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CONNECTICUT
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SYMPOSIUM INTRODUCTION:
WHAT CAN WE LEARN FROM TRANSNATIONAL
COURTS ABOUT JUDICIAL DIVERSITY?

*Mathilde Cohen**

* Professor of Law, University of Connecticut. For helpful comments, I am grateful to Erin Delaney and Elizabeth Emens. Special thanks to Fernanda Nicola for inviting me to put together this symposium panel at the 2019 AALS Annual Meeting.

Transnational judicial bodies have grown in number and importance in the past century, becoming major players in international politics, lawmaking, and the global economy.¹ Their decisions affect us all, whether directly or mediated by domestic legal systems. Yet the judges sitting on transnational courts are often at odds with the billions of people affected by their decisions in terms of representation. For instance, though the world is gender diverse and many domestic judiciaries have made strides toward gender parity, symposium contributor Jarpa Dawuni emphasizes that women, especially women of color, remain dramatically underrepresented on transnational courts outside of the African continent.² The disparity is particularly striking for certain countries: while 63% of domestic French judges identify as women, France has never nominated a single female judge to an international or regional court, as Laurence Burgogue-Larsen notes in her contribution to this volume.³

The paradox of transnational courts, however, is that if by one measure they lack in judicial diversity, by another measure, they are designed based on the very principle of judicial diversity, unlike their domestic counterparts. The goal of this symposium is to investigate this tension by offering case studies examining different dimensions of diversity at a number of transnational courts. This introduction will begin by scrutinizing the terms of the debate, before exploring how transnational courts actively pursue judicial diversity, and briefly presenting the six essays collected in this volume.

In using the phrase “transnational court,” the intention was simply to include in the analysis both international judicial bodies (such as the International Court of Justice) and regional judicial bodies (such as the African Court on Human and People’s Rights) and to draw a clear distinction with the research on national courts. The expression “judicial diversity” calls for more in-depth elaboration, however. In the context of United States history, law, politics, and economy, sociologist Ellen Berrey has criticized the word diversity as a well-intended but problematic one, typically used as a stand-in by white people when they find the topic of race uncomfortable but still want to talk about it.⁴ The word diversity, she writes,

¹ See generally Karen J. Alter, *The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review*, in INTERNATIONAL PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 345 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) (discussing the many contributions international courts make to international politics).

² Jarpa Dawuni, *Vive la Diversité or Aluta Continua? Achieving Gender Equity on the African Court on Human and Peoples’ Rights*, 34 CONN. J. INT’L L. 384 (2019); see also Nienke Grossman, *Shattering the Glass Ceiling in International Adjudication*, 56 VA. J. INT’L L. 339, 339 (2016) (pointing out that “women are found in dramatically low numbers on the benches of the majority of the world’s most important international courts”).

³ Laurence Burgogue-Larsen, *Women and Case Law: Some Loose and Comparative Wanderings*, 34 CONN. J. INT’L L. 270 (2019). Note, however, that France appointed a female Advocate General to the Court of Justice of the European Union in 1981, Simone Rozès, who served on the court in that capacity until 1984.

⁴ Ellen Berrey, *Diversity is for White People: The Big Lie Behind a Well-Intended Word*, SALON.COM (Oct. 26, 2015, 1:58 PM), https://www.salon.com/2015/10/26/diversity_is_for_white_people_the_big_lie_behind_a_well_intended_word/.

largely reflects the interests, worldviews, and experiences of powerful decision makers and their most important constituents—who may include people of color but by and large are white and well-off. The corporate managers, community leaders, and other decision makers who champion diversity have redefined racial progress for the post-civil rights era, from a legal fight for equal rights to a celebration of cultural difference as a competitive advantage. Their aspirational idea of diversity reframes racial integration as an accomplishment in which all parties benefit—not a zero-sum game or moral imperative to help black people.⁵

Berrey's powerful critique of the idea—and agenda—of diversity carries over, in part, to the more specific notion of judicial diversity. Judicial diversity is now the consecrated expression to describe whether and to what extent judges come from a variety of backgrounds and life experiences. As contributor Sally Kenney puts it in her essay, “it profoundly matters who judges are, what they believe about the world, and what their approach to law and judging is.”⁶ At the same time, talking about “judicial diversity” abstractly tells us little about the types of identity traits considered relevant for inclusion on the transnational bench. Domestically, debates on judicial diversity have tended to focus on gender (particularly in European countries),⁷ race (mostly in common law jurisdictions),⁸ and, more rarely, sexual

⁵ ELLEN BERREY, *THE ENIGMA OF DIVERSITY: THE LANGUAGE OF RACE AND THE LIMITS OF RACIAL JUSTICE* 7 (2015).

⁶ Sally J. Kenney, *Towards a Less Essentialist, More Intersectional, and Institutional Approach to Gender and Judging*, 34 CONN. J. INT'L L. 406 (2019).

⁷ See Mathilde Cohen, *Judicial Diversity in France: The Unspoken and the Unspeakable*, 43 L. & SOC. INQUIRY 1542, 1547 (2018) (arguing that in France most diversity initiatives and research agendas have centered on gender diversity rather than racial diversity and other forms of diversity); see also Rosemary Hunter, *More than Just a Different Face? Judicial Diversity and Decision-Making*, 68 CURRENT LEGAL PROBS. 119 (2015) (asking within the context of the judiciaries of England and Wales what difference it would make for more women to sit on the bench).

⁸ There now is a massive amount of literature about racial integration (and the intersection between race and gender representation) among federal and state courts in the United States. For a few examples, see Barbara Luck Graham, *Judicial Recruitment and Racial Diversity on State Courts: An Overview*, 74 JUDICATURE 28 (1990); Susan Moloney Smith, *Diversifying the Judiciary: The Influence of Gender and Race on Judging*, 28 U. RICH. L. REV. 179 (1994); Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1998); Mark S. Hurwitz & Drew Noble Lanier, *Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts*, 3 ST. POL. & POL'Y Q. 329 (2003); Barbara L. Graham, *Toward an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153 (2004); Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race*, 28 HARV. J. RACE & ETHNIC JUST. 91 (2012); Athena D. Mutua, *Disparity in Judicial Misconduct Cases: Color-Blind Diversity?*, 23 AM. U. J. GENDER. SOC. POL'Y L. 23 (2014); Maya Sen, *Is Justice Really Blind? Race and Reversal in US Courts*, 44 J. LEGAL STUDS. 187 (2015); see also Erin Delaney, *Searching for Constitutional Meaning in Institutional Design: The Debate Over Judicial Appointments in the United Kingdom*, 14 INT'L J. CONST. L. 752 (2016) (discussing the terms of the UK debate on judicial diversity along gender and racial lines).

orientation.⁹ At the transnational level, discussions of judicial diversity have extended to other dimensions, in particular geographic representation,¹⁰ legal culture,¹¹ and linguistic proficiency.¹²

But is judicial diversity a useful concept in the context of transnational courts? Would “integration” better describe the goal of transforming predominantly white and male international organizations? In other words, as Kathryn Stanchi, Bridget Crawford, and Linda Berger ask in their symposium essay,¹³ is the right question, “where are the women, in particular the women of color, on the international bench?” Or is it, “where are the marginalized, those who historically have not been part of making the law at the transnational level?” Or, still, what are the mechanisms of inequality that enable dominant groups or “producers of discrimination,” to use contributor Iyiola Solanke’s frame,¹⁴ to monopolize judgeships and other opportunities transnationally? While these and a host of other questions are considered in this symposium, a central thread is that the literature on judicial diversity at the international level needs to move from a primary focus on gender to the intersectional representation of other marginalized groups defined by race, sexual orientation, gender identity and expression, religion, socioeconomic background, language, and different abilities, among other traits.

Note that this symposium does not attempt to demonstrate why there should be more intersectional diversity on transnational courts. Nor does it purport to evaluate various strategies for increasing diversity, or to suggest concrete prescriptions for action as to how diversity should be pursued. The premise, here, as Sally Kenney points out,¹⁵ is that everyone should have a seat at the table. Just like we do not (or no longer) ask whether women should have the right to vote or become scientists on

⁹ See Leslie Moran, *Researching the Irrelevant and the Invisible: Sexual Diversity in the Judiciary*, 10 FEMINIST THEORY 281 (2009) (memorializing the difficulties of conducting empirical research of sexual diversity in the judiciary given that most stakeholders hold that sexual orientation is not a difference that should be taken into account); see also Cohen, *supra* note 7, at 1547 (discussing the lack of sexual diversity of the French judiciary and the lack of research and public attention on the topic).

¹⁰ Abhinav Chandrachud, *Diversity and the International Criminal Court: Does Geographic Background Impact Decision Making?*, 38 BROOK. J. INT'L L. 487, 494–501 (2013) (discussing “geographic diversity” in international judicial bodies and other institutions).

¹¹ See Mathilde Cohen, *The Continuing Impacts of French Legal Culture on the International Court of Justice*, in COMPARATIVE INTERNATIONAL LAW 181, 182–83 (Anthea Roberts, Paul Stephan, Mila Versteeg & Pierre-Hugues Verdier, eds., Oxford University Press, 2017) (arguing there are different national understandings of what law is and what an international court should be and do and that judges come to the international bench with expectations and practices informed by their domestic legal environment).

¹² See Mathilde Cohen, *On the Linguistic Design of Multinational Courts: The French Capture*, 14 INT'L J. CONST. L. 498 (2016); see also Leigh Swigart, *Linguistic and Cultural Diversity in International Criminal Justice: Toward Bridging the Divide*, 48 U. PAC. L. REV. 197, 198 (2016) (pointing out the challenges of an insufficiently culturally linguistically diverse international criminal bench when they have little knowledge of the languages and worldview of the litigants appearing before their court). But, note that linguistic and geographic representation also come up in some domestic court systems, particularly Canada (for language) and the United Kingdom (for geography).

¹³ Kathryn M. Stanchi, Bridget J. Crawford & Linda L. Berger, *Why Women? Judging Transitional Courts and Tribunals*, 34 CONN. J. INT'L L. 316 (2019).

¹⁴ See IYIOLA SOLANKE, DISCRIMINATION AS STIGMA: A THEORY OF ANTI-DISCRIMINATION LAW (2017) (re-orienting the conversation on discrimination “to highlight ‘the producers of rejection and exclusion—those who do the discriminating’ rather than those who are the recipients of such rejection behaviours.”).

¹⁵ Kenney, *supra* note 6.

the ground that they vote like their husbands or reach the same conclusions as male scientists, so too there is little point in inquiring why people who do not identify as men, white, straight or cis, among others, should be elevated to the transnational bench. The burden of proof should be on those denying the need for intersectional diversity.

In that respect, transnational courts are an excellent jumping ground to reflect upon judges' identities and backgrounds. The paradox of these courts, to return to this introduction's opening paragraph, is that in the international context, the idea of representation has always been assumed and valued, be it understood as descriptive or substantive representation.¹⁶ Some forms of identities, such as national origin, are not only desirable, but also thought to be essential to the courts' mission, while other forms of identity, such as race, sex, gender identity and expression, class, or disability, may be ignored or challenged. Historically, international adjudication has developed as an outgrowth of international arbitration, in which arbitrators were expected to be independent, but also presumed to represent the particular state that had appointed them.¹⁷ Many transnational courts continue to require that each of their member states be represented by a national and/or that a rotation system ensure that each country have "its" judge on the court for a term of years. In other words, transnational adjudication is premised on the very idea that some form of judicial diversity is not only valuable, but also necessary both to the court's internal collective wisdom and to its public legitimacy. Strict descriptive representation is often insisted upon, even for the least numerous "minority" countries. It would be unacceptable, for example, for the Court of Justice of the European Union to not include a judge from Luxembourg, even if it is the smallest European country (population: 590,667).

Nationality is an accepted or even desired element of bias on the transnational bench, where it is framed as a distinct perspective or form of legal expertise. Tellingly, in some transnational judicial bodies, when a case began in country *x*, formal or informal court rules require that the judicial panel convened to adjudicate it comprise a judge originating from that very country. By contrast, on the domestic bench, "non-traditional" judges such as female judges, judges of color, LGBTQ judges, and/or differently abled judges are routinely suspected of "bias," and sometimes called to recuse themselves from cases raising issues viewed as connected to their presumed identity traits.¹⁸ Similar occurrences are likely to have happened on the international bench, which tends to be integrated from a nationality perspective, but homogeneous when it comes to most other forms of identity.

¹⁶ See HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 60–143 (1967) (distinguishing between two forms of representation: descriptive representation, or "standing for," which refers to the identifying features which a representative might share with different constituencies such as race, gender, educational achievement, while substantive representation, or "acting for," is the tendency of office holders to advocate on behalf or decide for the benefit of certain groups without regards to shared characteristics).

¹⁷ See Cohen, *supra* note 11, at 199.

¹⁸ See Cohen, *supra* note 7, at 1550 (recounting the story of a French judge of Moroccan ancestry who had been denied the assignment of a case, which involved Moroccan railway worker plaintiffs who claimed discriminatory treatment in the allocation of pension benefits, on the grounds that she would not be impartial).

Despite their poor record in promoting the type of intersectional diversity this symposium is interested in, transnational courts may nevertheless provide us with a paradoxical model of integration in which judges are not only selected because of their different backgrounds and worldviews, but also valued for them. In that respect, transnational courts can work both as models and countermodels for domestic courts and other institutions.

The symposium includes six essays. It begins with Laurence Burgorgue-Larsen's *Women and Jurisprudence. Some Loose and Comparative Wanderings*, which focuses on gender and the multiple ways in which women are excluded from transnational justice, be it as plaintiffs, lawyers, scholars, or judges. While noting the structural barriers that prevent women from being equal actors in transnational adjudication, Burgorgue-Larsen proposes that activism and cause lawyering can go a long way toward making their voice heard on the international legal arena.

Jarpa Dawuni in *Vive la Diversité or Aluta Continua? Achieving Gender Parity on the African Court on Human and Peoples' Rights* takes on the idea of "gender balanced benches" within the African context. She shows that the African Court on Human and Peoples' Rights is the most gender balanced international court currently in existence, suggesting that transnational courts whose membership includes mostly majority white countries should seek inspiration from the African Court's gender parity rules, informed and skilled allies, and member states' governments' political will and action.

In *Where Are the Black Female Judges in Europe?* Iyiola Solanke focuses on the Court of Justice of the European Union, which lies in the awkward position of being a court tasked with ruling on racial discrimination among the EU member states and yet itself remains an all-white and predominantly male institution with no internal diversity agenda on the table. Solanke argues that the problem is due in large part to the fact that European domestic judiciaries are themselves homogeneous, particularly along racial and ethnic lines, testifying to national governments' lack of will to diversify their judiciaries.

Konstantinos Polomarkakis zooms in on the gender dynamic inside the European Union's highest court in *United in Diversity? Gender and Judging at the Court of Justice of the European Union*, noting its internal stratification, whereby judges and advocate generals are predominantly male, while the rest of the court's personnel—the administrative, research, linguistic staff, etc.—is primarily female. Polomarkakis also speculates on the effect of gender on substantive judicial outcomes through a comparison between two conflicting opinions by advocate generals of different genders on the same fact pattern.

Kathryn Stanchi, Bridget Crawford, and Linda Berger use the technique of counter framing in their essay, *Why Women? Judging Transnational Courts and Tribunals*, to dissect the word "women" in dominant discourses about judicial diversity. By asking the question what is a woman anyway, they urge us to avoid all forms of essentialism and to broaden the notion of judicial diversity, illustrating the importance of changing law and organizations by challenging words.

Finally, in her concluding essay, *Towards a Less Essentialist, More Intersectional, and Institutional Approach to Gender and Judging*, Sally Kenney proposes an anti-essentialist and intersectional turn in contemporary theorizing about

judicial diversity by doing away with studies of categories of marginalization taken one by one at the exclusion, and erasure, of the others.

In sum, the paradox at the heart of transnational courts is that while they are to some extent out of touch with those they govern, they also provide a model of judicial institution that recognizes the importance of embracing judges from different backgrounds. Reflecting about judicial diversity in transnational courts is thus fruitful not only to advance the international judicial order by calling for the inclusion of challenged forms of identities, but also to move forward domestic judicial systems that remain homogeneous.



WHERE ARE THE BLACK JUDGES IN EUROPE?

Iyiola Solanke

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INTRODUCTION

It is hard to deny the power of courts and the judiciary in the 21st century: law and litigation increasingly permeate everyday life. Courts and judges play a larger role in society. This increased power of judicial review has led to demands that the judiciary itself be more open to public scrutiny. For example, the use of televised sentencing¹ is not just a cost-saving measure, but also a response to calls for more “open justice.”² As courts take on a more visible role in social order, they are expected to uphold standards of public management typically expected of other democratic institutions; such as transparency, accountability, efficiency and diversity. Expansion in the reach of judicial authority has given rise to a growing interest not only in what courts say, but also their composition: who the members are, how they are selected and how they work³ matter.

An important legitimacy factor for courts is the extent to which their composition reflects those they serve.⁴ This is a matter of *democracy* and not diversity for its own sake. As put by Lady Brenda Hale, President of the UK Supreme Court, “[t]he law, the legal profession and the courts are there to serve the whole population, not just a small section of it. They should be as reflective of that population as it is possible to be.”⁵ Likewise, the American Bar Association acknowledges that:

The public’s trust and confidence in the justice system is enhanced when they see that the judges deciding their cases resembles the vast racial, ethnic, and cultural groups that make up American society. Likewise, a diverse judicial branch expands an individual judge’s perspective in making decisions that impact a diverse population.⁶

In the 21st century, courts increasingly operate in a context of plurality, as the spaces in which their decisions will be implemented are heterogenous. Thus, this heterogeneity should be reflected within deliberation chambers and in judicial reasoning. Delivery of justice requires a plurality of perspectives and

¹ *Televised Sentencing in English Courts “considered”*, BBC NEWS (Sept. 6, 2011), <https://www.bbc.com/news/uk-14798203>; Steven Brocklehurst, *Filming in Court ‘not precedent’*, BBC NEWS (Apr. 18, 2012), <https://www.bbc.com/news/uk-scotland-edinburgh-east-fife-17745584> (discussing the allowance of cameras in Scotland’s courts). For a comment *see*, *Justice on Camera*, THE TELEGRAPH (Apr. 18, 2012, 8:58 PM), <http://www.telegraph.co.uk/comment/telegraph-view/9211668/Justice-on-camera.html>.

² The Supreme Court already uses Twitter, *see Twitter Policy for the UK Supreme Court*, THE SUPREME COURT, <http://www.supremecourt.uk/twitter-policy.html> (last visited March 30, 2019), and televises its proceedings, *see Supreme Court Live*, SKY NEWS, <https://news.sky.com/supreme-court-live> (last visited Nov. 22, 2019).

³ APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD (Kate Malleon & Peter H. Russell eds., 2006).

⁴ STEPHANIE M. WILDMAN ET. AL., *Privilege Revealed: How Invisible Preferences Undermines America*, in RACE AND RACES – CASES AND RESOURCES FOR A DIVERSE AMERICA 534–35 (John F. Perea et al. eds., 2000); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DIVERSITY IN LAW FIRMS (2003), <https://www.eeoc.gov/eeoc/statistics/reports/diversitylaw/lawfirms.pdf>.

⁵ Suzanne Bearne, *Lady Hale: ‘Studying Law? Make sure you have the stomach for it’*, THE GUARDIAN (Feb. 15, 2018, 11:56 AM), <https://www.theguardian.com/law/2018/feb/15/baroness-hale-studying-law-supreme-court-lawyers>.

⁶ *Standing Committee on Diversity in the Judiciary*, ABA, <https://www.americanbar.org/groups/judicial/committees/scdj/> (last visited March 30, 2019) (showing that the American Bar Association (ABA) has a Standing Committee on Diversity); *see also Diversity on the Bench*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/judges/diversity-bench> (last visited Oct. 6, 2019).

experiences in a court. The process of considering a wide variety of viewpoints in the pursuit of legal answers to complex questions ultimately strengthens judicial decision-making.⁷ Despite recognition of this, in the EU, as in the US and UK,⁸ the majority of judges continue to be white, male and upper class, even in the presence of increasing numbers of black and female law students, lawyers and legal professionals.⁹ Anyone who saw the composition of the UK Supreme Court during the *Miller*¹⁰ hearings would be hard-pressed to identify any progress in the last 20 years.

Yet, judicial diversity is now widely acknowledged as a constitutional principle linked to the rule of law, overwhelmingly seen as “an essential component of a fair and impartial judiciary.”¹¹ Traditional expectations of the judiciary such as efficiency, independence and impartiality, continue to be important¹²—there has been discussion on the compatibility of these values—diversity is often seen as a threat to merit and judicial standards.¹³ Elaine Mak, for example, suggests that adherence to diversity might undermine efficiency. Some judges also worry about the sustainability of standards in a diversifying judiciary: “... agreeing on and enforcing ethics [and] core values was much easier when there were far fewer barristers with similar backgrounds, and when there were far fewer and less diverse opinion-makers.”¹⁴ At the same time, few now believe that homogeneity in judicial institutions serves justice, democracy, or makes better law.

As in the UK and US, the EU promotes diversity in the judiciary—the diversity agenda for gender is a long standing policy.¹⁵ Under the title ‘Building A European Area of Justice’, the Directorate-General for Justice and Consumers

⁷ See Rosemary Hunter, *More Than Just a Different Face: Judicial Diversity and Decision-Making*, 68 CURRENT L. PROBLEMS 119, 119 (2015).

⁸ See MINISTRY OF JUSTICE, THE REPORT OF THE ADVISORY PANEL ON JUDICIAL DIVERSITY 62, 65, 69 (2010), <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf> (reporting on Surveys in the UK. Showing in 2000, a report by the Society of Labour Lawyers “describing [the] judiciary as dominated by white, middle- class, Oxbridge-educated males”; in 2005, a Sutton Trust survey concluded that the “senior judiciary [were] overwhelmingly privately educated and with degrees from Oxbridge”; in 2009 a report by the Sutton Trust again highlighted “that [the] overwhelming majority of senior judges and barristers and majority of senior partners in law firms were educated in independent fee-paying schools and Oxbridge”).

⁹ See MINISTRY OF JUSTICE, JUDICIAL DIVERSITY STATISTICS (July 12, 2018) <https://www.judiciary.uk/wp-content/uploads/2018/07/judicial-diversity-statistics-2018-1.pdf>; see also JUDICIAL DIVERSITY INITIATIVE, <https://judicialdiversityinitiative.org> (last visited Mar. 30, 2019).

¹⁰ *R (on the application of Miller and another) v. Secretary of State for Exiting the European Union* [2017] UKSC 5.

¹¹ *Judicial Diversity: A Resource Page*, BRENNAN CENTER FOR JUSTICE, (Sept. 12, 2017) <https://www.brennancenter.org/analysis/judicial-diversity-0>

¹² Elaine Mak, *The European Judicial Organisation in a New Paradigm: The Influence of Principles of ‘New Public Management’ on the Organisation of the European Courts*, 14 EUR. L.J. 718 (2008).

¹³ See Avner Levin & Asher Alkoby, *Shouldn’t the Bench be a Mirror? The Diversity of the Canadian Judiciary*, 26 INT’L J. LEGAL PROF. 69, 85– 86 (2019).

¹⁴ Lord Neuberger Of Abbotsbury MR, Lecture at the 25TH Annual Bar Conference: The Tyranny of The Consumer or The Rule Of Law ¶ 3 (Nov. 6, 2010) (Transcript available at https://www.barcouncil.org.uk/media/100350/bar_conference_lecture_lord_neuberger_speech_061110.pdf).

¹⁵ *Gender Equality*, EUROPEAN COMMISSION, http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/judiciary/supreme-courts/index_en.htm (last visited Mar. 30, 2019).

promotes gender diversity in the judiciary.¹⁶ In 2003, the European Commission established a database to monitor the numbers of men and women in key decision-making positions covering politics and public administration, business, finance, media and the judiciary. Gender diversity in the EU judiciary has been a multi-level affair, actively pursued by female academics and legal practitioners through training programmes and organizations such as the Judicial Diversity Initiative and the Campaign for Gender Parity in International Representation (GQUAL).¹⁷

Progress in gender representation actually began prior to the establishment of a formal agenda, due to the increasing role of the highest court in the European Union, the CJEU, in gender equality law.¹⁸ The appearance of female judges in the CJEU took place alongside the development of the gender equality jurisprudence of the Court: cases such as *Defrenne* and the introduction of Directive 76/2000 developed gender equality throughout the EU. Since 1957, both female Advocates General¹⁹ and female judges have been appointed in the CJEU.²⁰ At present, there are eight female judges in the Court of Justice (CJ) and ten in the General Court (GC), making a total of eighteen women in the CJEU.

None of them are black. The EU does not have a broader agenda for judicial diversity, despite the fact that for over 20 years the EU has made progress on other aspects of discrimination, like gender, increasing the CJEU role in these areas. In 1997, a new Treaty provision was introduced prohibiting discrimination on the grounds of race, ethnicity, sexual orientation, religion, belief, disability, and age. Closely following this treaty, the EU enacted the Race Directive and the Equal Employment Directive. Since then, the CJEU has enjoyed jurisdiction over cases relating to discrimination on these grounds. This expanded mandate is an additional reason why a broader diversity agenda in the CJEU is necessary. Yet, the adoption of these legal responsibilities has not led to a discussion on expanding the judicial diversity agenda at the CJEU—the EU focus remains on gender, and there is no indication of action to improve diversity beyond this. To date, for example, there has never been a black Advocate General or judge at the CJEU.²¹

To argue for broader diversity at the CJEU is not to transform this court into a representative body. As US Supreme Court Justice Sonia Sotomayor has persuasively argued, the value of diversity in the judiciary lies in the contribution

¹⁶ *Id.*; see also COUNCIL OF EUROPE, BALANCED PARTICIPATION OF WOMEN AND MEN IN DECISION-MAKING: ANALYTICAL REPORT-2016 DATA 67–8 (2016), <https://rm.coe.int/analytical-report-data-2016-/1680751a3e> (noting that although a long-standing policy, data shows that most European Council countries have a poor gender balance in the High/ Supreme Courts. Italy and the UK have the lowest numbers at 7.1% and 8.3% respectively).

¹⁷ GQUAL, www.gqualcampaign.org (last visited Mar. 30, 2019).

¹⁸ See Sally J. Kenney, *Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice*, 10 FEMINIST LEGAL STUD. 257 (2002).

¹⁹ Simone Rozes (France, 1981–84), Christine Stix-Hackl (Austria, 2000–2006), Juliane Kokott (Germany, 2003–present), Eleanor Sharpston (UK, 2006–present) and Verica Trstenjak (Slovenia, 2006–present).

²⁰ Fidelma O' Kelly Macken (Ireland, 1999–2004), Ninon Colneric (Germany, 2000–2006), Pernilla Lindh (Sweden, CFI Judge 1995–2006; ECJ Judge October 2006–present), Rosario Silva de Lapuerta (Spain, October 2003–present), Camelia Toader (Romania, 2007–present). See Kenney, *supra* note 18, at 262–63 (discussing the appearance of female members at the Court); JOHN BELL, JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW (2006).

²¹ See https://curia.europa.eu/jcms/jcms/Jo2_6999/en/; see also Iyiola Solanke, *Diversity and Independence in the European Court of Justice*, 15 COLUM. J. EUR. L. 89, 114 (2009).

to judgecraft²² that personal knowledge and understanding of discrimination can bring. Alongside this input value, there are—as mentioned above—output values, such as the perception of fairness that a judiciary reflective of the society it serves can deliver.

Whereas diversity was originally designed to address discrimination and exclusion, in this paper diversity is presented as a tool to inoculate systems and structures from discrimination, just as a vaccine inoculates a person from the flu. In other words, diversity is approached as a tool not just to promote individual inclusion, but healthy public institutions. The suggestion of this paper is therefore that tackling homogeneity in the judiciary should be viewed as action to inoculate public institutions from the virus of discrimination. I advocate a broad judicial diversity agenda for Europe designed to promote justice and democracy in the EU.

The argument that I make in this paper is three-fold. First, I argue that judicial diversity in Europe should be pursued as a plank of anti-discrimination law. Second, I argue that discrimination needs to be understood as a virus, meriting preventive interventions. Third, building on this public health model of discrimination, I argue that the European Union needs a broad agenda for judicial diversity to create healthy public institutions—that promote justice and democracy—in the EU. The argument proceeds in five parts. In Part One, I set out the theory of discrimination as a virus and the public health approach to tackling it. In Part Two, I explain the practical, pedagogical and political challenges to diversity in the CJEU. In Part Three, I consider the arguments for judicial diversity. In Part Four, I present the Diversity Charters in Europe and the EU promotion of corporate social responsibility and consider the advantages and disadvantages of extending this approach to the judiciary. Specifically, I analyze if and to what extent there is a match between judicial diversity as a principle of constitutional law and as an element of corporate social responsibility. Finally, in Part Five, I highlight how a public health approach to judicial diversity can be independently implemented by the CJEU pending support of the EU and the member states.

I. DISCRIMINATION AS A VIRUS

It can be argued that the theory of diversity has its origins in anti-discrimination law and policy created in the US to tackle the entrenched discrimination that was the norm there before and after World War II. African-American war veterans were determined to enjoy at home the rights—civil, economic and political—for which they had risked their lives. In addition, the women who had taken up the jobs in manufacturing and industry left behind by these men were in no hurry to return to dull and unpaid labor in domestic enclaves. In the USA and—to a lesser extent, the UK—civil rights movements sprang up to fight for legal protection from the discrimination that kept black people and white women out of the workplace. These laws, it was hoped, would pierce homogenous white male workspaces to allow all able²³ workers to take

²² ‘Judgecraft’ can be understood as the tasks which are common to all judges such as assessing evidence, case management, decision and judgment writing, oral delivery of decisions, judicial ethics. See *The Judicial College and Training*, COURTS AND TRIBUNALS JUDICIARY, <https://www.judiciary.uk/about-the-judiciary/international/training-for-overseas-judges/>. (last visited Dec 3, 2019)

²³ Disability discrimination continued to be tolerated for a long time after the Civil Rights Act 1964 and Race Relations Acts in the UK were adopted.

up gainful employment regardless of race or gender. The ultimate aim of anti-discrimination law was to make public spaces, especially the workplace, more diverse. They would promote inclusion by preventing and punishing exclusionary treatment and impact. Diversity in the workplace was therefore an intended consequence of anti-discrimination law.

