



European
University
Institute

DEPARTMENT
OF LAW

WORKING PAPERS

LAW 2015/21
Department of Law

Thirty years of gender quotas in Germany:
Policy adoption between mainstreaming
and minimal compliance

Sabine Lang

European University Institute
Department of Law

**THIRTY YEARS OF GENDER QUOTAS IN GERMANY:
POLICY ADOPTION BETWEEN MAINSTREAMING AND MINIMAL
COMPLIANCE**

Sabine Lang

EUI Working Paper **LAW** 2015/21

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author. If cited or quoted, reference should be made to the full name of the author, the title, the working paper or other series, the year, and the publisher.

ISSN 1725-6739

© Sabine Lang, 2015

Printed in Italy
European University Institute
Badia Fiesolana
I-50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Legal Struggles and Political Mobilization around Gender Quotas

This paper is part of a case study series stemming from a project, "Gender quotas in Europe: Towards European Parity Citizenship?" funded by the European University Institute Research Council and Jean Monnet Life Long Learning Programme under the scientific coordination of Professors Ruth Rubio-Marín and Eléonore Lépinard. Gender quotas are part of a global trend to improve women's representation in decision-making bodies. In the past decade they have often been extended in terms of the numbers to be reached (40 or 50% instead of 30%), and in terms of the social field they should apply to (from politics to the economy to the administration). The aim of the project is to assess and analyse this global trend in the European context, comparing the adoption (or resistance to) gender quotas in 13 European countries in the fields of electoral politics, corporate boards and public bodies.

The case-studies in this series consider the legal struggles and political mobilization around Gender Quotas in Austria, Belgium, Denmark, France, Germany, Italy, Norway, Poland, Portugal, Slovenia, Spain, Sweden, and the U.K. They were presented and discussed in earlier versions at a workshop held in September 2014 at the EUI. Based on the workshop method, all working papers have reflected on similar aspects raised by their country case, concerning: 1) domestic/national preconditions and processes of adoption of gender quotas; 2) transnational factors; 3) legal and constitutional challenges raised by gender quotas in both the political and economic spheres; and 4) new frontiers in the field.

The working papers will be also made available on the blog of the workshop, where additional information on the experts and country information sheets can be found, and new developments can be shared. <https://blogs.eui.eu/genderquotas>.

Author Contact Details**Sabine Lang**

University of Washington

Salang@u.washington.edu

Abstract

This paper reviews three decades of gender quota policies in Germany and assesses policy adoption in parties, public administration, as well as on corporate and public boards. Germany was an early adopter of quotas for women in political parties and in public administration. Even though both measures were controversial when first enacted in the 1980s and early 1990s, they have since become rather low-profile gender equality strategies. A recent initiative to adopt quotas for women on corporate and public boards, by contrast, produced substantial public discussion. The mainstreaming of positive action plans in public institutions that include decision quotas, fixed quotas and goal quotas has given gender advocates formally strong leverage to advance a gender equality agenda. At the same time, a culture of minimalist compliance has pervaded the public sector and parties. Male institutions and organizations tend to exhibit more passive resistance than vocal opposition, thus making it difficult for feminists to engage effectively with non-compliance. A lack of sanctions as well as intricate strategies to circumvent quota decisions add to a sense among German feminist activists that quotas are one, but by no means the only strategy for gender equality in public life.

Keywords

Germany, quotas, gender equality, corporate board quotas, gender equality law

Table of Contents

INTRODUCTION	1
PARTIES: VOLUNTARY LIST QUOTAS, BUT NO DIRECT CANDIDATE QUOTAS.....	1
QUOTAS IN PUBLIC ADMINISTRATION	9
LEGAL AND CONSTITUTIONAL CHALLENGES.....	11
QUOTAS ON CORPORATE AND PUBLIC SECTOR BOARDS.....	12
CONCLUSION	14
LITERATURE	17

Introduction

This paper reviews three decades of gender quota policies in Germany and assesses policy adoption in parties, public administration, as well as on corporate and public boards. Germany was an early adopter of quotas for women in political parties and in public administration. Even though both measures were controversial when first enacted in the 1980s and early 1990s, they have since become rather low-profile gender equality strategies. A recent initiative to adopt quotas for women on corporate and public boards, by contrast, produced substantial public discussion. The mainstreaming of positive action plans in public institutions that include decision quotas, fixed quotas and goal quotas has given gender advocates formally strong leverage to advance a gender equality agenda. At the same time, a culture of minimalist compliance has pervaded the public sector and parties. Male institutions and organizations tend to exhibit more passive resistance than vocal opposition, thus making it difficult for feminists to engage effectively with non-compliance. A lack of sanctions as well as intricate strategies to circumvent quota decisions add to a sense among German feminist activists that quotas are one, but by no means the only strategy for gender equality in public life.

Upon the Green Party entering Federal Parliament in 1987 with a zippered male-female list system, most political parties established some form of quota in their party statutes – the exception being the Liberal Party. In a parallel mobilization effort since the mid-1980s, feminist insiders in public administrations pushed together with women's movement activists from the center-left Social Democrats and the Greens to support positive action plans with quotas for women in sub-national (*Länder*) public administration. A third area in which mostly soft quotas have been introduced since the early 1990s is state-financed institutions and facilities, and here in particular for the advancement of women professors in the university system. Fourth and most recently, quotas were introduced in 2015 for corporate boards of private businesses (CBQ) as well as for all public boards (PBQ) -- those in which the German state is involved -- from the local, to the subnational and federal level. This latest push for quotas for the corporate sector gained increasing public support after several attempts to foster voluntary compliance by business did not result in substantive increases in women's representation. The German case builds on Holli's generational approach (Holli 2011), showing that a confluence of party quotas and positive action plans in progressive subnational governments paved the way for quotas in public office on the national level, in state-subsidized institutions and on corporate boards.

Parties: Voluntary List Quotas, but no Direct Candidate Quotas

Party quotas have been debated in Germany for more than a century. As early as 1908, Social Democratic (SPD) women had demanded concrete actions to ensure participation of women in all party functions according to their membership percentage. Yet party statutes historically included only the obligatory mention of democratic representation of women without specific proactive measures that would help achieve that goal. Upon the founding of the Federal Republic in 1949, the SPD had 19% women as members, but women held only 9.5% of the Social Democratic parliamentary seats. This ratio got worse during the 1950s and 1960s: In 1972 the Social Democratic fraction in the Federal Parliament had only 5.4% female members (Wettig-Danielmeier/Oerder 2012: 22). It was former Chancellor Willy Brandt who pushed the idea of having a quota for women in parliamentary bodies that matched the percentages of female party members (ibid.: 21). Female party members were initially sceptical. According to the former head of the Association of Social Democratic Women (ASF), they were convinced at the time that their party program as such was sufficient to ensure that women would be advancing through the ranks and that their male members only had to be convinced to give women a chance. Historically, quotas were perceived as undermining individual achievement, and SPD women articulated a trope that has not withered yet: They wanted to be respected on the basis of their own competency.

