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DRAFT REPORT

ON THE METHOD OF NOMINATION OF CANDIDATES
WITHIN POLITICAL PARTIES

on the basis of comments by

Ms Maria del Carmen ALANIS FIGUEROA
(Substitute Member, Mexico)

Ms Paloma BIGLINO CAMPOS (Substitute Member, Spain)

Mr Paul CRAIG (Substitute Member, United Kingdom)

Mr Ben VERMEULEN (Member, the Netherlands)

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I. INTRODUCTION

1. In 2012, the Council for Democratic Elections adopted the "Report on Measures to Improve the Democratic Nature of Elections in Council of Europe Member States".¹ This document pointed out that democratic standards derived from Europe's electoral heritage were "in greater or lesser detail [incorporated] in the legislation of Council of Europe member states". It recognised, however, that practice showed a more complex reality. Among those issues identified as needing further development and study was the question of the methods adopted by political parties in the selection process of candidates. In the Council meeting of December 2012, the decision was taken to launch a study on this topic and to prepare a questionnaire.

2. The questionnaire included two sets of questions. 27 countries replied, as well as some political parties concerning their internal practices. Based on an analysis of the questions received, as well as further research on the rules existing in another 23 states, a table was compiled.² This table contains information on the criteria for nominating candidates, including gender quotas, the regulation concerning the representation of minorities, young people and vulnerable groups, as well as procedural aspects (see [CDL\(2015\)007](#)).

3. The rapporteurs appointed to conduct this study were Ms Carmen Alanis Figueroa (substitute member, Mexico), Ms Paloma Biglino (Substitute member, Spain), Mr Paul Craig (substitute member, United Kingdom) and Mr Ben Vermeulen (member, The Netherlands), who was assisted by Ms Leontine Weesing-Loeber (expert from the Council of State of the Netherlands).

4. The research reveals that the nomination of candidates by political parties varies significantly, both among countries and between political parties within each country. This diversity is partly a consequence of the legal treatment of political parties in each political system and their consideration as public or private entities.

5. In contemporary democracies, two main principles are central to the internal functioning of political parties. The first one is the principle of party autonomy, under which political parties are granted associational autonomy in their internal and external functioning. According to this principle, political parties should be free to establish their own organisation and the rules for selecting party leaders and candidates, since this is regarded as integral to the concept of associational autonomy. The second element is the principle of internal democracy, the argument being that because political parties are essential for political participation, they should respect democratic requirements within their internal organisation.

6. There can be tensions between the principle of party autonomy on the one hand and the principle requiring internal democracy on the other. It is not surprising that the influence of each principle differs in each system. Some countries stress the respect for the freedom of political parties, while others place greater emphasis on compliance with internal democratic requirements by political parties. The tension between these two principles could explain why there are different ways in which legal systems regulate the nomination of candidates within political parties. It is, however, important to note that the degree of tension between the principles depends on several factors. One factor is the concept of democracy chosen. A system primarily based on a "liberal" view – the liberal theory of a 'free electoral market' – is

¹ CDL-AD(2012)005.

² The countries analysed for the purpose of this study are the following: Albania, Andorra, Argentina, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bolivia, Bosnia and Herzegovina, Bulgaria, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Malta, Mexico, Moldova, Monaco, Montenegro, Netherlands, Norway, Paraguay, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, Ukraine and Venezuela.

likely to emphasise party autonomy and to have only a few rules regulating political parties. A system grounded on a concept of democracy based on the assumption of some fundamental values that democracy should adhere to, will probably have a more strongly regulated regime for political parties, including their internal party organisation. What system prevails in a particular country is basically shaped by its history and current circumstances. Much also depends on more detailed specification of the two principal factors set out above and the weight attached to them. Thus, it cannot be assumed that attachment to the principle of associational autonomy precludes *per se* any regulation of internal party procedure, since such a conclusion is dependent on contestable normative assumptions as to the degree of autonomy that flows from freedom of association. The same is true in relation to the principle of democracy. It is not self-evident what demands flow from attachment to this principle without further inquiry as to the more particular precepts that constitute the democratic principle and the way in which they might be applicable to the nomination of candidates by political parties.

7. This report contributes to exploring, from a general perspective, the various methods of nomination of candidates within political parties, taking into account the balance between, on the one hand, the scope of autonomy and self-governance granted to political parties under the principle of freedom of association and, on the other hand, the degree of external constraints and regulations in their internal work.

8. The Venice Commission has assessed the essential role of political parties within a democratic society in many different texts, such as, among others, the Code of Good Practice in the Field of Political Parties (CDL-AD(2009)021), the Guidelines on Political Party Regulation adopted jointly with OSCE/ODIHR (CDL-AD(2010)024) and the Guidelines on Prohibition and Dissolution of Political Parties and analogous measures (CDL-INF(2000)1). The importance of political parties in any democracy, considering that freedom of political opinion and freedom of association, including political association, represent fundamental human rights guaranteed by the European Convention on Human Rights, has been stressed.

9. In the present Report, the Venice Commission will specifically focus on the internal rules of political parties for nominating candidates and the requirements needed for improving democratic decision-making and inclusiveness within each party.³ The current Report will assess, more specifically, three different issues: the first chapter will describe the state of the art, by examining the legal framework governing political parties and the different existing approaches as to the rules that influence the internal functioning of parties and the choice of their candidates. The second chapter will explore the legal requirements for the methods of nominating candidates within political parties, including both procedural aspects of nomination of candidates and the rights of those candidates within political parties. The third chapter will focus on the different factors used for measuring internal democracy within political parties, in particular on the requirement of gender balance, the representation of minorities, ethnic and vulnerable groups, including indigenous populations, as well as other possible factors, which may have an impact on the internal functioning of political parties. The fourth chapter identifies a number of criteria for establishing a balance between freedom of association and the requirements regarding internal democracy

10. *The present report was adopted by the Council for Democratic Elections at its ... meeting (Venice, ... 2015) and by the Venice Commission at its ... Plenary Session (Venice, ... 2015).*

³ The Venice Commission tackled the balanced representation of women in politics in its *Report on the Impact of Electoral Systems on Women's Representation in Politics*, (CDL(2009)080).

II. CHAPTER I. REGULATING POLITICAL PARTIES: THE STATE OF THE ART

11. The European Court of Human Rights has held in its case-law that political parties are a form of association essential to the proper functioning of democracy and that, in view of the importance of democracy in the European Convention on Human Rights system, an association, including a political party, is not excluded from the protection afforded by the Convention.⁴

12. The Venice Commission *Guidelines on Political Party Regulation* view political parties as private associations that play a critical role as political actors in the public sphere.⁵ Although the document considers that “some regulation of internal party activities can be considered necessary to ensure the proper functioning of a democratic society”, such legislation must be “well-crafted and narrowly tailored” in order not to interfere with the freedom of association. However, the Guidelines recognise that:

“As parties contribute to the expression of political opinion and are instruments for the presentation of candidates in elections, some regulation of internal party activities can be considered necessary to ensure the proper functioning of a democratic society. The most commonly accepted regulations are limited to requirements for parties to be transparent concerning their decision making and to seek input from membership when determining party constitutions and candidates”.⁶

13. However, stressing the importance of internal democracy, the Guidelines also state that: “[n]ot only political parties’ speech and action *ad extra* must formally endorse the democratic principles and rule of law contained in constitutional and legal provisions of the country but their internal organisation and functioning must also substantially abide by the principles of democracy and legality. The basic tenets of democracy are not satisfied with formal adherence or lip-service paid by the statutes of the party but require substantial application of them *ad intra*.”⁷

14. In principle, the way in which constitutions refer to political parties has an impact on the legislation on candidate nomination. When the constitution imposes internal democracy, it mandates or, at least, allows the legislator to establish requirements and proceedings for candidate nomination, which bind all political parties. In this way, the constitution enables the law to limit political parties’ freedom in their internal functioning.