Since then, the goal and discourse of diversity has become embedded around the world in almost all sectors of society. Diversity is entrenched into institutional goals as equality through inclusion initiatives in all forms of governmental social policy. Networks exist within and across companies, sectors of the economy, countries and continents to promote and achieve diversity. While the idea of “remedial” measures linked to discrimination and affirmative action remain controversial, non-remedial action linked to diversity flourishes. It could be argued that diversity has become so widespread precisely because it has lost its moorings in anti-discrimination law.

However, there are problems with this: the focus on diversity is so intense that some now speak of “diverse humans.”²⁴ The diversity discourse has become so ubiquitous that, as Atiba Ellis argues, it may appear “meaningless and amorphous”: he describes it as being in the “midst of an existential crisis.”²⁵ The diversity agenda now promotes a hyper-individualism that ignores the anti-discrimination agenda, in particular the role of anti-discrimination law in structural change and the protection of democracy. In order for diversity to be a strong tool to change structures and support democracy, it therefore needs to be reconnected to anti-discrimination law and this broader goal of fixing discriminatory systems. A broad understanding of anti-discrimination law needs to be revived in diversity discourse and objectives.

The hyper-individualism of the diversity agenda can be removed if discrimination is understood as a virus. This idea has been advanced in a study of desegregation in American schools.²⁶ VG Morris and CL Morris describe the “discrimination virus” as similar to the flu:

The cold virus has been around for centuries. Scientists have not found a cure for it, and it keeps passing from person to person, year after year. Medical science knows only how to treat the symptoms. Just as the cold virus affects the body and the spirit, the ‘discrimination virus’ poisons the mind and the spirit. Like the cold virus, the discrimination virus cannot be seen with the naked eye, yet it is highly infectious and can pass from one person to another very rapidly, often without recipients being aware that they have been infected. However, the discrimination virus, based on skin colour, differs from the cold virus in one very important way: the cold virus may be active in an individual’s body for only one or two weeks per year, and maybe not even every year. But the discrimination virus has the potential for affecting the life of a victim every day for a lifetime. You can’t see the virus but victims can

²⁴ David D. Troutt, *Stop Calling Me Diverse*, OZY (Feb. 13, 2019), <https://www.ozy.com/immodest-proposal/stop-calling-me-diverse/92540>.

²⁵ Atiba Ellis, *When Diversity is at the Bottom of the List*, L. PROFESSORS BLOG NETWORK: RACE & L. PROF BLOG (March 6, 2019), https://lawprofessors.typepad.com/racelawprof/2019/03/when-diversity-is-at-the-bottom-of-the-list-1.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+RaceAndTheLaw+%28Race+and+the+Law+Prof+Blog%29.

²⁶ VIVIAN G. MORRIS & CURTIS L. MORRIS, *THE PRICE THEY PAID: DESEGREGATION IN AN AFRICAN AMERICAN COMMUNITY* 80 (2002).

recognise how it sounds, how it feels and they experience the results of the infection in their lives.²⁷

Although the authors focus on race discrimination, all forms of discrimination can be described as a virus. While there are limits to the analogy, there are many advantages to thinking about discrimination in this way. The main advantage is the emergence of broader forms and forums of action to tackle discrimination for, if discrimination is a virus, it can be tackled with the concepts and tools used in public health, where viruses are dealt with on a daily basis. A public health approach to discrimination is not as strange as it may sound—public health approaches are increasingly being used to tackle intractable social issues. For example, the World Health Organization (WHO) promotes a public health approach to social justice issues²⁸ and the Scottish government has adopted a public health approach to tackling knife crime.²⁹

Public health specialists speak of breaking the “chain of infection”³⁰ and therefore tackle viruses at multiple levels, looking at ways to prevent viral spread through society as well as to find treatments to both immunize healthy and cure afflicted individuals. Action is taken to heal the individual but also to impact the environment within which the virus appears in order to prevent a re-occurrence. At the social or general level, where necessary, practices need to be amended or traditions ceased, such as the burial practices that underlay the spread of Ebola in Sierra Leone.³¹ At the institutional/ organizational level, new norms may need to be introduced, such as the general use of hand sanitizer in hospitals to tackle MRSA. At the individual level, a dual approach is adopted: prevention (inoculation by vaccine) or cure (by medical treatment).

Coordinated actions are taken at all three levels: public health can be improved by social campaigns for avoiding viral infection; potential epidemics can be prevented at the outset if inoculation is introduced in advance. Where vaccination cannot be used, or is unsuccessful, medical treatments are used to heal those who contract the virus. All methods are equally legitimate, with their own advantages and disadvantages. Action to address discrimination can also be described using these terms: litigation would be the “cure” for infected individuals—to the extent that the harm of discrimination can be “cured”—and positive action intended to increase diversity and inclusivity would be ‘prevention’ or inoculation at the organizational/institutional level.

Litigation (“cure”) is the most common form of action to tackle discrimination; organizational positive action (“prevention”/inoculation) is still an exception to this norm. In the US especially, positive or affirmative action is seen as controversial, sometimes mistakenly described as “reverse discrimination.” Likewise it is rarely used in Europe, despite being lawful under both EU and national anti-discrimination laws.³² Since 2010, the UK Equality

²⁷ *Id.*

²⁸ *Violence and Injuries*, WORLD HEALTH ORGANIZATION: REGIONAL HEALTH OFFICE FOR EUROPE, <http://www.euro.who.int/en/health-topics/disease-prevention/violence-and-injuries/violence-and-injuries> (last visited Sept. 23, 2019).

²⁹ Paul O’Hare, *How Scotland Stemmed the Tide of Knife Crime*, BBC: SCOTLAND NEWS (Mar. 4, 2019), <https://www.bbc.com/news/uk-scotland-45572691>.

³⁰ *Break the Chain of Infection*, INFECTION PREVENTION AND YOU, <http://professionals.site.apic.org/protect-your-patients/break-the-chain-of-infection/> (last visited Sept. 23, 2019).

³¹ See e.g., Kathryn G. Curran et al., *Cluster of Ebola Virus Disease Linked to a Single Funeral—Moyamba District Sierra Leone, 2014*, 65 MORBIDITY & MORTALITY WKLY. REP. 202, 202–205 (2016).

³² Positive action is set out in both the EU Race Directive and the EU Employment Directive.

Act³³ has gone further to include a provision mandating a pro-active approach to anti-discrimination principles: the public sector equality duty (PSED)³⁴ places an obligation on public authorities to pay “due regard” that all policies—new or existing—do not undermine the goals of elimination of discrimination, advancement of equal opportunity, and the fostering of good relations between statutorily protected groups. This idea of “due regard” has been narrowly interpreted by the courts to limit the obligation.³⁵ Environmental action to change prevailing norms is tackled indirectly through organizational action.

What would a public health approach to discrimination look like? Overall, action would be multi-level and interlinked. First, there would be direct action at the environmental level: a public health approach to discrimination would start from the position that tackling discrimination is a social responsibility, not just the responsibility of those individuals who may be the targets of unlawful discrimination. Second, a public health approach to discrimination would raise organizational/institutional action (positive action) to a norm alongside litigation: it would no longer be an exception but an integral tool to tackle the virus of discrimination. Furthermore, under the public health approach, positive action would more properly be named “public action.” Finally, under this approach, diversity would be action for inoculation and treatment—the goal of diversity initiatives would be the long-term immunization of democracy and democratic bodies from discrimination rather than short-term hyper-individualism. Given the increased role of courts in society,³⁶ this applies as much to judicial as to other organizations.

II. CHALLENGES TO RACIAL DIVERSITY IN THE CJEU

There are three main challenges to racial diversity in the CJEU: these can be categorized as practical (the recruitment procedure), pedagogical (access to legal education and training) and political (the politics of race). The first challenge is in the method of nomination and recruitment set out in EU law. This procedure provides limited opportunity for the EU to pursue a judicial diversity agenda independently—it can only do so with the cooperation of the Member States. The challenge is compounded at the EU level because groups poorly represented in the national legal and judicial systems have no independent access to the CJEU.³⁷ The opaque procedures for selection and nomination thus contribute to replication in the CJEU of the racial and ethnic homogeneity in the national judiciaries.

³³ Equality Act 2010, c. 15 (UK).

³⁴ Equality Act 2010, c. 15, § 149 (UK).

³⁵ Claire Darwin, THE PUBLIC SECTOR EQUALITY DUTY: AN UPDATE AND OVERVIEW, https://www.matrixlaw.co.uk/wp-content/uploads/2016/03/27_01_2016_12_40_30_Public-Sector-Equality-Duty-Update-and-OverviewvP.pdf (last visited Jan. 26, 2016); THE PUBLIC SECTOR EQUALITY DUTY AND ‘DUE REGARD’, EQUALLY AND DIVERSITY FORUM, <https://www.equallyours.org.uk/wp-content/uploads/2015/06/DueRegardJune2015.pdf> (last visited June 2015).

³⁶ See generally CARLO GUARNIERI AND PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY (2002).

³⁷ Hilary Sommerlad, *What are You Doing Here? You Should be Working in a Hair Salon or Something: Outsider Status and Professional Socialization in the Solicitors’ Profession*, WEB J. CURRENT L. ISSUES (2008).

A. *Recruitment to the CJEU*

There are again³⁸ just two Courts within the European Union (EU) legal system: the Court of Justice (CJ),³⁹ whose twenty-eight judges have general jurisdiction, and the General Court (GC) of forty-five judges,⁴⁰ with a narrower mandate covering direct actions.⁴¹ How do persons become members of the CJEU? Although its decisions are supranational, the composition of the CJEU follows international law with each Member State having at least one judge in each court. The Treaty on the Functioning of the European Union (TFEU) says little⁴² about who should be nominated or how. It states that members of the CJEU are to be appointed by “common accord of the governments of the member states for a term of six years.” Beyond this, there is no formal uniform appointment procedure for Advocates General⁴³ or judges laid out in the TFEU. In fact, the treaty provides that Member States “retain unfettered discretion” over the appointment process.⁴⁴ In the absence of a central nomination or appointment process at the EU level, Member States decide autonomously how to identify and select their nominees. This work is primarily conducted by national politicians and civil servants. Selection historically took place within the “muffled atmosphere of ministerial cabinets and diplomatic meetings” in all Member States,⁴⁵ primarily determined by the political leadership. Unsurprisingly, national political interests and affiliations play a key role in the nominations. In most Member States, the selection process is determined by internal cultural concerns as well as presidential and/or ministerial preferences. For example, nominations from Belgium must take geographical, linguistic and political questions into account: if the Belgian judge is French-speaking, then the Advocate General (AG) must be a Dutch speaker. As Sally Kenney writes:

Each country seeks to balance a number of different constellations of interests and cleavages in choosing its members of the ECJ, such as party, language, region, legal system, and governmental department.⁴⁶

A few Member States have moved to open competition. In Austria, former AG Stix-Hackl was summoned by Parliament to an open hearing where she had to defend her qualifications and her nomination was subject to approval by both

³⁸ The Civil Service Tribunal (CST) created in 2005 and ceased to exist in 2016. It had jurisdiction to hear and determine at first instance civil service disputes between staff of the EU and the institutions, bodies, agencies and offices of the EU. Over its lifetime it delivered 1549 judgements. See www.curia.europa.eu.

³⁹ Subsequently also referred to as ‘the Court’.

⁴⁰ This will increase to 56 in 2019 (2 from each member state).

⁴¹ The jurisdiction of the General Court previously included appeals from the Civil Service Tribunal (2005 – 2016) which was the only tribunal to be created using Art. 225a EC introduced by the Treaty of Nice in 2000.

⁴² See Treaty on the Functioning of the European Union, art. 19, 253, and 254, July 29, 1992, 1992 O.J. (C 191) [hereinafter TFEU].

⁴³ NOREEN BURROWS AND ROSA GREAVES, *THE ADVOCATE GENERAL AND EC LAW* (2007).

⁴⁴ Ruth MacKenzie & Phillippe Sands, *Judicial Selection for International Courts: Towards Common Principles and Practices*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 221 (2006).

⁴⁵ RENAUD DEHOUSSE, *THE EUROPEAN COURT OF JUSTICE: THE POLITICS OF JUDICIAL INTEGRATION* 14 (1998).

⁴⁶ Curran, *supra* note 31, at 206.

Houses and the President.⁴⁷ In a similar vein, the UK government placed an advertisement in a daily newspaper (*The Telegraph*) when seeking a replacement for Francis Jacobs.⁴⁸ Denmark, Slovenia and the Netherlands have also used open competitions in the past.⁴⁹ The process in the EU is less transparent: consultation is minimal, informal and highly confidential. The key EU institution is COREPER—the Committee of Permanent Representatives—which is responsible for collating and circulating the names of nominees to all the Member States. While Member States may take some time to consider COREPER's proposals, they have never rejected a recommendation, lest their own nominee be subject to the same treatment.

Progression within the Court is a decision made by the Member States.⁵⁰ Governments decide who moves from one court to the other, and within the CJ from the role of AG to judge or vice versa. AGs have become judges (Mancini, Slynn, La Pergola, Da Cruz Vilaça⁵¹ and Gulmann) and judges from both the CJ (Tabucchi, Capotorti)⁵² and GC (Saggio) have become AGs. Although considered to be an internal reappointment, this is not determined by the CJEU: recalls and re-nominations are decided by the Member States. Recalls can come at any time—Simone Rozes, for example, left Luxembourg after three years instead of six. The members of the CJEU have no formal role power to determine who joins their ranks or for how long, and no authority to retain those they like or get rid of those they may dislike. The Court determines only the distribution of its administrative tasks, electing its president, the presidents of the chambers, and heads of administrative departments.

B. Legal Education and Training

Given these structural barriers, the lack of racial diversity in the CJEU is an inherited problem originating in the Member States. In the absence of an independent route to membership of the CJEU, the level of racial and ethnic diversity at the ECJ is determined by the homogeneity of national legal institutions and professions.⁵³ Access to legal education and training is therefore a key issue. The EU has no competence in this area—it is determined by each member state independently. With some exception in the UK, legal education in the Member States is racially homogenous with little attempt to include black citizens,⁵⁴ who continue to be seen as second-generation immigrants by most

⁴⁷ Sally J. Kenney, *The Members of the Court of Justice of the European Communities*, 5 COLUM. J. EUR. L. 101 (1998) (discussing the judiciary and Advocates General appointments to the ECJ).

⁴⁸ This procedure will also be used for judges in future.

⁴⁹ *The Judicial Appointment Council*, DANMARKS DOMSTOLE (Mar. 20, 2009), <http://www.domstol.dk/om/otherlanguages/english/thedanishjudicialsystem/judicialappointmentscouncil/Pages/default.aspx>.

⁵⁰ Requests for re-appointments from British members of international courts will not be subject to open competition but will be considered by ministers.

⁵¹ Da Cruz Vilaça was President of the General Court from 1989 to 1995.

⁵² Takis Tridimas, *The Role of the Advocate General in the Development of Community Law: Some Reflections*, COMMON MKT. L. REV. 1352 (1997).

⁵³ Cheryl Thomas, *Judicial Diversity in the United Kingdom and Other Jurisdictions* (2005), https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/judicial_diversity_in_the_uk_and_other_jurisdictions.pdf (last visited Dec. 3, 2019) (report commissioned for HM's Comm'n for Jud. Appointments.).

⁵⁴ Exact numbers of black EU citizens are unknown, as the majority of member states do not collect ethnic data. For a discussion and overview see, Patrick Simon, "Ethnic" Statistics and Data

white Europeans.⁵⁵ Black Europeans⁵⁶ are “outsiders,” belonging to groups that have “historically lacked power in society, or have traditionally been outside the realms of fashioning, teaching, and adjudicating the law.”⁵⁷

For example, in Germany, there are few students of color in law schools.⁵⁸ Dietrich Rueschemeyer illustrated that the recruitment of students to a legal career in Germany is narrowly restricted—it is not “open to anyone with intelligence and industry.” He found that German lawyers come predominantly from families of academics and civil servants, ensuring a similar set of attitudes and values.⁵⁹ As educational policy is the responsibility of 16 different states, national change may be difficult. A few steps have been taken to improve racial diversity in lower administrative courts by removing a nationality requirement,⁶⁰ but this criterion remains—lay magistrates must have German nationality.⁶¹ Likewise in Lithuania, bar membership is limited to citizens, a rule which effectively deters non-citizens from embarking upon legal studies.⁶² In addition, cultural practices—from clothing to social capital⁶³—and low expectations, which discourage minority youths,⁶⁴ act as exclusionary mechanisms.

Anita Böcker and Leny de Groot-van Leeuwen show that in many EU Member States, the legal profession is only slowly changing its racial and ethnic composition.⁶⁵ For example, in France, there are still few members of the French judiciary with a North African or Muslim background, an absence which raises

Protection in the Council of Europe Countries, EUR. COMM’N AGAINST RACISM & INTOLERANCE (2007). For a discussion of the current debate in France see, Daniel Sabbagh & Shanny Peer, *French Color Blindness in Perspective: The Controversy Over “Statistiques Ethniques,”* 26 FRENCH POL., CULTURE & SOC’Y 1 (2008).

⁵⁵ Iyiola Solanke, *For Full Integration, EU Must Tackle Race-based Discrimination*, ANN ARBOR NEWS at A16 (Apr. 19, 2007).

⁵⁶ Allison Blakely, *Black European Responses to the Election of Barack Obama*, in INVISIBLE VISIBLE MINORITY: CONFRONTING AFROPHOBIA AND ADVANCING EQUALITY FOR PEOPLE OF AFRICAN DESCENT AND BLACK EUROPEANS IN EUROPE 88 (2014).

⁵⁷ Natasha Bakht et al., *Counting Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education*, 45 OSGOODE HALL L.J. 667, 672 (2007); see also Margaret E. Montoya et al., *Unmasking the Self While Unbraiding Latina Stories and Legal Discourse*, 15 CHICANO-LATINO L. REV. 1 (1994).

⁵⁸ Iyiola Solanke, *Where are the Black Lawyers in Germany?*, in MYTHEN, MASKEN UND SUBJEKTE: KRITISCHE WEIßSEINFORSCHUNG IN DEUTSCHLAND 179 (Maureen M. Eggers et al. eds, 2005).

⁵⁹ DIETRICH RUESCHEMEYER, *LAWYERS AND THEIR SOCIETY: A COMPARATIVE STUDY OF THE LEGAL PROFESSION IN GERMANY AND IN THE UNITED STATES* 96–100 (1973).

⁶⁰ BELL, *supra* note 20, at 48; Anita Böcker & Leny de Groot-van Leeuwen, *Ethnic Minority Representation in the Judiciary: Diversity Among Judges in Old and New Countries of Immigration.*, JUD. Q., at 28–29 (2007).

⁶¹ Böcker & Groot-van Leeuwen, *supra* note 60, at 29.

⁶² SANFORD LEVINSON, *WRESTLING WITH DIVERSITY* 164 (2003).

⁶³ Sommerlad, *supra* note 37; Montoya et al., *supra* note 57.

⁶⁴ DR. MARIE-CLAUDE GERVAIS, *GOV’T EQUAL. OFFICE, ETHNIC MINORITY WOMEN: ROUTES TO POWER* (2008)

⁶⁵ Böcker & Groot-van Leeuwen, *supra* note 60. In the absence of ethnic data, the authors relied on eyewitnesses and the identification of “foreign” names in listings of lawyers and judges. They focused on names of Turkish origin in Germany and North-African and African names in France. Many minorities—for example, black Germans—are likely to have been invisible based on this methodology. On a list of 18,205 attorneys registered with the Paris Bar, the authors counted over 600 with both forenames and surnames that were non-European. North African names were most common, but they also found a few dozen names from the rest of Africa, China, and Vietnam, and a smaller number of Turkish, Persian, and Japanese names. The figure of 600 amounts to roughly 3% of all Paris attorneys, which represents half the proportion of persons of African origin in the total French population. Böcker and de Groot-van Leeuwen found this figure proportionate considering the level of education of the first North-African generation. However, these numbers are likely to include persons from former French colonies who went to France to qualify in law with the intention of returning home to practice. *Id.* at 18.

“serious questions about the judiciary’s ability to deal sensitively with issues touching matters of vital concern to the underrepresented groups.”⁶⁶ Aside from a small number of lawyers of Turkish heritage,⁶⁷ the German legal profession remains racially and ethnically homogenous.⁶⁸ Böcker and de Groot-van Leeuwen found that the number of German lawyers of Turkish origin was increasing, especially in cities with large communities such as Cologne and Duisberg,⁶⁹ but as in France, black judges were rare.⁷⁰ There are both structural and social reasons for this, including the stratified education system and state control over entrance to the profession.⁷¹ A list of the reasons for underrepresentation includes access, application and acceptance to law school; completion of training; and transition to the profession.⁷² The ground-breaking empirical work of Mathilde Cohen in France has also shown that resistant legal professionals use three strategies—linguistic, institutional and geographic—to dodge or downplay the importance of judicial diversity.⁷³

C. *The Politics of Race*

Racial diversity in the CJEU can therefore only improve when racial diversity improves in the Member States, not only in relation to the judiciary but in legal education in general. However, the commitment of Member States to achieve this objective is questionable, given the political refusal to discuss race and overarching reluctance to tackle racism. One reason why the majority of national judges in Europe are white is simply because racism is not recognized. Public discourse in most EU countries interprets discussion of race as perpetuation of racism, silencing the victims instead of assisting them. Countries

⁶⁶ Malleson & Russell, *supra* note 3, at 435. An example of a member of the French judiciary who did have a North-African background is the Justice Minister, Rachida Dati, who is of Moroccan and Algerian origin. She is now a MEP.

⁶⁷ For example, Seyran Ateş, the women’s rights Turkish-German lawyer.

⁶⁸ RUESCHEMEYER, *supra* note 59, at 58.

⁶⁹ Böcker & de Groot-van Leeuwen, *supra* note 60, at 18. A list of 4,820 names of attorneys from the Cologne Bar Association contained more than eighty Turkish and much fewer Arabic names (under 2%). Böcker and de Groot-van Leeuwen estimate that, in Germany as a whole, there are a few hundred ethnic Turkish advocates, which amounts to a few tenths of a percent of all advocates. This is a disproportionate percentage, given that the number of people of Turkish origin in the German population as a whole is just under 3%.

⁷⁰ On a list of names of the German judiciary, Böcker and de Groot-van Leeuwen found a total of seven Turkish names: five judges (three women and two men) and two public prosecutors (one woman and one man). Most of them were appointed after 1999, and two of them were still on probation. They work in Nordrhein-Westfalen (two judges), Baden-Württemberg (one judge and one prosecutor), Berlin (one judge), Brandenburg (one judge) and Bavaria (one prosecutor). See Böcker & de Groot-van Leeuwen, *supra* note 60.

⁷¹ SOLANKE, *supra* note 58.

⁷² See Böcker & de Groot-van Leeuwen, *supra* note 60, at 32 (identifying demand-side, supply-side and contextual factors); see also HELEN CARR & EDDIE TUNNAH, UK CTR. FOR LEGAL EDUC., EXAMINING THE EFFECTIVENESS OF THE UNDERGRADUATE LAW CURRICULUM IN PREPARING BLACK CARIBBEAN STUDENTS FOR ENTRY INTO THE LEGAL PROFESSION (Mar. 2004); MICHAEL SHINER, *Young, Gifted and Blocked! Entry to the Solicitors Profession*, in DISCRIMINATING LAWYERS 87 (Philip A. Thomas ed., 2000); Gita Wilder, Law School Admissions Council Research Report 02-01, *The Road to Law School and Beyond: Examining Challenges to Racial and Ethnic Diversity in the Legal Profession* (Aug. 2003); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 618 (2003); MICHAEL ZANDER, THE LAW-MAKING PROCESS 349 (2004).

⁷³ Mathilde Cohen, *Judicial Diversity in France: the Unspoken and the Unspeakable*, 43 L. & SOC. INQUIRY 1542 (2018).

such as France, Germany,⁷⁴ and Sweden⁷⁵ have debated removal of the word “race” from their laws as a means to tackling racism. The absence of black judges in the CJEU cannot be addressed without recognition of race in the EU Member States. Where race is not recognized as a meaningful socio-political category, it is impossible to discuss the issue.

Only in the UK is there unequivocal recognition of the salience of race as a meaningful socio-political category. Britain adopted its first Race Relations Act in 1965⁷⁶ and revised this statute many times before incorporating it into the Equality Act 2010.⁷⁷ Explicit official recognition of black British citizens was made in 1968 by Home Secretary Roy Jenkins as he defended the extension of legal protection from discrimination to the field of employment. Black people in Britain are protected from racial discrimination at work, as well as in a range of other areas such as access to goods and services. Ethnic data is regularly collected—statistics exist to show that law schools in Britain attract significant numbers of black students⁷⁸ but establishment within the profession, especially in the judiciary, continues to lag.⁷⁹ Recent data demonstrates that, as elsewhere, white women have been the main beneficiaries of action to improve judicial diversity: 28% of court judges and 45% of tribunal judges are female but only 7% of court and 10% of tribunal judges are black.

It is therefore unsurprising that advancement in racial diversity remains “one of the greatest challenges facing judiciaries today.”⁸⁰ As Deborah Goldberg writes, “levels of diversity are only as high as the appointer allows.”⁸¹ If racial discrimination is not a pressing issue in EU Member States, the CJEU will never have a black judge. If, in many countries in Europe the specific experiences of black women and men are invisible in law and politics,⁸² there can be no recognition that black judges—male and female—bring anything meaningful to the judicial chamber. Former British High Court judge Linda Dobbs⁸³ suggested the introduction of quotas to address the “woefully slow” change in the color

⁷⁴ Emilia Roig & Cengiz Barskanmaz, *La République gegen Rasse*, VERFASSUNGBLOG (May 22, 2013), <http://verfassungsblog.de/la-republique-against-race/>.

⁷⁵ Kayla Ruble, *Sweden Plans to Thwart Racism By Eliminating the Mention of Race From Its Laws*, VICE NEWS (Aug. 11, 2014), <https://news.vice.com/article/sweden-plans-to-thwart-racism-by-eliminating-the-mention-of-race-from-its-laws>.

⁷⁶ For a socio-legal history of anti-racial discrimination law in the UK, Germany and the EU, see IYIOLA SOLANKE, *MAKING ANTI-RACIAL DISCRIMINATION LAW: A COMPARATIVE HISTORY OF SOCIAL ACTION AND ANTI-RACIAL DISCRIMINATION LAW* (2009).

⁷⁷ Equality Act 2010, c.15 (UK).

⁷⁸ In 2004 just under 30% of first-year law students in England came from an ethnic minority background. This is three times as high as the proportion of minorities in the English population. See, Böcker & de Groot-van Leeuwen, *supra* note 60, at 14. *But see*, HIGHER EDUCATION FUNDING COUNCIL FOR ENGLAND, *HIGHER EDUCATION ADMISSIONS: ASSESSMENTS OF BIAS* (2005) (noting that in Britain ethnic minority students are less likely to get an offer to study law).

⁷⁹ Marcel Berlins, *Judicial Diversity Goes into Reverse*, GUARDIAN (May 19, 2008, 5:17 AM), <https://www.theguardian.com/uk/2008/may/19/law>; DEP’T OF CONSTITUTIONAL AFFAIRS, *CONSTITUTIONAL REFORM: A NEW WAY OF APPOINTING JUDGES* (Jul. 2003), <https://pureportal.strath.ac.uk/en/publications/constitutional-reform-a-new-way-of-appointing-judges-written-evid>.

⁸⁰ See *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER*, *supra* note 3.

⁸¹ Deborah Goldberg, Democracy Program Dir. Brennan Ctr. for Just., N.Y.U., Testimony at Fordham Law School Public Forum: A Lasting Blueprint for Judicial Diversity (Mar. 1 2007).

⁸² On the qualitative difference of intersectional discrimination see Iyiola Solanke, *Putting Race and Gender Together: A New Approach To Intersectionality*, 72(5) MOD. L. REV. 723, 723–49 (2009).

⁸³ Linda Dobbs, appointed in 2004, is the first Black woman High Court judge.

composition of the British judiciary⁸⁴—this method of public action would be useful across the continent.

III. DIVERSITY AND JUDGECRAFT

Why the effort to diversify the bench? How does racial diversity in the judiciary inoculate courts from discrimination and contribute to democracy? There are symbolic and substantive reasons to promote diversity. The importance of racial diversity in the legal profession—including the courts—is widely acknowledged as a component in the collective legitimacy of the legal and political system. Lawyers and judges play important roles in social, economic and political life, contributing to stability in private and public relations.⁸⁵

For both symbolic and substantive reasons, diversity matters. At a symbolic level, broader perspectives protect public trust in courts. In general, “citizens are more likely to respect and trust courts whose judiciaries include people like themselves. A lack of legitimacy could mean a reluctance to look to the courts for justice and a tendency to resolve differences in more disruptive ways.”⁸⁶ Homogenous judiciaries “raise serious questions about the judiciary’s ability to deal sensitively with issues touching matters of vital concern to the underrepresented groups.”⁸⁷ In a multicultural polity, the absence of diversity in the judiciary leads to a perception of bias which can undermine the trust held by historically disadvantaged groups in the legal justice system. The maintenance of the public perception of fairness is crucial to the effectiveness of any legal system.⁸⁸

Racial plurality therefore constitutes a vital feature of a legal system’s collective legitimacy, paramount to the maintenance of public confidence in it. When judicial thinking is not dominated by a single, privileged perspective, when it is actually impartial, faith in the courts can be expected to grow. Diversity enhances impartiality by providing a guarantee of continued fairness and sensitivity in decision-making. The creation of impartiality in court proceedings goes beyond the mere ruling. Justice needs to be seen to be done: the way in which people outside of the legal system perceive people inside the legal system is also an important part of the legal structure.⁸⁹ A lack of racial diversity amongst those playing key roles in the justice system can result in a deficit of confidence in the system as a whole.

