

AFFIRMATIVE ACTION IN MEXICO: THE ROLE OF ELECTORAL JUSTICE IN THE CONSTRUCTION OF A PLURAL DEMOCRACY

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Abstract

Modern democracies have developed affirmative actions as a way of dismantling conditions of historical inequality experienced by vulnerable groups and as a tool to include them in spaces where they are underrepresented. The diversity of objectives behind these measures has resulted in the development of a wide range of policies and institutions that can advance these actions, and consequently, citizens can now request their application through many different channels.

In Mexico, many of the affirmative actions in the political arena emerged during the last decade, as an outcome of claims presented to the Electoral Tribunal of the Federal Judiciary. This practice has led to an increase in the number of cases submitted by these groups, situation which raises the question of whether this practice effectively responds to their claims or is merely a consequence of the social system's failure to answer the quest for more representation.

I will answer this question by using data to help visualize the ratio between an increase in cases related to affirmative actions and the number of rulings that have given place to more representation of these groups. Afterwards, I explain how an increase in the representation of vulnerable groups was made possible through an institutional course, which allowed this judicial scenario, as well as the type of rulings that have benefited political representation of these groups. The results of this analysis highlight how some disadvantaged groups have accomplished the protection of their representation rights through strategic litigation at the Electoral Tribunal, which, as a result, gave rise to tension among the Electoral Tribunal of the Federal Judiciary, political parties and the legislative branch.

Keywords: *affirmative action, electoral justice, representation, gender parity, disadvantaged groups.*

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1. Introduction

It is essential to revisit the relevance of affirmative actions in democratic systems, as well as the role Courts play in the defense of these mechanisms. At this moment, affirmative actions are being contested and reverted, as it recently happened in the USA, with the Supreme Court's rejection of these policies regarding racial quotas for college. Democracy is based on equality, the rule of law, and the protection of minorities' rights, nevertheless, conditions of inequality prevail, making it necessary to develop affirmative actions as temporary tools to address this issue.

According to literature developed on the subject, affirmative actions that foster political representation of underrepresented groups are usually driven by either Congress –through legislation–, the Executive branch –through public policies developed to compensate conditions of inequality–, or through a Court's rulings². I want to share our experience in Mexico, which is an outstanding situation because a significant portion of the affirmative actions developed to achieve political representation of vulnerable groups have emerged in the last decade, due to strategic litigation that takes place in the Electoral Tribunal of the Federal Judiciary (TEPJF)³.

Statistical data regarding these types of demands, as well as predictions of what will happen in the near future, show an upward trend in judicial controversies presented by those who belong to underrepresented groups, specifically in matters related to affirmative actions. This increase in controversies either points at the success of strategic litigation used by these groups as a way to achieve their right to representation or to an unmet demand for representation. This situation is what gives rise to the need to examine how representation is effectively obtained, to find out if it is directly related to the Electoral Tribunal's rulings and how these resolutions answer demands for participation and political representation of the historically underrepresented groups in Mexico.

My premise is that through its rulings, the Electoral Tribunal promotes public policies in favor of social inclusion, thus allowing the defense, promotion, modification, and validation of affirmative actions that benefit these groups. In this way, the Electoral Tribunal answers, in most cases, to demands made by citizens through strategic litigation, as its job is to guarantee the most basic political participation and representation rights in Mexico. It is presumed this increase in the number of lawsuits has resulted in an expansion of the judicial protection offered to minorities, hence the growth in the number of cases presented by these groups to assert their right to representation and political participation.

²Udi Sommer, Victor Asal, *Political and legal antecedents of affirmative action: a comparative framework*, Cambridge University Press, "Journal of Public Policy", 39:2, 2019, 359-391.

³ These are the initials in Spanish that stand for "Tribunal Electoral del Poder Judicial de la Federación".

In an attempt to answer the question of what happened first, I will share a theoretical analysis regarding affirmative actions and their judicialization in Mexico's democratic system. Next, I will disclose some of the Electoral Tribunal's judicial data, in order to examine the relationship between demands presented by these groups and the number of favorable rulings, which will help us reach a conclusion on how the Electoral Tribunal has answered these groups' quest. Afterwards, I will present some data regarding the institutional channels that have made this dynamic possible. Furthermore, I will analyze the types of affirmative actions developed in the electoral dimension of judicial defense. Finally, I will present the findings regarding the fulfillment of these groups' demands and, to conclude, a section in which I make some comments on the topic.

This brief study regarding the guarantee of fundamental political rights in a democratic society allows us to understand how the judicialization of demands by members of minorities has become a solution to conquer political representation, when the Executive and legislative powers haven't adequately answered them. And not surprisingly, this assumption leads us to another topic of interest in modern democracies, the role of Courts in society, the efficacy of their resolutions, and the implications of the relationships it develops with other branches of public power.

2. Analytical framework: the judicial defense of affirmative action

Modern democracies imply that the rights and freedoms of all citizens are guaranteed, in order to offer each and every member of society a level playing field regarding opportunities in life and participation in public policies. This has led us to understand democracy as the morally preferable system, especially in the political arena, due to the expectation of it being completely or almost completely responsive to all its citizens⁴. This notion of democracy has been corresponded with the existence of different mechanisms developed to include all voices of society in the decision-making processes.

