favore delle donne*, in LA PARITÀ DEI SESSI NELLA RAPPRESENTANZA POLITICA 51, 60, *translated in* Ruiz & Marín, *supra* note \*, at 298-99. In this line, Article 23 of the Charter of Fundamental Rights of the European Union allows for the possibility of adopting "*measures providing for specific advantages* in favor of the underrepresented sex"—this is so of course as long as the measures are reasonably justified. *See* 2007 O.J. (C 303) 7 (emphasis added), *available at* [http://eur-lex.europa.eu/RECH\\_reference\\_pub.do](http://eur-lex.europa.eu/RECH_reference_pub.do) (search by citation).

11. *See* STC, Jan. 29, 2008 (STC 12/2008).

12. Ley organica para la igualdad efectiva entre mujeres y hombres [Organic Law for the Effective Equality of Women and Men] (B.O.E. 2007, 71). In Spain, Organic Laws are laws the approval, modification, or repeal of which requires an absolute majority of the House of Representatives in a final vote on the entire bill. The Spanish Constitution requires that some matters, including some fundamental rights such as political rights, be regulated by Organic Law.

13. "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." Constitución [C.E.] art 9.2 (Spain), *available at* [http://www.la-moncloa.ed/IDIOMAS/9/Espana/ElEstado/LeyFundamental/titulo\\_preliminar.htm](http://www.la-moncloa.ed/IDIOMAS/9/Espana/ElEstado/LeyFundamental/titulo_preliminar.htm).

the Constitutional Court upheld the constitutionality of this provision, based mostly on a substantive approach to the constitutional principle of equality and the related possibility of adopting affirmative action measures also in the political domain (a possibility that Article 9.2 explicitly contemplates).<sup>14</sup> This was the same approach to gender quotas taken by the Colombian Constitutional Court in its decision of March 2000.<sup>15</sup> As we shall see in Part III, however, the latter distinguished between executive appointments and elected positions, making clear that for the latter the autonomy of political parties prevailed thus ruling out the possibility of mandatory quotas in the electoral field.<sup>16</sup>

We have seen that in 1982 the French Conseil Constitutionnel declared mandatory electoral gender quotas incompatible with the constitutional principles of formal equality and general and unitary representation. The Italian Constitutional Court reached a similar conclusion in 1995 in the context of a constitutional challenge brought against two laws, Law No. 81/1993 and Law No. 277/1993.<sup>17</sup> Law No. 81/1993, regulating local and provincial elections, stipulated that neither gender could have a presence of less than 25% on lists in municipalities of up to 15,000 inhabitants, and not less than 33% in those of more than 15,000. Similarly, Law No. 277/1993, regulating elections to Congress, provided that the political parties must present electoral ballots in alternating gender order (“zipper list”) for elections to seats subject to the proportional system (that is, for 25% of seats). To be sure, the Italian Constitution does enshrine a substantive approach to the principle of equality in Article 3.2,<sup>18</sup> yet this provision was not found to support the adoption of affirmative action measures in the political field.<sup>19</sup> In Italy, as in France, constitutional amendments were introduced to serve as a departure from a formal towards a substantive understanding of the equality principle in the political domain.<sup>20</sup> As in

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14. See STC, Jan. 29, 2008 (STC 12/2008).

15. See Corte cost., Mar. 29, 2000, Sentencia C-371/00.

16. *Id.*

17. Corte cost., decision no. 422/1995. For a thorough discussion of the Italian debate see Ruiz & Marín, *supra* note \*.

18. According to Article 3.2 “It is the duty of the republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country.” COST., art. 3.2. Note that Article 3.2 only refers to *economic and social* obstacles, not to obstacles *in general*, which would include obstacles of a normative kind, as is the case of Article 9.2 of the Spanish Constitution. Unlike this article, moreover, the Italian provision refers only to the duty of the republic to *remove* obstacles for political participation, but not to *promote* the conditions for real and effective equality.

19. Corte cost., decision no. 422/1995.

20. Constitutional Law No. 2/2001 provided that electoral laws in regions with a special autonomy statute are to promote gender parity in elections. Constitutional Law No. 3/2001 added the following seventh paragraph to Article 117 of the Constitution: “Regional laws shall suppress any hindrance of full equality between men and women in social, cultural and economic life and shall promote parity of access to elective office between men and women.” Finally, Constitutional Law No. 1/2003 added a

France, these amendments provoked a change in the attitude of the Constitutional Court towards mandatory electoral gender quotas, a change that occurred, interestingly enough, even before Constitutional Law No. 1 went into effect. Thus when the government challenged the constitutionality of Valle d'Aosta Law No. 21/2003, which required that ballots for Regional Council elections include candidates of both genders, the Italian Constitutional Court rejected the challenge.<sup>21</sup>

In sum, electoral gender quotas and parity are inadmissible under a formal understanding of the equality principle, while they may well be, and indeed often are, justified under a substantive equality model as a type of affirmative action measure. This is so at least until the moment in which women can be said truly to enjoy equal opportunities to access representative positions. Under a substantive equality model, however, it may be difficult to explain why only women, and not also some other politically underrepresented groups (such as younger or older people, and ethnic, religious, or other minorities) should not enjoy similar quotas if they too suffer from underrepresentation. Also, although quotas that ensure a minimum representation threshold for women (25% to 30%) may be easier to justify in the name of equality of opportunities, it is not clear why parity measures<sup>22</sup> would pass a constitutionality test, as it might be difficult to justify that they are proportional to the aim pursued. For one thing, they would be over-inclusive, since they apply not only to women, but also to men—something difficult to justify on the basis of substantive equality and the logics of affirmative action. It may also be argued that gender parity is disproportionate and is thus far unjustified. It would be hard, though not impossible, to argue that nothing short of a guaranteed representation of women that is strictly proportional to the female population is needed to remove whatever systemic obstacles there may be for women to run for office.

