



Lessons on Gender Equality and Women's Political Participation

Election Case Law Analysis Series

ELECTION ✓ **JUDGMENTS**

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Lessons on Gender Equality and Women's Political Participation

Election Case Law Analysis Series

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ELECTION JUDGMENTS

Election Case Law Analysis Series

With support from the United States Agency for International Development (USAID), in 2021 IFES launched [ElectionJudgments.org](https://electionjudgments.org), a curated global database that makes judicial decisions on election cases of all types more transparent and accessible. It is a resource for judges, election professionals, policymakers and researchers who are working to resolve disputes and prevent violations for more credible elections around the world.

IFES has used this database, which is intended to facilitate the exchange of sound precedents across jurisdictions, to conduct an initial analysis of critical judgments on a variety of topics, represented in the new Election Case Law Analysis Series. This paper, the first in the series, focuses on critical judgments related to gender equality and women's political participation.

The [ElectionJudgments.org](https://electionjudgments.org) database is updated periodically. To contribute judgments or resources, please use the appropriate form [here](#) or [contact us](#).

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Reached 205M+
people with civic and
voter education



Trained 759,326
election officials
in fiscal year 2019



Worked in 145+
countries

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Executive Summary

With support from USAID, in 2021 IFES launched [ElectionJudgments.org](https://www.ifes.org/election-judgments), a database for national election judgments from around the world.¹ IFES has used this database, which is intended to facilitate the exchange of sound precedents across jurisdictions, to conduct an initial analysis of critical judgments on gender and elections decisions. For elections and political participation for women, comparative case law provides insight into real-world efforts to operationalize the goal of gender equality espoused by many countries but achieved by almost none. A review of the litigation in this space, from France to Samoa and Kenya to Mexico, shows that the argument for gender equality and fairness has been used both for and against the cause of women's equal participation in politics.

This analysis found that questions related to gender quotas and other affirmative actions designed to operationalize gender equality were widespread, and that these measures are most impactful when accompanied by institutional commitment on the part of the courts to enforce the spirit and the letter of the law. These cases also raised important questions for the field about possible conflicts between LGBTQI+ rights, women's rights, and Indigenous rights, as well as the limitations of gendered quota systems grounded in a gender binary that is losing resonance with a growing portion of the population.

Ultimately, this paper finds that, while courts can play important roles in enforcing laws intended to promote gender equality and protect the equal political participation of women, these efforts will ultimately be ineffective, and even pyrrhic, without both societal and institutional action.

Introduction

For true democracy to exist, all citizens must have equal access to elections.² The International Convention on Civil and Political Rights (ICCPR), to which 173 countries are States Parties, makes clear that this includes equal access for women and men. Per Article 25, "every citizen shall have the right and the opportunity, regardless of their sex, to take part in the conduct of public affairs and to have equal access to public service in his country."³ Furthermore, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) explicitly promotes women's political participation by requiring countries that have ratified the convention to take action to ensure women's equal participation, mentioning specifically the right to vote, stand for election, hold public office and participate in the formation and implementation of government policy.⁴

¹ The Elections Judgments database is supported by the United States Agency for International Development (USAID) under the Global Elections and Political Transitions (GEPT) Program.

² See *Gender equality in elections*, IFES, (Apr. 10, 2019), <https://www.ifes.org/issues/gender-equality>; see also *12 Principles of Good Governance*, Council Eur.

³ UN General Assembly, International Covenant on Civil and Political Rights, art. 25, 16 December 1966.

⁴ Convention on the Elimination of All Forms of Discrimination against Women, art. 7, 3 September 1981, <https://www.ohchr.org/documents/professionalinterest/cedaw.pdf>.

Women's meaningful participation is a human rights imperative and is essential to election credibility, integrity and democratic governance.⁵ Women's equal representation in government is a precondition for truly inclusive and representative democracies. There is also ample evidence to suggest that having more women in elected office increases public trust in institutions and improves both the policymaking process and the policies themselves.⁶

Although 187 of 194 UN Member States ratified CEDAW and "the principle of equality of women and men has been affirmed in the constitutions and laws of most countries and in all international instruments," women remain woefully underrepresented in political leadership.⁷ As of 2021, women represent 5.9 percent of elected heads of state and 6.7 percent of heads of government overall; the global average for women in parliament is 25.5 percent.⁸ Additionally, the 2021 World Economic Forum's Global Gender Gap Report found that the global gender gap in political empowerment remains the largest of the four areas tracked and that, at the current rate of progress, "it will take 145.5 years to attain gender parity in politics."⁹ Legal frameworks are necessary to promote gender equality and women's political participation but insufficient to ensure women's equal participation in elected office, let alone public life.

Gender, Elections and the Courts

Countries have taken a variety of executive and legislative approaches, including constitutional provisions and "temporary special measures," such as quotas and other forms of affirmative action, to address the persistent challenges of gender equality in politics. A number of these approaches have led to legal challenges, amplifying the role of courts in interpreting and upholding the implementation of these provisions.

