CONSTITUTIONAL REFORM. REFLECTIONS FROM THE PRINCIPLE OF EQUALITY BETWEEN MEN AND WOMEN IN THE FRAMEWORK OF THE 1978 SPANISH CONSTITUTION

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Abstract: This article considers the relationship between the principle of equality between men and women and the power of constitutional reform. It starts from the "original sin" of the modern constitutional state which, despite its pretensions of equality and universality, excluded women from being citizens. The analysis moves to the current Spanish constitution, bringing a gender perspective to a review of women's participation during the 1977 "Constituent Assemblies" as well as the main questions that, according to jurisprudential thinking, should be addressed in a hypothetical reform of our constitution. Finally, it examines the extent to which the principle of equality, currently enshrined in the democratic principle, is construed as a possible limit to constitutional reform.

1. INEQUALITY IN THE THEORITICAL BASIS AND THE HISTORICAL ORIGINS OF THE CONSTITUTIONAL STATE

The construction of the modern constitutional state has been marked, practically from the beginning, by voices denouncing either the lack of equal rights between

women and men, or the that principle of equality contained in the declarations of rights is no more than a rhetorical flourish that does not translate to legal content. One might think that this situation basically happens in Europe, in states whose constitutions were not conceived of as true legal norms -and even less as hierarchically superior to the law, an expression of the will of the sovereign *legibus solutus*. However, it is well known that in the USA Chief Justice Marshall affirmed early on the supremacy of the constitution over the law in *Marbury v. Madison*. It is therefore clear that neither the exclusions of the *exercise* of constituent power -not so much in the ownership of sovereignty-, nor the exclusions in the *entitlement* to rights linked to constituted powers -access to representative positions within the legislature and executive; access to public roles, particularly judicial- were derived from the constitution's ultimate lack of normativity.

Although women were not the only ones excluded from enjoying the equal rights proclaimed by the revolutionary constitutional declarations, they were the last to benefit from the intrinsic logic of the idea of human rights. And while in the civil arena they enjoyed some parity, of course they did not reach the level of political subjects[1]. It would be wrong to think that at that time this inequality was accepted without complaint as though it were the natural order[2]. In reaction to the Declaration of the Rights of Man and the Citizen, which did not recognize women as equals, even though they had also fought for the revolution, Olympe de Gouge wrote the Declaration of the Rights of Woman and the Female Citizen, which stated in article I "Women are born free and enjoy the same rights as men" [3]. Olympe de Gouge paid a high price for her support of the Girondins, and being a woman did not spare her from being denounced for the

[1] Lynn Hunt, *La invención de los derechos humanos*, Tusquets, 2009, pp. 149 y ss. With regard to the lack of recognition of women's rights in the origin of the constitutional state, see the work of Ana Aguado, "Ciudadanía, mujeres y democracia", in *Historia Constitucional*, núm. 6, 2005, pp. 11-27, available at: http://www.historiaconstitucional.com/index.php/historiaconstitucional/article/view/61/49 (last accessed: 28th of December 2019). Similarly, see the contribution from Jasone Astola Madariaga, "Las mujeres y el estado constitucional: un repaso al contenido de los grandes conceptos del derecho constitucional", A presentation given at the multidisciplinary congress of Women and the Law: Past and Present, organised by the Bizkaia section of the Faculty of Law, October 2008, p. 227-290. The complete records of the congress are available at: https://web-argitalpena.adm.ehu.es/pdf/UVWEB081572.pdf (last accessed: 28th of December 2019).

[2] See the work by Celia Amorós Puente and Rosa Cobo, "Feminismo e Ilustración", in Ana de Miguel Álvarez, Celia Amorós Puente (Coords.), *Teoría feminista: de la Ilustración a la globalización. Vol. 1: De la Ilustración al segundo sexo*, pp. 91-144.

[3] *Les droits de la femme. A la Reine*. The text can be found at https://gallica.bnf.fr/ark:/12148/bpt6k9629179b (last accessed: 28th of December 2019). Olympe de Gouges directed her declaration at Queen Marie Antoinette, paradoxically, they were both ultimately executed.

transgressions that, as a woman, she committed. As the *Moniteur Universel* published following her execution:

> "She began to talk nonsense, and ended up adopting a project of the traitors who would divide France: she wanted to be a man of the state, and it seems that the law punished this conspirator for having forgotten the virtues of her sex" [4].

In 1790, Condorcet had denounced the fallacy that supposedly affirmed the principle of equality and subsequently deprived women of political rights:

> "Have they not violated the principle of equality of right by calmly depriving half of the human race of the right to participate in the creation of laws, the right of citizenship? [5].

As is well known, the victorious ideas were not those of equality of rights between sexes, but those that from the diversity of the human race constructed the political categories of men and women, and ascribed them different abilities and roles which involved, furthermore, the subordination of women. In the words of Rousseau:

> "One [the man] must be active and strong; the other [the woman] passive and weak: it is necessary that one should have both the power and the will and that the other should make little resistance. From this principle it follows that woman is particularly made to satisfy man […]. If woman is made to please and to be subjugated to man, she ought to make herself pleasing to him rather than to provoke him […]. Woman is worth more as a woman and less as a man; when she tries to usurp our rights, she is our inferior […]. Hence her education must, in this respect, be different from man's"[6].

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[4] *Gazette Nationale ou Le Moniteur Universel*, Nº 5g, Nonodi 29 Brumaire l'an 2 de la Republique Française une et indivisble (19 de noviembre de 1973, "viejo estilo"), may be found at https://www.retronews.fr/journal/gazette-nationale-ou-le-moniteur-universel/19-novembre-1793/149/1994897/1 (last access: 28th of December 2019). The same edition reported the execution of Marie Antoinette.

[5] M. de Condorcet, "Sur l'admission des femmes au droit de cité", *Journal de la Société de 1789*, nº 5. Available at the web project Online Library on Liberty, from the Liberty Fund: http://oll-resources.s3.amazonaws.com/titles/1014/0570_Bk.pdf (last access: 28th of December 2019).

[6] J. J. Rousseau, *Emile ou de l'Education*, Livre V, (the quoted text is from pages 281 to 286), published in 1762. In *Oeuvres complètes* by J. J. Rousseau. Volume 5 / réimprimées d'après les meilleurs textes sous la direction de Louis Barré; illustrées par Tony Johannot, Baron et Célestin Nanteuil. J. Bry Ainé, Libraire Editeur, Paris, 1856. Source: Gallica.bnf.fr / French National Library, disponible en: https://gallica.bnf.fr/ark:/12148/bpt6k5786957n (Last access: 28th of December 2019). A response to this educational program for women may be found in the work of Mary Wollstonecraft, published in England in 1792: *A Vindication of the Rights of Woman with Strictures on Political and Moral Subject*, which openly appealed to Talleyrand to change his ideas of the rights of women and their education, laid down in 1791 in a report on public instruction carried out at the request of the French Constitutional Committee.

Before the expansive power of some equal, universal, natural rights could reach women[7], new forms of sexism (along with racism and antisemitism) were developed, dressed up as biology in the counter-revolutionary restoration and nationalist movements of the 18th century[8]. With that, the lack of recognition of certain rights for women was made to reside in their *nature*, identified with their roles as mothers and wives, and by extension, with questions concerning the home. In this way, the construction of sexual difference legitimized legal inequality, creating a true bio-power. It is well known that often the principle of equality was accompanied by legal exclusion from rights in the institutional public space, such as the right to vote. It also provided cover for the lack of punishment for physically, mentally, or sexually harmful behavior towards women in the domestic arena, identifying it as a private space that should be kept separate from the meddling of authorities[9].

