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COMMENTS

ON

THE METHOD OF NOMINATION OF CANDIDATES WITHIN POLITICAL PARTIES

by

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I. TWO PRINCIPLES IN TENSION: FREEDOM AND INTERNAL DEMOCRACY OF POLITICAL PARTIES.

1. The nomination of candidates by political parties varies significantly, both among countries, and between political parties within each country. In part, this diversity is a consequence of the legal treatment that political parties receive in each political system.

2. In contemporary democracies, two main principles rule the internal functioning of political parties. Firstly, there is the principle of freedom, under which political parties are given autonomy in their internal and external functioning. According to this principle, political parties should be free to establish their own organization and the rules for selecting party leaders and candidates. The second principle is democracy. Since political parties are essential for political participation, they must respect this principle while establishing their internal organization and the internal election of directives and candidates.

3. However, the influence of each of these principles differs in each system. Some countries stress freedom, while others are more prone to underline democratic exigencies. The tension between these two principles could explain the different ways in which legal systems rule on the nomination of candidates / candidate nomination.

4. Some constitutions do not mention political parties at all[1], while others refer to them only when ruling on elections[2]. Other constitutions shape political parties as a specific type of association. Art 49 of the Italian Constitution of 1947, for example, recognizes the right of all citizens to freely associate in parties to contribute through democratic processes in determining national policies. In such cases, the constitutions directly guarantee an individual right and, indirectly, the existence of political parties, since they are essential in pluralistic systems.

5. When the constitution does not recognize political parties, when it only mentions the parties' role in elections, or when it just proclaims the parties' independence, then the supreme norms follows the so-called "liberal theory". According to P. Norris, in this case political 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. Any legal regulation by the state, or any outside intervention by international agencies, was regarded in this view as potentially harmful by either distorting or even suppressing pluralist party competition…"[3].
In other cases, the constitution establishes more detailed rules on political parties, rules that can follow different patterns.

6. Thus, some constitutions not only grant freedom to political parties but also impose some duties on their structure and functioning. The most famous case is the well-known Art 21.1 of the German Basic Law, which requires that political parties' internal organization conform to democratic principles[4]. According to this pattern, political parties play a vital role in the political system, since they contribute to the formation and expression of public opinion, and are the main actors in the election of representatives. Due to this prominence, political parties must be regarded as associations of constitutional relevance. Thus, the law can impose requisites and prohibitions on political parties -- legal demands that affect the internal rules for nominating candidates -- in order to guarantee their loyalty to democracy.

7. The second pattern is when the constitution obligates political parties to improve representation of women. This is the case of the French Constitution since its Art 1.2 stipulates that the law shall promote equal access of women and men to electoral mandates and elected

[1] This is the case of Belgium, Denmark, Ireland and Netherlands, for example.
[2] This is the case, for example, of the Austrian Constitution.
[3] 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
[4] Other constitutions follow the same pattern. This is the case of Art 3.3 of the Portuguese Constitution; Art 26 of Andorran Constitution; Art 6 of the Spanish Constitution; Art 97 of the Costa Rican Constitution and Art 69 of the Turkish Constitution. Art 41.I. 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.

offices. Consequently, Art 4 recognizes the responsibility of political parties to uphold and promote this principle[5].

8. However, few constitutions have delved further into the nomination of candidates by political parties. The exceptions come from Latin America, where some supreme norms not only impose internal democracy or gender equality, but also contain special norms on the nomination of candidates by political parties, although the content of these norms varies significantly from one to another[6].

II. LEGAL REQUIREMENTS ON SELECTION OF CANDIDATES BY POLITICAL PARTIES.

9. The Guidelines on Political Party Regulation view political parties as private associations that play a critical role as political actors in the public sphere7. 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 to not interfere with freedom of association. However, the Guidelines recognize 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"[8].*

10. In principle, the way in which constitutions rule on political parties can have a strong impact on the legislation on candidate nomination. In fact, when the Constitution imposes internal democracy, it mandates--or at least allows--the legislator to establish requirements and proceedings for candidate nomination, exigencies that bind all political parties. In this way, the constitution permits the law to limit political parties' freedom on the issue.

