



# WOMEN'S POLITICAL RIGHTS THROUGH AFFIRMATIVE ACTION: THEIR IMPLEMENTATION IN THE LEGISLATIVE SEAT AND SUBSEQUENT EXPANSION IN THE JUDICIAL HEADQUARTERS

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## Abstract

In the Mexican State, affirmative actions in electoral matters are generated legislatively, as well as in administrative and judicial headquarters. This last function makes Mexican electoral tribunals the only judicial institutions in the world that issue affirmative actions in favor of gender parity. Since the first judicial criteria almost 10 years ago, its evolution has been strengthened, to such an extent as to allow its implementation, even when the electoral processes are in development, as well as the alteration of closed lists, after the democratic elections.

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## I. INTRODUCTION

Equality is a value that underpins the legal order in most modern Constitutional States and which, in addition, due to its principled nature *characterizes the Constitution as a form of legal organization of power*<sup>1</sup>. The overcoming of the classic principle of formal equality or before the law against the value of substantive or political equality has illuminated new categories such as the so-called *positive discrimination*. Thus, in relation to the application of the principle of the dignity of the human person<sup>2</sup>, that value is claimed to such a degree that it acts as a material limit on the very content of the law itself, within the framework of the Democratic and Social State of Law to pursue material equality.<sup>3</sup> It is in this context, women's rights have been projected since the middle of the last century as an objective to be

fulfilled by the project that postulates the path of constitutionalism. Women are part of a vulnerable group that deserves special distinction, particularly in the design of (*affirmative*) actions that encourage a balanced presence of women in all areas of public life.

This social change that has occurred in Latin America, particularly in Mexico, has led to the promotion of affirmative actions created by the democratic legislator, but also by administrative and judicial authorities, with the purpose of ensuring the greatest benefit to women, on the one hand, as well as dismantling patterns of exclusion to which they have been subjected in the political sphere. , on the other.

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<sup>1</sup> FIGUERUELO BURRIEZA, Ángela, "El discurso jurídico: la mujer en la Constitución Española", in: FIGUERUELO, A., LÓPEZ DE LA VIEJA, T., and. ly. (Eds.), *Women in the European Constitution. Multidisciplinary gender studies*, Ediciones Universidad de Salamanca, Centro de Estudios de la Mujer, Salamanca, 2005, pp. 15-32.

<sup>2</sup> KING MARTINEZ, Fernando, *The fundamental right not to be discriminated against on the basis of sex*, McGraw-Hill Interamericana de España, Madrid, 1995; PÉREZ LUÑO, Antonio Enrique, *Dimensions of equality*, Dykinson, Instituto de Derechos Humanos Bartolomé de las Casas-Universidad Carlos III, Madrid, 2005, p. 38.

<sup>3</sup> IGLESIAS BÁREZ, Mercedes, *Organizational structure and Fundamental Rights in the Spanish Constitution of 1978*, Ediciones Universidad de Salamanca, 2ª. Revised Ed., Salamanca, 2011, p. 165.



However, the interpretation made by these latter organs of the Mexican State (administrative and judicial) of fundamental rights, particularly political rights, goes beyond the limits established for them by the constitutional text. This has far-reaching theoretical and practical repercussions. Theoretical, because it moves away from the dogmatic considerations that conceive of parliamentary seats as an exclusive space for the creation of *affirmative actions*, extending to other dimensions, while completely nullifying the possibility of establishing a jurisprudential doctrine that consistently systematizes the limits to the political rights, particularly in difficult cases involving *affirmative action*. And practices, because it erodes the principle of legal certainty by virtue of the discretion of the judge when deciding the aforementioned cases. In addition, this phenomenon contributes to the fact that the judicial authority establishes itself even by adopting case-law and *rules* for the development of affirmative actions, which undoubtedly exceed competence. material granted by the Constitution.

## II. THE BASIS OF AFFIRMATIVE ACTION

The absence of women in the construction and construction of modern Constitutions is undeniable. Recognition as a subject of law has been given in form for the past several times, until just after the middle of the twentieth century<sup>4</sup>. Professor LUCAS VERDÚ would already say it: "The contemporary State and its fundamental order, which starts from the seventeenth and eighteenth centuries, comes after profound and extensive socioeconomic transformations encouraged, mobilized, configured, mainly, by men." <sup>5</sup> The enlightenment project of modernity gradually built public life in the absence of women, as opposed to the same principles of universality of human rights that the liberal project proclaimed. It will be until the appearance of the feminist movements of the late nineteenth and early twentieth centuries,

<sup>4</sup> BALAGUER, M. Luisa, *Women and Constitution. The legal construction of gender*, Cátedra, Madrid, 2005, p. 89.

<sup>5</sup> LUCAS VERDÚ, P., *Political Law Course*, Vol. IV, Tecnos, Madrid, 1984, p. 340.

