

# Colombia's Constitutional Debate on Gender Quotas: The Link between Representation, Merit, and Democracy

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Article Received: April 4, 2018

Article Accepted: August 29, 2018

Doi: <http://dx.doi.org/10.12804/revistas.urosario.edu.co/desafios/a.6723>

To quote this article: Jaramillo Ruiz, F. (2019). Colombia's Constitutional Debate on Gender Quotas: The Link between Representation, Merit, and Democracy. *Desafios*, 31(1), 19-44.

Doi: <http://dx.doi.org/10.12804/revistas.urosario.edu.co/desafios/a.6723>

## Abstract

*Gendered quotas have been one of the preferred instruments for promoting women's participation and empowerment in public decision-making positions. This study analyzes Colombia's constitutional validation of gender quotas. It examines how ideas of merit were articulated in favor and against the enactment of gender quotas. In doing so, it argues that the centrality of merit in the constitutional debate on gender quotas is fundamentally flawed, for it ignores the subjective nature of merit, limiting the type of experiences and potential that matter in democratic representation. From this perspective, the primary idea that men and women need to show*

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*that they ‘deserve’ to occupy representative positions undermines feminist critique on representation. In this sense, the article contributes to the debate on women’s global leadership by revealing the risks of merit-driven arguments for advancing women’s democratic representation.*

**Keywords:** *Gender quotas, democracy, Colombia, Constitutional Court.*

## El debate constitucional sobre las cuotas de género en Colombia: el vínculo entre la representación, el mérito y la democracia

### Resumen

*Las cuotas de género han sido uno de los instrumentos preferidos para promover la participación y el empoderamiento de las mujeres en los cargos de nivel decisorio. Este estudio analiza la evaluación constitucional de las cuotas de género en Colombia. Así, examina cómo las ideas de mérito se articularon a favor y en contra de la promulgación de la Ley de Cuotas. El artículo argumenta que la centralidad del mérito en el debate constitucional sobre las cuotas de género es peligrosa, en tanto que ignora la naturaleza subjetiva del mérito, lo que limita el tipo de experiencias y el potencial que pesan en la representación democrática. Desde esta perspectiva, la idea principal de que los hombres y las mujeres deben demostrar que “merecen” ocupar puestos representativos socava la crítica feminista a la representación. En este sentido, el artículo contribuye al debate sobre el liderazgo global de las mujeres al revelar los riesgos de los argumentos basados en el mérito para promover la representación democrática de las mujeres.*

**Palabras clave:** *cuotas de género, democracia, Colombia, Corte Constitucional.*

## O debate constitucional sobre as quotas de género na Colômbia: o vínculo entre a representação, o mérito e a democracia

### Resumo

*As quotas de género têm sido um dos instrumentos preferidos para promover a participação e o empoderamento das mulheres nas posições de nível decisório. Este estudo analisa a avaliação constitucional das quotas de género na Colômbia. Assim,*

*examina como as ideias de mérito de articularam em favor e em contra da promulgação da lei de quotas. O artigo argumenta que a centralidade do mérito no debate constitucional sobre as quotas de gênero é perigosa, enquanto que ignora a natureza subjetiva do mérito, o que limita o tipo de experiências e o potencial que pesam na representação democrática. Desde esta perspectiva, a ideia principal de que os homens e as mulheres devem demonstrar que 'merecem' ocupar posições representativas socava a crítica feminista à representação. Neste sentido, o artigo contribui ao debate sobre liderança global das mulheres ao revelar os riscos dos argumentos baseados no mérito para promover a representação democrática das mulheres.*

**Palavras-chave:** *quotas de gênero, democracia, Colômbia, Corte Constitucional.*

## Introduction

In recent years, there has been an exponential growth of studies on gender quotas (Boldeón González, 2010; Krook, 2010; Rubio-Marín, 2012). These researches have extracted some of the critical reasons for quota adoption (Bush, 2011; Hughes, Krook & Paxton, 2015; Towns, 2010). However, not many empirical analyses have been published about the ideas and values articulated in favor and against gender quotas (Murray, Krook & Opello, 2012).