15. When the constitution only recognises the freedom of political parties, the legislator must be more respectful of the autonomy of parties and the proportionality principle. This does not imply that the law cannot rule on the method of nomination of candidates within political parties at all. Equality, freedom of expression, and democracy are, to a certain extent, also applicable to political parties, since these entities are the main channels through which citizens participate in public life. It implies that the requirements for limiting freedom imposed by the proportionality test are more demanding, with the consequence that legislative intervention will, in relative terms, be more difficult to justify.

16. This must be distinguished from the situation in which the constitution makes no reference to political parties, which falls midway between a situation where the constitution imposes internal democracy and that in which it simply recognises the freedom of political parties. In this

⁴ *Guidelines on Prohibition and Dissolution of Political Parties and analogous measures*, CDL-INF(2000)001, para. 8.

⁵ CDL-AD(2010)024, para. 6.

⁶ CDL-AD(2010)024, para 98.

⁷ *Draft Explanatory Report on the Draft Code of Good Practice in the field of Political Parties*, CDL-EL(2008)014, p. 5.

third scenario, it is open to the legislator, subject to the proportionality principle, to impose regulatory requirements concerning the nomination of candidates and it will, other things being equal, have greater latitude in this respect than where the constitution explicitly recognises the freedom of political parties.

17. Some constitutions do not mention political parties at all, such as those of Belgium, Denmark, Ireland and the Netherlands, while others refer to them only with respect to rulings on elections. This is the case, for example, of the Austrian Constitution. Other constitutions regard political parties as a specific type of association. Article 49 of the Italian Constitution of 1947 recognises the right of all citizens to freely associate in parties to contribute to determining national policies through democratic processes. In this case, the constitution directly guarantees an individual right of association and, indirectly, guarantees the existence of political parties, since they are essential in pluralistic systems.

18. From the perspective of what has been termed the “liberal view”, parties are regarded as private associations, which should be entitled to compete freely in the electoral marketplace and govern their own internal structures and processes. In these cases, any legal regulation by the state, or any outside intervention by international agencies, could be regarded as potentially harmful by distorting or even suppressing pluralist party competition.⁸ Traditionally, the United Kingdom has been reluctant to impose regulation on the internal functioning of political parties. The same applies to the Netherlands, where – apart from laws on funding and government subsidies - political parties are only regulated by the general civil law rules on associations.

19. When the constitution establishes rules on political parties, the degree of detail may differ. Some constitutions not only grant freedom to political parties, but also impose some requirements on their structure and functioning. Article 21.1 of the German Basic Law requires that political parties’ internal organisation conform to democratic principles.⁹ According to this type of approach and legal framework, political parties play a vital role in the political system, since they contribute to the formation and expression of public opinion and they are the main actors in the election of representatives. Due to their prominence, political parties must be regarded as associations of constitutional relevance. Therefore, the law can regulate political parties, including through legal requirements that affect the internal rules for nominating candidates, in order to ensure that they comply with essential democratic precepts. For these reasons, laws on political parties are more common in countries whose constitution imposes internal democracy. Although these laws may not rule directly on the nomination of political parties, they establish some basic principles that affect the nomination process.

20. There are only a few constitutions that have gone further in regulating the methods of nomination of candidates within political parties. Most of the exceptions are in Latin America, where some constitutions not only impose internal democracy or gender equality, but also contain special norms on the nomination of candidates by political parties. Guatemala was the first country in the region to include a reference to political parties in its Constitution. However, the content of these norms varies significantly from one country to the next (see more details on this in **chapter III**).

⁸ Norris, P. Building political parties: reforming legal regulations and internal rules, Report commissioned by International IDEA, p. 20, http://www.idea.int/parties/upload/pippa%20norris%20ready%20for%20wev%20_3_.pdf.

⁹ Other constitutions follow the same pattern. This is the case of Article 3.3 of the Portuguese Constitution; Article 26 of Andorran Constitution; Article 6 of the Spanish Constitution; Article 97 of the Costa Rican Constitution or Article 69 of the Turkish Constitution. Article 41.1. of the Mexican Constitution has a different meaning because, although it does not impose democracy, it declares that political parties are entities of public interest.

III. CHAPTER II. NOMINATION OF CANDIDATES WITHIN POLITICAL PARTIES: THE LEGAL REQUIREMENTS

21. Understanding the difference between the liberal model and other models based on a substantive notion of democracy can serve to better grasp the way in which each democratic system addresses political parties in general.¹⁰ However, over the years, many of the differences between the various patterns described above have diminished and most states have chosen a mixed approach, in which there are elements from both views.

22. During the last decade, many countries have evolved from a liberal point of view towards increased regulation of political parties. The principle of non-intervention that prevailed across the European continent from the very emergence of political parties seems no longer to be the dominant paradigm.¹¹ Moreover, in new or transitional democracies there are frequent constitutional references to respect for democratic principles.¹²

23. Indeed, not only has the reference to specific rules for political parties increased, but Europe is also witnessing a proliferation of specific laws exclusively dealing with political parties. This is also the case in Latin America.¹³ In 2012, 24 European countries had adopted a law specifically devoted to political parties.¹⁴ Although these laws refer to different matters, such as political parties' registration or finances, some of them also include provisions on internal democracy, with regulations concerning elections of party bodies, their accountability and the resolution of party conflicts.¹⁵ Therefore, it seems to be a growing trend in further regulating the methods for choosing candidates within political parties, as well as for regulating their rights. There are three main categories of countries: those with specific legislation on political parties, but no specific provisions on intraparty democracy; those with specific legislation on political parties and a focus on intraparty democracy, although the degree of detail may vary considerably from one case to another; and those which lack specific regulation on political parties and generally apply legislation on associations.¹⁶

24. The *Venice Commission Guidelines on Political Party Regulation* state that:

"Parties must have the ability to determine party officers and candidates, free from government interference. Recognising that candidate selection and determination of ranking order on electoral lists is often dominated by closed entities and old networks of established politicians, clear and transparent criteria for candidate selection is needed, in order for new members (including women, and minorities) to get access to decision-making positions. Gender-balanced composition of selecting bodies should also be commended".¹⁷

25. Many national laws follow these principles and apply the basic rules of the democratic principle to the internal structure of political parties. Among the countries studied, one of the most recent laws adopted in this field was the Italian Decree-Law of 28 December 2013. This is

¹⁰ There is no law on political parties in Ireland.

¹¹ Casal-Bértoa, F., Romée Piccio, D., Rashkova E. R., *Party Law in Comparative Perspective, Party Law in Modern Europe, The Legal Regulation of Political Parties in Post-War Europe*, Working Paper 16, March 2012.