<sup>6</sup> SILVA ROSALES, Patricia, "El género en la sociedad" en AA.VV. *Gender Perspective*, (Julia del Carmen Chavez Cerapia coord.), Plaza and Valdez-ENTS-UNAM, Mexico, 2004, pp. 17-19; LIPS, Hilary M.,

mainly in the area of the right to vote, that the search for equality between women and men will be placed in the public arena.

This social change raises a series of demands and demands that consequently and require a set of actions by the State to achieve real and effective equality between the two genders. As a starting point, the gender perspective can be understood as: "an instrument of analysis that allows us to identify the differences between men and women, to establish actions aimed at promoting situations of equity [...] Therefore, its purpose will be the design of policies and implementation of programs and operation of projects that promote the change of beliefs or models that prevent the full development of human beings." <sup>6</sup> On the other hand we have *affirmative actions*, conceived as "any measure, beyond the simple termination of a discriminatory practice, adopted to correct or compensate for present or past discrimination or to prevent discrimination from occurring in the future".<sup>7</sup>

It is in this context that gender quotas in electoral matters arise, whose implementation and application in European and Latin American countries has generated countless fruitful and nourished debates that are based on the experience of applying quotas of law based on the affirmative action measures created by the legislator in its

*Gender the basics*, Routledge, Nueva York, 2014, p. 2; TANNEN, Deborah, *Gender and Discourse*, Oxford University Press, Nueva York, 1996, p. 22; MONRO, Sun, *Gender Politics*, Pluto Press, London, 2005, p. 10;

<sup>7</sup> MARTÍN VIDA, María Ángeles, *Rationale and constitutional limits of positive action measures*, (prologue by Gregorio Cámara Villar), Civitas, Madrid, 2003, p. 35.

majority, as well as its subsequent review<sup>8</sup> and eventual correction in court<sup>9</sup>.

Within the framework of *affirmative actions*, there are conflicting positions on how to conceptualize and substantiate them. One sector of the doctrine has classified *affirmative action* as a form of *reverse discrimination*, dividing it in turn into *flexible and rigid*<sup>10</sup>. In the first category we have those treatments that are formally unequal, but that pursue a constitutionally legitimate purpose among the citizens considered individually. That is, the effects it produces are individual. In the second category are the *positive actions*, coming from the common law, mainly from the North American *action policy*, consist of "granting certain social groups, which are in an unfavorable situation with respect to the average of the population, a favorable treatment that allows them to overcome their situation of real inferiority".<sup>1112</sup>

<sup>8</sup> Recently, the report can be consulted in the Report generated by the European Parliament that shows the evolution that the application of gender quotas has had in seven countries of that continent: Germany, Belgium, Slovenia, Spain, France, The United Kingdom and Sweden. European Parliament *Electoral systems of gender quotas and their application in Europe*, European Parliament-IDEA-Stockholm University, Brussels, 2008. Likewise for Latin America, can read: RASKE, N. y M. MOLINEUX (Coords.), *Gender and the politics of rights and democracy in Latin America*, Palgrave, London, 2002. KARAM, A. (Ed.), *Women in Parliament: Beyond numbers*, IDEA, Stockholm, 1998. VAZQUEZ, Silva, (Comp), *Public men, public women*, Friedrich Ebert Foundation, Buenos Aires, 2002. ARAÚJO, Clara, "Quotas for women in the Brazilian legislative system"; GARCÍA QUESADA, Ana Isabel "Concretizing the mandate: legal reform in Costa Rica"; PESCHARD, Jacqueline, "The implementation of quotas in Mexico"; COSTA BENAVIDES, Jimena, "Participación política de las mujeres en Bolivia: progresos y obstáculos", all in: VV. AA. *The application of quotas: Latin American experiences*, IDEA, Lima, 2004.

<sup>9</sup> At this point, the Mexican case is of special relevance, since it is the only one of the countries that has a constitutional jurisdiction specialized in electoral matters, whose constitutional control is carried out by a specialized body as will be detailed later. In this regard: GILAS, Karolina, *Quotas are not enough. Gender quotas and other affirmative actions*, TEPJF-CCJ, Mexico, 2014; ARAGÓN CASTRO, Laura Lizette, *Scope and limits of affirmative action in favour of women in electoral bodies*, TEPJF, Mexico, 2011. TEPJF, *Egalitarian democracy. Jurisprudential criteria for gender equity and inclusion of indigenous communities*, TEPJF, Mexico, 2014. For a critical view of gender quotas in Mexico: IGLESIAS

For the authors cited, mainly GIMÉNEZ GLUCK, in the application of *affirmative actions*, competing subjects in the selective processes of the benefited group lose opportunities or assets that would have corresponded to them if traits such as sex, race or disability had not been taken into account in a favorable way. REY MARTÍNEZ and RUIZ MIGUEL have launched sharp criticisms, expressing the danger of the slippery slope, that is, that other groups also discriminated against demanded that the same solution be applied to them. However, as was anticipated at the beginning of these positions, not all agree with this position, since for BALAGUER CALLEJÓN, the expression "reverse discrimination" evokes the negative sense of equality, and it is here where he points out his difference with the two authors referred to above, since the defense of electoral quotas responds to the following:<sup>131415</sup>