On February 25, 2021, IFES launched [Election Judgments](#), a database for national election judgments from around the world.¹⁰ Intended to facilitate the exchange of sound precedents across jurisdictions, this curated database enables judges, election professionals and researchers to filter and search cases by topic or thematic area, including

"State Parties shall take appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; [and] To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government."

⁵ IFES, *supra* note 1.

⁶ See generally, Lucina Di Meo, *#ShePersisted. Women, Politics & Power in the New Media World*, Wilson Ctr. (2019), https://static1.squarespace.com/static/5dba105f102367021c44b63f/t/5dc431aac6bd4e7913c45f7d/1573138953986/191106+SHEPERSISTED_Final.pdf

⁷ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 23: Political and Public Life*, para. 1, 1997, [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared Documents/1_Global/INT_CEDAW_GEC_4736_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_4736_E.pdf)

⁸ Inter-Parliamentary Union & United Nations Entity for Gender Equality and the Empowerment of Women, Map, *Women in Politics: 2021*, unwomen.org (2021), <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2021/women-in-politics-2021-en.pdf?la=en&vs=353>

⁹ *Global Gender Gap Report*, World Economic Forum (Mar. 2021), http://www3.weforum.org/docs/WEF_GGGR_2021.pdf

¹⁰ The Elections Judgments database is supported by the United States Agency for International Development (USAID) under the Global Elections and Political Transitions (GEPT) Program.

gender, offering insights into the challenges and questions presented when courts are called on to apply some of these gender equality provisions in practice.¹¹

In this paper, IFES offers an initial analysis of critical judgments on gender in election decisions, with the expectation that this field of jurisprudence will continue to grow in quantity, range and complexity across the world. For elections and political participation for women, comparative case law provides insight into real-world efforts to operationalize the goal of gender equality espoused by many countries but achieved by almost none. A review of the litigation in this space shows that the argument for gender equality and fairness has been used both for and against the cause of women's equal participation in politics. In pursuit of a continuing goal of identifying common challenges and identifying emerging issues, this piece provides a preliminary analysis of judicial actions on gender in elections today.

Quotas on Trial—Constitutionality and Implementation

The primary theme identified in a survey of gender-related cases available in the Election Judgments database is the issue of affirmative actions—corrective, compensatory and promotional measures, including gender quotas, that states have taken to increase the representation of women in politics. Such measures, when applied in accordance with CEDAW, “realize de facto or substantive equality for women, rather than an exception to the norms of non-discrimination and equality.”¹² These “temporary special measures” may include “recruiting, financially assisting and training women candidates; amending electoral procedures; developing campaigns directed at equal participation; setting numerical goals and quotas; and targeting women for appointment to public positions such as the judiciary or other professional groups that play an essential part in everyday life of all societies.”¹³ While temporary special measures have resulted in more women being elected to political office, as the data above indicates, they have been insufficient to achieve gender equality.

By 2009, half of the world's countries used some type of electoral quota for their parliaments.¹⁴ These quotas generally take one of three forms: 1) a *reserved-seat quota*, which mandates by law that a certain minimum number of seats be set aside in the legislature for women; 2) a *legal candidate quota*, which regulates the number of women each political party must, as mandated by law, nominate as candidates; or 3) a *voluntary party quota*, in which individual political parties adopt voluntary quotas.¹⁵ Only the reserved-seat quota guarantees that women occupy the

¹¹ This paper relies on the cases that have been captured in the Election Judgments database, which, to date, include 22 judgments captured using the [“gender” filter](#)

¹² UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 25: Political and Public Life*, para 14, 1997, [https://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20\(English\).pdf](https://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf)

¹³ *CEDAW General Recommendation No. 23 (Political and Public Life)*, para. 15.

¹⁴ Institute for Democracy and Electoral Assistance (IDEA), Inter-Parliamentary Union & Stockholm University, *Gender Quotas Database*, (2021), <https://www.idea.int/data-tools/data/gender-quotas/quotas>

¹⁵ Anisa A. Somani, *The Use of Gender Quotas in America: Are Voluntary Party Quotas the Way to Go?*, 54 *Wm. & Mary L. Rev.* 1451, 1455 (2013), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3477&context=wmlr>

prescribed numbers of seats in the legislature; because the other two models apply the quotas at the nomination stage, there is no guarantee that a woman will actually win the seat in question.

Constitutionality of Quotas

Despite the fact that the constitutions of many countries guarantee gender equality and that those same countries have made international commitments to the principle of women's equal political participation, courts have had to grapple with questions over the constitutionality of gender quotas. For example, courts in Spain, France and Germany have considered challenges to the constitutionality of gender quotas in their respective countries.