¹² Such as the Constitutions of Germany (Article 21), Spain (Article 6) and Portugal (Article 51.5).

¹³ Bolivia, Chile, Costa Rica, Mexico, Paraguay, Uruguay and Venezuela among others.

¹⁴ Armenia, Austria, Bulgaria, Croatia, Czech Republic, Estonia, Finland, Georgia, Germany, Hungary, Latvia, Lithuania, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, The Netherlands, Turkey, Ukraine and the United Kingdom. *Ibidem*, p.4.

¹⁵ *Ibidem*, p. 7. Particularly, see Armenia, Georgia, Germany, Kyrgyzstan, Latvia, Lithuania, Portugal, Romania, Serbia, Spain, The Netherlands, Turkey and Ukraine.

¹⁶ This is the case, in Europe, of only 12 countries: Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Georgia, Ireland, Liechtenstein, Luxembourg, Malta, Sweden and Switzerland.

¹⁷ CDL-AD(2010)024, para 113.

the first general norm that regulates political parties in Italy. However, the new Decree-Law does not impose internal democracy and transparency on all political parties, but only on those parties that run for European, national and regional elections. Therefore, the Law aims to establish a link between the rights and duties recognised in the new regulation and the effective representation of political parties.¹⁸

26. The requirements for candidate nomination are, in most cases, not specifically stated in the laws on political parties. However, they can be deduced from the general rules stated by the legislation on party organisation and proceedings and from the principles that the constitution proclaims, such as the principle of internal democracy, non-discrimination, and the recognition of universal suffrage. In other cases, the requirements are stated in the electoral law, as is the case for the Federal Elections Act of the German Republic (FEAG),¹⁹ Article 21 of which establishes detailed provisions for the election of the members of the *Bundestag*.

27. Some of the laws establish specific rules on the nomination of candidates within political parties. This is exemplified by Article 17 of the German Law on Political Parties of 24 July 1967²⁰ and Article 33 of Portuguese Organic Law 2/2003 on Political Parties²¹. In Latin America, many of the states analysed have specific rules in their legislation on the nomination of candidates within political parties, such as Argentina, Bolivia, Costa Rica, Chile, Mexico, Paraguay, Peru, Uruguay or Venezuela. The lack of strong democratic intra-party structures seems to have fostered the adoption of detailed legislation as a way to strengthen internal democracy inside political parties, among other factors. For example, Article 95.8 of the Costa Rica Constitution states that the law must establish guarantees for the designation of public authorities and candidates of political parties, according to democratic principles and without gender discrimination.

28. There are three more specific issues that should be assessed that are central to candidate nomination: the body that should nominate the candidates (section A); the procedure to be followed when making the decision (section B), and the rights of party members during the selection (section C).

A. Requirements concerning the nominating bodies

29. Some laws state that the main decisions regarding the party must be made by its general assembly (composed of all the members of the party), or by an assembly composed of delegates. That is the case, for example, in Article 7.2 of Spanish Organic Law 6/2002,²² which establishes that political parties must have a general assembly composed of all their members, or of their delegates. This assembly can act directly or through delegates and must make the main decisions of the party according to the procedures established in the parties' statutes.

30. Article 21 of the German Electoral Law is more precise, given that it specifically regulates the selection of party candidates. Its first paragraph allows the direct election of candidates by

¹⁸ Allegri, M.R. "Prime note sulle nuove norme in materia di democraticità, trasparenza e finanziamento dei partiti politici", Osservatorio costituzionale, marzo 2010, AIC, <http://www.osservatorioaic.it/prime-note-sulle-nuove-norme-in-materia-di-democraticita-trasparenza-e-finanziamento-dei-partiti-politici.html>.

¹⁹ Federal Elections Act, version as promulgated on 23 July 1993 (Federal Law Gazette I pp. 1288, 1594), as last amended by Article 2 of the Act of 3 May 2013, (Federal Law Gazette I p. 1084). The English translation of the Law in

http://www.bundeswahlleiter.de/en/bundestagswahlen/downloads/rechtsgrundlagen/bundeswahlgesetz_engl.pdf

²⁰ English version published at

<http://www.bundestag.de/blueprint/servlet/blob/189734/2f4532b00e4071444a62f360416cac77/politicalparties-data.pdf>.

²¹ Lei dos Partidos Políticos, Lei Orgânica n.º 2/2003, de 22 de Agosto, com as alterações introduzidas pela Lei Orgânica n.º 2/2008, de 14 de Maio,

http://www.parlamento.pt/Legislacao/Documents/Legislacao_Anotada/LeiPartidosPoliticos_Anotado.pdf.

²² <https://www.boe.es/buscar/act.php?id=BOE-A-2002-12756>.

all the members of the party, or the indirect election by member representatives. This Article states that “A person may only be named as a candidate of a party in a constituency nomination if he or she is not a member of another party and has been elected for this purpose at a members' assembly convened to elect a constituency candidate or at a special or general delegates' assembly”. The same Article establishes that the assembly of members can only be composed of members of the party who, at the time of their meeting, are eligible to vote in the German *Bundestag* elections in their constituency. Therefore, primary elections are not allowed. Furthermore, the Electoral Law recognises that the executive committee of the level of the party involved in the selection has the right to veto the decision on candidates. In this case, the election must be repeated²³.

31. Article 112 of the Election Act of Finland is more demanding²⁴, since it requires the selection of candidates to be done by members of the party. However, a vote by the members is not obligatory if only so many candidates are nominated in the election as the party has the right to nominate in the electoral district. Furthermore, Article 113 of the same Law refers the regulation of the nomination process to the inner rules of the party. Only if there is no provision on voting by members or nominating candidates in the statutes of the party will these provisions set forth in the Act apply.

32. Constitutions in Latin American countries often contain requirements for candidates' nomination. In Costa Rica, for example, the Constitution states that the appointment of officials and candidates of political parties must respect the principles of democracy without discrimination on grounds of sex (Article 95. 8). In Paraguay, the Constitution contains requirements for candidates to run for office as President, Vice-President, Senator, Congressman, Governor, etc. as well as the rules on possible incompatibilities preventing the exercise of such a function. The Electoral Code of Paraguay establishes mandatory elections to nominate candidates within political parties, the rules to be observed during the internal electoral process and deadlines, the procedure to challenge the nominations and the rules governing the replacement of candidates. In Mexico, the Constitution states that “The law will establish the requirements and ways to organise the selection and nomination of candidates to public office by popular vote, as well as the rules for precampaigns and campaigns” (article 41, base IV).

33. When the eligibility criteria are fulfilled, the nomination stage for the candidates may start. In Chile, for example, the Constitution states that the electoral process will be public, which has an impact on candidates of political parties, who are placed in the same position as independent candidates in order to present candidates for the elections. The Chilean Electoral Act further states that political parties must follow a system of primary elections to nominate the candidates for President, MPs and mayors, for which certain rules are established:

- a) Political parties can participate in the primary election to nominate candidates for the different posts, alone or together with other political parties and independent candidates, forming an electoral block;
- b) A list of candidates must be submitted by each of the electoral constituencies;
- c) The procedure for the primary election must cover all constituencies.

²³ Art. 21.4 of the Federal Electoral Law literally says: “The executive committee of the Land branch or, where such Land branches do not exist, the executive committee of the next lower regional branch in whose area the constituency lies or another body provided for this purpose in the party's statutes may object to the decision of a members' or delegates' assembly. If such an objection is raised, the ballot shall be repeated. Its result shall be final.”