That said, the metaphor of the *sexual contract* as an unavoidable component of the social contract was a powerful image, powerfully descriptive of reality[10]. The price paid for the ideal of emancipation and equality in the face of the old system of privilege and social predetermination was, for women, their exclusion from political space and their confinement to this private sphere connected with the pre-social state conceived of as an area of liberty, free from state intervention, which in turn facilitated the survival of private jurisdictions[11]. This private sphere was, for women (and occasionally still is) the domestic arena, as –even though it seems paradoxical– "that which women are deprived

[7] An indispensable reference on the lack of full development of the enlightenment ideals of the rights of women is the work of Cristina Molina Petit, *Dialéctica feminista de la Ilustración*, Anthropos, Barcelona, 1994. This inequality was not just the legacy of the French revolution; the American revolution did not give any greater consideration to the rights of women. See, for example, the writing of Gerda Lerner, "The Lady and the Mill Girl: Changes in the Status of Women in the Age of Jackson", *American Studies*, 10 (1), 1969, pp. 5-15. Available at: https://journals.ku.edu/amsj/article/view/2145 (last access: 28th of December 2019).

[8] Lynn Hunt, *La invención de los derechos humanos*, *op.cit.*, pp. 191-200.

[9] As stated by the North Carolina Supreme Court in State v. A. B. Rodhes (61 N.C. 453; 1868), in which a man was accused of assaulting his wife: *"We will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence […] family government is recognized by law as being as complete in itself as the State government is in itself".* With reference to how the construction of the private domestic environment has been used to not prosecute violence against women or child abuse in the USA, see the bibliography cited by Frances Olsen in "Constitutional Law: feminist critiques of the public/private distinction", *Constitutional Commentary*, vol. 10, núm. 2, 1993, p. 321.

[10] As is surely well known, this expression refers to the 1988 work of Carole Pateman, *The Sexual Contract*.

[11] As it was the fathers' or husbands' families who were given to supervise many key decisions that could often seriously affect women's autonomy, such as taking on paying work, or moving freely.

of most is privacy" [12], even in this domestic space that was supposedly their natural home. This distorted the idea of a private area as a space in which to pursue one's own idea of good, opening the door to a space that aimed to keep the state out, even when there were relationships that could harm fundamental rights. It is evident why the different understandings of the public, the private, the social and the personal are particular spheres of study and criticism in feminism and gender studies[13].

In this way, as indicated in jurisprudence, the basis of our political culture is "not only on a specific negation of specific women of that time, but in an absolute negation at the symbolic level of all women from all times, by conceiving of so-called universal ideas which exclude us" [14].

2. EXCLUSIONS FROM CONSITUENT POWER IN THE 1978 SPANISH CONSTITUTION[15]

Consideration of the consequences of the presence or absence of women in modern constituent processes can be achieved from Article XVI *in fine* from the aforementioned Declaration of the Rights of Woman and the Female Citizen:

> "All societies where the guarantee of rights is not assured, nor the separation of powers established, lack constitutions; *the constitution is void if the majority of individuals making up the nation have not cooperated in its drafting".*

Olympe de Gouges' addition to the Declaration of the Rights of Man and the Citizen is particularly important, as it points directly to the heart of the problem of constituent power, and ultimately, to the question of constitutional legitimacy as it

[12] *Cfr*. Françoise Collin, "Espacio doméstico. Espacio público. Vida privada", in *Ciudad y Mujer* (Actas del Curso: urbanismo y mujer. Nuevas visiones del espacio público y privado), Ed. Seminario Permanente "Ciudad y Mujer", 1995, pp. 231-237.

[13] See "Public and Private", in Judith Squires, *Gender in Political Theory*, Polity Press, 1999, p. 24 y ss.

[14] Cfr. Jasone Astola Madariaga, "Las mujeres y el estado constitucional…", *op. cit*., p. 255.

[15] Given the research project it is framed by, the aim of this work lies in the relationship between constitutional amendment and the principle of gender equality. For this reason I decided not to include a historical section concerning the voices that were pioneers in Spain about claiming women's rights. These voices include the jurist Adolfo Posada, who in 1899 wrote *Feminism*. For a deeper understanding of some of the aspects of the constitutional history of legal feminism in our country, a work of great interest is the collection by Irene Castells: *Mujeres y constitucionalismo histórico español. Seis estudios*, In itinere, 2004. In addition, see the work by Javier García Martín: "Adolfo G. Posada, un constitucionalista ante el feminismo. Entre Estado social y derecho privado", Lecture given in the multidisciplinary conference *Mujeres y Derecho*…, op. cit., pp. 291-312, where there is also an analysis of the exclusion of women from the politial spectrum of the Cádiz constitution; and the work of Sergio Sánchez Collantes, "Antecedentes del voto femenino en España: el republicanismo federal pactista y los derechos políticos de las mujeres (1868-1914)", *Historia Constitucional*, número 15, 2014, pp. 445-469. Available at http://www.historiaconstitucional.com/index.php/historiaconstitucional/article/view/409 (last accessed: 28th of December 2019).

specifically relates to the question of the legitimacy of the constituent process. Exclusion from the right to vote is without doubt a central element of that legitimacy because, in the words of Pierre Rosanvallon "the justification of power from the ballot has always implicitly referred to the idea of a *general* will, and therefore, to a people that together make up society"[16].

In Spanish constitutional history, it took until the 1931 constitution to enshrine the principle of equality between the sexes, as well as true universal suffrage (male and female). Paradoxically, the 1931 elections to the constitutional assemblies was within a framework of a system recognizing passive suffrage for women, but not active suffrage[17]. Only two women were elected in a total of 47 seats: Clara Campoamor and Victoria Kent, who during the constitutional debates made famous impassioned speeches about the recognition of votes for women[18].

Elections to the Cortes Generales were carried out within the framework provided by the 1977 Law of Political Reform, which introduced, among other things, universal active and passive suffrage for men and women, later developed by Royal Decree Law 20/1977, on electoral rules. The Constituent Legislature (1977-1979) had 350 seats in Congress –of which 21 were occupied by women– and 207 in the Senate – with only six female senators. Of those 27 parliamentarians[19], only María Teresa Revilla López, from the Central Democratic Union, was first part of the Congressional Constitutional Commission, and subsequently –from February 1978– the Commission on Constitutional Matters and Public Freedoms. It is well known that none of the female parliamentarians were part of the Constitutional Committee named at the beginning of

[16] *La legitimidad democrática. Imparcialidad, reflexividad y proximidad*, Paidós, 2010, p. 22.

[17] This was included in the Decreto del Ministerio de la Gobernación of the 8th of May 8 1931, modifying the 1907 Electoral Law, establishing in art. 3 the eligibility of women (and priests). The text may be found at https://www.boe.es/datos/pdfs/BOE/1931/130/A00639-00641.pdf (last accessed: 28th of December 2019).

[18] See, for example, the Diario de Sesiones de las Cortes Constituyentes (número 48), corresponding to the 1st of October sesión, which includes part of the debates about women's rights to the vote. It is available on the Congress website: http://www.congreso.es/backoffice_doc/prensa/notas_prensa/54648_1506689774662.pdf (last accessed: 28th of December 2019). Also essential in this regard, the work by Clara Campoamor, *El voto femenino y yo: mi pecado mortal*.