By examining the constitutional debate on gender quotas in Colombia, I assess how ideas of merit supported the arguments in favor and against their constitutional validity. I analyze the main opinions put forward by the opposing fronts of the constitutional deliberations. On the one side, the participants that opposed the measure argued that quotas undermined the authority of women occupying public positions. They held that quotas were an attack on women's merit, perpetuating the social bias that without this mechanism women would be incapable of reaching high power offices. On the other side, the participants that supported the soundness of the quota argued that the aim was to correct the social prejudices that acted against women's merit. They claimed that quotas were one step towards transforming the stereotypes that portray women as incapable and unable. By revealing this emphasis on merit during the Colombian constitutional evaluation, I argue that the debate on gender quotas exposes the narrow conception of representation. In this note, I claim

that the persistence of merit-based arguments fails to question the subjective nature of merit in the evaluation of human experiences, capabilities, and potentials. In this vein, the article contributes to the debate on women's global leadership by revealing the risks of grounding the struggle for women's democratic representation on ideas of merit.

The object of analysis is the deliberations on the constitutionality of gender quotas in Colombia. In this sense, I examine two crucial rulings —C-371/00 and C-490/11—, in which the Colombian Constitutional Court evaluates the validity of gender quotas. As an interpretative and inductive exercise, the assessment of the decisions seeks to identify the primary values, beliefs, and ideas in favor of and against the constitutionality of the quota mechanism. Furthermore, by contrasting the theoretical discussion on women's representation and the constitutional findings, I show how the overarching emphasis on merit blocks quotas' potential for advancing towards a model of democracy that does place the feminine outside of the political terrain and allocates phallogocentric traits to the public sphere. Conclusively, I argue that the deliberation on the constitutionality of gender quotas provides critical insight into the gendered nature of the state.

I structure the research into three sections. First, I explore the way feminist scholars have addressed women's representation in public decision-making. Second, I study how gender quotas have become one of the preferred mechanisms for advancing women's representation. Third, I analyze the debate on the constitutionality of the gender quota in Colombia. In the conclusion, I contrast the theoretical discussions on representation and the case study's findings.

## **Women's Representation in Public Decision-Making**

Historically, a sexual contract excludes women from decision-making (Boucher, 2003). This contract "is about the right of men's government over women, which includes access to their labor and bodies" (Mills & Pateman, 2011, p. 120). By drawing a boundary between the public

and the private domain, the prevalent masculine order places the feminine outside of the political terrain and allocates phallogocentric traits to the public sphere (Jaramillo Ruiz & Erazo, 2016; Prokhovnik, 1998; Ruiz & Rubio-Marin, 2008). Under this patriarchal system, women's representation in the public sphere encounters numerous hurdles that derive from cultural, legal, political, economic, and social circumstances (Hoecker & Fuchs, 2004; Inglehart, Norris & Welzel, 2002).

With the purpose of contesting male dominance in the public sphere, feminist put into question structures that prevent women from partaking in public decision-making and power (Childs & Dahlerup, 2018). They embrace normative projects that promote women's equality both at national and international level. For the most part, they seek to permeate state institutions through the formulation of gender equality norms and policies that remove the barriers that menace women's political engagement (Hoecker & Fuchs, 2004; Piscopo, 2015). In this sense, one of the core elements in feminist agendas has been to increase the descriptive and substantive representation of women positions of power (Dassonneville & McAllister, 2018).

Scholars that focus on descriptive representation argue that the inclusion of women in the decision-making process is fundamental for democracy (Childs & Dahlerup, 2018; Hoecker & Fuchs, 2004). They assume that women would do a better job of representing women's issues, priorities, demands, and concerns (Espírito-Santo, Freire & Serra-Silva, 2018; Martin, 2018). From this perspective, they have shown that high levels of women's elected representation in democracies translate into greater substantive representation, leading to an increase in responsiveness to women's reproductive health and education (Swers, 2005).

Nevertheless, the link between women's descriptive and substantive representation has been subjected to scrutiny. Some scholars have shown that women's descriptive representation does not necessarily imply that women's issues will find more space in the political deliberations (Dassonneville & McAllister, 2018; Espírito-Santo, Freire & Serra-Silva, 2018; Piscopo, 2015). In this sense, they have questioned

the meaning of substantive representation mean, insisting on the importance of investigating women representational claims (Celis et al., 2008). Fundamentally, by analyzing women's opportunities to participate in the process of forming political agendas and influencing the possible outcomes, this group of researchers has insisted on examining women's substantive representation (Franceschet & Piscopo, 2008).