In [Spain](#), the Constitutional Court upheld the constitutionality of the quotas after their introduction in 2007, concluding that they serve a legitimate purpose of ensuring equal participation based in the context of a lingering culture of sexism. However, the court also recommended that the legislature review the quotas' efficacy and reassess the need for them once the goal has been achieved.¹⁶ On the other hand, in [France in 1999](#), the Constitutional Council overturned an electoral law outlining a new model of electing counselors in the Corsican Assembly, which intended to introduce the obligation that each electoral list ensure the equality of women and men, effectively instituting a gender quota.¹⁷ The council issued a holding that it was unconstitutional to require gender parity under the Electoral Code because "citizenship confers the right to vote and stand for election on identical terms for all who have not been excluded on grounds of age, incapacity or nationality . . . and no distinctions may be made between voters and candidates on grounds of gender."¹⁸ It was not until the adoption of constitutional amendments and a new electoral law the following year that quotas were put in place.

In [Germany](#), recent decisions by state-level constitutional courts in [Thuringia](#) and [Brandenburg](#) overturned new laws introducing quota requirements. At the same time, [the Senate of the Federal Constitutional Court](#) rejected a complaint protesting the current election law. In its ruling, however, the Federal Constitutional Court noted the low number of women representatives in the Bundestag and was critical of "the lack of laws requiring parties to have equal representation on state lists and constituency candidacies" but indicated that clear legal obligations for parity in the federal legislature would be necessary to implement quotas.¹⁹ The Federal Constitutional Court did not rule on whether an electoral law based on gender parity would be consistent with the equality mandate in the German Constitution, noting that this is the purview of the legislature.²⁰

¹⁶ B.J.C., Feb. 13, 2009 (R.J. No. 38, p. 136) (Spain), <https://electionjudgments.org/en/entity/a3sv54ah3bk>

¹⁷ Conseil constitutionnel [CC] [Constitutional Court] decision no. 98-407DC, Jan. 14, 1999 (Fr.),

<https://electionjudgments.org/en/entity/d3oyce7ime7>

¹⁸ *Id.* at 2.

¹⁹ Toni Spangenberg, *Germany nulls gender equality law for politicians*, Berlin-Zeitung (Feb. 2, 2021), <https://www.berliner-zeitung.de/en/germany-nulls-electoral-gender-equality-law-li.138445>

²⁰ Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 29 September 2020, Article 3, Section 2, (Federal Law Gazette I p. 2048) ("Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist."), https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html

If the experiences of Spain and France are any indication, a gender quota may be a helpful tool for Germany to comply with its constitutional equality mandate. While women make up only 31 percent of the Bundestag, in Spain, women hold 45 percent of seats in the Congress of Deputies and 41 percent of seats in the Senate.²¹ In France, women hold 40 percent of seats in the National Assembly and 35 percent of seats in the Senate, up from less than 11 percent of total seats in the Parliament in 1997.²² Both France and Spain saw increases in women's representation in elected office after the quotas were put in place.²³

Enforcing Quotas

Courts and Election Management Bodies (EMBs) have also been called on to enforce the implementation of quotas under a variety of circumstances, resulting in equally varied results. While not an exhaustive list of all cases related to gender quotas, the role of courts and EMBs in enforcing quotas has been highlighted in the selection of cases contained in the [ElectionJudgments.org](https://www.electionjudgments.org) database. In [Indonesia](#), for example, the Bawaslu (the independent General Election Supervisory Agency), considers whether the EMB violated election laws during the election administration process. In one such case, a political party challenged a ruling of the EMB, which disqualified its candidate lists in two electoral districts for not meeting the 30 percent gender quota. However, by utilizing both its discretion and administrative flexibility, the Bawaslu allowed the party to “cure” both lists, simultaneously enforcing the gender quota and ensuring efficient election administration.²⁴

In 2019, the Supreme Court of [Argentina](#) took the opposite tack, upholding the letter of the law but perhaps not the spirit. In *Together for the Change Without Formalizing Candidacies*, the court considered a case in which a male candidate died and was replaced by the next male candidate on the list. The court rejected the petitioners' argument that the next candidate, a woman, should have replaced the deceased candidate to fulfill the constitutional goal of providing for the representation of women.²⁵ Instead, the court determined that the substitute candidate should be

²¹ Institute for Democracy and Electoral Assistance (IDEA), Inter-Parliamentary Union and Stockholm University, *Gender Quotas Database* (2021). <https://www.idea.int/data-tools/data/gender-quotas/country-view/103/35>

²² *Id.*

²³ In Spain, for example, “[t]he law has led to a steady increase in the number of women elected, and, interestingly, not only in the case of the socialist PSOE but also the conservative People's Party (PP), which had previously opposed quotas.” <https://eige.europa.eu/gender-mainstreaming/good-practices/spain/electoral-quotas-work>. In France, the gender quota “created change on local and national levels, spurring progress in women's representation and serving as an example of quantifiable change created through structural reforms.”