## II. DEMOCRATIC REPRESENTATION MODELS

A rights model can thus justify electoral gender quotas as affirmative action measures, whereas measures seeking gender parity in political representation are hard, though again not impossible, to justify. More difficult to justify under the principle of equality is that such measures should benefit only women and not other underrepresented groups. Let us now explore the explanatory possibilities of democratic representation models.

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second sentence to Article 51.1, which now reads: "Citizens of one or the other sex are eligible for public office and for elective positions under equal conditions, according to the rules established by law. To such ends, the Republic shall use special measures to promote equal opportunities among men and women." *Translated in Ruiz & Marín, supra note \**, at 295.

21. Corte cost., decision no. 49/2003.

22. I.e., quotas that apply to both sexes and that set the threshold at 50% or something close to it.

To this end, let us shift to the columns that cover some of the conceivable models of democratic representation besides the traditional elected representation model. Indeed, to fully account for what has happened in countries where either gender parity or some form of gender quota has been established (but no quotas for other marginalized groups)—such as France, Italy, or Spain—one has to move beyond both the rights discourse and the contours of the traditional democratic representational model.

We already mentioned why the traditional elected representation model is antithetical to both parity and any conceivable form of quotas that would defy the notion of a unitary electoral body (conceived as abstract citizens coming together to exercise their individual right to suffrage). Several models have been put forward recently to challenge this traditional model, triggered by the need to put an end to voters' apathy and the privileging of a hegemonic and homogenous traditional political class. Here we would like to test the compatibility of gender quotas and gender parity with the democratic deliberative model, discussed in Part II. A., and the mirror representation model, discussed in Part II. B. Finally, in Part II. C. we propose a parity democracy model, a model in which the logic of electoral gender parity is entrenched in the very logic of the democratic system and is different from, though not incompatible with, the logic that underlies the justification of other electoral quotas.

#### A. *The Deliberative Democracy Model*

Deliberative theories have placed the emphasis on the importance of participation and voice, as opposed to the mere voting procedure. This model is not a radical departure from the elected representation model but rather a corrective thereof that believes that at stake in democracy, including representative democracy, is deliberation and not just voting and that healthy democratic deliberation must be inclusive of as many different voices and views as possible.<sup>23</sup> Under this logic the advancement of the good of all those represented can only be achieved if different groups, with their different views and voices, are present in representative bodies so that sufficient attention is accorded to issues that affect them disparately.<sup>24</sup> This is due as much to epistemological limitations as to the limits of human empathy and altruism. This does not mean that electoral quotas necessarily

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23. The idea behind this model is that the generality, universality, and impartiality of laws characteristic of the elected representation model actually depend not on the neutrality of the legislator, but on the breadth with which the legislative debate can voice the biases in play. The more biases that are brought up and pitted against each other in the debate, the more impartial the legislative outcome will be. See generally JÜRGEN HABERMAS, *FAKTIZITÄT UND GELTUNG [BETWEEN FACTS AND NORMS]* 212 (1994); Klaus Günther, *Legal Adjudication and Democracy: Some Remarks on Dworkin and Habermas*, 3 *EUR. J. PHIL.* 49 (1995).

24. See IRIS. M. YOUNG, *INCLUSION AND DEMOCRACY* (2002).



cast doubt on the universal and unitary nature of political representation of the state. Indeed, defenders of gender quotas do not usually claim that women should vote only for women, receive votes only from women, or only represent women's interests. Nor does this system assume that all women, or indeed all members of any other minority group, must share some common and exclusive interests as a group.<sup>25</sup> The logic of the deliberative model continues to be one where elected representatives represent all citizens. The aim is rather to improve the conditions of deliberation from within that logic—assuring a baseline connection between representatives and their constituencies and rescuing minority groups from invisibility and ensuring them and their most likely heterogeneous views a space in deliberation. The aim is, in other words, to enrich and extend the legitimacy of the democratic system without challenging the model of universal and unitary political representation on which the state rests.

Under this model, one could well justify the adoption of gender quotas and quotas for other politically marginalized groups—all for the sake of enriching the political debate and ensuring the inclusion in it of as many perspectives and interests as possible. Conversely, it would be difficult to justify why electoral quotas are guaranteed to women but denied to other voiceless or underrepresented groups. Parity would also be difficult to sustain. What seems crucial, for deliberative purposes, is to have a certain critical mass in debates that guarantees the presence of issues, views, and perspectives that would arguably be left out otherwise. This critical mass has been set by the United Nations at 30%.<sup>26</sup> Going beyond such a critical mass to defend gender parity would imply the impossibility of one gender representing the interests of the other. It would thus imply going beyond the very logic of the deliberation model towards the logic of a system of mirror representation. Neither quotas for women only nor quotas of 50% for women thus seem defensible under the model of deliberative democracy. This is reflected in Column IV.<sup>27</sup>

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25. On tackling the idea of “women’s interests” Cockburn and Jonasdottir propose an interesting distinction between the formal dimension—summarized in terms of agency—and the substantive dimension—regarding the content of the interest. In order for an interest to be attributed to women as a whole, it is not necessary, in terms of content, for all women to defend the same position regarding a given matter (abortion is a paradigmatic example). What is crucial is that, because the decision on the matter may have a disparate impact on women, it may reasonably be argued that women have a special interest in ensuring that this decision not be made without the opinion and participation of women. See Cynthia Cockburn, *Strategies for Gender Democracy: Strengthening the Representation of Trade Union Women in the European Social Dialogue*, 3 EUR. J. WOMEN'S STUD. 1 (1996); Anna G. Jonasdottir, *On the Concept of Interest, Women's Interests, and the Limitations of Interest Theory*, in *THE POLITICAL INTEREST OF GENDER* (Kathleen B. Jones & Anna G. Jonasdottir eds., 1988).

