Articles

"Gender Quotas" in French and Italian Public Law: A Tale of Two Overlapping and Then Diverging Trajectories

By Mathias Möschel[*]

Abstract

This Article compares the French and Italian experiences with gender quotas—understood as mechanisms intended to increase women's participation in public life, including but not limited to, the reservation of seats in certain positions and the modulation of electoral lists—in public entities such as legislative and executive bodies (including political parties), the judiciary, and public universities. The comparison between France and Italy demonstrates that even between two countries whose constitutional history and trajectory with regard to gender quotas has been portrayed as being essentially identical, a closer analysis of the recent developments in both countries' constitutional and administrative case law shows a slightly more nuanced picture. Using Rodolfo Sacco's approach of legal formants, this Article argues that the difference stems mainly from the different attitude and interpretation of equality by the judicial formant.

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A. Introduction

In the United States, public debates and academic literature about gender quotas in politics or on private company boards and other positions of traditional male power are conspicuously absent or marginalized.[1] Why this might be the case has already been explained elsewhere[2] and will not be discussed in this Article. Outside of the United States, comparative constitutional law, political science literature, and feminist legal scholarship discusses the spread—and at times the success—of gender quotas in Europe and around the globe for a considerable amount of years.[3]

This Article will compare the French and Italian experiences with gender quotas in public entities such as legislative and executive bodies—including political parties—, the judiciary, and public universities,[4] but will exclude the ongoing discussion on gender quotas—whether voluntary or mandatory—on private company boards.[5] By "gender quotas," I understand mechanisms intended to increase women's participation in public life—i.e. politics and other public institutions—, including but not limited to, the reservation of seats in certain positions, the modulation of electoral lists and other incentive measures.

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[1] For more on this topic of legal literature in the United States or literature in English language comparing gender quotas in the United States and abroad, see ANNE PETERS, WOMEN, QUOTAS AND CONSTITUTIONS: A COMPARATIVE STUDY OF AFFIRMATIVE ACTION FOR WOMEN UNDER AMERICAN, GERMAN, EUROPEAN COMMUNITY AND INTERNATIONAL LAW (1999); Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119 (2006); Darren Rosenblum, *Feminizing Capital: A Corporate Imperative,* 6 BERKELEY BUS. L.J. 55 (2009); Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 INT'L J. CONST. L. 449 (2012); Nadia Urbinati, *Why Parité is a Better Goal Than Quotas*, 10 INT'L J. CONST. L. 465 (2012); Véronique Magnier & Darren Rosenblum, *Quotas and the Transatlantic Divergence of Corporate Governance*, 34 NW. J. INT'L L. & BUS. 249 (2014).

[2] Ruth Rubio-Marín, *A New European Parity-Democracy Sex Equality Model and Why It Won't Fly in the United States*, 60 AM. J. COMP. L. 99 (2012).

[3] On the general literature on women's quotas (in politics) and their global spread, see, e.g., WOMEN, QUOTAS AND POLITICS (Drude Dahlrup ed., 2006); MONA LENA KROOK, QUOTAS FOR WOMEN IN POLITICS. GENDER AND CANDIDATE SELECTION WORLDWIDE (2009); THE IMPACT OF GENDER QUOTAS (Susana Franceschet, Mona Lena Krook & Jennifer M. Piscopo eds., 2012); ELÉONORE LÉPINARD, GENDER QUOTAS AND TRANSFORMATIVE POLITICS (RSCAS Policy Paper No. 6, 2014).

[4] More specifically on gender quotas in France in English beyond some of the references indicated *supra* note 1, see Rainbow Murray, *Parity in France: A 'Dual Track' Solution to Women's Under-Representation*, 35 WEST EUR. POLITICS 343 (2012); more specifically on gender quotas in Italy in English, see Elisabetta Palici Di Suni, *Gender Parity and Quotas in Italy: A Convoluted Reform Process*, 35 WEST EUR. POLITICS 380 (2012).

[5] Both countries have introduced quotas for some types of companies. For France: Law no. 2011-103 of Jan. 27, 2011, J.O., Jan. 28, 2011. p. 1680 (concerning the balanced representation of women and men on corporate boards and professional equality); for Italy: Law July 12, 2011, no. 120, G.U., July 28, 2011, no. 174 (concerning equal access to corporate boards of publicly listed companies). The European Commission is still debating the introduction of a similar instrument Europe-wide, *Commission Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance Among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures*, COM (2012) 0614 final (Nov. 14, 2012).

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The interest in comparing France and Italy is that even within what has been defined as the “European Parity-Democracy Sex Equality Model,”[6] and even between two countries whose constitutional history and trajectory with regard to gender quotas has been portrayed as being essentially identical,[7] a closer look at the recent developments in French and Italian constitutional and administrative law shows a slightly more nuanced picture. Undoubtedly, the differences between these two legal systems are less macroscopic than those existing between the European and the American reality. Nevertheless, this closer look through the lens of comparative law allows the issue to be contextualized, thus demonstrating that the seemingly unitary European approach to gender quotas can be differentiated on the basis of the positions of the different actors who call them into life and implement them.

Part I of this Article delineates the overlapping history of gender quotas in Italy and France. Part II then looks at the French developments and compares them in Part III to what happened in Italy. Some concluding observations provide a potential explanation of the divergences between the two systems.

B. The Overlapping Trajectory

France and Italy have been presented as sharing a common history and constitutional trajectory on gender quotas.[8] Both legal systems tried to introduce gender quotas in the electoral context in the 1980s to 1990s. France did so in 1982 when the French Parliament proposed a bill which would have prohibited electoral ballots in municipal elections of which more than seventy-five percent of the candidates were of the same sex.[9] Italy introduced legislation in 1993, which provided that political parties had to include at least twenty-five percent of each sex on their electoral lists for local elections in municipalities of up to 15,000 inhabitants and of at least thirty-three percent in municipalities of more than 15,000 inhabitants.[10]

These measures were declared unconstitutional in both systems, but in somewhat unexpected ways. The constitutional challenge in France was not against the quotas per se—for which there was actually political consensus—but rather against their reduction by

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[6] Rubio-Marín, *supra* note 2.

[7] *See* Blanca Rodríguez Ruiz & Ruth Rubio-Marín, *The Gender of Representation: On Democracy, Equality, and Parity*, 6 INT’L J. CONST. L. 287 (2008), and, in particular, on France and Italy at 290–96.

[8] *Id.*

[9] Law Nov. 19, 1982, no. 82-974, J.O., Nov. 20, 1982, p. 3487.

[10] D.L. 81/1993, G.U. Mar. 27, 1993, Supp., no. 72.

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legislative amendment from thirty percent to twenty-five percent.[11] Against such consensus, the French *Conseil constitutionnel* (hereinafter "the Council") held that the measure violated the principle of voter equality and the principle of indivisibility of the electoral body enshrined in Article 3 of the Constitution[12] and Article 6 of the Declaration of the Rights of Man and the Citizen of 1789,[13] making it unconstitutional.[14] In 1999, the Council confirmed its 1982 decision concerning an act determining the mode of electing regional counsellors and counsellors in the Corsican Assembly—which intended to introduce the obligation that each electoral list ensure the equality of women and men.[15]

In Italy as well, the challenge was actually not against the quotas themselves. In Baranello, a small village in Molise with less than 15,000 inhabitants, only one woman was included in the party list for the town council election, instead of the required candidate list with at most two-thirds of the same sex. Thereafter, an elector brought a claim for the non-observation of a quota regulation introduced by the 1993 legislation. Rather than upholding the quota, the Italian *Corte costituzionale* (hereinafter "the Court") followed a similar line of reasoning as the French Council. It struck down the legislative measures as being contrary to Article 51 of the Constitution,[16] which it held to be a specific constitutional rule implementing the (formal) equality principle as established in Article 3, paragraph 1 of the Italian Constitution—and not of the principle of substantial equality enshrined in Article 3, paragraph 2. In its relevant part, that paragraph provides that: "[i]t is the duty of the Republic to remove those obstacles of an *economic* or *social nature* which constrain the freedom and equality of citizens . . . ."[17] Indeed, the Court held that the 1993 statute introduced an affirmative action which did not eliminate the *de facto* inequalities referred to in the second

[11] On this point, see MARTIN A. ROGOFF, FRENCH CONSTITUTIONAL LAW: CASES AND MATERIALS 324 (2011).

[12] 1958 CONST. [CONSTITUTION] OCT. 4, 1958 art. 3 (Fr.) (in the version in force at that time) provided that: "National sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum. No section of the people nor any individual may arrogate to itself, or to himself, the exercise thereof. Suffrage may be direct or indirect as provided for by the Constitution. It shall always be universal, equal and secret. All French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided for by statute."

[13] Declaration of the Right of Man and the Citizen, Aug. 26, 1789 art. 6 (France). This provision states: "All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents."

[14] Conseil constitutionnel [CC] (Constitutional Court) decision No. 82-146 DC, Nov. 18, 1982.

[15] Conseil constitutionnel [CC] (Constitutional Court) decision No. 98-407 DC, Jan. 14, 1999.