Yet what does diversity bring to the work of judging itself? Judicial diversity arguably makes a difference both to the quality of judicial decision-making and the quality of justice in a democracy. As an input, diversity in the courtroom has the same value as diversity in the classroom: we promote ‘critical mass’ in education because diversity of expertise and interests increases the richness of knowledge available. Just as a classroom, a court is a “community of

⁸⁴ Frances Gibb, *High Court Judge Wants to Bring in Ethnic Quotas*, TIMES (Oct. 18 2007, 1:00 AM), <https://www.thetimes.co.uk/article/high-court-judge-wants-to-bring-in-ethnic-quotas-t98lrlq13wj7>.

⁸⁵ Richard O. Lempert, et al., *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 L. & SOC. INQUIRY 395 (2000).

⁸⁶ APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER, *supra* note 3, at 434.

⁸⁷ *See id.*

⁸⁸ Ming W. Chin, *Fairness or Bias?: A Symposium on Racial and Ethnic Composition and Attitudes in the Judiciary*, 4 ASIAN L.J. 181 (1997).

⁸⁹ Alex M. Johnson, *The Under-Representation of Minorities in the Legal Profession: A Critical Race Theorist’s Perspective*, 95 MICH. L. REV. 1005 (1997).

discourse...in which constructive discussion, questioning and criticism become the norm.” Just like a classroom, a court is a place where the environment is ‘seeded’ with ideas and concepts, some of which may take root in rulings and spill over into social relations. Judges may “reshape and deploy them, interpret and transform them... When the ideas persist over time, they stimulate further research and exploration.”⁹⁰

The presence of plural perspectives can improve the judiciary’s institutional capacity for openness to alternative views—not because judges of any given race will “represent” a viewpoint, but because of the likelihood that judges of a particular racial affinity will be better positioned to understand and take seriously views held within their own communities. Systems which know “the anguish of the silenced” and give them a voice are stronger than those that do not.⁹¹ This improves the quality of justice.

It is no longer controversial to suggest that personal values⁹² or judicial philosophy can influence judicial decision-making, and to assert that life experience can contribute to judging. Judges themselves accept that neutrality is a myth;⁹³ yet, this does not undermine judicial independence and impartiality. On the contrary, blind perpetuation of this myth in the age of openness⁹⁴ can have a negative impact on public confidence in the judiciary. It is inevitable that professional and life experiences affect how judges approach the problems coming before them: a greater range of perspectives allows for a “fuller and richer evolution of the law.”⁹⁵ Judicial dialogue, taking place within panels, tribunals and across courts, helps to disseminate alternative viewpoints more broadly. A consideration of a broad range of political-moral views can result in better resolutions for at least four reasons:

Openness to alternative legal resolutions prevents us from discarding meritorious resolutions out of hand, provides us with new information about the contours of the legal problem, and potentially produces new and better compromise answers. Most significantly, the collective experience of living with alternative moral solutions may be the surest way for us to agree on which solutions are the correct ones.⁹⁶

Judges themselves recognize the value of their autobiography to a court. Sandra Day O’Connor, the first female Justice on the US Supreme Court, spoke out in support of the inclusion of more women in the judiciary, especially in relation to economic development. She argued that:

⁹⁰ Gesa S. E. van den Broek, *Innovative Research-Based Approaches to Learning and Teaching* 79 (working paper) (on file with author).

⁹¹ SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 133 (2003) (discussing Thurgood Marshall: “His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice”).

⁹² Rachel J. Cahill-O’Callaghan, *The Influence of Personal Values on Legal Judgments*, 40 J. L. & SOC’Y 596 (2013).

⁹³ LORD NEUBERGER, *OPENING REMARKS AT THE SINGAPORE PANEL ON JUDICIAL ETHICS AND DILEMMAS ON THE BENCH: THE ROLE OF THE JUDGE: UMPIRE IN A CONTEST, SEEKER OF THE TRUTH OR SOMETHING IN BETWEEN?* (Aug. 19 2016).

⁹⁴ WARREN BENNIS, ET. AL., *TRANSPARENCY: HOW LEADERS CREATE A CULTURE OF CANDOR* (2008).

⁹⁵ Joy Milligan, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. REV. 1206, 1212 (2006).

⁹⁶ *Id.*

Women judges can play a critical function in strengthening the rule of law both through their contributions to an impartial judiciary as well as through their role in the implementation and enforcement of laws, particularly those that provide access to justice for women and girls. Without access to justice, investments in women and girls will likely fail to yield maximum impact or have lasting results. As a result, women judges are likely to emerge as important agents of poverty reduction, sustainable development, and global economic growth.

Both Justice O'Connor and Justice Ruth Bader Ginsburg have invoked the question of whether a wise old man and wise old woman would reach the same conclusion in select cases. Justice Sotomayor put these ideas on the experience of race and gender together when she said:

I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life... Whether born from experience or inherent physiological or cultural differences, our gender and national origins may and will make a difference in our judging.⁹⁷

She made these remarks whilst sharing reflections on her life experiences as a hispanic female judge and on how the increasing diversity on the federal bench "will have an effect on the development of the law and on judging." However, Justice Sotomayor recognized two crucial caveats: First, there is no uniform perspective shared by all women or members of a minority group; and second, when the Supreme Court delivered its historic desegregation and sex equality decisions, it was all white and all male.

IV. DIVERSITY CHARTERS AND CORPORATE SOCIAL RESPONSIBILITY

As the EU now has legal competence to tackle racial and ethnic discrimination, the CJEU can legitimately seek to create a culture at the Court and within the Member States that is as welcoming to racial and ethnic diversity as it is towards national and gender diversity, making black Europeans integral to European judicial identity.⁹⁸ While, for reasons presented above, this may be challenging, the EU and CJEU do not need to start from the beginning: there already exists broad diversity agenda in the private commercial sector of the EU that can serve as a model.⁹⁹

Since 2004, the EU has set up Diversity Charters¹⁰⁰ across the Member States to promote and support best practices in diversity management in

⁹⁷ Charlie Savage, *A Judge's View of Judging is on the Record*, N.Y. TIMES, (May 14, 2009) <http://www.nytimes.com/2009/05/15/us/15judge.html>.

⁹⁸ See ELLA EDMONSON BELL & STELLA NKOMO, *OUR SEPARATE WAYS—BLACK AND WHITE WOMEN AND THE STRUGGLE FOR PROFESSIONAL IDENTITY* (2001); David B. Wilkins, *Why Global Law Firms Should Care About Diversity: Five Lessons from the American Experience*, 2 EUR. J. L. REFORM 415, 436 (2000); Sumitra Vignaendra, Marcia Williams, & Jerry Garvey, *Hearing Black and Asian Voices—An Exploration of Identity*, in *DISCRIMINATING LAWYERS* 121 (Philip A. Thomas ed., 2000).

⁹⁹ *Third Issue of EU Platform of Diversity Charters Newsletter*, CSR EUROPE, <http://newsbundle.csreurope.org/EuropeanCommission/1km11z7hyyw> (last visited Sep. 26, 2019).

¹⁰⁰ Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, Luxembourg, Netherlands, Poland, Spain and Sweden.

multinational companies, small and medium-sized enterprises (SMEs) and public organizations. The Diversity Charters are founded on the principle of diversity as a core value for the EU. They are adopted voluntarily by businesses in the Member States working in collaboration with national ministries. To date, there are 21 Diversity Charters across the EU Member States¹⁰¹ brought together in a Platform of Diversity Charters.¹⁰² These charters are broader than gender diversity—they span the breadth of prohibitions listed in Article 19 of the TFEU. It is noteworthy that these Charters have proliferated in countries that have only recently adopted laws prohibiting discrimination beyond gender.

The legal basis for these diversity initiatives is extensive, and shows that diversity in the EU is pursued as a plank of anti-discrimination law.¹⁰³ It includes Articles 18 and 19 of the TFEU which establish non-discrimination as a fundamental principle in the primary law of the EU. This is reiterated in Title III of the Charter of Fundamental Rights of the EU.¹⁰⁴ It also includes the two EU directives on racial discrimination and equal treatment in employment. Directive 2000/43 prohibits direct and indirect discrimination based on racial or ethnic origin in employment, social protection and social security, social benefits, education, and access to and supply of goods and services.¹⁰⁵ Directive 2000/43 also requires each State to institute an independent high authority with a mandate to monitor and support victims of discrimination.¹⁰⁶ Directive 2000/78 prohibits, direct and indirect discrimination based on religion or belief, disability, age and sexual orientation in the areas of access to employment (including recruitment and promotion), access to vocational training, employment and working conditions (including dismissal and remuneration), membership of and involvement in a workers' or employer's organization.¹⁰⁷

Beyond these, the legal basis includes Directive 2004/113, implementing the principle of equal treatment between women and men in the access to and supply of goods and services (but not in the other areas covered by Directive 2000/43).¹⁰⁸ Directive 2006/54 regulates equal opportunities and equal treatment of men and women in matters of employment and occupation.¹⁰⁹ This Directive defines the concepts of direct and indirect discrimination, harassment and sexual harassment.¹¹⁰ In addition, it encourages employers to take preventive measures to combat sexual harassment, imposes stronger sanctions for discriminatory conduct, and plans on establishing—in Member States—organizations concerned with promoting equal treatment between men and women.¹¹¹ Directive 2010/41 concerns the application of the principle of equal treatment

¹⁰¹ *Diversity charters by EU country*, EUROPEAN COMMISSION, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/diversity-management/diversity-charters-eu-country_e (last visited Sept. 26, 2019).

¹⁰² *EU Platform of Diversity Charters*, EUROPEAN COMMISSION, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/diversity-management/eu-platform-diversity-charters_en#theplatformofdiversitycharters (last visited Sept. 26, 2019).

¹⁰³ PRACTICAL GUIDE TO LAUNCH AND IMPLEMENT A DIVERSITY CHARTER, EUROPEAN COMMISSION (2015).

¹⁰⁴ 2012 O.J. (C 326) Tit.3.

¹⁰⁵ Council Directive 2000/43, 2000 O.J. (L 180/22) (EC).

¹⁰⁶ *Id.*

¹⁰⁷ Council Directive 2000/78, 2000 O.J. (L 303) (EC).

¹⁰⁸ Council Directive 2004/113, 2004 O.J. (L 373/37) (EC).

¹⁰⁹ Council Directive 2006/54, 2006 O.J. (L 204/23) (EC).

¹¹⁰ *Id.* at art. 2.

¹¹¹ *Id.* at art. 1.

between men and women engaged in a self-employed occupation (including agriculture).¹¹²

Finally, most importantly, the legal basis includes Directive 2014/95: this requires companies with more than 500 employees (approximately 6,000 companies across the EU) to publish information relating to their diversity policy.¹¹³ This final Directive is significant because it is a plank in the EU strategy for Corporate Social Responsibility (CSR). It straddles both anti-discrimination and good corporate behavior. It encourages companies to respect human rights, reflect upon social and employee wellbeing, and reject corruption and bribery. This Directive is significant because the Diversity Charter website emphasizes a Business rationale, stating that:

The 'Business Case for Diversity' shows that diversity management—whereby employers recognize, value and include women and men of different ages, abilities, ethnic origin, religion or sexual orientation—makes good business sense. Therefore, managing diversity and promoting inclusion increasingly form part of the business world's *strategic agenda in response to a more diversified society, customer base, market structure and overall business environment*.¹¹⁴

Indeed, research by McKinsey concludes that companies committed to diverse leadership enjoy more long-term success—race and gender diverse companies outperform industry norms by as much as 35% and 15%, respectively.¹¹⁵

The EU Diversity Charters and CSR strategy do not exist in a vacuum. There is now a matrix of overlapping networks at the international, regional and local levels to promote diversity and inclusion. In 2000, the United Nations (UN) created the Global Compact, a set of ten principles designed to promote and entrench responsible behavior amongst companies.¹¹⁶ The UN Global Compact currently has more than 12,000 signatories in multiple sectors in over 160 countries in all parts of the world.¹¹⁷ Its purpose is to effect global change through global business, to “mobilize a global movement of sustainable companies and stakeholders to create the world we want...to end extreme poverty, fight inequality and tackle climate change.”¹¹⁸ Like the EU Diversity Charters, the Compact encourages companies to operate responsibly in relation to human rights, labor, the environment, and corruption. The ten principles place obligations upon signatories to act in certain ways. The most relevant for the purposes of this paper is Principle 6, on the elimination of discrimination in

¹¹² Council Directive 2010/41, 2010 O.J. (L 180/1) (EU).

¹¹³ Council Directive 2014/95, 2014 O.J. (L 330/1) (EU).

¹¹⁴ *Id.*

¹¹⁵ Ruchika Tulshyan, *Racially Diverse Companies Outperform Industry Norms by 35%*, FORBES (Jan. 30, 2015, 12:51PM), <https://www.forbes.com/sites/ruchikatulshyan/2015/01/30/racially-diverse-companies-outperform-industry-norms-by-30/>.

¹¹⁶ *The Ten Principles of the UN Global Compact*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited Sept. 26, 2019).

¹¹⁷ *Id.*

¹¹⁸ *Your 2018 Engagement in the UN Global Compact*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/participation/tiers> (last visited Sept. 26, 2019).

respect of employment and occupation.¹¹⁹ Multinational corporations sign multiple initiatives: French company L’Oreal, for example, signed the UN Global Compact in 2003 and created one of the first EU Diversity Charters in 2004.¹²⁰ Companies are encouraged to develop “manifestos” for integration and are supported in these aims by a national and international network. Twenty-six countries in Europe, including many of the EU Member States, have created a network based on the UN Global Compact.

It is interesting to note that countries which reject the concept of race participate in these broad corporate diversity schemes. As mentioned above, France was the first country to introduce a Diversity Charter. In 2005 and 2006, respectively, Belgium¹²¹ and Germany¹²² followed suit. Spain¹²³ and Italy¹²⁴ joined in 2009, and Austria¹²⁵ and Sweden¹²⁶ in 2010. In 2012, five countries adopted a Charter: Poland¹²⁷, Luxembourg¹²⁸, Finland¹²⁹, Ireland¹³⁰, and

¹¹⁹ *The Ten Principles of the UN Global Compact*, U.N. GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited Sept. 26, 2019).

¹²⁰ L’ORÉAL, 2016 REGISTRATION DOCUMENT: ANNUAL FINANCIAL REPORT 167 (2016).

¹²¹ *Belgian Diversity Charter*, EUROPEAN COMMISSION, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/diversity-management/diversity-charters-eu-country/belgian-diversity-charter_en (last visited Sept. 26, 2019).

¹²² *German Diversity Charter*, EUROPEAN COMMISSION, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/diversity-management/diversity-charters-eu-country/german-diversity-charter_en (last visited Sept. 26, 2019).

¹²³ *Spanish Diversity Charter*, EUROPEAN COMMISSION, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/diversity-management/diversity-charters-eu-country/spanish-diversity-charter_en (last visited Sept. 26, 2019).

¹²⁴ *Italian Diversity Charter*, EUROPEAN COMMISSION, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/diversity-management/diversity-charters-eu-country/italian-diversity-charter_en (last visited Sept. 26, 2019).

¹²⁵ *Austrian Diversity Charter*, EUROPEAN COMMISSION, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/diversity-management/diversity-charters-eu-country/austrian-diversity-charter_en (last visited Sept. 26, 2019).

¹²⁶ *Swedish Diversity Charter*, EUROPEAN COMMISSION, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/diversity-management/diversity-charters-eu-country/swedish-diversity-charter_en (last visited Mar. 30, 2019).

¹²⁷ *Polish Diversity Charter*, EUROPEAN COMMISSION, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/diversity-management/diversity-charters-eu-country/polish-diversity-charter_en (last visited Mar. 30, 2019).

¹²⁸ *Luxembourg Diversity Charter*, EUROPEAN COMMISSION, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/diversity-management/diversity-charters-eu-country/luxembourg-diversity-charter_en (last visited Mar. 30, 2019).

¹²⁹ *Finnish Diversity Charter*, EUROPEAN COMMISSION, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/diversity-management/diversity-charters-eu-country/finnish-diversity-charter_en (last visited Mar. 30, 2019).

¹³⁰ *Irish Diversity Charter*, EUROPEAN COMMISSION, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/diversity-management/diversity-charters-eu-country/irish-diversity-charter_en (last visited Mar. 30, 2019).

Estonia.¹³¹ Denmark¹³² and the Czech Republic¹³³ launched Diversity Charters in 2014. The target groups of the Charters vary by country: gender equality is the most common focus (48%), followed by age (46% for senior; 45% for young people), disability (44%), and race and ethnicity (28%). Sexual orientation (16%) and gender identity (15%) are given less attention.¹³⁴

DIVERSITY AGENDAS	Judicial diversity	Corporate Social Responsibility
EU	gender	Art 19 TFEU – race, ethnicity, sexual orientation, age, disability, religion and belief
UK	Gender, race, disability, religion, sexual orientation	No EU Diversity Charter
Spain ¹³⁵	gender	Gender, disability, race, religion
Austria	gender	Gender, race, age, disability
France	gender	Age, disability, gender
Germany	gender	Age, race, gender, disability, sexual orientation
Ireland	gender	Gender, disability, sexual orientation, race
Italy	gender	Gender, disability, age, race
Luxembourg	gender	gender, age, race, disability, sexual orientation, gender identity
Sweden	gender	Gender, race, disability, sexual orientation and gender identity, age
Poland	gender	Gender, race, disability, age
Estonia	gender	Gender, age, race, disability, sexual orientation and gender identity
Finland	gender	Disability, age, gender, religion, race

As can be seen, diversity measures based on awareness of corporate social responsibility have led to a broad institutional anchoring of the promotion of diversity beyond gender. For example, Austria has created a Diversity

¹³¹ *Estonian Diversity Charter*, EUROPEAN COMMISSION, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/diversity-management/diversity-charters-eu-country/estonian-diversity-charter_en (last visited Mar. 30, 2019).

¹³² *Danish Diversity Charter*, EUROPEAN COMMISSION, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/diversity-management/diversity-charters-eu-country/danish-diversity-charter_en (last visited Mar. 30, 2019).

¹³³ *Czech Republic Diversity Charter*, EUROPEAN COMMISSION, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/diversity-management/diversity-charters-eu-country/czech-diversity-charter_en (last visited Mar. 30, 2019).

¹³⁴ EUROPEAN COMMISSION, OVERVIEW OF DIVERSITY MANAGEMENT IMPLEMENTATION AND IMPACT AMONGST DIVERSITY CHARTER SIGNATORIES IN THE EUROPEAN UNION (2014).

¹³⁵ See statistical data at <http://www.poderjudicial.es/cgpj/es/Temas/Igualdad-de-Genero/Estadisticas-e-informes/Estadisticas/>.

Department in the Vienna Economic Chamber¹³⁶ which in 2015 hosted a “night of diversity.”¹³⁷ These initiatives also encourage companies to take a firmer stance in relation to discrimination abroad. For example, it was not only Bruce Springsteen that reacted negatively to the decision in North Carolina to revoke protection from discrimination for LGBT people;¹³⁸ Deutsche bank also declared that it would cancel its plans to create 250 new jobs at its plant in Cary, North Carolina.¹³⁹

All of these Charters are voluntary and have different levels of resources and security of funding—the estimated annual cost of a Diversity Charter ranges from EUR 80,000 to EUR 300,000. However, the existence of this diversity agenda at the EU level and the charters at the national level means that the battle is half won for a broader judicial diversity agenda: the rationale for already exists, albeit on a narrow corporate basis. Businesses are clearly doing much better than the legal profession: corporations are ahead in diversifying their professional and technological workforces.

The challenge is therefore to transfer the existing diversity rationale from commercial interests to law. This may not be difficult. First, the Diversity Charters and judicial diversity share a goal—to tackle and combat discrimination. Second, some government ministries already support Diversity Charters across the EU. These ministries include Labor; Social Affairs/policies, Family; Employment; Economy; Interior; Integration, Immigration, Asylum, Reception and Support of Foreign Persons; Equal Opportunity; and Equality between territories.¹⁴⁰ There is no reason why this list should not include ministries of justice. Noticeably, the French Charter *does* include public institutions (however, it excludes race as a focus).¹⁴¹ Finally, law firms and barrister chambers are indeed also businesses, and courts are public organizations.

In addition, there is also a business case for judicial diversity. In the UK, the Bar Standards Board (BSB) cites a business rationale, arguing that “[a] profession which is representative of the people it serves is more likely to meet the diverse needs of clients, thereby working more effectively and creating a positive public image...organizations free from discrimination can work more

¹³⁶ *Realising the Business Benefits with European Diversity Charters: Managing Diversity at Work* (2001), https://www.wko.at/site/Charta-der-Vielfalt/charta-der-vielfalt/eu-diversity-charters-platform/111212_WEB_Broschuere_21x21_cs1_GS.pdf.

¹³⁷ *Austria: Night of Diversity*, EU PLATFORM OF DIVERSITY CHARTER NEWSLETTERS (May 2015), <http://newsbundle.csreurope.org/EuropeanCommission/pl6o083gndy1aoliwdjzx4?a=1&p=48785512&t=28403196>.

¹³⁸ House Bill 2 required persons to use public facilities corresponding to their birth gender. See 2016 N.C. Sess. Laws 3. It was subsequently repealed. See Jason Hanna, Madison Park & Elliott McLaughlin, *North Carolina Repeals 'Bathroom Bill'*, CNN (Mar. 31, 2017), <https://edition.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html>.

¹³⁹ *Deutsche Bank is Latest Business to Protest North Carolina Anti-LGBT Law*, GUARDIAN (Apr. 12, 2016, 12:12 EDT), <http://www.theguardian.com/business/2016/apr/12/deutsche-bank-protest-north-carolina-anti-lgbt-law>.

¹⁴⁰ PRACTICAL GUIDE TO LAUNCH AND IMPLEMENT A DIVERSITY CHARTER, EUROPEAN COMMISSION 32 (2014) available at http://ec.europa.eu/justice/discrimination/files/emerging_charter_guide_en.pdf.

¹⁴¹ See Charte de la Diversité, <https://www.charte-diversite.com/> (last visited Dec. 3, 2019).

efficiently.”¹⁴² Likewise, the American Bar Association (ABA) argues that business is better when legal institutions reflect the diversity of our world:

The rapid movement of people, financial instruments, culture, technology, and political change across international borders places new expectations on the ability of lawyers, law firms, corporations, and legal institutions to respond and adapt to the multinational and cross-cultural dimensions of legal issues [...]It makes good business sense to hire lawyers who reflect the diversity of citizens, clients, and customers from around the globe. Indeed, corporate clients increasingly require lawyer diversity and will take their business elsewhere if it is not provided.¹⁴³

Just as an independent judiciary attracts international clients, a judiciary that reflects or represents the people it serves will be attractive to international clients and draw them to a jurisdiction.¹⁴⁴

The judicial diversity and CSR agendas could therefore be joined together at the EU level, and the CSR Diversity Agenda extended to legal and judicial bodies. However, caution may be required before extending the Diversity Charters to the judiciary. One key question to ask is whether corporate social responsibility principles are compatible with constitutional law principles. While law is one of the four core principles of CSR,¹⁴⁵ how similar in substance are the ideas of diversity in courts and commerce? Does the diversity principle in commerce resemble that in the rule of law—is the constitutional principle in public law being applied to private organizations or is it something else? Will judicial diversity become marketized? If so, the short-term benefits will be outweighed by the long-term negative effects of a commercialized understanding of diversity in the rule of law.

The rationale for judicial diversity goes beyond business. Given the role of law and lawyers in society, one important additional rationale is leadership. The leadership rationale recognizes the role played by individuals with a legal training in wider society. Such individuals often possess the communication and interpersonal skills, and the social networks to rise into civic leadership positions, both in and out of politics. The ABA describes lawyers as being “in the vanguard” of democratization struggles and protection of the rule of law in the history of the US.¹⁴⁶ In addition, there are rationales linked to social justice. As put by Lord Neuberger, former President of the UK Supreme Court:

¹⁴² BAR STANDARDS BOARD, BSB EQUALITY STRATEGY 2013-2016 (2013), available at https://www.barstandardsboard.org.uk/media/1462454/bsb_equality_strategy_2013-16.pdf.

¹⁴³ A diverse workforce within legal and judicial offices exhibits different perspectives, life experiences, linguistic and cultural skills, and knowledge about international markets, legal regimes, different geographies, and current events. In many instances, corporations are ahead of the legal profession in diversifying their professional and technological workforces.

¹⁴⁴ Peter Lodder, *Bar Council: Inaugural Address*, THE GENERAL COUNCIL OF THE BAR (Dec. 2, 2010), https://www.barcouncil.org.uk/media/100022/101202_peter_lodder_qc_inaugural_bar_council_address_2010.pdf.

¹⁴⁵ According to Carroll, the four core elements of CSR are economic, legal, ethical, and discretionary or philanthropic. See Jamie Snider, Ronald Paul Hill, & Diane Martin, *Corporate Social Responsibility in the 21st Century: A View from the World's Most Successful Firms*, 48 J. BUS. ETHICS 175, 176 (2003).

¹⁴⁶ American Bar Association Presidential Diversity Initiative, *Diversity in the Legal Profession: The Next Steps* 9 (2011) (describing lawyers as being “in the vanguard” of democratisation struggles and protection of the rule of law in the history of the USA).

Diversity is important for two reasons. It is simply unjust if people have fewer opportunities in life because of, for instance, gender, sexuality, ethnicity, socio-economic background or disability. This is all the more so in a profession dedicated to securing justice. Secondly, if judicial positions are only open to a small proportion of the population, it is statistically inevitable that we will not be appointing the best and the brightest, which is against our national interest.

Finally, and perhaps most importantly, there is the democracy rationale: judicial diversity improves the quality of democracy. There is value in sustaining a legal system with broad participation by all citizens. As highlighted by the BSB,¹⁴⁷ diversity remains important for continued confidence in the legal system and the judiciary. A diverse bar and bench creates greater trust in the mechanisms of government and the rule of law, in particular judicial independence and impartiality. Furthermore, the legal profession thus plays a central role in legitimizing, facilitating, and instantiating the evolution and improvement of democracy and society in general. In the UK, around 20% of current MPs have a legal background. Justice Sandra Day O'Connor recognized this role of legal education when she noted in *Grutter v. Bollinger* that law schools serve as the training ground for such leadership and, therefore, access to the profession must be broadly inclusive.¹⁴⁸

V. A MULTI-LEVEL, MULTI-INSTITUTIONAL DIVERSITY AGENDA FOR THE EU

A diversity agenda for the CJEU will serve the interests of society by strengthening democracy and the health of public institutions—promoting fairness, wellbeing and the interests of the citizens by ensuring that their courts reflect society. A diversity agenda for the EU is therefore not just about the judiciary, and also cannot be limited to the EU. A broad, linked agenda is required, as the problem is multilevel and multi-institutional. The issue is not merely that there are too few judges in the CJEU who are neither white nor male; but also, that there is too few black judges in the Member States. It is also problematic that there are too few legal clerks, practicing lawyers, law professors and law firm partners that are black and female. Thus, the EU judicial diversity agenda cannot focus on the EU or the judiciary alone—any action plan must have a broader remit that includes environmental, organizational, institutional and individual interventions. As stated by Lord Neuberger:

The duty on the judiciary to improve diversity also applies to the legal profession. Lawyers occupy a special place in society, but that carries with it responsibilities as well as rights. The legal profession must do more to improve diversity. More broadly, if we really want to increase

¹⁴⁷ BAR STANDARDS BOARD, RISK OUTLOOK (April 2016), https://www.barstandardsboard.org.uk/media/1751659/bsb_risk_outlook_68pp_5.4.16_for_web.pdf.

¹⁴⁸ *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (demonstrating that schools serve as a training ground for leadership).

diversity, the problem has to be tackled throughout society, in our universities, schools and at home.¹⁴⁹

The CJEU can initiate the move towards a broader diversity agenda by incorporating a diversity declaration into its statute. A model for this could be Goal III of the ABA, which emphasizes "the full and equal participation in the legal profession by minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities."¹⁵⁰ Since 1999, the ABA has also produced the Goal III Report,¹⁵¹ which measures how well the Association has performed against this goal. It includes a survey of members asking questions such as how much was spent on diversity initiatives, policies and projects implemented, and their impact. Adopting such a declaration would be a good start for the judicial diversity agenda in the EU. The Declaration would incorporate a core number of commitments, which the CJEU would then seek to promote within the Member State judiciaries such as: reflecting the diversity of society; fostering an inclusive judiciary free of prejudice; promoting mutual trust, equal treatment and non-discrimination; acknowledging and valorizing people's differences and particularities; and of course, diversity to enhance democracy.

Ownership and leadership of such a Declaration is equally important, if it is to have any impact. In Spain, the responsibility for the judicial gender strategy is described as "priority activity" for the Commission for Equality.¹⁵² In Britain, leadership is provided not only by the Judicial Appointments Commission but also by senior members of the judiciary, professional and regulatory bodies. For example, the Crime and Courts Act of 2013 places a statutory duty upon the Lord Chancellor and Lord Chief Justice to encourage judicial diversity.¹⁵³ The BSB also has a duty to promote diversity. It must comply with Regulatory Objective 6 in the Legal Services Act of 2007, which requires the encouragement of a diverse legal profession.¹⁵⁴ Clear leadership responsibilities are instrumental to the success of any agenda for change. The President of the CJEU should therefore "own" the Diversity Declaration and devote time and resources to raising awareness, developing action programs and communicating initiatives. The President could work with the President of the Commission and Council of Ministers in a Joint Working Group on Diversity in the CJEU to promote and pursue the objectives set out in the Declaration.

¹⁴⁹ Terri Judd, *Legal Profession Must do More to Improve Ethnic Diversity, says Supreme Court President*, INDEPENDENT (June 18, 2013, 18:00), <http://www.independent.co.uk/news/uk/home-news/legal-profession-must-do-more-to-improve-ethnic-diversity-says-supreme-court-president-8664006.html>.

¹⁵⁰ AMERICAN BAR ASSOCIATION, ABA MISSION AND GOALS (2018), https://www.americanbar.org/about_the_aba/aba-mission-goals/ (Goal III of the ABA).

¹⁵¹ AMERICAN BAR ASSOCIATION COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION, GOAL III REPORT: THE STATE OF RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION (2015), http://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_diversity/2015GoalIII.athcheckdam.pdf.

¹⁵² In Spain, the responsibility for the judicial gender strategy is described as "priority activity" for the Commission for Equality

¹⁵³ IMPROVING JUDICIAL DIVERSITY, JUDICIAL DIVERSITY TASKFORCE 9 (Sept. 2013), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/244013/judicial-diversity-taskforce-annual-report-2013.pdf.