26. United Nations Dev. Programme [UNDP], Human Development Report 1995: Gender and Human Development, available at <http://hdr.undp.org/en/reports/global/hdr1995/>.

27. See also JONI LOVENDUSKI & PIPPA NORRIS, *GENDER AND PARTY POLITICS* (1993).

### B. *Mirror Representation Model*

Column V corresponds to a mirror representation model. This model represents a radical break with the elected representation model. It confronts the politics of ideas upon which the latter is based with the politics of presence. The politics of ideas, which sustains the standard model in representative democracies, is based on the possibility of one social group representing the interests of the other, because what is essential is ideological affinity rather than shared experience. By contrast, the politics of presence sustains—in the face of growing frustration about the self-referentiality of politics—that ideas cannot be entirely dissociated from experience and identity, so that there is a need for representative political bodies to reflect more accurately the plurality of the society they represent.<sup>28</sup> The underlying claim is that people can never accurately represent others with radically different views and experiences. Thus, far from thinking of politics as the realm of abstraction in which representatives act in the name of the entire nation, different social groups should be represented in a parliament that mirrors society in all its complexity, and representatives should speak for the specific interests of the distinct groups they represent. Because gender parity claims that the different sexes should have a representation that comes close to their numerical composition, it would seem compatible with the mirror representation logic. Yet, as pointed out above, most defenders of gender parity emphasize their commitment to the unitary, general, and abstract notion of representation—to the idea that, with or without parity (indeed with or without quotas), elected representatives, both male and female, should represent all citizens, both male and female.<sup>29</sup> Moreover, the logic of mirror representation requires that other social groups also be faithfully represented. This allows the conclusion that this is not exactly the shift that is taking place in countries that have embraced gender parity or some form of gender quotas. In these countries, the numerical representation of other social groups has not necessarily followed. Rather, the adequate representation of women is sought as an aim that appears to be detached from, and somehow to precede, the adequate representation of other social groups.

### C. *Parity Democracy Model*

This takes us to Column VI and the model of parity democracy that we propound in this paper. Under the logic of this model, both the distinctive treatment of gender as a category and the different logics underlying

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28. See generally ANNE PHILLIPS, *THE POLITICS OF PRESENCE* 57–85 (1995).

29. There are, however, exceptions. See Rosanna Tosi, *Le “quote” o dell’eguaglianza apparente*, in *LA PARITÀ DEI SESSI*, *supra* note 10, at 105–06.

quotas and parity become clear. The parity democracy model sustains that democracy strictly interpreted cannot be anything other than parity democracy. In order to understand the logic behind this conclusion, this model takes us back to the origins of the state and representative democracy and to the ideology of the social contract and of the sexual contract on which this rests.<sup>30</sup> It is this social-sexual contract that draws the modern boundary between the public and the private terrain as respectively masculine and feminine—both symbolically and functionally. The parity democracy model rests upon the realization that the gendered identification of these two areas is neither circumstantial nor a mere oversight, but rather that the disqualification of women as citizens—as members of the public sphere—is a structural feature of the modern state. This is so because the social contract reflects the liberal view of the subject as an autonomous being defining his own life project, a view upheld by the modern myth of the independence of the individual. The social contract assumes, in other words, that every individual is autonomous and independent from others. As Thomas Hobbes eloquently put it, individuals are considered “as if but even now sprung out of the earth and suddenly, like mushrooms, come to full maturity, without all kind of engagement to each other.”<sup>31</sup>

This picture of the individual leaves no room for dependency or for the need to reconcile personal autonomy and taking on the responsibility of dependency—both one’s own and that of others. Dependency is not seen as a defining aspect of the person, but as an external enemy against which man, naturally free, must defend himself.<sup>32</sup> Thus conceived, independence becomes an essential attribute of the individual in the modern interpretation thereof, an attribute that the liberal state erects as a prerequisite for access to the public sphere and active citizenship, and that the democratic state presumes in theory and aspires to in practice. The problem is that, since independence is a myth, the state can only assume the individual to be independent if it goes to the effort of removing all manifestations of individual dependency. Such a construct was possible to the extent that the individual was conceived as male, and women, cast out of that concept and of the ideal of independence, were assigned the tasks associated with man’s dependency. In performing these tasks women enabled men’s physical, social, and cultural survival, allowing the ideal of men as independent citizens and actors in the public sphere to work in practice. Men thus

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30. See generally CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988).

31. Thomas Hobbes, *Philosophical Rudiments Concerning Government and Society*, in 2 *THE ENGLISH WORKS OF THOMAS HOBBS OF MALMESBURY* 109, 109 (William Molesworth ed., George Grote trans., Scientia Verlag Aalen 1966) (Wissenschaftliche Buchgesellschaft 1966) (1655).

32. See JEAN-JACQUES ROUSSEAU, *Discourse on the Origin and Foundations of Inequality Among Mankind*, in *THE SOCIAL CONTRACT AND THE FIRST AND SECOND DISCOURSES* 69 (Susan Dawn ed. & trans., 2002).

achieved an appearance of independence by shifting toward women, in a pact of fraternity,<sup>33</sup> the weight of their own dependency.

As a foundational myth of the state, the social-sexual contract thus constructs the public sphere as a space for the interaction of citizens, conceptualized as independent individuals and as males. It leaves no space for dependency in the public sphere but pushes it, as a women's issue, beyond the state's area of concerns. Democracy, citizenship, and representation are the field of independence. It is independence that representative democracy was supposed to represent.