[16] In the version in force at that time, the relevant paragraph of 1958 CONST. [CONSTITUTION] OCT. 4, 1958 art. 51 provided that: "Any citizen of either sex is eligible for public offices and elected positions on equal terms, according to the conditions established by law . . . ."

[17] Corte Costituzionale (Corte Cost.) (Constitutional Court) [Hereinafter Corte Cost.], Sept. 12, 1995, no. 422, para. 3 (italics added).

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paragraph, but illegitimately expanded the right of some citizens (women) to stand for election, while restricting it for others—men.[18] Nevertheless, it continued to state that such measures would not be deemed unconstitutional if adopted voluntarily by political parties, associations or groups who participate in elections.[19] Together with this statute, the Court also declared the unconstitutionality of legislation applying to different levels of the Italian system—from the national level to the regional level—where some form of gender quotas on electoral lists were established.[20] The Court mainly rejected gender quotas in the political election process, even though the quotas were formulated gender neutrally and indirectly—e.g. on electoral lists and not directly reserving seats for women.

What remained unaffected by this judgment was legislation introducing gender affirmative action measures in the workplace, such as a statute introducing promotional measures for female entrepreneurs.[21] The Court already declared such measures constitutional because they were deemed to be removing obstacles of an economic and social nature—and not political nature—as permitted by Article 3, paragraph 2 of the Constitution.[22] What also remained untouched by the judgment—and this aspect will be analyzed in more detail below—were measures promoting the participation of women in civil service, administration, and government functions.[23]

In the wake of these judgments, both constitutions were modified so as to overcome the constitutional hurdle created by the respective national jurisprudence. In France, this occurred in 1999 when the Constitution was amended by adding a paragraph to Article 3—which after subsequent constitutional modifications today is Article 1 of the Constitution—stating that “[s]tatutes shall promote equal access by women and men to elective offices and posts,” and to Article 4 whereby political parties shall contribute to the principle of equal

[18] *Id.*, paras. 4–6.

[19] *Id.*, para. 7.

[20] *See, e.g.*, Law Aug. 4, 1993, no. 277, G.U. Aug. 20, 1993, no. 195 (introducing a requirement that political parties must present electoral lists with alternating candidates from each sex for those seats in the lower chamber of Parliament that are subject to the proportionality system (i.e. at that time twenty-five percent)); Law Feb. 23, 1995, no. 43, G.U. Feb. 24, 1995, no. 46 (concerning the election of regional and provincial parliaments of ordinary regions which provided again that each electoral list for those institutions could not contain more than two-thirds of candidates of the same sex).

[21] *See, e.g.*, Law Feb. 25, 1992, no. 215, G.U. Mar. 7, 1992, no. 56 (establishing affirmative action measures for female entrepreneurs). *See also* Law Apr. 10, 1991, no. 125, G.U. Apr. 15, 1991, no. 88 (establishing affirmative action measures for equality between men and women at work).

[22] *See* Corte Cost., Mar. 26, 1993, no. 109.

[23] D.L. 29/1993, G.U. Feb. 6, 1993, no. 30 (concerning the rationalization of the organization of public administration and the reordering of the framework of the civil service), especially art. 61, para. 1(a) and its subsequent modifications.

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access by women and men. In Italy instead, three different constitutional statutes in 2001 and 2003 intervened in order to overcome the obstacle(s). The first two in 2001 explicitly allowed regions with special autonomy status and regions with ordinary status to promote parity in elections in order to achieve a balanced representation of both genders.[24] The third directly intervened on Article 51, by adding a second paragraph which stated that ". . . the Republic shall adopt specific measures to promote equal opportunities between women and men."[25] Thus, both constitutional systems explicitly amended their constitutions to allow for some form of gender representation in the electoral context. And indeed, as a consequence, legislative proposals for gender quotas in the electoral context passed constitutional muster in both countries.

In France, the constitutionality of gender quotas was first accepted in 2000. A proposed modification of the French electoral code—concerning different levels of elections ranging from municipal elections to European Parliament elections—would have required electoral lists to have alternate candidates by sex—the so-called zipper system. The deputies and senators who challenged the constitutionality of this bill argued that the 1999 constitutional amendment introduced an obligation which almost corresponded in practice to a fifty percent gender quota, and that the amended rules did not have binding value but only represented an objective.[26] The Council rejected these arguments, holding that the constitutional amendment intended to allow Parliament to adopt any measure having the objective to ensure the equal access of women and men to electoral mandates and elective functions. The Council also added that no other rules or principles of constitutional values had been violated by the constitutional amendment.[27] Given the formulation of the constitutional amendment, hard quotas which would effectively reserve certain seats on a gendered basis, would not pass constitutional muster. The generalized understanding is that such quotas do not ensure equal access to electoral mandates and elective functions, but actually guarantee a specific outcome which would be in violation of other constitutional principles, one of them being the equality principle itself.

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[24] Const. Law Jan. 31, 2001, no. 2, G.U. Feb. 1, 2001, no. 26 (concerning the direct election of the presidents of the regions with special status and of the autonomous provinces of Trento and Bolzano)' available at: http://www.parlamento.it/parlam/leggi/01002lc.htm (last visited November 14, 2018) and Const. Law Oct. 18, 2001, no. 3, G.U. Oct. 24, 2001, no. 248 (modifying Title V of the second part of the Constitution), which amended Corte Cost art. 117 available at: http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario;jsessionid=o8HCVYOwo+Ru6dLdLB3XcQ__.ntc-as1-guri2a?atto.dataPubblicazioneGazzetta=2001-10-24&atto.codiceRedazionale=001G0430&elenco30giorni=false (last visited November 14, 2018).

[25] Const. Law May 30, 2003, no. 1, G.U. June 12, 2003, no. 134 (modifying Corte Cost. art. 51).

[26] Conseil constitutionnel [CC] (Constitutional Court) decision No. 2000-429 DC, para. 4., May 30, 2000.

[27] *Id.*, paras. 7–8.

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In Italy, the change in constitutional case law occurred with a judgment in 2003, when a regional statute of the special autonomy region, Val d'Aosta, requiring that candidates of both sexes be present on electoral lists came before the Court.[28] This time the constitutional judges held the provisions constitutional, not only due to the changed constitutional framework, but also because no voluntary measures by political parties, associations, and groups participating in elections had been adopted, contrary to what the Court had suggested in its previous judgment.[29]

Despite the similarities of the constitutional path to recognizing gender quotas, some differences however remained. In fact, in Italy the Constitution had already allowed some form of gender promotion measures to remove obstacles of a social and economic nature,[30] and gender quotas in the electoral context had been introduced afterwards by the constitutional amendments. In France, in comparison, the constitutional amendments initially only allowed quotas in the political reality. When the French Parliament tried introducing some gender balance measures to increase the participation of women in the judiciary's self-regulatory body,[31] the Council struck the measure down as unconstitutional, stating that Parliament could not use then-Article 3 to introduce gender equality measures outside of the electoral domain.[32] And again in 2006, the French Parliament intended to adopt legislation which would guarantee the presence of women not only on corporate boards, but also on other representative and audit bodies of private and state held or controlled companies. The Council, nonetheless, struck down those measures imposing hard quotas in the form of specific proportions, as contrary to the principle of equality[33] and only allowed softer measures to survive the constitutional challenge on the basis of the 1946 Constitution's preamble,[34] "as long as they do not have the effect of making the consideration of someone's sex prevail over those of his or her capacities."[35] Similar to what happened before, the Constitution was again amended, and another sentence was added to today's Article 1 in 2008, which now states that: "[S]tatutes shall promote equal access by women and men to elective offices and posts *as well as professional and social positions.*"[36]

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[28] Corte Cost., Feb. 19, 2003, no. 49.

[29] *Id.* at para. 4.

[30] Art. 3, para. 2 Constituzione [Cost.] (It.)

[31] This is known as the *Conseil supérieur de la magistrature*.

[32] Conseil constitutionnel [CC] (Constitutional Court) decision No. 2001-445 DC, June 19, 2001.

[33] Conseil constitutionnel [CC] (Constitutional Court) decision No. 2006-533 DC, para. 16, Mar. 16, 2006.

[34] More specifically it is para. 13 of the Preamble to the 1946 Constitution which states that "[t]he Nation guarantees equal access for children and adults to instruction, vocational training and culture."

[35] Conseil constitutionnel [CC] (Constitutional Court) decision No. 2006-533 DC, para. 18, Mar. 16, 2006.

[36] Art. 1, para. 2 Constituzione [Cost.] (It.) (italics added).

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This had the effect of overruling prior decisions. This additional step, which needed to be taken, is possibly already indicative of some of the persisting reluctance by the judiciary in France concerning gender quotas of which I will be referring to below.

Still, by 2008 we see that there is almost perfect overlap between the two systems, which explicitly at this point allows for gender quotas in the political sphere as well as in the economic and social sphere. Furthermore, the way in which this result was obtained—namely by overruling constitutional court decisions via constitutional amendments in order to overcome a formalistic interpretation of the equality principle—shows clear parallels.
What I argue here, though, is that since this point the trajectories have been diverging rather than overlapping. With the help of Rodolfo Sacco's theory of legal formants,[37] it will become clearer how this divergence(s) takes place. Sacco explained that each legal system is made up of different components. One such component is the judiciary—including constitutional courts—and case law; another component is the legislature and legislation intended in the broader sense, meaning government and administrative regulations; another is the doctrinal component, and lastly what he defined as "cryptotypes," namely all those implicit rules which function without necessarily being formulated or even recognized as legal rules. Sacco called these components legal formants and, depending on the system that is being analyzed, the importance of the various components varies. He also stated that these components are not necessarily harmoniously living together and that there are both dissonances and divergences.