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VILA, Marisa, "La acción positiva en la forma de cuotas rígidas: some reflections on the Coahuila and Veracruz cases", pp. 361-371; and AGUILAR RIVERA, José Antonio, "Equidad de género y participación política: el sistema de cuotas en México" pp. 373-401, both in: RÍOS VEGA, L. E. (Coord.), *Electoral topics a judicial dialogue between America and Europe*, Center for Political and Constitutional Studies, Madrid, 2011. KING MARTINEZ, Fernando, *Fees 2.0. A new approach to gender electoral quotas*, TEPJF-CCJ, 2013; by the same author: *Gender discrimination and the electoral system in Europe and Spain*, TEPJF, Mexico, 2008.

<sup>10</sup> GIMÉNEZ GLUCK, David, *A controversial manifestation of the principle of equality: positive actions moderate and reverse discrimination measures*, Tirant lo Blanch, Valencia, 1999, p. 57.

<sup>11</sup> ROSENFELD, Michel, "Equality and Affirmative Action for Women in the U.S. Constitution," in VV. AA. *Women and the Constitution in Spain*, op. cit., pp. 83-102.

<sup>12</sup> GARCIA MORILLO, J., *Constitutional Law Course* In. I, Tirant lo Blanch, Valencia, 1997, p. 171.

<sup>13</sup> GIMÉNEZ GLUCK, David, *A controversial manifestation of the principle of equality... op. cit.*, p. 78.

<sup>14</sup> KING MARTINEZ, F., *The fundamental right not to be discriminated against on the basis of sex...*, on. Cit., p. 100; RUIZ MIGUEL, Alfonso, *Equality as differentiation*, and VV. AA. *Rights of minorities and differentiated groups*, Escuela Libre Editorial, Madrid, 1994, pp. 283-295; From the same author: "Reverse discrimination and the case Kalanke", *Doxa: Notebooks of philosophy of law*, No. 19, 1996, pp. 123-140;

<sup>15</sup> BALAGUER CALLEJÓN, María Luisa, *Women and the Constitution: the legal construction of gender*, Cátedra, Madrid, 2005, p. 110; "The equal rights of women in the Spanish legal system" in *Information bulletin and legal analysis*, No. 1, 1999, page 1. 3-6;



The alleged difference between positive actions and reverse discrimination thus only serves the interest of maintaining the promotion of equality within parameters that do not involve situations of risk for those who have seen themselves benefiting from their possibilities as a dominant group. Indeed, lighter measures of equality (subsidies, requirements for access to goods and services) do not harm the interests of that dominant group that does not need to make use of these services, shared with marginal groups... However, when positive actions are carried out in respect of goods, not so much scarce as they are enjoyed by dominant groups (politics, elected officials), it is not only that the goods are scarce, but that they are important.<sup>16</sup>

The latter position defends the establishment of *electoral quotas* based on a vision of *affirmative action* with a strong intensity, although this character is denied, stating that *it is not a measure of reverse discrimination*. What is also clear is that the measure directly tries to influence the dominant group to equalize or level the unequal historical circumstances that women have had as a historically vulnerable group, and without admitting an intermediate or less mild solution than the proposal.

There is no doubt that after the intense doctrinal debate that this type of measures raise, it is important to note that there are two conceptual and jurisprudential origins for affirmative actions on gender equity: one of Anglo-Saxon roots, which derives from the gradual recognition of civil rights as a result of segregationist laws in the United States of America, and the subsequent interpretation made by the constitutional judges of

that nation on this regulation; and on the other hand, another of European continental roots, through the gradual recognition in the Fundamental Laws in those nations after the Second Post-War period, as well as the gradual European consensus of the end of the last century through the interpretation of the European Convention on Human Rights, mainly through the legislative creation of measures in the labor field in favor of women and against non-discrimination based on gender.<sup>17,18</sup>

Under the approach of the *system of sources of law*, understood as "that to which the order confers the virtuality of creating a norm", in Mexico electoral quotas as <sup>19</sup>*affirmative actions* have arisen from a fusion of both traditions (Anglo-Saxon and continental-European). At first, the Reforming Power of the Constitution added in the nineties the supreme law to establish a normative ceiling to prevent the underrepresentation of either gender, and some years later the Electoral Tribunal began an era characterized by interpretations that maximize these legislative measures, i.e. *electoral quotas*, favouring the inclusion of women in public life. This has not meant that these actions imply understanding them as an *end in themselves*, but that they remain a means to achieve real and effective equality between men and women.