This is the situation that parity democracy proposes to rectify. By including an equal number of men and women in the public-representative realm, parity democracy provides the basis for the state to cease being the exclusive venue of individuals perceived as independent and allows it to open to dependence—managed mainly by women. With parity democracy, dependence is moved into the public realm, not as an obstacle to the ideal of individual independence or autonomy, but as an equally important facet of ordinary life. Once human dependence ceases to be perceived as an obstacle to participation in public affairs, political representation can go beyond the masculine ideal of individuals to embrace aspects that the sexual contract traditionally ascribed to women. The state can then go on to represent all individuals in all their complexity. Moreover, introducing dependency in the public sphere redefines human autonomy as aspired to under the liberal ideal. The autonomy paradigm can then no longer be the dependence-free adult, but rather the adult who takes responsibility for his or her own dependence, as well as for those who depend upon him or her, as natural limitations on any life project. The paradigm of autonomy thus becomes, not independence, but interdependence.

The model of parity democracy is then in line with the dismantling of the sexual contract. This does not necessarily break with the idea of unitary representation. It is not about women who will only represent women and men who will only represent men. Rather the parity democracy model is a response to the fact that the democratic state thus far is a patriarchal state in which the political domain is symbolically and functionally defined as male, according to a paradigm of autonomy as independence. Its aim is to introduce individuals' dependency to the public/political domain, so that it can be represented on an equal footing with the ideal and the manifestations of independence. Indeed, it aims to redefine the subject of political representation by redefining autonomy as interdependence. The parity democracy model, in brief, articulates a justification of gender parity that rests on the idea that there is something distinctive, both structural and foundational, about the political exclusion of women that needs to be ad-

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33. PATEMAN, *supra* note 30, at 109.

dressed in its own idiosyncrasy—something that reflects the sexual contract upon which the modern patriarchal state rests and politics is defined. This does not mean that the exclusion or underrepresentation of other groups is irrelevant or insufficiently expressive of a democratic deficit that deserves attention. It means rather that parity has its own democratic logic, a logic distinct from, though compatible with, the logic of representation quotas of minority groups.

Parity democracy is then an enterprise concerned with redefining the sexes, state, and democracy in such a way that human interdependence gains a central place in the public sphere. Under this logic, parity democracy should be read into constitutionally enshrined democratic principles, as an interpretation of democracy and popular sovereignty that moves beyond the undemocratic implications of the sexual contract. No constitutional amendment is thus needed to justify it. Also, redefining the state is an endeavor that should start with tackling institutions of political representation but that needs to transcend those and enter other realms, including the labor market or the family. Finally, one could at the same time defend parity and the need of quotas for other marginalized groups, but one would need to do so on different grounds. On the other hand, defenders of parity may not see the need or the compellingness of quotas for other groups. The underlying logics are, after all, not the same.

The uniqueness of gender parity in representation has not been sufficiently acknowledged in constitutional decisions on the issue. The French decision of 2006 approached the question, as we have seen, from a rights perspective. It noted, however, that sex is a unique differentiation criterion because it cuts across all others, but provided no clue about where the political relevance of such a fact specifically lies.<sup>34</sup> The same is true of other constitutional decisions on the matter. Interestingly, the decisions of the Colombian Constitutional Court from 2000 and of the Spanish Constitutional Court from 2008 introduce, with different results, considerations on gender parity that go beyond the rights perspective and pertain to democratic theory.<sup>35</sup> Both decisions show the potential of applying a democratic approach to gender parity, although they both fall far short of exploiting that potential. The following sections analyze the decision of the Colombian Constitutional Court (Part III) and of the Spanish Constitutional Court (Part IV) on gender parity as missed opportunities of explicitly moving beyond the elected representation model and to talk about articulating the idiosyncratic logic and justification of parity democracy.

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34. See *supra* note 8 and accompanying text.

35. See *supra* notes 11–12 and accompanying text.

### III. CAUGHT BETWEEN PARTICIPATORY DEMOCRACY AND LIBERAL INDIVIDUALISM: THE COLOMBIAN CONSTITUTIONAL COURT ON GENDER QUOTAS

On March 29, 2000, the Colombian Constitutional Court announced its unanimous opinion in an automatic review of the constitutionality of a bill on gender quotas passed by the Colombian Congress in June 1999.<sup>36</sup> The piece of legislation was designed to implement the requirement of Article 40 of the Colombian Constitution (henceforth CC) that “the authorities will guarantee the adequate and effective participation of women at the decision-making levels of Public Administration.”<sup>37</sup> The law established a 30% quota for women in high-level decision-making positions in the public sector. These provisions were examined and found, for the most part, constitutional.<sup>38</sup> On the other hand, however, the Court struck down a provision in Article 14 on the participation of women in political parties that provided:

It is the task of the government to establish and promote mechanisms that motivate political parties and movements to increase the participation of women in their formation and in the development of their activities; among other things, it will look to stimulate women’s affiliation, their inclusion in no less than 30% of the steering committees and bodies as well as the incorporation of no less than 30% of women in all types of electoral lists in places that ensure their chances to be elected.<sup>39</sup>

The decision opens with a series of considerations regarding the legitimacy of the overall aim of the Bill—to increase the adequate and effective participation of women in all branches and public powers and to promote such participation in civil society—that one would have thought to lead to a different result. The overall reflection starts out with considerations on the type of democratic system constitutionally entrenched. The Court observes that, as stated in Article 1 of the CC, Colombia is a unitary, participatory, and pluralist democratic republic.<sup>40</sup> It goes on to recall that nowadays a democracy that tolerates the marginalization and the clear underrepresentation of half of its citizenry is no longer conceivable. This

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36. Corte cost., Mar. 29, 2000, Sentencia C-371/00 [Colom.].