[19] To understand more about these women, see the work co-ordinated by: Julia Sevilla Merino, Asunción Ventura Franch, María del Mar Esquembre Cerdá, Margarita Soler Sánchez, María Fernanda del Rincón García, *Las mujeres parlamentarias en la legislatura constituyente*, Congreso de los Diputados, 2006. The documentary film Constituyentes (2011), by Oliva Acosta may also be of interest.

the legislature which did, however, consider the different political and territorial sensibilities in its composition[20].

Once the legal framework accepted –albeit only formally– the principle of sex equality, one might wonder whether the power critical of the requirements of democratic legitimacy would be weakened, as the lower presence of women in the Legislature has more to do with "real, effective" equality than with the legal exclusions in force up to that point. Despite that, it is still possible to review the constituent process with a critical perspective from the point of view of gender. In this sense, the right to equality and non-discrimination for reasons of sex, insofar as a principle of optimization, could have been developed better, both from a formal and material perspective. From a formal or procedural perspective, the presentation of the candidates in the 1977 election could have been based on positive action, although it would only have been through incentives for the parties who were standing in those elections[21]. It is true, nonetheless, that at that time there were almost no referents in comparative law, and the requirements for balanced representation were more likely to be included in the demands of some feminist movements than part of European electoral systems, even those that had been constituted as democracies decades previously[22]. In fact, formalizing this concept of democratic parity at international level would have to wait until the 1992 Athens Declaration.

From a material perspective, the constitution unreservedly accepts the principle of sex equality and its realization in the matrimonial sphere, banishing the status of civil, workplace, and economic subordination to paternal or marital authority which had

[20] The minutes of the Constitutional Committee are avaialbe at: http://www.congreso.es/constitucion/ficheros/actas/actas.pdf (last accessed: 28th of December 2019)

[21] A summary of the recommendations of the feminist movements in the manifestos of the political parties contesting the 1977 elections can be seen in *Las mujeres parlamentarias en la legislatura constituyente, op. cit.*, pp. 35 y ss.

[22] Even so, in Sweden and Norway, some parties had already set minimum quotas by this time, set at 40% in all levels of the party, and these practices were surely known to their Spanish equivalents (I am thinking, for example, of the Swedish Communist Party) although it would be some years before this principle of representative parity would reach the electoral lists. *Cfr*. Anne Phillips, *Género y teoría democrática*, Instituto de Investigaciones Sociales, UNAM, 1996, p. 89. In the USA there are precedents in the Democratic Party from 1980 onwards: *cfr*. Timothy J. Hoy, "Affirmative Action in the Electoral Process: The Constitutionality of the Democratic Party's Equal Division Rule", *University of Michigan Journal of Law Reform*, vol. 15, núm. 2 (1982), pp. 309-335. With regard to continental Europe, and the Swedish model in particular, *cfr*. Teresa García-Berrio Hernández, Democracia paritaria, ¿mito o realidad? Francia vs. Suecia: Dos perspectivas antagónicas, *Anuario de Derechos Humanos. Nueva Época*. Vol. 9, 2008, pp. 267-336.

been established by the Francoist regime[23]. However, as legal feminism has highlighted, the constitution excluded fundamental protection from rights with a marked gender bias. Some which doubtless stand out are the recognition of sexual and reproductive rights. These include the protection of sexual freedom and integrity, the right to sexual and reproductive health, and the freedom to terminate a pregnancy[24].

Because, as I have already indicated, the main focus of this text is the relationship between men and women and constitutional reform, I do not believe it necessary to extend my analysis to the constituent process of the current constitution. The problem of constituent power, conceived of as an actual, pre-legal power, is different to the power of constitutional reform, or constituted constituent power, although an eventual questioning of the original democratic legitimacy of the constitution (i.e., at its foundational moment) could logically affect the legitimacy of the constitutional reform procedure designed by the constitutional text. However, and although there is no lack of positions which disavow the legitimacy of the 1978 Spanish constitutional text, it seems difficult to construct a gender specific criticism of the reform procedure, as the absence of unamendable clauses in the constitution makes any content that may be deficient in gender terms open to remediation via constitutional reform. The general criticism of the complexity of the aggravated procedure in art. 168 of the constitution is a different matter, which logically makes it more difficult –not to say impossible– to constitutionalize certain rights which are unarguably important to feminist demands, summarized above.

3. CONSTITUTIONAL REFORM AND THE PRINCIPLE OF SEX EQUALITY: FORMAL AND PROCEDURAL ASPECTS

There are many considerations arising from an eventual constitutional reform from a gender perspective. One of the areas that has been most worked on in recent years is constitutionalizing some of the proposals that aim to address the parts of the current constitution that exclude women and make them invisible[25].

[23] *Cfr*. María de los Ángeles Moraga García, "Notas sobre la situación jurídica de la mujer en el Franquismo", *Feminismo/s*, número 12 (2008), pp. 229-252.

[24] *Cfr*. Jasone Astola Madariaga, "De la Ley Orgánica de salud sexual y reproductiva e interrupción voluntaria del embarazo al anteproyecto de Ley Orgánica de protección de la vida del concebido y de los derechos de la mujer embarazada. Buscando los porqués últimos de la supresión de derechos fundamentales", *Revista Vasca de Administración Pública*, Núm. 99-100, 2004, pp. 465-49.

[25] Although the reform of the Spanish constitution has aroused significant interest, which is understandable, there are few texts in constitutional jurisprudence that pay particular attention to

Firstly, from a formal point of view –without meaning that it is any less important– there has been insistence of the need to reform the constitution to give it more inclusive language[26]. There has been a lot of powerful resistance to this idea, some of which has come from weighty public institutions such as the Spanish Royal Academy of Language (RAE) [27]. One of the main arguments is the fact that in Spanish the masculine form, in addition to marking gender, has a general use that includes both genders (*El autor* is a male author, *la autora* is a female author, but *los autores* are a group of male, or male and female authors). Without questioning the grammatical truth of this, I believe that a brief look at constitutional history will offer more than enough arguments to support language that avoids generic masculine formulations. This would give women visibility in our constitutional text, in exact contrast to the original exclusions, where the masculine form was also used to speak of the "so-called, with excessive precision, rights of man" [28]. Rights which, despite their ambitions of universality and abstraction, exclude women from their legal realization because it was understood that only those who enjoyed active citizenship –men– would be able to enjoy political rights. The use of inclusive language, apart from having other, persuasive arguments –replacing the image of a man as the "average" or "model" of the subject of rights, avoiding the assimilation of women to men[29]– would allow the reaffirmation of the rights of women in the face of the exclusions of the past. It is not just luck that art.

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questions of gender. One which stands out is the monograph by Itziar Gómez Fernández, *Por una constituyente feminista*, Marcial Pons, 2017, along with the monograph edition of Cuadernos Manuel Giménez Abad, coordinated by the same author: "Revisar el pacto constituyente en perspectiva de género", núm. 5, febrero 2017, available at: https://www.fundacionmgimenezabad.es/sites/default/files/monografia_5_febrero2017.pdf (last accessed: 28th of December 2019).