²⁴ See Suryadharna Ali & M. Romahurmuziy v. General Election Commission (June 13, 2013), <https://electionjudgments.org/en/entity/vhzytxi6czzr>

In one district, the list did not follow the “zipper” system for the placement of women on the candidate list (in which men and women candidates are listed in alternating order to prevent all the candidates of one gender being listed at the bottom of the ticket). In another district, one of the women candidates had an expired ID, which rendered her ineligible to stand for the election leaving the list short of the 30 percent requirement. For the list with the “zipper problem” the party was given the opportunity to reorder the candidates in accordance with the zipper system. The candidate with the expired ID (who presented an official letter explaining the delay in getting her ID renewed) was permitted to remain on the list, and therefore the ballot.

²⁵ Article 37 of the Constitución Nacional [Const. Nac.] (Arg.). provides that “[t]rue equality of opportunity between men and women in running for elected and party offices shall be guaranteed through affirmative actions in the regulation of political parties and in the electoral system.” This provision is operationalized through the electoral law, under which parties are required to alternate men and women on their candidate lists, effectively ensuring gender parity in the lists of candidates for the National Congress.

the next person available on the list of the same gender as the deceased, but it also specified that the list must be reordered to maintain the same gender alternation required under the electoral law.

Gender quotas were blatantly weaponized in a recent case in [Samoa](#) when the country's 10 percent gender quota, designed to increase women's parliamentary representation, was used as an excuse to block the instatement of the country's first woman prime minister. When the April 2021 parliamentary elections resulted in a razor-thin defeat of the ruling party, the sitting prime minister sparked a political crisis and what some called a "bloodless coup"²⁶ by appointing another woman member of Parliament (MP) from his party to deadlock the election, on the grounds that the five women MPs out of a total of 51 elected did not meet the 10 percent gender quota. The Supreme Court of Samoa rejected the formula for calculating the 10 percent minimum advanced by the ruling party, noting that it "in our respectful view tantamounts to a pedantic interpretation, becoming excessively concerned with irrelevant details, in an attempt to justify the unlawful addition of the [additional MP] four days after the publication of election results and execution of Warrants of Appointment by the Head of State."²⁷ This judgment cleared the way, after additional appeals, for the duly elected prime minister Fiame Naomi Mata'afa to finally take office and make history in July 2021.

Another dramatic decision regarding gender quotas was rendered in [Kenya](#) in April 2020 when the Chief Justice of the High Court determined that he must "advise the President to dissolve Parliament" for its repeated failure to implement a gender quota, known as the "two-thirds rule."²⁸ Parliament was required to enact implementing legislation to operationalize the constitutional mandate, a task they failed to do after more than a decade of delay and despite multiple court orders. Finally, the Chief Justice concluded, "Parliament has not enacted the legislation required to implement the two-thirds gender rule which, as the Court of Appeal observed . . . is clear testimony of Parliament's lackadaisical attitude and conduct in this matter. Consequently, it is my constitutional duty to advise Your Excellency to dissolve Parliament under Article 261(7) of the Constitution."²⁹ This guidance kicked off what some called a potential constitutional crisis in the country. One Kenyan legal scholar noted, "refusal to dissolve parliament . . . will open the president to accusations of breach of the 2010 constitution, and complicity in parliament's failure to enact the required law . . . the chief justice's advice will negatively impact the validity and legitimacy of the administration

²⁶ Fiona Ey, *Samoa is experiencing a bloodless coup. The Pacific's most stable democracy is in trouble*, The Guardian (May 13, 2021), <https://www.theguardian.com/world/2021/may/14/samoa-is-experiencing-a-bloodless-coup-the-pacifics-most-stable-democracy-is-in-trouble>

²⁷ Supreme Court of Samoa, *Faatuatua I Le Atua Samoa Ua Tasi (F.A.S.T. Party) v. Electoral Commissioner*, MISC 80/21 (May 17, 2021), <https://talamua.com/wp-content/uploads/2021/05/COURT-DECISION-FAST-Party-Anor-v-Electoral-Commissioner-Anor-Decision.pdf>

²⁸ See *In re Article 27 (3) & (8) of the Constitution of Kenya 2010*, S.C.K. (Sept. 21, 2020). Article 27 of the 2010 Kenyan Constitution calls for the elimination of all forms of gender-based discrimination and requires the state to take policy, legislative and other measures, including affirmative actions, to ensure that "not more than two-thirds of the members of elective or appointive bodies shall be of the same gender." <https://electionjudgments.org/en/entity/5hyb1gy3i34>

²⁹ *Kenya: Parliament Ordered to Enact Legislation Related to Increasing the Number of Female Members*, Libr. Cong. (Apr. 19, 2017), <https://www.loc.gov/item/global-legal-monitor/2017-04-19/kenya-parliament-ordered-to-enact-legislation-related-to-increasing-the-number-of-female-members/>. To ensure the implementation of its provisions, the Constitution imposes procedural and incremental serious substantive consequences of failure to do so. "If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter." See § 261(5). In response to such a petition, the High Court may issue a declaratory order, order Parliament and the Attorney General to comply with the applicable constitutional provision and put the two organs under the supervision of the Chief Justice for the purpose of performing the particular task. See § 261(6). If Parliament fails to follow through, the Constitution states that "the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament." See § 261(7).

in respect to matters that require parliamentary approval and oversight.”³⁰ To date, none of these dire predictions have come to pass, even though the president did not dissolve the Parliament. Instead, the High Court suspended any move to do so, pending a full hearing.