¹⁵⁴ Legal Services Act, (2007) c. 29 (Eng.), § 1(1)(f).

The Joint Working Group on Diversity in the EU Judiciary could conduct research and organize necessary initiatives and outreach events at the EU, working together with other relevant EU agencies such as the EU Diversity Charter. Measures could, for example, focus on helping black lawyers develop a cross-national “Royal Jelly”—a network of contacts, work experience and professional exposure that would place them in a position to apply for jobs at the Court. Additionally, shadowing schemes could be established to provide opportunities to observe how a member of the CJEU conducts her work. Schemes that have been found to work in the Member States could be adapted and improved for use at the EU level. Beyond this, the CJEU should seek to establish links and bridges with organizations that could help it nurture a new generation of black legal professionals in the EU. The Diversity and Community Relations Judges¹⁵⁵ in the UK could be a model for this.

It would be preferable for action to be embedded in a clear long-term strategy, but just as with gender diversity, progress can develop alongside the jurisprudence before the establishment of a formal agenda. Until the EU and the Member States agree on action, the members of the CJEU can make efforts to tackle homogeneity in areas where they do make decisions, such as in relation to staffing their Cabinets. In addition to electing the Court’s President and the Presidents of the Chambers, CJEU members retain autonomy in the hiring of legal secretaries or *référéndaires*, administrative secretaries, and junior and senior administrators.¹⁵⁶ Initiatives taken by the members to promote diversity in their ranks could include mentoring schemes. The Council on Legal Educational Opportunity (CLEO) in the US could be a useful model.¹⁵⁷ CLEO has helped more than 8000 students from marginalized and low-income groups join the legal profession. CLEO alumni are represented in private law firms, law schools, federal and state judiciaries, and legislatures.¹⁵⁸

As stated by Lord Neuberger, diversity must be mainstreamed and pursued by schools and universities too. Even in the absence of leadership from the EU, the CJEU can act as a force for good at the national level, encouraging law schools to expand their idea of who can enter and succeed in the legal profession. As high ranking members of the judiciary in their home country, the members of the CJEU could promote diversity activities in the Member States to be organized with professional associations or legal firms. Working in partnership will not only provide for mutual support but also place “productive pressure”¹⁵⁹ on national law firms and legal organizations to focus on diversity. The CJEU also has good links with law schools in the Member States. If national law schools have not embraced and pursued a diversity agenda, the CJEU can work

¹⁵⁵ See *Diversity and Community Relations Judges (DCRJ)s*, COURTS AND TRIBUNALS JUDICIARY, <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/list-of-members-of-the-judiciary/diversity-and-community-relations-judges-list/> (last visited Nov. 23, 2019).

¹⁵⁶ Senior administrative positions such as Head of Translation Service or Registrar, tend to go to former *référéndaires*: Emmanuel Colon, now Registrar of the Court of First Instance, was *référéndaire* at the CFI for President Saggio from 1996–1998 and President Vesterdorf from 1998–2002; Roger Grass, Registrar at the Court of Justice since February 1994 was formerly a *référéndaire* to the President of the ECJ. See generally *Court of Justice*, Court of Justice of the European Union, https://curia.europa.eu/jcms/jcms/Jo2_7024/en/ (last visited Dec. 3, 2019).

¹⁵⁷ The Court could establish a network of law schools and firms along the lines of the Council on Legal Education Opportunity (CLEO). For more information, see COUNCIL ON LEGAL EDUCATION OPPORTUNITY, INC.

¹⁵⁸ AMERICAN BAR ASSOCIATION COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION *supra* note 151, at 23.

¹⁵⁹ AMERICAN BAR ASSOCIATION, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS, at 15 (2010).

in partnership with these schools to develop the diversity agenda. Just as they visit American law schools, CJEU Judges and Advocates General could take EU law into local schools in Europe, simultaneously encouraging these schools to promote diversity. There is nothing to prevent the CJEU from establishing its own legal educational project in Luxembourg to promote and pursue its diversity agenda. It could of course develop this in conjunction with law schools in the Member States.

The CJEU could also work with secondary or high schools in the Member States. Working in partnership with them, the CJEU could manage a monitor a legal educational pipeline to a career in the EU judiciary. Pipeline programs are common in the engineering profession. These long-term initiatives support and encourage young learners in topics such as math and science that are crucial to the engineering profession. A legal pipeline would therefore focus on language, logic and debating skills. One way to promote and encourage excellence in these topics would be for the CJEU to initiate and support, in partnership with national schools, a regular debating competition. Working with schools makes sense as these institutions will provide the judges of tomorrow in the EU.

CONCLUSION

The relationship between judges and the judged is changed: judges are now called upon to uphold standards of “new public management”¹⁶⁰ typically demanded of all other public institutions. Judicial independence is now premised upon values such as transparency, accountability,¹⁶¹ efficiency¹⁶² and diversity rather than unquestioned deference. We expect open justice, responsible and timely decision-making as well as a bench reflective of the society affected by its decisions. Judges themselves are aware of the new conditions: as Lord Steyn stated, “what the public was content to accept many years ago is not necessarily acceptable in the world of today ... the indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago.”¹⁶³

The ABA argues that a diverse court is “more just, productive and intelligent because diversity, both cognitive and cultural, often leads to better questions, analyses, solutions, and processes.”¹⁶⁴ A broad range of views can lead to better answers for our complex world because it keeps us from discarding meritorious resolutions out of hand, provides us with new information about the contours of the legal problem, and potentially produces new and better solutions.¹⁶⁵

People have confidence in institutions that reflect the world. Beyond, this by creating a “critical mass” in our courts, we democratize the judiciary without politicizing it. Diversity in judicial institutions is not a question of representation of popular political *interests*, but presentation of marginalized legitimate *ideas*. The greater the diversity of ideas that inform decision-making in courts, the stronger the reasoning; the stronger the reasoning, the more independent and

¹⁶⁰ Elaine Mak, *supra* note 12, at 726.

¹⁶¹ Andrew Le Sueur, *Developing Mechanisms for Judicial Accountability in the UK*, LEGAL STUD. 73, 73 (2004); H. O. YUSUF, TRANSITIONAL JUSTICE, JUDICIAL ACCOUNTABILITY AND THE RULE OF LAW (Routledge, 2010); and DANIELA PIANA, JUDICIAL ACCOUNTABILITIES IN NEW EUROPE: FROM RULE OF LAW TO QUALITY OF JUSTICE (Ashgate, 2010).

¹⁶² Hence the doubling of the number of judges in the General Court.

¹⁶³ *Lawal v. Northern Spirit Ltd* [2004] UKHL 35.

¹⁶⁴ AMERICAN BAR ASSOCIATION COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION, *supra* note 151, at 5.

¹⁶⁵ Milligan, *supra* note 95, at 1209.

comprehensible the decision. In raising the quality of reasoning, diversity supports judicial independence and strengthens democracy. Diversity in the CJEU is therefore to be pursued because it promotes healthy public institutions and improves democracy in the EU.



WHY WOMEN? JUDGING TRANSNATIONAL COURTS AND TRIBUNALS

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“Running in the streets wearing silly pink hats does not make a woman a woman.”¹

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¹ Meghna Chakrabarti, *Pennsylvania's Adventures in Redistricting and How They Could Impact Midterms*, NPR PODCAST: ON POINT (Oct. 8, 2018), <https://www.wbur.org/onpoint/2018/10/08/pennsylvania-gerrymandering-redistricting-midterms> (quoting Pennsylvania voter and President Trump supporter Dorothy Niklos).

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INTRODUCTION

At the 2019 Association of American Law Schools (“AALS”) Annual Meeting, the panel on Judicial Diversity in Transnational Courts asked, “Why do so few women serve on transnational courts and tribunals?”¹ That line of feminist inquiry has a long tradition. As Catharine MacKinnon observed, “Feminists have this nasty habit of counting bodies and refusing not to notice their gender.”² Underlying the panel’s organizing question—and indeed much of feminist jurisprudence—is the belief that the presence (or absence) of women has consequences in almost any context. Based on personal and professional experience, we share this foundational assumption, though we note that the research on whether women judges make a difference in outcome is equivocal.³

Despite our understanding of the intuitive power of asking for more women, we do not pursue the panel’s original inquiry. Instead, this essay takes up a second-order question: *why ask* why so few women serve on transnational courts and tribunals? If the reason for posing this question is to strengthen these tribunals in their work of recognizing and remedying injustice, the question limits the range of potential solutions. This perspective is informed by our experience with the Feminist Judgments Projects, an international collaboration of feminist scholars and lawyers who use feminist reasoning and methods to rewrite judicial opinions.⁴ The feminist

² Judicial Diversity in Transnational Courts Session at the 2019 Association of American Law Schools Annual Meeting (Jan. 5, 2019), <https://tinyurl.com/yxzb4arr> (the session description in the 2019 AALS Annual Meeting Program asks “Why do so few women and people of color serve on transnational courts and tribunals?”). This essay focuses in particular on the “woman” part of the question, but the analysis merits extension to a paucity of people of color on the bench, as well. *See infra* Part Conclusion.

³ CATHARINE A. MACKINNON, *On Difference and Dominance*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 35 (1988). The “nasty habit of counting bodies” is an empirical starting point that one might call asking the “woman question.” *Id.* Other variations on the “woman question” include asking how law fails to take into account the experiences and viewpoints of members of historically disadvantaged groups, or what implications the law has for groups of people based on identity categories such as sex or gender. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 836 (1990) (“One [feminist legal] method, asking the woman question, is designed to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups”); MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY (3d ed. 2013) (describing asking the “woman question” as a way of “tracing out the gender implications of a social practice or rule”).

⁴ Theresa M. Beiner, *The Elusive (but Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 603–09 (2003) (providing an overview of research on how gender, race and political affiliation impact judicial voting). *Compare* Nancy E. Crowe, *The Effects of Judges’ Sex and Race on Judicial Decision Making on the U.S. Courts of Appeals, 1981-1996*, (1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with author) (noting that women and African American male judges were more likely to vote in favor of the plaintiff in sex discrimination cases) with Jennifer Segal, *Representative Decision Making on the Federal Bench: Clinton’s District Court Appointees*, 53 POL. RES. Q. 137, 143–44 (2000) (noting that male judges are more sympathetic to claims involving “gender discrimination sexual harassment, abortion rights and maternity rights, custody battles and equal pay”).

⁵ *See, e.g.*, Diana Majury, *Introducing the Women’s Court of Canada*, 18 CANADIAN J. WOMEN & L. 1, 4 (2006); FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (Rosemary Hunter et al. eds., 2010); AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW (Heather Douglas et al. eds., 2014); FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi et al. eds., 2016) [hereinafter US FEMINIST JUDGMENTS]; NORTHERN/IRISH FEMINIST

judgments methodology demonstrates that judges who apply feminist perspectives—not judges who claim a particular biology or gender—can make a difference in the substance and form of judicial opinions. As editors of the U.S. Feminist Judgments Project, we specifically declined to guide contributors on what we meant by “feminism.”⁵ From a personal and professional perspective, though, we understand feminism as a historical and contemporary movement, related to politics, that motivates multiple social, legal and other projects seeking women’s equality.⁶ At the same time, feminism to us is “a movement and mode of inquiry that has grown to endorse justice for all people, particularly those historically oppressed or marginalized by or through law.”⁷ Our version of “feminism” therefore is not the unique province of “women,” and we believe that both terms must include multiple and fluid identities and perspectives.⁸

Thus, even if tribunals were full of “feminist” judges, they would be applying feminisms that are sufficiently complex, nuanced and different that even majority-feminist benches would disagree. For that reason, the overall justice project may be better served by asking why in transnational courts and tribunals there is so little diversity of all kinds. Part I of this essay provides an overview of the limitations of using binary categories like “women” and “men.” Part II reframes the initial question as part of a broader quest for diversity in decision-making. The essay concludes by considering further avenues for inquiry.

I. WHAT IS A WOMAN ANYWAY?

A. *The Definition Problem*

The global population is approximately 49.56% female and 50.44% male.⁹ Most schoolchildren understand this to mean that half of all humans are girls or women, and half of all humans are boys or men. But there also are people whose bodies, as described by the United Nations Office of the High Commissioner for Human Rights,

JUDGMENTS: JUDGES’ TROUBLES AND THE GENDERED POLITICS OF IDENTITY (Máiréad Enright, et al. eds., 2017); FEMINIST JUDGMENTS OF AOTEAROA NEW ZEALAND TE RINO: A TWO-STRANDED ROPE (Elisabeth McDonald et al. eds., 2017). There are projects under way in Scotland, India, and Mexico, as well as an International Feminist Judgments project, *see* SCOTTISH FEMINIST JUDGMENTS PROJECT, <https://www.sfpj.law.ed.ac.uk> (last visited Oct. 4, 2019); THE FEMINIST JUDGMENTS PROJECT INDIA, <https://fpjindia.wixsite.com/fjpi> (last visited Oct. 4, 2019); E-mail from Trish Luker, Co-Editor, AUSTRALIAN FEMINIST JUDGMENTS, to authors (July 7, 2017, 12:38 AM) (on file with the author) (describing Mexico Feminist Judgments Project); *Feminist International Judgments Project: Women’s Voices in International Law*, U. LEICESTER, <https://tinyurl.com/y6qm8ef6> (last visited Oct. 12, 2019).

⁶ US FEMINIST JUDGMENTS, *supra* note 5, at 3.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 3–4.

¹⁰ *Population, female (% of total) and Population, male (% of total)*, WORLD BANK, https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS?end=2017&name_desc=false&start=1960&view=chart (last visited Oct. 4, 2019) (providing estimates for 2017 population based on the United Nations Population Division’s World Population Prospects: 2017 Revision).

"do not fit typical binary notions of male or female bodies."¹⁰ Intersex individuals may comprise 0.05% to 1.7% of the population.¹¹

Separate and apart from physical appearance and genetic make-up—typically called “sex”—are the related classifications of “gender” and “gender identity.” *Gender*—the socially constructed expectations for behavior and appearance of individuals—may or may not correspond to an individual’s sex.¹² So, too, *gender identity*, or the perception of oneself as male, female, neither or some combination, may be different from one’s sex or gender.¹³ And further distinct from all three is *sexual orientation*, meaning the sex and/or gender of the individuals one finds sexually attractive.¹⁴

B. Binarism in Biology

There is no universally accepted definition of “woman.” In feminist theory, the concept has been the subject of much debate, resulting in recognition of the limitations of various options.¹⁵ From a biological perspective, sex can be defined in terms of one or more attributes of physical appearance, chromosomes, or hormone

¹¹ U.N. Hum. Rts. Office of the High Comm’r, *Fact Sheet, Intersex*, https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf (last visited Oct. 4, 2019) (using the term “intersex” to refer to people “born with sex characteristics [including genitals, gonads and chromosome patterns] that do not fit typical binary notions of male or female bodies”).

¹² *Id.*; see also Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. OF HUM. BIOLOGY 151, 151–66 (2000) (estimating frequency of births of infants whose bodies do not fit typical binary sex category as high as 2% of live births); ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 53 (2000) [hereinafter SEXING THE BODY] (claiming 1 in 60 human births might be of people with intersex characteristics). The study by Blackless et al. and the work of Fausto-Sterling have been the subject of extensive criticism for use of outdated terminology. Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, 33 THE SCIENCES 20 (1993) [hereinafter *The Five Sexes*]. Nevertheless, some intersex groups have embraced the studies’ figures. See, e.g., *How common is intersex?*, INTERSEX SOCIETY OF NORTH AMERICA, <http://www.isna.org/faq/frequency> (last visited Oct. 4, 2019).

¹³ The U.N. World Health Organization defines gender as “the socially constructed characteristics of women and men—such as norms, roles and relationships of and between groups of women and men. It varies from society to society and can be changed.” *Gender, Equity and Human Rights, Gender*, U.N. WORLD HEALTH ORGANIZATION, <https://tinyurl.com/yyg6g9hw> (last visited Oct. 4, 2019). Sex, in contrast, is the “different biological and physiological characteristics of males and females, such as reproductive organs, chromosomes, hormones, etc.” *Gender, Equity and Human Rights, Glossary of terms and tools*, U.N. WORLD HEALTH ORGANIZATION (2011), <https://www.who.int/gender-equity-rights/knowledge/glossary/en/>; see also Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1209 (2016) (discussing courts’ confusing use of terms “sex” and “gender”).

¹⁴ *Sexual Orientation and Gender Identity Definitions*, HUMAN RIGHTS CAMPAIGN, <https://tinyurl.com/yd43z59j> (last visited Oct. 4, 2019) (defining gender identity as a person’s “innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One’s gender identity can be the same or different from their sex assigned at birth”).

¹⁵ See *id.* (defining sexual orientation as “[a]n inherent or immutable enduring emotional, romantic or sexual attraction to other people”).

¹⁶ Paul G. Lannon, *Transgender Student Admissions: The Challenge of Defining Gender in A Gender Fluid World*, BOS. B.J. (Apr. 22, 2015), <https://bostonbarjournal.com/category/spring-2015-vol-59-2/>.

levels, to give just three possibilities.¹⁶ Using even one of these approaches can result in multiple answers as to an individual's sex.¹⁷

Rules governing international track and field competitions illustrate the difficulty of determining "sex." The International Association of Athletics Federations began to require women to provide a medical certificate of their sex in order to compete in sanctioned competitions.¹⁸ The International Olympic Committee adopted mandatory sex testing in 1968.¹⁹ But physical examinations can be inconclusive because an individual may have a large clitoris, a small penis, an undeveloped or underdeveloped vagina, or undeveloped or underdeveloped testes.²⁰ Alternately, a person may have unambiguous (or insufficiently ambiguous) genitalia, but other biological characteristics—i.e., genes—associated with a different sex.

Two decades ago, Anne Fausto-Sterling suggested that there may be five, not two, sexes.²¹ Although the vocabulary she used now seems outdated (at best) or even hostile (at worst),²² she named and recognized multiple sex classifications to argue for the end to "corrective" infant genital surgery.²³ Fausto-Sterling asserted that "[t]he more we look for a simple physical basis for 'sex,' the more it becomes clear that 'sex' is not a pure physical category. What bodily signals and functions we define as male or female come already entangled in our ideas about gender."²⁴ Both Fausto-Sterling's work from decades ago and the possibility of changing one's

¹⁷ JOHN MONEY, *SEX ERRORS OF THE BODY AND RELATED SYNDROMES: A GUIDE TO COUNSELING CHILDREN, ADOLESCENTS AND THEIR FAMILIES* (2d ed. 1994) (setting forth eight factors that may contribute to the medical determination of an individual's "sex"); see also GLAAD MEDIA REFERENCE GUIDE, at 10 (10th ed. 2016), <https://perma.cc/Z7PR-C8ZQ> (defining sex as "a combination of bodily characteristics including: chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics"). We acknowledge that scientific knowledge and word choices and definitions are constantly changing, and thus we do not endorse any particular view of how to define "sex." We fully expect that any present-day knowledge and terminology will (and should) change in the future.

¹⁸ See, e.g., Matthew Bramble et al., *Psychological Effects of Sex Differentiation*, in *ENCYCLOPEDIA OF REPRODUCTION* 250 (2d ed. 2018) (noting that in utero exposure of a developing fetus to estrogens or androgens does not necessarily lead to development of external genitalia that corresponds with the stereotypical "male" or "female" phenotype).

¹⁹ See, e.g., Erin Elizabeth Berry, *Respect for The Fundamental Notion of Fairness of Competition: The IAAF, Hyperandrogenism, and Women Athletes*, 27 *WIS. J.L. GENDER & SOC'Y* 207, 210 (2012).

²⁰ Jan Todd & Terry Todd, *Significant Events in the History of Drug Testing and the Olympic Movement: 1960-1999*, in *DOPING IN ELITE SPORT* 65, 68–69 (Wayne Wilson & Edward Derse eds., 2001) (describing implementation of International Olympic Committee's newly-adopted mandatory testing for drugs and sex).

²¹ Lisa Melton, *New Perspectives on the Management of Intersex*, 357 *LANCET* 2110, 2110 (2001) (describing variations in genital appearance).

²² Fausto-Sterling, *SEXING THE BODY*, *supra* note 12, at 33.

²³ Writing in 1993, Fausto-Sterling used the labels "males," "females," "herms" (for "hermaphrodites"), "merms" ("male pseudo-hermaphrodites") and "ferms" ("female pseudo-hermaphrodites"). *Id.* at 21–22. Fausto-Sterling was criticized for this terminology. Eric Vilain et al., *We Used to Call Them Hermaphrodites*, 9 *GENETICS IN MED.* 65–66 (2007); Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, *N.Y. TIMES MAG.* (June 28, 2016), <https://tinyurl.com/kbaajcd> ("[t]he word 'hermaphrodite' is considered stigmatizing, so physicians and advocates instead use the term 'intersex' or refer to the condition as D.S.D., which stands for either a disorder or a difference of sex development.").

²⁴ FAUSTO-STERLING, *SEXING THE BODY*, *supra* note 12, at 78–79.

²⁵ *Id.* at 4.

external genitalia (and hormone levels) through gender confirmation surgery²⁵ demonstrate that physical appearance is hardly the best proxy for sex classification.

From a genetics perspective, biology students learn that females have two X chromosomes and males have an X and Y chromosome.²⁶ But some people's genes do not fall into either category,²⁷ and some individuals may have "mosaic genetics."²⁸ People with these genetic differences can have the physiology of a female or a male, or a physiology that does not fit neatly in the binary gender paradigm.²⁹ A recent scientific study suggests that up to one-third of human genes operate differently in men and women, and that it is not the X or Y chromosome that drives such difference.³⁰ Given this possibility, for legal scholars to limit their understanding of "women" to persons with only XX chromosomes is contrary to reality.

Having moved on from physical examinations and genetic testing, international athletic competitions now favor hormone testing of competitors. Hormone testing has resulted in few definitive results, instead generating rounds of tests followed by a series of lawsuits and appeals.³¹ The process of classifying international athletic

²⁶ See *Gender Confirmation Surgeries*, AM. SOC. PLASTIC SURGEONS, <https://www.plasticsurgery.org/reconstructive-procedures/gender-confirmation-surgeries> (last visited Oct. 12, 2019) (describing different surgical options for patients who would like to change their external appearance to match the gender they feel themselves to be). The American Society of Plastic Surgeons reported that more than 3, 200 of these procedures were performed in 2016. Alexandra Sifferlin, *Gender Confirmation Surgery is on the Rise in the U.S.*, TIME (May 22, 2017), <http://time.com/4787914/transgender-gender-confirmation-surgery/> (attributing increase in number of surgeries to changes in medical care coverage and greater education of doctors and the public about the need for these surgeries).

²⁷ See *Men and Women: The Differences are in the Genes*, SCIENCE DAILY.COM (Mar. 23, 2005), <https://tinyurl.com/ydho4m3> (reporting results of scientific study by Pennsylvania State University showing significant X-linked gene expression in females).

²⁸ See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 281 (1999) (describing array of variation in chromosomes). Such chromosomal variation may or may not impact sex development; Padawer, *supra* note 22.

²⁹ *What Is Intersex?* INTERSEX SOCIETY OF NORTH AMERICA, http://www.isna.org/faq/what_is_intersex (last visited Oct. 6, 2019).

³⁰ See generally FAUSTO-STERLING, *SEXING THE BODY*, *supra* note 12, at chapter 3; see also 46, *XX Testicular Disorder of Sex Development*, NIH U.S. NAT'L LIBR. OF MED.: GENETICS HOME REFERENCE (Oct. 1, 2019), <https://ghr.nlm.nih.gov/condition/46xx-testicular-disorder-of-sex-development>.

³¹ See Moran Gershoni & Shmuel Pietrokovski, *The Landscape of Sex-Differential Transcriptome and its Consequent Selection in Human Adults*, 15 BMC BIOLOGY 1 (2017) (reporting results of RNA-sequencing from 544 adults); Jenny Graves, *Not Just About Sex: Throughout Our Bodies, Thousands of Genes Act Differently in Men and Women*, THE CONVERSATION (Oct. 31, 2017), <https://tinyurl.com/y594tnyq> (elaborating on implications of study by Gershoni & Pietrokovski).

³² In 2014, officials barred Indian sprinter Dutee Chand from track competition when testing revealed that her body contains elevated levels of androgens (male sex hormones like testosterone). *Chand v. Athletics Federation of India*, CAS 2014/A/3759 (Ct. of Arb. for Sport 2015). International attention continues to focus on South African middle-distance runner and two-time Olympic champion Caster Semenya. Katrina Karkazis & Rebecca Jordan-Young, *The Treatment of Caster Semenya Shows Athletics' Bias Against Women of Color*, GUARDIAN (Apr. 26, 2018, 12:40 PM), <https://tinyurl.com/y8z29k82>; see also Jeré Longman, *Track's New Gender Rules Could Exclude Some Female Athletes*, N.Y. TIMES (Apr. 25, 2018), <https://tinyurl.com/y3odj5wy> (describing the alternatives for athletes who refuse to artificially lower their testosterone levels as entering competitions for men, entering competitions for intersex athletes, if any exist, changing distance specialties or not participating in elite competitions). In May 2019, the Court for Arbitration in Sport rejected Semenya's appeal of the regulations promulgated by the International Association of Athletics Federations that would require her to take medication to suppress her natural levels of testosterone, if Semenya wishes to compete in middle-distance at IAAF-sanctioned

competitors as “male” or “female” reveals the exercise of power that is involved in defining who is a woman or a man—no matter what the context.³² First, a governing body must decide how sex will be determined. Then, someone must physically test the candidates to assign them to categories. Finally, someone must police the category boundaries.

In addition to biological complexity, the number of people identifying as neither male nor female is increasing rapidly. A 2017 poll by the Harris group found that 12% of people aged 18-34 self-identify as other than cisgender.³³ A similar survey by the National Center for Transgender Equality showed that the respondents who identified as transgender wrote in *more than 500 unique gender terms* with which they identified, including non-binary, multi-gender, bigender and agender.³⁴ Moreover, as Heath Fogg Davis notes, these are studies of people who identify as *transgender*, which means that the numbers within the general population are likely higher.³⁵ Dr. Diane Ehrensaft calls the expanding number of persons identifying as transgender, gender fluid or genderqueer a “new gender revolution. It's erased boxes and created gender infinity instead.”³⁶

C. Binarism in Law and Culture

Similar to scientific ideas about sex and gender, the law's treatment of sex and gender is on a collision course with reality. For the most part, the law operates as if gender were “a fixed phenomenon that derives naturally from an individual's biological sex.”³⁷ One commentator notes that “it is almost ludicrous to maintain that sex discrimination, sexual identification, or sexual identity takes place on the level of biology or genitals. Yet the law continues to insist that they do.”³⁸

For example, Title VII has been slow to protect sexual minorities, particularly transgender people and people whose gender expression does not fit the binary of male/female. Ann McGinley observes that “[t]he problem of adequately protecting sexual minorities under Title VII lies in the courts' binary view of sex and gender, a view that identifies men and women as polar opposites and that sees gender as naturally flowing from biological sex.”³⁹ Anti-discrimination law can handle discrimination when it fits neatly into traditional categories. Behavior or identity

events. Hailey Middlebrook, *Court Rules Against Caster Semenya in IAAF Testosterone Case*, RUNNERS WORLD (May 1, 2019), <https://www.runnersworld.com/news/a27332526/caster-semenya-court-ruling> (explaining ruling and its negative impact on Semenya's ability to compete in prestigious international competitions).

³³ This idea borrows from Foucault's notion of the legal subject. See MICHEL FOUCAULT, *HISTOIRE DE SYSTÈMES DE PENSÉE, ANÉE 1980-1981* (1981) (Fr.); see also HEATH FOGG DAVIS, *BEYOND TRANS: DOES GENDER MATTER?* 10–11 (2017) (“The administrative discretion to decide who is female and who is male is the essence of sex identity discrimination...[and] a specific subcategory of sexism.”).

³⁴ GLAAD, *ACCELERATING ACCEPTANCE* 4 (2017), <https://www.glaad.org/publications/accelerating-acceptance-2017>.

³⁵ SANDY E. JAMES ET AL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY* 40 (2016).

³⁶ DAVIS, *supra* note 33, at 11.

³⁷ Jon Brooks, *Boy? Girl? Both? Neither? A New Generation Overthrows Gender*, KQED SCIENCE (April 24, 2017), <https://tinyurl.com/y9utnq2c>.

³⁸ *Id.*

³⁹ Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: Disaggregating Sex from Gender*, 144 U. PA. L. REV. 1, 40 (1995).

⁴⁰ Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 715 (2010).

outside this norm presents a situation similar to what Catharine MacKinnon called a “paradigm trauma” that creates a “crisis time for the doctrine.”⁴⁰

The problem of defining “woman” in legal and cultural settings is elucidated by several examples. For example, in *Corbett v. Corbett*,⁴¹ the court heard “extensive testimony from psychiatrists, gynecologists, endocrinologists, physicians, and state-appointed sexual organ inspectors”⁴² to attempt to discern whether April Ashley Corbett, a transgender woman, was actually a “woman” for purposes of UK divorce law.⁴³ Ashley Corbett had male chromosomes and had been born with male genitalia, but after surgery had female hormone levels and “remarkably good” female genitals.⁴⁴ She fully identified as a woman and presented so convincingly as a woman that the court noted her remarkably compelling “pastiche of femininity.”⁴⁵ Nevertheless, the court disregarded this evidence as well as Ashley Corbett’s own testimony and concluded she was male, relying mainly on her chromosomes and genitals.⁴⁶ The court therefore granted Arthur Corbett’s petition for divorce, on the grounds that the marriage had been void *ab initio* because Ashley Corbett was a “man,” and same-sex marriage was not possible under UK law at the time.⁴⁷

The cultural battle over single-sex bathrooms is another example of the difficulties in defining certain identity categories.⁴⁸ Ruth Colker notes that signs on sex-segregated restrooms rely on stereotypes, yet “few women probably recognize themselves as a stick figure wearing a triangle dress or skirt.”⁴⁹ Decades before the issue erupted in North Carolina,⁵⁰ Colker worked at a university where only the men’s bathroom had showers, so her employer furnished her with a “woman in shower” placard to place on the entrance to the men’s room when she wished to shower. This caused her some tongue-in-cheek “gender confusion” because her

⁴¹ MACKINNON, *supra* note 2, at 36.