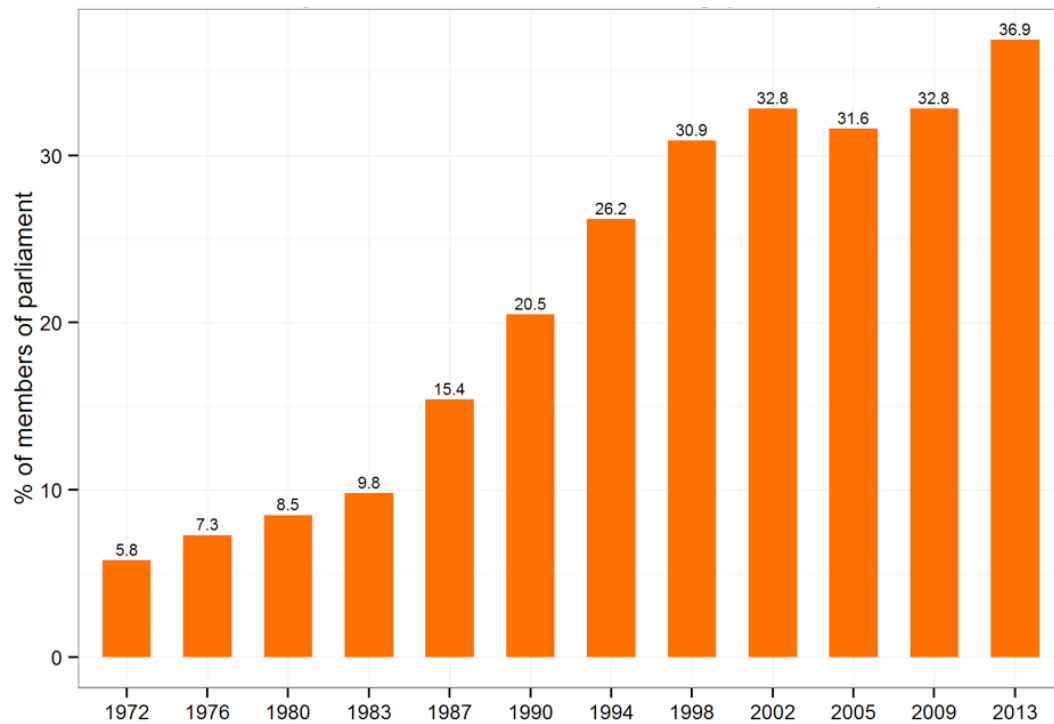
While Social Democratic women still held on to the idea of convincing men rather than legislating equality, the Green Party was founded and entered Federal Parliament in 1987. The Greens established zippered candidate lists in which every uneven seat on every candidate list from the local to national-level elections as well as for party functions needed to be filled with a woman. In the 1986 elections, the Greens were the only party sending more women than men into the Federal Parliament (Lemke 2001). Initially, the party also established a system of having two party leaders, one woman and one man.

Afraid of losing women voters, the Social Democratic Party voted in 1988 with a two-thirds majority of party delegates to adopt quotas as a binding principle. Starting with a 33% goal quota for elections and party office, the SPD moved in 1996 towards establishing a 40 percent quota for both genders in candidate selection and parity in all elective party offices. (Wettig-Danielmeier 2012: 21f.).

Drawing on Murray, Krook, and Opello's framework for analyzing the institutionalization of quotas (Murray/Krook/Opello 2012: 25), the German case exhibits a confluence of all three of the authors' possible explanations for instituting party quotas: The first, that parties adopt quotas when they want to *attract women voters* (see also (Davidson-Schmich 2006; Kittilson 2006; Meier 2004), is clearly present for German Social Democrats as they follow the Green example. *Ideological incentives* were particularly dominant in the Green Party with their focus on general social inclusion of underrepresented constituencies. Yet one can also detect a somewhat *strategic element* in quota adoption (Krook 2006), in particular as Social Democrats were pressured by a more leftist party to sharpen its equality profile.

With the SPD and the Greens courting women voters, the conservative Christian Democratic Union (CDU) was pressured by its own women's organization to address the dismal representation of women within the party. A controversial party conference in 1988 refused to use the term 'quota', but instead created a voluntary 'quorum' of 33% of party list seats and party office seats that should go to women (Lemke 2001). Their Bavarian based ally, the Christian Social Union (CSU), by contrast, refused all statutory equality measures and instead added a paragraph to the party statute stipulating in most general terms that "women have to be considered" (ibid.). The Free Democratic Party, just as averse to quota regulations as the CSU, established that women should be considered according to their party membership. Only with the ascent of the former East German Socialist party (PDS) and their later iteration as 'The Left' (Die Linke) did the push for women's representation gain renewed momentum. The PDS established a 50% quota for party lists as well as candidates and party office, thus pushing the number of women in the parliamentary elections of 1990 to 20.5%, then further to 26.2% in 1994 and 30.9% in 1998. Arguably, German unification and the traditionally stronger involvement of East German women in political affairs contributed to an increased presence of women in politics in the 1990s.

Fig. 1: Proportion of women in German Parliament 1972 – 2013

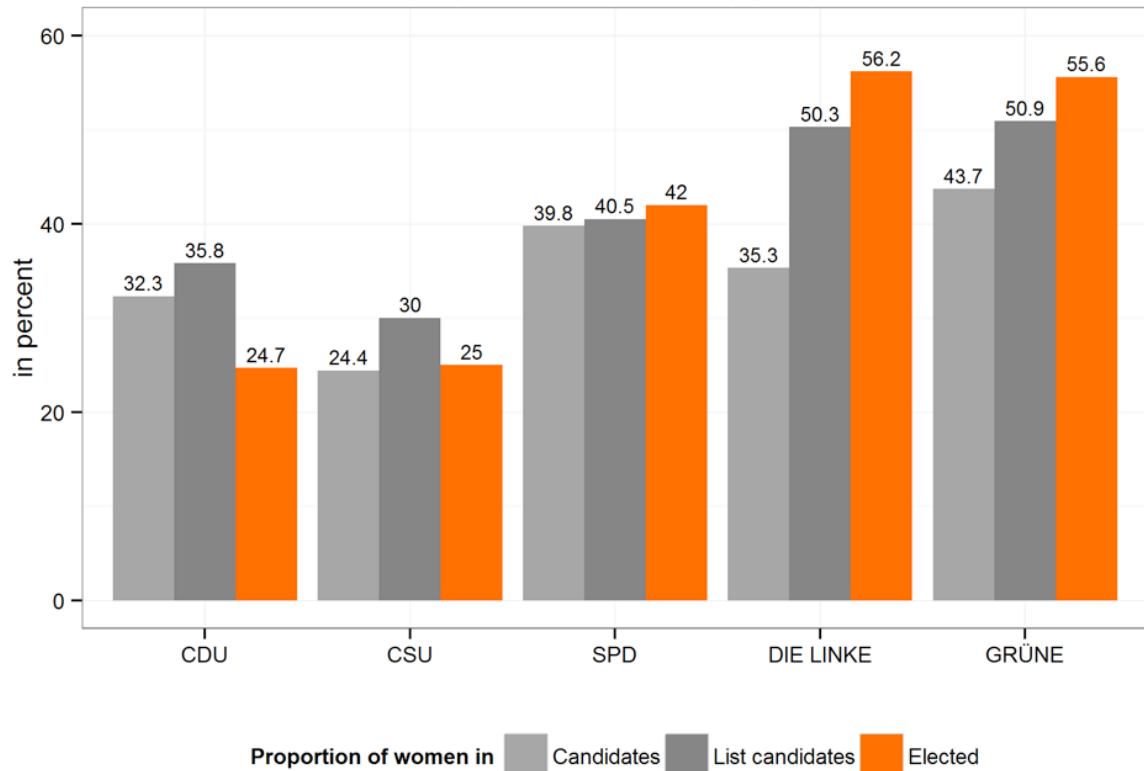


Source: Giebler/Spittler 2014

Yet despite consensus among the major parties that quotas were necessary to break up traditional male party structures and a gendered selection bias, in the decade between 1998 and 2009, Germany could not cut through a roughly one third women glass ceiling in the Federal Parliament. It is only the recent election of 2013 that gave women's representation another push, increasing parliamentary representation by roughly 4% from 32.8% to 36.9%. The most likely explanation for this increase in women parliamentarians is an indirect contagion effect, stemming from Angela Merkel's second term as Chancellor. Even though Angela Merkel was historically opposed to quotas, she might have paved the way for other women in her party as well as in others to enter candidacies (Mushaben 2014).