[26] *Cfr*. among other texts that will be cited: Jasone Astola Madariaga, "El género en el lenguaje jurídico: utilización formal y material", *Feminismo/s*, número 12 (2008), pp. 33-54; Ana Marrades, María Luisa Calero, Julia Sevilla y Octavio Salazar: "El lenguaje jurídico con perspectiva de género. Algunas reflexiones para la reforma constitucional", *Revista de Derecho Político*, número 105, 2019, pp. 127-160

[27] See Julia Sevilla Merino, "Derechos, Constitución y lenguaje", in *Corts: Anuario de Derecho Parlamentario*, número extra, 31, 2018, pp. 81-104. The RAE announced the approval of the report and its immediate referral to the government on the 16th of January 2020, just as this text was being completed, but its contents have yet to become public.

[28] Anne Phillips was being ironic about the paradox between the pretention of universality and willing exclusion. She is cited in *Género y teoría democrática*, *op. cit*., p. 14.

[29] *Cfr*. the work of an author who is an essential reference in the study of the relationship between gender and language: Mercedes Bengoechea Bartolomé, "Necesidad de poseer cuerpo y nombre para acceder plenamente a la ciudadanía", in Teresa Freixes & Julia Sevilla (Coords.): *Género, Constitución y Estatutos de Autonomía*, Madrid, INAP, Ministerio de Administraciones Públicas, 2005, pp. 37-44; as well as her writing "El lenguaje jurídico no sexista, principio fundamental del lenguaje jurídico modernizado del siglo XXI", en *Anuario de la Facultad de Derecho* (Universidad de Alcalá), 2011, núm. 4, p. 15-26. See also Julia Sevilla Merino, "Representación y lenguaje", *Feminismo/s*, núm. 12 (2008), pp. 55-78.

32 of the constitution wanted to remove any doubt by reaffirming equality between men and women in marriage. Was this added precision really necessary? Art. 14 had already established the principle of equality and non-discrimination by sex. It does not seem that it was, and yet the historical and legal circumstances advised it. Because of this, one more reason supporting reviewing and updating our constitution is, without doubt, to accommodate a language that better expresses the diversity of society and which manifests itself in a more explicit commitment to those who have traditionally been missed out in the exercise of power.

From the procedural point of view, on the other hand, the question arises of whether it is essential to establish a minimum participation of women in the framework of constitutional reform. Our constitution has two different amendment procedures (art. 167 and 168). While it is true that reform of the principle of equality and non-discrimination in art. 14 could be done through what is called the ordinary procedure, I chose to make my analysis in the framework of the extended or special procedure of art. 168 for two reasons. Firstly, and as I will argue in the final part of this study, the principle of equality between the sexes is part of the essential elements of democracy. For that reason, depending on the meaning of the reform from an equality perspective, it could be understood to affect the democratic principle, and therefore the preamble to the constitution mandates that it would have to follow the art. 168 CE procedure.

The second reason is related to the fact that, by examining the more exacting procedure, all of the considerations will include any that would have been made about the simple art. 167 CE procedure. In particular, all of those related to parliamentary representation, as in the route described in art. 167 CE constituted constituent power differs from ordinary legislative power only in quantitative terms, in other words, by the *qualified* majorities needed for constitutional amendment. There is no difference with respect to who participates in the reform, at least not with those who *necessarily* must be involved. It is true that based on art. 167 CE the door could be opened to involving the electorate, but it is no less true that the only two constitutional reforms so far in our current democracy involved nothing more than the effective exercise of the constituted constituent power of the Cortes Generales (parliament). Even so, this eventuality is also covered by the more exacting framework of the special procedure, which necessarily requires a binding referendum to complete the amendment process.

With this clarification made, it is time to examine whether the requirement of democratic legitimacy delimited by the right of suffrage is reduced exclusively to the formal recognition of the same without discrimination by sex, or whether a higher standard from a gender perspective may be included, incorporating material requirements in the process. In this sense, I believe the core of the debate revolves around the problem of the supposed abstract nature of parliamentary representation and its relationship with calls for recognition from those who share identities that have traditionally been excluded from enjoying civil and political rights. This has been the case for women, among others, but not only have they not been considered *subjects* of rights, such that their voices have been excluded form representative institutions,[30] and not been able to form part of the public sphere in the Habermasian sense, their expectations and needs have not formed part of the public debate, as their demands were not considered to belong to the political sphere, but rather to the "good life", or to put it another way, to the autonomy of the private[31]. It is not surprising that in the 1970s, feminist movements focused their efforts on announcing "the personal is political".

One should be aware that our current electoral system has already included material requirements in the configuration of political representation. Currently, Organic Law 5/1985, on the General Electoral Regime, requires in art. 44 bis, that:

> 1. Candidates standing for election to Congress, municipalities, island councils, and Canary island councils in the terms described in this Law, the European Parliament, and the legislative assemblies of the autonomous communities, must have a balanced composition of men and women, such that the complete list of candidates of each sex must represent at least forty percent of the total. When the number of positions to fill is less than five, the proportion of men and women will be as close as possible to numerical equivalence. (…)

[30] Art. 3 of the Standing Orders for the internal government of the 1810 parliament stated that "No woman is permitted to enter any of the galleries of the debating chambers". The text can be found on the website of the Congress of Deputies: http://www.congreso.es/docu/blog/reglamento_cortes_1810.pdf (last accessed: 28th of December 2019). Regarding this exclusion, see the article by Irene Castells Oliván and Elena Fernández García, "Las mujeres y el primer constitucionalismo español (1810-1823)", in which the
subsequent maintenance of this exclusion is analyzed. The text was published in the journal *Historia Constitucional*, núm. 9 (2008), available on the journal website: http://www.historiaconstitucional.com/index.php/historiaconstitucional/article/view/148, and in the previously cited volume *Mujeres y constitucionalismo histórico español*, pp. 99-124 (last accessed: 28th of December 2019).

[31] *Cfr*. Seyla Benhabib, "Toward a Deliberative Model of Democratic Legitimacy", in the collection *Democracy and the difference* which she also edited, published by Princeton University Press, 1996, pp. 67-94. Indispensable on this point is Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy", *Social Text*, Num. 25/26 (1990), pp. 56-80, in which she offers a critical re-reading of Habermas's theory of the public sphere starting from the observation of the exclusions on which it was historically constructed. Available at: https://pdfs.semanticscholar.org/15ee/acadb07940a6a2ffa324dee54e3e6a02cf26.pdf?_ga=2.81272215.1458109022.1578592644-619761131.1578592644 (last accessed: 28th of December 2019).

> 2. The minimum proportion of forty percent will be maintained in each tranche of five positions. When the final tranche of the list does not have five positions, the proportion of men and women in this tranche will be as close to equal as possible, although the proportion must be maintained with respect to the list as a whole.
>
> 3. The same rules in the above sections apply to the list of substitutes.
>
> 4. When candidates for the Senate are grouped in lists, according to article 171 of this law, those lists must also have an balanced composition of men and women, such that the proportion between one and the other is as close as possible to equal.

In essence, it is a requirement to articulate democracy in an equal way[32]. The means that, faced with an eventual reform of the constitution, our parliament would have a balanced composition, as far as sex is concerned[33]. It is true that, as it is a legal provision, one cannot discount a majority alternative replacing it in the future, which is why it does not ensure parity between the sexes when it comes to representation. If such a legislative change were to happen, we would have to ask ourselves whether a constitution amended by parliaments without gender parity would suffer a lack of democratic legitimacy from the point of view of equality.