## II. IMPLEMENTATION OF AFFIRMATIVE ACTIONS AND THEIR EVOLUTION IN COURT

Affirmative *actions* were recognized in Mexico at the constitutional and legal level in 1996 with the establishment of gender quotas in electoral matters. Initially set a standard that provided for the presence of no more than 70% of either gender.

"Transversality as an element of positive equalization", in BALAGUER CALLEJÓN, María Luisa (Coord.), *XXV Anniversary of the Spanish Constitution: proposals for reforms*, Diputación de Málaga, Centro de Ediciones de la Diputación de Málaga, 2004, pp. 389-410.

<sup>16</sup> BALAGUER CALLEJÓN, María Luisa, *Women and Constitution... op. cit.* p. 113.

<sup>17</sup> ROSENFELD, Michel, "Equality and affirmative action...", *on. Cit...*

<sup>18</sup> CARMONA CUENCA, Encarna, "La prohibición de non-discrimination. New contents (art. 14 ECHR and Protocol 12)", in GARCÍA ROCA, Javier and

SANTOLAYA, Pablo (Coords.) *The Europe of Rights (The European Convention on Human Rights)*, Centro de Estudios Políticos y Constitucionales, 3rd ed., Madrid, 2014, pp. 587-612.

<sup>19</sup> DE OTTO Y PARDO, Ignacio, "Derecho Constitucional. Font system" in *Complete Works* (Editing and presentation by Ramón Punset Blanco, Francisco J Bastida Freijedo and Joaquín Varela Suanzes-Carpegna) (Coord. Ignacio Fernández Sarasola), Universidad de Oviedo, Centro de Estudios Políticos y Constitucionales, Oviedo, 2010, pp. 869-871.

In 2002, legislative reforms modified this rule, by establishing the incorporation of the same percentage, but for candidates of the same gender (owner and alternate). By 2008, the percentage increased to 40% of candidates owning the same gender, while the subsequent reform of 2014 raised that standard to parity of 50%. Finally, in 2019, the constitutional reform called *total parity* was approved, which establishes the obligation to observe the principle of parity in all applications for positions of popular election in Mexico.

Prior to the aforementioned constitutional and legal reforms, it should be noted that the federal elections of 2012 and the three elections of 2015 brought with them a different hermeneutic line for the Electoral Court in its capacity as a specialized body with constitutional electoral jurisdiction. The activism of that court provoked countless reactions towards that institution as a result of certain interpretative lines, which from the point of view of some changed the rules of the game previously defined by the legislator. The new criteria ordered, for example, to review *closed Party lists* after the elections or to quantitatively demand parity in the integration of Payrolls for mayors in both a vertical and horizontal dimension<sup>20</sup>, starting from the premise that it was a requirement of the conventional system of sources, and sometimes coming to paralyze some electoral processes in development (political campaigns).<sup>21</sup>

Until June 2019, there was no express mandate in the federal Constitution to order the institutions of the Mexican State to have horizontal, vertical or transversal parity. It has been through the interpretative and expansive work of the Human Right to substantive equality by the electoral

tribunal that an important advance has been achieved whose current stage is the constitutional reform of June 2019 by the Congress of the Union to the federal Constitution. This has evolved towards maximizing the political right to access public office under conditions of equality. As of June 2019, the interpretation derives directly from a constitutional mandate of transversal parity in all public positions.

To this is added a rather peculiar interpretation on the part of the TEPJF on the so-called affirmative actions as those temporary measures that can even be elaborated not only in legislative headquarters, but in administrative or jurisdictional headquarters, a situation quite abnormal from the perspective of constitutional theory and Human Rights, since their development on the planet is usually only in legislative headquarters, or administrative, in any case. However, today the progressivity of this principle of parity derives directly from what is established in articles 41, 35 and 53 of the CPEUM, which, however, has not been sufficient, since the permanent Constituent Assembly, once again, has failed to establish the rules that materialize and concretize the principle.<sup>22</sup>

At present, the most recent examples derived from the reform, establish that there is no violation of the principle of reservation of law, when the administrative body creates affirmative actions in favor of parity, even after the electoral process has begun, even modifying the material content of the law, specifically, the Superior Chamber has established: "the electoral administrative authority may validly develop rights, modalities or normative variables in charge of the subjects that are linked to

<sup>20</sup> This happened in the local elections in the State of Coahuila de Zaragoza where the elected deputies were removed after the elections by modifying the closed lists of some Political Parties. In this regard, see the appeals for reconsideration: SUP-REC-936/2014 to SUP-REC-946/2014, and SUP-REC-953/2014.