11. When the constitution does not rule on political parties or simply / only recognizes their freedom, the legislator must be more respectful of the proportionality principle. It does not mean that the law cannot rule on nomination. Equality, freedom of expression, and democracy also link political parties, since these entities are the main channels through which citizens participate in public life. It only means that, in this case, the requirements for limiting freedom imposed by the proportionality test are more demanding / stringent.

12. For these reasons, laws on political parties are more common in countries whose constitution imposes internal democracy. Although in general these laws do not rule directly on the nomination of political parties, they establish general principles that affect it.

13. Thus, understanding the difference between the liberal model and other models can serve to better understand the way in which each democratic system conceives political parties in general. The distinction is also useful since some countries – such as Ireland, for example -- have not changed the main characteristics of the liberal theory9. However, over the years many of the differences between the patterns described above are diminishing.

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[5] The information on women's representation has been extracted from QuotaProject, Global Database of Quotas for Women, http://www.quotaproject.org/.

[6] For example, Transitory Provisions W and Z of Chile's Constitution rule on the primary elections to President and Vice President of the Republic; Ar. 67 of the Constitution of the Bolivarian Republic of Venezuela establishes that political association must follow democratic methods of organization, functioning and direction. "Their governing organs and candidates for elective office shall be selected by internal elections with the participation of its members". Art 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 the democratic principles and without gender discrimination.

[7] Para 6, Para 98.

[8] Para 98.

[9] There is no law on political parties even now.

14. In fact, during the last decade, many countries have evolved from a previously liberal point of view to the others. A recent study demonstrates[10] that 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. Indeed, not only has the regulation of political parties increased, but Europe is witnessing a proliferation of specific laws on political parties or party laws. In 2012, out of the thirty-three countries analyzed by that study, twenty had adopted a party law[11]. Although some of these laws refer to different matters, such as political parties' registration or finances, many of them include provisions on internal democracy, with regulations concerning elections of party bodies, their accountability, and the resolution of party conflicts[12].

15. One of the last steps in this process has been the Italian Decree-Law of 28 December 2013, nº 2013.13 This is the first general norm that rules on political parties in that country. However, the new Decree Law does not impose internal democracy and transparency on all political parties, but only on the parties that run for national, European and regional elections. Therefore, the Law aims to establish a link between the rights and duties recognized in the new regulation, and the effective representativeness of political parties[14].

II. 1 Requirements on internal democracy.

16. Few of these laws specifically rule on the nomination of candidates. This is the case of Art 17 of the German Law on Political Parties of 24 July 1967 (GL)[15] and Art 33 of Portuguese Organic Law 2/2003 on Political Parties (PL)[16]. The content of these articles will be analyzed later in this paper. At the moment it must be noted that, in general, the requirements for candidate nomination are not specifically stated in the laws on political parties. However, they can be deduced from the general rules stated by the party laws on party organization 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. The most interesting case is the Federal Elections Act of the German Republic (FEAG) [17] since its Art 21 establishes detailed provisions for the election of the members of the Bundestag.

On this matter, the Guidelines on Political Parties states that:

> *"Parties must have the ability to determine party officers and candidates, free from government interference. Recognizing 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-*