Nevertheless, conditions of inequality still prevail in the different democracies around the world, which have pushed for affirmative action as a temporary measure to reverse the situation of disadvantage in which minorities currently live⁵. Some of these affirmative actions are:

- reparation for the different kinds of discrimination

⁴ Robert Dahl, *Polyarchy: Participation and Opposition*, New Haven, Yale University Press, 1998. Cited in: Maurizio Cotta, Federico Russo, *Research Handbook on Political Representation*, Edward Elgar Publishing, Cheltenham, 2020.

⁵ Alexandra Avena Koenigsberger, Reyes Rodríguez Mondragón, "Capítulo 1. El debate constitucional de las primeras aproximaciones de la paridad de género en Coahuila. La Acción de Inconstitucionalidad 2/2002: lo que fue y lo que pudo ser." En *Los derechos fundamentales en el siglo XXI. Tomo IV. Los derechos político-electorales*. (Coord. Yessica Esquivel) Tomo XXIV. Academia Interamericana de Derechos Humanos, Coahuila, 2022, Tomo XXIV.

- promotion of diversity in institutions
- inclusion of historically excluded groups
- elimination of social prejudices against minorities⁶.

These measures can be soft or hard, according to their force in accomplishing equality. Soft ones foster more opportunities for members of minorities, while hard ones search for equality by providing its members seats in legislative bodies⁷. This point of view considers affirmative actions as state mobilizations driven by legislative bodies, the executive branch⁸, or by Courts, through their rulings. In this way, when democracies have strong institutions, the state is better equipped to mend political discrimination, which leads us to establish a positive correlation between the quality of democracies and policies of affirmative action⁹.

It is important to point out that these mechanisms are often criticized, a recent example of this situation is what was ruled regarding affirmative actions in U.S. colleges; the U.S Supreme Court decreed that, by complying with racial quotas, discrimination of the majority is being promoted.

In this regard, the Venice Commission established that these measures must be proportional to the need of the minority group in question, and must be directed to provide the means to achieve equal opportunities. Affirmative actions must not be seen as privileges, but as tools for minorities to acquire rights that the majority members already enjoy¹⁰.

Therefore, minorities will be attracted to those political parties or representatives that best embody their needs, and that offer a higher probability that their demands will be met. This situation can lead to a judicialization of affirmative actions in order for minorities to claim their political rights. The judicialization of affirmative actions and other political issues happens when:

- values in a society don't match values embodied in the current legislation,
- dysfunctional political systems issue resolutions that don't foster the rule of law, and
- there's a fragmentation of power between the three government branches¹¹.

Considering this situation, it is then expected for disadvantaged groups to practice strategic litigation as a tool to promote those rights that have not been guaranteed by

⁶ Randall Kennedy, *For Discrimination: Race, Affirmative Action, and the Law*, Vintage, 2013.

⁷ Jack Citrin, *Affirmative action in the people's court*, UC Berkeley Corking Papers, 1995.

⁸ Through its public policies to reverse conditions of inequality.

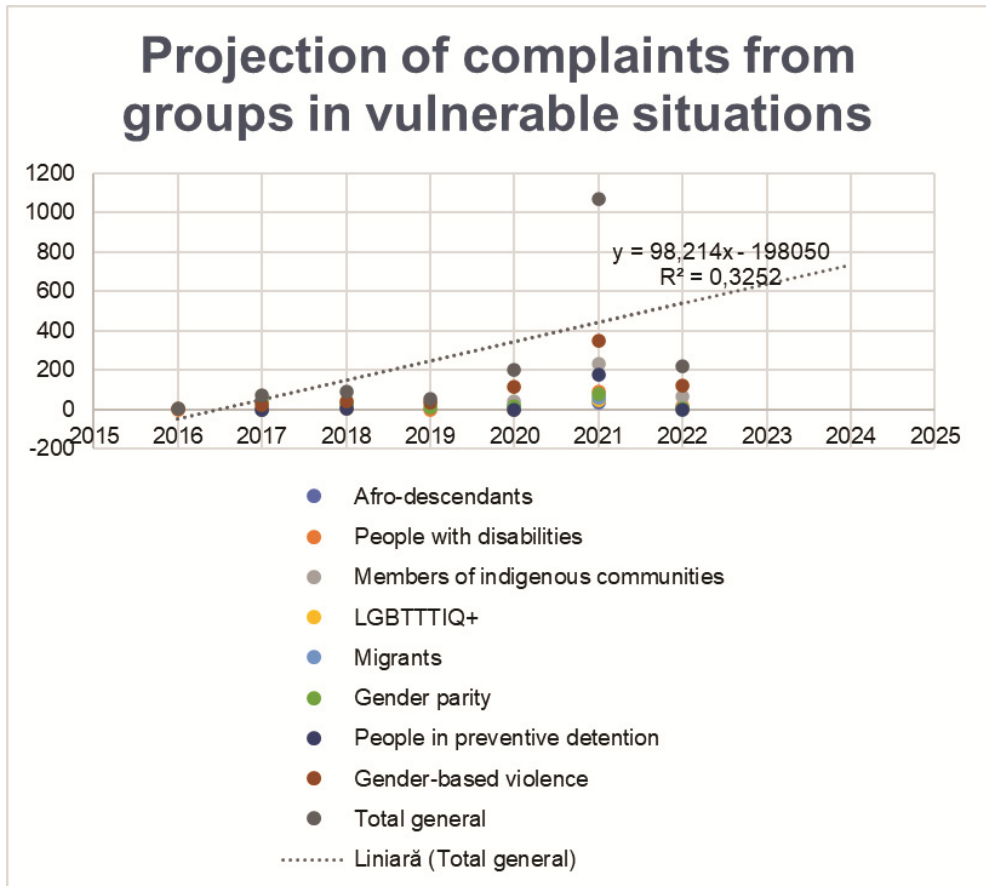
⁹ Sommer, Asal, *op. cit.*

¹⁰ Venice Commission, *REPORT ON ELECTORAL RULES AND AFFIRMATIVE ACTION FOR NATIONAL MINORITIES' PARTICIPATION IN DECISION-MAKING PROCESS IN EUROPEAN COUNTRIES*, European Commission for Democracy Through Law, Strasbourg, Study No. 307/2004. Document is available online at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)009-e [Date of last access: 02/07/2023].