Despite their differences, feminist theories on descriptive and substantive representation conceive lack of women representation as problematic (Siim, 2000). They argue that a system of government built on the principle of justice is not one that excludes more than half of its population (Hoecker & Fuchs, 2004). Hence, if the strength of democracy lies in the values of equality and representation, there is an inherent injustice in women's marginalization from public decision-making, government programs, and power (Young, 2002). In this sense, as long as women are not full and equal members and citizens, democratic practices will continue to be flawed (Pateman, 1989). At the heart of the matter, the discussion on women's representation is intimately tethered to ideas on gender equality, "understood both a means and an end, calling for the empowerment of women and a new ethic of shared responsibility in public and private life" (Montaño & Rico, 2007, p. 10). Accordingly, women's representation seeks to transform the political sphere, making it more inclusive and diverse (Young, 2002).

Ultimately, three key ideas buttress feminists' objectives concerning women's representation in the public sphere. The first idea is that women and men should have the same rights and opportunities. The second idea is that all acts of discrimination and exclusion towards women can be, and should be, eradicated. The third idea is that women's rights are not solely a problem of women. They are a concern of society as a whole. Using these three premises, feminists challenge the masculine composition of the public sphere (Inglehart, Norris & Welzel, 2002). They open the door for women's public engagement, weakening the male bias of the state.

## Gender Quotas and Women's Inclusion in the Public Sphere

In international human rights frameworks, gender quotas have progressively been considered a necessary affirmative action “to realize *de facto* or substantive equality for women” (United Nations Committee on the Elimination of Discrimination Against Women, 2004, p. 4). From this perspective, although gender quotas are intended to tackle women's descriptive representation, the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) considers that gender quotas enhance women's substantial representation. How did gender quotas become an international trend in the promotion of women's representation?

In 1991, Argentina became the “first state in the world to establish by law a quota for the threshold of candidates that must be included on party slates” (Gray, 2015, p. 289). It devised a groundbreaking legislated candidate quota mechanism aimed at correcting women's underrepresentation in the public sphere. Argentina is more than just another case of gender quota enactment. Within the Latin American quota literature, Argentina's case is a milestone for women's political rights (Carrió, 2005; Gray, 2003; Krook, 2010). It invented the main quota mechanism that exists today in the region. Because of this, writings about quota adoption in Mexico, Brazil, Nicaragua, Costa Rica, Panama, among others, recurrently mention its significance (Araujo, 2003; Baldez, 2004; Hinojosa & Gurdian, 2012; Krook, 2010; Sagot, 2010). In the words of Jennifer M. Piscopo, “Argentina became the first country to elevate an internal party strategy to a national legal mandate, and countries across Latin America (and the globe) soon followed” (2015, p. 27).

Since Argentina's path-breaking quota enactment, seventeen Latin American countries have adopted legislated candidate gender quotas (International IDEA, 2018). In this sense, legislative candidate quotas have been the preferred arrangement for the correction of women's underrepresentation. The period of enactment is particularly significant. Out of the seventeen countries in Latin America, eight

established the quota provision between 1996 and 1997. Moreover, most of them have introduced a 30% legislative candidate quota like the one initially enacted by Argentina (Jones, 2009).

Some researchers explain the spread of quota adoption by focusing on the role of political parties that react to a range of competing incentives (Hinojosa & Gurdían, 2012; Murray, Krook & Opello, 2012). Others underscore the importance of women organizations and their endeavors for political representation (Carrió, 2005; Gray, 2003; Piscopo, 2015). A third group defends the role of international organizations and transnational women's advocacy (Bush, 2011; Hughes, Krook & Paxton, 2015; Towns, 2010). This group focuses on national and international pressures and shaming strategies that coerce legislative support for quota enactment (Baldez, 2004; Hughes, Krook & Paxton 2015). A fourth group emphasizes the relevance of national courts in the quota adoption (Krook, 2010; Sagot, 2010).

When looking at the literature on gender quotas in Latin America, the importance of political parties is present in research about Brazil, Mexico, and Nicaragua (Araujo, 1998, 2003; Bruhn, 2003). In Panama and Costa Rica, scholars stress the impact of the Beijing Platform for Action and the CEDAW (Gray, 2015; Sagot, 2010). The literature emphasizes the struggle of women's organizations in Colombia (Guzmán & Prieto, 2011; Jaramillo Ruiz & Erazo, 2016). In general, as described by Mona Lena Krook, the research falls within one of the four stories of quota adoption:

Women mobilize for the quota to increase women's representation; political elites recognize strategic advances for pursuing quotas; quotas are consistent with existing or emerging notions of equality and representation; and quotas are supported by international norms and spread through transnational sharing (Krook, 2007, p. 369).

Hence, the gender quota trend is a result of different factors, actors, and forces.