As this sample of cases from many regions of the world makes clear, courts have, and undoubtedly will continue to have, a significant role in determining whether quotas, and other more progressive forms of affirmative action, are a viable mechanism for advancing gender equality. Thus, the next section provides a case study on what is possible when electoral bodies commit themselves to operationalizing the principles of gender equality enshrined in law.

From Voluntary Political Party Quotas to Gender Parity: Mexico Leading the Way

Arguably, no country in the world has come closer to realizing gender parity in elected positions than Mexico. By 2018, women had gained half the seats in Mexico's Congress and went on to lead a 2019 constitutional reform to require “parity in everything,” which the congress adopted unanimously. The June 2021 elections, the largest in the country's history with over 20,000 national, state and municipal offices on the ballot, were the first test of the requirement for gender parity for all candidates for elected office and for top executive and judicial positions.³¹ As journalists and commentators from around the world noted, the “June 6 elections shattered records for the number of female candidates,” with women making up more than half of all candidates.³² Voters elected six women governors out of the 15 open positions. Prior to the June elections, “only nine women had been governors in Mexico since women got the vote in 1953.”³³

This transformation did not happen overnight, nor was it inevitable. It was the result of decades of organizing, strategizing and persisting by women-led civil society organizations, activists, academics and government representatives.³⁴ Mexico started down this path in 1993 with a call for political parties to promote the greater participation of women in politics. This was followed by almost a decade of lackluster compliance by parties and increased enforcement efforts to include financial sanctions and other penalties. In response, parties found other ways to comply with the letter of the law while betraying its spirit, including techniques such as nominating and electing a woman candidate, forcing her to resign and then putting a man in her place.

³⁰ Muthomi Thiankolu, *How Kenya courted a constitutional crisis over parliament's failure to meet gender quotas*, The Conversation (October 1, 2020), <https://theconversation.com/how-kenya-courted-a-constitutional-crisis-over-parliaments-failure-to-meet-gender-quotas-147145>

³¹ Jennifer M. Piscopo, “Parity in Everything”: *What Mexico Can Teach Us About Women's Representation*, Ms. (June 4, 2021). <https://msmagazine.com/2021/06/04/mexico-midterm-elections-parity-women-representation-politics/>

³² Jennifer M. Piscopo and Lorena Vázquez Correa, *Mexico's political parties did the minimum to meet gender parity rules. Female candidates scored big anyway*, Washington Post (June 14, 2021). <https://www.washingtonpost.com/politics/2021/06/14/mexicos-political-parties-did-minimum-meet-gender-parity-rules-female-candidates-scored-big-anyway/>

³³ *Ibid.*

³⁴ <https://www.usaid.gov/sites/default/files/documents/1866/WiP%20-%20Mexico%20Case%20Study.pdf>

“Women are not going to organically ‘just advance themselves’—we don’t live in societies where that happens. Setting up rules is important... Rules can guarantee women are able to exercise their rights like anyone else.”

– *Georgina De La Fuente, Instituto Nacional Electoral, Mexico*

Mexico’s electoral bodies include the Instituto Nacional Electoral (INE), an organization that determines the electoral rules and organizes the presidential and congressional elections, and the Tribunal Electoral del Poder Judicial de la Federación (TEPJF or Tribunal), a specialized court charged with resolving electoral disputes and certifying the validity of elections. In tandem with efforts by activists and legislators, the INE and TEPJF began putting specific criteria in place to ensure the gender quotas were enforceable and to “achieve the objective of having a large number of women holding public office.”³⁵ While these were effective, political parties began to resist in more subtle ways, including by refusing to allocate budgets for women candidates or other resources for their campaigns—a form of discrimination the TEPJF has classified as political violence.

The Tribunal continues to take an active role in ensuring that Mexico realizes the parity requirements in the Constitution and put in place by the Congress. In advance of the June 2021 elections, for example, the INE issued an order³⁶ requiring that each political party nominate women candidates in at least seven of the 15 gubernatorial races. When the president of the Senate challenged that order, the TEPJF upheld the INE’s decision, paving the way for the historic results noted above.³⁷

Affirmative Actions and Intersecting Identities

The TEPJF and the INE have been similarly progressive in advancing the political rights of other historically disadvantaged groups in Mexico, including designing and enforcing affirmative action mechanisms to increase political representation of Indigenous persons, LGBTQI+ people, Afro-Mexicans and disabled persons, in addition to women. This desire to protect and advance the specific rights of multiple groups has resulted in interesting questions for the courts to consider when one person represents multiple protected classes.