⁴² *Corbett v. Corbett* [1970] All ER 33 (Fam).

⁴³ *Id.* It is difficult to imagine what a sexual organ inspector is, how someone would qualify to be one, and what kind of intrusive process is involved in submitting to such an inspection.

⁴⁴ *Id.* (discussed in Franke, *supra* note 39, at 45).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ For a sophisticated analysis of the relationship between sex-segregated bathrooms and equality, see Mary Anne Case, *All the World's the Men's Room*, 74 U. OF CHI. L. REV. 1655 (2007); Mary Anne Case, *Changing Room? A Quick Tour of Men's and Women's Restrooms in U.S. Law over the Last Decade, from the U.S. Constitution to Local Ordinances*, 13 PUB. CULTURE 333 (2000).

⁵⁰ Ruth Colker, *Public Restrooms, Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 150 n.30 (2017) (describing results of image search for male and female restrooms, noting that the male figures always have long trousers). *But, see #ItWasNeverADress*, <https://itwasneveradress.com> (last visited Oct. 12, 2019) (reimagining the triangle dress a superhero’s cape).

⁵¹ See, e.g., Amber Phillips, *The Tumultuous History of North Carolina’s Bathroom Bill, Which is On Its Way to Repeal*, WASHINGTONPOST.COM (Mar. 30, 2017) (providing overview of controversy that followed the February, 2016 passage by the Charlotte City Council of a law that would prohibit discrimination in public accommodations against gay or transgender customers), <https://tinyurl.com/y2q3gq3l>; Camila Domonoske, *North Carolina Repeals Portions of Controversial “Bathroom Bill,”* NPR. (Mar. 30, 2017), <https://tinyurl.com/y2zh9c52> (describing prohibition until 2020 on local jurisdictions from passing laws that would protect LGBT people).

gender was “different” depending on the purpose for which she was using the facility (male to shower, female to use the toilet).⁵¹

Similarly, Patricia Williams wrote in the late 1980s of the experience of a trans woman law student who was not permitted by other students to use either the male or female bathrooms.⁵² The student approached Williams because the student’s failure to fit within the gender binary rendered her a “nobody” when it came to using a bathroom.⁵³ Non-binary people report similar problems even of self-policing: if there are only men’s and women’s rooms, which does a person choose, if the person identifies as neither?⁵⁴

The reactions of some feminists to the “paradigm trauma” of who-counts-as-a-woman provide further examples. The Michigan Womyn’s Music Festival for years banned trans women based on its “festival for womyn-born womyn” policy.⁵⁵ This policy led to a boycott by state and national equality groups in 2014; the festival elected to shut down rather than allow trans women to attend the festival.⁵⁶ In the North Carolina bathroom controversy, some feminists have aligned with the fundamentalist Christians in backing the law requiring strict sex-segregated bathrooms.⁵⁷

Many women’s colleges have struggled to define who is a “woman.” Compare Mount Holyoke’s policy, which allows admission to any student who “is female or who identifies as a woman” (which appears to include anyone except for someone who is “born male and identifies as a man”) with Smith College, which does not permit applications from trans men (or anyone identifying as male) or students who are gender non-binary.⁵⁸ Smith College relies entirely on admissions material to make its judgment about gender, but both Wellesley and Bryn Mawr require information beyond the admissions material.⁵⁹ Wellesley College “will consider for

⁵² Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L.J. 56, 47–48 (1995).

⁵³ Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2144–46 (1989).

⁵⁴ *Id.*

⁵⁵ Brooks, *supra* note 37.

⁵⁶ Kat Callahan, *I Don’t Care About MichFest’s Trans Exclusion, You Shouldn’t Either*, JEZEBEL (Aug. 14, 2014, 10:15 PM), <https://tinyurl.com/y4e4u5fp>.

⁵⁷ Diane Anderson-Minshall, *Op-ed: Michfest’s Founder Chose to Shut Down Rather Than Change with The Times*, ADVOCATE, (Apr. 4, 2015, 7:15 PM), <https://www.advocate.com/commentary/2015/04/24/op-ed-michfests-founder-chose-shut-down-rather-change-times>.

⁵⁸ See, e.g., Kaeley Triller Haver, *A Rape Survivor Speaks Out Against Transgender Bathrooms*, THE FEDERALIST, (Nov. 23, 2015), <http://thefederalist.com/2015/11/23/a-rape-survivor-speaks-out-about-transgender-bathrooms/> (arguing that men will take advantage of bathroom sex desegregation to sexually assault women); Fr. Mark Hodges, *Proposed Bathroom Bill Will Keep ‘Transgender’ Men Out of Girls’ Bathrooms in Texas*, LIFE SITE, (Jan. 9, 2017, 10:47 PM) <https://www.lifesitenews.com/news/public-reacts-to-texas-proposed-bathroom-privacy-law-with-praise-protests> (describing need for the “Women’s Privacy Act” to protect women’s privacy while using a restroom).

⁵⁹ Compare Admission of Transgender Students, MOUNT HOLYOKE, <https://tinyurl.com/yy24nws7>; with Gender Identity & Expression, SMITH COLLEGE, <https://tinyurl.com/y3n2xwkh>. For a discussion of the category dilemma raised by single sex educational institutions, see Davis, *supra* note 33, at 85–86 (discussing the case of Calliope Wong, a transgender woman denied admission to Smith College).

⁶⁰ See Lannon *supra*, note 16 (calling the decision to probe beyond admissions material “remarkable”).

admission any applicant who lives as a woman and consistently identifies as a woman,” a definition that excludes trans men and some others who are outside the binary.⁶⁰ Bryn Mawr's policy is open to transgender and intersex individuals, but only if they “live and identify as women at the time of application,” and trans men, as long as they have not taken “medical or legal steps to identify as male.”⁶¹

D. Binarism in the Twenty-First Century

The twenty-first century has brought increased visibility of gender fluidity,⁶² making the term “woman” seem anachronistic in some contexts. Although the terms “men” and “women” likely still function as cognitive or linguistic shorthand for more nuanced understandings of the terms,⁶³ framing any policy discussion in terms of “men” and “women” will fail to account for biological variety, individual difference, diverse gender identity, multiple sexual orientations, and the significant role that society plays in constructing these identifiers. To ask, “Where are the women?” (as one of us has done frequently and publicly)⁶⁴ is, upon critical reflection, to risk converting persons who do not fit into the binary into “unnatural outcasts.”⁶⁵

If the global culture is starting to move away from binary thinking about sex, then feminist legal scholars should do the same. Legal scholars who believe in the value of diverse perspectives on the bench should support methods that “erase boxes”⁶⁶ and reconfigure the “woman question.”⁶⁷ As already discussed, the question of “women” on the courts raises myriad definitional issues. While feminists may agree that greater diversity on the bench is necessary for political legitimacy, as Sally Kenney argues,⁶⁸ counting “women” is complicated.⁶⁹ Moreover, if feminists agree that society constructs the meaning of both sex and gender,⁷⁰ then the feminist

⁶¹ *Mission and Gender Policy*, WELLESLEY COLLEGE, <https://www.wellesley.edu/news/gender-policy>.

⁶² *Transgender Applicants*, BRYN MAWR COLLEGE, <https://www.brynmawr.edu/admissions/transgender-applicants>.

⁶³ Karina Collins, *How to Market to the Gender Fluid*, MEDIUM.COM (Nov. 26, 2018), <https://medium.com/datadriveninvestor/how-to-improve-your-marketing-in-the-era-of-gender-fluidity-d3fefb25ce28> (calling gender fluidity, as an idea popularized and embraced by young people born in 1982 and after “the new cool”).

⁶⁴ See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (describing identity categories as “strategies for simplifying the perceptual environment and acting on less-than-perfect information”).

⁶⁵ Bridget J. Crawford, *Where are the Women? Faulkner Law Review Edition*, FEMINISTLAWPROFESSORS.COM (Aug. 31, 2017), <http://www.feministlawprofessors.com/2017/08/where-are-the-women-faulkner-law-review-edition>; Bridget J. Crawford, *Where are the Women? Not in this Issue of “The Tax Lawyer”*, FEMINISTLAWPROFESSORS.COM (Apr. 27, 2017), <http://www.feministlawprofessors.com/2017/04/where-are-the-women-not-in-this-issue-of-the-tax-lawyer-review>.

⁶⁶ McGinley, *supra* note 40, at 718.

⁶⁷ *Id.*

⁶⁸ MACKINNON, *supra* note 2.

⁶⁹ SALLY KENNEY, GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER 126, 175 (2012).

⁷⁰ JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 34 (2d ed. 1999) (arguing that gender is a social construct and performance and is far from immutable).

⁷¹ See generally *id.*

project must reconfigure the details of its “nasty habit of counting bodies and refusing not to notice their gender.”⁷¹ Without more fully considering these concepts, the inquiry is intellectually and politically precarious.⁷²

To reframe the question, we need to better understand the purpose of asking for more “women” on the courts. The goal may be to have more judges who *look like* women so that more individuals in our society will be able to see themselves on the bench.⁷³ But that purpose might require appearance- and presentation-policing that many feminists can and should reject.⁷⁴

For other feminists, asking for more women on the bench might be shorthand for seeking judges who are sensitive to “women’s issues” or “women’s lived experiences.” But the newcomers most likely to be placed on tribunals and in courts will be women who most closely resemble—and are least threatening to—those in power.⁷⁵

Rather than the question posed to this panel, we take up Mari Matsuda’s invitation to ask the “other question,” taking into account the interconnectedness of all subordination.⁷⁶ With an expansive view of feminism, one can ask how a judge’s lived experience, identity, and perspective inform decision-making. Increasing diversity on the bench might correlate to diversity in sex, gender, gender identity, or sexual orientation, but it ought not be confined to those qualities. What might courts and tribunals look like if more judges had lived in poverty; grew up in rural areas; suffered discrimination based on gender, race, religion, nationality, or disability; lived in fear of group-based violence; or otherwise struggled because of a marginalized position in society?

II. THE EPISTEMOLOGY OF JUSTICE(S)

Suggesting that the effects of unrepresentative courts and unequal justice will be alleviated by appointing more women to the bench is rooted in the kind of binary thinking that has long entangled women. This solution evades the real problem that feminist legal scholars presumably want to solve: the lack of diverse perspectives on the bench. As Katherine Franke describes the problem:

Defining sex in biological or anatomical terms represents a serious error that fails to account for the complex behavioral aspects of sexual identity. In so

⁷² MACKINNON, *supra* note 2.

⁷³ WORLD BANK GROUP, *supra* note 10.

⁷⁴ KENNEY, *supra* note 69 at 56–58, n.84 (recognizing the “role model” argument).

⁷⁵ See, e.g., *Rosa v. Park West Bank and Trust*, 214 F.3d 213 (1st Cir. 2000) (discussing that this is a serious danger); DAVIS, *supra* note 33, at 89–90 (discussing how some responses to transgender woman’s application to Smith College centered on the opinion that she looked “obviously male”).

⁷⁶ Rosemary Hunter, *Can Feminist Judges Make a Difference?*, 15 INT’L J. L. PROF. 7, 7–8 (2008); see also MACKINNON, *supra* note 3, at 37 (explaining that women who would likely benefit would be “women who have been able to construct a biography that somewhat approximates the male norm, at least on paper”).

⁷⁷ Mari Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) (“The way I try to understand the interconnection of all forms of subordination is through a method I call ‘ask the other question.’ When I see something that looks racist, I ask, ‘Where is the patriarchy in this?’ When I see something that looks sexist, I ask, ‘Where is the heterosexism in this?’ When I see something that looks homophobic, I ask, ‘Where are the class interests in this?’ Working in coalition forces us to look for both the obvious and non-obvious relationships of domination, helping us to realize that no form of subordination ever stands alone.”).

doing, this definition elides the degree to which most, if not all, differences between men and women are grounded not in biology, but in gender normativity.⁷⁷

Feminist theory's attempts to define "woman" have been riddled by essentialism and stereotyping. A prominent example occurred in the 1980s, largely due to the success of Carol Gilligan's book *In a Different Voice*, when feminist theory exploded with theories of women's relational nature and "connectedness." Scholar Suzanna Sherry summarized the claimed essential difference: "the basic feminine sense of self is connected to the world, the basic masculine sense of self is separate." This difference suggested that due to factors including pregnancy, child-rearing responsibilities, menstruation, and intercourse, "women have a 'sense' of existential 'connection' to other human life which men do not."⁷⁸ That many people who identified as women did not experience any of these physical connections did nothing to stop the wave of scholarship on women's "different" voice.⁷⁹

Feminists used Carol Gilligan's sociological data to reach wide-ranging conclusions. Among them were that women's "special" sense of connection created "a way of learning, a path of moral development, an aesthetic sense, and a view of the world and of one's place within it which sharply contrasts with men's."⁸⁰ And some feminist legal scholars generated an entire scholarly oeuvre about how women's "ethic of care" could change the law, legal education, legal practice, and judging.⁸¹

The "connection" theory of womanhood has been roundly critiqued,⁸² but vestiges remain. Consider, for example, a speech by Baroness Hale, the first woman in the House of Lords; she resists the notion that women judges are "different" and likely to make "different decisions" from their male counterparts.⁸³ At the same time, she elevates the importance of stereotypically female work such as changing diapers and cooking meals for children: "I would like to think that a wider experience of the world is helpful: knowing a little about bearing and bringing up children must make some difference."⁸⁴

Similarly emphasizing the presumed difference of women and girls, Justice Ruth Bader Ginsburg wrote a separate concurring opinion in *Safford v. Redding*, where the U.S. Supreme Court found that a school's strip search of a 13-year old

⁷⁸ Franke, *supra* at 39.

⁷⁹ Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 15–16 (1988).

⁸⁰ See, e.g., Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in the Law*, 15 VT. L. REV. 1 (1990).

⁸¹ West, *supra* note 78, at 15–16 (calling this feminism's "official" story).

⁸² See, e.g., Menkel-Meadow, *supra* note 79; Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Minna J. Kotkin, *Professionalism, Gender and the Public Interest: The Advocacy of Protection*, 8 ST. THOMAS L. REV. 157 (1995).

⁸³ KENNEY, *supra* note 69, at 30–38 (rejecting "difference" as a basis for calling for more women judges); MACKINNON, *supra* note 3, at 38–39; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 602–05 (1990).

⁸⁴ Brenda Hale, *Equality and the Judiciary: Why Should We Want More Women Judges?*, PUB. L. 489, 504 (2001).

⁸⁵ *Id.*

female student violated her Fourth Amendment rights.⁸⁵ News reports said the case “revealed a gender fault line at the court,” because Justice Ginsburg said that her (then all-male) colleagues “have never been a 13-year-old girl. It’s a very sensitive age for a girl. I don’t think that my colleagues, some of them, quite understood.”⁸⁶ Questions by the male Justices during oral argument seemed to imply that requiring a 13-year-old girl to strip down to her underwear is not traumatic because it is akin to a bathing suit or like changing for gym class.⁸⁷

Ginsburg’s comments have been frequently cited as evidence for the need for more women on the bench to understand the perspectives of the women and young girls.⁸⁸ But if instead of asking the “woman question” Ginsburg had asked the “other question,” she might have reached the conclusion that a 13-year-old boy would be equally embarrassed, shy, and traumatized, by being strip searched by school administrators.⁸⁹ As masculinities scholars have pointed out, the male cultural imperative requires even young teenagers to “man up” and accept bodily indignities when they resemble typical “locker room” scenarios.⁹⁰

A different strand of feminist theory, one that examines women in terms of their structural and interpersonal subordination to men,⁹¹ avoids the “woman as caregiver” trap but has other weaknesses. Under anti-subordination theory, what women have in common is a shared experience of being devalued *as women*.⁹² Patriarchy, and women’s position in it, is maintained through a set of purportedly neutral, objective standards of merit that mask the masculine ideal.⁹³ Constant threats of sexual violence against women, pornography and harassment, and the devaluation of characteristics associated with women buttress the system of subordination.⁹⁴ In a patriarchal society, “women” are those who occupy the lowest rung.

Many feminist scholars disagree that anti-subordination theory describes all “women’s” experiences, pointing out that women have multiple types of oppressions

⁸⁶ Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009).

⁸⁷ Adam Liptak, *Supreme Court Says Child’s Rights Violated by Strip Search*, N.Y. TIMES (June 25, 2009), <https://www.nytimes.com/2009/06/26/us/politics/26scotus.html>.

⁸⁸ Transcript of Oral Argument at 21–22, 44–46, Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009) (No. 08-479).

⁸⁹ See, e.g., Joan Biskupic, *Ginsburg: Court Needs Another Woman*, ABC NEWS (May 6, 2009, 1:25 AM), <https://abcnews.go.com/Politics/ginsburg-court-woman/story?id=7513795>.

⁹⁰ Brief for National Association of Social Workers et al. as Amici Curiae Supporting Respondent, Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009) (No. 08-479), 2009 WL 870022, at 5–8 (discussing the social science documenting trauma from strip searches to children and young adults, gender neutral).

⁹¹ Cynthia Godsoe & Margo Kaplan, *Rewritten Opinion in Michael M. v. Superior Court*, in FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 268 (Kathryn M. Stanchi et al. eds., 2016) (noting that the California statutory rape law at issue ignored “the trauma of . . . young male victims . . . [whose] sexual exploitation has long been ignored.”); see also DAN KINDLON & MICHAEL THOMPSON, RAISING CAIN: PROTECTING THE EMOTIONAL LIFE OF BOYS 165 (2009) (describing how boys are taught “to be willing to take the bullet—take the emotional pain—and act as if it doesn’t matter”).

⁹² See, e.g., MACKINNON, *supra* note 3; Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005–08 (1986).

⁹³ Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 638–39 (1983).

⁹⁴ MACKINNON, *supra* note 3, at 36.

⁹⁵ Mary Becker, *Patriarchy and Inequality: Towards A Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 23–29 (1999).

to resist, and so it is not appropriate to create some sort of hierarchy, putting sexism before any other concerns.⁹⁵ Angela Harris has emphasized that it is inaccurate to combine all women's experiences into one "devaluation," as the experiences of poor women and women of color are qualitatively different from those of many white women.⁹⁶ Similarly, several lesbian feminist theorists have distanced themselves from the description of women's experiences as always those of subordination, giving as examples their contrasting experiences with pornography⁹⁷ and their experience of escaping patriarchy in their romantic and sexual lives.⁹⁸ Still other women, like the rural Pennsylvania woman quoted at the beginning of this essay, reject the idea that they are subordinated at all. And, to be sure, the emphasis of anti-subordination feminist theory on women's experiences under patriarchy can also sometimes transform into devaluation of the experiences of trans, lesbian, gay or other gender-non-conforming people.⁹⁹

These critiques serve as a reminder to avoid essentialist pitfalls when talking about the need for more "women" on courts and tribunals. Chief among these pitfalls is the assumption that "women" judges will transform the institutions they serve simply because they are women. As Rosemary Hunter writes: "Why did we think that women would transform institutions without simultaneously—or alternatively—being transformed by them? Why did we believe that women appointed to positions of power would be 'representative' of women as a group, rather than being those who most resemble the traditional incumbents and are thus considered least likely to disturb the status quo?"¹⁰⁰ Catharine MacKinnon has long observed that the women who benefit from feminism's emphasis on formal equality are "mostly women who have been able to construct a biography that somewhat approximates the male norm . . . They are the qualified, the least of sex discrimination's victims."¹⁰¹

This factor is multiplied because the system of judicial appointment is marked by bias and elitism. Deborah Rhode calls this the "misleading myth of meritocracy," the dangerous and false idea that opportunity and advancement result from a system untainted by bias.¹⁰² Sally Kenney recounts her frustration that whenever she talks

⁹⁶ See BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 35 (2d ed. 2000) (saying that feminism "can end the war between the sexes. It can transform relationships so that alienation, competition, and dehumanization that characterize human interaction can be replaced with feelings of intimacy mutuality, and camaraderie," and, therefore, changing gender roles need not be the top priority at all times).

⁹⁷ Harris, *supra* note 83, at 596–97.

⁹⁸ See generally Mary C. Dunlap, *Sexual Speech and the State: Putting Pornography in Its Place*, 17 *GOLDEN GATE U. L. REV.* 359 (1987).

⁹⁹ See Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 *BERKELEY WOMEN'S L.J.* 191 (1989).

¹⁰⁰ See, e.g., Elinor Burkett, Opinion, *What Makes a Woman?*, *N.Y. TIMES* (June 7, 2015), <https://www.nytimes.com/2015/06/07/opinion/sunday/what-makes-a-woman.html> (arguing, with controversial effect, that Caitlin Jenner is not "really" a woman because she has not lived as a woman under patriarchy); see also DAVIS, *supra* note 33, at 89–90 (asking "if female socialization is the litmus test for being considered "female" then how much time lived "as female" is enough to earn one's "woman card").

¹⁰¹ Hunter, *supra* note 76, at 8.

¹⁰² MACKINNON, *supra* note 3, at 37.

¹⁰³ DEBORAH L. RHODE, *SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY* 147–48 (1997); Deborah L. Rhode, *Myths of Meritocracy*, 65 *FORDHAM L. REV.* 585, 588 (1996).

about women on the bench, she is urged to modify “women” with the word “well-qualified,” as if her goal is to populate the bench with unqualified women.¹⁰³

Federal judges, for example, tend to be chosen from prestigious clerkships and big corporate law firms, two professional enclaves that tend to favor white, wealthy and male candidates.¹⁰⁴ The more than 1300 sitting federal judges overwhelmingly attended Harvard (140 judges) and other elite law schools.¹⁰⁵ These elite law schools—including Yale, Columbia, Stanford, Berkeley, NYU—tend to skew white and wealthy.¹⁰⁶ Indeed, every step leading up to that first appointment to the bench—from academic indicators to standardized testing and beyond—embeds race, class and gender bias.¹⁰⁷

While calling for more “women” in the judiciary may yield a short-term gain, the real work lies in broadening the definition of who is “qualified” to be a judge. That requires open acknowledgment of the biases inherent in the admissions processes that lead to judicial positions: elite law schools, clerkships, prestigious law firms and other gate-keepers. Otherwise, the effort will yield only female judges who “are able to construct a biography that somewhat approximates the male norm.”¹⁰⁸ Getting a different result requires us to ask a different question.¹⁰⁹

CONCLUSION

When we argue that the panel’s inquiry should be reframed, we must remember that women and men from populations underrepresented in the law—for example, people of color, people who grew up poor—may not be eager to join a campaign (or even attend an AALS program) focused on “more women.” According to Kimberlé Crenshaw, many Black women continue to be ambivalent “about the degree of political and social capital that ought to be expended toward challenging gender

¹⁰⁴ Sally J. Kenney, *Toward a Feminist Political Theory of Judging: Neither the Nightmare nor the Noble Dream*, 17 NEV. L.J. 549, 557–59 (2017) (“calling for so-called merit selection does little to foster a diverse and representative bench and obfuscates the nature of judging”).

¹⁰⁵ KENNEY, *supra* note 69, at 25 (noting that long after women comprised 50% of law students, “vital gatekeepers” did not recommend women for prestigious clerkships and the United States Supreme Court still has mostly white, male clerks).

¹⁰⁶ See Adam Feldman, *Law Schools, Judges, and Government Attorneys*, EMPIRICAL SCOTUS (Sept. 10, 2017), <https://empiricalscotus.com/2017/09/10/law-schools/> (providing data on law school affiliation of United States Attorneys, sitting federal judges, state attorney generals and state solicitor generals).

¹⁰⁷ See, e.g., 2017 IL Enrollment by Gender & Race/Ethnicity, AM. B. ASS’N, https://www.americanbar.org/groups/legal_education/resources/statistics (follow “2017 IL Enrollment by Gender & Race/Ethnicity” hyperlink) (last visited Oct. 12, 2019). As an example, Harvard Law School admitted 560 students in 2017; of those only 178, or roughly 32%, are minority. Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 632–33 (2011) (reporting that only 5% of students in elite law schools come from lower socio-economic classes).

¹⁰⁸ See, e.g., ALL. FOR JUSTICE, BROADENING THE BENCH: PROFESSIONAL DIVERSITY AND JUDICIAL NOMINATIONS (2016), <https://www.afj.org/wp-content/uploads/2014/11/Professional-Diversity-Report.pdf> (noting that vast majority of Federal judiciary comes from those who practiced as corporate lawyers and prosecutors); see also TRACEY E. GEORGE & ALBERT H. YOON, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS, AM. CONST. SOC’Y, <http://gavelgap.org/pdf/gavel-gap-report.pdf> (last visited Mar. 24, 2019) (noting the lack of diversity in state judiciaries).

¹⁰⁹ MACKINNON, *supra* note 3, at 37.

¹¹⁰ See Kenney, *supra* note 104, at 558–59 (“I care about more than the legal qualifications of prospective judges. I care about their judicial philosophy, and I care about their views on social facts and most importantly, their willingness to subject their views to rigorous empirical examination.”).

barriers, particularly when the challenges might conflict with the antiracism agenda.”¹¹⁰

As the distant and recent past indicates, white women have a history of choosing their racial privilege over solidarity with poor women or women of color.¹¹¹ The 2018 midterm elections illustrate this point. Stacey Abrams, an African-American woman running for governor in Georgia against a white man, garnered only 25% of the white female vote.¹¹² A white woman, Cindy Hyde-Smith, won a Mississippi Senate seat running against an African-American man, even after making racially charged jokes about voter suppression, saying she would be on the “front row” if a supporter invited her to a public hanging and posing in a Confederate cap.¹¹³ Ms. Hyde-Smith is the first female senator from Mississippi because white women supported her,¹¹⁴ but her election is hardly a victory for the broader social justice project.

If elite white women are the ones who will benefit from a call for more “women” judges, it is imperative to reframe the question. Instead of asking for more women, we should clearly call, as Kimberlé Crenshaw urged almost two decades ago, for the elevation of women who have the least professional capital. Crenshaw relates the story of nineteenth century feminist Anna Julia Cooper. After a community leader claimed that wherever he entered, the Black race entered with him, Cooper observed, “Only the Black Woman can say, when and where I enter . . . then and there the whole Negro race enters with me.”¹¹⁵ Cooper’s story reinforces the message that efforts to elevate the “qualified . . . the least of sex discrimination’s victims,” will mean that only elite women will advance. Feminists would be better served by a focus on those most hurt by discrimination. As Mari Matsuda frames it, “dismantling any one form of subordination is impossible without dismantling every other . . . particularly in the women of color movement, the answer is that no person is free until the last and the least of us is free.”¹¹⁶ Truly, all will enter with the elevation of women who are multiply-burdened by not only sex discrimination but also

¹¹¹ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 161 (1989); see also Danielle Young, *Tarana Burke Explains Why Black Women Don’t Think #MeToo is For Them*, ESSENCE (Nov. 7, 2018), <https://www.essence.com/videos/tarana-burke-explains-why-black-women-dont-think-metoo-is-for-them/>; Tamela J. Gordon, *Why I’m Giving Up on Intersectional Feminism*, QUARTZY (Apr. 20, 2018), <https://qz.com/quartzy/1265902/why-im-giving-up-on-intersectional-feminism/> (“I know what sisterhood is and I know what white women think sisterhood is; they got it all wrong.”).

¹¹²See, e.g., Treva B. Lindsey, *The Betrayal of White Women Voters: In Pivotal State Races, They Still Backed the GOP*, VOX (Nov. 9, 2018, 10:40 AM), <https://www.vox.com/first-person/2018/11/9/18075390/election-2018-midterms-white-women-voters> (reporting that, nationally, black women voted 92% for progressive candidates, but 49% of white women voted Republican).

¹¹³ *Id.*

¹¹⁴ Emily Wagster Pettus, *There Was No Ill Will, No Intent Whatsoever: Sen. Cindy Hyde-Smith Apologizes After Controversial ‘Public Hanging’ Remark*, BUS. INSIDER (Nov. 20, 2018, 11:05 PM), <https://www.businessinsider.com/cindy-hyde-smith-apologizes-after-public-hanging-remark-mississippi-2018-11> (quoting the candidate as saying, “For anyone that was offended by my comments, I certainly apologize. There was no ill will, no intent whatsoever in my statement”).

¹¹⁵ *Id.*

¹¹⁶ Crenshaw, *supra* note 111, at 160 (quoting Cooper).

¹¹⁷ Matsuda, *supra* note 77, at 1189.

discrimination based on race, class, disability, immigration status, gender identity, sexuality or other personal identities beyond biological sex.

This essay has challenged the foundational question of the panel but proceeds from the belief that feminist legal theorists share a commitment to facilitating entry for all women to enter, not just privileged white women, and not white women first. The last of these beliefs may be unfounded or even controversial. After all, the experience of human nature is that one naturally pushes for changes or reforms that will benefit oneself.¹¹⁷ Yet our version of feminism is broad. We conceive of it as a project that wants equality and advancement for not only women but for all historically disadvantaged groups. And “women” must be understood to mean women in all of their complexities, with all of their multiple identities.

Calling for more “women” is easy. Achieving true diversity is harder. Let’s begin.

¹¹⁸ *But see*, Dylan M. Smith et al., *A New View of Utility: Maximizing “Optimal Investment,”* in *MOVING BEYOND SELF-INTEREST: PERSPECTIVES FROM EVOLUTIONAL BIOLOGY, NEUROSCIENCE, AND THE SOCIAL SCIENCES* 239 (Stephanie L. Brown et al. eds., 2012) (explaining and then questioning basic assumption of economics that “if given freedom of choice, people will generally act rationally to promote their own self-interest”).



UNITED IN DIVERSITY? GENDER AND JUDGING AT THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU)

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INTRODUCTION

Undoubtedly, the European Union (EU) has made efforts to promote gender equality over the years, albeit with various levels of success.² Since the 1950's and the foundational Treaty of Rome, the principle of equal pay for equal work was ringfenced therein.³ More than half a century—and several reforms, policies, strategies and decisions of the Court of Justice of the European Union (CJEU)—later, someone would have expected a gender-equal EU, but statistics show there is still a long way to go. According to the latest Gender Equality Index, the overall score across the EU increased only by a meager 4.2% in the decade 2005-2015, rising to 66.2%.⁴ This showed signs of a slowdown and, in some cases, even a move backwards.⁵ Thus, despite presumptions that equal treatment in the EU is at an acceptable level, the fact remains that gender inequality is alive and kicking and that some complacency can be observed, taking into account the recent developments on the matter.