²⁴ Election Act 714/1998, amendments up to 218/2004 included, <http://www.finlex.fi/en/laki/kaannokset/1998/en19980714?search%5Btype%5D=pika&search%5Bpika%5D=Election>

B. Requirements on the nomination procedure

34. The democratic principle serves to establish the guidelines for the procedure to select candidates within political parties. Article 17 of the German Law on Political Parties establishes that the nomination must be done by secret ballot. The Portuguese Law is more detailed Article 33 of which not only imposes a secret ballot, but also the personal ballot in all the elections and referenda organised within the parties. Furthermore, Article 34.1 of the Portuguese Law sets out a number of general rules on electoral procedures that are applicable to the nomination of candidates. Firstly, the Article establishes that electoral rolls shall be drawn up and access to them shall be guaranteed within a reasonable period of time; secondly, the Article states that every candidature shall be given equal opportunities and shall be treated impartially. The secret ballot is also required in Peru's electoral legislation.

35. Transparency is a principle that is also imposed on the nomination procedure by a number of electoral laws, as exemplified by Serbia. Article 9 of the *Law on elections of members of Parliament* establishes the right of citizens to be fully informed about the nominated candidates.²⁵

36. The importance of political pluralism and the right to participate in public affairs are also the underlying principles of the procedure for the nomination of candidates, as defined by the constitutions of Argentina, Chile, Costa Rica, Mexico and Spain, among others.

37. In most of the states under analysis, the existing legislation on political parties leaves the final decision to them. Some are quite "centralised", and party leaders have extensive powers in choosing their candidates, as is still the case in most Central and Eastern European countries. In the most decentralised parties, the decisions are taken by grassroot party members, if there are closed primaries, or in public decisions if there are open primaries. The level of internal democracy of the political party will therefore depend on the "degree of centralisation" (how much power is given to regional, district and local bodies in the selection process), the "scale of participation" in the nomination and the "scope" of decision-making.²⁶ Mechanisms of direct democracy have been introduced in the statutes and internal regulations of some political parties, such as the Green Federation in Italy, the Reform Movement and the Socialist Party in Belgium, the Union for a Popular Movement and the Socialist Party in France, as well as by the Green Party in Ireland.²⁷ Inclusive mechanisms are maintained according to the general rule of representative democracy by other parties, where the right to vote is restricted to the members' delegates and eligibility is more limited.²⁸

²⁵ Law on the Elections of Members of the Parliament, ("Official Gazette of RS", no. 35/2000, 57/2003 – decision of CCRS, 72/2003 – oth.law, 75/2003 – correction of oth. law, 18/2004, 101/2005 – oth. law, 85/2005 – oth.law, 28/2011 – decision of CC and 36/2011). At <http://www.legislationline.org/topics/country/5/topic/6>. According to this article, "In the context of this Law, the suffrage shall include the right of the citizens to the following, in the manner and according to procedures determined by this law: to elect and to be elected; to nominate candidates and to be nominated as candidates; to make decisions concerning both nominated candidates and electoral lists; to publicly ask nominated candidates questions; to be promptly, truthfully, completely and impartially informed about both the programs and activities of submitters of the electoral lists and candidates on those lists, as well as to have other rights foreseen by this law."

²⁶ Norris, Pippa, *Building political parties: reforming legal regulations and internal rules*, Report commissioned by International Idea, 2004, pp. 20 and ff, http://www.idea.int/parties/upload/pippa%20norris%20ready%20for%20wev%20_3_.pdf.

²⁷ See Tanchev, Evgeni, "Internal functioning of political parties: the issue of intra party democracy or still we have not found what we were looking for", Conference on "political parties in a democratic society": legal basis of organisation and activities, Saint Petersburg, 2012, CDL-EL(2014)003.

²⁸ In Spain, the General Coordinator of United Left, the Secretary-General of the Spanish Socialist Workers' Party and the President of the People's Party are elected by the delegates' assembly and the two latter parties require candidates to obtain previous support of a significant part of the delegates to enter competition for the post. The Labour Party in Ireland and the Liberal Democrats in the United Kingdom restrict eligibility for the post of leader to members of the parliamentary group of the party. The Labour Party in the United Kingdom presents a kind of mixed mechanism where the Commons members of the Parliamentary Labour Party act as *gatekeepers* (candidates must

C. Requirements concerning party members' rights

38. Finally, the party member's rights recognised by the laws are also applicable to the nomination procedure; rights such as equality, the right to participate in the activities and organs of the party, the right to vote, and the right to run for party offices.²⁹ For example, Article 21.3 of the Federal Electoral Act of Germany sets out a number of requirements for the election of members of the *Bundestag* aimed at guaranteeing democratic debate within the assembly that nominates candidates. It states that every eligible person attending the assembly should be entitled to submit a proposal. Furthermore, this Article proclaims the right of the candidates to introduce themselves and present their programme. Also Article 112.1 of the Finnish Electoral Law states that, to nominate candidates, a party must perform a secret vote by the members based on equal voting rights. Furthermore, Article 114 sets out the general requirement to stand for elections, while Article 115 refers to the right to vote.

39. Some of the laws analysed above establish several requirements for internal democracy. In general, laws on political parties are quite respectful of their freedom. For this reason, these laws refer to the statutes of political parties in order to set out in detail the principles and requirements established by the laws themselves.³⁰

40. Although laws on political parties are less detailed, more flexible in nature, laws on elections are more compelling. When ruling on elections, the principal value taken into account is the citizens' right to political participation. In many countries, especially where electoral lists are closed, the importance of political parties in the selection of candidates justifies the legal limitations imposed on freedom of association. The impact that the selection of candidates has on the proper functioning of political representation -the core of democracy- justifies a greater degree of public intervention³¹. Therefore, electoral laws impose on parties the basic requisites of democracy, namely that decisions should be taken by free, equal and secret vote (direct or indirect). Furthermore, electoral laws impose, within the party the right to vote, the right to stand as a candidate and freedom of speech during the selection procedure.

41. When the constitution does not impose internal democracy on political parties, the level of independence of political parties is higher. In some cases, for example, the law allows the executive board of the party to determine the procedures for the nomination and election of representatives.³² In other cases, the law leaves it to the parties' own statutes to establish the organs, procedure, and the electoral rights of party members in the nomination of candidates.³³

42. In order to evaluate the real impact of the nomination rules analysed above, it must be noted that the flexibility of some norms and the difficulties in verifying their compliance reveal significant differences between the *de jure* and the *de facto* nomination procedure. Determining the 'main location' of decision-making in the nomination procedure has its limitations, the

be members of this group or have their support) but a party-wide ballot is conducted for the selection among nominees. Tanchev, *Ibidem*.

²⁹ For example, Article 8 Spanish Political Parties Law. In Germany, the basic principles of Art 38 of the Constitution - which addresses the election of the members of the Bundestag- are applicable to the nomination procedure as well. This means that the election must be general (prohibition of an unjustified denial of the right to vote), free, equal, and secret. Furthermore, the basic principles require that each party member who is eligible must also have the right of proposal and the right to decide (at least by electing delegates) on the party's candidates. (Federal Constitutional Court of Germany, BVerfGE 89, p. 251; Judgment of the Constitutional Court of the City of Hamburg, NVwZ 1993).