Although gender quotas have become a global trend, authors continue to disagree about their effectiveness. One group of scholars claims that quotas have a positive impact. They claim that this instrument enhances national commitments to gender equality and increase the level of women's representation (Celis et al., 2008). From this perspective, whether it is through the implementation of sanctions, placement mandates, and monetary incentives, quotas are an effective mechanism to advance women's political representation (Paxton & Hughes, 2015; Tripp & Kang, 2008). Another group argues that there is little proof that quotas have a positive impact on women's political engagement. In this sense, quota laws sometimes become a mere formality with no actual implications to women's political representation (Gray, 2015; Krook, 2007; Zetterberg, 2009).

The third group of authors has expounded the different effectiveness levels of the mechanism by evidencing that similar quota laws have profound differences (Dahlerup, 2013). For example, some quota laws establish electoral sanctions for not fulfilling the legal mandate, while others do not (Gray, 2015). Moreover, the consequences of quota reform also depend on the type of electoral lists: whether they are close or open lists (Guzmán & Prieto, 2011; Jones, 2009). Hence, well-designed quota legislation plays a vital role in the efficacy of the mechanism (Carrió, 2005; Gray, 2003; Martin, 2018). The fact is that behind the apparent similarity there is a vast difference in the outcomes of legislated candidate quotas. Overall, scholarly narratives offer three main accounts for variations in quota effectiveness: "the impact of quotas is linked to details of the measures themselves, the impact of quotas depends on the institutional framework in which they are introduced, and the impact of quotas stems from the balance of actors for and against implementation" (Krook, 2007, p. 379).

Concerning gender quotas in Colombia, Maria Emma Wills and Florentina Cardozo (2010) have exposed the hostile attitude towards the insertion of women in electoral slates by Colombian political parties. Luis Alfredo Rodríguez Valero (2013) has shown that more women in parliament do not automatically generate an increasing prevalence of women interests in the national agenda. Angelica Bernal Olarte

and Maria Emma Wills (2003) have demonstrated that partisan affiliation rather than gender explicates the motives for supporting laws that concern women's rights. Overall, these authors argue that even though quotas increase descriptive gender representation (i.e., the number of women in parliamentary bodies), social stereotypes and prejudices against women continue to exist in the public sphere (Childs & Dahlerup, 2018; Gray, 2003; Jaramillo Ruiz & Monroy, 2015). This has originated the question as to "whether it is more important to have, in a decision-making position, a person that shares feminist principles or simply a woman, independently of her political position, ideology or ethics" (Sagot, 2010, p. 32).

Although most of the research has argued that gender quotas would and should be a means to achieve gender justice and gender equality (Agustín, Siim & Borchorst, 2018), "the 'merit' argument used against quotas is one critical debate that gender and politics scholars have so far failed to dethrone" (Childs & Dahlerup, 2018, 199). In this sense, the analysis of Colombia's Constitutional Court debate on gender quotas provides critical empirical insight into the deliberation on merit that surrounds gender quotas.

## **Colombia's Quota Constitutional Experience**

In 2000, Colombia's Congress enacted Law 581. This law sought to ensure adequate and effective participation of women in all levels and branches of public power (art. 1). The law contemplated a 30% quota for high-level public decision-making and other decision-making posts (art. 4). Hence, all political appointments had to respect the quota measure, which meant that 30% of all ministries, departments, and government agencies had to be led by women. Furthermore, the law called on the state to take the necessary measures to promote women's participation in the private sector and all civil society decision-making spaces (art. 9). Within the instruments to fulfill this mandate, the law contemplated the education on values of equality between the sexes, decisive measures to overcome the obstacles faced by women, specialized training for women on leadership, and dissemination of information

concerning women's rights (art. 10). Lastly, although the law did include law threshold of women candidates that must be included on party slates, in a first ruling, the Constitutional Court declared this prerogative unconstitutional, claiming that the constitution impeded the legislature from intervening in the internal organization of the party (C-371/00).

In 2011, the Congress passed Law 1475. This law established a 30% legislative candidate quota, provided monetary incentives for the promotion of women's participation (art. 17), and required educational measures for women's political empowerment (art. 18). Before enacting the law, nevertheless, the government had to pass two legislative acts—Legislative Act 1 of 2003 and Act 1 of 2009—that permitted the legislature to intervene in the regulation of some internal aspects of political parties and movements. The law sought to overcome the constitutional obstacles that the Court had found in ruling C-371/00 regarding the implementation of gender quotas in party slates.

Since any intent to transform democratic practices affects fundamental human rights, both Law 581 of 2000 and Law 1475 of 2011 required constitutional approval. These legal deliberations opened the door for the participation of different civil society actors and experts. In this sense, the rulings C-371/00 and C-490/11 register the proceedings in the Constitutional Court. These documents serve as the primary sources of information for this research.