37. *See id.*

38. *See id.*

39. *See id.*

40. Article 1 of the CC reads:

Colombia is a legal social state organized in the form of a unitary republic, decentralized, with the autonomy of its territorial units, democratic, participatory and pluralistic, based on respect of human dignity, on the work and solidarity of the individuals who belong to it, and the predominance of the general interest.

is all the more so since Article 1 of the CC does not only sanction the institutions of representative democracy, but also mechanisms of participatory democracy. “Participation in politics,” the decision goes on, “means that people as human beings are bound to decide and can’t and ought not to delegate the decisions that affect them. Doing so would mean accepting their objectification, hence their dehumanization.”<sup>41</sup> Thus, “the transition from a merely representative democracy to a more participatory democracy model implies not only an improvement of the political system but also a certain measure of moral progress.”<sup>42</sup> This brings the Court to Article 2.1 of the CC<sup>43</sup> which emphasizes, among the goals of the state, the need to facilitate the participation of all in the decisions that affect them and the corresponding duty of the state to remove whatever obstacles hinder the full participation of women in the democratic life of the country—something that is all the more important in view of the pluralist nature of the constitutionally-sanctioned democratic model. As a result of this pluralist nature, and since men and women are both biologically and functionally different, “political decisions adopted without taking account of women’s perspective, a perspective that is conditioned by manifold biological and sociological specificities, would be biased and partial and hence, contrary to the general will that embodies the common interest.”<sup>44</sup>

These opening considerations would seem to be the threshold of an analysis of gender quotas that focuses on democratic questions. Yet the rest of the decision includes no further discussion of democracy. It upholds the quota system for the most part, conceptualized as temporary affirmative action measures that are in principle compatible with the notion of substantive equality as sanctioned in Article 13.2 of the CC. This provision obliges the state to promote the conditions so that equality is real and effective and to adopt measures in favor of discriminated and marginalized groups.<sup>45</sup> This substantive dimension of equality, the Court said, has a “remedial, compensatory, emancipatory character, corrective and defensive of persons and groups situated in conditions of inferiority.”<sup>46</sup> In what remains, the decision provides a careful analysis of the constitutionality of

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41. *Id.*

42. *Id.* ¶ 33.

43. Article 2.1 of the CC reads:

The essential goals of the state are to serve the community, promote general prosperity, and guarantee the effectiveness of the principles, rights, and duties stipulated in the Constitution; to facilitate the participation of all in the decisions that affect them and in the economic, political, administrative, and cultural life of the nation; to defend national independence, maintain territorial integrity, and ensure peaceful coexistence and the enforcement of a just order.

44. *Id.* ¶ 31.

45. “The state will promote the conditions necessary in order that equality may be real and effective and will adopt measures in favor of groups which are discriminated against or marginalized.” *Id.*

46. *Id.*

the gender quotas in the Bill which, consistent with a rights-based approach, is made to rest on a proportionality test. On the basis of this test the Court has to decide whether these quotas pursue a legitimate aim and whether they do so through means that are effective, necessary, and proportionate.

To begin with, the aim of attaining a fair level of representation of women was found *legitimate* under Article 13.2.<sup>47</sup> The quotas under examination were then found an *effective* means towards that aim, on different grounds. First, they ensure the critical mass of women's presence that the United Nations recommends (30%) to allow women to overcome discrimination obstacles and exercise a meaningful influence in the different social spheres.<sup>48</sup> Second, quotas not only serve to overcome the underrepresentation of women but also to symbolically counterbalance some of the causes that generate it, including the longstanding patriarchal tradition according to which women belong primarily to the private sphere, a tradition that has rendered women invisible. Finally, the Court considered that women's access to positions of power is likely to increase policies adapted to the overall benefit of women.<sup>49</sup> Quotas were also found to be *necessary* as measures that aim not only at achieving an equal playing field, but also at equality in results, something that no other measure can achieve as successfully. The Court rejected the argument that an egalitarian order merely requires that equitable conditions are guaranteed at the starting point. Educational opportunities, the Court states, are necessary but not sufficient, as statistics show the huge disparity between the high number of women with university degrees in all fields and the low percentage of women in positions of power.<sup>50</sup> The Court finally addressed the last leg of the proportionality test and decided that quotas are *proportionate stricto sensu* as they do not severely impinge against other constitutionally-sanctioned rights and principles of equal importance. They cannot be said to sacrifice the rights to employment or equality of men, because men can still access positions of power—in fact, as many as 70%!—and being deprived of an unjustified privilege can hardly be considered a violation of a right.<sup>51</sup> Also, quotas do not end up discriminating against women by stigmatizing them as inferior or unable. It is precisely because women are neither inferior nor unable, but are in fact equally if not better prepared than men and yet do not access positions of political power, that quotas are needed, not as measures adopted by a paternalistic state, but as measures destined to redress social practices that generate conditions of inequity.<sup>52</sup> Thus, the

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47. *Id.* ¶ 37.

48. *Id.* ¶ 38.

49. *Id.* ¶ 39.

50. *Id.* ¶ 40.

51. *Id.* ¶ 42.

52. *Id.* ¶ 43.



Court declared quotas justified under the proportionality test, at least for the most part,<sup>53</sup> and so long as they are understood to be temporary measures to be applied gradually.

