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Increasing the Gender Diversity of High Courts: A Comparative View

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doi:10.1017/S1743923X10000243

The appointment of Sonia Sotomayor and the nomination of Elena Kagan to the United States Supreme Court provides a timely opportunity for scholars, policymakers, and members of the legal community to consider why there are so few women on the world's highest courts. Although singular moments draw our attention to the importance of women on high courts, sadly, this attention is rarely sustained over long periods. While much was made of Ronald Reagan's historic nomination of Sandra Day O'Connor to serve as the first female justice of the U.S. Supreme Court, more than a decade and four nomination opportunities passed by before Ruth Bader Ginsburg was appointed. On this point, Paula Monopoli aptly observes: "[T]he assumption that progress would steadily continue until gender parity was achieved has proven to be wrong" (2007, 43). Unfortunately, this same observation could be said of virtually all other high courts across the globe.

In this essay, I examine recent efforts to increase gender diversity on high courts. In particular, I examine whether gender quotas for judicial seats would be advantageous for increasing women's presence on high courts. In recent years, countries as diverse as India, Ecuador, England, and South Africa, as well as the International Criminal Court (ICC) have discussed or even adopted gender quotas for judicial positions, with mixed success. While it is too soon and the sample is too small to draw

firm conclusions about the utility of quotas, the literature on legislative quotas should provide insight into whether such measures can be successfully deployed in the pursuit of greater gender diversity on the world's high courts.

Although serious discussions of judicial quotas are novel, legislative and party quotas have been around for a few decades. Half of all countries have introduced some form of quota, and quotas appear to increase women's participation and representation in legislative bodies (Htun and Jones 2002; Kittilson 2005). However, some researchers (e.g., Bauer 2008; Dahlerup 2006, 2008; Jones 2009; Krook 2009; Meier 2008) caution that quotas alone are insufficient to increase women's participation in representative bodies.[1] Thus, before advocates mobilize in support of judicial quotas, it is wise to consider what we can learn from the success (and failures) of legislative quotas. In the following section, I briefly review the relevant findings on the impact of legislative quotas as they may apply to efforts to adopt and implement judicial quotas. That section is followed by an overview of recent attempts to diversify courts using quotas (or something akin to quotas). I conclude the essay by urging feminist legal reformers to take advantage of the momentum for legislative quotas and advocate for reforms to promote gender diversity. I also argue for more research using a comparative, longitudinal, and cross-sectional approach in order to understand how quotas, together with the larger legal and political system, affect the gender diversity of high courts.

What Can We Learn from Gender Quotas for Legislatures?

In recent years, a veritable cottage industry has evolved examining the role of gender quotas on women's representation in elected offices. The attention to legislatures is understandable given the widespread, global diffusion of gender quotas in recent decades. Most scholars of gender quotas attribute the rapid diffusion to the 1995 United Nations Fourth World Conference on Women held in Beijing. This conference called for increasing women's participation in elective and nonelective offices (see Kenney 2002; Sacchet 2008; Tripp and Kang 2008). Following the conference, women's groups mobilized to pressure parties and

1. Dahlerup (2006) and Krook (2009) both include extensive information on the quotas adopted worldwide. In addition, Drude Dahlerup, along with Stockholm University and International IDEA, maintains a Website on all enacted quotas at http://www.quotaproject.org/.

legislatures for the adoption of quotas. It is interesting to note that the conference advocated for broad adoption of these quotas and not exclusively for elected bodies (Tripp and Kang 2008). Unfortunately, there was little mobilization on behalf of quotas for judicial positions.

The results of legislative and party quotas are somewhat mixed (see Bauer 2008; Caul 1999 Jones 2004, 2009; Krook 2009; Meier 2008). In reviewing this literature, as well as conducting her own research, Mona Lena Krook (2009) concludes that there is no single explanation for why quotas work in some places and not in others. Her work, and that of others, suggests six considerations for future research, each of which seems equally relevant to questions about promoting diversity on courts. First, the critical actors in the adoption of quotas vary widely across contexts, and they may have very different motives for pursuing the quotas (see also Bauer 2008). Regardless of the context or motives, however, it is this mobilization of interests that is critical to the adoption and implementation of these policies (see also Baldez 2007; Galligan 2006; Tripp and Kang 2008). Second, international organizations and transnational networks were influential in nearly all instances of quota adoption (see also Sacchet 2008; Schwindt-Bayer 2009; Tripp and Kang 2008). Third, normative debates play a critical role in shaping the debate (see also Meier 2008). Fourth, strategic motivations (i.e., attracting new voters or distinguishing one party from others) play an important role. Fifth, the success or failure of quotas is often a result of how they interact with the existing political environment and infrastructure (see also Baldez 2004, 2007; Htun and Jones 2002; Jones 2009; Schmidt and Saunders 2004). Finally, and somewhat frustrating for researchers looking for the "smoking gun," Krook observes that given the "central importance of causal combinations and the possibility of multiple paths to the same outcome, there are limits to prediction and prescription when it comes to quota adoption and implementation" (2009, 224). The same is likely to apply to research on gender diversity on courts.