[10] 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.
[11] That is, Austria, Bulgaria, Croatia, Czech Republic, Estonia, Finland, Germany, Hungary, Latvia, Lithuania, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Ukraine and the United Kingdom. Ibidem, p.4.
[12] Ibidem, p. 7.
[13] Testo del decreto-legge 28 dicembre 2013, nº 149 coordinato con la legge di conversione 21 febbraio 2014, n. 13 recante "Abolizione del finanziamento pubblico diretto, disposizioni per la trasparenza e la democraticita' dei partiti e disciplina della contribuzione volontaria e della contribuzione indiretta in loro favore", en http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2014;13..
[14] Allegri, M.R. "Prime note sulle nuove norme in materia di democraticitá, trasparencza e finnaziamento del parititi politici", Osservatorio costituzionale, marzo 210, AIC, http://www.osservatorioaic.it/prime-note-sulle-nuove-norme-in-materia-di-democraticit-trasparenza-e-finanziamento-dei-partiti-politici.html.
[15] English version published at http://www.bundestag.de/blueprint/servlet/blob/189734/2f4532b00e4071444a62f360416cac77/politicalparties-data.pdf.
[16] 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.
[17] 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 Mai 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

making positions. Gender-balanced composition of selecting bodies should also be commended"[18].

17. In general, national laws follow these principles and apply the basic rules of the democratic principle to the internal structure of the political parties. Thus, these laws rule on the body that shall nominate, the proceedings to follow in order to make the decision, and the rights of party members during the selection.

II. I. a) Requirements on the nomination bodies.

18. Some laws state that the main decisions must be made by the party general assembly (composed of all the members of the party), or by an assembly composed of delegates. That is the case of Art 7.2 of Spanish Organic Law 6/2002 (SL)[19], 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 principal decisions of the party according to the proceedings established in the parties' statutes.

19. However, Art 21 FEAG is more precise since it specifically rules on the selection of party candidates. In fact, its first paragraph allows the direct election of candidates by all the members of the party, or the indirect election by member representatives. Thus, the Art 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".

20. 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 recognizes 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 shall be repeated[20].

II. I. b) Requirements on the nomination proceedings

21. Sometimes the democratic idea serves to identify the main principles that guide the proceedings. As stated, Art 17 GL establishes that the nomination must be done by secret ballot. The Portuguese Law is more detailed because its Art 33 not only imposes secret ballot, but also personal ballot in all the elections and referenda run inside the parties. Furthermore, Art 34.1 PL states some general rules on electoral proceedings 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 treated impartially.

22. Transparency is a principle also imposed by some electoral laws to the nomination process. That is, for example, the case of Serbia. Art 9 *of the Law on elections of members of Parliament* establishes the citizen right to be fully informed about the nominated candidates[21].

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[18] Para 113.

[19] https://www.boe.es/buscar/act.php?id=BOE-A-2002-12756.

[20] Art. 21.4 FEAG 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.

[21] 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 electand 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,

II. I. c) Requirements on party members' rights.

23. Finally, the party member's rights recognized by the laws are also applicable to the nomination process; 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[22]. For example, Art. 21.3 FEAG states some requirements for the elections of the members of the Bundestag aimed to guarantee democratic debate within the assembly that nominates candidates. Indeed, it imposes that every eligible person attending the assembly shall be entitled to submit proposal. Furthermore, the article proclaims the right of the candidates to introduce themselves and present their program.

24. The laws analyzed above establish some requirements on internal democracy. However, these norms are quite respectful of freedom of political parties. For this reason, these norms refer to the statutes -- or constitutions -- of political parties in order to detail the principles and requisites established by the laws themselves[23].

25. When the Constitution does not impose democracy, 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[24]. In other cases, the law leaves to the parties' own statutes the establishment of the organs, proceedings, and the electoral rights of party members in the nomination of candidates[25]

26. In order to evaluate the real efficiency of the nomination rules analyzed above, it must be observed that the flexibility of some norms and the difficulties in verifying their compliance entail significant differences between the de jure and the de facto nomination process. As P. Norris stated some years ago, "the attempt to determine the 'main location' of decision-making in the nomination process typically encounters a number of limitations so we need to be cautious about these conclusions"…The difficulties are greater "in poorly-institutionalized parties where democratic rulebooks and procedures exist on paper but which are widely flouted in practice"[26].