This doubt also extends to the participation of the electorate, which in the special constitutional reform process, is provided for on two occasions. The first, following the dissolution of parliament once the principle of constitutional reform is approved, such that, while it cannot be said that parliament is "constituent", it is true that the electoral process would be mediated by the eventual debate on the proposed constitutional reform. Because of that, it seems logical to think that –except for reforms that have a broad consensus, such as there might be for a limited amendment to remove male primogeniture from the succession to the throne in art. 57.1– the content of the constitutional amendment would be the subject of debate in the electoral campaign, and would affect the outcome of the vote. In this case, obviously, the resultant composition

[32] The bibliography in this regard is already very extensive in our academy. See, for all, the extensive work by Julia Sevilla Merino, who has dedicated much of her research to the question of women's participation in politics. Of her bibliography, one may highlight for the topic before us the text "Democracia paritaria y Constitución", Seminar *Balance y Perspectivas de los Estudios de las Mujeres y del Género*, 2003, págs. 28-58, available at: http://www.democraciaparitaria.com/administracion/documentos/ficheros/28112006125125JULIASEVILLA%20democracia%20paritaria%20y%20constitucion.pdf (last accessed: 28th of December 2019).

[33] The law has set this balance, establishing a minimum of 40% of the total members of the full chamber. This was only achieved in the 13th legislature, in 2019 (there were 166 female members, representing 47.43% of the total), owing to the influence of the division of seats in electoral regions, although in the two previous legislatures the percentage was 39%. In the current legislature (the 14th, 2019), there are 154 female members of Congress, or 44% of the chamber. In the Senate, the balance was reached in the 11th legislature (2015). Statistics about the participation of women in "power and decision making" may be found in the web portal of the Women's Institute: http://www.inmujer.gob.es/MujerCifras/PoderDecisiones/PoderTomaDecisiones.htm (last accessed: 28th of December 2019).

would be different depending on whether the electoral system included parity in the mechanisms of democracy or not.

The second point at which the electorate's involvement is prescribed is none other than the binding referendum, if the amendment is approved beforehand by two-thirds of Congress and the Senate. In this case the participation of the "sovereign people" is not subject to specific requirements. Specifically no quorum of participation is set[34], which makes it even more difficult to set standards for participation of women which, in this sense, could affect the legitimacy of a constitutional reform by the effective participation of a minimum percentage of women[35]. Despite all of this, and without disdaining the influence of gender roles and stereotypes in political participation[36], the fact is that the tendency for years has been for the exercise of active suffrage to exhibit a balance between the number of votes cast by men and women[37]. Thus, at least as long as this trend does not change, it does not seem necessary -nor justified- to take any kind of positive action in this respect in Spain[38].

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[34] One exception is found in the autonomic process framework in art. 151.1 of the constitution. In this case a consultative referendum (plebiscite) for an autonomous community initiative requires ratification by an absolute majority of the electors of each province.

[35] The establishment of a minimum quorum is already a reality in many systems around us, although with many caveats. In this respect see the work of Carlos Garrido López, "La utilidad del referéndum como acicate y contrapeso en las democracias representativas", *Revista de Estudios Políticos*, núm. 181, 2018, pp. 135-165 (in particular, pages156-162).

I have, nevertheless, not found precedents for setting a minimum quorum for a certain group. On the other hand, it is worth wondering from the point of view of the sources, whether a constitutional reform would be necessary which included this requirement in the framework of art. 92 or Title X; or whether, in contrast, it would be enough to modify Organic Law 2/1980, on the regulation of the different kinds of referendum. Bearing in mind that the establishment of so-called "electoral quotas" was done at the legal level, and that other elements of the electoral system -such as the electoral threshold- were not expressly provided for in the constitution, without either of these lacks of provision resulting in declarations of unconstitutionality, I am inclined to believe that the introduction of a minimum quorum of participation in the case of referendums would also not require prior constitutional amendment.

[36] In this regard, see the information from the Electoral Knowledge Network on their website: http://aceproject.org/ace-es/topics/ge/onePage. Aslo of interest is the report *Procesos Electorales incluyentes [Inclusive Electoral Processes]. Guía para los Órganos de Gestión Electoral sobre la promoción de la igualdad de género y la participación de las mujeres*, PNUD / ONU Mujeres, 2015.

[37] *Cfr*. Juan José García Escribano, Lola Frutos Balibrea: "Mujeres, hombres y participación política. Buscando las diferencias", *Reis. Revista Española de Investigaciones Sociológicas*, núm. 86 (1999), pp. 307-329. In this regard, in Study 3248: *Postelectoral. Elecciones Generales 2019*, carried out by the Sociological Research Centre (CIS), it showed that (question 39) in the 2016 elections, 83.7% of men voted, and 84.6% of women. The desegregated data can be found at: http://www.cis.es/cis/export/sites/default/-Archivos/Marginales/3240_3259/3248/cru3248sexo.html

[38] Obviously this is a very generic statement, as it comes from overall data in the framework of sociological surveys on participation. It is not possible to know whether in certain territories, or for example, in more rural, less populated areas, there are differences in voting patterns between men and women which would make it advisable to establish certain positive measures, albeit as incentives. It would be advisable to have the official data from the electoral roll desegregated by sex, as recommended by the *Inclusive Electoral Processes* report *cit.*, p. 47.

This idea that links the effective exercise of women's right to vote with the legitimacy -and, if we include positive measures such as legal requirements, also with the validity- of an eventual constitutional reform, at least when it affects the principle of equality between men and women raises a deeper question that must be addressed: for a question that (also) affects women to be validly decided, must women participate (in a position of certain priority)? Or more explicitly, do only women represent women? I will address this complex question in the following section, as I believe that it is related to the configuration of the democratic principle as a principle that includes sex equality as one of its essential elements, which is why it is necessary to ask ourselves how equality should be realized from the perspective of representation and decision-making in the framework of a democratic legal system, beginning with the most basic question. Does the principle of sex equality constitute a material limit to constitutional reform?

4. DOES THE PRINCIPLE OF EQUALITY FOR WOMEN CONSTITUTE A MATERIAL LIMIT TO CONSTITUIONAL REFORM?

This final section aims to analyze the point to which the principle of equality between men and women has become a limit to the reform of our constitution. It will first address -highlighting only the most important laws- the international legal framework along with the obligations derived from belonging to the European Union. Following that, it will examine the Spanish constitutional framework, reflecting on the relationship between constituted constituent power, the democratic principle, and equality between men and women.

4.1. The principle of equality and non-discrimination by sex in international and European Union law

At the international level, the principle of equality and non-discrimination by sex has been enshrined from the beginning of the codification period following the end of the second world war. The 1945 founding charter of the United Nations established the aim of "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" (art. 1). Art. 61 created the Social and Economic Council, which in 1946 decided to institute the Commission of the Legal and Social Status of Women, whose function is to produce

plans and proposals related to the promotion of women's rights in the political, social, economic, and teaching fields[39]. One of its first successes was managing to ensure that the 1948 Universal Declaration of Human Rights used gender neutral text, avoiding the use of "man" as a synonym of "humanity" [40]. This shows the sensitivity that already existed at that time about the language of rights, in the face of previous documents and declarations that, as we have seen, used the masculine plural in a generic sense ("men", "ciudadanos" [male citizens in Spanish]). The 1948 declaration clearly opted for neutral terminology ("people", "human beings") which of course had an irrefutable symbolic value from the point of view of inclusion of historically excluded subjects.