In 2000, the Constitutional Court evaluated the legality of Law 581 of 2000. In the constitutional assessment, various actors had the opportunity to provide written and verbal concepts regarding the law's legitimacy. The Constitutional Court's evaluation of the quota law offers critical insights into the values that quota mechanisms must comply with to be considered legitimate. When reading the concepts and interventions made during the constitutional hearing of March 7 of 2000, one realizes that merit was a central issue of the debate. Two different positions can be identified in the document: those that defended that the gender quota was contrary to merit and those that argued that it was a defense to merit.

Those that opposed sustained that the quota affected equal possibilities for men. For this group, the quota infringed the values of merit. Those that supported the quota claimed that this mechanism corrected existing inequalities, by tackling the merit biases that hindered the representation of women in decision-making positions. Counting the different types of concepts and interventions, 25 people participated by giving their opinion on the constitutionality of the quota provision: eighteen women and seven men. Out of the eighteen women, one rejected the quota provision, and four out of the seven men did the same. Overall, 68% of the participants argued in favor of the constitutionality of the law, while 20% opposed. The missing 12% neither supported the measure entirely nor rejected it as a whole.

### **Gender Quotas as an Attack on Merit**

In the constitutional revision, the leading arguments of those that opposed the gender quota revolved around merit. Yefferson Mauricio Dueñas argued, “the measures taken are not essential or necessary; it is possible to stimulate the participation of women through other mechanisms that do not involve an exaggerated sacrifice of the rights of men” (Intervention 3, C-371/00). He claimed that the quota sacrificed the possibility of appointing people based on merit, asking whether the goal of excellent public service should be lost in order to guarantee women “to perform an activity for which they are not the most capable” (Intervention 3, C-371/00).

Maria Isabel Patiño, president of the Colombian Association of Pension Fund Administration (known by its acronym in Spanish as ASOFONDOS), gave her concept as an expert on the private sector. She argued against the quota because she believed that it “reiterated a message of women’s disability, discrimination, and weakness” (Concept 2, C-371/00). She contended that quotas replicated cultural stereotypes that describe women as incapable, endorsing ideas that women would not be able to reach positions of power just by merit and without government assistance. In this sense, her position echoed the arguments of scholars that have maintained that quotas lead to

enforcing negative views and stereotypes of women's competence, generating suspicion that women will not be selected on merit (Casey, Skibnes & Pringle, 2011).

Similarly, Mauricio Raina, associate researcher of FEDESARROLLO, one of Colombia's most prestigious think-tanks on economic and social issues, claimed that work experience and merit regulated participation on the labor market. For him, "in the case of women's labor participation, no evidence allows us to sustain that women are receiving fewer labor opportunities than what their productive capacities would justify. There is no proof that the Colombian market discriminates against women in a way that justifies the quota measure" (Concept 9, C-371/00). Additionally, he sustained that the 30% quota could threaten the functioning of the state by having women that were not prepared for the task as public servants in high decision-making positions. For him, the measure would lead the state to hire "inept and mediocre civil servants" (Concept 9, C-371/00). This position was echoed by Fanny Kertzman of the Direction of the Tax and Customs Department. During the public audience, she claimed, "a law of this type would force companies not to hire the most suitable persons for certain positions, which would harm the companies' good performance" (Intervention 7, C-371/00).

Despite the different points of view, when reading the concepts carefully, it is possible to see the weight of merit in the deliberation. For example, the fear that the quota law would replicate a message of women's inferiority stemmed from a specific understanding of merit. From this perspective, the quota acts against women's merit to occupy decision-making positions by propagating a false notion that without the quota they would be unable to reach power positions. Additionally, the point about the exaggerated sacrifice is also linked to the idea that men "deserve" the posts and that their merit is being undermined. In sum, those that oppose the quota viewed the provision as a frontal attack on merit-based decisions. In the words of one of the participants of the constitutional hearing, Luis Carlos Sachica, "equal opportunities should be given at the starting point

and not at arrival, being equal by law and not by merit is contrary to justice” (Intervention 4, C-371/00).