However, the question remains why a system with strong formal quota commitments by the vast majority of parties has still not achieved equal representation after three decades. Part of the answer lies in the electoral system. Germany's mixed electoral system is an instructive case study for the different impact of proportional and single-past-the-post systems on women's representation. German voters have two votes in every election: the first vote is for a direct candidate in one's district; the second vote is for the party list and it is this latter vote that ultimately determines the percentage of seats that a party has in Parliament. Historically, women have always gained better representation via the second vote; and particularly so since most parties have adopted zippered candidate lists for the second vote. Overall, the percentage of women on party lists tended to be about 10 percent higher than the percentage of female direct candidates. Almost twice as many women were elected by way of the second party-list vote as opposed to the first-past-the-post direct candidate vote (Davidson-Schmich 2014: 87). Yet recent studies indicate that the gap between successful PR and direct candidates is narrowing across Germany. In the recent 2013 federal elections, 30 percent of the major parties' direct candidates were women as opposed to 27 percent in the 2009 elections (Davidson-Schmich 2014: 86).

Fig. 2: Proportion of Women in German Parliament 2013, by party

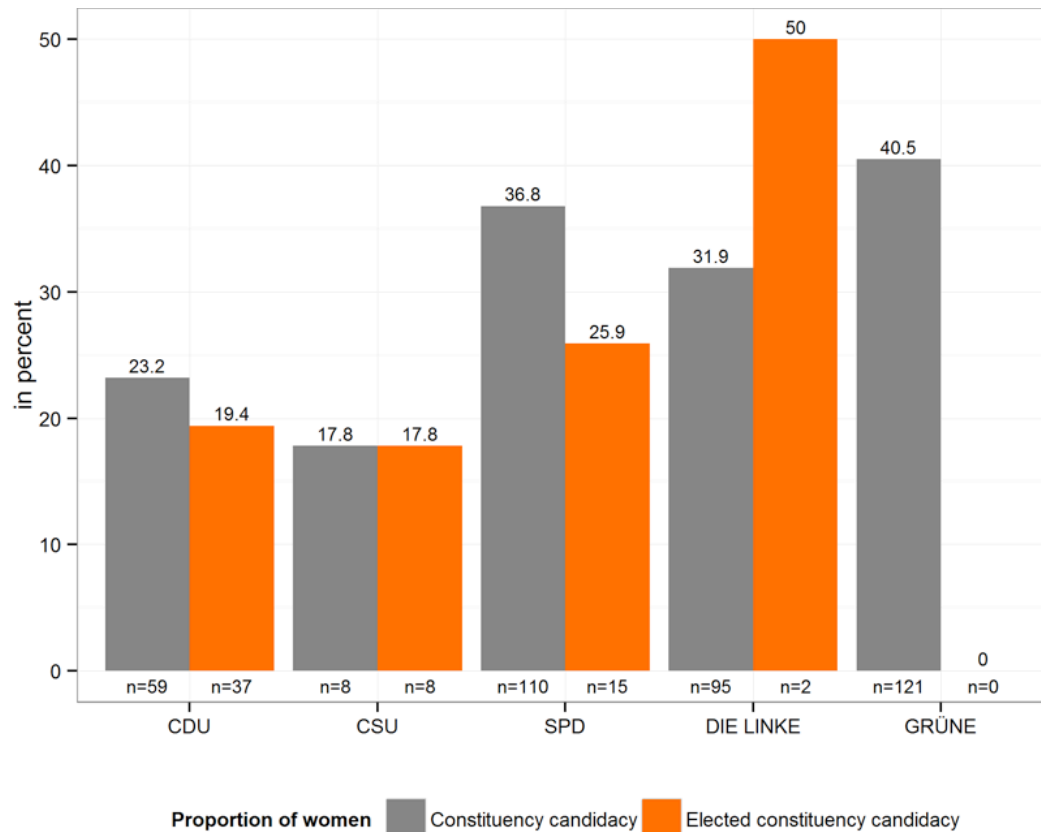


Source: Giebler/Spittler 2014

The proportion of women as overall candidates, list candidates, and elected candidates differs quite dramatically between parties. Whereas the conservative CDU and CSU send proportionally fewer women into their party fractions than they nominate as candidates, the Left Party and the Green Party send proportionally more women into parliament than they nominate as candidates. Only the Social Democrats have a fairly balanced scheme of female candidates and female parliamentarians. A second striking feature of this graph is that in all parties, there are many more female list candidates than overall candidates, pointing to the fact that it is still more difficult for women to be nominated for a direct candidacy in a first-past-the-post electoral scheme.

This point can be also illustrated by looking at the proportion of women in the 2013 Federal Elections who were constituency (or direct) candidates. None of the parties did fulfil their quota in terms of nominations for direct candidates. And only the Conservative Social Union (CSU), which in many parts of Bavaria has a monopoly on the vote, managed to get all their eight female direct candidates election. The Greens, by contrast, who had nominated 121 direct women candidates, did not get a single woman elected.

Fig. 3: Proportion of Women as Direct Candidates 2013, by party



Source: Giebler/Spittler 2014

These issues of non-compliance can become more pronounced on the subnational level of Germany's federal system. An instructive case for differences in compliance between national and subnational entities are the recent May 2014 elections to the European Parliament. All parties aside from the conservative CDU decided on national candidate lists. The 90 Social Democratic, the 26 Green, and the 20 *Linke* (Left) candidates were zipped alternately along the gender dimension.¹ The CDU, by contrast, decided not to organize candidate selection nationally. Left to their own devices, subnational Land CDU chapters missed the 33% quorum by 10 percentage points – only 23.4% of candidates were women.

¹ <http://www.europawahl-bw.de/kandidaten.html>.

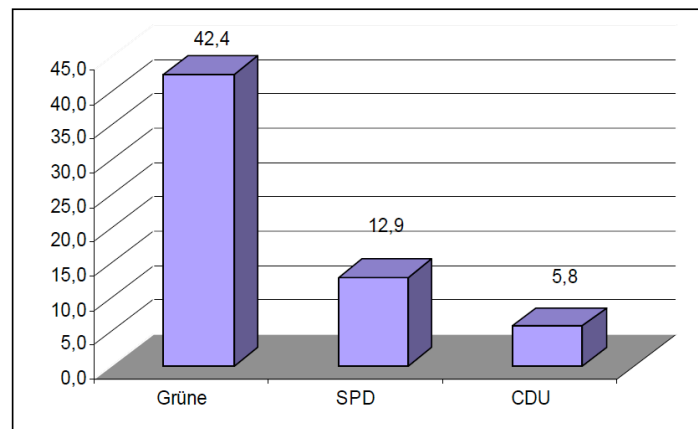
Table 1: Christian Democratic Union Candidates for EU Parliament Election May 2014

State	Male candidates	Female candidates
Baden-Wuerttemberg	9	1
Bavaria	7	5
Berlin	2	1
Brandenburg	3	0
Bremen	2	1
Hamburg	3	1
Hessen	6	3
Mecklenburg-Vorpommern	2	0
Lower Saxony	5	3
North Rhine-Westphalia	9	4
Rhineland-Palate	3	2
Saarland	2	1
Saxony	3	1
Saxony-Anhalt	2	0
Schleswig-Holstein	3	1
Thuringia	3	2

Source: Party lists of CDU at <http://www.cdu-bruessel.org/index.php?ka=1&ska=1&idn=212> (access 1/8/14). Compiled by author.

The rich Southern state of Baden-Württemberg had only 10% female conservative candidates; the former East German state of Brandenburg had none. While one could argue that such a flagrant disrespect of a party's quorum might be a particular predicament of a conservative party, even states that historically have been dominated by the Social Democrats exhibit substantial compliance problems, in particular on the district and communal level. In North-Rhine Westphalia, a traditionally Social Democratic state and one of the early adopters of decision quotas for public administrators, all parties, including the SPD, exhibit little compliance on the district level.