It is precisely the continued dissonance in the French system between the legislative formant and the judicial formant on gender quotas which constitutes the main divergence from the Italian system. In Italy, this dissonance seems to be much less pronounced because the judiciary has more willingly embraced the idea that quotas are not contrary to the equality principle, but instead are an essential part of it.

C. Continued Skepticism in France

I. Constitutional Case Law

As far as France is concerned, the constitutional amendments represented a more limited turning point for the judicial formant in regard to gender quotas. Undoubtedly, since the constitutional amendment in 1999, Parliament has introduced a number of gender equality measures—or "parity" measures as they are called in France. To name a few of the most

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[37] Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. COMP. L. 1 (1991); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343 (1991).

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important ones for the purposes of this contribution, in 2001, a statute[38]—whose measures were then reinforced by a statute on equal pay between women and men in 2006[39]—introduced a number of soft gender equality measures for companies. In 2011, a statute introduced a quota for women of forty percent on boards of directors and supervisory boards for certain types of corporations;[40] then, in 2012, a statute introduced measures concerning the fight against discrimination for certain levels of the French Civic Service;[41] and more recently, in 2014 and in 2017, statutes were introduced which broadly intervened in a number of areas to guarantee *inter alia* effective equality between men and women.[42] Some authors have been more reserved about the actual political will and success of these and other gender equality policies.[43] Others have critiqued some quotas for not constituting a true revolution in the domain of French Civil Service,[44] for failing to establish a fully-fledged legal obligation of equality rather than a mere objective, and also for excluding the highest levels of political and executive representation from any form of parity requirement.[45] Nevertheless, it still demonstrates that the legislative formant is not necessarily acting as the bottleneck here.

In certain cases, the unconstitutionality of parity promoting measures was not even raised by parliamentary members in recent legislation, thus demonstrating a seemingly shared

[38] Law no. 2001-397 of May 9, 2001, J.O., May 10, 2001, p. 7320 (concerning professional equality between women and men).

[39] Law no. 2006-340 of Mar. 23, 2006, J.O., Mar. 24, 2006, p. 4440 (concerning equal pay between women and men).

[40] Law no. 2011-103, *supra* note 5.

[41] Law no. 2012-347 of Mar. 12, 2012, J.O., Mar. 13, 2012, p.4498.

[42] Law no. 2014-873 of Aug. 4, 2014, J.O., Aug. 5, 2014, p. 12949 (concerning effective equality between men and women).

[43] *See, e.g.*, EUR. PARL., DIRECTORATE-GENERAL FOR INTERNAL POLICIES, POLICY DEPARTMENT C: CITIZEN’S RIGHTS AND CONSTITUTIONAL AFFAIRS, THE POLICY ON GENDER EQUALITY IN FRANCE (PE510.024) (2015), http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/510024/IPOL_IDA(2015)510024_EN.pdf (last visited May 24, 2017).

[44] *See, e.g.*, Olivia Bui-Xuan, *L’égalité professionnelle entre hommes et femmes dans la fonction publique*, AJDA 1100 (2012).

[45] *See, e.g.*, Isabelle Boucobza & Charlotte Girard, *La parité en politique. Le genre, un outil de pouvoir*, *in* LA LOI ET LE GENRE. ETUDES CRITIQUES DE DROIT FRANÇAIS 507–24 (Stéphanie Hennette-Vauchez, Marc Pichard & Diane Roman eds., 2014); Loi no. 2014-873 commentaire de la loi pour l’égalité réelle entre les femmes et les hommes du 4 août 2014, [Law 2014-873 of August 4, 2014, on the real equality between women and men], RECUEIL DALLOZ 1895, 1902–03 (2014).

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acceptance of the principle amongst the deputies and senators.[46] In other cases when parliamentary members decided to challenge such measures, the Council upheld the constitutionality of gender equality promoting measures often based on the explicit amendments of the constitutional text. For example, in 2010, on the basis of Article 1, paragraph 2 of the French Constitution, the Council upheld certain measures intended to promote the participation of women in the Economic, Social and Environmental Council.[47] In 2012, on the basis of this same constitutional provision, the Council declared the constitutionality of measures intended to promote the participation of women in France's public finances watchdog, the High Council of Public Finances.[48] Again in 2013, for the same reasons, it upheld measures introducing a parity mechanism for the electoral lists of departmental deputy elections.[49] Last but not least, with some minor reservations, the Council declared the constitutionality of a delegation by Parliament to the Government, contained in the abovementioned 2014 statute,[50] introducing measures promoting the equal access of women and men within independent administrative authorities and independent public authorities.[51]

It would thus seem that the constitutional judges have finally embraced gender equality. Despite this, in an even more recent decision, the Council has again demonstrated in a novel way its suspicion towards the equality principle and certain limitations in its application in the context of gender equality promotion measures.[52] In fact, a 2013 statute[53] modified Article 712-6-1 of the French Education Code by introducing a double equality condition for the restrained formation of academic councils—which decide over individual issues concerning researchers who are not full university professors. On the one hand, the members of such a restrained formation needed to be equally composed of researchers and university professors. On the other hand, the new rule also required that each gender should

[46] See the latest example when the Council had to decide on the constitutionality of Law no. 2017-86 of Jan. 27, 2017, J.O., Jan. 28, 2017, no. 24 (concerning equality and citizenship) which contains a number of parities promoting measures in Conseil constitutionnel [CC] (Constitutional Court) decision No. 2016-745 DC, Jan. 26, 2017.

[47] Conseil constitutionnel [CC] (Constitutional Court) decision No. 2010-608 DC, June 24, 2010. The Economic, Social and Environmental Council is known as *Conseil économique, social et environnemental* and is a constitutional consultative assembly.

[48] Conseil constitutionnel [CC] (Constitutional Court) decision No. 2012-658 DC, para. 43, Dec. 13, 2012; The High Council of Public Finances is known as *Haut conseil des finances publiques*.

[49] Conseil constitutionnel [CC] (Constitutional Court) decision No. 2013-667 DC, paras. 10–16, May 16, 2013.

[50] *Supra* note 402.

[51] Conseil constitutionnel [CC] (Constitutional Court) decision No. 2014-700 DC, paras. 5–9 July 31, 2014,

[52] Conseil constitutionnel [CC] (Constitutional Court) decision No. 2015-465 QPC, AJDA, 2015, 1552, Apr. 24, 2015, note Legrand.

[53] Law no. 2013-660 of July 22, 2013, J.O., July 23, 2013, p. 12235 (concerning higher education and research).

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be equally represented. Administrative regulations then implemented the legislation in basically allowing the president of the academic council to eliminate those elected members from the lists and to reduce the composition until the double equality criterion is achieved.[54] The Conference of University Presidents (hereinafter “CUP”) was not happy with this double equality requirement and brought a suit in the administrative law courts. The referring court raised the issue of constitutionality claiming that there was a risk of negative incompetence by Parliament which could seriously affect the principle of voting equality.[55] In other words, the plaintiffs claimed that in leaving it to the administrative regulations to establish how this double equality requirement should be implemented, Parliament had affected the fundamental right of voting equality as enshrined in Article 3 of the Constitution. One could say that they contested too much equality. In contrast, some third-party interventions claimed that the unconstitutionality of the provisions stemmed from too little equality. They complained about a violation of the equality principle as enshrined in Article 6 of the 1789 Declaration of the Rights of Man and the Citizen—which provides *inter alia* that the law “must be the same for all whether it protects or punishes.” In fact, the Education Code does not establish the double equality standard for the restrained formations deciding on full university professors, when statistically in this category women represent only twenty-two percent, whereas in the researcher formation women represent forty-three percent. Thus, the unconstitutionality would arise from the fact that Parliament differentiated situations in an unconstitutional manner.[56]

An important aspect to note is that unlike the decisions which have been described or mentioned above, this came up in the context of *a posteriori* judicial review procedure which had only been introduced in France with the constitutional review of 2008.[57] This, in part, explains the somewhat different legal questions raised and answers provided. In its judgment the Council—relying on earlier case law—held that the negative incompetence argument cannot be raised in the context of an *a posteriori* judicial review procedure unless the incompetence directly infringes upon a right or a liberty which the Constitution guarantees.[58] Put differently, an alleged violation of the separation of competences and powers *à la française,* where Parliament unconstitutionally has failed to recognize its own

[54] *See* Decree no. 2014-780 of July 7, 2014, J.O., July 9, 2014, p. 11369.

[55] Conseil d’Etat, Feb. 1, 2015, no. 386118.

[56] See this presentation of the facts: Olivier Le Bot, *La parité dans les instances universitaires*, CONSTITUTIONS 262 (2015).