While the bulk of the gender quota research has, quite understandably, focused on women's representation in legislatures, some recent work examines whether the adoption of party quotas affects gender diversity on courts. Even though these quotas do not apply to judicial offices, one might hypothesize that since political parties often serve as gatekeepers to these positions (Caul 2001; Kenney 2008), party quotas might advance women's representation in the judiciary as well. Or, as some scholars suggest, legislative quotas may have effects beyond the number of women in legislatures and may change perceptions about gender

relations more broadly (Kittilson 2005; Sacchet 2008). Thus far, the only research to look at this question is the work by Margaret Williams and Frank Thames (2008). Their research focuses on the relationship between gender quotas (both voluntary party quotas and legislatively enacted quotas) and the percentage of women on high courts in a number of advanced nations of the Organization for Economic Co-operation and Development. The findings support the hypotheses that gender quotas and executive nomination are both important factors in creating gender-diverse courts.

Even though the results are suggestive, the research is exclusively cross-sectional and, thus, cannot firmly establish the causal connection between quotas or executive appointment and the advancement of women to high courts. To establish causality, we would want to know whether the imposition of the quota within a country increased women's representation on those courts. In other words, do we see a clear before-and-after increase in the number of women appointed? With a cross-sectional approach, it is impossible to know whether the relationship is spurious since nations with greater concern for gender equality may also promote more women to their courts and also enact gender quotas for legislative office. Secondly, the research does not look into whether the women on the court were nominated by officials from parties where voluntary party quotas were in place. Many quotas are adopted by political parties with little influence over the selection of judges. Despite these shortcomings, the research is promising and may help advance our understanding of how to promote greater diversity on courts.

Recent Proposals Aimed at Increasing Diversity on High Courts

As mentioned earlier, the lack of gender diversity on high courts is not unique to the United States. It also persists in most other advanced, industrialized nations. For example, as Sally Kenney (2008) observes, it was not until 2003 that Lady Brenda Hale became the first women to sit on Britain's highest appellate court. This lack of diversity among high courts in England prompted the creation of the Advisory Panel on Judicial Diversity, charged with investigating the barriers to women and minorities in the judiciary and proposing remedies and recommendations (see also Malleson 2009).

England is not alone in lamenting the lack of diversity on high courts. In Western Europe and other democracies, women represent only a small

percentage of the members of high courts. While Australia and Canada now have three and four justices each on their seven- and nine-member courts, respectively, these are very recent events, and as recently as 2004, there had been only one woman to serve on the high court in Australia. This underrepresentation across Western democracies persists despite advances in many other areas of professional life. Moreover, parity (or something very close) with male colleagues in law schools and in the legal profession exists in many of these nations (Kenney 2002; Shaw and Schultz 2003). Given the paucity of women among the ranks of high court judges worldwide, the lack of sustained mobilization efforts, policy debates, and scholarly attention is not only regrettable but surprising as well.

Despite the lack of sustained attention to the status of women on high courts, however, there is a recent smattering of scholarly attention (e.g., Cowan 2006, n.d.; Kenney 2002, 2008; Galligan 2006; Malleson 2003, 2009; Monopoli 2007; Williams and Thames 2008). In addition, there is more debate among policymakers and activists alike. For instance, in countries as diverse as Ecuador, India, South Africa, and England, policymakers have broached the possibility of enacting quotas for women judges. Quotas were enacted in Ecuador in 2005, and proposals with language very similar to that of quotas were enacted in both South Africa and on the ICC. All of the examples are very recent and the record of success is mixed. However, there are now enough examples from which to try to speculate about whether and under what circumstances these mechanisms might foster greater gender diversity on high courts. Moreover, the research on legislative and party quotas reviewed here provides important insights into why some attempts have failed, and whether and where mobilization efforts might have the greatest impact.