¹¹ Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, Faculty of Law and Department of Political Science, University of Toronto, Toronto, "Annual Review of Political Science", 11:93-118.

government, and to include in these same lawsuits different topics that haven't been discussed in the public arena¹².

Mexico is a clear example of this process, because it was through the Courts that women and other disadvantaged groups addressed resistance coming from political parties' in order to force them to comply with gender and indigenous quotas for candidacies or positions of power. As a result of these claims, the Court ordered and defended different types of affirmative actions that expanded the protection of their rights by taking into consideration all human rights agreements and treaties the country has ratified.



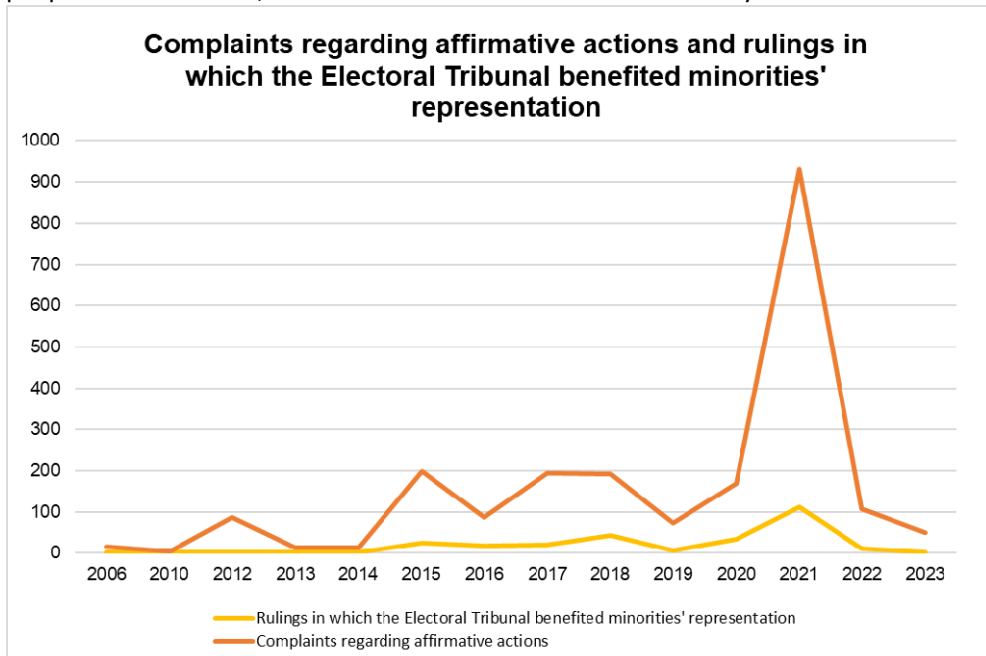
Source: Electoral Tribunal's Statistics Office.

¹² Diego R. Morales, *¿Qué es el litigio estratégico en derechos humanos?*, "nexos", 2010. Document is available online at <https://eljuegodelacorte.nexos.com.mx/%C2%BFque-es-el-litigio-estrategico-en-derechos-humanos/> [Date of last access: 23/05/2023].

This course of action has led to an increase in lawsuits coming from disadvantaged groups, as well as in claims related to affirmative actions. This increase makes it relevant to question whether the growth in number of lawsuits is due to a public perception that strategic litigation is successful or, if it means there is an unmet claim for more representation. As an answer, the Electoral Tribunal has effectively developed a judicial policy in favor of the political inclusion of minorities, by defending, fostering, changing, and validating affirmative actions. Clearly, the Electoral Tribunal has answered the citizens' demands to guarantee their fundamental political participation and representation rights.

3. The judicial protection of affirmative action in Mexico

In Mexico, there has been a constant increase in complaints coming from minorities during the last three elections, as well as an increase in rulings from the Electoral Tribunal that make representation of these minorities mandatory. The diversity of minority groups involved in this judicialization process has also changed. Ten years ago, most cases related to affirmative action were those concerned with women's rights and the rights of members of indigenous communities. Since the last three electoral processes, these cases have widened to include claims from afro-descendants, migrants, people with disabilities, and members of the LGBTTTIQ+ community.



Source: Electoral Tribunal's Statistics Office.

3.1 The judicial policy of inclusion

Adopting from the Judiciary a policy of inclusion is related with the growing political significance of courts and the expansion of their scope to become part of the analysis of the most pertinent and polemical political controversies of a democratic society¹³. In Mexico, this dynamic has meant a change of course for the Electoral Tribunal, which was made possible by the continuous judicialization of demands coming from minority groups for effective representation, which has led to a consolidation of precedents and interpretations that are now applied to all cases related to this topic.