Ensuring gender equality at high profile positions, particularly when policy-making or judicial decision-making is involved, is of paramount importance for reasons of equal opportunities and democratic representation alike.⁶ At the EU level, the importance of gender diversity in such roles had already been recognized in the Third Action Programme on equal opportunities between men and women (1991-1995), which stated:

The principle of equal opportunities in the workplace could not be achieved in a society where women are not treated equally and where they are insufficiently represented in the media and decision-making. Actions were to be developed in this area, because "women in decision-making could be one of the most effective ways of achieving equality and a lasting change in mentality."⁷

More than two decades later, one would assume that gender diversity at the EU's own judiciary, the CJEU, would have been achieved. This could not be further from the truth; the CJEU is a predominantly male institution, contradicting the EU ambitions.

There have been numerous studies on the merits of female representation at the judiciary, some of them focusing on the CJEU.⁸ The present article builds on their work—by applying a feminist critical discourse analysis in the cadre of an in-depth case-study—in order to examine the influence of the CJEU's gender composition on its decision-making processes. This represents a novel methodological approach in the field of EU legal studies, which aims at

² Sylvia Walby, *The European Union and Gender Equality: Emergent Varieties of Gender Regime*, 11 SOC. POL. 4, 5–7 (2004).

³ Consolidated Version of the Treaty on the Functioning of the European Union art. 157, May 9, 2008, 2008 O.J. (C 115) 117, 118.

⁴ European Institute for Gender Equality, *Gender Equality Index 2017—Measuring Gender Equality in the European Union 2005-2015* (2017).

⁵ European Commission, *2018 Report on Equality Between Women and Men in the EU*, at 7–8 (2018).

⁶ Brenda Hale, *Equality and the Judiciary: Why Should We Want More Women Judges?*, 2001 PUB. L. 489 (2001).

⁷ EUROPEAN EXPERTS NETWORK "WOMEN IN DECISION-MAKING", WOMEN IN DECISION-MAKING: PANORAMA OF ACTIVITIES IN THE FRAMEWORK OF THE THIRD MEDIUM-TERM COMMUNITY ACTION PROGRAMME ON EQUAL OPPORTUNITIES FOR WOMEN AND MEN (1991-95), at 3 (2003).

⁸ See SALLY J. KENNEY, GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER 108–34 (2012).

substantiating the theoretical claims supporting gender diversity in the composition of the CJEU.

This article proceeds in three parts. By way of background, the article briefly sets out the role and composition of the CJEU, with a focus on the problematic gender composition of this decision-making body, drawing on the pertinent academic literature. Part I discusses the influence of gender in decision-making generally, and at the CJEU in particular, based on a critical feminist approach. Part II discusses the case-study herein. This Part kicks off with the methodological details and analytical framework of the case-study, and then moves on to set out the two Advocate General Opinions revolving around issues of maternity leave for commissioning mothers, together with the respective judgments of the CJEU, which are compared and contrasted through a critical feminist discourse.⁹ Part III reflects on the outcome of the case-study. Lastly, the conclusion brings together the article's key points.

BACKGROUND: THE ROLE OF THE CJEU AND ITS PROBLEMATIC GENDER COMPOSITION

The first incarnation of the CJEU was that of the Court of the European Coal and Steel Community (ECSC) under Article 31 of the eponymous Treaty, signed back in 1951. Its current form is based on the two Rome Treaties, entered into force on January 1, 1958, and their subsequent amendments, though.¹⁰ According to Article 19(1) of the Treaty on the European Union (TEU), the CJEU includes the Court of Justice, the General Court and specialized courts. Article 19 further outlines the key aspects of the composition and functions of the CJEU. While Articles 251 to 281 of the Treaty on the Functioning of the European Union (TFEU) provides further details as to the composition, functions, and jurisdiction of the CJEU, the majority of the nitty-gritty, together with further particulars, are found in the Statute of the CJEU¹¹ and its Rules of Procedure (RoP).¹² The latter two, not being part of the Treaties per se, are more easily amendable.

In practice, that means that the composition of the Court of Justice in regards to its judges, clearly laid down in Article 19 TEU, can only change following a reform. For the time being, it consists of one judge from each Member State.¹³ The judges are assisted in their decision-making role by Advocate Generals, each assigned to a case,¹⁴ but producing a written report—their so-called Opinion—only if the case raises a new point of law.¹⁵ At the moment there are 11 Advocate Generals.¹⁶ Unlike the Court of Justice, the Treaties lay down only

⁹ Case C-167/12, *C.D. v. S.T.*, 2014 EUR-Lex CELEX LEXIS 169 (Mar. 18, 2014); Case C-363/12, *Z. v. A Gov't Dep't*, 2014 EUR-Lex CELEX LEXIS 159 (Mar. 18, 2014).

¹⁰ See ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 5–7 (Oxford Univ. Press 1999).

¹¹ See Consolidated Version of Protocol (No. 3) on the Statute of the Court of Justice of the European Union, [hereinafter CJEU]; Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) [hereinafter TFEU]; Consolidated Version of the Treaty Establishing the European Atomic Energy Community, Mar. 30, 2010, 2010 O.J. (C 84/01).

¹² Consolidated Version of the Rules of Procedure of the Court of Justice, 2012 O.J. (L 265), as amended by 2013 O.J. (L 173) 65 and 2016 O.J. (L 217) 69 [hereinafter Rules of Procedure of the Court of Justice].

¹³ TFEU, *supra* note 11, art. 19(2).

¹⁴ Rules of Procedure of the Court of Justice, *supra* note 12, art. 16(1).

¹⁵ Statute of the Court of Justice, *supra* note 11, art. 20.

¹⁶ TFEU, *supra* note 11, art. 252 (stipulating 8 Advocate Generals unless there is a unanimous decision of the Council to increase their number. This was the case with Declaration 38, annexed to the final act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, on Article 252 of the Treaty on the Functioning of the European Union regarding the number of Advocates-General in the Court of Justice which raised their number to 11 since October 7, 2015).

a minimum of one judge per Member State for the General Court¹⁷ which has allowed for changes to its composition recently. The aim of those changes being the gradual doubling of its size to two judges per Member State as from September 1, 2019.¹⁸ The same reforms dissolved the sole specialized tribunal, the Civil Service Tribunal, on September 1, 2016, transferring its jurisdiction to the General Court.¹⁹

Compared to the rest of the core EU institutions, the judicial system of the EU did not encounter many radical changes, other than those primarily affecting its composition.²⁰ Technically an international court, the CJEU can be distinguished from its peers due to its compulsory jurisdiction, the indirect access of individuals through the preliminary reference procedure, and the enforcement proceedings that can be brought by the supranational European Commission.²¹ It was the CJEU and its judges that managed to transform the Treaty of Rome into a quasi-constitution through their legal reasoning.²² Its role in advancing European integration has therefore been pivotal. This is partly attributed to the convictions of its judges who have generally shared an affinity to at least some of the values of European integration.²³ As EU competences grew after each subsequent Treaty amendment, the CJEU's ambit of adjudication, its playing field, was widened accordingly. This allowed it to make an impact on a diverse set of areas ranging from economic to social policies, from free movement of goods to EU citizenship, from taxation to gender equality and non-discrimination on various grounds.

The CJEU proudly states in its annual report that 60% of its officials and other staff are women, with the proportion of them in administration and management posts being above average compared to other EU institutions.²⁴ Notwithstanding that statement, at judge-level only 5 out of the 28 judges (17.9%) and 2 out of the 11 Advocate Generals (18.2%) of the Court of Justice, and 11 out of the 46 judges (23.9%) of the General Court are women.²⁵ The CJEU is a predominantly male institution insofar as its members sitting on the bench are concerned, despite the pro-equality discourse it has exhibited in quite a few of its judgments.²⁶ These figures are below par compared to the gender distribution in the judiciaries of the Member States, even among members of their Supreme Courts, and show a sluggish increase compared to the average

¹⁷ TFEU, *supra* note 11, art. 19(2).

¹⁸ Regulation (EU, EURATOM) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, 2015 O.J. (L 341) art. 1.2(c). For a critical account of the reforms *see*, Daniel Sarmiento, *The Reform of the General Court: An Exercise in Minimalist (but Radical) Institutional Reform*, 19 CAMBRIDGE Y.B. EUR. LEGAL STUD. 236 (2017).

¹⁹ Council Regulation 2016/1192, 2016 O.J. (L 200/137).

²⁰ Joseph H. H. Weiler, *Epilogue: The Judicial Après Nice*, in THE COLLECTED COURSES - ACADEMY OF EUROPEAN LAW 217–18 (Gráinne De Búrca & J.H.H. Weiler eds., 2001).

²¹ KAREN J. ALTER, THE EUROPEAN COURT'S POLITICAL POWER: SELECTED ESSAYS 32 (Oxford University Press 2009).

²² Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41, 41–42 (1993); ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE 238–39 (2004).

²³ HIALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICYMAKING 292 (1986).

²⁴ COURT OF JUSTICE OF THE EUROPEAN UNION, 2017 ANNUAL REPORT: THE YEAR IN REVIEW 51 (2018).

²⁵ *See* COURT OF JUSTICE OF THE EUROPEAN UNION, https://curia.europa.eu/jcms/jcms/j_6/en/ (last checked on May 10, 2019).

²⁶ Case C-43/75, *Defrenne v. Sabena*, [1976] ECLI:EU:C:1976:56; *see also*, RACHEL A. CICHOWSKI, THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE 73–98 (2007).

among the 28 EU Member States.²⁷ Moreover, they fail to genuinely address gender equality concerns since women are concentrated at the bottom of the hierarchy, largely limited to low-level administrative roles, with very few exceptions as one moves up the ladder and even fewer exceptions for women as members of the Court.²⁸

Flowing from the above is the first, mostly symbolic, drawback of the current gender composition of the CJEU. There is a disjunction between the majority of the decisions of the CJEU on gender equality and the actual assimilation of equality in its composition. In a way, this disregards the importance of equality between men and women for the EU. The latter features prominently among its founding values, in addition to a broader concept of equality.²⁹ It is a tad hypocritical that whilst the CJEU has gone the extra mile for promoting equality, vis-à-vis the legal orders of the Member States,³⁰ the same approach was not chosen in relation to its inner workings. This creates difficulties for the CJEU to lead by example in support of an equitable distribution of men and women sitting on the bench of its national peers. Granted, the procedures for appointing judges and Advocate Generals at the CJEU leave a lot of discretion to the Member States and are seldom scrutinized.³¹ Yet, the lack of gender diversity could be remedied through the introduction of certain eligibility criteria, or some sort of affirmative action,³² similar to what has been done in other supranational courts.³³

The lack of gender diversity in the composition of the CJEU raises further questions about the meaning, substance, and aspects of equality it conveys through its judgments. Especially regarding the Court of Justice, women are the minority in all its chambers and, although not the norm, all-male chambers still exist. It is the small percentage of women judges that prevents from having women dominated chambers following the lists composed in accordance with Article 27(4) RoP. Inevitably, this impacts the power dynamics of its judicial decision-making, prompting questions about the role of women judges therein, the resonance and influence of their views amidst a male majority, and the credibility—especially from a feminist perspective—of the judgments handed down by the CJEU on gendered issues, among others.³⁴ The lack of chambers with female majority, coupled with the overall gender imbalance within the CJEU, turns the appointments of women judges into tokens with limited voice.³⁵ This is further exacerbated by the fact that there has never been a female president of the Court of Justice or the General Court. Also, it was not until October 9, 2018, that the Court of Justice had its first female Vice-President, Rosario Silva de Lapuerta.

One could argue that the gender of the appointee makes no difference to a judiciary, due to the neutrality and independence of courts, as counter-

²⁷ EUROPEAN INSTITUTE FOR GENDER EQUALITY, GENDER EQUALITY IN POWER AND DECISION-MAKING 31 (2015).

²⁸ ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION (1st ed. 1977).

²⁹ TFEU, *supra* note 11, art. 2.

³⁰ CICHOWSKI, *supra* note 26.

³¹ KENNEY, *supra* note 8, at 110; Sally J. Kenney, *The Members of the Court of Justice of the European Communities*, 5 COLUM. J. EUR. L. 101 (1998) [hereinafter *Members of the Court*]; Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT'L ORG. 669, 676 (2007).

³² Iyiola Solanke, *Diversity and Independence in the European Court of Justice*, 15 COLUM. J. EUR. L. 89 (2008).

³³ Alastair Mowbray, *The Consideration of Gender in the Process of Appointing Judges to the European Court of Human Rights*, 8 HUM. RTS. L. REV. 549 (2008).

³⁴ JESSICA GUTH & SANNA ELFVING, GENDER THE COURT OF JUSTICE OF THE EUROPEAN UNION (2018).

³⁵ KANTER, *supra* note 28, at 291–92.

majoritarian, and therefore non-representative institutions.³⁶ Such views have been overcome by theories that see courts— especially supranational and Supreme ones—as more responsive, more democratic, and, consequently, more representative institutions.³⁷ A prime example of the CJEU’s widely acknowledged representative character is the fact that there must be at least one judge per Member State. Therefore, if country of origin is recognized as important then gender may as well be too, since it further legitimizes the adjudicative process, following democratic principles that emphasize the participation and consideration of, *inter alia*, women’s perspectives in deliberations, by whose outcome women themselves are also affected.³⁸ This democratic legitimacy complements other forms of legitimacy, namely the so-called normative and sociological legitimacies. Gender diversity boosts normative legitimacy in areas where gender may impact judicial decision-making by ensuring impartiality and eliminating biases through equal representation of female and male judges.³⁹ Even where gender plays no difference, while people think it does, gender diversity gratifies the needs of sociological legitimacy in that it corroborates perceptions of impartiality and fairness, which are essential for the incontestability of a court’s judgment.⁴⁰

Therefore, gendering the CJEU is likely to have an impact on both the substance of at least some of its rulings and on the perception of it as a more representative and democratic institution, which addresses some of the criticisms expressed against it in the past. In light of these, the latest reforms of the General Court are partly aimed at achieving greater gender diversity.⁴¹ Indeed, the 11th recital of the preamble to Regulation 2015/2422 states the following:

It is of high importance to ensure gender balance within the General Court. In order to achieve that objective, partial replacements in that Court should be organised in such a way that the governments of Member States gradually begin to nominate two Judges for the same partial replacement with the aim therefore of choosing one woman and one man, provided that the conditions and procedures laid down by the Treaties are respected.⁴²

Nonetheless, preambles are not legally binding⁴³ and, even if they were, a textual interpretation of the aforementioned recital would confirm its largely discretionary nature. The aim is for Member States to choose one woman and one man, but there is neither a carrot nor a stick to enforce that goal. In addition, the recital refers to the reforms affecting the composition of the General Court. There is nothing similar alerting Member States about gender considerations in their nominations of judges for the Court of Justice. Although time will tell, these reforms, despite their underlying good intentions, are half-baked at best.⁴⁴

³⁶ See Rachel A. Cichowski, *Courts, Rights, and Democratic Participation*, 39 COMP. POL. STUD. 50, 51 (2006).

³⁷ CICHOWSKI, *supra* note 26; *Members of the Court*, *supra* note 31, at 109.

³⁸ KENNEY, *supra* note 8.

³⁹ Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 CHI. J. INT’L L. 647, 654–60 (2012).

⁴⁰ *Id.* at 660–68.

⁴¹ Fernanda G. Nicola, *National Legal Traditions at Work in the Jurisprudence of the Court of Justice of the European Union*, 64 AM. J. COMP. L. 865, 871 (2016).

⁴² Council Directive 2015/2422, art. 11, 2015 O.J. (L 341) 14, 15.

⁴³ Case C-162/97, Nilsson & Others, 1998 E.C.R. I-7498, ¶ 54.

⁴⁴ For alternatives see, Solanke, *supra* note 32; Alberto Alemanno & Laurent Pech, *Reform of the EU’s Court System: Why a More Accountable – Not a Larger – Court is the Way Forward*, EU L. ANALYSIS (June 16, 2015, 11:54 PM), <http://eulawanalysis.blogspot.com/2015/06/reform-of-eus-court-system-why-more.html>.

I. THE INFLUENCE OF GENDER IN JUDICIAL DECISION-MAKING

A. *Gender and Judicial Decision Making: An Overview*

The significance of women in judicial appointments in terms of improving representation and legitimacy is unequivocal. Sally J. Kenney has eloquently made the case for more women judges at the CJEU and, as shown above, the EU's response has so far been lackluster.⁴⁵ Such considerations mainly focus on aspects of the so-called input legitimacy, a constituent of democratic legitimacy.⁴⁶ According to the theory of input legitimacy, the composition of the judiciary shall reflect the mosaic of society. Nonetheless, for judicial outputs to serve democratic aims their democratic legitimacy must be viewed as a two-dimensional concept.⁴⁷ This means that output legitimacy, "effective fate control" in line with collective ethos, is as important as input legitimacy.⁴⁸ Measures trying to attain gender diversity on the bench should not be limited to token gestures put in place to merely acknowledge the importance of gender equality externally. Instead, it is imperative that they internalize the thesis that by doing so the output legitimacy of the courts is set to improve, as well.

Whilst the incorporation of the output legitimacy benefits of a gender diverse court in the thought process of those in charge and, eventually, of those governed is desirable, it would be a fallacy if this relied partly on assumptions about sex differences, a trap that legal scholars often fall into.⁴⁹ An empirically driven understanding of the contribution of a gender diverse judiciary to the aims, contents, and essence of its judgments is the foremost concern. First, adopting an empirical understanding over instinctive assumptions better addresses outdated arguments that women do not bring any difference in the adjudicative process due to the neutrality of the law.⁵⁰ Second, it also captures better the nuances among the diverse viewpoints expressed by those who accept that women on the bench make a difference to the substance of the judgments produced, recognizing gender as a form of social process.⁵¹ The scholars belonging to the latter strand turn down, at large, any biological assumptions in favor of a socialization model, based on women's lived experiences, which in turn inform their reasoning.⁵² Women's voices balance, in a legal landscape that

⁴⁵ KENNEY, *supra* note 8, at 110; *Members of the Court*, *supra* note 31; Sally J. Kenney, *Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice*, 10 FEMINIST LEGAL STUD. 257 (2002).

⁴⁶ Fritz W. Scharpf, *Economic Integration, Democracy and the Welfare State*, 4 J. EUR. PUB. POL'Y 18, 19 (1997).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Sally J. Kenney, *Thinking about Gender and Judging*, 15 INT'L J. LEGAL PROF. 87, 88 (2008) (relying on what Kenney calls an "essentialist" approach rooted in an uncritical reading of Carol Gilligan's work).

⁵⁰ Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546 (1991); Miriam Goldman Cedarbaum, *Women on the Federal Bench*, 73 B.U. L. REV. 39 (1993); Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 OSGOODE HALL L.J. 507 (1990); Lady Hale, *Kuttan Menon Memorial Lecture: Equality in the Judiciary* (Feb. 21, 2013), <https://www.supremecourt.uk/docs/speech-130221.pdf>

⁵¹ Kenney, *supra* note 49, at 88; Dermot Feenan, *Editorial Introduction: Women and Judging*, 17 FEMINIST LEGAL STUD. 1, 4 (2009).

⁵² Beverly Blair Cook, *Will Women in Judges Make a Difference in Women's Legal Rights? A Prediction from Attitudes and Simulated Behaviour*, WOMEN, POWER AND POL. SYS. (Margherita Rendel ed., 1981); HELENA KENNEDY, *EVE WAS FRAMED: WOMEN AND BRITISH JUSTICE* 3 (Random House, 2011); Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891 (1995).

is dominated by men, any male bias that may exist, rendering the administration of justice more objective.⁵³

The majority of studies investigating the impact gendering the bench has on the judicial decision-making processes originate from national settings, particularly the United States.⁵⁴ Rules that allow the diverging views of each judge to be expressed, through dissents or concurring opinions, make such judiciaries an easy subject to study. Notwithstanding that, the results of these studies are not always on the same page. They are for the most part inconclusive, irrespective of the level of court, jurisdiction, and/or type of case-law examined.⁵⁵ The only exception is discrimination but even the overall picture there is not 100% uniform.⁵⁶ As the number of women increased, their influence became more apparent—and less contested—at least for certain categories of case law, especially if the socialization model was chosen as the explanatory framework of the undertaken studies.⁵⁷

Insofar as international courts as a whole are concerned, studies of that kind are scarce, if not non-existent. The majority of what is out there is often not based on empirical findings but is largely autoethnographic or anecdotal.⁵⁸ This could be attributed to the low numbers of women sitting on the bench therein.⁵⁹ Of those studies that undertake an empirical analysis, the focus is placed on courts created under International Treaties.⁶⁰ The CJEU sits, in a way, outside of their scope, seemingly falling behind in terms of research progress in the area. To put it into perspective, empirical research about gender and the CJEU is few and far between, and is instead primarily done by scholars based in the United States who, for the most part, have a political science background.⁶¹ In addition, the literature is particularly concerned about the gendering of the CJEU's composition and not so much about the impact of women on the adjudication of cases.⁶² Thus, there is a gap in the literature, which this article aims to address.

B. *The Judicial Decision-Making Process of the CJEU*

In order to fill the aforesaid gap, this article undertakes a case-study of two Advocate Generals Opinions, together with the respective judgments by the Court of Justice, assessed under a feminist discourse lens. As said above, the

⁵³ SANDRA HARDING, *WHOSE SCIENCE? WHOSE KNOWLEDGE?: THINKING FROM WOMEN'S LIVES* (1991).

⁵⁴ Feenan, *supra* note 51, at 4.

⁵⁵ See Kate Malleon, *Justifying Gender Equality on the Bench: Why Difference Won't Do*, 11 FEMINIST LEGAL STUD. 1, 5–7 (2003) (providing a good overview of various studies).

⁵⁶ *Id.* at 7.

⁵⁷ Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005); Fred O. Smith, Jr., *Gendered Justice: Do Male and Female Judges Rule Differently on Questions of Gay Rights?*, 57 STAN. L. REV. 2087 (2005); James Stribopoulos & Moin A. Yahya, *Does a Judge's Party of Appointment or Gender Matter to Case Outcomes? An Empirical Study of the Court of Appeal for Ontario*, 45 OSGOODE HALL L. J. 315 (2007).

⁵⁸ See Grossman, *supra* note 39, at 654–60 (discussing the roles of ICTR and ICC Judge Navanethem Pillay, ICTY Judge Elizabeth Odio Benito, and former IACHR judge Cecilia Medina Quiroga).

⁵⁹ Kimi L. King & Megan Greening, *Gender Justice or Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia*, 88 SOC. SCI. Q. 1049, 1050 (2007).

⁶⁰ *Id.*

⁶¹ For the most authoritative and prolific work touching upon the issue, see, KENNEY, *supra* note 8, at 110; Kenney, *supra* note 45.

⁶² For example, the latest empirical study on gender in the CJEU revolved around the matter of representation as regards the appointment of judges. It was also undertaken by political science scholars based in the United States. Rebecca D. Gill & Christian B. Jensen, *Where are the Women? Legal Traditions and Descriptive Representation on the European Court of Justice*, POL., GROUPS & IDENTITIES (2018).

CJEU has been neglected in empirical analyses of gender's impact on judicial decision-making. There are possible reasons behind this. First and foremost, the CJEU is modelled after the French judicial discourse, that of the Conseil D'Etat in particular. As Mitchel de S.-O.-L'E. Lasser observes:

The ECJ's collegial decisions remain distinctly civilian—and especially French (i.e., “Continental”, “Cartesian”, and “cryptic”)—in style, despite their abandonment of the single-sentence syllogism. ECJ decisions continue to be unsigned, univocal, magisterial (“authoritarian”), and largely deductive documents that reveal decidedly less than they might: as we have seen, the Court's shorthand reference to, and axiomatic application of, such systemic policies as “the effectiveness” of Community law, ‘legal certainty and uniformity’, and/or the “legal protection” of Community rights tend to leave much—and at times, virtually everything—unsaid.⁶³

Apart from cryptic, the CJEU's decisions also appear neutral. Their unsigned, univocal character gives the impression that rifts between its members are lacking since they all prioritize an integrationist rationale over the projection of other narratives.⁶⁴ Indeed, given the dearth of women judges at the CJEU, one could see the latter as a brotherhood whose views are replicated by, or imposed on, the odd “token” female judge.⁶⁵ This could result in a waning interest in investigating the matter further. For example, no studies on voting patterns can be drawn from, nor can they attribute to, certain views to a particular judge.⁶⁶ This could be further exacerbated by the bureaucratization of the CJEU, which may shift the emphasis away from the judges to their support personnel.⁶⁷

On a different note, the CJEU has long been perceived as a driver of economic integration, which is an area that is not particularly useful for undertaking any such empirical research.⁶⁸ An added hurdle is the fact that the CJEU does not have any sentencing jurisdiction for comparisons to be drawn.⁶⁹ Nonetheless, cases of discrimination have been adjudicated *en masse* by the CJEU over time⁷⁰ and even fundamental rights were gradually entrenched in its discourse.⁷¹ Therefore, areas for scholarly exploration exist. In particular, equality in the workplace and maternity rights recall seminal studies elsewhere, studies whose findings often—but not always—established that gender

⁶³ MITCHEL DE S.-O.-L'E. LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND LEGITIMACY* 351–52 (2009).

⁶⁴ PHIL SYRPIS, *EU INTERVENTION IN DOMESTIC LABOUR LAW* 12–53 (Oxford Univ. Press 2007).

⁶⁵ Antoine Vauchez, *Keeping the Dream Alive: the European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence*, 4 EUR. POL. SCI. REV. 51, 62 (2012); Dermot Feenan, *Editorial Introduction: Women and Judging*, 17 FEMINIST LEGAL STUD. 1, 4 (2009).

⁶⁶ Unlike the United States, for example. David W. Allen, *Voting Blocs and the Freshman Justice on State Supreme Courts*, 44 THE WEST POL. Q. 727 (1990).

⁶⁷ Mathilde Cohen, *Judges or Hostages? The Bureaucratization of the Court of Justice of the European Union and the European Court of Human Rights*, in EUROPEAN UNION LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE 58–80 (Bill Davies & Fernanda Nicola eds., 2017).

⁶⁸ Clifford J. Carrubba et al., *Judicial Behavior under Political Constraints: Evidence from the European Court of Justice*, 102 AM. POL. SCI. REV. 437 (2008); Malleson, *supra* note 55, at 6–7.

⁶⁹ Herbert M. Kritzer & Thomas M. Uhlman, *Sisterhood in the Courtroom: Sex of Judge and Defendant as Factors in Criminal Case Disposition*, 14 SOC. SCI. J. 77 (1977).

⁷⁰ See COURT OF JUSTICE OF THE EUROPEAN UNION, *supra* note 24.

⁷¹ Jason Coppel & Aidan O'Neill, *The European Court of Justice: Taking Rights Seriously*, 12 LEGAL STUD. 227 (1992).

composition makes a difference as to the case's outcome.⁷² Drawing parallels with the aforementioned studies, this article's case-study looks at the issue of maternity leave for commissioning mothers who opted for surrogacy, as decided by the CJEU primarily on the basis of the Pregnant Workers Directive 92/85/EEC and the Equal Treatment Directive 2006/54/EC.⁷³

II. THE CASE-STUDY

A. *Context, Framework and Methodology*

This case-study draws on two contrasting Advocate General Opinions, together with the respective judgments of the CJEU, in the cases of *D.*⁷⁴ and *Z.*⁷⁵ Both center on aspects of surrogacy leave; commissioning mothers who had a baby through surrogacy arrangements sought to rely on various EU Directives in order to receive protection.⁷⁶ They present comparable cases, which, nevertheless, triggered diverging Opinions between the Advocate Generals that were assigned to each case. The female Advocate General assigned to the case of *D.*—Juliane Kokott, the third woman ever to hold this position—suggested the adjudication of the case in a sympathetic manner. In comparison, the male Advocate General for the case of *Z.*, Nils Wahl, gave an opposing—but apologetic—view. The Court decided both cases uniformly by declining any protection to commissioning mothers, following for the most part the Opinion of Advocate General Wahl and ignoring the one of Kokott.

Before presenting the analytical framework of the study, the rationale behind it should be set out first. Unlike the collegial character of a CJEU judgement, the Opinion of an Advocate General represents the personalized argument of another member of the CJEU.⁷⁷ It is therefore easily discernible and attributable to a specific court member. The reliance, or lack thereof, on the Opinion by the chamber of the Court of Justice that decides a case, moreover, could shed some light on the power dynamics between the two, given that most of the time the judges tend to follow to some extent the Opinion of the Advocate General.⁷⁸ Even in courts that sit on panels, such as the CJEU, gender has often—but not always—been found to have a positive impact, leading to views

⁷² As a point of reference, see, Pat K. Chew, *Judges' Gender and Employment Discrimination Cases: Emerging Evidence-Based Empirical Conclusions*, 14 J. GENDER RACE & JUST. 359 (2011). Although, there have been studies with different outcomes. See Kathy Laster & Roger Douglas, *Feminized Justice: The Impact of Women Decision Makers in the Lower Courts in Australia*, 12 JUST. Q. 177 (1995); Frances Raday, *Women in Law in Israel: A Study of the Relationship Between Professional Integration and Feminism*, 12 GA. ST. U. L. REV. 595 (1996).

⁷³ Although the Framework Directive 2000/78/EC on equal treatment in employment and occupation was also relevant, and relied on to some extent, the discussion focuses on the Pregnant Workers Directive 92/85/EEC and the Equal Treatment Directive 2006/54/EC, since they are the closest linked to gender equality.

⁷⁴ Case C-167/12, *C.D. v. S.T.*, 2014 EUR-Lex CELEX LEXIS 169 (Mar. 18, 2014).

⁷⁵ Case C-363/12, *Z. v. A Gov't Dept.*, 2014 EUR-Lex CELEX LEXIS 159 (Mar. 18, 2014).

⁷⁶ Council Directive 92/85, 1992 O.J. (L 348) (EEC); Council Directive 2006/54, 2006 O.J. (L 204) (EC); Council Directive 2000/78, 2000 O.J. (L 303) (EC) (on equal treatment in employment and occupation).