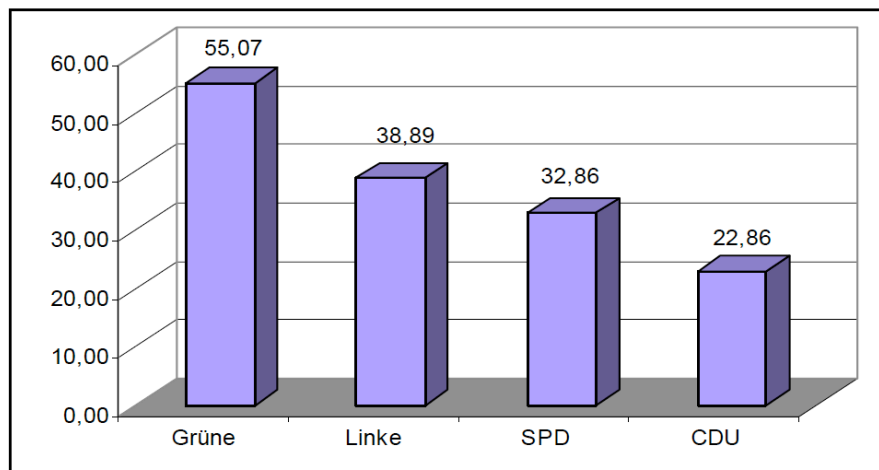
Fig. 4: Percentage of districts in North-Rhine Westphalia where parties follow their quota rules



Source: Holtkamp/Wiechmann/Schnittke 2009: p. 48.

In effect, not even the Green Party enforces its quota regulation on a consistent basis on the local district level. A similar dynamic is evident in larger cities.

Fig. 5: Percentage of large cities in which the parties follow their quota/quorum regulations



Source: Holtkamp/Wiechmann/Schnittke 2009: p. 46.

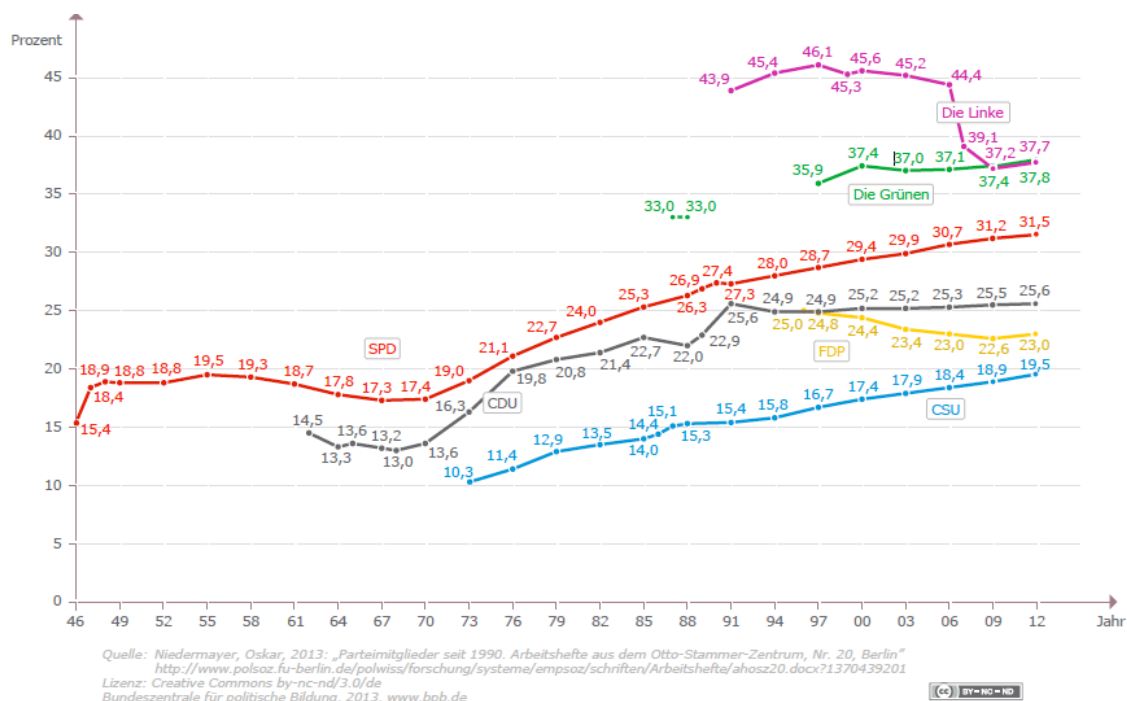
While parties with ‘zipper systems’ in candidate selection (SPD, *Linke*, Greens) do generally better than parties with just quorum guidelines (CDU, and, most recently, the CSU), they have obvious compliance problems, even in urban areas. Women lack representation on the local and communal level, and particularly in the most conservative states with conservative parties in power. In Bavaria, out of a candidate pool with roughly 25% women on the local level, even fewer women are being elected (Bavarian State Office for Statistics and Data Management 2014). Out of 31626 local council representatives in Bavaria in 2014, only 5661 (17.9 percent) are women. In Baden-Württemberg, the local council elections of May 2014 brought roughly 25% women into Councils. The percentage of women in larger regional Bavarian Councils is 23.3 percent and in cities it is 32.2 percent. On the highest level of subnational positions, women only have very small shares in Bavaria: Of 71 District

Chief Executives in Bavaria only 2 are women (2.8 percent), and out of 1101 full-time mayors there are only 65 female (5.9 percent).²

Compliance and sanctions are issues of rising concern among German feminist politicians and gender advocates. As comparative research has established that quotas work best if adequate and compulsory mechanisms for compliance as well as stringent means for sanctioning non-compliance are in place (Davidson-Schmich 2006: 212; also Dahlerup 2006), the challenge for women and feminist party activists is clearly how to organize compliance better. The Social Democratic Women's Organization is demanding that lack of compliance be sanctioned with the withdrawal of party funds. Others argue that candidate seats should remain open until a woman is being selected in cases of underrepresentation.

On the other side of the debate, there is increasing frustration among male party officials who question the rationale of quotas being a means of societal representation. Instead, they demand a quota-lite by favoring a cascade model based on party membership. With women traditionally exhibiting much lower party membership than men, this would substantially reduce the number of women candidates particularly in the center-left parties.

Fig. 6: Percentage of women party members, in percent, 1946 to 2012



Source: Niedermayer 2013

The Social Democrats, who operate with a 40% quota, have only 31.5% female party members. Both the Green Party and the Left Party have a 50% quota, but only 37% female party members.

Within the Social Democratic Party, a pamphlet by a male party executive in 2011 titled “Why 25 years of quota are enough” (Funken 2011), brought the issue to attention. Funken argues that when the SPD established the quota in 1988, it did so on the basis of a deadline for 25 years, after which the quota would be abolished. Ten years before it was supposed to run out, a party convention abolished the deadline stipulation, arguing that not enough progress had been achieved. The fact that the party

² For more information see http://www.pnp.de/themen/2014/kommunalwahlen/1225966_Kommunalwahl-Nur-jeder-fuenfte-Kandidat-ist-eine-Frau.html

leadership decided in 2013 to also institute an obligatory quota for direct candidacies is attacked by Funken as one more step in the wrong direction. Scores of men, so the interpretation of the author, have left the party and only their departure has increased the percentage of female party members. The quota is being blamed for voter disenchantment with the party.

Yet Funken's position is currently a minority position. Public debate centers on the question why the mainstreaming of quotas in most parties has induced little compliance and how to implement policies 'with teeth' (i.e. more effective sanctions).