<sup>21</sup> In the State of Tabasco, it was ordered once the electoral campaigns began to replace almost 40 mayoral candidates from different political parties, arguing that the "gender parity" constitutionally enshrined at both the national and local levels, required a horizontal dimension in the integration of candidacies for municipal presidencies (parity). In this regard: appeals for reconsideration: SUP-REC-128/2015, SUP-REC-130/2015, SUP-REC-

132/2015, SUP-REC-133/2015, SUP-REC-134/2015, SUP-REC-135/2015, SUP-REC-136/2015, SUP-REC-137/2015, SUP-REC-138/2015, SUP-REC-139/2015, SUP-REC-148/2015 and SUP-REC-149/2015, resolved on 8 May 2015. It should be noted that the replacement was ordered since April 26 of that same year by the Xalapa Regional Chamber, which also has powers of specific constitutional control, acting as a federal instance prior to the final resolution of electoral matters.

<sup>22</sup> Jurisprudence 11/2015. AFFIRMATIVE ACTION. FUNDAMENTAL ELEMENTS. Gazette of Jurisprudence and Thesis in electoral matters, Electoral Tribunal of the Judicial Power of the Federation, Year 8, Number 16, 2015, pages 13, 14 and 15.

them, provided that there is a support or legislative basis in the corresponding legal framework, adhering to the principles and values oriented from the legal construction."<sup>23</sup>

In this same sense, when it comes to the regulation of nomination of candidates by closed lists for the federal Congress or the local Congresses, the administrative-electoral bodies may establish rules, even after the electoral processes have begun. The foregoing, because the court openly recognizes that rights or modalities of gender parity can be developed from the regulation, through an administrative agreement, completely transforming and redefining the concept of reservation of law affirming that it is not a question of modification of the law, but of "modulation of legal norms" that materialize the principle of substantive equality and non-discrimination, superimposing a series of norms of International Human Rights Law and the Mexican Constitution that they use to strengthen this approach, without being clear in any of these quotes.<sup>24</sup>

As we refer to in the introductory section of this work, there is no consensus in the doctrine on the conceptualization and foundation of affirmative actions. This also causes a theoretical and practical conflict regarding the *status* of the Electoral Tribunal as a supposed closing body with respect to specialized resolutions in electoral matters. ? Should quotas be assumed to be part of affirmative action or to be measures of reverse discrimination? If this position is defended: what are the formal and material limits of such electoral jurisdiction? Does the Electoral Court have constitutional powers to create or modify in court the rules previously

established by the legislator, even after the elections, in compliance with a direct observance of the principle of parity enshrined since 2019?

From these issues and once the primary definition on *affirmative actions* of the Electoral Court has been established, it is more or less clear that this body has understood electoral quotas – now generically called *compliance with parity* – as a kind of *affirmative action*, which brings with it a series of hermeneutic problems of great magnitude, since sometimes the *test of proportionality and reasonableness* that this Court uses when reviewing the constitutionality of *affirmative actions* is based on an *automatism*, dispensing with any possible clash or collision that may exist against the men participating in the electoral process, active suffrage, or electoral certainty and legality. Moreover, when in theory it is not even clear to the definition of what is meant by *rational and reasonably* accepted in judicial decisions; that is, if it is based on consensus or objective guidelines that allow reaching more or less acceptable conclusions.<sup>25</sup>

Based on the study based on the hermeneutic and comparative methodology, and in accordance with the elements of the context described above, it is undeniable that the Electoral Tribunal has exceeded its powers of electoral constitutional jurisdiction to modify the rules previously established by the legislator and the administrative-electoral authority. It has amended those rules without foundation, objective reasons and lack of proportionality. It has used international or European Community law in an impertinent way to justify the creation of rules that supposedly derive from guiding principles. And finally, it has

<sup>23</sup> SUP-RAP-116/2020. Parity in Governorship Case, § 62.

<sup>24</sup> Section 5.4.1.2.1. of Judgment SUP-RAP-121/2020.

<sup>25</sup> ATIENZA, Manuel, "Sobre lo razonable en el derecho", in *Spanish Journal of Constitutional Law*, Year 9. No. 27. September-December 1989, pp. 93-110; *Law as Argumentation. Conceptions of argumentation*, Ariel, Barcelona, 2006; ALEXY, Robert, *Theory of legal argumentation. The theory of rational discourse as a theory of legal foundation*, (trans. by Manuel Atienza and Isabel Espejo), CEPC, Madrid, 1997. "The Reasonableness of Law" in BONGIOVANNI, Giorgio, SARTORI, Giovanni, and. ly. (Eds.) *Reasonableness and law*, Springer, Dordrecht, 2009, pp. 5-16. AARNIO,

Aulis, *The Rational as Reasonable (A Treatise on Legal Justification)*, Centro de Estudios Políticos y Constitucionales, Madrid, 1991; FINNIS, John, "Law as Fact and as Reason for Action: A Response to Robert Alexy on Law's 'Ideal Dimension'", in *American Journal of Jurisprudence*, Oxford University Press, No. 59, June, 2014, pp. 85-109; BERNAL PULIDO, Carlos, "Is the weighting irrational and contrary to the democratic principle? A discussion on the theory of Fundamental Rights as principles in the context of Spain", in SIECKMANN, Jean (Ed.) *The Principialist Theory of Fundamental Rights (Robert Alexy's Studies on the Theory of Fundamental Rights)*, Marcial Pons, Madrid, 2011, pp. 223-242.

dispensed with concrete weightings of affected principles, such as the principle of self-organization of political parties, or democratic one translated into the free expression of the citizen vote and the affectation of men's candidacies.