For example, traditionally, those districts in Mexico with more than 60 percent Indigenous persons run their elections under Indigenous Normative Systems, consistent with Indigenous customs. In the case of the City Council of the

³⁵ Carla Humphrey, Electoral Councilor of the National Electoral Institute (INE) in her presentation at the June 4, 2021. panel “Political rights of the citizens. Gender Equality and Social Inclusion” as part of the Informative Forum for Foreign Visitors sponsored by the Instituto Nacional Electoral, Mexico (INE).

³⁶ Tribunal Electoral [Electoral Tribunal], Judgement, La Protección de Los Derechos Político-Electorales del Ciudadano [The Protection of the Political-Electoral Rights of the Citizen], SUP-JDC-2729/2020 (Oct. 3, 2020), https://www.te.gob.mx/EE/SUP/2020/JDC/2729/SUP_2020_JDC_2729-927357.pdf

³⁷ Tribunal Electoral [Electoral Tribunal], Judgement, La Protección de Los Derechos Político-Electorales del Ciudadano [The Protection of the Political-Electoral Rights of the Citizen], SUP-RAP-116/2020 (Dec. 2, 2020), https://www.te.gob.mx/media/pdf/SUP-RAP-116-2020-ENGROSE_SGA_.pdf

Municipality of Coicoyán de las Flores, this resulted in the denial of an Indigenous woman's request to run for office. She was told that only party candidate lists headed by men could be registered because "our electoral process has always been carried out in this way in our community." The Xalapa Regional Chamber found her grievances to be groundless. The Regional Court noted that ensuring gender equality in Indigenous communities "must be guaranteed on the basis of their own internal regulatory system" and held that "in order to consider gender-based acts of discrimination to be accredited, the mere statements of the alleged victim are not enough, but there must also be minimal elements of proof that lead to sustaining that the alleged conduct was in fact based on gender elements." The plaintiff appealed the decision.

Thus, the TEPJF was asked to consider whether Indigenous customs for men to elect political leaders outweigh the principles of non-discrimination, equality and gender parity, as well as the right of "every woman . . . to a life free of violence, both in the public and private spheres" and to "freely and fully exercise their political rights."³⁸ In a split ruling, the TEPJF [ordered](#) the Regional Chamber to reconsider the case utilizing "a gender-based and cross-sectional approach" and "the reversal of the burden of proof established in this ruling" in making its decision.³⁹ The TEPJF noted that, "although it is true that the Municipality of Coicoyán de las Flores has the collective rights of self-determination, self-government, and autonomy to elect its authorities or representatives in accordance with its norms, procedures, institutions, and traditional practices, to do so it must not contravene the fundamental rights and recognized principles in the Federal Constitution." In short, the tribunal found that, while Indigenous communities do have a right to choose their leaders according to their customs and traditions, that right is not absolute and does not trump Mexico's constitutional commitment to gender equality.

In 2018, the TEPJF considered a case that touched on a range of intersecting issues, including women's equality, gender identity and Indigenous rights. The judgment in this case reinforced the role of electoral authorities in preventing the misuse of gender quotas for political gain (as seen in the Samoa case) while placing the burden on these authorities to mitigate potential abuses in a way that does not discriminate against women, Indigenous or transgender candidates.

In December 2017, the General Council of the Institute for Elections and Citizen Participation of Oaxaca (IEEPCO) approved the guidelines on gender equality to be followed by political parties and other candidates when registering their candidacies.⁴⁰ These guidelines established that for nominations from transgender, transsexual, intersex or

³⁸ See Tribunal Electoral [Electoral Tribunal], Judgement, Recurso de Reconsideración [Appeal for Reconsideration] SUP 2020 REC 102 924628 (Sept. 2, 2020), <https://electionjudgments.org/en/entity/ulrx721d3dd>

³⁹ *Id.* "[T]he assessment of evidence in cases of gender-based political violence must be carried out with a gender perspective, in which the responsibility of providing what is necessary to prove the facts is not transferred to the victims, in order to prevent a stereotypical interpretation of the evidence, and to pass resolutions without gender considerations, which hinders, on the one hand, the access of women victims to justice and, on the other, the stigma-free vision of women who dare to file a complaint...the defendant, perpetrator, or the counterparty is the one who will have to reliably disprove the non-existence of the facts on which the offense is based."

⁴⁰ Resolution IEEPCO-CG-76/2017, <https://www.ieepco.org.mx/archivos/acuerdos/2017/IEEPCO-CG-76:2017.pdf? x tr sl=es& x tr tl=en& x tr hl=en-US& x tr pto=nui>

Muxe people, the candidacies should correspond “to the gender the person identifies with.”⁴¹ *Muxes* are members of the Zapotec people of Oaxaca born with male sex characteristics and assigned as male at birth but who identify or present as a different gender identity than their birth assignment; some *Muxes* identify or present as women.⁴² In April 2018, IEEPCO approved the registration of 19 candidates who self-identified as both transgender and as members of the *Muxe* community. All 19 sought to register as women and benefit from the gender quotas in place for legislative and municipal offices.