Quotas in Public Administration

Initially, quota regulations in Germany were not based on public mobilization, but were the result of inner-administrative and parliamentary pressure by femocratic insiders. Early institutionalization of women's policy agencies on the subnational state level fostered awareness of women's underrepresentation in public administration and civil service of the nine West German states. Between 1989 and 1998, quota diffusion occurred across Germany: decision quotas combined with goal quotas were embedded in policies to establish plans for women's advancement on all levels of public administration (Rodriguez Ruiz/Sacksofsky 2005: 157). When the city-state of Hamburg established the first state-level advancement plan for women on 1.1.1984,³ it already included language for preferential treatment for women in hiring and promotion in case of equal qualification with men. The first comprehensive women's equality law was created in North Rhine-Westphalia in 1989, combining a decision quota with a goal quota of 50% for women employees.⁴ The left-leaning city states of Berlin, Bremen, and Hamburg followed in 1990 and 1991, also with combined decision and goal quota regulations, stipulating that in cases of equal qualification and professional achievements, women should be hired up to a 50% participation on the entry level and according to the percentage of women in the next lower ranks on higher level promotions, thus being an early iteration of the cascade quota model. Particularly noteworthy for the time is paragraph 9.2 of the Hamburg Law of 1991. It defined qualification not merely as job related performance, but asked public employers to consider experiences from family work as part of their employment decision.

Within a decade between 1989 to 1998, all German States established Women's or Gender Equality Laws with some stipulations related to an attempted quota of 50% women in public administration.⁵ Most notably, it was feminists operating within the subnational state structures and backed up by women's movement activists who pushed for gender equality laws. On the federal level, where neither femocratic leverage nor outside pressure was as strong as on the subnational level, it took post-unification pressure to get traction. After unification, Eastern German policy positions on women's equality added pressure to establish stronger equality legislation in unified Germany. The revision of article 3 of the German Basic Law in 1994 included a provision that required government to take positive action against underrepresentation of women. This revision also resulted in the First Federal Equality Law for the Federal Public Administration and the Court System (FFG Women Equality Law). The FFG included provisions for equal representation of women on all boards where the federal state is involved (Article 11 FFG: Federal Board Recruitment Law). In 2001, the FFG was amended into a Federal Equality Law BGleG (BMFSFJ 2011: 9). Article 8 of this BGleG stipulates that in professional areas where women are underrepresented and in case of equal qualification, women have

³ 'Richtlinie zur Förderung von Frauen' of 1/1/84.

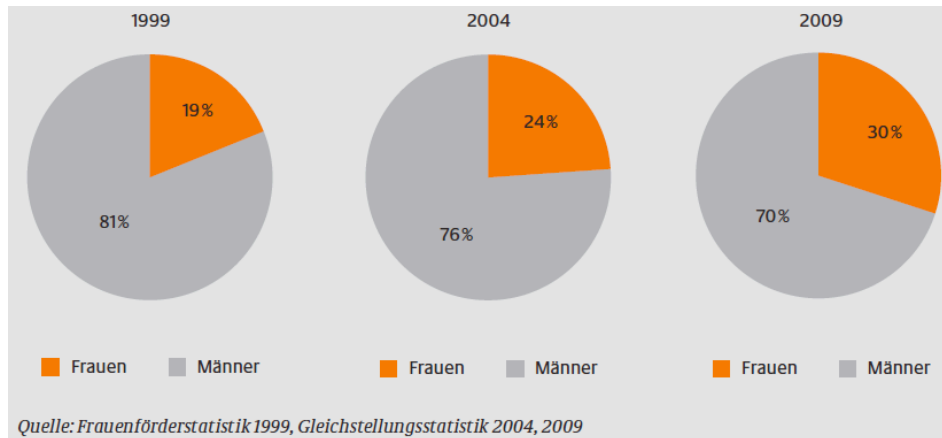
⁴ Bei gleicher Leistung, Eignung und Befähigung sind Frauen bei Einstellungen und Beförderungen in den Bereichen zu bevorzugen, in denen sie unterrepräsentiert sind. Entscheidungen zu Gunsten von Männern sind nur in Ausnahmefällen bei Vorliegen schwer wiegender individueller Gründe möglich (Öffnungsklausel).

⁵ 1989: North-Rhine Westphalia; 1990: Bremen, Berlin; 1991: Hamburg; 1993: Hessen; 1994: Brandenburg, Mecklenburg-Vorpommern, Lower Saxony, Saxony, Saxony-Anhalt, Schleswig Holstein; 1995: Baden-Wuerttemberg, Rhineland-Palatinate; 1996: Bavaria, Saarland; 1998: Thuringia (based on Guetzkow et al. 2003: pp. 29-30).

to be selected unless there is evidence of reasons that would advantage the male candidate⁶. This latter clause is a direct result of a decision by the European Court of Justice from 1995, in which a male contender had sued the state of North Rhine-Westphalia and had won on grounds that he had a family and thus more potential hardships from not getting the position than an equally qualified female candidate. This ‘social opening clause’ has since pervaded all state and sub-national equality measures.

With the Federal Equality Law, the number of women in leadership positions of the Federal Administration has slowly increased to now 30%.

Figure 7 Percentage of Women in Federal Administrative Leadership Positions



Source: BMFSFJ 2011: 28.

Yet if one breaks down the category of ‘leadership position’ and focuses on the most prestigious and influential offices, the picture is not quite as rosy: In 2009, only 3% of Deputy State Secretaries in Federal Ministries were women and only 14% of Administrative Directors (*Abteilungsleiter*) were female (ibid BMFSFJ 2011: 32). A recent legal expertise on the practices of implementing quota regulations commissioned by North Rhine-Westphalia (Papier/Heidebach 2014) stipulates that public offices have adapted to the current policies by simply not letting cases of equal qualification materialize. In the day-to-day practices of public administration hiring, the criteria for jobs and advancement are being micro-adjusted to a degree that cases of equal qualification between a male and a female applicant are systematically avoided. The Papier Expertise suggests that alternative ways of women’s advancement be considered and in particular the legal language concerning sanctions for non-compliance be firmed up.

The federal law to increase women’s representation on federal boards and on boards with federal participation (BGremBG 1994) shows equally slow traction. The Law stipulates that the federal level has to actively take action to ensure equal representation of men and women on public boards (paragraph 1 BGremBG) It calls for a dual nomination of one woman and one men to every open board slot. The deciding level then has to take into account underrepresentation of one sex (paragraph 5 BGremBG). In 2009, 24.5% of the 5673 public board positions that the federal level is involved in

⁶ Where women are underrepresented in leadership positions, their administrative unit has to promote the woman over male colleagues if they are equally qualified, unless there exist considerations pertaining to the competitor that outweigh this clause. (Translation SL for: Fuer Leitungsfunktionen gilt: Sind Frauen in einzelnen Bereichen unterrepraesentiert, hat die Dienststelle sie bei beruflichem Aufstieg bei gleicher Eignung, Befaeigung und fachlicher Leistung (Qualifikation) bevorzugt zu beruecksichtigen, sofern nicht in der Person des Mitbewerbers liegende Gruende ueberwiegen) (see. paragraph 8, BGleiG)

were occupied by women. If one would discount the 56.9% female representation on the boards of the Federal Ministry for Family and women this figure would easily fall below 20% (BMFSFJ 2011: 130). Thus, we see a similar lack of enforcement capacity of a legal framework that lacks effective sanctions.

Legal and Constitutional Challenges

It was women's movement insiders who originally pushed for Germany's early quota regulations in parties and in public office. They acted in response to a political and social culture that traditionally harboured a strong male breadwinner orientation and lacked behind other European countries in equality law formulation. In the 1970s and 1980s, German feminists fought an array of legal stipulations that had discriminatory content, such as a provision in the Civil Code, removed only in 1977, that formally allowed women to only take up employment with consent of their husbands. Also until 1977, women were required to take their husband's name at marriage and were obliged by way of civil statute to do the housework. Protective legislation, such as women not being allowed to work night shifts and incentives for mothers to stay home with young children, spoke of a politics of difference. This difference-approach to women's rights was promoted not just by the ruling conservative party, but had supporters in trade unions and in the Social Democratic party.