## Gender Quotas as a Promotion of Merit

Although merit was also a crucial ingredient in the arguments supporting gender quotas, the positions in favor tended to underscore the importance of women’s representation and equality. The Union of Citizens of Colombia (UCC), represented by Rosa Turizo de Trujillo, Luz Mery Alargon, and Isabel Franco Ramirez, defended the law by evidencing the lack of women in political positions of power. They asserted that the quota was indispensable to legitimize “women’s position in society and the state”, maintaining that Colombian women were prepared to contribute to perfecting democracy. They contended that women’s presence in high decision-making positions would enrich the democratic debate by bringing it closer “to the idea of a community of dialogue” (Concept 3, C-371/00). Similarly, the representative of the Ministry of Justice and Law, Blanca Esperanza Niño, stated, “quota measures are a form of ‘positive discrimination’ aimed at warranting that the right to equality is effective and not a mere rhetorical postulate” (Intervention 2, C-371/00; See also: Concept 7, C-371/00). In this sense, the quota was viewed as an adequate mechanism for advancing women’s representation.

The Corporación Viva la Ciudadanía, represented by Maria Teresa Muñoz Losada, considered the law necessary in the current conditions of society and must be part of a legal order that seeks equality, justice, and peace. After exposing the situation of discrimination that women experience in Colombia, she maintained that the state must “transform the economic order that discriminates and segregates”, guaranteeing women’s full exercise of their citizenship. As echoed by the Red Nacional de Mujeres, represented by Beatriz Quintero and Cecilia Barraza, “incorporating women in the public sphere through positive actions means building a new way of doing politics, in which the interests of 100% of the population are represented” (Concept 5, C-371/00; see also: Concept 6, C-371/00).

For Rosalba Duran Forero, professor of the Institute of Philosophy of the University of Antioquia, the quota served to obstruct “the marginalizing, clientelist, and antidemocratic criteria that operate in the election dignitaries” (Concept 7, C-371/00). According to her, quotas are a step towards transforming political and social cultures that exclude women. Florence Thomas, coordinator of the Grupo Mujer y Sociedad, and Yolanda Puyana, coordinator of the Program on Gender Studies of the National University of Colombia, in their concept to the Constitutional Court, shared this position. They claimed that quotas are an effective measure to ensure women’s permanent representation. Arguing that those that opposed the measure tend to forget the political, economic, social, and cultural conditions that exclude and subordinate women, Thomas and Puyana contended that quotas serve to resist the prejudices that prevent women from reaching certain political positions by merit (Concept 8, C-371/00).

When defending her position in favor of the quota, Olga Amparo Sanchez, representative of the Corporación Casa de la Mujer, showed that women were scarcely represented in spaces where laws and governmental decisions are made. In this sense, she claimed that this situation “weakens their position in the different spheres of their life, for their needs and points of view are not taken into account” (Concept 11, C-371/00). Likewise, Julieta Lemaitre, of the Observatory of Women of the University of Los Andes, advocated for the quota stating that the measure promotes the inclusion of a group that has been historically excluded (Concept 12, C-371/00).

Some participants, such as Maria Mercedes Cuellar, Director of the Instituto Colombiano de Ahorro y Vivienda, claimed,

Women differ from men, and they are the only ones that know their needs. To date, the rules that govern their bodies have mostly been adopted by men. Hence, laws such as pensions or maternity leave frequently pass. [These laws] are counterproductive because they reaffirm the preference for male employees. This type of situation is only corrected with the participation of more active women in decision-making (Intervention 1, C-371/00).

Conclusively, in the positions in favor, gender quotas are seen as a way of advancing women's descriptive and substantial representation. In this sense, women have the merit to reach the decision-making positions, but structural barriers hamper their advancement. From this perspective, positive discrimination is a way of safeguarding democracy.

### **The Constitutional Courts Reasoning: Linking Meritocracy to Democracy**

The Constitutional Court evaluated the legality of the law by answering a series of questions. First, it asked whether affirmative actions and special treatment violated the Constitution. In this section, the Court reasoned that affirmative actions are valid in the presence of circumstances of discrimination. Thus, for the Court, the sole condition as women did not validate gender quotas. It was necessary to prove the discriminatory practices and conducts. Furthermore, even if the discriminatory practices and conducts were shown, the measures had to be reasonable and proportionate. Lastly, affirmative actions had to be temporary, eliminating them once substantial equality had been reached.