27. For this reason, perhaps the most problematic aspect of the nomination of candidates is the kind of control established to verify the fulfillment of the requirements imposed by the laws and by the statutes of the party. In this matter, the liberal theory leads to the conclusion that political parties, as private associations, are free to follow their own rules. According to this point of view, the voters will reward or punish the parties for the decisions made in the selection of candidates. The approach to the problem is different when the juridical system imposes requisites on internal democracy. In this case, it is possible to establish different types of control over the compliance of political parties with the rules stated in the constitution, the law or 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 nomination of candidates[27]. In other countries,

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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.

[22] For example, Art 8 SL. In Germany, the basic principles of Art 38 of the Constitution - which rules on 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), it must be 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).

[23] For example, art. 21.5 of FEAG 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".

[24] This is the case of Art 32 of the Latvia Party Law.

[25] Art 3 of the Italian Decree Law of 28 December 2013, nº13; of Art 10 of the Romanian Party Law.

[26] 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

[27] This is the case of Italy, for example, according to art. 3.a) of the Decree Law of 28 December 2013, nº 2013.

there is not a clear answer, because the competence of ordinary judges on the matter is still under discussion[28].

28. However, other systems follow a different pattern. This is the case of Portugal, where ordinary judges and the Constitutional Court can verify if the party has complied with the requirements imposed by the juridical system[29]. This is also the case of Germany. In this country, the constituency nomination must be summited 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[30]. If the nomination does not meet these requirements, it shall be rejected by the Constituency Electoral Committee[31].

II. 2. Requirements on gender balanced representation

29. 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 recognizes that "the small number of women in politics remains a critical issue which undermines the full functioning of democratic process"[32]. Hence, the document states that "electoral gender quotas can be considered an appropriate and legitimate measure to increase women's parliamentary representation".

30. The study on Electoral Gender Quota System and their implementation in Europe, Update 2013[33] analyzes the adoption of electoral gender quotas in the European Union and European Economic Area (EEA) countries[34]. The analysis shows that some type of electoral gender quotas for public elections is in use in a majority of these 30 countries. Thus, eight countries – Belgium, France, Poland, Portugal, Slovenia, Spain, Greece and Ireland – have introduced legislated quotas that are binding for all political parties. Voluntary party quotas have been implemented in 16 of the countries, meaning that at least one of the political parties represented in parliament has written electoral gender quotas into its statutes. In six countries, no gender quotas are in use for national elections"[35].

31. From the start, the establishment of legislated electoral quotas has been polemical in many countries. In fact, France -- which was the first state in the world to introduce a compulsory fifty per cent gender parity provision[36] -- had to change the Constitution in 1999. In Italy, the Sentence of the Constitutional Court nº 422 of 12 December of 1995 against the quotas led to the constitutional reform of 2001[37].

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[28] 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.

[29] Art. 34. 2 of PL 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.

[30] Art. 21.6. The same articles 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".

[31] Art. 26.2 FEAG.

[32] Para. 99.

[33] 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

[34] Iceland, Liechtenstein and Norway.

[35] In 2013 there were no quotas in Finland, Denmark, Latvia, Bulgaria, Estonia and Liechtenstein. Ibidem, p. 7-8.

[36] http://www.quotaproject.org/uid/countryview.cfm?country=53.

[37] 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 economic life and promote equal access to elected offices for men and women".(Constitutional Law of 18 October 2001 nº3). 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 nº 1 added a new sentence which declares that

32. In Spain, Organic Law 3/2007 on Effective Equality between Women and Men applied the balanced composition to the electoral list, introducing the new Art 44.bis into Organic Law 5/1985, on General Electoral System[38]. 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 set for candidates.

33. One of the most polemical issues of balanced electoral lists was that the law had been enacted without changing the Constitution previously. According to this opinion, balanced lists were an imposition on those political parties that were against quotas, since they held a different idea of equality. The Constitutional Court[39] rejected this criticism using Art 9.2 of the Spanish Constitution, which imposes on public power the duty to promote a real and effective equality[40]. From the Constitutional Court's point of view, political parties enjoy freedom of functioning and are free to form and express their ideology. And, of course, 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, balance between the sexes is just another limitation, whose constitutional basis is the mandate to foster equality imposed by the supreme norm.