Change emerged with the strengthening of sub-national *Länder* Social Democratic governments of the early 1980s and with the advent of the Green Party. Whereas the voluntary quotas in parties were never legally challenged, quotas within positive action plans for subnational public service (and later for the federal level public administration) were controversial. In the 1980s an impressive body of legal texts still tried to prove positive discrimination unconstitutional (see Weingärtner 1988: 14). It was an expertise for the city-state of Hamburg, commissioned by one of the pioneering women's policy agencies in the Federal Republic that changed the debate in 1986. Here Ernst Benda, the former head of the Federal Constitutional Court, declared that the state had some leeway under Art.3 of the Basic Law to implement gender equality in the German social welfare state (Benda 1986).

Article 3 of the German Basic Law thus is the foundation for the German quota laws and regulations, stating that men and women should have equal rights ("*Männer und Frauen sind gleichberechtigt*"). After unification and with pressure from a cross-party coalition of women parliamentarians and in particular also former East German women politicians, the article was amended in 1994 to include a stronger equality mandate for the state. Article 3.2 now reads (2) "Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist."⁷ Even though some legal scholars argue that Article 3.3 disqualifies any strict quota regulations by stipulating "(3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability", the legal consensus over time is that the quota in public service is not a general 'favour' but a decision mechanism in case of equal qualification in order to advance the underrepresented sex.

With the German States moving towards the establishment of positive action laws for their public administrations, and with the help of feminist lawyers who interpreted the 1994 amendment to article 3 as a strong message to adopt positive action towards equality, the focus of public debate turned towards what kind of quota regulations to establish. Initially, states put forward moderate decision quotas in case of equal qualification. Later, some states stipulated goal quotas to be reached within a set time on different levels of administrative jobs (Berghahn 2011: 10; Geissel 2013).

⁷ Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 21 July 2010 (Federal Law Gazette I p. 944).

In several cases, male civil servants sued and cases went to the Federal Constitutional Court as well as to the European Court of Justice (ECJ). Until 2005, the ECJ decided four cases on gender quotas, three of them being put forward from Germany. All three became landmarks for German quota law: In the “Kalanke” case, where a male job contender felt victimized by quotas in hiring, the ECJ ruled in 1995 that the strict equal opportunity law in the state of Bremen violated European law, because it provided for an automatic preference for women in case of equal qualification – an automatism that the Court argued discriminated against men. The Court demanded that quota laws needed hardship clauses and each decision needed to be based on an evaluation of the specific circumstances of the individual applicant. The Kalanke case was widely scrutinized across Europe; it was the first decision by the ECJ on a quota regulation in an EU-member state. Women’s rights advocates in Germany and beyond implored this ruling as initiating a backlash against positive action plans in general and quotas in particular.

In 1997, a second German case involving quotas in civic administration went before the ECJ. In the “Marschall Case”, the Court did not reject quota regulations within the North Rhine-Westphalian positive action plan, arguing that as long as the decision for preferring a woman is taken on a single case basis (“*Einzelfallprüfung*”) considering the merits of each individual candidate, quotas are legal. Since the positive action plan of North Rhine-Westphalia included such a single-case provision, the Court upheld lower-court decisions and confirmed the view that “equal employment policies could be build on active preferential treatment of women”. The Marschall Case since has become the litmus-test for positive action plans and quota regulations across the country.

Finally, in 2000, the ECJ upheld the legality of decision quotas, goal quotas, as well as fixed quotas for training positions in the Hesse Statute. The Court argued that since the Statute did not give unconditional preferential treatment to women and utilized fixed quotas only for very limited purposes, it operated within European Law.

On the federal level, neither the Federal Equal Opportunities Law of 2001 nor the General Equal Treatment Act (also called antidiscrimination law) of 2006 had quota provisions. Only with the Federal Equality Act (*Bundesgleichstellungsgesetz*) of 2009 did Germany establish decision quotas for women in federal public administration. The 2009 law also stipulates contract compliance of firms that have contracts with the German state, in effect providing for the first time substantial inroads into the business sector on the federal level.⁸

Quotas on Corporate and Public Sector Boards

Women in higher office in German businesses are far and few between. According to a study by the German Institute for Economic Research (DIW), in 2012 women held only 4% of CEO positions and 13% of corporate board seats in the top 200 German companies (DIW/Holst and Schimeta 2013). The issue had been simmering in German public debate since the early 2000s, but the social democratic Schröder as well as the conservative Merkel governments had been resisting any stark measures, relying instead on what is called a “flexi quota” – in essence a voluntary program by business for business to advance women. In 2010, the German telecommunications company Deutsche Telekom was the first listed corporation in Germany to voluntarily introduce a binding 30% quota by 2015 – but its initiative remained a singular endeavour.

When in November 2012 the EU Commission proposed a 40% quota for the underrepresented sex in non-executive board member positions by 2020 (EU Commission 2012), Chancellor Merkel ordered the Berlin representation in Brussels in blunt language to “immediately – and on diplomatic levels –

⁸ Some *Länder*, such as Berlin, Brandenburg, Saarland and Thuringia, put contract compliance regulations in their Gender Equality Laws.

promote the German position” and ensure the “rejection of the proposed guidelines”.⁹ Whereas the European Parliament voted for the initiative, the Merkel government was able to stop the directive in the Council. Yet Commissioner Viviane Reding’s initiative added momentum and credibility to a sentiment among the majority of *Länder* women’s policy agencies (WPAs) that without a quota, business would not react. In a strong showing of trans-party alliance, on September 21, 2012, the First Parliamentary Chamber, the *Bundesrat*, had already, with the support of two conservative *Länder* Governors, proposed a federal law that would require a CBQ with 20% women on corporate boards by 2018 and 40% by 2023. The *Bundesrat* initiative included heavy fines for noncompliance such as tax increases as well as the shaming factor of public disclosure. Social Democratic *Länder* Hamburg and Brandenburg initiated the law, but it passed the First Chamber with the votes of Conservatives of Saarland and Saxony-Anhalt before being rejected by a liberal-conservative majority in the Second Chamber in April 2013.

Several factors coalesced to create the perfect public storm for the CBQ to travel onto the public agenda. One, two conservative *Länder* did shun party discipline and voted for the social democratic WPA initiative. Two, even within Merkel’s coalition, there existed dissent: The strong female Labor Minister (and former Women’s Minister) Ursula von der Leyen positioned herself against the Women’s Minister Kristina Schroeder and advocated publicly for quotas while the Women’s Minister rejected them. And, three, the EU directive exposed Merkel as a backward-oriented veto power in the European Union. Women’s organizations across the country weighed in and the media, even though at times exploiting the sensationalist character of “The Quota Wars” (German Times), were full of substantive debate. While Merkel’s conservative party tried to reign in their dissenters, the two conservative women governors of the two states that voted for the quota proposal became highly visible public advocates for the law. Ultimately, Merkel could not silence dissenting women within her own party and had to find a way to appease quota supporters while forcing them to reject the Quota Law. A compromise was reached in spring 2013 that entailed writing mandatory quotas for business into the party program for the 2013 election and a quota of 40% to take effect in 2020. When the NYT commented that “in a rare political setback for the world’s most powerful woman, Chancellor Angela Merkel on Thursday found herself forced to give in to a rebellious bloc in her own party” (NYT 4/18/2013), it was left unsaid to what degree the combined force of the *Länder* initiative with EU support and cabinet support by the Labor Minister had provided the seeds for this success. Even if the Merkel government could fend off mandatory quotas before the election in 2013, it was forced to give in to their own women’s lobby and establish quotas by 2020 in case of business inertia.