³⁰ For example, Article 21.5 of the Federal Electoral Act of Germany states that "Further details regarding the election of delegates for the delegates' assembly, the convening and the quorum of the members' or delegates' assemblies as well as the procedure for the election of the candidate shall be set forth in the parties' statutes".

³¹ Biglino Campos, Paloma, "Intervención del legislador y selección de candidatos por los partidos políticos: una perspectiva comparada. Teoría y Realidad Constitucional, nº35, 2015, pp. 203-223.

³² This is the case of Article 32 of the Latvia Party Law.

³³ Article 3 of the Italian Decree Law of 28 December 2013, nº13; Article 10 of the Romanian Party Law.

difficulties being greater “in poorly-institutionalised” parties where democratic rulebooks and procedures exist on paper, but are not always followed in practice”.³⁴

IV. CHAPTER III. EVALUATING SPECIFIC ELEMENTS OF INTRA PARTY DEMOCRACY: ON SUBSTANTIVE DEMOCRACY

A. Requirements of gender balanced representation

42. The most demanding requirements on the selection of candidates by political parties are those aimed to ensure equal gender representation. The Guidelines on Political Parties Regulation recognise that “the small number of women in politics remains a critical issue which undermines the full functioning of democratic process”.³⁵ Hence, “electoral gender quotas can be considered an appropriate and legitimate measure to increase women’s parliamentary representation”.

43. There are various socio-economic, cultural and political factors that can hamper women’s access to the political arena. Structural obstacles in society limiting the political representation of women are not easy to remove and fundamental changes will require much time and effort. Thus, changing the electoral system, for instance, by introducing quota rules, may offer a viable alternative to increase female representation.³⁶ The Venice Commission, in its *Code of Good Practice in Electoral Matters*, considered that the legal rules requiring a minimum percentage of persons of each gender among candidates should not be considered contrary to the principle of equal suffrage, if they have a constitutional basis.³⁷

44. The analysis of the electoral gender quota systems and their implementation in Europe³⁸ shows that some type of electoral gender quotas for public elections is in use in 30 countries. Thirteen countries (Albania, Belgium, Bosnia and Herzegovina, France, Greece, Ireland, Montenegro, Poland, Portugal, Serbia, Slovenia, Spain and “The former Yugoslav Republic of Macedonia”) have introduced legislated quotas that are binding for all political parties. Voluntary party quotas have been implemented in 22 countries, meaning that at least one of the political parties represented in parliament has written electoral gender quotas into its statutes.³⁹ In six countries, no gender quotas are in use for national elections.⁴⁰

45. From its inception, the establishment of legal electoral quotas has been controversial in many countries. In France, which was the first state in the world to introduce a compulsory fifty per cent gender parity provision,⁴¹ the Constitution was changed in 1999. In Italy, the Constitutional Court ruled against the quotas on 12 December 1995 and this led to the constitutional reform of 2001.⁴²

³⁴ Building political parties: reforming legal regulations and internal rules, Report commissioned by International IDEA, 2004, p. 28, http://www.idea.int/parties/upload/pippa%20norris%20ready%20for%20wev%20_3_.pdf

³⁵ Para. 99.

³⁶ *Report on the Impact of Electoral Systems on Women’s Representation in Politics*, (CDL(2009)080, paras 107-109.

³⁷ *Code of Good Practice in Electoral Matters* (CDL-AD (2002)023rev), point I.2.5.

³⁸ Freidenvall, L, Dahlerup, D., “Electoral Gender Quota Systems and their implementation in Europe, Update 2013”, European Parliament, Directorate-General for Internal Policies, Policy Department, Citizens’ Rights and Constitutional Affairs, 2013, [http://www.europarl.europa.eu/RegData/etudes/note/join/2013/493011/IPOL-FEMM_NT\(2013\)493011_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/493011/IPOL-FEMM_NT(2013)493011_EN.pdf). For the purpose of this report, more recent data have also been used, including the ACE project database in gender quotas.

³⁹ Austria, Croatia, Cyprus, Czech Republic, France, Germany, Greece, Hungary, Iceland, Italy, Lithuania, Luxembourg, Malta, Netherlands, Norway, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland and United Kingdom.

⁴⁰ There are no quotas in Bulgaria, Denmark, Estonia, Finland, Latvia and Liechtenstein.

⁴¹ Law No. 88-227, Article 9(1). See <http://www.quotaproject.org/uid/countryview.cfm?country=53>.

⁴² Judgement No. 422. The first step was the reform of Art 117 of the Constitution. The new paragraph declares that “Regional laws shall remove any hindrances to the full equality of men and women in social, cultural and

46. In Spain, Organic Law 3/2007 on Effective Equality between Women and Men imposed a requirement of balanced composition in the electoral list, introducing new Article 44.bis into Organic Law 5/1985, on the General Electoral System⁴³. The first paragraph of this Article establishes that the electoral list “shall have a balanced proportion of women and men, so that candidates of each sex make up at least 40% of total membership. Where the number of seats to be covered is less than five, the ratio between women and men shall be as close as possible to equal balance”. In addition, paragraph 3 of the same Article states that the lists of substitutes must respect the same rules as set for candidates⁴⁴.

47. One of the most controversial issues concerning balanced electoral lists was that the law had been enacted without previously changing the Constitution. On this point, balanced lists were regarded as an imposition on those political parties that were against quotas, since they held a different idea of equality. The Constitutional Court⁴⁵ rejected this criticism, drawing on Article 9.2 of the Spanish Constitution, which imposes on public power the duty to promote real and effective equality⁴⁶. From the Constitutional Court’s perspective, political parties enjoy freedom of functioning and are free to form and express their ideology. They are also free to elaborate and to present their lists of candidates. But, this freedom is not absolute. The law-maker can limit it by imposing conditions, such as requirements regarding eligibility or closed and blocked lists. Thus, a balance between the sexes is just another limitation, the constitutional basis of which is the mandate to foster equality imposed by the supreme norm.

48. Legislated quotas are more respectful of political parties’ freedom when they only impose a certain percentage of female candidates in the electoral list.⁴⁷ When the proportion of women must be respected in groups of seats, the restriction placed on political parties is higher.⁴⁸ The most demanding system is the zipper list, because in this case men and women must alternate. However, this kind of list seems to be the most effective for securing the representation of women.

49. It should, in any event, be noted that according to the European experience, although gender quotas are an effective tool for increasing women’s presence in political bodies, they do not automatically result in an equal representation of women and men. Quotas must include rules about rank order and sanctions for non-compliance.⁴⁹ According to the Study of the European Parliament of 2013, quota provisions must incorporate rules about the placement of candidates on the list. Indeed, a quota system that does not include such rank-order rules may have no effect at all: “If the 40 per cent of a party’s candidates on the electoral list in a PR

economic life and promote equal access to elected offices for men and women”.(Constitutional Law of 18 October 2001 n° 3). Later, Art 51 of the Constitution was also modified. This article recognizes the right of access to elected positions and public offices on equal terms. Constitutional Law of 30 May 2003 n° 1 added a new sentence which declares that “To this end, the Republic shall adopt specific measures to promote equal opportunities between women and men”.