In the analysis of cases in particular, the Electoral Tribunal, in its capacity as a body specialized in the matter, carries out a review of the constitutionality of the norms containing the so-called *electoral gender quotas*, resulting in arbitrary action when said body maximizes and interprets gender parity favorably, the *principle of equality and non-discrimination*, through the modification of closed lists after the elections, or when ordering the replacement of candidates once the electoral campaigns have begun to comply with horizontal parity in the candidacies to the City Councils.

Gender parity is assumed to be a product of the development of the value of substantive equality. Like the democratic principle, gender parity is embodied in the Mexican Constitution as a constitutional principle since the 2019 reform, establishing a reservation of law that obliges the legislator to develop the legal norms that ensure its observance. However, in the case of the collision between constitutional principles, in which one of them is that of substantive equality, the chances that we are in the presence of a difficult case are increased<sup>26</sup>. Indeed, the principle of substantive equality lies in an area of gloom and normative indeterminacy<sup>27</sup>, since affirmative actions, whatever they may be in the form of electoral quotas, require further electoral legislative development. Then, as HART pointed out, the open texture of the principle of substantive equality allows the legal operator, in these difficult cases

(borderline cases) to resort to that texture and make use of judicial discretion.<sup>28</sup>

Likewise, according to the doctrine, the countless cases that can be presented as difficult cases can yield a series of possible classifications depending on the normative or factual premises on which each judicial matter is raised. In this sense MACCORMICK has expressed that there may be problems related to the extension and scope of the standards, and there are a few seconds, based on the qualification of tests and facts. For these cases, following the Dworkinian terminology, there is no correct answer, but several, because its normative formulation is ambiguous and the concepts are vague, there is even no consensus in the community of jurists on the term itself, but above all, the concretion of the principle of substantive equality implies moral judgments that have to do with the perspective that each judge has on the specific circumstances of the facts and the context on which a certain judicial decision falls.<sup>29,30</sup>

This is confirmed by the fact that some authors come to pose a scenario of tragic cases, because the sacrifice of one principle sometimes leads to the elimination of the other. For example, in some cases where the closed lists of political parties have been modified in the candidacies for city councils and certain local congresses, the Electoral Tribunal has changed the order of the lists to form the integration of the representative body, altering the position of men to prefer women. This implies, also being before a tragic case, because the weighting of both principles happens, but under the scheme of all or nothing. That is, the principle of democracy and party self-organization is automatically and completely abolished to ensure that of gender parity.<sup>31</sup>

<sup>26</sup> ATIENZA, Manuel, *The meaning of the law*, Ariel, Barcelona, 2007, p. 264. From the same author: *The reasons for the right*, IJ-UNAM, on. Cit., p. 133.

<sup>27</sup> NAVARRO, Pablo E., "Sistema Jurídico, Casos Difíciles y Conocimiento del Derecho", in *Revista DOXA. Notebooks of philosophy of law*, No. 14, University of Alicante, Alicante, 1993, p. 253.

<sup>28</sup> HART, *The concept of law*, on. Cit. p. 153.

<sup>29</sup> MACCORMICK, Neil, *Legal Reasoning and Legal Theory*, Oxford University Press, New York, 1994, p. 140 y ss.

<sup>30</sup> NAVARRO, Pablo E., "Sistema Jurídico, Casos Difíciles y Conocimiento del Derecho", in *DOXA. Notebooks of philosophy of law* Num. 14, Alicante, University of Alicante, 1993, pp. 252-253.

<sup>31</sup> LARIGUET, Guillermo, "Conflictos trágicos y derecho. Possible challenges" in *Doxa Cuadernos de filosofía del Derecho*, No. 27, Alicante, 2004, pp. 318-319. ATIENZA, Manuel, "The limits of constitutional interpretation (Again on tragic cases)", in *Isonomy* no. 6, April, Mexico, 1997, pp. 7-30.

In this sense, the state of affairs that maintains parity in terms of gender electoral quotas in the Electoral Tribunal is worrying from the argumentative level. First, because of the equivocation to which the fact of having raised the rules of gender parity to constitutional status leads. Now the principle of gender parity *in the terms determined by law*, as provided for in article 41 of the Constitution, binds the parties to the effect of the nominations of all candidates for positions of popular representation at all levels. In such a way that this principle would now become a kind of constitutional value placed above the rest of the principles that may eventually be at stake. The above is a totally equivocal situation, methodologically and argumentatively imprecise, but perhaps the most serious thing is that it seems that the emergence of this "constitutional principle" follows from the existence of a block contained in the Constitution and a series of international instruments from which the Electoral Tribunal has derived the existence of the aforementioned principle from a "systematic and harmonious" interpretation.