After the fall 2013 federal election, the quota issue became part of the Grand Coalition negotiations between the Social Democrats and the Conservatives. Merkel was pushed by her own conservative women’s organization to give in to SPD demands for an immediate Quota Law for the Public Sector. The SPD led Ministries of Justice and Women drafted a law that was adopted by the German Parliament in March 2015 and will go into effect in 2016. As of 2016, companies registered on the German stock exchange will be required to have at least 30% women on their corporate and public boards. In case of non-compliance, an ‘empty chair’ policy is enforced until a given seat is being filled with the underrepresented gender. Additionally, about 3500 large businesses will have to submit plans for elevating more women into top corporate positions. Even though this first German CBQ law is being hailed as a step in the right direction, it has its limits: It only applies to about 120 large firms in Germany that are publicly traded and fall under co-determination rules.

According to news reports, this draft law stipulates a 30% gender quota for corporate and public boards to take effect immediately. In case of non-compliance, an ‘empty chair’ policy is being required until a given seat is being filled with the underrepresented gender.

⁹ Op cit. <http://www.spiegel.de/international/europe/germany-to-lobby-against-eu-gender-quota-a-887174.html>, access 12/04/13.

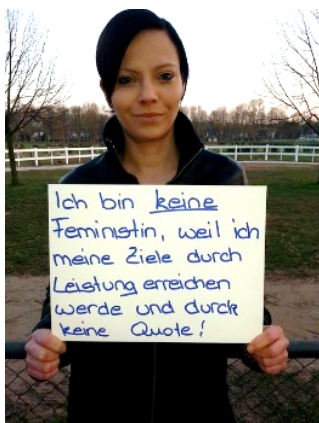
The quota law for corporate and public boards is an impressive success for German quota advocates. Policy learning took place among *Länder* WPA who had long expressed frustration with the slow pace of advancement of women in business. The fact that WPA of conservative *Länder* were willing to part with their party line showcases the ability of federal structures to advance innovation bottom-up, against the explicit policy direction of a strong federal Chancellor. Having an ally in the cabinet (the Labor Minister) and support from over 20 conservative women in Parliament was also crucial in terms of facilitating the original dissent in 2013.

The multilevel agenda setting from the EU Commission, the German Second Chamber, as well as from the federal Labor Minister, all within a few months, coalesced into a strong call for action. The *Länder* WPA in their debate in the Second Chamber cited the developing EU initiative as cause for moving away from conservative laissez-faire politics. Without a federalist structure that allowed conservative governors to endorse a legal quota framework in the First Chamber, pressure on the federal level would not have built to the degree it did. If the EU would not have introduced its own draft law around the same time, *Länder* WPA could not have cited urgency of action in convincing their *Länder* governors to support the law. Thus, supranational combined with subnational pressure was decisive in creating momentum for quotas in the German corporate sector.

Conclusion

Since their inception three decades ago, quota policies have widely permeated German politics and public administration. The path from women's quotas to gender quotas and from voluntary flexi quotas to decision and goal quotas within positive action plans was paved by femocratic insiders in parties and public administration and supported by ECJ rulings. EU initiative has also played a central role in the recent push to establish quotas on corporate and public boards. Beyond the EU, it has been the openings created by subnational federal administrations on the *Länder* level that provided the innovation capacity for quotas and positive action plans. The German case thus illustrates quota diffusion based on (1) feminist commitment, (2) competitive voter orientation of parties, (3) subnational policy experimentation as well as (4) transnational pressures from the EU.

Recently, women in other civic sectors and professional organizations demand the institution of quotas in order to advance parity. Women journalists have founded the initiative 'ProQuote', and women medical doctors the initiative 'ProQuote: Medizin' to demand equal representation in top-level posts of either profession. The German Science Foundation has issued guidelines that women should be awarded equal shares of grants. Programs that advance women professors have been put in place in several *Länder* of federalized Germany and have also been pushed by way of several state programs.¹⁰



However, at the same time German quota laws and regulations encounter increasing vocal resistance, fueled by a stronger anti-feminist mobilization – in particular, but not exclusively, by right-wing parties. A new Eurosceptic party called “Alternative for Germany” which – with 4.7% – barely missed the 5% threshold for representation in the Federal Parliament elections of 2013, runs among other topics on an anti-quota agenda.

This sign of a young AfD member reads: “I am not a feminist because I want to achieve my goals through effort and not through a quota.”

¹⁰ Hochschulsonderprogramme (special programs for universities) since 1991; followed by a specific Women Professors Program since 2007 that established concrete data analysis and specific numerical goals for increasing women's participation on all professorial levels (BMBF 2012).

The party used this slogan in a recent campaign for the European elections and got 7.1% of the German votes.

Regarding existing quota policies, data for both quotas in parties and in public office indicate at best a mixed culture of compliance and in some cases the professionalization of avoidance. Empirically difficult to verify are allegations by gender advocates that the case-based approach to decision quotas has produced spurs of creativity among male bureaucrats in leadership position to draft job descriptions geared towards male candidates they want to advance. Sanctions are either too vague or not strictly enforced and thus do not foster stronger compliance. The lack of sanctions as well as intricate strategies to circumvent quota decisions add to a sense among German feminist activists that quotas are one, but by no means the only strategy for gender equality in public life.

Literature

- Baines, Beverley/Rubio-Marín, Ruth (eds.) (2005). *The Gender of Constitutional Jurisprudence*. New York: Cambridge UP.
- Becker, Ruth/Kortendieck, Beate (eds.) (2010). *Handbuch Frauen- und Geschlechterforschung. Theorie, Methoden, Empirie*. 3rd edition. Wiesbaden.
- Benda, Ernst (1986). *Notwendigkeit und Möglichkeit positiver Aktionen zugunsten von Frauen im öffentlichen Dienst*. Expertise commissioned by the Women's Equality Office, Hamburg.
- BMBF (2012). *Bundesministerium für Bildung und Forschung. Bekanntmachung über die Verlängerung der Bund-Länder-Vereinbarung gemäss Artikel 91b Absatz 1 Nummer 2 des Grundgesetzes über die Fortsetzung des Professorinnenprogramms des Bundes und der Länder zur Förderung der Gleichstellung von Frauen und Männern in der Wissenschaft und Forschung an deutschen Hochschulen*. 6.12.2012 at <http://www.gwk-bonn.de/fileadmin/Papers/Professorinnenprogramm-Fortsetzung-2012.pdf> (accesss 8/2/14).
- BMFSFJ (2011). *Erster Gleichstellungsbericht*. Drucksache 17/6240. Berlin (auch: Gleichstellung in der Bundesverwaltung: Erfahrungs- und Gremienbericht 2010).
- Brandt, Willy (ed.) (1978). *Frauen heute – Jahrhundertthema Gleichberechtigung*. Frankfurt.
- Dahlerup, Drude (2007). *Electoral gender quotas: Between equality of opportunity and equality of result*. Representation 43(2): 73-92.
- Dahlerup, Drude (ed.) (2006). *Women, Quotas and Politics*. New York: Routledge
- Dahlerup, Drude/Freidenvall, Lenita (2008): *Electoral Gender Quota Systems and their Implementation in Europe*, European Parliament PE 408.309, Brussels.
- Davidson-Schmich, Louise K. (2006) *Implementation of Political Party Gender Quotas: Evidence from the German Laender 1990-2000*. Party Politics 12: 211-32.
- Davidson-Schmich, Louise K. (2010) *Gender Quota Compliance and Contagion in the 2009 Bundestag Election* in Eric Langenbacher (ed.) *Between Left and Right: The 2009 Bundestag Elections and the Transformation of the German Party System*. New York, pp. 151-172.
- Davidson-Schmich, Louise K. (2014) *Closing the Gap. Gender and Constituency Candidate Nomination in the 2013 Bundestag Election*. German Politics and Society 32(20): 86-105.
- Davidson-Schmich, Louise K./Kürschner, Isabelle (2011): *Stößt die Frauenquote an ihre Grenzen? Eine Untersuchung der Bundestagswahl 2009*. Zeitschrift für Parlamentsfragen 42(1): 25-34
- Ebert, Berit (2012) *Gleichstellung und Gender in der Jurisdiktion des Gerichtshofes der Europäischen Union*. Eine Analyse unter Berücksichtigung kontemporärer Gerechtigkeitstheorien. Berlin: Logos Verlag.
- European Commission (2012) Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures. COM (2012) 614. Access at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0614:FIN:en:PDF> (13/04/13)
- Fonseca, Sara Claro da/Espírito-Santo, Ana (2008). *Quotenfrauen – Kandidatinnen, Listen- und Direktmandate im deutschen Wahlsystem*. WZB-Mitteilungen, Heft 120, Berlin.
- Freidenvall, Lenita/Micheletti, Michele (eds.) (2013). *Comparisons, Quotas, and Critical Change*. In