From this understanding, the Court argued, “the population qualified to hold positions of high political responsibility is (for quite some time now) equitably distributed between men and women and that even the balance is inclined more and more in favor of the latter” (paragraph 21, C-371/00). The Court explicitly recognized the existence of structural factors that hinder women's representation. It proved that there were more women with university degrees than men (paragraph 21, C-371/00). In contrast, women's representation was less than 13% in all branches of government. Guided by this rationality, the Court dismissed the arguments that depicted the quota as an attack on meritocracy. It unveiled the inherent bias of the gender order, which acted in detriment of the female population (paragraphs 25, 26 and 27, C-371/00). Based on this assessment, it concluded that women's precarious representation obeyed to structural factors of discrimination. Consequently, it deemed the quotas necessary, for they produced a double effect: “an immediate one, consisting in alleviating under-

representation; and another in the longer term, which affects the transformation of the mentality, incompatible with the purposes set by an egalitarian and democratic Constitution” (paragraph 30, C-371/00).

The Court explicitly stated that the quota did not replicate discrimination against women, defending the need to eliminate the barriers that obstruct their equality. In the words of the Court,

Affirmative actions, including reverse discrimination, are expressly authorized by the Constitution and, therefore, the authorities may appeal to race, sex or other categories not to marginalize certain people or groups or to perpetuate inequalities, but to lessen the harmful effects of social practices that have placed those same people or groups in unfavorable positions (paragraph 14, C-371/00).

On this subject, the Court reflected on the meaning of the Constitution when referring to Colombia as a democratic, participative, and pluralist republic. It considered that in a democratic system marginalization of half of its citizens could not be tolerated. Furthermore, it defined political participation as an ethical principle according to which a person, when called to participate, should not —and cannot— delegate the decisions that affect her/him. For the Court, “doing so would imply endorsing responsibilities and, consequently, to dehumanize, objectify oneself” (paragraph 31, C-371/00). In this vein, the state had to guarantee substantial equality and participation. As for the principle of pluralism, the Court reaffirmed the need to consider the women’s point of view, for without their experiences political decisions would be partial, biased and, consequently, contrary to the common interests.

To examine the validity of the gender quota, the Court determined if the measure pursued a lawful objective, if the different treatment given to women was adequate to achieve the objective, if it was necessary, in the sense that no other possible instruments could fulfil the same purpose more effectively, and if it was proportional, meaning that it did not violate values, principles, and rights consecrated in the Constitution (paragraph 35, C-371/00). For the Court, the quota satisfied

the test of constitutionality, for it assures that capable women, willing to participate in public administration, do not dwell at the margins because of patriarchal traditions and social stereotypes (paragraph 38, C-371/00). From its perspective, the measure was necessary for it had proven that even though women exceeded men in academic qualification, they continued to encounter obstacles for reaching decision-making positions (paragraph 40, C-371/00).

Answering to the concerns that the quota discriminated women by portraying them as incapable, the Court considered that the mechanism was directed to correct social practice and not to reaffirm state paternalism or argue in favor of women's incapacity. In this sense, for the Court, the quota did not an attack on merit, but it endorsed women's competencies and abilities. It prevented them from being subject to unfair treatment (paragraph 49, C-371/00).

Lastly, the Court declared the extension of the quota to political parties and movements unconstitutional. It defended the public's freedom to choose its representatives and argued that quota restrictions affected the principle of popular sovereignty (paragraph 69, C-371/00). For the Court, political parties had the right to select the candidates of the party slates autonomously, without the intervention of the state. However, this decision did not mean that political parties and movements could not voluntarily adopt the quota, but that it could not be an imposition by the legislature. As summarized by Blanca Rodríguez-Ruiz and Ruth Rubio-Marín, "the Court remained faithful to the logic of the elected and unitary representation model when examined the constitutionality of electoral gender quotas and, in this logic, declared them incompatible with the freedom of political parties" (Ruiz and Rubio-Marín 2008, 1888; Rodríguez-Ruiz & Rubio-Marín, 2009, p. 1888). Consequently, at the time, the quota measures did not encompass the political arena.

From the analysis of the Constitutional Court's reasoning, it is possible to identify the connectedness of gender quotas and merit. Although the Court does defend women's descriptive and substantive representation, it justifies its argument based on ideas of capabilities and

meritocracy. Hence, its focus is less on diversity and pluralism and more on abilities and discrimination.

## **Extending Quotas to the Political Arena**

In 2011, with the purpose of advancing towards women's inclusion in the political arena and strengthening their participation in electoral positions, the Colombian Congress enacted Law 1475. The law was a way of filling the void left by Law 581 of 2000. It contemplated a series of measures to boost women's participation in electoral positions. Namely, it established a 30% legislative candidate quota, provided monetary incentives for the promotion of women's participation (art. 17), and required educational measures for women's political empowerment (art. 18). In this sense, when evaluating the constitutionality of the law, the Court had to go back on its precedent. It had to justify why the quota mechanisms that it had deemed as unconstitutional in its former ruling was now constitutional. Thus, the Court's reasoning exposes how democratic values change and react to demands for gender equality.