This does not imply that the existence of gender quotas is of no practical use or beneficial to the electoral system. On the contrary, as mentioned, the affirmative actions designed by the democratic legislator are necessary in cultural contexts characterized by the null presence of women in public life, but in accordance with the postulates of the constitutional text itself that gives them validity. However, what is worrying is that the motivation of decisions in court is usually based on meta-legal arguments, far from objective and reasonable justification to give way to the plane of political sociology, pretending that the hermeneutic exercise of proportionality is only an ornament to give an appearance of justification and place the Courts on a slippery floor, leaving political actors in an area of perpetual gloom. On the nomination of candidates, it is worth mentioning the following jurisprudential criterion of the Electoral Tribunal:

<sup>32</sup> GENDER PARITY. IT MUST BE OBSERVED IN THE NOMINATION OF CANDIDATES FOR THE INTEGRATION OF FEDERAL, STATE AND MUNICIPAL POPULAR REPRESENTATION

In this sense, the principle of parity emerges as a parameter of validity that derives from the constitutional and conventional mandate to establish rules to guarantee the registration of candidacies in accordance with this principle, as well as measures of all kinds for its effective compliance, so it must permeate the nomination of candidacies for the integration of both federal organs of popular representation, local and municipal, in order to guarantee a plural and inclusive model of political participation in the different spheres of government.<sup>32</sup>

Secondly, with regard to the allocation of proportional representation positions and respect for the self-determination of registered lists of candidates, as well as the democratic principle, translated into the citizen vote, the rule of the Electoral Tribunal is to respect the registered list of candidates. However, the hermeneutical criterion varies when there is underrepresentation of the female gender. To this end, the Court argues, the following steps or phases must be followed:

the authority may establish measures aimed at parity provided that it does not disproportionately affect other guiding principles of electoral matters, for which it must take into account objective criteria with which the principles of parity, gender alternation, substantive equality and non-discrimination are harmonized, as well as that of self-organization of parties and the democratic principle in the strict sense, taking into consideration that parity and equality are principles established and recognized in the legal system, which must be given effect through the application of rules, such as alternation, the application of which is not a necessary condition for achieving parity, but a means to achieve it, and must therefore be applied when the conditions of the case and the applicable legislation so provide to give effect to that principle. In this way, in order to define the scope of the principle of parity at the time of the integration of a collegiate body of

BODIES. Jurisprudence 6/2015. Gazette of Jurisprudence and Thesis in electoral matters, Electoral Tribunal of the Judicial Power of the Federation, Year 8, Number 16, 2015, pages 24, 25 and 26.

popular election, the specific rules provided for in the applicable regulations must be taken into account, in order to harmonize the principles that support the implementation of a special measure in the allocation of deputations or regidurías by the principle of proportional representation and to make a weighting so that the incidence of the measures aimed at achieving parity does not imply a disproportionate or unnecessary affectation of other principles or rights involved.<sup>33</sup>

More recently, in 2021, the Electoral Tribunal established a jurisprudential criterion that confirms its conception of the mandate contained in the principle of parity, as well as its status as a closing court, establishing *adjustment rules* that are not in the legislation and whose review by another body is simply impossible. The Electoral Tribunal will argue that, from the systematic and functional interpretation of various articles of the Mexican Constitution, as well as of the American Convention on Human Rights and other international treaties, "it is noted that the application of *adjustment rules* to the lists of candidates under the system of proportional representation, in order to achieve equal integration between genders in legislative or municipal bodies, it is justified when it translates into access for a greater number of women. This considers, in principle, that the normative provisions that incorporate the mandate of gender parity or affirmative measures must be interpreted and applied seeking the greatest benefit of women, as they are preferential measures in their favor, aimed at dismantling the exclusion to which they have been subjected in the political sphere. Thus, making adjustments in the allocation of proportional representation positions in such a way as to reduce the number of women within the governing body would imply that a measure that was implemented for their benefit translates into a limit on their participation by access to public

power and, therefore, would be an unjustified restriction of their right to occupy positions of popular election. Based on reasoning, in these cases it is attached to the principle of equality and non-discrimination that legislative and municipal bodies are composed of a greater number of women than men."<sup>34</sup>

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### III. BY WAY OF CONCLUSION: A CRITICAL EVALUATION OF THE WORK OF THE ELECTORAL TRIBUNAL WITH AN ARGUMENTATIVE APPROACH

As has been pointed out, the electoral tribunal's interpretative excesses of the principle of gender parity are demonstrated by the modification it has made to the closed lists of political parties after the elections. That is, with these decisions the Electoral Tribunal goes further, because in its consideration gender parity will not only have effects at the time of nomination, but also at the time of the allocation of seats by the principle of proportional representation in the integration of parliamentary bodies, through an exercise of proportionality between the principles in conflict.<sup>35</sup>