⁴³ English version of the Law at

<http://www.juntaelectoralcentral.es/portal/page/portal/JuntaElectoralCentral/JuntaElectoralCentral>.

⁴⁴ See, on the Spanish case, Biglino Campos, P., “Equal representation in Spain:Lessons learned from balance electoral lists”, in IDEA, *Improving Electoral Practices. Case Studies and Practical Approaches*, 2014, pp.203-224.

⁴⁵ Sentence 12/2008 of 29 January.

⁴⁶ This article states that “it is the responsibility of public authorities to promote conditions ensuring that freedom and equality of individuals ... 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.”

⁴⁷ This is, for example, the case of Portugal. Art 2 of Organic law 3/2006 requires a minimum 33% representation of each sex in candidate lists.

⁴⁸ As stated above, in Spain the proportion between women and men must be respected in brackets of five seats.

⁴⁹ Dahlerup, D., Freidenvall, L. et alii, *Electoral Gender Quota Systems and their implementation in Europe*, European Parliament, Directorate-General for Internal Policies, Policy Department, Citizens’ Rights and Constitutional Affairs, 2008, p. 38.

<http://www.europarl.europa.eu/document/activities/cont/200903/20090310ATT51390/20090310ATT51390EN.pdf>

system are women but they are placed at the bottom of the list, this may result in no woman being elected at all. In plurality/majority electoral systems, rules are needed with regard to the gender distribution of “winnable” or “safe” seats”.⁵⁰ Other aspects of the electoral system in place also influence the effectiveness of quota regulations. For instance, even if women have to be placed at the top of the list, in a system of preference voting, it is the voter who determines which persons will be elected. This may lead to lesser female representatives than might be expected from their position on the list.

50. Furthermore, the effectiveness of quota provisions depends on the existence of institutional bodies that supervise the application of quotas and impose sanctions for non-compliance⁵¹.

51. There are different sanctions for breaching quotas. In some cases, they consist of financial penalties. This is the case for Portugal and France. In the latter, for example, non-compliance with the 50% parity rule will result in a decrease in public funding provided to the parties.⁵² In Spain, the consequences of breaching the legal requirements for the nomination of candidates are heavier. Indeed, the electoral commission cannot accept candidatures unless they meet the requirements set out on a balanced list. For this reason, electoral lists that do not respect the proportion of women and men must be rejected.⁵³

52 In Latin America, the use of gender quotas has been quite systematic, which is reflected in the fact that the American continent has reached a representation of 26.6 % of women in Parliaments. Argentina, Bolivia, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guyana, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Uruguay have introduced gender quotas for their legislative elections.

53. In particular, Bolivia, Costa Rica and Mexico have introduced a 50-50 quota. Nicaragua has also adopted this rule. Mexico established that the 50% rule is applicable to the candidates' list and the substitutes' list.⁵⁴ Both Bolivia and Costa Rica have introduced the zipper list into their laws, alternating one candidate of each sex.

54. Argentina and Peru have a gender quota of 30% for women. Argentina established that party electoral lists are required to have a minimum of 30% women among their candidates for all national elections with real chances to be elected.⁵⁵ Peru established that the electoral lists must include at least 30% of men or women among the candidates.⁵⁶

55. In Paraguay, parties should ensure that one in every five candidates in primary elections is a woman. This represents a quota of 20 %.⁵⁷ In Uruguay, candidates of both sexes must be represented in every three places on electoral lists, either throughout the entire list or in the first 15 places. Where only two seats are contested, one of the two candidates must be a woman.⁵⁸

56. Argentina was the first country in the region to introduce a gender quota in its electoral law (1991). Paraguay, Peru and Bolivia followed in the 90s. Mexico adopted the gender quota in 2002. Uruguay and Costa Rica adopted them in 2008. Chile and Venezuela have not yet introduced a gender quota into their laws.

⁵⁰ Freidenvall, L, Dahlerup, D., “Electoral Gender Quota Systems and their implementation in Europe, Update 2013” cit. p. 38.

⁵¹ Ibidem.

⁵² Art 9.1 of Law n° 88-227 of 11 March 1988 on Financial Transparency of Political Life. More information on the issue in <http://www.quotaproject.org/uid/countryview.cfm?country=53>

⁵³ Art 47.4 Organic Law 5/1985.

⁵⁴ General Law of Institutions and Electoral Proceedings, Articles 232, 234.

⁵⁵ Electoral Code, Article 37.

⁵⁶ Electoral Law, Article 116 and Law No. 28094 regulating Political Parties, Article 26

⁵⁷ Electoral Code, Article 32.

⁵⁸ Article 2 of Law No. 18.476.

57. Concerning sanctions applied to gender quotas, Bolivia ruled that if political parties do not comply with the legislated quota, the electoral management body may reject the registration of candidates. Argentina and Mexico established a 48-hour deadline to make the necessary changes. In Argentina, if the political parties do not change the selection of candidates to meet the requirement that candidates of different sexes are in the first three places of the list, the electoral authority itself can make the appointment. In Mexico, after an additional 24 hours, the electoral authority may reject the registration of the list.

B. Requirements on minorities representation

58. Ensuring an inclusive participation of minorities is not often considered in candidates' lists within political parties. Indeed, in general, there are no binding rules in Europe on the nomination of candidates aimed at ensuring the presence of minorities in parliament. The same can be said for Latin America. However, political participation of minorities should be promoted, especially in those countries where the requirements for minimum membership and regional representation could restrict the possibilities of persons belonging to national minorities, or where political parties based on ethnicity or region are prohibited.⁵⁹

59. The Venice Commission, in its *Guidelines on Political Party Regulation*, referred to the rights of members of minorities to be elected. Measures should be taken within the electoral process, therefore, to ensure that national minorities have an equal opportunity to be elected and represented in parliament.⁶⁰

60. In its *Study on Electoral Law and National Minorities*, the Venice Commission refers to two main elements to be considered by the legislative body:

- a) When lists are not closed, a voter's choice may take into account whether the candidates belong to national minorities. The freedom of choice may have favourable or unfavourable results with respect to minorities, and this depends on many factors.
- b) When the minority population is the majority in a territory, there may be the right to be represented by someone of the same group.⁶¹

61. All laws should consider the need to provide a measure to help minority representation. Indeed, the Venice Commission has stated that:

- a. "Parties representing national minorities must be permitted. Yet the participation of national minorities in political parties is not and shall not be restricted to the so-called ethnic based parties (...)
- b. Special rules guaranteeing national minorities reserved seats or providing for exceptions to the normal seat allocation criteria for parties representing national minorities (for instance, exemption from a quorum requirement) do not in principle run counter to equal suffrage.
- c. Neither candidates nor voters must find themselves obliged to reveal their membership of a national minority.
- d. Electoral thresholds should not affect the chances of national minorities to be represented.
- e. Electoral districts (their number, the size and form, the magnitude) may be designed with the purpose to enhance the minorities' participation in the decision-making processes."⁶²

⁵⁹ As it is the case in Bulgaria or in Russia, see CDL-EL(2008)014.

⁶⁰ *Guidelines on Political Party Regulation*. Role of candidates and parties "Minority Candidates". See paras. 106 and ff.