34. Legislated quotas are more respectful of political parties' freedom when they only impose a certain percentage of female candidates in the electoral list[41]. When the proportion of women must be respected in brackets of seats, the limitation is higher[42]. 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 women representation.

35. In any case, the European experience shows that, although gender quotas are an effective tool for increasing women's presence in political bodies, they do not automatically result in equal representation of women and men. Quotas must include rules about rank order and sanctions for non-compliance[43].

36. According to the Study of the European Parliament cited above, quota provision 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 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"[44].

37. Furthermore, the effectiveness of quota provisions depends on the existence of institutional bodies that supervise the application of quotas and impose sanctions for non- compliance[45].

"To this end, the Republic shall adopt specific measures to promote equal opportunities between women and men".

[38] English version of the L aw at http://www.juntaelectoralcentral.es/portal/page/portal/JuntaElectoralCentral/JuntaElectoralCentral.

[39] Sentence 12/2008 of 29 January.

[40] 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."

[41] 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.

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

[43] Dahlerup, D., Freidenvall, L. et ali, 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

[44] Freidenvall, L, Dahlerup, D., "Electoral Gender Quota Systems and their implementation in Europe, Update 2013" cit. p. 38.

[45] Ibidem.

38. The result of breaching the quotas can be different. In some cases, they consist of financial penalties. This is the case of Portugal and France. In this last country, for example, non-compliance with 50% parity rule will result in a decrease of public funding provided to the parties[46]. In Spain, the consequences of breaking the requisites imposed by Law for the nomination of candidates are heavier. Indeed, the electoral commission cannot accept candidatures unless they meet the requirements set out on balanced list. For this reason, electoral lists that do not respect the proportion of women to men must be rejected[47].

II. 3. Requirements on protection of minorities

39. In general, in Europe there are no binding rules on nomination of candidates aimed at ensuring the presence of minorities in the parliament.

40. It is true that some constitutions guarantee the presence of minorities in the national chamber. That is the case, for example, of Romania. Art 62.2 of the Constitution states that "organizations 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 organization only".[48] However, this provision is not applicable to the internal nomination of candidates.

41. The most common model is to protect minorities under the general principle of equality[49]. Furthermore, in some countries, their presence in the parliament is ensured by the way in which electoral districts are drawn. That is, for example, the case of Switzerland where pluralism is guaranteed by the fact that the Cantons are the constituencies.

III. BALANCING DEMOCRACY AND FREEDOM.

42. The previous analysis on European and Latin American countries shows that ruling or not on selection of candidates is a choice taken by each country according to variable factors. In general, some deep-rooted democracies which have not undergone radical break show strong confidence in political parties and entrust them with the establishment of internal rules for nominating candidates. The control over the compliance of these requirements is also left to the party internal bodies of the parties. However, the consequences of extrapolating this model to countries whose democracy is not well consolidated are mixed. On the one hand, the liberal model can help to strengthen political parties. On the other hand, the lack of requirements on internal democracy can potentiate the excessive weight of party elites at the expense of party ranks members.

43. The imposition of internal democracy can also generate contradictory effects as a result of the social and political characters 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 public debates can help to restore public confidence. However, in other cases, the establishment of this kind of exigencies can put in danger the stability of political parties. The possibility should not be excluded of abuse by a limited number of members party in detriment of the decisions democratically taken by the majority according with the party program.

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[46] 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

[47] Art 47.4 Organic Law 5/1985.

[48] 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.

[49] 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..

44. As the example on quota provision shows, one of the most controversial apect of the laws which impose inner democracy is that they may limit political pluralism. However, this kind of result could only occur when parliamentary majorities impose on minorities requirements 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 fulfill the exigencies required by the proportionality test. Therefore, the limits must be suitable to increase democracy; they must be neccesary and the least detrimental for political party freedom; finaly, the benefits for democracy that derives from from the requisites must outweigh the potential harm to freedom.