In this section, I examine how the Constitutional Court revised its previous ruling. Differently from the past section, I do not focus on the various interventions made in the constitutional evaluation. Instead, I show the way the Court justified why the quota mechanisms that it had deemed as unconstitutional in its former ruling was now constitutional. In this sense, the analysis serves to expose how democratic values change and react to demands for gender equality.

To validate the constitutionality of the law, the Court argued that the constitutional parameters have suffered significant transformations. Specifically, the Court claimed that the Legislative Act 1 of 2003 and the Legislative Act 1 of 2009 eliminated the prohibition that impeded the legislature from intervening in the internal organization of the party. These acts reduced the level of autonomy and limited the room for discretion that the Constitution granted political parties and movements (paragraph 103, C-490/11).

Reaffirming the arguments of ruling C-371/00, the Court defended the need to promote women's equal participation in politics. It also conceived the quota as a remedial measure, aimed at "compensating, emancipating, and correcting the situation of discrimination suffered by women" (paragraph 106, C-490/11). For the Court, according to the principles of democracy and gender equality, "political parties and movements should seek to embody representativeness based on effective equality between men and women, and deploy actions aimed at removing barriers that obstruct the equal and equitable participation of both" (paragraph 105, C-490/11). In this vein, they should adopt measures in favor of discriminated and marginalized groups, which includes eradicating practices that place women in conditions of disadvantage (paragraph 105, C-490/11). In sum, based on international mandates and the changes made to the Constitution, the Court sustained that Colombia's political parties and movements had to ensure descriptive and substantive representation of women in all public decision-making levels. Thus, it went back on its precedent by underscoring the constitutional changes that placed a limit on the autonomy and freedom of political parties, which allowed the legislature to adopt measures intended to promote gender equality.

## Conclusion

In the constitutional debate, the contending ideas converge on the importance of merit when arguing against and in favor of the gender quota. When analyzing the constitutional debate, one finds that the argument of merit was often linked to the idea that quotas harmed the rights of men. From this perspective, quotas took away the jobs that "more capable men" rightly deserved. Hence, merit served to maintain and justify men's prevalence and access to decision-making positions. Instead of rejecting the idea of merit, the Constitutional Court focuses on women's competencies and capabilities. It claimed that the quota made not an attack on merit, but it endorsed women's competencies and abilities. Accordingly, merit was also a fundamental point in the Constitutional Court's reasoning.

While the literature on women's representation focuses on diversity and inclusion, the constitutional debate centers on merit. Even in the arguments in favor of gender quotas merit played a central role. In this sense, a core concern was to prove women are capable and able, showing that structural discrimination hindered merit from working correctly. Thus, merit continued to be embraced as a fundamental principle of representation. In sum, the demand to incorporate women in the public sphere through positive actions to build a new way of doing politics, which was articulated by some of the participants of the constitutional debate, was not the essential reason for validating gender quotas. As such, the overarching emphasis on merit reveals the difficulty of transcending ideas of competence for furthering women's democratic representation.

Julie McKay states, "Merit by its very nature is subjective. It is a combination of experience and subjective judgment of potential. If we accept that, we accept that relying on merit to overcome systemic gender inequality is fundamentally flawed" (Corkery, Taylor & Hayden, 2018, p. 201). In a similar vein, the centrality of merit in the constitutional debate on gender quotas is fundamentally flawed. It ignores the subjectivity of merit, limiting the type of experiences and potential that matter in democratic representation. Hence, the analysis shows that the quota debate continues to be linked to the idea that men and women need to show that they "deserve" the position. From this perspective, the debate on gender quotas unintentionally legitimized a problematic conceptualization of merit, overlooking its subjective nature. Thus, the overarching emphasis on merit blocks quotas' potential for advancing towards a model of democracy that does place the feminine outside of the political terrain by allocating phallogocentric conceptions of merit, in which men "deserve" to occupy decision-making positions. It misses feminist demands to transform the public sphere, making it more inclusive and diverse. In this sense, it also reveals the gendered nature of merit, which puts capabilities over diversity.

Further research is needed to explore the discursive constructions of merit that serve to maintain male dominance and prevalence in decision-making positions. In this sense, if gender quotas fail to

question merit-based arguments, they might undermine the efforts to gender justice and gender. Hence, research must assess the risk of replicating merit-based mechanisms that disregard the subjective nature of judging human experience, capacities, and potential.

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