⁷⁷ There is no differentiation between the judges and Advocate Generals within the CJEU; they are all members of the Court of Justice. Nonetheless, the Advocate Generals' difficult interpretative position leads them to "emerge as individual voices who must respond at length to contrary arguments, and do so in a highly personalized, relativized, and even insecure fashion." MITCHEL DE S.-O.-I'E. LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND LEGITIMACY* 204 (2009).

⁷⁸ Takis Tridimas, *The Role of the Advocate General in the Development of Community Law: Some Reflections*, 34 COMMON MKT. L. REV. 1349 (1997).

that promote social justice, particularly in sex discrimination cases.⁷⁹ The two surrogacy-leave cases examined herein are categorized as social policy cases, spanning across issues of gender discrimination and family, fairness and social justice; issues on which the role of women judges is influential.⁸⁰

Thus, the case-study covers the least contested area of case-law vis-à-vis the merit of female judges' substantial contribution in a judiciary's decision-making processes. It would, thence, be invaluable to test this hypothesis at the level of the CJEU. Although the sample here analyzed is arguably small, it is rare to stumble upon two similar cases, which were decided by the same chamber (Grand Chamber) of the Court of Justice on the same day, and whose Advocate General Opinions were delivered together, but by Advocate Generals of different genders. The coincidence of so many parameters renders the cases of D. and Z. a window of opportunity to gather insights about the role of gender in the nitty gritty of a judiciary whose final output makes it hard for any such speculation. The fact that the Court of Justice sat as a full court in a Grand Chamber, although with slightly different composition, for both cases, serves to highlight their complexity and importance.

Indeed, these cases test the waters for a related yet emerging topic, maternity leave for non-conventional forms of motherhood, that is not explicitly covered by EU legislation. This makes the CJEU's output all the more pivotal. Of course, in a small sample the risk of overgeneralization is lurking, particularly if one relies on unsubstantiated assumptions about the explanatory role of gender therein.⁸¹ Other variables may play just as important a part in defining the orientation of a judgment. For example, insofar as the Advocate General's Opinion is concerned, the different background of each Advocate General could explain the difference in outcomes. In the examined cases, though, the Advocate Generals are of similar age, both have an academic background, and come from countries known for their social models, which, although distinct, aim to offer levels of protection higher to those of a liberal welfare regime.⁸² If nothing else, Advocate General Wahl's Member State of origin, Sweden, has long been renowned for its high—albeit not perfect—standards of gender equality.⁸³

In terms of comparing the two Advocate General Opinions then, the determining factor comes down to their understanding of the gendered experience, and it is here that the importance of gender is proven.⁸⁴ Their feminist views, or lack thereof, is another determinant in line with studies centered on the socialization model mentioned above. Moreover, the degree of influence that Advocate General Kokott's Opinion may exert on the judgment

⁷⁹ Sean Farhang & Gregory Wawro, *Institutional Dynamic on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J. L., ECON. & ORG. 299 (2004); Gerard S. Gryski, et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143 (1986); Although, note the issues arising as to the interpretation of empirical findings from such studies; Malleson, *supra* note 55, at 8–9.

⁸⁰ See discussion Grossman, *supra* note 39.

⁸¹ Kenney, *supra* note 49.

⁸² Despite the recent retrenchment, Sweden has been a good example of a social democratic welfare state, whereas Germany that of conservative corporatism, with a strong emphasis on the Sozialstaat principle. GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990); Hans Michael Heinig, *The Political and the Basic Law's Sozialstaat Principle—Perspectives from Constitutional Law and Theory*, 12 GERMAN L. J. 1887 (2011).

⁸³ Charlott Nyman, *Gender Equality in 'The Most Equal Country in the World'? Money and Marriage in Sweden*, 47 SOC. REV. 766 (1999).

⁸⁴ Rosemary Hunter, *More than Just a Different Face? Judicial Diversity and Decision-making*, 68 CURRENT LEGAL PROBS. 119, 130–132 (2015).

of the Court of Justice will also test how, and if, a woman may affect the rest of her peers' views on equality-related cases, in the context of the CJEU.⁸⁵

The analytical lens of this study is rooted in a simplified feminist discourse analysis, centered on the reasoning of the four examined documents; the two Advocate General Opinions and their two subsequent judgments. Critical discourse analysis aims at critiquing unjust social practices, whereas its feminist strand focuses on unmasking their gendered implications.⁸⁶ Rosemary Hunter observes in relation to a feminist critical discourse analysis of judgments:

Discourse analysis involves paying close, critical attention to the judicial reasoning, including the language and concepts used, the way the argument is constructed, and what might be absent from or excluded by the text. The aim is to identify what understanding/s of gender and/or sexuality are invoked or constructed by the judgment, to place the judgment within the context of wider legal and non-legal discourses around gender and sexuality, and to consider the potential socio-legal effects of the judgment.⁸⁷

By looking at these documents, this article will—for the first time in relation to the CJEU—assess how gender and feminist thought affect the judicial interpretation of “equal protection and discrimination law in light of those provisions’ broad social change purposes.”⁸⁸ Similar to the Feminist Judgments Projects, this article will look at how the indeterminability of the law leads to diverse interpretations and, consequently, policy choices, depending on the standpoint of a judge, in turn partly attributed to their gender and/or feminist ideals.⁸⁹ Yet, the Advocate Generals’ Opinions and the Court of Justice’s judgments are not going to be re-written. Their narratives come under scrutiny in order to empirically interrogate and ascribe their feminist consciousness.⁹⁰ For Hunter, the narratives underpinning the reasoning of a court are just as important as its output.⁹¹ By looking at the respective Opinions and Court judgments in detail, the substantive adjudicative impact of the CJEU’s gender composition will come to light for the first time.

B. *Discussion*

The cases of D. and Z. arose in domestic proceedings in the United Kingdom and Ireland, respectively. D. was a commissioning mother who fulfilled all formal requirements for taking part in a surrogacy pregnancy, and who was initially refused maternity leave by her employer. Even though the latter eventually granted D. maternity leave, treating the request as an adoption case and applying the legal provisions in place for adoption, D. claimed legal interest to continue the case. The Employment Tribunal, Newcastle Upon Tyne, referred the matter to the CJEU, asking questions concerning the relevance for the case of the Pregnant Workers Directive 92/85/EEC and the Equal Treatment Directive 2006/54/EC.

⁸⁵ As a singled-out gendered voice. See also, Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406 (2010).

⁸⁶ Michelle M. Lazar, *Feminist Critical Discourse Analysis: Articulating a Feminist Discourse Praxis*, 6 CRITICAL DISCOURSE STUD. 141, 145–46 (2007).

⁸⁷ Rosemary Hunter, *Analysing Judgments from a Feminist Perspective*, 15 LEGAL INFO. MGMT. 8 (2015).

⁸⁸ KENNEY, *supra* note 8, at 15–16.

⁸⁹ ROSEMARY HUNTER ET AL., *FEMINIST JUDGMENTS: AN INTRODUCTION*, FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE 5–7 (Rosemary Hunter, et al. eds., 2010).

⁹⁰ ETHEL KLEIN, *GENDER POLITICS: FROM CONSCIOUSNESS TO MASS POLITICS* (1984).

⁹¹ Hunter, *supra* note 87, at 9.

Surrogacy is unregulated in Ireland, where the case of Z. originated. Z. chose to become a commissioning mother because she suffered from a condition that precluded her from bearing children. Accordingly, she requested maternity or adoption leave under Irish law, both of which were refused, on the basis that they do not cover commissioning mothers. In light of her claim that she had been discriminated against on grounds of sex and disability, or in the alternative that the allegedly applicable Directives 2006/54/EC and 2000/78/EC are invalid, the national court, the Equality Tribunal, chose to refer her case to the CJEU. The fact patterns of both cases are quite similar, and that is why they have been examined together in the pertinent literature.⁹²

C. *The Two Advocate Generals' Opinions*

1. Advocate General Kokott's Opinion in the Case of D.

The Opinion for the case of D. was assigned to Advocate General Kokott. The first issue of substance she deals with is that of the scope of the Pregnant Workers Directive. According to Articles 1 and 2 thereof, the Directive applies to pregnant workers and those who have recently given birth or are breastfeeding. Advocate General Kokott cannot see a commissioning mother falling under the umbrella of a pregnant worker, or a worker who has recently given birth.⁹³ Following a textual interpretation of the said Articles, only commissioning mothers who are working and breastfeeding could fall within the scope of the Directive, precluding those that are not breastfeeding from relying on it.⁹⁴ Apart from the letter of the law, the Advocate General ponders on the Directive's overarching purpose, an interpretative tool to which the CJEU is no stranger.⁹⁵ She then goes on to add that:

Directive 92/85 must be viewed in its historical context. In the early 1990s the practice of surrogacy was not as widespread as it is today. It is thus not surprising that the normative structure of Directive 92/85 is based on an approach which takes biological motherhood as the norm.⁹⁶

However, that does not mean that an intended mother should be completely denied the protection afforded by Directive 92/85 even if this special case was not specifically taken into account by the legislature. The essential basis must, rather, be the objectives of Directive 92/85 and it must be considered whether it is necessary for intended mothers to be included in the scope of the protection afforded by Directive 92/85.⁹⁷

According to her, the interpretation of EU law should not remain static to the biological concept of motherhood, prevalent at the time the Pregnant

⁹² See generally Michèle Finck & Betül Kas, *Surrogacy Leave as a Matter of EU law: CD and Z*, 52 COMMON MKT. L. REV. 281 (2015); Mel Cousins, *Surrogacy Leave and EU Law*, 21 MAASTRICHT J. EUR. & COMP. L. 476 (2014); Eugenia Caracciolo di Torella & Petra Foubert, *Surrogacy, Pregnancy and Maternity Rights: A Missed Opportunity for a More Coherent Regime of Parental Rights in the EU*, 40 EUR. L. REV. 52 (2015); Geert de Baere, *Shall I be Mother? The Prohibition on Sex Discrimination, the UN Disability Convention, and the Right to Surrogacy Leave under EU Law*, 74 CAMBRIDGE L.J. 44 (2015).

⁹³ Case C-167/12, C.D. v. S.T., 2013 ECLI:EU:C:2013:600, ¶ 35 (opinion of Advocate General Kokott).

⁹⁴ *Id.* at ¶ 36.

⁹⁵ *Id.* at ¶ 37. For more on the CJEU's teleology see, Albertina Albors Llorens, *The European Court of Justice, More than a Teleological Court*, 2 CAMBRIDGE Y.B. EUR. L. STUD. 373 (2000).

⁹⁶ Case C-167/12, C.D. v. S.T., 2013 ECLI:EU:C:2013:600, ¶ 39.

⁹⁷ *Id.* at ¶ 41.

Workers Directive was drafted. Instead, the overarching purpose of the Directive is the most crucial factor and the key interpretative tool. Although commissioning mothers do not risk encountering the same health and safety perils as pregnant workers or workers who have recently given birth, Kokott argues that the risks and demands for breastfeeding mothers are identical to those of commissioning mothers.⁹⁸ She also adds that:

Directive 92/85, and in particular the maternity leave for which it provides, is not intended solely to protect workers. Maternity leave is also intended to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, a position which is also consistent with Articles 24(3) and 7 of the Charter of Fundamental Rights of the European Union.⁹⁹

This objective of protection based on the mother-child relationship even suggests that Directive 92/85 must apply generally to intended mothers irrespective of whether or not they breastfeed their child. [...] In the same way as a woman who herself has given birth to a child, an intended mother has in her care an infant for whose best interests she is responsible. However, precisely because she herself was not pregnant, she is faced with the challenge of bonding with that child, integrating it into the family and adjusting to her role as a mother. This “special relationship between a woman and her child over the period which follows pregnancy and childbirth” warrants protection in the case of an intended mother in the same way as it does in the case of a biological mother.¹⁰⁰

[i]n the context of Directive 92/85 motherhood cannot be seen as detached from pregnancy... Reproductive medicine has since overtaken the legislature’s scheme, but without thereby creating a situation in which the legislative intention has no relevance to intended mothers...in surrogacy cases the mothering role is shared between two women who must be granted the protection afforded by Directive 92/85 at the times relevant to them.¹⁰¹

Consequently, in view of the possibilities created by medical advances, the objectives pursued by Directive 92/85 mean that the class of persons defined in Article 2 of the directive must be understood in functional rather than monistic biological terms.¹⁰²

On the other hand, if intended mothers were to be excluded from the scope of Directive 92/85, that would ultimately be to the detriment of children born to a surrogate mother and contrary to the basic idea expressed in Article 24 of the Charter of Fundamental Rights of the European Union, under which in all actions relating to children, whether taken by

⁹⁸ *Id.* at ¶¶ 43–44.

⁹⁹ *Id.* at ¶ 45.

¹⁰⁰ *Id.* at ¶ 46.

¹⁰¹ *Id.* at ¶ 47.

¹⁰² *Id.* at ¶ 48.

public authorities or private institutions, the child's best interests must be a primary consideration.¹⁰³

The preceding excerpts indicate Kokott's feminist teleology. Not only have times changed socially but protecting commissioning mothers is also in the best interests of the child, which are protected by the Charter of Fundamental Rights. The scope of the law is not extended but is merely updated to incorporate the contemporary lived experiences of women that opt for surrogacy. The reasoning alludes to Martha Albertson Fineman's conceptualization of vulnerability, with the interpretation of maternity leave under the Directive in a more robust and inclusive way, as to better guarantee equality and afford greater levels of protection.¹⁰⁴ Or as Kenney put it, Kokott interprets the law in accordance to its "broad social change purposes."¹⁰⁵ This powerful reasoning is repeated to reinforce the claim that commissioning mothers who do not breastfeed should also benefit from the Directive.

The remainder of her Opinion, touching upon the Equal Treatment Directive 2006/54/EC, is much more muted. After her bold interpretation of the Pregnant Workers Directive, so as to allow commissioning mothers to get adequate protection, she retracts by finding, in quite a minimal way, no breach—or much relevance for that matter—of Directive 2006/54/EC.¹⁰⁶ This could be because the remaining questions that were referred became redundant in light of the positive answer in relation to Directive 92/85/EC.¹⁰⁷ Alternatively, it could signal a cautious approach so as not to put forward too many radical and, thus controversial solutions in the hopes of keeping the Opinion's chances of adoption by the Court of Justice relatively high. Unlike other Opinions, Advocate General Kokott refrains from using phrases that draw attention to the personal and relative character of an Opinion, instead framing her predominantly feminist voice in a way that promotes "a sense of deductive interpretative necessity."¹⁰⁸

2. Advocate General Wahl's Opinion in the Case of Z.

Advocate General Wahl's Opinion in the case of Z. sits somewhat at odds with that of his colleague. For him, the Pregnant Workers Directive's aim is to improve the health and safety at work of pregnant workers, by protecting their physical and mental condition.¹⁰⁹ Vulnerability is conceived in narrow, biological terms, without the breadth of Kokott's purposive conceptualization of the issue. Instead, the legislative provision is contextualized in its initial 1990's setting, centered on the concept of confinement, which Advocate General Wahl emphasises in italics.¹¹⁰ He also adds:

[T]he Court also attaches importance to the special relationship that develops after birth between the woman and her child. However, I believe that that objective can only be

¹⁰³ *Id.* at ¶ 52.

¹⁰⁴ See, Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1, 8–9 (2008).

¹⁰⁵ KENNEY, *supra* note 8, at 15–16.

¹⁰⁶ Case C-167/12, C.D. v. S.T., 2013 ECLI:EU:C:2013:600, ¶¶ 78–89.

¹⁰⁷ Mel Cousins, *Surrogacy Leave and EU Law*, 21 MAASTRICHT J. EUR. & COMP. L. 476, 480–81 (2014).

¹⁰⁸ MITCHEL DE S.-O.-L'E. LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND LEGITIMACY* 204 (2009).

¹⁰⁹ Case C-363/12, Z. v. A Gov't. Dep't. & the Bd. of Mgmt. of a Cmty. Sch., 2013 ECLI:EU:C:2013:604, para. 44 (Sept. 26, 2013) (op. of Advocate General Wahl).

¹¹⁰ *Id.* at ¶ 45.

understood in context; as a logical corollary of childbirth (and breastfeeding).¹¹¹

[A]lthough Ms Z is the genetic mother of the child born through surrogacy, I am not convinced that that circumstance alone may be construed as enabling the ambit of Directive 92/85 to be widened to protect, in general terms, motherhood, or indeed parenthood, in defiance of its very wording and its clearly enunciated objectives.¹¹²

The interpretation of the Directive cannot thus match the contemporary realities of women that chose to become commissioning mothers; their special relationship with their children, not deriving from the event of childbirth, is not as special as that of biological mothers. Not all mothers are created equal for the purposes of Directive 92/85/EC. Indeed the Advocate General makes this view explicit by saying that:

[T]hat directive only covers a specific category of workers whom the EU legislature has deemed to be in need of special protection. In this respect, I do not believe that a woman undertaking surrogacy can be compared to a woman who, after being pregnant and having endured the physical and mental constraints of pregnancy, gives birth to a child.¹¹³

The alternative of relying on the Equal Treatment Directive is also dismissed, although with a more elaborate explanation in comparison to Kokott's Opinion. Unlike *Mayr* and *in vitro* fertilization,¹¹⁴ for Wahl, surrogacy is not linked to the commissioning mother's pregnancy *per se*, and as a result it cannot automatically lead to a case of pregnancy-related sex discrimination.¹¹⁵ A male comparator is required, who, nonetheless, would be treated the same. This means that if discrimination was found, then this "would additionally entail a value judgment as to the qualitative difference between motherhood as opposed to parenthood in general."¹¹⁶ The only ground for sex discrimination may be *vis-à-vis* adoption leave, due to the similarities in the circumstances attributed to the lack of "the physical and mental effects of pregnancy and childbirth."¹¹⁷ This is an area contingent on the existence of national laws on the matter, though.¹¹⁸ And because of the lack of relevance of Z.'s situation in terms of the Pregnant Workers and the Equal Treatment Directives, her case falls outside the scope of EU law:

[A] specific legislative instrument reflecting a fundamental legislative choice to enhance substantive equality between the sexes – in accordance with Articles 21 and 23 of the Charter – cannot be construed, simply by evoking fundamental rights, as covering other (possible) forms of discrimination.¹¹⁹

¹¹¹ *Id.* at ¶ 47.

¹¹² *Id.* at ¶ 48.

¹¹³ *Id.* at ¶ 52.

¹¹⁴ Case C-506/06, *Mayr v. Bäckerei und Konditorei Gerhard Flöckner OHG*, 2007 ECLI:EU:C:2008:119 (Nov. 27, 2007).

¹¹⁵ Case C-363/12, *Z. v. A Gov't. Dep't. & the Bd. of Mgmt. of a Cmty. Sch.*, 2013 ECLI:EU:C:2013:604, ¶¶ 57–60 (Sept. 26, 2013) (op. of Advocate General Wahl).

¹¹⁶ *Id.* at ¶ 63.

¹¹⁷ *Id.* at ¶ 64.

¹¹⁸ *Id.* at ¶¶ 65–68.

¹¹⁹ *Id.* at ¶ 73.

Wahl has relativized here the application and interpretation of EU law, in order to decline heightened protection for commissioning mothers. Not only is the commissioning mother's special relationship not as special as those of pregnant women, sex discrimination is also inapplicable, again, primarily because of the centrality of biological pregnancy. The Opinion's narrative proliferates arguments about certain types of motherhood, worthy of EU law protection, based on largely outdated axiomatic views regarding the type of mother that qualifies for it.¹²⁰ Yet, at the end of his arguments comes a quasi-apology:

I have considerable sympathy with the difficulties that commissioning parents undoubtedly face because of the legal uncertainty surrounding surrogacy arrangements in a number of Member States. However, I do not believe that it is for the Court to substitute itself for the legislature by engaging in constructive interpretation that would involve reading into Directives 2006/54 and 2000/78 (or, indeed Directive 92/85) something that is simply not there. That, in my view, would amount to encroaching upon the legislative prerogative.¹²¹

Indeed, construing an entitlement to paid leave of absence from employment judicially would entail taking a stand on questions of an ethical nature, which have yet to be decided by legislative process. If extending the scope of protection of maternity or adoption leave (or indeed creating a separate form of leave for surrogacy arrangements) is considered to be socially desirable, it will be for the Member States and/or the EU legislature to put in place the necessary legislative measures to attain that objective.¹²²

The fact that Advocate General Wahl wishes to excuse the outcome of his Opinion, in a rather personalized tone, could ostensibly be a token gesture. There is a distinct separation of powers, which allows only the Member States and the EU legislature to update any such laws. Of course, adhering to an outdated law is not the sole possible interpretation respecting the separation of powers. According to some courts, there is a duty to set the laws they interpret in their context by undertaking purposive interpretations.¹²³ Certainly the CJEU is no stranger to this, given some of the discussion above.¹²⁴ Although encouraging, in that it acknowledges the problematic lacunae in the protection of other forms of motherhood, or parenthood for that matter, the rather formalistic *dura lex sed lex* approach comes at the expense of embedding more progressive gender considerations in the judicial discourse.

D. *The Two Judgments By the Court of Justice*

The judgment in the case of D. saw the arguments made by Advocate General Kokott rejected, in favor of a biological conceptualization of

¹²⁰ Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L. J. 187 (1986); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTING L. J. 597 (2002).

¹²¹ Case C-363/12, *Z. v. A Gov't. Dep't. & the Bd. of Mgmt. of a Cmty. Sch.*, 2013 ECLI:EU:C:2013:604, ¶ 120 (Sept. 26, 2013) (op. of Advocate General Wahl).

¹²² *Id.* at ¶ 121.

¹²³ See T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 22–46 (1988) (providing an overview of the different theories).

¹²⁴ Albertina Albors Llorens, *The European Court of Justice, More than a Teleological Court*, 2 CAMBRIDGE Y.B. EUROPEAN LEGAL STUD. 373 (1999).

vulnerability and motherhood, similar to Advocate General Wahl and his Opinion in *Z*. Despite the Pregnant Workers Directive aiming to protect not only the biological condition of a woman in the course of pregnancy, but also the special mother-child relationship, the latter is conditional upon confinement.¹²⁵ This is because the latter objective “concerns only the period after ‘pregnancy and childbirth.’”¹²⁶ To address any doubts, the Court of Justice shuts the door to commissioning mothers completely:

[A] female worker who as a commissioning mother has had a baby through a surrogacy arrangement does not fall within the scope of Article 8 of Directive 92/85, even in circumstances where she may breastfeed the baby following the birth or where she does breastfeed the baby. Consequently, Member States are not required to grant such a worker a right to maternity leave pursuant to that article.¹²⁷

It then drops the ball to the Member States, stating that they are allowed to cover such situations should they wish to do so. But this is not what Advocate General Kokott said, whose Opinion in regard to the interpretation of Directive 92/85/EC appears to have been discarded completely by the Court of Justice, choosing instead not to question the *status quo*. The Court of Justice agrees with the Advocate General about the non-application of the Equal Treatment Directive, but uses much more rigid language:

A commissioning mother [...] cannot, by definition, be subject to less favourable treatment related to her pregnancy, given that she has not been pregnant with that baby.¹²⁸

Moreover [...] Directive 92/85 does not require Member States to provide maternity leave to a [...] a commissioning mother [...]. Therefore, that commissioning mother is not subject to less favourable treatment related to the taking of maternity leave within the meaning of Directive 92/85.¹²⁹

Anything related to motherhood is construed under the biological aspect of it. Any other form of motherhood is excluded and unworthy of extending EU law’s protection towards it. Nothing of the more encompassing reasoning of Kokott’s Opinion managed to infiltrate the Court’s discourse. To confirm that, no mention of the Advocate General is made in any substantive part of the judgment.

The second judgment, that in the case of *Z*., mirrored the respective Advocate General Opinion to a large extent, apart from its feminist *dicta*. Citing particular paragraphs of Wahl’s Opinion, the issue of sex discrimination is addressed indistinguishably.¹³⁰ Commissioning mothers are treated identically to commissioning fathers, without anything pointing at the former being in a particular disadvantage, which negates any claims of direct or indirect discrimination.¹³¹ More specifically, “the fact that the commissioning mother has been responsible for the care of the child from birth [...] is not such as to

¹²⁵ Case C-167/12, *C.D. v. S.T.*, 2013 ECLI:EU:C:2013:600, ¶¶ 34–35.

¹²⁶ *Id.* at ¶ 36.

¹²⁷ *Id.* at ¶ 40.

¹²⁸ *Id.* at ¶ 52.

¹²⁹ *Id.* at ¶ 53.

¹³⁰ Case C-363/12, *Z. v. A Gov’t. Dep’t. & the Bd. of Mgmt. of a Cmty. Sch.*, 2013 ECLI:EU:C:2013:604, ¶ 52. (Sept. 26, 2013) (op. of Advocate General Wahl).

¹³¹ *Id.* at ¶¶ 53–55.

call that finding into question.”¹³² Paragraph 56 of the judgment on the impossibility for commissioning mothers to suffer less favorable treatment on the basis of pregnancy copies paragraph 40 of the judgment in D. almost verbatim, showing a shared reasoning behind their adjudication by the Court of Justice. The judgment in the case of D. is also relied on as authority for the exclusion of commissioning mothers from maternity leave, and, *mutatis mutandis*, from claims of less favorable treatment related to it.¹³³

According to the Court of Justice, the aspect of the refusal to provide adoptive leave to commissioning mothers is largely regulated at the national level, and only becomes relevant at the EU level for issues of return to work and dismissal, which the case of Z. does not concern.¹³⁴ Therefore, in line with Advocate General Wahl, no discrimination has taken place, and any other matter related to maternity leave falls outside the scope of EU law.

III. REFLECTIONS

LEGAL DOCUMENT	GENDER (COMPOSITION)	AG OPINION	FEMINIST PERSPECTIVE
OPINION OF AG KOKOTT IN D. (C-167/12)	Female	N/A	Pragmatic
OPINION OF AG WAHL IN Z. (C-363/12)	Male	N/A	Idealistic (partially)
JUDGMENT OF THE CJEU IN D. (C-167/12)	Male-dominated	Rejected completely	Lacking
JUDGMENT OF THE CJEU IN Z. (C-363/12)	Male-dominated	Accepted except for feminist components	Lacking

What can this study say about the role of gender in the adjudicative process of the CJEU? In a way, it represents a cautionary tale about the negative impacts a predominantly male—and apparently not very feminist—composition may have on judicial decision-making, particularly for cases that affect women or entail an equal treatment dimension. The least feminist views of the male Advocate General seem to have been espoused by both judgments, even if only indirectly in that of the case of D. These were more subdued and conservative than the more protective, and somewhat progressive, Opinion of Advocate General Kokott, which was ignored by her peers without any explanation. It strikes as bizarre that the approach in the judgment of D. was seemingly modelled after Advocate General Wahl’s Opinion, even though the two cases were not joined. It seems that a fellow voice from the brotherhood echoed louder

¹³² *Id.* at ¶ 55.

¹³³ *Id.* at ¶¶ 58–60.

¹³⁴ *Id.* at ¶¶ 63–64.

in the Grand Chamber.¹³⁵ The law is the law, framed statically, and not open to more purposive interpretation, at least not when motherhood and equal treatment are a concern.

Feminist consciousness, then, is lacking from the two judgments, and from the most part of Wahl's Opinion. Even though certain categories of mothers are *de lege lata* excluded from the CJEU-approved biological definition of motherhood, and thence from any protection that comes with it, including maternity leave, this dynamic is nowadays outdated and perpetuates 1990's stereotypes, even though Advocate General Kokott called for corrective action;¹³⁶ this narrative was not replicated in the judgments by the Court of Justice, not even in the case on which she gave her Opinion. Nor was much of that consciousness prevalent in the Opinion of Advocate General Wahl either. The latter did not wish to shatter long-standing and stereotypical¹³⁷ perceptions, but sought to excuse the allegiance to these *ex post*, invoking the gap that exists in law, which, according to him, the judiciary unfortunately cannot, and is not meant to, tackle. This was observed vis-à-vis the same law, which the woman Advocate General showed how it could be interpretatively bent to accommodate the lived experiences of commissioning mothers. Is this a gendered variation of judicial reasoning?

Advocate General Kokott's Opinion is by no means faultless. In particular, she has been criticized for focusing on motherhood, especially when distinguishing surrogacy from adoption, a position "that entrenches stereotypes, and bypasses the best interests of the child."¹³⁸ In fact, Advocate General Wahl ostensibly suggested legislative intervention for all visions of parenthood to be protected, influenced perhaps by the high levels of equality in his country of origin. This is his Opinion's feminist silver lining. Instead, the highlighting by Kokott of the special mother-child relationship, conceptualized as borderline synonymous to parenthood, if adopted, may have had unintended consequences for same-sex couples, or other non-traditional families.¹³⁹

Whilst it is true that various strands of feminist critique have lamented certain conceptualizations of motherhood,¹⁴⁰ without Kokott's Opinion, we are only left with the strictly biological approach to motherhood in practice. Moreover, the Pregnant Workers Directive as a whole is structured around motherhood, and it is in that context that her Opinion is written. Kokott has been an Advocate General within the CJEU since 2003, and thus well acquainted with its inner workings and reasoning. Surely, it would be easier to propose to the Court of Justice to extend partially the scope of the Directive, rather than to put forward a more ground-breaking, and on the face of the facts of the case, contextually irrelevant argument. She therefore adopted a more pragmatic approach, unlike the more idealistic interlude about equality and parenthood by Wahl. Her Opinion portrays a genuine attempt to better the interpretation of a law that had *de facto* a restrictive ambit. After all, given the law's and the legislature's prejudices, who can guarantee that stereotypical views of

¹³⁵ Antoine Vauchez, *Keeping the Dream Alive: the European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence*, 4 EUR. POL. SCI. REV. 51, 62 (2012).

¹³⁶ In reference to the elements of feminist consciousness, see Patricia Y. Martin et al., *Gender Bias and Feminist Consciousness among Judges and Attorneys: A Standpoint Theory Analysis*, 27 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 665, 671 (2002).

¹³⁷ Walby, *supra* note 2, at 6.

¹³⁸ Caracciolo di Torella & Foubert, *supra* note 92, 64-65.