One of the first steps this Tribunal took towards the inclusion of minorities in the political life of the country happened 20 years ago, when the scope of claims asking for protection of political-electoral rights¹⁴ was broadened to include allegations from party members against decisions they did not agree with, coming from leaders. This modification forced political parties to comply with the gender quotas¹⁵ enforced by the Electoral Courts.

The second step taken by this institution in that same direction was in 2011, through a constitutional reform regarding human rights and the resolution of a norm contradiction (Guiding Case-Law 293/2011)¹⁶ that gave the Electoral Tribunal the authority to apply a constitutional and conventional control of actions and rules emitted by the Electoral Courts that could affect human rights. This modification implied that the international treaties Mexico had signed had the same hierarchy as the Constitution, which allowed the possibility to use them as a justification in resolutions, when there was a lack of precedents, or the law that applied was unclear or incomplete. This has led to a judicial dialogue between the Electoral Tribunal and the Inter-American Human Rights System that has benefitted not only minorities in Mexico but in other countries where Mexican resolutions are cited.

Another example of this policy of inclusion adopted by the Electoral Tribunal is related to the judicialization of claims regarding women's political participation. One of the international commitments confirmed by Mexico during the Convention on the Elimination of All Forms of Discrimination against Women¹⁷ and the Convention on

¹³ Ran Hirschl, "The Judicialization of Politics." *The Oxford Handbook of Law and Politics*, Keith E. Whittington, R. Daniel Kelemen, Gregory A. Caldeira (eds.), Oxford University Press, 2008.

¹⁴ In Spanish it is known as "JDC" which stands "juicio de protección de los derechos político-electorales del ciudadano".

¹⁵ Flavia Freidenberg, *The Long and Winding Road to Gender Parity in Mexican Congresses*, En *Women in Mexican Subnational Legislatures. From Descriptive to Substantive Representation*, Coord. Flavia Freidenberg, Karaolina Gilas, Camilo Saavedra y Sebastián Garrido, Editorial Springer, 2022.

¹⁶ Suprema Corte de Justicia de la Nación, "Contradicción de Tesis 293/2011. SCJN determina que las normas sobre derechos humanos contenidas en Tratados Internacionales tienen rango constitucional". SCJN, México, 2011. Document is available online at: <https://www2.scjn.gob.mx/asuntosrelevantes/pagina/seguimientoasuntosrelevantespub.aspx?id=129659&seguimientoid=556> [date of last access: 04/07/2023].

¹⁷ CEDAW, "Convention on the Elimination of All Forms of Discrimination against Women". Document is available online at: <chrome-extension://efaidnbmnncpajpcglclefindmkaj/https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/cedaw.pdf> [date of last access: 04/07/2023].

the Political Rights of Women¹⁸ was to guarantee equal participation in every institutional level, as well as in elected positions in all agencies of the state. During that moment, Mexico's electoral regulations did not contemplate parity, and because of this international framework, the Electoral Tribunal could, from that moment on, rule towards achieving horizontal parity in municipal positions (2015)¹⁹, and local governments.

Finally, a third step taken towards the implementation of affirmative actions in the political sphere is the use of the figure of *amicus curiae* or "friends of the court." This mechanism allows people or groups that are not involved in an action, but are interested in the matter, to ask for the Court's consent to submit a brief, with the intention of influencing its decision²⁰. This happens when:

- there is no other space to expose these opinions
- the judicial case in question might lead to important effects
- the people or group interested in submitting a brief have the intention to protect what has already been accomplished²¹.

The Electoral Tribunal has admitted these opinions²² in relevant cases regarding affirmative action, such as the revision of gender parity when integrating local Electoral Courts. These amicus briefs were provided by "Mujeres en Plural"²³ and "Observatorio Binacional de la Iniciativa Ciudadana para la Promoción de la Cultura del Diálogo A. C.", two organizations interested in a positive outcome regarding the reservation of legislative seats for migrants in the Lower Chamber of Mexico City^{24, 25}.

¹⁸ United Nations, "Convention on the Political Rights of Women", Nueva York, 1953. Document is available online at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://treaties.un.org/doc/treaties/1954/07/19540707%2000-40%20am/ch_xvi_1p.pdf [date of last access: 04/07/2023].

¹⁹ Reyes Rodríguez, "Estándares del Sistema Interamericano de Derechos Humanos en la Política Judicial Electoral en México", presentation at the "Sexto Seminario Internacional. Impacto Transformador del SIDH en América Latina", México, 2019.

²⁰ Corte Interamericana de Derechos Humanos, "Reglamento de la Corte Interamericana de Derechos Humanos", Costa Rica, 2009. Document is available online at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.corteidh.or.cr/sitios/reglamento/nov_2009_esp.pdf [date of last access: 04/07/2023].

²¹ Geraldina González de la Vega, *Amicus curiae. Reflexiones sobre la participación de la sociedad civil en la definición de los derechos*, en *El matrimonio igualitario desde el activismo, la academia y la justicia constitucional*, Centro de Estudios Constitucionales de la Suprema Corte de Justicia de la Nación, Ciudad de México, 2017. Document is available online at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.sitios.scjn.gob.mx/cec/sites/default/files/publication/documents/2019-03/05_GONZ%20C3%81LEZ_El-matrimonio-igualitario-desde-el-activismo-57-83.pdf [date of last access: 04/07/2023].