Members of the *Muxe* community subsequently filed a complaint with IEEPCO, alleging that 17 of the 19 registered candidates were not genuine *Muxes* but were simply seeking to take advantage of the gender quota. Community representatives noted that some of the candidates were seeking to be re-elected and had not self-identified as *Muxes* (or women) during their previous candidacy. Additionally, it was alleged that 15 of those 17 candidates had first tried to register as men for the 2018 elections, before then registering as *Muxe* candidates when they found they could not be placed on the ballot as men. In response to these complaints, the IEEPCO analyzed the claim and, after obtaining evidence on the gender identity with which these 17 candidates conducted themselves socially, opted to cancel the registration in 15 cases, noting in its opinion that these were in fact men who had self-identified as transgender women to successfully register their candidacies.⁴³

On appeal, the Tribunal [considered](#) two issues: 1) what proof the state can demand from an individual to prove his or her gender identity for the purpose of inclusion in the gender quota⁴⁴ and 2) what measures the authorities can and should adopt to verify the gender identity of a person to avoid the fraudulent use of gender quotas. With respect to the first question, the TEPJF ruled that it is enough for a potential candidate to inform the respective electoral body of his or her gender identity, and that no additional evidence should be required. However, on the second question, the TEPJF found that, if claims are made that cast doubt on the authenticity of the self-identification, the electoral authority must take measures to protect the electoral rights of women and transgender persons against possible abuse. This takes the burden of proving gender identity away from the individual and places it on the person challenging that identity or on the electoral body registering that candidate.⁴⁵ In this case, the TEPJF noted that the *Muxe* community had provided evidence that 15 of the 17 candidates had tried to register first as men, which cast doubt on the validity of their subsequent self-identification as transgender women. Thus, the TEPJF ruled that these 15 applications were invalid, canceled the registration of those candidacies and ordered the relevant parties to replace them with 15 women.⁴⁶

⁴¹ Article 16: In the event of a nomination of transgender, transsexual, intersex or *Muxe* people, the nomination will correspond to the gender the person identifies with and such nomination will be taken into account for the fulfillment of the principle of gender equality. Of which the nominating political party must inform in the registration corresponding to the candidate or candidates in question.

⁴² Leora Yashari, *Life Outside the Binary: Meet Mexico's Muxe Community Celebrating Genderqueerness* (2019), <https://theculturetrip.com/north-america/mexico/articles/a-brief-history-of-muxe-mexicos-third-gender>

⁴³ IEEPCO-CG-28/2018: [http://www.ieepco.org.mx/archivos/acuerdos/2018/ACUERDO IEEPCO-CG-28 2018.pdf](http://www.ieepco.org.mx/archivos/acuerdos/2018/ACUERDO%20IEEPCO-CG-28%202018.pdf).

⁴⁴ SUP-JDC-304/2018, para 302 (“The essential aspect that must be determined is whether the mere declaration of gender identity is sufficient for the person concerned to be considered as a candidate of the gender to which they claim to belong.”) <https://electionjudgments.org/en/entity/492xlz5bqyh>

⁴⁵ See Ellena, Katherine, “Protecting the Political-Electoral Rights of Citizens: An Analysis of the 2018 *Muxe* Judgment of the Superior Chamber of the Electoral Tribunal of the Federal Judiciary of Mexico in SUP-JDC-304/2018” (Forthcoming)

⁴⁶ *Id.*

Adjudicating Political Violence Against Women

Mexico's electoral bodies have also been active in addressing barriers to women's participation in politics, including political violence against women, building on successful efforts in Bolivia to criminalize violence against women in politics.⁴⁷ In 2020, Mexico amended eight national laws to include provisions to prevent and prosecute violence against women in politics, while the TEPJF ordered the creation of a National Registry of Sanctioned Persons for Violence Against Women in Politics,⁴⁸ and the INE adopted [guidelines](#) to cancel candidacies for any person found guilty of committing gender-based violence. Under the "3 for 3 Against Violence" rule, candidates for office must attest when they register their candidacy that they do not have any convictions or sanctions for family and domestic violence, sexual crimes or delinquent alimony debt. Mónica Aralí Soto Fregoso, Justice of the High Chamber of the TEPJF, noted at a conference in advance of the June 2021 elections that the TEPJF received 740 cases in the category of political and gender violence between November 2020 and May 2021.⁴⁹

These acts of violence include online violence against women candidates, including through social media. In one such case, the TEPJF [determined](#) that misogynistic behaviors expressed through Facebook and WhatsApp by a partisan state official constituted political violence against women based on gender, violating the human rights of the general secretary of a political party (the target of the abuse).⁵⁰ Again referencing the "principle of reversion" described above, the Tribunal upheld the judgment of the Electoral Tribunal of the State of Campeche and confirmed the penalties ordered by that body, including the registration of the official on the register of people sanctioned in matters of political violence against women based on gender.