Clearly, the approval of the declaration did not mean the elimination of legal exclusion by sex which continued in many UN member states' legal systems, among other reasons because of its declaratory nature -at least at the beginning.

In 1953 the Convention on the Political Rights of Women was adopted, which established the obligation to recognize women's right to active and passive suffrage "on equal terms as men, without any discrimination" (arts. 2 and 3). Similarly, the convention established equal access for women to any public role or office[41]. Art. 2.1 of the International Covenant on Civil and Political Rights and art. 2.2 of the International Covenant on Economic, Social, and Cultural Rights, both approved in 1966 and ratified by Spain in 1977, established the general prohibition of sex-based discrimination.

The international system legally embodied a specific antidiscrimination right for women in 1979 with the approval of the Convention on the elimination of all forms of discrimination against women (CEDAW)[42]. According to its art. 2, state parties promise:

> *a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;*

[39] Resolution 11 (II) 21st of June 1946.
[40] *Cfr*. the section "Brief history" on their website: https://www.unwomen.org/en/csw/brief-history
[41] Spain ratified the Convention in 1974, although it made three reservations that excepted not only the "provisions related to the Head of State contained in the Spanish Fundamental Laws", but also the then current provisions which defined the "status of head of the family", as well as those functions which "by their nature can be exercised satisfactorily only by men or only by women" according to the current law. It seems difficult not to conclude that these reservations would denature conventional commitments, as Czechoslovakia indicated in their objections to the Spanish reservations, considering them "incompatible with the objectives of the convention".*Cfr*. United Nations, *Treaty Series*, vol. 940, pp. 339-340 in https://treaties.un.org/doc/Publication/UNTS/Volume%20940/v940.pdf
[42] Resolution 34/180 of the UN General Assembly, 18th of December 1979.

Spain ratified the Convention in 1984, and that obliged it, as indicated above, to incorporate the principle of equality into its legal system in both formal and material senses[43]. As is well known, the Spanish constitution includes that in arts. 14 and 9.2 respectively, such that the international obligation to ensure the practical realization of equality is reinforced by the normative nature of our constitution. Similarly, and while given the constitutional configuration one might understand that the fundamental right to equality covers only the formal perspective, there is no doubt that our legislators cannot wash their hands of inequalities that continue to exist in reality. Obviously, this obligation also reaches constitutional reform, if one does not want to contravene the international rules that Spain has signed up to, and continues to be bound by.

In the European international arena, apart from the general embodiment of the prohibition of discrimination in the European Convention for the protection of human rights and fundamental freedoms (1950), it is particularly important that in 2014 Spain ratified the Istanbul Convention (Council of Europe Convention on preventing and combating violence against women and domestic violence, signed in Istanbul in 2011). The content of this convention raises the obligation for the signatory states to recognize violence against women due to gender as a specific kind of violence that must be combatted with legal and any other necessary measures.

Within the framework of European integration, the principle of retributive equality between men and women is explicitly covered in the founding constituent treaties of the European Communities, and survives nowadays in art. 157 of the Treaty on the Functioning of the European Union (TFEU). In a more general way, the European Union treaty established its foundations -among other things- on the value of equality, which it considers "common to all member states" (art. 2), due to which the Union "will promote equality between men and women" (art. 3). Art. 19 of the TFEU recognizes the possibility of the Union implementing positive measures, although in this case the procedure requires unanimity in the Council, which means that this provision would not be an insurmountable obstacle if, in the future, Spain decided to remove the material or "effective" content of equality of its constitutional framework.

While it is true that, within the framework of European integration the legal protection of equality between men and women is, for jurisdictional reasons, strongly linked to the workplace, its field has been progressively becoming more extensive, also

[43] Of course, Spain had to make a "reservation" at the time of ratifying the Convention, indicating that it would not affect the constitutional provisions related to the crown.

dealing with access to goods and services. Similarly, in recent years its commitment has extended to other legal areas, as shown by the authorization to sign the Istanbul Convention -in the name of the European Union- with regard to issues related to legal cooperation in criminal matters, and respecting the right to asylum and non-return[44]. It is true that recently, this signature has not yet been produced, as reported by the European Parliament Resolution of the 28th of November 2019, on the accession of the Union to the Istanbul Convention and other measures against gender-based violence (Argument V).

In this way, the international legal framework and European Union law help -and oblige- us to specify the framework to understand our fundamental rights via art. 10.2 CE, which has meant an internationalization of the constitutional order[45]. As the Consitutional Court indicated

> "This constituent decision expresses the recognition of our agreement with the area of values and interests that said instruments protect, as well as our desire as a nation to be part of an international legal system that advocates the defense and protection of human rights as a fundamental basis of the organization of the state. For this reason, from its first judgements, this court has recognized the important interpretive function, for determining the content of fundamental rights, played by international human rights treaties ratified by Spain" (STC 91/2000, FJ 7).

In this case, the highlighted treaties specified the content of the fundamental right to equality and non-discrimination due to sex. To fully understand how far international obligations extend over our fundamental laws, the words of professor Rubio Llorente are crystal clear: "the elements introduced in the content of rights… [are] part of the *minimum content* of the right that the legislator must respect", as the treaty does not extend "over the possible content of rights, but only over their *necessary* content" [46], such that the treaty is closer to the Constitution than to the law[47].

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[44] Council Decision (EU) 2017/865, 11th of May 2017, regarding the signing, in the name of the European Union, the Council of Europe Convention on preventing and combating violence against women and domestic violence, in regard to matters related to legal cooperation in criminal matters (DO L 131 on 20.5.2017, pp. 11-12). Council Decision (EU) 2017/866, 11th of May 2017, regarding the signing, in the name of the European Union, of the Convention on preventing and combating violence against women and domestic violence, in regard to asylum and non-return (DO L 131 de 20.5.2017, pp. 13-14).

[45] On this subject, see the recent work by Paloma Requejo Rodríguez, *La internacionalización del orden constitucional: los derechos fundamentales*, Marcial Pons, 2018, which includes an important review of work related to the value of art. 10.2 CE.

[46] Francisco Rubio Llorente, *La forma del poder. Estudios sobre la Constitución*, Centro de Estudios Políticos y Constitucionales, Madrid, 2012, vol. 3, p. 1003.

[47] *Cfr*. Paloma Requejo Rodríguez, *La internacionalización del orden constitucional…, op. cit.,* p. 30.

Of course, the power of constitutional amendment can not only modify the current configuration of the principle of equality and non-discrimination, eliminating it or restricting its scope -for example, with regard to the material perspective which provides the foundations for the positive actions based on art. 9.2 CE-, it can also request international disengagement from the commitments acquired via treaties related to women's equality. However, the interest of the international and European perspective is not solely in understanding the obligations that arise from us belonging to the international community, but rather also in assessing the extent to which the requirements to overcome historical discrimination against women form part of what it means to live in a democracy. That said, an eventual elimination of the principle of equality, or a part of its essential content, could cause secondary harm to the democratic principle, and end up being impossible to change without changing democracy at the same time. With this in mind, I will conclude this study by examining the relationship between democracy and equality.