²² Tribunal Electoral del Poder Judicial de la Federación, "Jurisprudencia 8/2018. AMICUS CURIAE. ES ADMISIBLE EN LOS MEDIOS DE IMPUGNACIÓN EN MATERIA ELECTORAL", TEPJF, Ciudad de México, 2018, "Gaceta de Jurisprudencia y Tesis en materia electoral", año 10, núm. 21.

²³ Tribunal Electoral del Poder Judicial de la Federación, SUP-JDC-1622/2019, Ciudad de México, 2019. Document is available online at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.te.gob.mx/Informacion_juridiccional/sesion_publica/ejecutoria/sentencias/SUP-JDC-1622-2019.pdf [date of last access: 04/07/2023].

²⁴ Tribunal Electoral del Poder Judicial de la Federación, SUP-REC-88/2020, Ciudad de México, 2020. Document is available online at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.te.gob.mx/EE/SUP/2020/REC/88/SUP_REC_88-919807.pdf [date of last access: 04/07/2023].

²⁵ Reyes Rodríguez Mondragón, *La figura del amicus curiae y la justicia abierta en la Sala Superior del TEPJF*, presentation at the "III Jornada sobre La justicia abierta en Coahuila: ¿Discurso o Realidad?", Coahuila, 2021.

This continuous litigation regarding affirmative actions in Mexico resulted in an institutional restructure, that is, in the adoption of a policy directed towards constructing a plural democratic society, that allows members of minority groups to push their interests forward. These rulings have responded to the omissions of legislative authorities to develop laws to protect minorities. Some of these topics, recently analyzed by the Electoral Tribunal are:

- opposition from political parties to comply with electoral rules and quotas for minorities
- legislative omissions when addressing political rights of members of these groups
- the unwillingness of political actors to comply with rulings on this subject

The Electoral Tribunal has actively worked to protect and implement a policy of affirmative action, which promotes political equality, originally directed at women; today, it is directed towards the inclusion of other minority groups. This judicial policy of inclusion has guided the Electoral Tribunal's resolutions regarding three main types of situations in which affirmative actions are needed:

- 1) running for elected office
- 2) addressing exclusion in the electoral results and composition of government institutions
- 3) addressing exclusion in electoral management bodies

During the last decade, most of the affirmative actions were related to promoting and guaranteeing women's political participation. The rulings gave place to:

- implementing same-sex candidacies for legislative bodies²⁶, as a response to actions from political parties that overturned gender quotas by selecting male substitutes for women legislators; women who were finally allowed by their parties to access seats in legislative bodies were immediately forced to resign, for men to substitute them. This measure of same sex candidacies became a barrier to these procedures.
- Achieving total parity in the candidacies proposed by political parties for representative seats at Congress²⁷ and as heads of local governments²⁸.

²⁶ Tribunal Electoral del Poder Judicial de la Federación, "SUP-JDC-12624/2011", Ciudad de México, 2019. Document is available online at: <https://www.te.gob.mx/sentenciasHTML/convertir/expediente/SUP-JDC-12624-2011> [date of last access: 05/07/2023].

²⁷ Tribunal Electoral del Poder Judicial de la Federación, "SUP-REC-39/2015", Ciudad de México, 2019. Document is available online at: chrome-extension://efaidnbmnnnibpcjpcglclefindmkaj/https://www.te.gob.mx/Informacion_judicial/sesion_publica/ejecutoria/sentencias/SUP-REC-0039-2015.pdf [date of last access: 05/07/2023].

²⁸ Tribunal Electoral del Poder Judicial de la Federación, "SUP-RAP-116/2020 y acumulados", Ciudad de México, 2020. Document is available online at: chrome-extension://efaidnbmnnnibpcjpcglclefindmkaj/https://www.te.gob.mx/media/pdf/SUP-RAP-116-2020-ENGROSE%20SGA_.pdf [date of last access: 05/07/2023].

- Designing competitiveness blocks by districts, to guarantee that political parties won't nominate women to districts in which there is a low probability of winning²⁹.

These actions that support women's representation rights paved the way for other minority groups. First, in 2018 this Electoral Tribunal ruled in favor of allocating a set number of seats at the Federal Congress³⁰ for members of indigenous communities. This measure resulted in the access of 13 indigenous deputies as representatives of their people in the Federal Congress in 2018 and 36 in the election of 2021³¹.

Second, the Electoral Tribunal ordered all political parties to include members of minority groups in their candidacies for legislative seats assigned by proportional representation in the Federal Congress³². This resulted in 442 postulations, with 65 legislators belonging to the following groups:

- six Afro-descendants
- eight people with disability
- four from the LGBTTTIQ+ community
- thirty-six indigenous people
- eleven migrants³³

The Electoral Tribunal implemented a third measure when it confirmed the figure of independent candidacies, which allowed indigenous and Afro-descendant people to compete to compete for seats in a local Congress as an alternative to the party system³⁴. Throughout these rulings, the Electoral Tribunal has recognized the obstacles faced by minority groups when exercising their political rights and has effectively protected their right to political participation and representation.

²⁹ Tribunal Electoral del Poder Judicial de la Federación, "SUP-JDC-1172/2017", Ciudad de México, 2017. Document is available online at: <https://www.te.gob.mx/sentenciasHTML/convertir/expediente/SUP-JDC-1172-2017> [date of last access: 05/07/2023].