[57] Before the amendment of Corte Const. art. 61 by the Const. Law 2008-724 of July 23, 2008, J.O., July 24, 2008, p. 11890 (modernizing the institutions of the Fifth Republic), France only had abstract, *a priori* judicial review of legislation, meaning that the constitutionality control could only take place before any legislation entered into force.

[58] *See* Conseil constitutionnel [CC] (Constitutional Court) decision No. 2010-5 QPC June 18, 2010; Conseil constitutionnel [CC] (Constitutional Court) decision No. 2012-254 QPC, June 18, 2012.

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competences which were exercised by the executive, can only be raised by litigants if this violation directly infringes upon a constitutional right or liberty. Now, the issue turns to which fundamental constitutional rights could have been directly infringed by the fact that administrative regulations and not the legislation itself specified the modalities of the double equality requirement. The Council rejected the arguments that the principle of the choice of voters or the principle of the independence of university professors might be violated.[59] But most importantly for the purposes of this contribution, it also held that the equality provision enshrined in Article 1, paragraph 2 of the Constitution represents only an objective and not a right or liberty which the Constitution guarantees. Hence, it cannot be invoked in the context of what in France are known as "QPC decisions."[60] Last but not least, it also found no violation of the equality principle under Article 6 of the 1789 Declaration, because Parliament distinguished between restrained formations for university researchers and for full professors, even though the gender imbalance in the latter is much larger than in the former. According to a regular adage in French constitutional equality jurisprudence, Parliament is free to treat different situations differently where this difference is related to the law's objective.[61] Thus, no violation of the French Constitution was found.

On the positive side, one could highlight that the Council no longer declares the unconstitutionality of gender equality measures and quotas as it would have done years ago before the constitutional reforms. On the negative side, it characterized the equality provision enshrined in Article 1 of the Constitution as a mere objective, which cannot be enforced or invoked in *a posteriori* judicial review. Once again, and in yet another context, we see how gender quotas of various forms are either struck down or subject to restrictive interpretation by the judicial formant—despite the legislative formant's evident will and determination to introduce changes.

II. The Administrative Courts

The Council's restrictive approach is mirrored in two fairly recent judgments by France's Supreme Administrative Court, the *Conseil d'Etat* (hereinafter "CdE") and shows the judicial formant's limitations in fully embracing a binding principle of gender equality in their jurisprudence on gender quotas. Indeed, the constitutional amendment has not fully eliminated the suspicion towards the equality principle and towards gender quotas.

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[59] For the former, the CUP had linked this to paragraph 8 of the 1946 Constitution's Preamble which states that "[a]ll workers shall through the intermediary of their representatives, participate in the collective determination of their conditions of work and in the management of the work place," whereas the latter has been declared a fundamental right by the Council itself. *See* Conseil constitutionnel [CC] (Constitutional Court) decision No. 83-165 DC, Jan. 20, 1984.

[60] Conseil constitutionnel [CC] (Constitutional Court) decision No. 2015-465 QPC, paras. 13-14, Apr. 24, 2015.

[61] *Id.* at para. 11.

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The first example concerns a 2013 judgment by the Assembly of the CdE[62] involving the electoral mechanism for the chambers of agriculture, which are a sort of professionally managed public institution. In particular, a 2012 governmental decree introduced the requirement that on the electoral lists to these chambers, for each three candidates at least one needed to be of the other sex.[63] Interestingly, trade unions challenged this decree before the administrative courts, mainly on the grounds of separation of powers. In fact, unlike many other countries, in France the allocation of legislative competences is split between the Parliament and the Executive. Article 34 of the French Constitution reserves certain areas to Parliament, whereas Article 37 provides that “[m]atters other than those coming under the scope of statute law shall be matters for regulation”—i.e. reserved to the executive. Article 1, paragraph 2 of the Constitution states that “[s]tatutes shall promote equal access by women and men to elective offices and posts, as well as to professional and social positions.” The issue thus became whether the executive could intervene with its regulatory powers under Article 1, paragraph 2 or whether the word “statutes” in this provision had to be interpreted as reserving this domain to Parliament only. The CdE decided in favor of the latter solution by opting for a formalistic interpretation that

> Only Parliament is competent both in the domain of subject matters defined by Article 34 of the Constitution and those belonging to the regulatory power as per Article 37 to adopt the rules destined to favor equal access of women and men to the electoral mandates, functions and responsibilities mentioned in Article 1 of the Constitution.[64]

As highlighted elsewhere, this judgment confirms a general suspicion by the CdE towards gender equality in its case law.[65] The way this plays out in this particular judgment is that it interprets Article 1, paragraph 2 as if it were a provision for the allocation of competences between the Executive and Parliament, which is instead outlined in Articles 34 and 37 of the Constitution. According to Roman and Hennette-Vauchez, the constituent powers decided not to enshrine this gender equality provision in Article 34, opting instead for Article 1. As a consequence, gender equality became a fundamental constitutional value of the French

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[62] Conseil d’Etat [CdE], Ass., May 7, 2013, no. 362280, Lebon, p. 119. Assembly decisions by the CdE are reserved to the most solemn and important decisions by this body.

[63] Decree no. 2012-838 of June 29, 2012, J.O., June 30, 2012, p. 10786 (concerning the elections to agricultural chambers).

[64] Conseil d’Etat, May, 7, 2013, no. 362280; *supra* note 60, para. 1.

[65] *See* Diane Roman & Stéphanie Hennette-Vauchez, *Seul le législateur peut imposer la parité hommes-femmes dans les listes de candidats aux élections aux chambres d’agriculture* [*Only the legislator can impose equality between men and women for electoral candidates to the agricultural chambers*], REVUE FRANÇAISE DE DROIT ADMINISTRATIF 882 (2013).

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Republic binding on both Parliament and the Executive, regardless of the power and the instrument by which the measures are introduced. If the legislator does not intervene, this should not mean constitutionally that the Executive cannot intervene.[66] By its judgment, the CdE not only demonstrated once again its suspicion of gender equality measures, but it also overruled previous jurisprudence on the right to strike enshrined in the 1946 Constitution Preamble where, on the contrary, the CdE had authorized the executive to intervene in the absence of parliamentary intervention.[67]

The second example comes from yet another decision in 2013 by the CdE, this time involving the issue of gender equality measures in the domain of sports federations.[68] In fact, the French Gymnastics Federation asked the CdE to annul certain provisions contained in an annex to a decree by the Sports Minister,[69] which required that the delivery of a license to sports federations should only occur if the federations' internal bylaws specify *inter alia*, that: "[T]he representation of women is guaranteed at the management level by reserving a number of seats proportional to the number of female licensed members." The plaintiffs argued that these had been adopted *ultra vires* and the CdE agreed with them, mainly on the basis of a temporal argument. Indeed, in its reasoning it stated that:

> [T]he constitutional principle of equality does not stand in the way of the research of a balanced access of women and men to positions of responsibilities, it is nevertheless prohibited, unless specifically allowed by constitutional provisions, to let the consideration of one's sex prevail over those of capacity and common good; that therefore, prior to the adoption of Constitutional Act of 23 July 2008, the constitutional principle of equality excluded that mandatory rules based on the sex of people called to take part in the managing bodies of legal persons governed by private law, such as sports federations, could apply; that if, as has been said, a second paragraph has been added to Article 1 of the Constitution and has as a goal to combine this principle with the objective of equal access of women and men to professional and social responsibilities, at the same time it is clear that such provisions can only be adopted by the Parliament both

[66] *Id.* at 887–88.

[67] Conseil d'Etat, Ass., July 7, 1950, no. 01645, Lebon 426.

[68] Conseil d'Etat, Oct. 10, 2013, no. 359219.

[69] Decree no. 2004-22 of Jan. 7, 2004, J.O., Jan. 8, 2004, p. 729.

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> in the subject matters defined at Article 34 of the Constitution and in those subject matters that depend on the regulatory power pursuant to Article 37, to adopt the rules destined to favor the equal access of women and men to those mandates, functions and responsibilities that are mentioned at Article 1 of the Constitution.[70]

Put differently, at the time that the ministerial decree had been adopted in 2004, the pre-2008 Constitution was still applicable. Under that version, the gender equality principle had not yet been extended outside of the political domain, meaning that the quotas which the sports federations would have had to apply were not yet constitutionally permissible.
This point would already have been sufficient to annul the decree. Nevertheless, the CdE felt compelled to add another element in *obiter*, namely the fact that the annex does not limit itself to:

> [F]ixing an objective of balanced representation of women and men at the management level of such sports federations but imposes the respect of a specific proportion between men and women based on the proportion of the number of licensed members of each sex; that such provisions were thus contrary to the constitutional principle of equality before the law at the date at which they were introduced.[71]

In other words, based on earlier constitutional jurisprudence, if gender equality is a mere objective, it passes muster before the Council and the CdE. But if it becomes an automatic outcome or reserved seat then it will fail. The reluctance by the judicial formant in France becomes even clearer when one looks comparatively at the different trajectory which the jurisprudence has taken in Italy over the past years and after the constitutional modifications of the early 2000s.