4.2. A democratic principle, sex equality and constitutional reform

Given that our constitutional framework has chosen not to include material limits to the power of constitutional reform[48], it is perfectly possible to conceive of a hypothetical reform of the principle of equality. The interest of considering this possibility is reduced logically to the hypothesis of a *reformatio in peius* of the principle which would mean the elimination or a constitutionalization of a "minimalist" version of the principle that could establish limitations on how it is put into practice by legislation. Although from this theoretical point of view it is feasible to pose the constitutionality of eliminating the democratic principle itself, given the absence of unamendable clauses in our constitution, the question driving my consideration is whether such a reform of the principle of equality could be carried out whilst maintaining the idea that it is not affecting the principle of democratic organization.

I begin from the consideration that -from the legal point of view- the constitution is the apex of a legal system "characterized by two interdependent traits: its *positivity*

[48] Juan Luis Requejo Pagés indicated that, in reality, in our constitution constituted constituent power is more the second than the first, given that the impossibility of instituting controls over its appropriate procedures would allow it -if it was effective- to impose reform. Cfr. his work "El poder constituyente constituido: la limitación del soberano", in Ramón Punset (Coord.), *Fundamentos: Cuadernos monográficos de teoría del estado, derecho público e historia constitucional*, núm. 1: *Soberanía y Constitución*, Junta General del Principado de Asturias, 1998, pp. 361-380.

and its *self-referentiality*" [49]. In very simple terms, the positivity of the system is understood as that quality by which a "cognitive opening" is established which institutionalizes its own change, and with that, better ensures the new expectations that arise from complex societies. Self-referentiality on the other hand -continuing with the same simplification- is linked to the need for the legal system to preserve its own identity, by which the basis of its laws must be internal (self-referential), rather than from other systems such as moral, religious, or political systems[50]. Although *a priori* these characteristics do not seem to be predicated on a single legal organization, jurisprudence has highlighted how the democratic principle strengthens these qualities, by being shaped from the idea of self-government –self-referentiality–, and the possibility of change -positivity- as long as it is done democratically, in other words, through a self-governing system[51].

Those who are familiar with feminist criticisms of the law will find it easy to recount how changes resulting from their proposals strengthen both characteristics. Where the system has been open to include issues that had traditionally been excluded from legal regulation, by removing the distinction between the public and private spheres, it has enhanced the positivity of the system. Where the rules have excluded provisions that subordinate women's legal status, or whose ultimate basis was in moral or religious considerations (prohibition of divorce, greater weight being given to female infidelity as "dishonor", or the many restrictions of women's options in life considered to be necessary due to their "nature"), the system has gained self-referentiality. It is not by chance that both democracy and feminist demands strengthen both traits. Although it has not always been so, the demand for equality -both from feminists and other movements such as those claiming civil, political, and social rights- today form an essential part of the democratic principle[52]. According to Rosanvallon, the idea of a general will that sustains the justification of power "has consistently been strengthened by the moral need for equality and the legal imperative of respecting rights, which calls for consideration of the intrinsic worth of each member of the group"[53].

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[49] *Cfr*. Benito Aláez Corral, "Soberanía constitucional e integración europea", in Ramón Punset (Coord.), *Fundamentos…,* núm. 1*, op. cit.*, p. 504.
[50] *Cfr*. Benito Aláez Corral, "Soberanía constitucional e integración europea", *op. cit.,* pp. 503-555.
[51] *Cfr*. Francisco Bastida Frejiedo, "La soberanía borrosa: la democracia", in Ramón Punset (Coord.), *Fundamentos: Cuadernos monográficos de teoría del estado, derecho público e historia constitucional*, núm. 1: *Soberanía y Constitución*, Junta General del Principado de Asturias, 1998, pp. 387- 388.
[52] Cfr. Anne Phillips, *Género y teoría democrática, op. cit*., p. 13.
[53] *La legitimidad democrática…, op. cit.*, p. 22.

Because democracy is a principle and putting it into practice, therefore, a -fuzzy- question of degree, it is worth asking ourselves in what cases would the principle of equality between men and women be a limit to constitutional reform by being part of its essential, or minimum, content. One might say the essence of democracy lies in the organization of a legal system which establishes "procedural routes which give access to the system to the greatest number of different expectations arising from the social medium and which thus can be converted into normative responses by the general will"[54]. In this case, the eventual exclusion of women or of certain expectations (such as constitutionalizing a prohibition on abortion) from participation in these routes would not only affect equality but also the democratic principle.

There is an unarguable link between democracy and procedures -the organization of powers, political rights, and modalities of representation[55]. From this perspective, studies of gender in the field of political and legal theory have noted that one of the focuses of study should without a doubt be the representation of women. To begin with there was a line of research that emphasized the need for a truly equal democracy to correct the underrepresentation of women in parliament. It dealt with the "descriptive representation of women", or DRW[56]. The DRW challenged a basic premise of liberal democracy: the abstraction of the personal circumstances of those making up the citizenry, which leads to the irrelevance of the composition of parliaments. This abstraction was surely in every respect necessary in order to deny legitimacy to a class-based representation which placed people according to their position (normally by birth) in society. And this abstraction would surely have been less questioned if it had not also excluded other categories of people -it could be argued also by "birth": being born a woman in this case.

In any case, if what is considered essential is that the interests which are "made present" be general and not respond to corporate interests, given the fiction that they represent the people or nation as a "political unit", one might accept the need to consider in abstract terms who exercises active suffrage: in other words, the articulation

[54] Francisco Bastida Frejiedo, "La soberanía borrosa…", op. cit., p. 391.
[55] *Cfr*. Pierre Rosanvallon, *La legitimidad democrática…, op. cit.*, pp. 248-249.
[56] In Spain, art. 44 bis of LOREG is a good example of the inclusion of *formal* requirements of a democracy which includes the requirement for equality as a sign of identity in the basic core elements of the electoral system. In judgement 12/2008, in which the Constitutional Court responded to an appeal of unconstitutionality against this article, the Court indicated that the aim of translating the equality that existed in society -divided in two balanced groups- to parliamentary representation not only did not violate any constitutional provisions, instead it "was consistent with the democratic principle" (FJ 7).

of representation should be general or political, not a particular representation that considers individual circumstances such as sex. Nonetheless, this situation does not inevitably lead to the need to consider those who are designated as representatives in the abstract. In fact, at least once universal male and female suffrage is achieved, it may be useful to think that representation seeks to "capture" what all those people have in common regardless of their individual circumstances. In this case, the homogeneity of the parliamentary class should give rise to the suspicion of exactly those individual conditions which are -disproportionately- present in parliament, and the consequent exclusions of those which are not[57].

In the logic of modern representation which was born in the French revolution, the representation of common interests and individuals seems legitimate, common interest being identified with the defense of individual spaces of liberty. However, it completely rejects this new form of legitimizing the power of representation of "group" interests, seen as a danger to the community[58]. The 20th century saw the constitutional incorporation of parties -prior to that seen as "factions"- which became central elements in representative democracy[59]. Democracy has faced, for some decades, the drive to incorporate the representation of interests that are particularly concerned with traditionally excluded identities, firstly with legal approval, and later based on socioeconomic and cultural structures which, absent corrective criteria[60], continue to produce "surprisingly homogeneous" results in parliament. This is the demand for "recognition" which operates both at the formal level of the composition of the various institutions that exercise power, and at the material level of the policies enacted – the political agenda.