While the "3 for 3 Against Violence" rule has been both lauded and criticized as a means for addressing political violence against women, it is worth noting that this mechanism was implemented in the context of the most violent election in Mexico's history, in which dozens of candidates were murdered while seeking to run for office.⁵¹ Further, while intended to punish and presumably deter acts of political violence against women—an aim that is both admirable and necessary—this step is clearly insufficient to address the broader epidemic of gender-based violence in Mexico, a nation with one of the highest rates of femicide in the world.⁵²

⁴⁷ <https://www.panoramas.pitt.edu/news-and-politics/violence-against-women-politics-bolivia>

⁴⁸ Ordena TEPJF al INE crear lista de quienes cometan violencia política de género; la rechazan 2 magistrados [TEPJF orders the INE to create a list of those who commit gender political violence; 2 magistrates reject it], Aristegui (July 29, 2020), <https://aristeginoticias.com/2907/mexico/ordena-tepif-al-ine-crear-lista-de-quienes-cometan-violencia-politica-de-genero-la-rechazan-2-magistrados/>.

⁴⁹ Mónica Aralí Soto Fregoso, Justice of the High Chamber of the TEPJF in her presentation at the June 4, 2021 panel "Political rights of the citizens. Gender Equality and Social Inclusion" as part of the Informative Forum for Foreign Visitors sponsored by the Instituto Nacional Electoral, Mexico (INE).

⁵⁰ See: [SX JE 0003 2021](#)

⁵¹ Luis Gómez Romero, *Mexico's largest, deadliest and most polarised election*, Univ. Melbourne (June 6, 2021), <https://electionwatch.unimelb.edu.au/articles/mexicos-largest-deadliest-and-most-polarised-election>

⁵² Miriam Berger, *Women in Mexico are protesting femicide. Police have responded with force.*, Wash. Post (Mar. 9, 2021), <https://www.washingtonpost.com/world/2021/03/09/womens-day-protests-amlo-mexico/>

Conclusion—What Do These Cases Tell Us About Gender Equality?

From the adoption of CEDAW in 1979 to the Fourth World Conference on Women in Beijing in 1995 and the Generation Equality Forums in Mexico City and Paris in 2021, the international community has heralded, time and again, its commitment to the principles of gender equality. Yet, as the cases discussed in this paper and included in the Elections Judgments database demonstrate, this collective commitment often breaks down in the face of national implementation. To take women's representation in national parliaments as one (imperfect) proxy, at just 25.5 percent, we are barely halfway there.

That questions related to gender quotas and other affirmative actions designed to operationalize gender equality dominate the gender-related cases in Elections Judgments database is telling in itself. At a minimum, we can see that quotas and affirmative actions 1) are the source of relatively frequent litigation, from constitutional challenges to concerns about their implementation; 2) have been used to varying degrees of success to advance gender equality; and 3) are most powerful when accompanied by an institutional commitment on the part of the courts to enforce both the spirit and the letter of the laws, as seen in the case of Mexico.

The cases discussed in this paper also raise important questions for the field. As was previewed in the case of the *Muxes*, there are some people for whom the requirement to identify (even to self-identify) as a man or a woman is not a meaningful or appropriate distinction. Even when not combined with the possible conflict between LGBTQI+ rights, women's rights and Indigenous rights, what will happen when a candidate does not identify with one of the two sexes recognized under a gendered quota system and is not willing to "pick one" to exercise his or her political rights, even if doing so could lead to a political advantage? Our language around women's rights and gender equality is fundamentally grounded in the gender binary, a concept that is less relevant to younger generations and is increasingly likely to become an issue for courts adjudicating gender cases in elections moving forward.

“If there is one message that echoes forth from this conference, let it be that human rights are women's rights and women's rights are human rights once and for all... Women must enjoy the rights to participate fully in the social and political lives of their countries, if we want freedom and democracy to thrive and endure.”

– Hilary Rodham Clinton, *Beijing, 1995*

Perhaps more fundamentally, what happens when the courts are the primary (or the only) voice attempting to uphold the rule of law on cases of gender equality and beyond? As seen in Kenya, when a court issues an order to the president to dissolve the Parliament, citing language in the Constitution included for just that purpose, and the

president does not act, the reputations of all three bodies—the court, the executive and legislature—are damaged. And even in less extreme cases, the cause of gender equality and women's empowerment is one that must be recognized and enforced at every level of society—from the household to the workplace to the community to the legislature—for all people to realize their right to live “free and equal in dignity and rights.” Without that societal *and* institutional commitment, victories in court, no matter how well-argued and well deserved, will be pyrrhic.



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