Specialists such as Dieter NOHLEN have established that the various forms of candidacy and voting allow the voter to exert a greater or lesser influence on the selection of candidates within the article. For while individual candidacies somewhat encourage the independence of the candidate from the candidate, in the case of lists of candidates, this can be strengthened (closed and blocked list) or weaken the candidate's dependence on his or her article (open list). In this regard, it is stated that in the first case (closed and blocked list), the candidate is tied to the nomination of the article, but this does not happen in the system of open lists.<sup>36</sup>

<sup>33</sup> PROPORTIONAL REPRESENTATION. GENDER PARITY AS A ASSUMPTION OF MODIFICATION OF THE ORDER OF PRIORITY OF THE REGISTERED LIST OF CANDIDATES. Jurisprudence 36/2015. Pending publication.

<sup>34</sup> GENDER PARITY. ADJUSTMENTS TO PROPORTIONAL REPRESENTATION LISTS ARE JUSTIFIED IF ACCESS FOR A GREATER NUMBER OF WOMEN IS ENSURED. Jurisprudence 10/2021.

<sup>35</sup> GENDER QUOTA. IT MUST TRANSCEND THE ASSIGNMENT OF PROPORTIONAL REPRESENTATION DEPUTIES (OAXACA LEGISLATION). Thesis IX/2014. Gazette of Jurisprudence and Thesis in electoral matters, Electoral Tribunal of the Judicial Power of the Federation, Year 7, Number 14, 2014, pages 42 and 43.

<sup>36</sup> NOHLEN, Dieter, Treaty of Comparative Electoral Law in Latin America, FCE, Mexico, IDEA-TEPJF, Mexico, 2007, p. 301 et seq.

For its part, the system of closed and blocked lists in the opinion of NOHLEN allows nomination "for example specialists, women or representatives of certain social groups in safe places on the list." That is, a structure of political representation according to social or functional criteria, which is more complex and difficult in the case of individual candidacies and other forms of lists.

In this sense, the aforementioned author continues, the different forms of candidacy in the world are used to improve political representation. That is, if the weakness of the Parties and their frequent independence from deputies under the relative majority system is criticized, then the election by closed and blocked list is advisable. On the other hand, in countries where, on the contrary, partisanship is criticized for the effect of these lists, it is therefore advisable to introduce non-blocked lists, in order to counteract the lack of political representation.

Then, one of the fundamental elements to evaluate the quality of an electoral system is the representation and legitimacy, the first has a double meaning: on the one hand, representation for all, in terms of the different groups of people being represented, fundamentally, minorities and women; on the other hand, fair representation, that is, a more or less proportional representation of social and political forces, equivalent to a balanced relationship between votes and seats. The empirical measurement parameter of adequate representation is the degree of proportionality between votes and seats. Overly pronounced deviations from proportionality are often seen as problematic.

Importantly, legitimacy involves participation, simplicity and representation, and requires a degree of general acceptance of the outcome of elections and the electoral system, that is, the rules of the game of democracy. A parameter for judging the electoral system according to this criterion may be to observe whether the electoral system serves to unite or, on the contrary, to disunite a society. In Mexico at the federal level and in almost all the Federative Entities there is a system of closed lists where the Political Parties decide and establish the

order of priority of each of the candidates who will occupy these lists<sup>37</sup>.

However, as has been clearly pointed out, a system of closed lists does not allow it to be modified in court. However, the current state of the precedent system has abandoned the certainty and predictability of decisions, giving way to renewed lines of precedent, which in no way favours jurisprudential line on objective and reasonable grounds. In this sense, it seems that the Court is more interested in meaning than in the weight of the arguments. When it seems that the weight of a principle such as parity or substantive equality has greater prominence in almost all the judgments of this section, suddenly there is an argumentative turn and turns to defend the legality of the electoral process, the essence of the weighting is lost and it ends up deciding, through the nullification of one principle over the other, as if nothing of the argument of the first principle had made sense.

To weigh up, you need reasons, enough to defeat one principle over the other. There is no point in justifying the decision on principles if they are not going to be confronted. That is the real problem of the decisions analyzed here, methodologically it was not necessary to use the proportionality test. Sometimes it is not necessary to make weightings, especially when the initial thesis is admitted where the legislator is required to act within the framework of the principle of reservation of law to make parity effective through rules, that is, to enable the administrative or judicial authority to alter the order of closed or open lists.

The justification of a judicial decision where the argumentative structure of the principle of proportionality is used and which begins under the argument that the principle of reservation of law does not empower the judge to modify the closed lists is meaningless, rather than favoring the argumentation weakens it, since gender parity itself loses "constitutional" value in the face of such an interpretative scenario.

<sup>37</sup> NOHLEN, Dieter, *SElectoral istemas and electoral reform. An introduction*, IDEA-Asociación Civil Transparencia, Lima, 2004, p. 147 et seq.