³⁰ Tribunal Electoral del Poder Judicial de la Federación, "SUP-RAP-726/2017 y acumulado", Ciudad de México, 2017. Document is available online at: <https://www.te.gob.mx/sentenciasHTML/convertir/expediente/SUP-RAP-00726-2017> [date of last access: 05/07/2023].

³¹ Tribunal Electoral del Poder Judicial de la Federación, "SUP-RAP-121/2020 y acumulados", Ciudad de México, 2020. Document is available online at: chrome-extension://efaidnbmninnbpcjpcglclefindmkaj/https://www.te.gob.mx/EE/SUP/2020/RAP/121/SUP_2020_RAP_121-945532.pdf [date of last access: 05/07/2023].

³² Tribunal Electoral del Poder Judicial de la Federación, "SUP-RAP-21/2021 y acumulados", Ciudad de México, 2021. Document is available online at: chrome-extension://efaidnbmninnbpcjpcglclefindmkaj/https://www.te.gob.mx/Informacion_juridiccional/sesion_publica/ejecutoria/sentencias/SUP-RAP-0021-2021.pdf [date of last access: 05/07/2023].

³³ El Colegio de México, *ESTUDIO ESPECIALIZADO SOBRE LA EFECTIVIDAD EN LA APLICACIÓN DE LAS ACCIONES AFIRMATIVAS Y LAS BARRERAS QUE ENFRENTAN LOS GRUPOS EN SITUACIÓN DE DISCRIMINACIÓN EN LA REPRESENTACIÓN POLÍTICA EN EL PROCESO ELECTORAL FEDERAL 2020-2021*, Ciudad de México, 2022, INE/DJ/124/2021.

³⁴ Tribunal Electoral del Poder Judicial de la Federación, "SUP-REC-53/2021 y acumulado", Ciudad de México, 2021. Document is available online at: chrome-extension://efaidnbmninnbpcjpcglclefindmkaj/https://www.te.gob.mx/EE/SUP/2021/REC/53/SUP_2021_REC_53-966707.pdf [date of last access: 05/07/2023].

The second type of affirmative action ruled by the Electoral Tribunal is the one regarding adjustments in the way seats in the Legislative Congress are distributed to guarantee its composition complies with full gender parity. These modifications have led to an adjustment in seat distribution for parties who received a lower number of votes or when female representation is low³⁵. Furthermore, the Electoral Tribunal has confirmed other measures, such as the ones that order local Congresses to include legislators from minority groups³⁶.

With this type of rulings, the Electoral Tribunal has recognized that there are still many actions required to guarantee the correct implementation of quotas or reserved seats. Even though we are going in the right direction, more adjustments will be needed to achieve a plural society in which all voices are heard.

The third type of affirmative action ruled by this Electoral Court has been regarding the configuration of electoral management bodies, in which the following criteria were implemented:

- gender parity in power positions³⁷;
- exclusive candidacies, in which only women participate³⁸;
- there must be gender alternation in power positions.

Finally, the Electoral Tribunal has developed other measures that are not considered affirmative actions but have aided in guaranteeing equality in the access of women and other minority groups to the public sphere.

These decisions consist of the promotion of gender parity in power positions in political parties³⁹ and in pointing out any legislative omission of both local and federal Congresses to regulate issues such as the duty political parties have to nominate women as heads of local governments, as well as other measures that favor representation of people with disabilities⁴⁰ or members of the LGBTTTIQ+

³⁵ Tribunal Electoral del Poder Judicial de la Federación, “SUP-REC-1524/2021 y acumulados”, Ciudad de México, 2021. Document is available online at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.te.gob.mx/Informacion_judicial/sesion_publica/ejecutoria/sentencias/SUP-REC-1524-2021.pdf [date of last access: 05/07/2023].

³⁶ Tribunal Electoral del Poder Judicial de la Federación, “SUP-JE-1142/2023”, Ciudad de México, 2023.

³⁷ Tribunal Electoral del Poder Judicial de la Federación, “SUP-JDC-1479/2022”, Ciudad de México, 2022. Document is available online at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.te.gob.mx/Informacion_judicial/sesion_publica/ejecutoria/sentencias/SUP-JDC-1479-2022.pdf [date of last access: 05/07/2023].

³⁸ Tribunal Electoral del Poder Judicial de la Federación, “SUP-JDC-74/2022”, Ciudad de México, 2022. Document is available online at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.te.gob.mx/Informacion_judicial/sesion_publica/ejecutoria/sentencias/SUP-JDC-0074-2022.pdf [date of last access: 05/07/2023].

³⁹ Tribunal Electoral del Poder Judicial de la Federación, “SUP-JDC-1862/2019”, Ciudad de México, 2019. Document is available online at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.te.gob.mx/EE/SUP/2019/JDC/1862/SUP_2019_JDC_1862-901086.pdf [date of last access: 05/07/2023].

⁴⁰ Tribunal Electoral del Poder Judicial de la Federación, “SUP-JDC-92/2022”, Ciudad de México, 2022. Document is available online at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.te.gob.mx/Informacion_judicial/sesion_publica/ejecutoria/sentencias/SUP-JDC-0092-2022.pdf [date of last access: 05/07/2023].

community⁴¹. In that sense, the Electoral Tribunal ordered Congresses to legislate on these subjects.

The Electoral Tribunal has answered claims for more access to political participation and representation through these rulings, which have either a direct or indirect impact on affirmative actions. Nevertheless, these results pose two new questions:

1. Are these rulings responding to claims for more participation and representation?
2. What are the implications of the judicialization of affirmative actions in a democracy?