⁶¹ CDL-INF(2000)004, *Study on Electoral Law and National Minorities*, adopted in 2000, at <[http://venice.coe.int/docs/2000/CDL-INF\(2000\)004-e.asp](http://venice.coe.int/docs/2000/CDL-INF(2000)004-e.asp)> (hereinafter "Study on Electoral Law and National Minorities"), p. 8. This is the case for example in Italy, Slovakia or Spain.

62. The possibilities are therefore very wide: reserved seats, lower electoral thresholds, special parliamentary committees, adapted constituency boundaries, etc. In Europe, some laws include the possibility of reserving a certain number of parliamentary seats,⁶³ or of waiving the threshold of the number of votes received for obtaining representation in parliament in the case of national minorities.⁶⁴

63. Some European constitutions guarantee the presence of minorities in the national chamber. That is the case, for example, in Romania. Article 62.2 of the Constitution states that “organisations of citizens belonging to national minorities, which fail to obtain the number of votes for representation in Parliament, have the right to one Deputy seat each, under the terms of the electoral law. Citizens of a national minority are entitled to be represented by one organisation only”.⁶⁵ However, this provision is not applicable to the internal nomination of candidates.

64. The most common model is the protection of minorities under the general principle of equality.⁶⁶ In some countries, their presence in parliament is ensured by the way in which electoral districts are drawn. That is, for example, the case in Switzerland where pluralism is guaranteed by the fact that the Cantons are the constituencies. In “the Former Yugoslav Republic of Macedonia”, special districts may be established to enable the election of certain minorities, such as members of the Roma community.⁶⁷

65. In spite of the fact that there are 522 indigenous peoples representing more than 28 million people⁶⁸ in Latin-America, the standards for the presentation of candidates are not yet very developed. Peru is an exception, as it has established that 15% of the nominations are reserved for representatives of native communities and indigenous peoples, for their provinces and regions. Venezuela has reserved three seats for Indigenous Congressmen (Organic Law on Electoral Processes, Article 180). Bolivia decided to make special electoral boundaries for

⁶² CDL-AD(2005)009, Report on electoral rules and affirmative action for national minorities' participation in decision making process in European countries, adopted in 2005, at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)009-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)009-e).

⁶³ This is the case, for example, of Croatia. Article 15 of the Constitution guarantees “equal rights for the members of all national minorities”. A quota for national minorities in Parliament has been established by the Act on the Rights of National Minorities in the Republic of Croatia 2002 (amended in 2010). According to Article 19(2), a minimum of three seats in the Croatian Parliament shall be reserved for representatives of those national minorities which, on the effective date of this Constitutional Law, account for more than 1.5 percent of the population of the Republic of Croatia and which achieve their right to representation on the basis of universal suffrage, by election from the party slates of such minorities or slates proposed by voters belonging to such minorities, in compliance with legislation governing the election of deputies to the Croatian Parliament. National minorities which account for less than 1.5% of the population of the Republic of Croatia shall, in addition to their right to exercise universal suffrage, be entitled to the special right to vote enabling them to elect five deputies belonging to such national minorities from within their own special constituencies, all in compliance with legislation governing the election of deputies to the Croatian Parliament and without the possibility of impinging upon the acquired rights of national minorities.” Bosnia and Herzegovina also has a system of reserved seats, mainly in the field of local elections: members of all national minorities which make up to 3% of the total population of a municipality shall be guaranteed at least one seat in a Municipal Council/Municipal Assembly (Article 13A of the Election Law).

⁶⁴ This solution is applied in Germany, where the 5% threshold is not applied for political parties representing minorities, in Denmark or in Poland.

⁶⁵ According to Art 9.1 of Law 35/2008, the organizations of citizens belonging to a national minority, which are legally established and do not win parliamentary representation in either chamber, are entitled to one seat each in the Chamber of Deputies on the condition that the organization obtains at least 10% of the average number of valid votes casted for an elected Deputy. There is no upper limit on the number of seats reserved for minority organizations. <http://www.ipu.org/parline-e/reports/2261.htm>.

⁶⁶ This is the case of Ukraine, where Art. 9 of the Law on National Minorities states that Ukrainian citizens who belong to national minorities are granted the right to be equally elected to any position, in particular, to legislative bodies and local self-government.

⁶⁷ Law on Election of the Members of the Parliament, “Official Gazette of the Republic of Macedonia No. 42/2002 ; Source: <http://www.dik.mk>.

⁶⁸ UNICEF, “Indigenous peoples in Latin-America”, 2012.

native indigenous peoples representing ethnic minorities in the country. They are allowed to nominate candidates according to their own ethnic traditions.⁶⁹ In Mexico, the Electoral Law does not establish an indigenous quota, but as result of a constitutional amendment, the State has to promote the political participation of the indigenous groups; in order to do so, it has allowed the drawing of special electoral boundaries where the indigenous people exceed 40% of the population.⁷⁰

V. CHAPTER IV: FINDING AN APPROPRIATE BALANCE BETWEEN INTRA-PARTY DEMOCRACY AND FREEDOM OF ASSOCIATION

66. The previous analysis on European and Latin American countries shows that regulating the selection of candidates is a possibility each country may decide on according to multiple factors. Countries with a certain legal tradition may opt for less regulation of political parties, with the consequence that political parties may establish their own rules on the nomination of candidates in their statutes. Control over compliance with these requirements is also left to the internal bodies of the parties themselves. However, applying this approach is more difficult to some countries, often in new or transitional democracies, or which have been confronted by important electoral malpractice, or structural impediments in society to representation of minorities and other groups. On the one hand, the liberal view can help to strengthen political parties; fostering the creation of internal structures and autonomous regulations; on the other hand, the lack of requirements on internal democracy could foster the creation of exclusive party elites.

67. The requirements concerning internal democracy can also generate undesirable effects as a result of the social and political characteristics of the country. In systems where political parties have undergone difficulties, due to financial scandals or other internal problems for example, the establishment of requirements on participation or on public debates can help to restore public confidence. However, in other cases, the establishment of such requirements can jeopardise the stability of political parties. The possibility of abuse by a limited number of party members to the detriment of the decisions taken democratically by the majority in accordance with the party programme, should not be excluded.

68. As the example on quota provision shows, one of the most controversial aspects of the laws which impose internal democracy is that they may limit political pluralism. However, this kind of result could only occur where parliamentary majorities impose requirements concerning gender and minorities representation that are not directly linked to democracy, or when the limits are not necessary or excessive. For this reason, any limit on internal democracy must meet the conditions of the proportionality test: the limits must be suitable to increase democracy; they must be necessary and the least detrimental to political party freedom; finally, the benefits for democracy that derive from the requirements must outweigh the potential harm to freedom.

69. Furthermore, the degree of legal intervention in the selection of candidates should be consistent with the electoral system. When the electoral lists are open or not closed, voters have the possibility to choose between different candidates presented by the party. In this case, the requirements imposed by law should be less burdensome than in systems with party lists. Indeed, when the electoral lists are closed, the voters can only choose between candidates selected by political parties with no possibility of changing the order decided by them.

⁶⁹ Law No. 026.

⁷⁰ Constitution Amendment Decree August 14th 2001, Article third. The Electoral Tribunal of Mexico has issued a decision on 8 April 2015 requesting political parties to respect the constitutional principles, mainly adopting a material approach to equality and requiring the inclusion of indigenous candidates in the lists (SUP-JDC-824/2015).