The first explicit adoption of a gender quota for high court judges of which I am aware was in Ecuador in 2005. Overall, Ecuador has had a mixed record when it comes to women in political positions. While it was the first Latin American nation to grant suffrage to women (World Bank 2000), women were not well represented until a gender quota law was adopted. In 1997, a 20% quota for the Chamber of Deputies was introduced (http://www.quotaproject.org). This quota increased women's representation in the legislature from about 6% in 1996 to about 20% in 1998 (World Bank 2000; see also Franceschet and Krook 2006). However, women's representation in the judiciary (as well as in the executive branch) remained quite low. In 1999, only one of the 31 judges of the Ecuadorian Supreme Court was a woman.

The judiciary faced many other pressing problems not uncommon to judiciaries in Latin America. In April of 2005, the new government declared the court unconstitutional and removed all of the justices, each of whom had been appointed by the prior government (UNIFEM 2005). Following this attack on the courts, and with increasing international scrutiny on human rights abuses, Ecuador revised its Organic Law for the judiciary, and among other reforms established a judicial selection committee that agreed to a 20% quota for women on the Supreme Court. According to UNIFEM (UN Development Fund for Women), the reforms were part of a concerted mobilization effort, including domestic women's groups and Consejo Nacional de las Mujeres (CONAMU), and with support both financial and technical from UNIFEM (2005).

Despite the relative success of the legislative quotas and the mobilization of both domestic and international organizations, the judicial quota did not produce the desired effect, and only two women were appointed to the 31-member court. One might be tempted to conclude that these quotas arose more from outside pressure and, thus, were doomed to fail. However, as Krook (2009) notes, outside pressure is often instrumental in the adoption of many successful reforms. Thus, it is somewhat disappointing and puzzling that the judicial quota was virtually ignored. The quota was likely adopted only to satisfy lending organizations who grew concerned over the recent, unconstitutional removal of the prior Supreme Court (World Bank 2007). Following the reforms, there were little sustained mobilization efforts to implement the quota as the court continued to be embroiled in political controversy, distracting reformers from the gender-diversity goals.

In England, one recommendation being considered by the newly created Advisory Panel on Judicial Diversity is the enactment of gender quotas. However, at the time of this writing, the panel has yet to make any official recommendations and is not expected to do so until November 2009. Baroness Neuberger, chair of the panel, defended quotas, stating that while they may be controversial and are not likely to be the first option pursued, they are certainly on the table. She states, "There is also something about blockages at different levels of the judiciary. And those are things I would want to look at. Nothing is off the agenda and I am looking at practical things, but if you said to me my first instinct would be to go for quotas, I would say no. But that doesn't mean we won't look at it." Of course, the issue has already raised debate, and the Lord Chief Justice, Sir Igor Judge, recently commented:

"Appointment to the judiciary should be based on merit. I reject any idea of quotas for appointment, for a number of reasons, but not least because that would be unacceptably patronising. No judge should believe . . . he or she was chosen to fill a gap in a quota scheme."[2]

In England, as in the United States, there are potential legal and normative barriers to the adoption of party quotas. In both instances, quotas would likely face constitutional challenges. Moreover, the normative debates, which Krook (2009) notes as one of the key factors to the adoption and success of gender quotas for legislative office, would likely pose a challenging obstacle as well. Merit is often thought of as inconsistent with any sort of quota. However, as Kate Malleson (2009) observes, English attitudes may be softening somewhat, at least with regards to "targets" rather than "quotas." She writes, "[P]roposals for adopting targets in some form in the judicial appointments process are starting, slowly, to win official support" (2009, 396).

The advocates of gender quotas for legislative office had to overcome this normative hurdle as well. For example, Petra Meier (2008) observes that attempts to reframe the debate regarding quotas in Belgium, following the enactment of party quotas there, were met with mixed results. Reframing the debate in terms of citizenship, representation, and equality was only successful with women, and not men. In her work advocating for quotas for selection to the U.S. Supreme Court, Paula Monopoli (2007) argues that one effective normative argument in favor of quotas would be that the Framers themselves valued diversity for the vitality and legitimacy of the Court (though their emphasis was on geographic diversity). Even if the normative argument proved persuasive, she recognizes that significant statutory and/or constitutional reform would be necessary for quotas to be recognized as constitutional. Reform in England would likely face similar obstacles (Malleson 2009).