3.2 Have they worked?

There is evidence to confirm that the Electoral Tribunal has answered claims for more political participation and representation coming from minority groups, as strategic litigation has proven to be a reliable alternative for protecting their rights. There are three ways to confirm this assumption:

1. Through the numeric ratio between the claims and the rulings in favor of affirmative actions.
2. Through the institutional change in course and the precedents developed to protect the rights to political participation and representation.
3. In the rulings by the Electoral Tribunal that have broadened the scope of protection to defend not only the access of minorities to the public sphere but to their effective participation and representation.

However, to conclude whether the judicialization of affirmative action responds appropriately to the claims for more representation, it is necessary to analyze the main results of these rulings as well as the new obstacles that emerged. I will use Pitkin's theory of representation to analyze the issue by⁴² referring to what happened during the election for seats at the Federal Congress in the last election process (2021).

Today, the Lower House of Congress has the same number of seats allotted to both women and men (250/250), an accomplishment achieved in all local state Congresses too. Regarding other minority groups, their legislative presence has increased too, from having only 13 indigenous legislators in 2018, to a total of 65 members from a variety of groups, such as afro descendants, the LGBTTIQ+ community, people with a disability, and migrants in 2021. Another way to measure the improvement in minority

⁴¹ Tribunal Electoral del Poder Judicial de la Federación, "SUP-JDC-951/2022", Ciudad de México, 2022. Document is available online at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.te.gob.mx/EE/SUP/2022/JDC/951/SUP_2022_JDC_951-1181816.pdf [date of last access: 05/07/2023].

⁴² Hanna F. Pitkin, *The Concept of Representation*, University of California Press, 1972. Pitkin referred that there are 4 types of representation: formalistic, symbolic, descriptive and substantive.

representation is by comparing the percentage of legislators there is for each minority group and its proportion in society, for example, women who were allotted seats in Congress represent almost the same percentage of women in the community. However, we cannot celebrate, as other minority groups that gained access to the Lower House in 2021 have not yet reached that same level of representation⁴³. However, through affirmative action Congress successfully included a plurality of voices, as in 2021 73.84 % of these groups were incorporated for the first time⁴⁴.

Besides the access to the seats, the application of affirmative action in the political sphere has revealed new challenges regarding the effective exercise of political rights. In the first place, minority groups have fewer probabilities of gaining a seat. The probability of being elected once a person has access to a candidacy through affirmative action is 14.4 %, with differences between each one of the minority groups. These variations result from combining different variables, such as how strong is the party that postulated them, as well as an unequal opportunity when registering coalitions⁴⁵.

Last, the effectiveness of affirmative action depends on how these policies strengthen the substantive representation of minority groups. When discussing women's representation, the increase in the number of seats they occupy hasn't translated into an agenda in favor of women's rights. This is because "they have the seats, but not the power," which means that female legislators are only assigned to Commissions which are stereotypically related to women's issues, and no unified agenda or policy in favor of women is being promoted to change things⁴⁶.

On the other hand, minority groups that have accessed Congress through affirmative actions developed in 2021 don't work collaboratively or in any initiative related to the group they represent⁴⁷. In addition, we must consider that it is still too soon to evaluate substantive representation of these minorities that were allotted seats in Congress in the 2021 elections process, so there is a need for further analysis once their terms are up.

These examples show that there is a limit to the Electoral Tribunal judicial policy of inclusion leading to conclude that the judicialization of affirmative action in the Mexican political sphere is a dynamic that has achieved equality of opportunities and not of results⁴⁸. This Electoral Court has proven to be a critical factor in advancing

⁴³ People who belong to an indigenous community got 7.2 % of the seats, when they represent a 19.4 % of society. People with a disability gained 1.6 % of the seats when they are 4 % of the Mexican population. Members of the LGBTTTTIQ+ community got 0.8 % of the seats when they represent the 5 % of society.

⁴⁴ El Colegio de México, *op. cit.*

⁴⁵ El Colegio de México, *op. cit.*

⁴⁶ Freidenberg, *op. cit.*

⁴⁷ El Colegio de México, *op. cit.*

⁴⁸ George Gerapetritis, *Affirmative Action Policies and Judicial Review Worldwide*, Springer, Ius Gentium: Comparative Perspectives on Law and Justice (47), 2016.

representation of minority groups and their rights. As of today, there is a need for other political actors as well as other branches of government to comply with these rules.

3.3 Implications of a judicial protection of affirmative action

The judicialization of affirmative action tends to be controversial because the other two branches of government also play a role. Nevertheless, in a democracy, there's a clear relationship between the Courts and affirmative action. According to the Inter-American Court of Human Rights, these measures are practices to re-establish fundamental rights of excluded groups and to promote the elimination of any inequalities they face⁴⁹.

In this sense, Courts have the legitimate power to order the emission of affirmative actions, as well as to broaden and protect their proper exercise. However, since judicialization of affirmative action has become a means for the revision of laws, it also exposes legislative omissions that represent difficulties of implementation; however this dynamic can lead to tension between the judicial and the legislative branches.