- Honor of Drude Dahlerup*. Stockholm.
- Fuchs, Gesine (2006). *Politische Partizipation von Frauen in Deutschland* in: Hoecker, Beate (Hg.), *Politische Partizipation zwischen Konvention und Protest*, Opladen, pp. 235-260.
- Geissel, Brigitte (2013) *Successful Quota Rules in a Gendered Society - Germany* in Drude Dahlerup/Monique Leyenaar (eds.), *Breaking Male Dominance in Old Democracies*. London: Oxford UP, pp. 197-218.
- Giebler, Heike/Spittler, Marcus (2014) *Review of the Bundestagsselection 2013: FDP Out – Women In?* Wissenschafts-Zentrum Berlin für Sozialforschung: Democracy Blog at democracy.blog.wzb.eu/author/gieblerspittler/ (access 13/07/14)
- Hoecker, Beate (2008). *50 Jahre Frauen in der Politik: späte Erfolge, aber nicht am Ziel*. Aus Politik und Zeitgeschichte 24/08.
- Hoecker, Beate/Scheele, Alexandra (2008). *Feminisierung der Politik? Neue Entwicklungen und alte Muster der Repräsentation*. *Femina Politica* 2(8): 9-20.
- Holli, Anne Maria (2011). *Transforming local politics? The impact of gender quotas in Finland* in Barbara Pini/Paula McDonald (eds.), *Women and Representation in Local Government*. London: Routledge, pp. 142-158.
- Holtkamp, Lars/Schnittke, Sonja (2008a). *Probleme grüner Bürgermeisterkandidaturen – Ohne Stichwahl keinen Stich?*. *AKP* 2/2008: 63-66.
- Holtkamp, Lars/Schnittke, Sonja (2008b). *Erklärungsmodelle für die Unterrepräsentation von Frauen*. *Femina Politica* 2(8): 53-64.
- Holtkamp, Lars/Wichmann, Elke/Schnittke, Sonja (2009). *Unterrepräsentanz von Frauen in der Kommunalpolitik*. A Study for the Heinrich-Böll-Foundation. Berlin.
- Jessica Fortin-Rittberger/Eder, Christina (2013). *Towards a Gender-Equal Bundestag? The Impact of Electoral Rules on Women's Representation*. *West European Politics* 36(5): 969-985.
- Kaiser, Andre/Hennl, Annika (2008). *Wahlsysteme und Frauenrepräsentation. Ein Vergleich der deutschen Landesparlamente*. *Zeitschrift für Politikwissenschaft* 2(8): 167-184.
- Kittilson, Miki (2006). *Challenging Parties, Changing Parliaments*. Columbus: Ohio State University Press.
- Kleine, Uta (2006). *Geschlechterverhältnisse und Gleichstellungspolitik in der Europäischen Union*. Wiesbaden.
- Kolinsky, Eva (1991). *Political Participation and Parliamentary Careers: Women's Quotas in West Germany*. *West European Politics* 14: 56-72.
- Krook, Mona Lena/ Lovenduski, Joni/Squires, Judith (2009). *Gender Quotas and Models of Political Citizenship*. *British Journal of Political Science* 39: 781-803.
- Krook, Mona Lena (2009) *Quotas for Women in Politics*. New York: Oxford UP.
- Lang, Sabine (2007). *Gender Governance in Post-Unification Germany: Between Institutionalization, Deregulation, and Privatisation* in Johanna Kantola/Joyce Outshoorn (eds.), *Changing State Feminism*. Palgrave Macmillan, pp. 171-198.
- Lang, Sabine (2010). *Gendering Federalism – Federalizing Gender: Women's Policy Agencies and Policies in German Multilevel Governance*. *German Studies Review* 33(3): 517-530.
- Lemke, Christiane (2001) *Changing the Rules of the Game: The Role of Law and the Effects of Party Reforms on Gender Parity in Germany* in Jytte Klausen/Charles S. Meier (eds.), *Has Liberalism Failed Women? Assuring Equal Representation in Europe and the United States*. London: Palgrave, pp. 123-142.

- McKay, Joanna (2005) *Women in German Politics*. German Politics 13: 56-80
- Meier, Petra (2000). *The Evidence of Being Present: Guarantees of Representation and the Belgian Example*. Acta Politica: International Journal of Political Science 35(1): 64-85.
- Meier, Petra (2004). *The Mutual Contagion Effect of Legal and Party Quotas: A Belgian Perspective*. Party Politics 10(5): 583-600.
- Meier, Petra (2008). *A Gender Gap Not Closed by Quotas: The Renegotiation of the Public Sphere*. International Feminist Journal of Politics 10(3): 329-347.
- Mushaben, Joyce (2014). *The best of times – the worst of times. Angela Merkel, the Grand Coalition, and Majority Rule in Germany*. Unpubl. Manuscript.
- Niedermayer, Oskar (2013) *Parteimitglieder seit 1990*. Arbeitshefte aus dem Otto-Stammer-Zentrum No. 30. Berlin.
- Papier, Hans-Juergen/Heidebach, Martin (2014). *Rechtsgutachten zur Frage der Zulässigkeit von Zielquoten für Frauen im öffentlichen Dienst sowie zur Verankerung von Sanktionen bei Nichteinhaltung*. Im Auftrag des Landes Nordrhein Westfalen.
- Rodriguez-Ruiz, Blanca/Sacksofsky, Ute (2005) *Gender in the German Constitution* in Beverley Baines/Ruth Rubio-Marín (eds.), *The Gender of Constitutional Jurisprudence*. New York: Cambridge UP, pp. 149-173.
- Schick, Dagmar/Dieball, Heike/Horstkötter, Ingo/Seidel, Lore/Vieten, Ulrike M./Wankel, Sibylle (eds.) *Frauengleichstellungsgesetze des Bundes und der Länder. Kommentar für die Praxis zum Bundesgleichstellungsgesetz und den Gleichstellungsgesetzen, Gleichberechtigungsgesetzen und Frauenförderungsgesetzen der Länder*. 2nd Revised edition. Frankfurt: Bund Verlag.
- Schmitt Glaeser, Walter (1982). *Abbau des tatsächlichen Gleichberechtigungsdefizit der Frauen durch gesetzliche Quotenregelungen*, Schriftenreihe des Bundesministeriums des Innern, Bd. 16, Stuttgart.
- Wahl, Angelika von (2006). *Gender Equality in Germany*. West European Politics 3(6): 461-488.
- Weingärtner, Dr. (1988). *Die Quotierung zugunsten von Frauen in Organen der politischen Willensbildung im Inland und im europäischen Ausland*. Bonn: Wissenschaftlicher Dienst des Deutschen Bundestags. FB III.
- Wettig-Danielmeier, Inge (2008). *20 Jahre Quote* in Elke Ferner (ed.), *90 Jahre Frauenwahlrecht!* Berlin: Vorwärts Buch, pp. 93-105.
- Wettig-Danielmeier, Inge/Oerder, Katharina (2012) *Feminismus – und morgen? Gleichstellung jetzt*. Berlin: Vorwaerts Buch.
- Wiliarty, Sarah (2010) *CDU and the Politics of Gender in Germany*. Cambridge, UK: Cambridge University Press.