D. Winds of Change in Italy

I. The Constitutional Framework

Unlike France, in Italy the constitutional amendments of 2001 and 2003 constituted a true turning point rather than a mere shift for both for the legislative and judicial formant. Parliament enacted a number of statutes for the supra-national, regional, municipal, and the

[70] Conseil d’Etat, Oct. 10, 2013, no. 359219; Roman & Hennette-Vauchez, *supra* note 65, para. 5.

[71] Roman & Hennette-Vauchez, *supra* note 65, para. 6.

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national level, by inserting provisions requiring some form of minimum gender representation in the electoral context.

At the supra-national level, a 2004 statute required that for elections to the European Parliament no more than two thirds of the candidates on the electoral lists can be of the same sex.[72] For the European Parliament elections that took place under this statute, the effect was nevertheless limited. In fact, it sufficed for the political parties to indicate at least one third of women at the bottom of the electoral list, leading to the election of mainly male candidates with Italy ending up in the fourth-to-last place in terms of female European Parliament MPs, in front of Poland, the Czech Republic, and Malta.[73] Therefore in 2014 a new statute introduced some modifications indicating that (i) each list cannot have more than fifty percent of the same sex, that (ii) the first two candidates on the list need to be of different sex, and that (iii) where a maximum of three preferential candidates is indicated the chosen representatives need to be of different sex.[74]

At the regional and municipal level, pursuant to the constitutional amendments of 2001, a number of Italian regions introduced regional statutes establishing one form or another of gender representation requirements in various domains.[75] These were integrated, strengthened, and harmonized by state legislation in 2012[76] and 2014,[77] which will both be discussed below in more detail—and in 2016.[78]

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[72] Law Apr. 8, 2004, no. 90, G.U. Apr. 9, 2004, p. 4 (establishing *inter alia* rules for the elections of Italian members to the European Parliament).

[73] Pietro Faraguna, *Recenti sviluppi dell'esperienza costituzionale italiana in tema di c.d. "quote rosa" [Recent developments in the Italian constitutional experience concerning gender quotas]* [hereinafter *Recent developments*], *in* L'EGUAGLIANZA ALLA PROVA DELLE AZIONI POSITIVE [EQUALITY TESTED BY AFFIRMATIVE ACTION] 80 (F. Spitalieri, ed. 2013).

[74] Law Apr. 22, 2014, no. 65, G.U. Apr. 24, 2014, no. 95 (modifying the rules for the elections of Italian members to the European Parliament).

[75] For a detailed analysis of these regional interventions, see Elisabetta Catelani, *Statuti regionali e tutela del principio delle pari opportunità: prime leggi regionali di attuazione* [*Regional statutes and protection of the principle of equal opportunities: first implementing regional statutes*] [hereinafter *Statutiregionali*], *in* IL GENERE DELLA PARTECIPAZIONE: COME PROMUOVERE LA CITTADINANZA ATTIVA DELLE DONNE [THE GENDER OF PARTICIPATION: HOW TO PROMOTE ACTIVE CITIZENSHIP OF WOMEN,] 217–56 (Rita Biancheri, ed. 2010).

[76] Law Nov. 23, 2012, no. 215, G.U. Dec. 11, 2012, no. 288 (establishing *inter alia* measures to promote a balanced representation in local legislative and executive bodies as well as in regional legislative bodies).

[77] Law Apr. 7, 2014, no. 56, G.U. Apr. 7, 2014, no. 81.

[78] Law Feb. 15, 2016, no. 20, G.U. Feb. 25, 2016, no. 46.

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The last level at which gender quotas were introduced was the national level. In May 2015, after a heated political debate,[79] the Italian Parliament adopted a statute which also introduced gender quotas at the national election level for the lower chamber of Parliament, the House of Representatives,[80] which entered into force on July 1, 2016. According to Article 1 of this statute, there needs to be an alternation of male and female candidates on electoral lists; the heads of electoral lists cannot exceed sixty percent of one sex in total for each electoral district; and when voters indicate their preference for two candidates that are not heads of the electoral lists, they need to be of different sex.[81] The Court declared unconstitutional certain aspects of the new electoral law but did not touch the gender preference parts of it.[82] Ultimately, this means that today the only elective body remaining without any gender quota in Italy is the upper chamber of the Italian Parliament—the *Senato*. But even here in the wake of a 2017 judgment by the Court concerning the 2015 electoral statute, certain legislative proposals for additional changes to the electoral mechanisms are planning to extend the double gender preference to the senate election mechanism.[83] It remains to be seen whether this additional extension of gender quotas to the last and highest elective body will take place, but it is clear that the Italian Parliament has embraced it enthusiastically, if not fully.

What allowed this legislative change was clearly the constitutional amendments, helped by the interpretations provided by the judicial formant. From the constitutional turning point in 2003 onwards, the judicial formant has no longer been an obstacle—as can be seen from the two latest decisions by the Court on the topic. In fact, in a 2005 inadmissibility decision—concerning the mandatory participation of at least one third of women in the selection committees for competitions to enter civil service—the Court held *inter alia* that the amended Article 51 of the Italian Constitution is no longer a sort of special application of the formal principle of equality enshrined in Article 3, paragraph 1 of the Constitution, but now also imposes on the Republic the task of promoting equal opportunities between men and women which is actually something that Article 3, paragraph 2 of the Constitution prescribes.[84]

[79] *See id.* at 8.

[80] Law, May 6, 2015, no. 52; G.U. May 8, 2015, no. 105; the lower chamber of Parliament is the *Camera dei deputati*.

[81] This system is also known under the term “double gender preference” (*doppia preferenza di genere*).

[82] Corte Cost., Jan. 25, 2017, no. 35.

[83] *See* Bill (*Proposta*) no. 4262, presented on Jan. 31, 2017, http://www.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0049420.pdf (last visited November 12, 2018); Bill (*Proposta*) no. 4309, presented on Feb. 17, 2017, http://www.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0050170.pdf (last visited November 12, 2018); and Bill (*Proposta*) no. 4331, presented on Feb. 24, 2017, http://www.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0050141.pdf (last visited November 12, 2018).

[84] Corte Cost., Jan. 27, 2005, no. 39. The underlying facts of this case concerned a public competition to become director of the museum of the municipality Bassano del Grappa. A first competition was annulled due to the

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The link between revised Article 51 of the Constitution with the principle of substantive equality enshrined in Article 3, paragraph 2 of the Constitution is then made even more explicitly in a 2010 judgment concerning a regional statute of Campania. This statute imposed the indication of candidates of opposite sexes whenever the preferential voting system allowed for the indication of two candidates.[85] The Court held that:

> [A]ccording to Article 3, para. 2 which imposes on the Republic a duty to eliminate all obstacles which could *de facto* prevent the full participation of all citizens in the political organization of country, [t]he constitutional and legislative framework is inspired on a whole by the principle of effective equality between men and women in political representation at the national and regional level. Given the historical underrepresentation of women in elective assemblies which is not caused by formal requirements impacting on their eligibility but by cultural, economic and social reasons, the constitutional and statutory legislators indicate the direction of specific measures aiming at effectively implementing the abstract principle of equality which is not fully achieved in the political and electoral practice.[86]

Thus, we see how the Court comes almost full circle here and anchors such measures explicitly in the domain of substantive equality. It should be noted, nevertheless, that one of the reasons why the Court accepted this version of a gender quota is that the indication of two preferential candidates was optional—meaning that one could choose to indicate only one candidate, and if the second was of the same sex, the latter preference would simply not count, leaving the first one valid. Thus, the solution did not seem to unreasonably restrict active and passive voting rights.[87] Moreover, the Court reiterated that direct quotas which reserve seats for women in elective bodies would still be deemed unconstitutional.[88]

absence of women in the selection committee and the case was litigated through the administrative system all the way to the Supreme Administrative Court, which raised the issue of constitutionality of the applicable statute (art. 61, para. 1(a), of the Legislative Decree Feb. 6, 1993, no. 29, *supra* note 23) which had introduced such obligation.

[85] Corte Cost., Jan. 14, 2010, no. 4; GIURISPRUDENZA COSTITUZIONALE 63–81 (2010) (with note by Carlassare, Olivetti & Leone at 81–100).

[86] Corte Cost., Jan. 14, 2010, no. 4, para. 3.1.

[87] *Id.* at para. 3.3.

[88] *Id.* at para. 3.2.

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To some extent, the Italian Constitutional case law necessarily leaves a number of questions open. For instance, do Articles 3 and 51 require the state to introduce gender quotas if they have not been adopted yet at certain levels? Or are they simply constitutionally permissible if and when adopted, thus making quotas a mere programmatic, open-ended constitutional rule or objective? The literature is divided on this point and we go from those who are critical of quotas and doubt their constitutionality from various points of view,[89] to those who argue that the recent developments in Italy actually might transform quotas from being neither prohibited nor mandatory, to actually becoming constitutionally required and directly actionable.[90] Another open question concerns the requirement of parity itself. Is it sufficient to indicate that electoral lists cannot be constituted exclusively by members of one sex, meaning that in theory electoral lists with one woman could be constitutional? Or starting from which percentage is parity deemed to be established?