India is another example where the lack of diversity in the judiciary has prompted some debate about the possibility of imposing gender quotas for the judiciary. Only three women have served on the Supreme Court in India, and as of 2008, there were 42 women and 561 men on the 21 high courts (Nayak 2008). Within the last year, an Indian parliamentary committee recommended that when the size of the Supreme Court is increased from 25 to 30 justices, they should also consider a reservation for women of 33%. The bill passed the lower chamber on December 22, 2008, but has not been acted on in the upper house, the Rajya Sabha

2. "Quota System May Be Considered for Judges," *The Independent*, 29 April 2009.

(Nayak 2008). Given the difficulty and controversy that India has had enacting a national legislative quota system, a judicial reservation may seem unlikely. The main obstacle in the parliament was the lack of willingness on the part of the members, the vast majority of whom were men, to risk their own seats. Enactment of a judicial reservation would not affect their own self-interests and, thus, might be possible.

In creating its new constitution, South Africa affirmed the need to change the face of the judiciary from one exclusively of white males to one that was more reflective of society. Both race and gender were emphasized. While there was no explicit quota mentioned in the new constitution, increased diversity was "publicly embraced as a high priority commitment by everyone significant to the appointment process" (Cowan, n.d., 16). South Africa was able to overcome normative objections to quotas versus merit because of past injustices, which made obvious the need to have more diverse institutions. The previous, secretive method of judicial selection, which involved the president and the minister of justice, was replaced with a new selection committee: The Judicial Service Commission. The commission is comprised not only of members of the executive branch but also of other judges and other actors in the legal and political system. This committee has made numerous public statements and issued numerous reports about the need for diversifying the judiciary (Cowan n.d., 2006) and yet, despite this official recognition, there has been very little gender diversity in the South African courts (see also Kenney 2009). Recently, women lawyers and judges in South Africa have recognized the need to mobilize in order to see the constitutional goals of a more diverse judiciary realized. As Kenney (2009, 27) notes, "it seems an explicit goal may be necessary, but the South African case shows that it is not sufficient."

Finally, Article 36(8)(a)(iii) of the Rome Statute creating the International Criminal Court explicitly mentions that membership on the court of 18 justices would be comprised of a "fair representation of males and females." Louise Chappell's essay, included in this collection, provides an excellent overview of how and why the statute adopted such wording. Thus, a detailed review here is not necessary. However, it is worth noting that in terms of the number of women appointed to the ICC, the Rome Statute has been a success: As of 2010, 11 of the 18 members were women. Importantly, Chappell argues that "institutional design features . . . and the role of feminist advocates combined to create opportunities for women to take their place on the ICC bench." This comports with what scholars of legislative quotas have also observed.

Recall from the earlier discussion that quotas are most effective when they interact, in positive ways, with other institutional features and where there are sustained mobilization efforts to see that the quotas are faithfully implemented.

Conclusion

In nearly all areas of public life, women are still less powerful then men, if not outright political minorities. Women occupy fewer legislative and executive offices. While it is undoubtedly important to understand the gender gap in those offices, equal emphasis should be placed on understanding the lack of gender diversity on courts, especially high courts. It is time for researchers, policymakers, and reform advocates to focus on such efforts. Feminist legal reformers missed an opportunity to push for reform following the 1995 UN Fourth World Conference on Women, but it is not too late to turn attention to courts and seize upon some of the momentum established by advocates of legislative and party quotas. Their work should serve as an important blueprint for judicial reformers in terms of how to effectively mobilize, as well as how to overcome normative resistance to quotas by reframing the language of the debate. Biases against quotas may be even more difficult to overcome in the context of judicial selection than legislative candidate selection.

Moreover, the scholars of legislative and party quotas provide us with fertile theoretical ground for academic research on gender diversity on high courts. While scholars of American courts have long labored to discover how selection mechanisms affect the diversity of courts, the results are rife with contradiction (for an overview, see Kenney 2009). The research on legislative and party quotas shows us that institutional features may affect gender diversity, but they do so in interactive and sometimes unexpected ways. The research also shows us that regardless of the type of election system, parties can play an important gatekeeping role in the selection of women electoral candidates, and the same may be true with judicial candidates. Thus, even if judicial quotas do not "take off" immediately, scholars of the court should adopt a more comparative research agenda, one that looks beyond the American states and a narrow view of the role of selection systems, includes a longitudinal approach, and learns from the research on legislative diversity as well.

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Gender and Judging at the International Criminal Court

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doi:10.1017/S1743923X1000022X

Imagine this: a court presided over by a majority of women judges — many of whom are from racially marginalized backgrounds — and which has a "constitution" that has gender justice at its core. Incredibly, given what we know about gender and judging cross-nationally, this is not some utopian vision but the current reality at the International Criminal Court