Things changed, however, when the Court turned to elected as opposed to appointed public positions.<sup>54</sup> When it comes to popularly elected positions, the Court reasoned, “the public is free to choose freely who is to represent it and imposing restrictions would alter the principles of popular sovereignty.”<sup>55</sup> Under this premise, imposing upon political parties the obligation to include 30% of women within their candidate lists is considered unconstitutional. It would be different, the Court said, if the decision to impose quotas was made by the parties themselves. As it was, the measure was found to amount to an interference with the internal organization of political parties that is constitutionally proscribed even though the Court recognized that political parties are not just one more type of association but rather “organizations that mediate between the citizenry and political power helping to consolidate democracy”<sup>56</sup> and that it is indeed “a highly desirable end that women take part in their steering bodies and in the electoral lists in a democratic system which aims at ensuring the participation of *all* in the decisions that affect them.”<sup>57</sup> Moreover, nothing was changed by the Court’s acknowledgment that the autonomy of political parties finds its limits in the Constitution itself. Also rather surprisingly, the Court did not draw any connection between the requirements of a participatory and pluralist democratic model (the model it claimed in the opening passages of the decision to be constitutionally enshrined) and the legitimacy of mandatory sex quotas in electoral lists.<sup>58</sup>

It has been pointed out that the Court’s decision reveals an underlying tension between collectivism and substantive equality, on the one hand, and liberalism’s respect for individualism, on the other.<sup>59</sup> This seems confirmed by two other aspects of the decision. First, the Court examined a provision in the Bill contemplating the creation of a National Plan for the

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53. The decision upheld the provision in the Bill recognizing exceptions to Article 4’s mandatory 30% quota for career positions, positions filled by popular elections, and positions filled by the system of *ternas* (involving selections from nominations of three candidates). Also, a provision applicable to positions filled from lists, which mandated that women be named until the 30% quota was met, was deemed neither necessary nor proportional. Instead, it was found to be discriminatory and contrary to the principle of equality because individual men automatically would be excluded from a broad category of positions until this percentage was achieved.

54. This is so even though the statistics presented by the Court show that between 1991 and 2000 the representation of women in the Senate never surpassed 13.42% and that of women in the Chamber of Representatives never went beyond 12.7%. *See id.* ¶ 25.

55. *Id.* ¶ 57.

56. *Id.* ¶ 69.

57. *Id.*

58. *See id.*

59. *See* Martha I. Morgan, *Emancipatory Equality: Gender Jurisprudence under the Colombian Constitution*, in *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 91 (Beverly Baines & Ruth Rubio-Marín eds., 2005).

promotion of women's equal participation in different social spheres and specifying the requirements to be met by such a plan. The provision was declared to be inconsistent with academic freedom and freedom of expression, hence unconstitutional, in as far as it required that a section be included calling for the elimination of school texts with discriminatory content.<sup>60</sup> Second, the Court enforced a narrow interpretation of Article 9 of the Bill, which called upon public authorities to develop measures tending to promote the participation of women in the private sector. The Court upheld this provision, but cautioned that the legislature could only adopt indicative and not compulsory guidelines to promote the participation of certain groups in the private domain.<sup>61</sup> The Court did not depart from its tradition of affirming the horizontal effects of fundamental rights in the private sphere,<sup>62</sup> but it cautioned that the force of equality principles differs in the private sector, as the Constitution protects, not only gender equality, but also pluralism, freedom of association, and free development of the personality.

All the above reveals, in our view, the blindness of the Colombian Constitutional Court to what is at stake in the enterprise of parity democracy. Certainly, the Court was confronted with gender quotas, not parity. Yet it did not seize the chance to elaborate on the question of the democratic model that lies behind the promotion of women's participation in political representation. Instead, and against what was suggested by the opening considerations about the system of participatory democracy entrenched in the Colombian Constitution, the Court's analysis remained within the logic of fundamental rights, substantive equality, and affirmative action. Moreover, despite its opening considerations, the Court remained faithful to the logic of the elected and unitary representation model when it examined the constitutionality of electoral gender quotas and, in this logic, declared them incompatible with the freedom of political parties, hence unconstitutional. In such an individualistic vein, furthermore, the Court failed to see that women's political participation on an equal footing with men requires not just electoral quotas, or indeed parity, but also public intervention in other spheres, including the educational domain and the private sector, to subvert the deeply patriarchal structure of the state and redefine the male and the female and the power roles underlying such definitions.

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60. *See supra* note 36.

61. *Id.*

62. *See Morgan, supra* note 59, at 80.

#### IV. THE SPANISH CONSTITUTIONAL COURT ON GENDER PARITY AS CONSTITUTIONALLY ENTRENCHED: BETWEEN SUBSTANTIVE EQUALITY AND DEMOCRATIC REPRESENTATION

As we saw in Part I above, the Spanish Organic Law 3/2007 on Real Equality of Women and Men introduced the principle of a balanced presence of men and women in political representation through a system of gender quotas on electoral ballots, whereby these must include at least 40% of candidates of each gender. It introduced, in other words, what we could call a system of gender parity with a margin of flexibility, as it relies on minimum presence percentages for each sex, like the quota system, but endorses percentages that come very close to 50%.

The Spanish Constitutional Court faced the constitutionality of this law as a result of a double challenge. One was put forward by a judge who confronted the ironic question of whether the invalidation of two electoral lists of the conservative Popular Party (Partido Popular) containing more than 60% female candidates, in application of the new statute, was in conformity with the Constitution. The other was an abstract challenge brought forward by fifty conservative congressmen. In a nutshell, the plaintiffs questioned whether the new law contradicted the equality principle<sup>63</sup> in relation to the right to participate in public affairs,<sup>64</sup> the freedom of association in the context of political parties,<sup>65</sup> including their right to self-organization, and their ideological freedom and free speech.<sup>66</sup> More broadly speaking, the plaintiffs also questioned whether the law contradicted the principle of the unitary sovereignty of the Spanish nation.<sup>67</sup> The Constitutional Court faced these questions and challenges in its Decision 12/2008, January 29, 2008, concluding by eleven votes to one, that there is no such contradiction and upholding the statutory provision.<sup>68</sup> Interestingly, it did so on the basis of two different lines of arguments that cross-cut each other. One relies on considerations of the issue of democratic representation; the other on considerations pertaining to fundamental rights. The former set the background for the decision; the latter, on the other hand, carried the weight, or at least most of the weight, in response to specific claims.