II. The Administrative Case Law

Some of these answers can be gleaned from the developments taking place in Italian administrative law and the rich litigation which has emerged over the past ten years in this domain. From this litigation one can also understand why, as far as the judicial formant is concerned, the Italian trajectory has diverged from the French and moved towards a stronger interpretation concerning gender quotas from an equality perspective. In fact, various forms of promotional measures for women have been adopted not just in the electoral context, but also in other public law domains over the years in Italy. Already in 1991, a statute in the employment domain had allowed certain forms of affirmative action which would promote the increased participation of women not only in private employment, but also for civil servants.[91] We have already seen the requirement introduced as early as 1993,[92] that at least one third of women be present in selection committees for competitions to enter civil service—which was the object of the 2005 decision by the Court.

Other measures mainly relating to a gender balanced composition of municipal, provincial, and regional executive bodies have been at the center of vast and extremely interesting litigation. The pieces of the legislative puzzle that need to be mentioned at this point are certain provisions of the consolidated legislation on local government of the year 2000, which requires municipal and provincial statutes to promote equal opportunities between

[89] *See, e.g.*, Elisa Pazè, *Quote rosa: dubbi di costituzionalità e riserve critiche*, XLI POLITICA DEL DIRITTO 669 (2010).

[90] Pietro Faraguna, *Recent developments*, *supra* note 73, at 76.

[91] *See* Law Apr. 10, 1991, no. 125, *supra* note 21.

[92] Art. 61, para. 1(a) of the Legislative Decree Feb. 6, 1993, no. 29, *supra* note 23, which can today be found in a modified version at Art. 57, para. 1(a) of Legislative Decree Mar. 30, 2001, no. 165, G.U. May 9, 2001, Supp., no. 112 (also known as *Testo unico sull’impiego pubblico* (TUPI), the Consolidated Act on Civil Service).

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men and women in local, provincial, executive, and collegial bodies.[93] Later on, in 2012, a statute introduced the principle of equal opportunity for regional, provincial, and municipal executives, as well as for the gender balanced composition of these various sub-national executive bodies.[94] For the purposes of this contribution, the most important shift here has been that the municipal and provincial bylaws need to guarantee—and not just simply promote—the presence of both sexes in the executive, non-elective collegial, municipal, and provincial bodies, as well as all the bodies and institutions that depend on them.[95] Even more recently in 2014, the local executives of metropolitan cities and of municipalities with more than 3,000 inhabitants need to be composed of at least forty percent of each sex.[96] Given that in municipalities below 15,000 inhabitants only elected members of the local legislative body can also become members of the local executive, unless the local bylaws provide differently,[97] this obligation may create problems for a mayor who wants to form a gender-balanced executive if only—or predominantly—men were elected.

The 2014 statute provides a first answer to the question raised in terms of the percentage of women deemed to be sufficient to establish full equality. At least for local executives of metropolitan cities and municipalities with more than 3,000 inhabitants, since 2014 this is deemed to be forty percent. For those situations in which legislation does not establish any such clear proportion, the Italian Supreme Administrative Court, the *Consiglio di Stato* (hereinafter "the CdS") specified in an advisory opinion that unless Parliament has determined otherwise or explicitly, equality does not mean full parity but rather "the avoidance of any unreasonable preponderance of one sex over the other."[98] The statutory provisions have since been implemented in numerous regional, provincial and municipal regulations and bylaws, and the bulk of the litigation has been around situations where the gender requirements were either not implemented or not respected, meaning that women were either completely absent or underrepresented in regional, provincial, or local executive, non-elective bodies. Broadly speaking, there have been three issues[99] emerging from the litigation in the first instance administrative courts, the so-called *Tribunali*

[93] Art. 6, para. 3 of Legislative Decree Aug. 18, 2000, no. 267, G.U. Sep. 28, 2000, no. 227 (also known as *Testo Unico delle leggi sull'ordinamento degli enti locali* (TUEL), the Consolidated Act on Local Entities).

[94] Law Nov. 23, 2012, no. 215, *supra* note 76, at 16.

[95] *Id.* at art. 2.

[96] Law Apr. 7, 2014, no. 56, *supra* note 77, at art. 1, para. 137.

[97] Legislative Decree Aug. 18, 2000, no. 267, *supra* note 93, at art. 47.

[98] Cons. stato, sez. I, opinion no. 93, para. 6, Jan. 19, 2015.

[99] I borrow this classification from the article by Alfredo Amato, *Focus sulla giurisprudenza amministrativa in materia di pari opportunità nell'accesso agli uffici pubblici e alle cariche elettive*, ISTITUZIONI DEL FEDERALISMO 913 no. 4 (2001).

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amministrativi regionali (literally Regional Administrative Courts, hereinafter "TAR") or before the CdS.[100]

1. Equality as Binding or Merely a Non-Binding Objective?

The first issue emerging from the administrative case law is whether all these rules on equal opportunities—constitutional, statutory, and local—have direct binding effect or are merely programmatic—e.g. a non-binding objective to obtain in the future.

A minority of tribunals have sided with the argument that especially the constitutional rules of Article 3, paragraphs 2 and 51 of the Constitution—but also similar provisions at the regional, provincial or local level—have no directly binding effect and are merely the enunciation of programmatic constitutional principles. For example, the TAR Lombardia rejected the complaint against the nomination of a male dominated regional executive, because it found that the regional statute which provided *inter alia* that the region promotes the rebalancing of sexes in the regional executive bodies only had programmatic value and thus was not directly actionable.[101] At an even higher level, the CdS did not find Article 51 of the Constitution directly binding and attributed only programmatic character to it, meaning that if it is not implemented or specified by statutory, regional, or local provisions, it is not actionable.[102] In the case at hand, the mayor of Colleferro revoked the nomination, by decree, of the only female local executive member and nominated a man in her place, thus transforming the local executive into an all-male one. The issue was that the local bylaws were silent as to the gender balance and therefore the CdS refused to intervene by applying the constitutional provisions. The majority position of the administrative courts, however, is to reject the arguments of the defending parties that the rules demanding gender balance in public bodies have only programmatic, non-binding and non-justiciable value.

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[100] The case law is quite vast indeed and this Article only provides a glimpse of the actual decisions taken in the domain. For additional cases that are not mentioned here in this contribution, see, e.g., Ugo Adamo, *La promozione del principio di pariopportunita nella composizione delle giunte negli enti territoriali alla luce della più recente giurisprudenza amministrativa* [*The promotion of the principle of equal opportunity in the composition of local governments in the light of the most recent administrative case law*] [hereinafter *The promotion of the principle of equal opportunity*], RIVISTA AIC, no. 2, May 11, 2011, fn. 2 available at: http://www.rivistaaic.it/la-promozione-del-principio-di-pari-opportunit-nella-composizione-delle-giunte-negli-enti-territoriali-alla-luce-della-pi-recente-giurisprudenza-amministrativa.html (last visited June 6, 2017); Marta Cerroni, *Il principio di pari opportunita' nell'accesso alle cariche elettive alla luce della giurisprudenza amministrativa del 2011 (nota alla sentenza del TAR Sardegna, sez. II, 2 agosto 2011, no. 864)* [*The principle of equal opportunity in the access to elective positions in the light of the administrative case law of 2011] (note to the judgment of the TAR Sardinia, sez. II, Aug. 2, 2011, no. 864)* [hereinafter *The principle of equal opportunity*], FEDERALISMI.IT no. 13, fn. 2 (June 27, 2012).

[101] Trib. ammin. reg. Lombardia, Milano, sez. I, Feb. 4, 2011, no. 354.

[102] Cons. stato, sez. V, June 23, 2014, no. 3144.

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At an intermediate level, one finds judgments which motivate their decisions to annul certain local government nominations not because of a directly applicable and mandatory constitutional principle, but because the state, regional, provincial, or local provisions established such an obligation in binding and not merely programmatic language. For instance, in a case involving the town of Assisi, the CdS confirmed the programmatic character of Article 51 of the Constitution, but nevertheless annulled the mayor's decree because Article 30 of the municipal bylaws established that the mayor names the vice-mayor as well as the members of the local executive,[103] ensuring that both sexes are represented.[104] Another example of annulment on the basis of local bylaws instead of constitutional provisions occurred in Rome, where the municipal bylaws establish that the mayor ensures a balanced representation of men and women, leading the administrative tribunal to annul the nominations of the Roman local executive.[105] Yet another administrative tribunal annulled the regional executive nominations in the region of Campania because the regional statute of Campania provides that the President names the members of the regional executive in full respect of a balanced presence of women and men in the executive.[106]

Last but not least, the strongest judgments are those where the constitutional provisions themselves are used by the administrative tribunals to annul certain decisions. For example, in a judgment in which locally elected representatives filed a complaint concerning the absence of women in their local executive—as well as the board of directors of a fully government owned company—the administrative tribunal held that there is a symmetrical link between Article 3, paragraph 2 and Article 51 of the Constitution and that the constitutional legislator had intended to impose a directly applicable duty.[107] A similar direct constitutional obligation has been found to exist in cases involving the nominations by mayors of all-male municipal executives;[108] in a case involving the nomination of an all-male regional government in the region of Sardinia;[109] or in cases where the municipal bylaws had failed to implement the constitutional principle of equal opportunities as established by Article 51 of the Constitution.[110]

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[103] These are called *assessori*.