70. This report shows that many of the requirements on the nomination of candidates are stated in electoral laws. The electoral system establishes rules for alternating in political power and constitutes the basis for the entire democratic framework. For this reason, any measure imposing requirements on the selection of candidates that also affects the decision-making process of political parties has to be preceded by broad public discussion and it should be taken, if possible, by consensus. Any legal requirement imposed on political parties for selecting candidates should be effectively supervised by independent bodies, such as tribunals or electoral commissions, ensuring the existence of effective remedies available to protect the freedom of association of political parties and political rights of individuals.

71. One of the most problematic aspects of the nomination of candidates is the kind of control established to verify the fulfilment of the requirements imposed by the laws and by the statutes of the party. In this matter, the liberal view is inclined to reach the conclusion that political parties, as private associations, are free to follow their own rules. According to this point of view, voters will reward or punish the parties for the decisions made in the selection of candidates. The approach to the problem is different where the legal system imposes requirements on internal democracy. In this case, it is possible to establish different types of controls over the compliance of political parties with the rules stated in the constitution, in the law or in their own statutes. The most common rule is to leave the monitoring to an internal organ, which would act as an arbiter in the appeals against the nomination of candidates.⁷¹ In other countries, there is no clear answer, because the competence of ordinary judges on the matter is still under discussion.⁷²

72. Other systems follow a different pattern. In Portugal, ordinary judges and the Constitutional Court can verify whether the party has complied with the requirements imposed by the legal system.⁷³ This is also the case in Germany, where the constituency nomination must be submitted to the Constituency Returning Officer with a copy of the record of the candidate's election. The record must include details of where and when the assembly took place, the form of the invitation, the number of members present and the result of the ballot.⁷⁴ If the nomination does not meet these requirements, it must be rejected by the Constituency Electoral Committee⁷⁵.

VI. CONCLUSIONS

73. Freedom and democracy are the main principles that inspire the regulation of political parties in European and Latin American countries. The first principle is based on the nature of political parties, which are not to be considered state organs, but private associations. The second principle is relevant because of the vital role played by political parties in the public sphere.

⁷¹ This is the case of Italy, for example, according to art. 3.a) of the Decree Law of 28 December 2013, n° 2013.

⁷² That is the case of Spain, where parties are private associations of public relevance. As associations, Civil Courts should be competent to verify the obedience of the parties to their own statute. Pérez-Moneo, Miguel, *La selección de candidatos electorales en los partidos*. Madrid, 2012, pág. 319.

⁷³ Article 34. 2 of the Portuguese Law establishes that electoral procedural acts shall be subject to challenge before the applicable jurisdictional organ by any party member who is an elector or a candidate. Definitive decisions handed down under the terms of the previous paragraph shall be subject to appeal to the Constitutional Court.

⁷⁴ Article 21.6. The same Article states that "the chairperson of the assembly and two members present designated by it shall give the Constituency Returning Officer an assurance in lieu of an oath to the effect that the requirements specified in subsection (3), first to third sentences, were observed. The Constituency Returning Officer shall be responsible for accepting such an assurance in lieu of an oath; he shall be considered an authority within the meaning of Section 156 of the Penal Code".

⁷⁵ Article 26.2 Federal Electoral Act of Germany.

74. The need for an appropriate balance between freedom and democracy explains the different ways in which each country regulates political parties. Some countries consider political parties primarily from the perspective of freedom of association (the “liberal view”). In this case, the requirements imposed on political parties in general are the same as, or similar to, those that bind other private associations. Other countries also take into account that political parties contribute to the expression of political opinion and are tools for the presentation of candidates in elections.

75. Although there is a trend to regulate the functioning of political parties through legislation, in many cases this regulation does not affect the selection of candidates, but other issues, such as the registration process, the political parties’ financing, etc. However, there is also a growing number of states that specifically regulate the nomination of candidates. Often, laws on political parties are quite flexible. In general, these norms refer to the statutes or the constitutions of political parties in order to set out, in detail, the proceedings to follow and the bodies entitled to select candidates.

76. The main reason that warrants legislative intervention in the selection of candidates is the representative role that political parties are supposed to play in elections. Indeed, the most stringent laws on nomination of candidates are electoral laws, enacted to ensure the citizens’ right to political participation. According to this model, the citizens’ equal right to vote and right to stand for elections require transparency, equality and the members’ involvement in the selection of candidates. In such cases, the electoral law imposes requirements concerning the nominating bodies and the nomination procedure.

77. Among those countries that have regulated these issues, there are two main elements of “substantive” intra-party democracy, which can be identified:

- There is a growing number of countries that have included gender quotas in their legislation. Quotas within candidates’ lists are preferred, as opposed to reserved seats in constituencies.
- As to the rules on the representation of minority, ethnic and vulnerable groups, there seems to be an opposite trend: there are reserved seats or special constituencies, resulting in “guaranteed mandates” as a way of ensuring such groups’ representation.

78. Many European countries in recent times have taken steps, often through legislation, to ensure the participation of women and minorities, ethnic and vulnerable groups. In Latin-America, such rules have existed since the 90s. Although the so called “legislated quotas”, which mainly concern the representation of women, have been preferred in recent laws, many countries place trust in the so-called “voluntary quotas” stated by political parties in their statutes. The practice in the field of gender quotas differs from country to country: the required minimum percentage of each sex among the candidatures is different, the use of ranking orders, the sanction system, etc. Furthermore, the variations in interplay between the quota regulation and other features of the electoral system, as well as the relevance for women’s representation of these other features as such, has a key impact on the outcome.⁷⁶

79. The possibility of adopting legal measures to foster respect for democratic principles in the selection of candidates is consistent with international standards and principles stated by the Venice Commission. However, legal intervention in the selection of candidates is not always required or suitable. On the one hand, long-established democracies with deep-rooted political parties favour associational freedom, since internal democracy is guaranteed by the political

⁷⁶ Such as proportional representation/majority/plurality and mixed systems; single member vs multi-member districts; district magnitude; legal thresholds; closed versus open lists. Cf *Report on the Impact of Electoral Systems on Women’s Representation in Politics*, (CDL(2009)080, paras. 42-83..

parties themselves. On the other hand, state interference in the selection of candidates in new or transitional democracies might jeopardise political pluralism. There is an increased risk where legal intervention constitutes an imposition of the majority over the minority.

80. It is for each country to choose between a liberal view, which favours the freedom of political parties and the absence of legislation concerning their internal affairs (including the nomination of their candidates), and the view which seeks to strengthen internal democracy in the selection of candidates through legislation. Many states have also elements of both models. Other factors will influence the outcome, mainly the democratic tradition and the electoral system.

81. Nevertheless, the European and Latin American experiences show that, if legislative intervention is deemed necessary, some conditions should be taken into account:

- a) The requirements imposed on political parties for selecting candidates must be coherent with the electoral system.
- b) The fulfilment of the exigencies imposed by law must be effectively supervised by independent bodies, such as tribunals or electoral commissions, ensuring the existence of effective remedies available to protect the freedom of association of political parties and political rights of individuals.
- c) The law must respect the proportionality principle, establishing means that are necessary to increase democracy and the least burdensome to political parties' freedom.
- d) The legal requirements concerning the selection of candidates can affect the core of political parties in one of their most relevant decisions. For this reason, it is important that there should be a consensus on their necessity and content.