On the other hand, the judicialization of affirmative action poses another problem in democratic societies. These measures can be seen as an imposition from parties, by which they are forced to modify their nominations and political strategies, and where citizens are restricted to voting only for specific profiles. In this sense, affirmative actions are criticized for limiting the liberty of the active and passive vote due to the restrictions imposed by these measures. This criticism is materialized in the cases that the Electoral Tribunal analyzed during the last election for the Lower House in 2021. Forty of the candidacies registered through the figure of affirmative actions were contested, resulting in 51 substitutions and 19 cancelations⁵⁰.

Another way to look the tension produced by the judicialization of affirmative action is through the discussion in the public arena of a reform recently passed by the House of Representatives, in which restrictions applied to the constitutional and conventional control that the Electoral Tribunal could make operate on all claims related to gender parity and affirmative actions⁵¹. The initiative was widely rejected by the public opinion and the civil society, which led to the abandonment of the issue,

⁴⁹ Gerardo Durango Álvarez, *Las acciones afirmativas como mecanismos reivindicadores de la paridad de género en la participación política inclusiva: Ecuador, Bolivia, Costa Rica y Colombia*, Universidad Nacional (Colombia), Bogotá, 2016, Revista de Derecho, N.º 45. Document is available online at: <chrome-extension://efaidnbnmnibpcjpcglefindmkaj/http://www.scielo.org.co/pdf/dere/n45/n45a07.pdf> [date of last access: 05/07/2023].

⁵⁰ El Colegio de México, *op. cit.*

⁵¹ Cámara de Diputados, "INICIATIVA CON PROYECTO DE DECRETO POR LA QUE SE EXPIDE LA LEY GENERAL DE PARIDAD E INCLUSIÓN EN LA POSTULACIÓN DE CANDIDATURAS E INTEGRACIÓN DE ÓRGANOS DE ELECCIÓN POPULAR", LXV Legislatura, Ciudad de México, 2023. Document is available online at: <https://www.sergio.gutierrezluna.com/images/iniciativa-ley-de-paridad.pdf> [date of last access: 06/07/2023].

but it serves as an example to show a reaction from the legislative body and the political parties towards the litigation of these measures and the Electoral Tribunal's role in these issues.

The judicialization of affirmative action and the reactions it elicits from other public actors show the limitations of these rulings. They also show us how the outcome of these policies and their impact on society depend on the other factors such as compliance from society and other political actors. The examples illustrate how the Electoral Tribunal has answered to citizens' claims for more participation and representation, However, they also show us how these mechanisms are not enough when there is no collective compromise in favor of affirmative action.

These implications highlight the need for a collective internalization of the objectives and principles of affirmative actions. Their judicialization might be a reliable tool to guarantee the rights of political participation and representation of minority groups. We still have to find ways to compromise with the other branches of government that have a say in the matter. In this sense, these Mexican cases show how members of minority groups were able to win these rights through strategic litigation. We have to recognize all new obstacles that arise from these efforts, to be able to guarantee everyone's electoral-political rights and not only those groups who face no obstacles; a significant impact will only be achieved when all public institutions act in accordance to benefit these groups and reverse the conditions of inequality that affect them.

Conclusions

Electoral justice in Mexico has played a fundamental role in protecting and strengthening affirmative actions designed to guarantee electoral rights. In this sense, the Electoral Tribunal has answered claims coming from minority groups for greater participation and representation. Furthermore, the judicial policy of inclusion through affirmative action has allowed a connection of all institutions responsible for accomplishing a more deliberate, inclusive, and pluralistic democracy.

The first consideration worth noting is the contribution this analysis makes to literature on the subject, as it shows the outcomes and implications of using strategic litigation to guarantee the political right of representation of minorities. The second one is that this analysis points out the role that the Electoral Tribunal plays in the defense of affirmative action as a way to broaden the political rights of minority groups. Affirmative actions are recognized as measures intrinsically related to the guarantee of equality, which makes Courts the perfect place for its defense. This role might seem obvious, but it is a contemporary subject worth studying that helps determine the relevance, rationality, and legitimacy of this type of rulings.

This research also contributes to literature on the topic by developing categories for the types of rulings towards the actions that try to limit affirmative actions. Affirmative actions are usually studied in other areas, such as in the labor and education fields or as quotas in the electoral sphere. In this sense, this analysis shows us the main barriers to political representation of minority groups and the type of judicial response there is because of it.

A third contribution to literature on affirmative action is that this analysis allows us to understand the relationship between Courts and these measures in a democratic context. Courts have played a fundamental role in protecting these rights and broadening their scope by strengthening their judicial interpretations in alignment to human rights conventions and international justifications. However, the impact of a Courts' ruling depends on the relationship of trust there is between the judicial power and other actors such as society and political actors, as well as on the will from other political actors to comply with its rulings. It is essential to pay attention to what the claims say about relevant social issues that are not being addressed by democracy. Furthermore, it is pertinent to recall Iris Marion Young's critique of affirmative action because, besides its benefits for minority groups, the sole exercise of these mechanisms asks for an analysis of deeper social structures that need to be disarticulated, as well as other inequalities that make these conditions to prevail in society⁵².

Finally, it is essential to point out that the cases presented in this research illustrate how during the last decade women used this mechanism successfully, therefore other minority groups are replicating it to gain access to spaces of representation. However, we should not ignore that a considerable part of women's success was due to the parity reform at all government levels. This dictates a future agenda to answer the question of whether other minority groups can accomplish the same success with the help of the legislative bodies or if there is a different route set out for them.

⁵² Iris Marion Young, *Justice and the politics of difference*, Princeton University Press, 2011.