[104] Cons. stato, sez. V, July 24, 2014, no. 3938.

[105] Trib. ammin. reg. Lazio, sez. II, July 25, 2011, no. 6673.

[106] Trib. ammin. reg. Campania, Napoli, sez. I, Apr. 7, 2011, no. 1985.

[107] Trib. ammin. reg. Puglia, Lecce, sez. I, Feb. 24, 2010, no. 622.

[108] *See, e.g.*, Trib. ammin. reg. Campania, Napoli, sez. I, June 7, 2010, no. 12668; Trib. ammin. reg. Calabria, Reggio Calabria, Sept. 27, 2012, no. 589.

[109] Trib. ammin. reg. Sardegna, sez. II, Aug. 2, 2011, no. 864. For a comment on this decision, see Cerroni, *The principle of equal opportunity*, *supra* note 100.

[110] *See, e.g.*, Trib. ammin. reg. Puglia, Bari, sez. I, Jan. 17, 2012, no. 191; Cons. stato, sez. V, Dec. 18, 2013, no. 6073.

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Thus, we see that this case law establishes that the principle of equality in this domain is not merely a wishful objective, but rather a directly enforceable right either based on constitutional or lower level provisions. The most important consequence is that it also applies even when—or especially when—the municipalities, provinces, or regions did not include or mention anything about aiming for a more gendered representation.

2. The Political Nature of Nomination Acts

The second issue raised by the defending parties is linked to the question of the political nature of such nominations. Again, here we see the administrative courts taking a gender balance favorable approach in their jurisprudence. Indeed, one of the arguments concerning mainly the nominations to regional, provincial, or municipal executive bodies by the respective presidents or mayors was that these are political acts and as such not reviewable by courts. Constitutional provisions,[111] as well as ordinary case law,[112] have in general ensured a very restricted reading of when certain acts are deemed to be of a political nature and thus not judicially reviewable. The Court itself intervened in this exact domain in 2012, confirming the non-political nature of such acts.[113] The case involved the president of the Region Campania, who nominated a regional executive body composed of eleven men and only one woman, notwithstanding the constitutional and regional statutory provisions on gender balance. Both the first instance administrative tribunal and the Supreme Administrative Tribunal ordered the annulation of the nomination decree, whereupon the region claimed before the Court that there was a conflict of competences because the Supreme Administrative Court had interfered with the constitutionally guaranteed political powers and discretion of the region. What is interesting for the purposes of this contribution, is that the Court stated that the discretion of the regional president is limited by the respect of the principles found in the regional statute and in the Constitution on gender balance,[114] and that, therefore, his acts are judicially reviewable by administrative courts if they violate a legal rule.[115]

The Court’s decision confirms at the highest level what administrative courts have in general held before and since, namely that they could review such nominations and the resulting gender imbalance. What is interesting in this line of cases is what exactly becomes judicially

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[111] Mainly Corte Cost. art. 24 (the right of everyone to bring cases before a court of law in order to protect their rights under civil and administrative law) and Corte Cost. art. 113 (guaranteeing the right of judicial protection against acts by the public administration).

[112] *See, e.g.*, Cass. (S.U.), May 18, 2006, no. 11623.

[113] Corte Cost., Apr. 2, 2012, no. 81.

[114] Reference here is made in particular to art. 51, para. 1 and art. 117 of the Constituzione [Cost.] (It.).

[115] Art. 51, para. 4.3 Constituzione [Cost.] (It.).

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reviewable by the administrative courts and how far such review goes in practice with regard to such nominations. Mainly, it is the motivations or justifications provided by the administrations in explaining why there are no women or too few women in the various executive bodies. The absence of any motivation or justification constitutes grounds for annulment of the nomination act.[116]

Once such motivations are provided, though, what will the level of their scrutiny be? There are varying degrees of how far administrative courts could go in assessing the motivations or justifications provided by regional or provincial presidents or mayors. At the weakest end of the spectrum, one could imagine that the simple presence of *any* motivation or justification could be seen as sufficient, meaning that an annulation is possible only absent such a reasoned motivation explaining why the legal requirements were not respected or any indication that some efforts were made to include women in the executive bodies.[117] One example of such a weak form of review comes from the TAR Marche, which held that it was sufficient for the mayor of Mondolfo to justify the absence of women in the municipality with the declaration that he had unsuccessfully tried to identify women within the political majority, and had also asked two women outside of the municipal council to join the executive.[118]

Nevertheless, in general the standard for reviewing the motivations and justifications is quite strict, meaning that not just any showing of motivation is sufficient. For instance, it has not been deemed to be sufficient that the women nominated or invited to be part of the local executive declined the nomination or invitation and that this determined an all-male or predominantly male composition.[119] Other judgments have specified that these motivations need to be "punctual, exhaustive and concrete,"[120] and that the mayor needs to be aware that his actions[121] need to be taken with an obligation or best effort in achieving a specific result and not merely some due diligence.[122] In other words, the case law requires

[116] *See, e.g.,* Trib. ammin. reg. Campania, sez. I, Mar. 10, 2011, no. 1427. For a comment on this case, see *supra* Adamo, note 100.

[117] This is partly what is indicated in a Circular by the Interior Ministry, dated Apr. 24, 2014, at point 3.

[118] Trib. ammin. reg. Marche, sentenza 2012, no. 81. It should be indicated here, that for certain smaller municipalities there is the faculty but not the obligation to name members outside of the municipal council (i.e. the municipal legislative organ) to become part of the local executive.

[119] *See, e.g.*, Trib. ammin. reg. Puglia, Lecce, sez. I, ordinanza Oct. 21, 2009, no. 792; Trib. ammin. reg. Calabria, Catanzaro, sez. II, Jan. 9, 2015, no. 1.

[120] Trib. ammin. reg. Puglia, sez. III, July 6, 2005, no. 680.

[121] I explicitly do not add "her actions" here because in all the cases read and analyzed it was male mayors/presidents whose actions were under scrutiny and not female ones.

[122] *See* Trib. ammin. reg. Puglia, Lecce, sez. I, Oct. 10, 2009, no. 792.

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a showing that everything possible was done to encourage women’s participation and nomination, but that notwithstanding such efforts insurmountable obstacles prevented balanced gender representation.

Last but not least, the trend seems to be in the direction of a very strict analysis by the administrative judges of such justifications, if allowed at all. Thus, the administrative tribunal of Lazio, in the case involving Rome mentioned above,[123] held that it is difficult to imagine an explanation justifying the radical violation of a precise obligation. Moreover, the legislative textual amendments of 2012 and 2014 introduced certain linguistic changes and certainties, which make it more difficult for mayors to explain their way out of an increasingly precise legal obligation. This is clearly demonstrated by a recent 2015 judgment in which the TAR Calabria[124] annulled the decree of the mayor of Montalto Uffugo, who had nominated four men and one woman to the local executive, thus infringing both against constitutional requirements and the newly adopted legislation mentioned above. What is relevant in the court’s motivations for the annulation is first that this forty percent threshold is seen as mandatory without possibility of any derogations and that even if it were not mandatory, no visible efforts had been made on the side of the mayor to include more women. All the municipality provided was two letters by two potential female candidates renouncing their nomination. This judgment was then confirmed by the CdS under essentially the same terms.[125] We thus see also in this domain how the requirement of gender balance in the administrative jurisprudence receives a very favorable and broad interpretation.

3. Standing

The third broad issue raised by the administrative case law in this area concerns the question of standing. And here, as well, the judicial formant has provided broad interpretations in addition to the very special institutions which the Italian legislative formant has introduced. Indeed, one of the more surprising issues of the Italian developments concerning gender quotas is that these innovations have not only been substantive, but also institutional and procedural. In fact, since 1984, there exists a specific institution, the equality counselor[126] from the national level down to the local.[127] Originally, this institution was created for the

[123] *Supra* note 105.

[124] Trib. ammin. reg. Calabria, Catanzaro, sez. II, Jan. 9, 2015, no. 1. On that same day the same administrative court decided practically identical facts (no women or one woman nominated by the mayors) for three other small towns—Torano Castello, Vaccarizzo Albanese, Rombiolo—with the same outcome in Trib. ammin. reg. Calabria, Catanzaro, sez. II, Jan. 9, 2015, nos. 2–4.

[125] Cons. stato, sez. V, Feb. 3, 2016, no. 406.

[126] In Italian they are called *consigliere/a di parità*.