The Court's point of departure is the notion that the provisions under examination are not affirmative action measures that rely on a majority/minority logic and aim to favor an underrepresented minority. Rather, they are measures that account for the uniqueness of sex as a differentia-

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63. C.E. art. 14.

64. C.E. arts. 23 & 68.5.

65. C.E. arts. 6 & 22.

66. C.E. arts. 16 & 20.1.a.

67. C.E. art. 1.2.

68. STC, Jan. 29, 2008 (STC 12/2008).

tion criterion and introduce equality in political representation through bidirectional mechanisms that favor neither men nor women, but that seek a balanced presence of both in electoral lists. Made at an early stage in the decision, these considerations would appear to be the threshold of an analysis of gender parity based on considerations about democracy and the constitutionally endorsed system of democratic representation.<sup>69</sup> Not so. The Court soon turned to the substantive understanding of equality enshrined in Article 9.2 of the CE to make it the touchstone of its decision.<sup>70</sup> Nevertheless, the Court continued to draw on considerations of democratic representation, as substantive equality revealed itself insufficient to justify parity democracy—an insufficiency then discussed by the dissenting opinion, written by Justice Rodríguez Zapata.<sup>71</sup>

The challenged provisions, said the Court, do not compromise citizens' right to vote and stand for elections,<sup>72</sup> as they are not addressed to citizens, but to political parties.<sup>73</sup> Citizens have no right to be included in electoral lists, or to have specific candidates included in them. Suffrage guarantees citizens the right to vote and, if elected, to hold public office. Who is and who is not in an electoral list is a matter for political parties to decide, not for citizens or potential candidates.<sup>74</sup> What gender parity does restrict, on the other hand, is the freedom of political parties guaranteed in Article 6 of the CE.<sup>75</sup> To be sure, and as the Court notes, this freedom is subject to limitations imposed by the Constitution, laws, and the democratic principle. Indeed, the autonomy of political parties is already modulated by the legislature in manifold ways, as when it sets out nationality, age, or residency requirements for valid candidatures or as when it opts for a system of closed and blocked lists (FJ. 5). In this case, the legislator has decided to restrict this autonomy in an effort to address the shortcomings of formal equality and the principle of nondiscrimination recognized in Article 14 and to assert substantive equality in the political field. What remains to be ascertained is whether this restriction passes a test of proportionality, that is, whether it pursues a legitimate aim and is proportionate to that aim.

Now Article 9.2 embodies a commitment to a substantive conception of equality characteristic of a social and democratic state. In so doing, it

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69. *Id.* FJ 3.

70. *See supra* note 13 and accompanying text.

71. *Supra* note 68, FJ 9.

72. C.E. art 23.

73. *Supra* note 68, FJ 3.

74. *Id.* FJ 9.

75. C.E. art. 6 states:

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. Their creation and the exercise of their activities are free in so far as they respect the Constitution and the law. Their internal structure and operation must be democratic.

gives flesh to the principle of equality as a cornerstone of the constitutional system,<sup>76</sup> while at the same time enriching the right to equality and nondiscrimination recognized in Article 14.<sup>77</sup> Although men and women are formally equal, the Court notes, women have traditionally been excluded from the political domain so that it is now the task of public authorities to take proactive measures to ensure that they are incorporated. The Court cites international human rights instruments such as the Convention on the Elimination of All Kinds of Discrimination Against Women and different sources of European law to show that both are equally committed to this notion of substantive sex equality.<sup>78</sup>

Article 9.2, therefore, offers constitutional support to the limitation of political parties' autonomy under Article 6. As the Court goes on to point out, the breadth of substantive equality enshrined in this provision sets the Spanish constitutional text apart from the French and the Italian Constitutions before they were amended to allow for electoral gender quotas or parity. Indeed, Article 9.2 projects itself into the domain of political participation and mentions the duty of the state, not only to remove obstacles of any kind to the equal participation of all, including obstacles of a normative nature, but also actually to promote and facilitate true equality. This is why, the Court concludes, no constitutional reform is required for the introduction of electoral quotas, as was the case in France and Italy.<sup>79</sup>

The limitations imposed on political parties and Article 6 of the CE pursue, therefore, a legitimate constitutional aim under Article 9.2. They do so, moreover, through a means that is proportionate to this aim, i.e., the mandatory balanced presence of women and men in electoral ballots, with a margin of flexibility that adds to the proportionality of the measure. Interestingly, and somewhat inconsistently, the Court further supports the proportionality of the provisions in question by recalling that they apply equally to men and to women, the inference being that, strictly speaking, they do not contain an affirmative action type of measure.<sup>80</sup>

None of this, the Court explains, entails a violation of the freedom of ideology and of expression of political parties respectively.<sup>81</sup> To begin with, parties are not required to share the values that underlie parity democracy. They can even pursue a change in the electoral laws on gender parity. All they must respect is the mandatory balanced composition of

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76. "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." C.E. art. 1.1.

77. "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." C.E. art. 14.

78. *Supra* note 68, FJ 2.

79. *Id.*

80. *Id.* FJ 5.

81. *See* C.E. arts. 16 & 20.1.a.

electoral lists destined to ensure men and women's equal enjoyment of their right to stand for elections.<sup>82</sup> Even if we consider this to be a limitation of the parties' freedom, moreover, it is a limitation justified under Article 9.2 as a proportionate means towards a legitimate aim. Finally, on the basis of Article 9.2, the Court also rules out a violation of the right to equality in the enjoyment of the right to run for office, as the dissent argues there is.<sup>83</sup>

Thus far the analysis has focused on the confrontation between political parties' rights to self-organization and ideological freedom, on the one hand, and the promotion of women's substantive equality in the enjoyment of their right to run for office. This confrontation is, however, not all the decision is about. If it were, it would mean that electoral gender parity is exclusively seen as an affirmative action measure, something the Court's decision excludes both explicitly and implicitly. As the dissent points out, if this was only an affirmative action measure to ensure women's substantive equality it would make sense for it to have a temporary nature, something it does not have. If the purpose of the legislation was simply to maximize women's opportunities to get elected, it would also be rather ironic, as the dissent also brings up, to abolish electoral lists on the grounds that they contained too many female candidates. At stake, in the end, is something of a different nature, namely the democratic representation model implicit in gender parity.