45. Furthermore, the intensity of legal intervention on the selection of candidates should be consistent with the electoral system. In fact, when the electoral lists are open or not blocked, 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 and blocked, the voters can only choose between candidates selected by political parties with no possibility of changing the order decided by parties.

46. The precedent study shows that many of the requirements on nomination of candidates are stated in electoral laws. The electoral system establishes rules for alternating in political power and constitutes the bases of the entire democratic framework. For this reason, any measure imposing requisites on 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 general consensus.

47. 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 theory leads to the conclusion that political parties, as private associations, are free to follow their own rules. According to this point of view, the voters will reward or punish the parties for the decisions made in the selection of candidates. The approach to the problem is different when the legal system imposes requisites on internal democracy. In this case, it is possible to establish different types of control over the compliance of political parties with the rules stated in the constitution, the law or 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 nomination of candidates.[50] In other countries, there is not a clear answer, because the competence of ordinary judges on the matter is still under discussion.[51]

48. 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.[52] This is also the case in Germany. In this country, 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.[53] If the nomination does not meet these requirements, it shall be rejected by the Constituency Electoral Committee[54].

[50] This is the case of Italy, for example, according to art. 3.a) of the Decree Law of 28 December 2013, nº 2013.
[51] 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.
[52] 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.
[53] 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".
[54] Article 26.2 Federal Electoral Act of Germany.

CONCLUSIONS

49. Freedom and democracy are the main principles that inspire the regulation on political parties in European and Latin American countries. The first principle emanates from the nature of political parties, since political parties are not state organs but private associations. Democracy derives from the vital role that political parties play in the public sphere.

50. The balance between freedom and democracy explains the different ways in which each country rules on political parties. In fact, some countries mainly envision political parties from the perspective of freedom of association. In this case, the requisites imposed on political parties are the same exigencies that also bind other private associations. However, some countries also take into account that political parties contribute to the expression of political opinion and are instruments for the presentation of candidates in elections.

51. Although there is a trend to regulate through legislation the functioning of political parties, in many cases this regulation does not affect the selection of candidates but other issues, such as registration, financing, etc. Few countries specifically rule on the nomination of candidates, but even in these cases, laws on political parties are quite flexible. In general, these norms refer to the statutes or the constitutions of parties in order to set out in detail the proceedings to follow and bodies entitled to select candidates.

52. The main reason that legitimates legislative intervention on the selection of candidates is the role that political parties 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' right to vote and right to stand for elections require transparency, equality and members' involvement in the selection of candidates. In such cases the electoral law imposes requirements concerning the nominating bodies and the nomination procedure. Furthermore, the electoral law imposes the fulfilment of the right to political participation of the members of the party in the selection process.

53. The possibility of taking measures to fulfil the democratic principle in the selection of candidates is consistent with international standards and principles stated by the Venice Commission. However, the intervention of the law in the selection of candidates is not always required. On one hand, long-established democracies with deep rooted political parties prefer favouring freedom since inner democracy is guarantee by the parties themselves. On the other hand, the state interference on selection of candidates in new or transitional democracies might endanger political pluralism. This risk is more likely when the legal intervention constitutes an imposition of the majority over the idea of democracy sustained by the minority.

54. The choice between the liberal model and the model which intends to ensure inner democracy in the selection of candidates is up to each country, and it must be made taking into account different factors, such as democratic tradition and electoral system.

55. Even so, the European and Latin American experience shows that, if legislative intervention is deemed necessary, some conditions should be taken into account.

a) The requisites imposed on political parties for selecting candidates must be coherent with the electoral system.
b) The fulfilment of the exigencies imposed by the law must be effectively supervised by independent bodies, such as tribunals or electoral commissions.
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 requirements stated by law on the selection of candidates affect the core of political parties in one of their most relevant decisions. For this reason, a general consensus on the necessity and on the content of these exigencies is highly recommendable.