[127] For more details on the history of these counsellors, see Cristina Calvanelli, *La disciplina della figura e delle funzioni della consigliera e del consigliere di parità nel d. lgs. 198/2006* [*The framework of the figure and functions*

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employment domain,[128] but gradually via successive legislative modifications, the powers of this institution have been strengthened to extend outside of the employment context.[129] Most interesting for the purposes of this contribution is Article 37 of the Equal Opportunities Code,[130] which endows the national and regional equality counselors with a specific power and standing to bring collective discrimination cases. What might be even more surprising is that they actually do initiate litigation. In a number of cases it was these equality counselors who were at the origins of the complaints against mayors, provinces or regions who had nominated male-only or too few women to the respective executive bodies.[131] Moreover, in certain regions equal opportunity commissions and regional equal opportunity counsels or centers were also introduced,[132] whose members have also been active in bringing cases relating to the absence of some form of gender balance in local executive bodies before the administrative courts.[133]

Beyond the broad standing rules granted to the equality counselors by statute, the administrative courts themselves have been very generous rather than restrictive, thus showing again how favorable the judicial formant is—at least since the constitutional reforms of the early 2000s. Thus, the standing of associations—whose goals are the protection of women's rights and who have stable local roots—to bring complaints against all-male or predominantly male executive bodies has been recognized in various cases and without very much resistance.[134]

The jurisprudential situation is less clear as to whether all local executive members or all electors or citizens in the respective geographic area also have standing to challenge such

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of the equality counsellor in legislative decree 198/2006], in IL CODICE DELLE PARI OPPORTUNITÀ [THE EQUAL OPPORTUNITY CODE] 37–93 (Giuseppe de Marzol ed., 2007).

[128] Law Dec. 19, 1984, no. 863, art. 4, para. 4, G.U., Dec. 22, 1984, no. 351.

[129] Law Apr. 10, 1991, no. 125, G.U., Apr. 15, 1991, no. 88 (establishing affirmative action measures for equality between men and women at work), and the amendments made by the Legislative Decree May 23, 2000, no. 196, G.U., July 18, 2000, no. 166.

[130] Legislative Decree Apr. 11, 2006, no. 198, G.U., May 31, 2006, Ord. Supp. no. 133, which is better known as the *Testo Unico delle pari opportunità*.

[131] See the four Calabrian cases already mentioned above, *supra* note 108, but also Trib. ammin. reg. Puglia, Bari, sez. I, Jan. 11, 2012, no. 79.

[132] For more detail on these institutions, see Catelani, *supra* note 75, at 217–56.

[133] *See, e.g.*, Trib. ammin. reg. Puglia, Bari, sez. I, Jan. 11, 2012, no. 79; Trib. ammin. reg. Piemonte, Jan. 13, 2013, no. 24.

[134] *See*, *e.g.*, Trib. ammin. reg. Sardegna, sez. II, Aug. 2, 2011, no. 864 and Trib. ammin. reg. Sicilia, Palermo, sez. I, July 19, 2010, no. 8690.

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nominations. Some decisions broadly affirm such standing to all local executive members.[135] Others instead exclude standing to local executive members all together.[136] As to the electors or citizens, one case broadly affirmed that every citizen—in the affected geographic area—could in theory aspire to become a local executive member and therefore has standing to challenge the nominations.[137] Other judgments simply accept that the nominations can be challenged by theoretically eligible female citizens of a municipality.[138] The rule, however, seems to be that standing is at least extended to those who were actual candidates for the position or had all the eligibility criteria to become members for the local legislative body[139] even though in exceptional cases such standing has been excluded and limited to associations whose goal is the protection of collective interests.[140]

What this litigation demonstrates quite clearly is that overall the administrative courts have provided a gender quota friendly interpretation at various levels, ranging from standing to direct justiciability, when local governments did not respect the legal and constitutional obligation of naming a gender-balanced local executive. Combined with the constitutional case law in the domain one can understand how, contrary to France, the judicial formant has embraced the principles of gender parity representation.

D. Concluding Observations

Without pretending to provide a fully backed and provable hypothesis here, the question arises: Where does this divergence come from? What explains the continued resistance of the French judicial formant, where the Italian formant seems to have overcome the initial dissonance with the legislative formant?

One explanation could harken back to the two differing constituent moments of the French and Italian modern States. The French Revolution and the First Republic were followed by two Napoleonic Empires (1804–1815 and 1851–1870), the re-installment of the Bourbon and the Orléans royal families (1815–1848), and three more Republics (1848–1851; 1870–

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[135] *See, e.g.*, Trib. ammin. reg. Puglia, Lecce., sez. I, June 6, 2005, no. 680; Trib. ammin. reg. Sicilia, sez. I, Dec. 15, 2010, no. 14310; Trib. ammin. reg. Lazio, *supra* note 105; and Trib. ammin. reg. Lazio, sez. II, Jan. 20, 2012, no. 679.

[136] *See* Trib. ammin. reg. Sardegna, sez. II, June 27, 2011, no. 664.

[137] As was the case in Rome in the decision cited *supra* note 105.

[138] Trib. ammin. reg. Campania, sez. I, Mar. 10, 2011, no. 1427; Trib. ammin. reg. Piemonte, sez. I, Jan. 10, 2013, no. 24; Trib. ammin. reg. Calabria, sez. II, Feb. 6, 2015, no. 278.

[139] *See, e.g.,* Trib. ammin. reg. Campania, Napoli, sez. I, June 7, 2010, no. 12668; Trib. ammin. reg. Campania, Napoli, Apr. 7, 2011, no. 1985; Cons. stato, sez. V, July 27, 2011, no. 4502 (upholding the Trib. ammin. reg. Napoli judgment no. 1985/2011).

[140] *See* Trib. ammin. reg. Sardegna, sez. II, Aug. 2, 2011, no. 864; Trib. ammin. reg. Campania, Napoli, sez. I, Apr. 7, 2011, no. 1985.

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1940; 1946–1958) before today's Fifth Republic. Today's 1958 Constitution, in contrast, cannot be seen as a true founding and constituent moment, but is rather a conservative setback attempting to reign in the Parliamentary powers that were deemed to have paralyzed the French State during the Fourth Republic (1946–1958), and create a highly executive-centered semi-presidential regime.[141] Therefore, France's birth as a modern state can be said to coincide with the first abolition of the monarchy rather than with the 1958 Constitution. This has also shaped the primordial understanding of equality which is closely linked to the abolition of the *Ancien Régime*'s three estates, and, in particular, the privileges of the clergy and the nobility.[142] French equality was not primarily about redressing past forms of discrimination against minorities or other groups. As a consequence, gender quotas, rather than being seen as the expression of substantive equality or protection of minorities, are felt as (re-)introducing a privilege or a special right. As the constitutional history on gender quotas in France shows, step-by-step exceptions had to be carved out from this understanding of equality and inserted into the constitutional text where, nevertheless, the interpretation of the equality principle remained a formalistic one.

The Italian constituent moment instead has very different origins dating back to the post-World War II era when Italy's first true rigid constitution was adopted. The Italian Constitution was a result of important compromises between the Christian Democrats and strong left-wing movements. As a consequence, especially as far as the equality principle is concerned, Article 3 not only contained the principle of formal equality, but also one of substantive equality as far as gender equality is concerned. If one looks further into the constitutional text, one finds other special provisions protecting female workers—e.g. Article 37—indicating that the notion that special measures might be necessary even at the constitutional level in order to bring about real equality is not such a taboo as it might be in France.[143] Thus, from the inception of the Italian Republic, something in the constitutional text itself allowed for a broader understanding and interpretation by the judiciary of gender quotas than was the case in France. This may explain why today, Italian courts find it easier to overcome their initial hostility, whereas French judges remain steeped in the original constitutional understanding of equality. Using the words of Rodolfo Sacco, one could say that in France there is a constitutional cryptotype, which understands equality as formal equality which somehow persists even today, whereas in Italy this is not the case.

All together what this Article tried demonstrating is that after initially overlapping trajectories on gender equality in France and Italy, we see how these trajectories start

[141] SOPHIE BOYRON, THE CONSTITUTION OF FRANCE 29–94 (2013).

[142] *See* Decree Abolishing the Feudal System, Aug. 11, 1789, published in JOHN L. HEINEMANN, READINGS IN EUROPEAN HISTORY: 1789 TO THE PRESENT 9–10 (2d ed., 1994).

[143] That this might be in itself some form of constitutional gender stereotyping has been discussed elsewhere, see Mathias Möschel, *La tutela giuridica contro gli stereotipi di genere* [*The legal protection against gender stereotypes*], XXXIII RIVISTA CRITICA DEL DIRITTO PRIVATO 443, 461–62 (2015).

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diverging, mainly due to the different attitude and interpretation by the judicial formant. In France, the judiciary has been much more reluctant to interpret gender equality as a substantial, enforceable right, but rather interprets gender equality and gender quotas as an objective and as an exception to the principle of equality. In Italy, in contrast, the constitutional shift has really changed the picture, as demonstrated by the case law of the Court and of the administrative jurisdictions all over the country. The judicial formant has thus more fully embraced the idea that measures promoting gender equality at various levels are integral to the principle of equality and are in certain cases directly enforceable by a large number of potential plaintiffs.

With this, I do not want to say that there do not remain obvious issues as far as gender equality in both countries are concerned. First, except for the forty percent reservation introduced in 2014 in Italy for local executives, none of the measures mentioned here actually directly reserve seats for women. Second, in strict equality terms, one third or a forty percent quota are not full equality and it raises the question why such percentages are introduced or where they come from. It remains to be seen whether the measures put in place in both countries over the past years will be sufficient to increase the number of women in all domains from the political sphere to the economic sphere. If not, would hard quotas need to be introduced and withstand constitutional muster?

One thing seems certain: In Italy such hard quotas would likely prevail better than in France, partly due to the different approach taken by courts.

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