The Court seems aware that this must indeed be the case and, as we have seen, affirms this much earlier in the decision.<sup>84</sup> That democracy is at stake is clear in the way the Court addresses the freedom of political parties. When examining the contours of the freedom of political parties, says the Court, one must take into account that parties fulfill a double function: they actualize people's right to association, but far from being just one more kind of private association, they are also essential instruments for the functioning of the democratic system.<sup>85</sup> As public actors, they can be put to the service of actualizing the notion of substantive equality in the political field, a notion that, the Court insists, applies to both sexes and that, it points out, does not only aim at promoting everyone's participation in public affairs, but more fundamentally defines the very concept of citizenship.<sup>86</sup>

However, the Court falls short of elaborating on arguments concerning democratic representation or explaining which democratic representation model endorses parity. The Court looks into the principle of unitary repre-

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82. *Supra* note 68, FJ 6.

83. *Id.* FJ 9 (citing C.E. arts. 14 & 23).

84. *Id.* FJ 3.

85. *Id.* FJ 5.

86. *Id.* FJ 4.

sentation and declares it to be consistent with parity.<sup>87</sup> To be sure, the Court celebrates the greater closeness in identity between citizens and their representatives that parity brings about,<sup>88</sup> but it does not endorse a mirror representation model, nor does it regard parity as introducing such a model. It argues that the criterion of sex is both a natural and a universal criterion that does not divide the population along a majority/minority line, but into two quantitatively equivalent groups, the aim being, under Article 9.2, that such balance is reflected in the representative political bodies.<sup>89</sup> Yet it does so from within the logic of unitary, general representation, the implication being that there is something unique about sex that distinguishes it from other factors of social differentiation, such as race or age and that allows it to be taken account of in political representation.

Nevertheless, the Court does not elaborate on why parity is compatible with unitary representation. Nor does it explicitly say how exactly the criterion of sex is politically relevant. The closest it comes to such an explanation is to affirm that:

a system of political representation articulated around the necessary division of society between the two sexes is perfectly constitutional, because such balance is decisive for the definition of the content of norms and acts which are to emanate from such political bodies, not in the sense of their ideological or political content, but rather in the sense of their precontent or the background upon which every political decision must rest, namely the radical equality between men and women.<sup>90</sup>

The challenged provision, the Court says, is not about measures that compensate women for their historically discriminated condition but rather about bidirectional measures that apply similarly to men and women.

In the face of this lingering ambiguity, the strategy of the dissenting opinion is twofold. On the one hand, it reclaims the validity of the traditional general representation model that came hand in hand with the liberal state inaugurated with the French Revolution and that supports formal equality. It stresses that only the unitary elected representation model is constitutionally enshrined and considers mandatory gender parity a departure from this model that would require a constitutional amendment—as has been the case in other countries. Without such an amendment, the dis-

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87. *Id.* FJ 10.

88. *Id.* FJ 5.

89. *Id.* FJ 7.

90. *Id.*

sent further argues, mandatory gender parity violates the right to equality in relation to the right to stand for elections.<sup>91</sup>

On the other hand, the dissenting opinion points out the many weaknesses of relying mostly on substantive equality to justify parity, as the Court does.<sup>92</sup> To this end, it links substantive equality to the adoption of affirmative action measures and raises a series of questions: Why is affirmative action implemented only with respect to sex and not other politically marginalized groups? Why are temporary measures not sufficient? Why is gender parity strictly necessary, there being other measures that could also enhance women's equality, hence their opportunities in the public domain? The dissent points to measures that allow women to reconcile work and motherhood, that combat gender violence, sexual harassment, or any form of discrimination at work, in the media, or in the educational system. Moreover, political parties can ensure the inclusion of women in their lists and could possibly be encouraged to do so, e.g., through financial aid from public authorities in proportion to the percentage of women on their ballots. In the end, how can a bidirectional rule that could in some instances have restrictive effects on women in some lists qualify as an affirmative action measure in favor of women's effective equality with men?

As an affirmative action type of measure, gender parity begs questions such as these. In order to be addressed successfully, they must be faced, not from the perspective of substantive equality, but from the logic of a model of democracy that, unlike the liberal model endorsed by the dissenting vote, embraces parity while respecting the principle of unitary representation to which the Constitutional Court remains faithful. To this end, we contend, they must be addressed from the logic of a parity democracy model.

It might have taken too much conceptual sophistication or courage for a Constitutional Court to elaborate on the exact profile of a parity democracy model to justify gender parity. Yet as long as the questions of democratic representation raised by gender parity remain unaddressed, justifications based on the logic of rights, namely on the logic of substantive equality and affirmative action, will remain open to criticisms of the kind raised by the dissenting vote above. The majority opinion rightly brings gender parity to the realm of questions concerning the constitutionally-sanctioned model of democracy, representation, and citizenship. In order to respond to the criticisms it raises, a move needs to be made from the liberal approach to democracy the majority opinion endorses—one that leaves the implications of the sexual contract unquestioned—to parity democracy as a move away from those implications. Rightly understood,

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91. C.E. arts. 14 & 23.

92. *Supra* note 56, FJ 9.



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democracy requires that such a move be made and the implications of the sexual contract corrected. This leaves us with gender parity as a requirement not so much of substantive equality as of a consistent understanding of democracy. Gender parity is justified, in sum, as a democratic requirement.