This aspect is related to the point of view of a "substantive representation of women" (SRW), which wonders about the consequences of the entrance of women into

[57] Anne Phillips says that "the surprising homogeneity of our current representatives is sufficient proof [that something is wrong] as if there were no substantial differences between men and women, or between white and black, then those elected would no doubt by a more random sampling of the electorate. The clear overrepresentation of any social class already establishes that there is a problem". *Género y teoría democrática*, *op. cit*., p. 69.

[58] Cfr. Giuseppe Duso, "Génesis y lógica de la representación política moderna", in Francisco Bastida (Coord.), *Fundamentos: Cuadernos monográficos de teoría del estado, derecho público e historia constitucional*, núm. 3: *La representación política*, Junta General del Principado de Asturias, 2004, pp. 71 y ss.

[59] Cfr. Miguel Presno Linera, Los partidos y las distorsiones de la democracia, Ariel, 2000.

[60] The idea of the "sticky floor" or "concrete floor" in politics wonders whether about the number of women who must make up governments for them to be considered "legitimate". *Cfr*. Claire Annesley, Karen Beckwith, Susan Franceschet, *Cabinets, Ministers & Gender*, Oxford University Press, 2019, p. 212.

politics and whether this would bring about substantial change in how politics is done and in the issues brought into the public sphere.

Obviously, these feminist contributions to democracy raise serious questions. One is about the traditional distrust of the representation of group interests: how many groups will have to have "quotas" for parliament to be "representative" of the people or the nation? One must remember that, on the one hand, women are not a "minority", so the problem of underrepresentation is not the same as the lack of representation for socially minority groups. On the other hand, the complexity of the situation does not obviate the problem, as the lack of presence is absolutely a failure of representation[61].

Another question that arises is whether this requirement means that, on the one hand only women represent women, and on the other, women only represent women. In other words, the question is about the connection between DRW and SRW[62]. It seems that there an unarguable link has not yet been established which shows a strong correlation between the two, although the literature does confirm the appearance of new issues in the political agenda and of various ways of doing politics thanks to the greater presence of women in areas of political power[63].

A different question, and one that is fundamental for feminists, is whether there is an unbreakable relationship between women as representatives and as the represented. A detailed consideration of this would be beyond the bounds of this study, but as women's equality is presented as unarguable content of democracy, and therefore as a limit to constitutional reform insofar as it seeks to preserve democracy, it seems necessary to construct at least the foundations of a response. From my point of view, a positive answer would, in addition to being factually incorrect (not all women voters feel represented by all women in parliament, there are women in parliament who may clearly consider that there is nothing specific in representing women), be hard to reconcile with the idea of human dignity and the free development of personality, aiming to reduce people to a single -sexual- identity. "Woman" does not exist, only specific women, whose interests are not homogeneous, and whose intersections with other aspects of exclusion and oppression have been well known for some time. The

[61] Anne Phillips, "Representation and Inclusion", *Politics & Gender*, vol. 8, núm. 4, pp. 512-518.
[62] Although directed at the problem of the representation of minorities, the thoughts of Richard H. Pildes are extremely interesting, "Democracia y representación de intereses minoritarios", in Francisco Bastida (Coord.), *Fundamentos…*, núm. 3: *La representación política*, *op. cit.*, pp. 331 y ss.
[63] See an example in the work of Joni Lovenduski and Norris, "Westminster Women: the politics of presence", *Political Studies*, vol. 51, 2003, pp. 84-102.

essentialization of "specific" women's interests runs the risk of reinforcing the view of a world divided into gender roles, in the same way that happens when it is said that women "have" another way of doing politics. If they do "have" one, it is surely the consequence of a different historical attribution of roles which has reinforced and weakened different abilities in both the public and private spheres. If the goal is to "de-gender" people so that sexual differences -like differences of skin color, orientation and sexual identity, and religious beliefs- become irrelevant, insisting on the essence of difference will be no help at all. It is reasonable to think that a large part of women's common interests have been constructed by opposition to the interests of the dominant groups (in which there were internal conflicts), meaning their "identity" is constructed more on negative aspects -an especially common element is the trait that served as the basis of exclusion, oppression, discrimination- than positive. In this regard there is a lot of hetero-designation in identity, as it is others -those who have privileged access to resources, in this case the institutions of representation- who decide that this trait, not another, is important in determining exclusion. The different legal treatment in the framework of democratic representation, from this point of view thus forms part of the necessary positive action, but with a provisional bent[64]. In this regard I fully share the thinking that the presence of women in parliament not only promotes material representation of women, "but also because of what it symbolizes in terms of citizenship and inclusion, because of what it says and doesn't say about who counts as a member with full rights in society"[65].

A democracy conceived exclusively as a process -and very clearly as representation- would end up with very "sparse" content with which to face the demands for recognition from recent years[66]. Democracy is not only organization, but also government and politics (the content of the decisions), which must remain "attentive to the diversity of the situations [such that] it does not sacrifice anybody to the abstraction of a principle"[67].

Demands for recognition have introduced, in the demand for equality inherent in democracy, awareness of the value of diversity and have highlighted the obscene

[64] Anne Phillips, *Género y teoría democrática, op. cit.*, pp. 18-19.
[65] Anne Phillips, "Representation and Inclusion", *op. cit.*
[66] The work of Axel Honneth, Charles Taylor and Nancy Fraser, among others, are the references. Similarly, it is important to remember that calls for participation by feminists have always gone far beyond mere representative democracy, although logically the right to vote has become, over time, a claim that cannot be renounced.
[67] Pierre Rosanvallon, *La legitimidad democrática, op. cit.*, p. 251.

exclusions that make up the "original sin" of the constitutional configuration of the modern state[68], such that representation must, along with other functions, promote inclusion. It is true that modern representation, in addition to being based on political or general representativeness, has been based on the particular representativeness of a territorial nature, as opposed to the aforementioned privileges of the old regime, and including personal aspects in representation remains a concern. Nevertheless, the calls for greater representation of women -and other groups- does not have to necessarily mean that they represent people as long as they are "women". The demand for a more heterogeneous assembly -in agreement with "the true political demographics" of the electorate- is surely more a reaction against inequality in how social, economic and political powers are shared out -which extends to the disproportionality of homogeneous bodies- than a conviction of the need for parliaments to be constructed from the juxtaposition of "fragments" of group representatives. It has been observed that greater political equality does not always mean greater equality in other areas of power[69]. Nevertheless, it may be that when better social equality is achieved, political equality will be the consequence. In this sense, the lack of plurality in the identifying traits of those making up the representative assemblies would be yet another symptom of the persistence of "normative" identities, perceived as more, or less valuable.

As has already been recognized, this democratic demand for inclusion in representation causes difficulties, which is why a broad democratic debate is needed to establish the best way to bring it about. Because of that, maybe the specific mechanisms for effecting equal participation may be understood not as limits to constituted constituent power, but as the principle of "recognition" due to historical defects, the lack of equality, the need for representation to prevent exclusion, and thus, the configuration of democratic public power as an active agent in attaining equality in the effective enjoyment of rights.

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[68] Itziar Gómez Fernández, "¿Qué es eso de reformar la Constitución con perspectiva de género? Mitos caídos y mitos emergentes a partir del libro *Una Constituyente feminista*", *Eunomía. Revista en Cultura de la Legalidad*, núm. 16, 2019, p. 326.

[69] Anne Phillips, *Género y teoría democrática*, *op. cit*., pp. 87 y ss.

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