¹³⁹ Michèle Finck and Betül Kas, *Surrogacy Leave as a Matter of EU Law: CD and Z*, 52 COMMON MKT. L. REV. 281, 294-295 (2015).

¹⁴⁰ For an overview, see, ROSEMARIE TONG & TINA FERNANDES BOTTS, *FEMINIST THOUGHT: A MORE COMPREHENSIVE INTRODUCTION* (5th ed. 2017).

motherhood are not going to be reproduced, and consequently, progressive views of parenthood dismissed, if the matter is left solely to them?

In addition to being pragmatic, Kokott's approach is a rights-based one that incorporates the best interests of the child. In terms of discourse and narrative, her Opinion is, overall, the most sympathetic and feminist conscious output of those examined in the case-study. Gradually, and if followed, it could have enabled a progressive modernization of the law, to cover all forms of parenthood. It had the potential to push the debate forward, giving a fresh, and more equal, interpretation as a blueprint for future legislative proposals in the area. In her Opinion, this more realistic and encompassing purposive vision of motherhood is formulated as a transitional state, which would help more women get adequate protection, and contribute positively to their struggle for equality. In reality, women still share the largest burden of childcare, and, therefore, opening up the scope of maternity leave to them would have at least alleviated part of the undue burden society places upon them. Alongside judicial reasoning, Kokott's Opinion aims at breaking the confines by transforming maternal thought.¹⁴¹

Alas, even this incremental step towards further parity and more protection for women was destined to fail. For the CJEU acted with surprising reliance to views of the past, showing that path-dependence is alive and kicking. The male-dominated Court of Justice ignored the Opinion of the woman Advocate General and chose to follow that of her male peer instead, but stripped it of its feminist elements. This is a confirmation of the role of gender dynamics in its judicial decision-making processes. What it omitted to follow from Wahl's Opinion was his plea for legislative change. The Court of Justice was unwilling to reiterate this token gesture, which with some hope might have filled groups that fall outside the scope of the examined law. Thus, a hostile environment was framed not only towards a collegial and pragmatic feminist woman voice, but also towards the idealistic feminist suggestions of their male peer. Despite calls for a re-orientation of the judicial discourse of the CJEU since the early 2000s,¹⁴² 15 years later, these fell, once again, on deaf ears.

The gender dynamics of the Court of Justice-Advocate General interaction in the case-study are a parable for the weakened legitimacy, in all its aspects, a predominantly male composition of the judiciary carries. Symbolically, the ignored gendered voice of Advocate General Kokott cannot be overlooked. However, in terms of substance from a non-essentialist account, what matters is not that the woman Advocate General was not heard, but that her feminist account was disregarded. The Court rejected both her—arguably pragmatic—feminism as well as the traces of idealistic feminism found in the male Advocate General's Opinion. In fact, all feminist views were rejected, irrespective of their holder's gender, and this is the most troubling finding of the case-study. Although not within the remit of this article, it is interesting to note how the degree of feminist views expressed by the same judicial actor can vary depending on the area under examination. Kokott's intersectional perspective in *Achbita* is hardly compatible with her approach in *D.*,¹⁴³ showing that simply being a woman does not always lead to a feminist outcome, but it is the embeddedness of feminist consciousness that does.¹⁴⁴

¹⁴¹ Sara Ruddick, *Maternal Thinking*, 6 FEMINIST STUD. 342, 361 (1980).

¹⁴² Clare McGlynn, *Ideologies of Motherhood in European Community Sex Equality Law*, 6 EUR. L. J. 29 (2000).

¹⁴³ Opinion of Advocate General Kokott in Case C-157/15 *Achbita* [2016] ECLI:EU:C:2016:382. Especially when compared to the Opinion of her fellow Advocate General Eleanor Sharpston in, Case C-188/15 *Bouagnaoui* [2016] ECLI:EU:C:2016:553.

¹⁴⁴ KENNEY, *supra* note 8.

CONCLUSION

Gender diversity at the CJEU is lacking. Despite considerable progress in the judiciaries of the Member States, women are a fraction of the members of the Court of Justice and the General Court. In turn, the signals this gives to the people of Europe are not promising, especially insofar as representation and legitimacy are concerned; this is a largely uncontested premise. The CJEU fails to lead by example in that regard. A more contested area is the substantial contribution that a gendered and otherwise diverse judiciary would bring. Justice is meant to be blind, and the biggest motivation of CJEU judges is to safeguard and advance European integration. Yet, a diverse judiciary would allow these diverse voices to influence the adjudicative discourse and the court's interpretative lenses by drawing on their different backgrounds and lived experiences. This would open up new approaches to judicial decision-making, informing and subsequently improving the collective exercise of judging.¹⁴⁵ With more women on the bench, aspects of feminist standpoints are more likely to be considered whenever a relevant case is decided. It is important to highlight that this is more likely to happen, rather than always; not all women judges decide cases the same way, since they do not share the same experiences. Nor are they unequivocally more feminist than some of their male peers. And there are certain areas where this would be more prominent, as opposed to others.

Studies have looked at the impact of women on the judicial discourse world-wide, but not in relation to the CJEU. The fact that the CJEU's judgments are collegial does not help in the dissection of the different voices of its members. That notwithstanding, the Opinion of the Advocate General could provide useful insights as to the mechanics of the process; the CJEU may choose to rely on the Opinion or not. Thus, if the Advocate General of a case is a woman, and if that case refers to one of the areas in which it has been shown that often women may inform judicial decision-making from a feminist standpoint, then an opportunity for research is presented. If an almost identical case also exists, is decided on the same day, but with a male Advocate General assigned to it, then one has struck gold. A small, yet insightful, sample has thereby been created, and comparing and contrasting the discourse of the two Opinions and of the respective judgements of the Court of Justice would lead to useful conclusions and push the discipline forward. This is what this article embarked upon with the case-study of the decisions in *D.* and *Z.*

The feminist discourse analysis undertaken has confirmed the hypotheses that women judges matter from a representation and legitimacy point of view, and that feminist judges, irrespective of their gender, matter from a non-essentialist substantive standpoint. It also showed that male-dominated judiciaries, such as the CJEU, tend to prefer the views of their male peers, so long as these are stripped of their feminist elements, conforming to practices and worldviews of the past, as conceptualized in older case-law decided by male-dominated non-feminist chambers. This phenomenon, advertently or not, advances the proliferation of restrictive, outdated and unequal perceptions regarding women, and potentially other marginalized groups, too. The situation resembles a vicious circle, or a bad parable, where lack of embedded progressive thinking and proportional representation hamper equality and social welfare. Women's voices, and more specifically the most feminist or progressive among them, which might be espoused by feminist men as well, continue to be oppressed by a conservative judicial patriarchy. In terms of gender equality in

¹⁴⁵ ERIKA RACKLEY, *WOMEN, JUDGING AND THE JUDICIARY: FROM DIFFERENCE TO DIVERSITY* 169–177 (2013).

the composition of the CJEU then, there is more that needs to be done. Solanke's suggestions about affirmative action still resonate today.¹⁴⁶ The EU has acknowledged the problem, but has not yet taken any systematic steps to address it. It is hoped that this study will inform and incite future research, discussions and debates, which, in turn, would collectively prompt meaningful change in the composition and the adjudicative orientation of the CJEU.

¹⁴⁶ Solanke, *supra* note 32.



WOMEN AND CASE LAW
SOME LOOSE AND COMPARATIVE WANDERINGS

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INTRODUCTION

Contribution, protection, promotion, such is the analytical triptych chosen to present some thoughts on the interactions between Women and Case law. This triptych will constitute the guiding compass of these few lines in order to invite the reader to an entirely free journey, without any kind of flange, particularly that of academic conformism. Breaking free from codes, from time to time, is a good thing. This journey will lead us to faraway lands, to different ages. Back and forth over time and space will be constant. France will be intentionally pushed aside in this comparative peregrination¹ in order to open wide a window onto the world.

I. THE CONTRIBUTION OF WOMEN TO CASE LAW

Women make a very specific contribution to case law: they trigger it as litigants and guide it at the same time as lawyers; they comment on and teach it critically as legal scholars; and, last but not least, they create it as judges.

As *litigants*, the main obstacle that we can observe, in domestic legal systems and at the international judicial scale, concerns the multiple barriers women face in obtaining access to justice; especially when they are poor, and/or detained, and/or ostracized by their circle or community of origin. While we are inclined to think about indigenous women who, on the Latin American continent, are excluded from national mechanisms related to access to justice,² many reports established at the international,³ as well as the European,⁴ level demonstrate that, in fact, women are the ones who generally—particularly when compared to men—suffer from a lack of access to justice.

Beyond these structural obstacles, one fact is common to all judicial systems (both national and international)—female litigants cannot act alone. In order to bring “major causes” before the judges, women need to be supported, assisted, and represented by women and feminist associations, combining the expertise of many different types of legal experts, especially men and women lawyers. Activism is essential in this respect. Fight, again and again. Let us travel for a moment to a pair of countries at opposite ends in terms of geography and culture, South Korea and Senegal, to recognize the extent of the mobilization.

In South Korea, an emblematic example is the abolition of the *Hojuje*.⁵ Introduced during the Japanese colonization and later enshrined in the country’s Civil Code, the *Hojuje* (which could be translated as “family head system”) grants an exclusive power to the man (father and son) at the expense of the woman (mother and daughter) through a sophisticated set of legal provisions that anchor the patriarchal nature of Korean society and subordinate women to men.

¹ Even though some specific elements concerning France will be present, they will not constitute the core of the developments. For an impressive analysis of the judicial diversity issue in France that considers race, ethnicity and sexual orientation, see Mathilde Cohen, *Judicial Diversity in France: The Unspoken and the Unspeakable*, 43 L. & SOC. INQUIRY 1542 (2018).

² Inter-American Comm’n Human Rights [IACHR], *Access to Information, Violence against Women, and the Administration of Justice*, OAS/Ser.L/V/II.154 Doc. 19 (Mar. 27, 2015).

³ U.N. Dev. Program, *Gender Equality and Justice Programming: Equitable Access to Justice for Women* (2007); Comm. on the Elimination of Discrimination Against Women, *General Recommendation on women’s access to justice*, at 24, CEDAW/C/GC/33 (Aug. 3, 2015).

⁴ Gender Equal. Comm’n, *Towards Guaranteeing Equal Access to Justice for Women*, 5 (2016).

⁵ Eun-sil Yim et. al., *Les mobilisations d’expertes juristes dans la construction d’une cause féministe: L’abolition du Hojuje en Corée du Sud*, 29 NOUVELLES QUESTIONS FÉMINISTES 61 (2010) (Fr.).

The first trials pertaining to this discriminatory system began in 2000 in the county courts of Seoul, going all the way to the Constitutional Court that declared, in 2005, the unconstitutionality of the system. The analysis demonstrates over and over again that such a victory resulted from the synergy between ‘field’ legal experts (lawyers and activists), through the *Korea Legal Aid Center for Family Aid*, and “academic” ones (influential law professors at the *Korean Society of Family Law*). It is symptomatic to see that in the case of these two associations, pioneer women have thrown in their lot in deconstructing the traditional arguments raised to maintain the *Hojuje* system.

In Senegal, it is again in the area of family law that women jurists organized themselves in the early 1970’s to combat some provisions of the 1973 Senegalese Civil Code, imbued with various provisions taken from Muslim tradition as well as the Napoleonic Code and disadvantaging women (such as polygamy as a marital choice, the requirement that the husband be the head of family and have the paternal authority, and unequal inheritance rules). The *Senegalese Association of Women Jurists*—created thanks to the sound advice of Kéba Mbaye, one of Senegal’s greatest jurists of the 20th century, who spent a lifetime serving justice as president of the Supreme Court of Senegal, member of the International Court of Justice and then of the Court for Arbitration of Sport⁶—developed into one of the most respected associations of jurists in the country of President-Poet-Academic Léopold Sedar Senghor. In 1989, the Association succeeded in amending some of the more problematic provisions: for example, the power of the husband to oppose his wife’s occupational choices or the fact that a married girl—even though she was too young to be so—could not obtain a marriage annulment.⁷

Do litigants, following their successful access to the courtroom, always find a judicial system inclined to take their claims seriously and analyze them without stereotypes or prejudices, *a priori*?⁸ Here arises the eternal and crucial issue of women’s representation in *university faculty positions*, to *teach law* and to nurture vocations among women who will in turn picture themselves as *lawyers* or *judges* and study to become so.

In both domains—academic and judicial—the presence of women has never been self-evident. Everything has always been about a struggle, regardless of the latitudes, the countries, “developed” or not, democratic or not. How, then, can women contribute to the jurisprudence if they cannot readily become leading professors, lawyers, and judges, reputed within prestigious courts?

Enabling women to access positions of responsibility in universities and in the professional world of law has always entailed fighting to bring about legal change.

This was the case in France when opening the doors to women in the legal profession. Jeanne Chauvin, for example, waged an exceptional campaign in the

⁶ For a moving tribute by F. Ouguergouz to K. Mbaye, see Fatsah Ouguergouz, *Kéba Mbaye, Homme de loi, Homme de foi*, 6 DROITS FONDAMENTAUX 1 (2006) (Fr.).

⁷ Judy Scales-Trent, *Women Lawyers, Women’s Rights in Senegal: The Association of Senegalese Women Lawyers*, 32 HUM. RTS. Q. 115 (2010).

⁸ While European and Inter-American human rights mechanisms have been building, for some years now, the jurisprudence taking women’s rights into account, it is quite interesting to note, has not always been the case. In the Americas, it is common knowledge that the first great cases brought by women to the Inter-American Commission were not immediately referred to the Inter-American Court. Laurence Burgogue-Larsen, *La lutte contre la ‘violence de genre’ dans le système interaméricain des droits de l’homme. Décodage d’une évolution politique et juridique d’envergure*, in FEMINISME(S) ET DROIT INTERNATIONAL: ETUDES DU RESEAU OLYMPE 113 (2016) (Fr.).

late 19th century for women to be allowed to access the bar. In 1897, she tabled a legislative proposal to this end and, despite an initial refusal, succeeded in gaining support from Léon Bourgeois, Paul Deschanel and Raymond Poincaré.⁹ She paved the way for the iconic Suzanne Grinberg, Agathe Thévenin or Maria Verone.¹⁰ Such was also the case in the United States' academic world. More specifically, the enactment of measures of affirmative action, pioneering and genuinely transformative, fundamentally changed the situation. In a 1980 article published in the *American Bar Foundation Research Journal*, an American jurist—Donna Fossum—demonstrated, on the basis of particularly thorough empirical research, that the number of women professors in American universities had significantly increased since a decree issued by President Johnson in 1967 (*Executive order* 11,375). Not only did the text prohibit gender-based discrimination with regard to professional relations, it also promoted policies of affirmative action with regard to recruitment. Such a legislative act transformed considerably the American academic landscape and enabled women not only to access more easily higher education within the most prestigious law schools, but also to excel in the so-called noble subjects, until then traditionally reserved for men.¹¹ Nowadays, every country is looking at how to close the gap between men and women in professional life. We need only think of the Canadian system of gender-based analysis (GBA), which attempts to put an end to systemic discriminations in the workplace.¹²

With regard to women *judges*, political will is again crucial to promote a better representation, both domestically and internationally, specifically when the appointing authorities are elected through constituted powers. Things can then move on. However, history has shown that changes happen slowly, North America being a classic example. Out of the nine United States (US) Supreme Court judges, the three women currently sitting on the bench—Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan—were all appointed by Democrat Presidents, the first by Bill Clinton (in 1993) and the two others by Barack Obama (appointed respectively in 2009 and 2010). It is obvious that it has been above all a clearly assumed political endeavor aimed at promoting women of outstanding career paths.¹³ It should be noted that the first woman to enter this prestigious institution was Sandra Day O'Connor, appointed by Ronald Reagan in 1981 (where she remained until 2005, the year of her resignation). In other words, created in 1789 and settled in 1790, after 227 operating years there have only been four women judges on the US Supreme Court.

The issue of representation is especially relevant with regard to international judicial bodies. Their number has kept growing in the post-war period so that they have become *major players* in various areas—from criminal to economic law, and finally to human rights. The importance of their decisions on economic and political life calls now more than ever for a better representation of women within these institutions, for their legitimacy is at stake. In 1991, in an article published in the *American Journal of International Law*, which has since become a cult article in the legal literature at the international level, three women

⁹ The law was passed on June 30, 1899, and the Senate ratified it on November 13, 1900.

¹⁰ Anne-Laure Catinat, *Les premières avocates du barreau de Paris*, 16 MIL NEUF CENT 43, 44 (1998) (identifying the figures d'intellectuelles) (Fr.).

¹¹ Donna Fossum, *Women Law Professors*, 5 AM. B. FOUND. RES. J. 903 (1980).

¹² Louise Langevin, *Réflexions sur la nécessité d'une loi imposant l'analyse comparative entre les sexes au Canada*, 42 CAN. J. POL. SCI. 139 (2009) (Fr.).

¹³ The book by Sonia Sotomayor—*My Beloved World*—is a fascinating testimony of how to rise to the top of the US judiciary world as a Hispanic woman in the United States.

academics—Hillary Charlesworth, Christine Chinkin and Shelley Wright—considered the structure of international law as favoring men.¹⁴ In a recent study published in 2016, a young American woman academic, Nienke Grossman, decided to assess the observation made 25 years earlier, by undertaking an evaluation of possible changes in trend in the international judicial field.¹⁵ By looking at the composition, since their creation, of 12 international courts,¹⁶ she painted a fairly appalling picture.¹⁷ She succeeded brilliantly in deconstructing the justification – used by some States – consisting in the affirmation of the lack of qualified women. However, is it reasonable to sustain such a claim nowadays, when the number of women within law schools has been increasing dramatically, in both developed and developing countries? Amongst the many examples she gave, one cannot ignore France’s foreign legal policy. No woman has ever been appointed to any of the international courts whose jurisdiction was accepted by France: not to International Court of Justice (5 men), neither to the European Court of Human Rights (5 men), nor to the European Court of Justice (7 men), nor to the ICTY (3 men), nor to the Appeals Chambers of ICTY and ICTR, nor finally to the ICC (3 men)¹⁸ . . . What can be said? How do we justify the unjustifiable?

However, beyond the issue of legitimacy, questions regarding international law obligations must clearly arise. We know that several international human rights conventions, of general type, require States to prohibit any kind of discrimination based on sex.¹⁹ However, beyond this strictly egalitarian approach, several instruments on women’s rights deepen the scope of States’

¹⁴ Hilary Charlesworth et. al., *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613 (1991).

¹⁵ Nienke Grossman, *Achieving Sex-Representative International Court Benches*, 110 AM. J. INT’L L. 82 (2016).

¹⁶ The International Courts (“IC”) are: the African Court on Human and People’s Rights; the Andean Tribunal of Justice; the Appellate Body of the World Trade Organization; the Court of Justice for the Economic Community of West African States; the European Court of Human Rights; the European Court of Justice; the Inter-American Court of Human Rights ;the International Court of Justice; the International Criminal Court; the International Criminal Tribunal for the Former Yugoslavia; the International Criminal Tribunal for Rwanda; the International Tribunal for the Law of the Sea.

¹⁷ We discovered, among others elements, that four IC were required by statute to take sex into account when nominating or voting for judges: International Criminal Court (“ICC”), European Court of Human Rights (“ECtHR”), African Court of Human and People’s Rights (“ACtHPR”), and *ad litem* bench for International Criminal Tribunal for Rwanda (“ICTR”) and International Criminal Tribunal for Yugoslavia (“ICTY”). A higher percentage of women sat on the bench in mid 2015—32% of the judges on these courts were women. Where a “fair representation” of the sexes was not aspired to or required, women made up only 15% of the bench. *See* Grossman, *supra* note 15, at 82.

¹⁸ To be absolutely specific and accurate, it should be noted that only one woman (Michèle Picard) was appointed judge *ad litem* at the ICTY and another was appointed as an *ad hoc* Judge at the International Court of Justice (Suzanne Bastid). It is important to highlight that Suzanne Bastid has been an outstanding figure within the French legal landscape in International law. For more details about her personality and her career, *see* Alain Pellet, *Suzanne Bastid*, FRENCH SOC’Y FOR INT’L L. <http://www.sfdi.org/internationalistes/bastid/> (last visited Oct. 12, 2019); Daniel Vignes, *In memoriam: Madame Bastid. 1906-1995*, 40 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 7 (1994) (Fr.). It is noteworthy that she was appointed as a judge at the United Nations Administrative Tribunal for 32 years (1950–1982). The example of Suzanne Bastid is *the exception* which confirms the rule.

¹⁹ *See, e.g.*, International Covenant on Civil and Political Rights art. 3, Mar. 23, 1976, S. Treaty Doc. No 95-20, 999 U.N.T.S. 171; European Convention on Human Rights art. 1, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights art. 23, Nov. 21, 1969, 1144 U.N.T.S. 143, S. Treaty Doc. No. 95-21; African Charter on Human and Peoples’ Rights art. 13, June 27, 1981, OAU Doc. CAB/LEG/67/3.

obligations. For the first time in 1979,²⁰ the Convention on the Elimination of All Forms of Discrimination against Women laid the cornerstone in the field, while the African continent built on that effort through the adoption of the so-called “Maputo Protocol” in 2003.²¹ Article 9, §1 of the African text—in line with article 7 of the CEDAW²²—invites Member States to take “specific positive actions” to promote participative governance and the equal participation of women in the political life of their countries, while paragraph 2 of it is a useful instrument aimed at promoting women’s role “at all levels of decision-making.”²³ Beyond the promotion of women in the domestic political realm, article 8 of the CEDAW goes further by imposing the same process at the international level: “States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.” However, while “international organizations” certainly refer to universal (UN) and regional (the European Union, the Council of Europe, the Organization of American States, the African Union) organizations, they also refer to their affiliated institutions, such as judicial bodies like the ICJ, the ECJ, the ECtHR, the IACoM.HR and IACtHR, the African Commission and the African Court.²⁴ In other words, when a State such as France does not have any judge within international judicial bodies, one must seriously ask whether this State is taking “all appropriate measures” under article 8 of the CEDAW.

However, judicial bodies, both domestic and international, consisting of an equal number of men and women are indeed essential, especially when cases which highlight structural discrimination against women, resulting from

²⁰ Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) was adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 on 18 December 1979. It entered into force on September 3, 1981, after the deposit of the 20th instrument of ratification, in accordance with article 27 §1.

²¹ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (“Maputo Protocol”), July 11, 2003, AU, MIN/WOM/PROT II, rev.5, *adopted by the Conference of Heads of State and Government of the African Union on March 28, 2003 and entered into force on November 25, 2005.*

²² Article 7 of CEDAW reads as follow: “States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country[.]” and Article 8 states “Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.” Convention on the Elimination of All Forms of Discrimination against Women art. 7, Dec. 18, 1979, 1249 U.N.T.S. 13.

²³ Article 9 of the Maputo Protocol reads as follow: “(1) States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that: (a) women participate without any discrimination in all elections; (b) women are represented equally at all levels with men in all electoral processes; (c) women are equal partners with men at all levels of development and implementation of State policies and development programmes. (2) States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making”. Protocol to The African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) art. 9, July 11, 2003, AU, MIN/WOM/PROT II, rev.5.

²⁴ THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, A COMMENTARY 224 (Marsha A. Freeman et al. eds., 2012).

stereotypes deeply rooted in our ways of thinking and cultural habits, are brought before them. In such conditions, can jurisprudence truly protect women?

II. THE PROTECTION OF WOMEN THROUGH CASE LAW

It is well known that feminism has experienced several waves. However, *equality feminism*, aimed at ensuring rights for women beyond factual considerations by separating legal qualifications from social and especially natural characteristics, appears to be no longer sufficient to many scholars. Domestic rights, frontrunners of this egalitarian approach thanks to the influence of international human rights law, are experiencing some jolts due to the new feminist waves, sometimes to value women's difference (*cultural feminism*), sometimes to acknowledge the oppression of women by men (*radical feminism*).²⁵ With regard to these last two points, the evolution is difficult. Jurisprudence has not been consistent, as every country around the world is irrevocably rooted in a history and a culture that does not readily lend itself to much needed developments.

Various forms of stereotypes, as well as violence against women, are still well enshrined in many societies, regardless of their developed or democratic nature.²⁶ However, thanks to the virtues of using comparative law which arise from the free movement of judicial decisions,²⁷ the jurisprudence of international human rights mechanisms remains a touchstone, a connecting and harmonizing factor, that further develops jurisprudential policies bearing the stamp of convergence. Hence, with regard to the protection against domestic violence, it is a relief to observe the convergence between the jurisprudence of the CEDAW and of the Inter-American and European Courts of Human Rights which, in harmony, consider that gender-based violence "constitutes a form of discrimination."²⁸ Thus, in light of this movement towards coherence at the

²⁵ Françoise Tulkens, *La Convention Européenne des droits de L'Homme et les droits des enfants*, 272 JOURNAL DU DROIT DES JEUNES 29 (2008) (Fr.); *Les requérantes devant la Cour européenne des droits de l'homme*, in LIBER AMICORUM LUZIUS WILDHABE: HUMAN RIGHTS-STRASBOURG VIEWS : DROITS DE L'HOMME-REGARDS DE STRASBOURG 423-45 (L. Caflisch et al. eds, 2007) (Fr.).

²⁶ With regard to France, we refer to the opinion of the Commission Consultative des Droits de l'Homme. *Avis sur les violences contre les femmes et les féminicides*, JORF (Fr.), June 7, 2016. With regard to the European Union, see the survey conducted by the Fundamental Rights Agency of the European Union is enlightening, if not terrifying. European Union Agency for Fundamental Rights, *Violence against women: an EU-wide survey: Main result report* (2014).

²⁷ See Laurence Burgorgue-Larsen, "Decomartmentalization": *The Key Technique for Interpreting Regional Human Treaties*, 16 INT'L J. CONST. L. 187 (2018).

²⁸ Since 1992, the CEDAW Committee has clearly affirmed that domestic violence, a particular form of gender-based, constitutes a form of discrimination as it "impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions." U.N. Comm. on the Elimination of Discrimination of Women, *Gen. Recommendation no. 19: Violence against women*, art.7, 1992, CEDAW/C/1992/L.1/ADD.15. Such an approach was reiterated by the Inter-American Commission in *Maria da Penha v. Brazil* (April 16, 2001), the Inter-American Court in *Cotton Field v. Mexico* (November 16, 2009), and then by the European Court in *Opuz v. Turkey* (June 9, 2009). These elements were incorporated in the Council of Europe Convention on preventing and combating violence against women and domestic violence, the so-called "Istanbul Convention," which was adopted May 11, 2011. Dubravka Šimonović, *Global and Regional Standards on Violence Against Women: The Evolution and Synergy of the CEDAW and Istanbul Convention*, 36 HUM. RTS. Q. 590 (2014).

international level, the task of national jurisdictions is proving to be easier,²⁹ especially when States have established the relevant legal instruments.³⁰

With regard to combating stereotypes, it will be a bitter fight.³¹ Indeed, judicial structures, like any other type of bodies, are not immune to cultural biases rooted in societies and/or some corporations. While reading a 2017 decision of the European Court—*Carvalho Pinto de Sousa Morais*³²—we find out, astounded, about the way the Portuguese Supreme Court had addressed the analysis of a case involving compensation for damages suffered following a failed surgical operation on a 50-year-old woman, which resulted in chronic pain as well as in a permanent incapacity to have sexual intercourse.³³

The Supreme Court had indeed significantly reduced the amount of damages awarded to the applicant, owing to her age and to her family situation: in a nutshell, she was “old”—sexual intercourse no longer matters at 50—and her role as a mother had already been fulfilled, her children being now grown and no longer requiring her care. The European Court had the courage to establish a new methodology which could not be the classic one originating from the principle of non-discrimination. The first stage consists in *naming* the stereotypes, indicative of prejudice. As well as affirming that they arise from “a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfillment of women as people.”³⁴ The fact that the Portuguese Supreme Court judge had failed to take into account “other dimensions of women’s sexuality” by making “a general assumption” without verifying its application in this specific case was regarded by the Court, not as an unfortunate turn of phrase, but as introducing an actual discrimination on the grounds of sex and age.³⁵ The harmful effect of the stereotype in question, the second phase of the methodology—the *contestation* one—thus came into play. What matters here, according to the Court, no longer involves the notorious “comparability” test, as used in “classic” discrimination cases, but the contextualization, aimed at demonstrating the prejudicial effect of a stereotype in a specific case.

Such a methodology will not be easily pursued by national judges, may they be from developed or developing countries, while it has already been decrypted and promoted by academic communities.³⁶ It disrupts entrenched habits, and involves, above all, an understanding of its implementation, as the method to establish is innovative; it entails a fresh look on the law and its biases. This new method and fresh look are far from eliciting unanimity, even within the European Court: one need only look at the dissent in the *Carvalho Pinto da Sousa* case of *messieurs* of the judges from Luxembourg (Ravarani) and Slovenia (Bosniak) to

²⁹ As an illustrative example, it is worth mentioning the judgement of December 19, 2016 of Administrative Litigation Division of the High Court of Justice of Andalusia.

³⁰ In Spain, the Organic Act 1/2004 of 28 December 2004 on Integrated Protection Measures against Gender Violence is a model for best practice.

³¹ This is despite the fact that the Committee responsible for monitoring the application of the CEDAW has long delivered a specialised and subtle doctrine on how to combat stereotypes. Lucie Lamarche, *Diane Roman (dir.), La Convention pour l'élimination des discriminations à l'égard des femmes*, in 28 REVUE QUÉBÉCOISE DE DROIT INTERNATIONAL 132 (2015).

³² *Carvalho Pinto de Sousa Morais v. Portugal*, 17484/15 Eur. Ct. H.R. (2017).

³³ Laurence Burgogue-Larsen, *Actualité de la Convention européenne des droits de l'homme*, ACTUALITE JURIDIQUE DE DROIT ADMINISTRATIF 1768 (2017) (Fr.).

³⁴ *Carvalho Pinto de Sousa Morais*, 17484/15 Eur. Ct. H.R.

³⁵ *Id.*

³⁶ See REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES 288 (2010).

appreciate it. Clearly, we still have a long and challenging road ahead in this area.

III. THE PROMOTION OF WOMEN THROUGH CASE LAW

The promotion of women in professional life has also been a lengthy and challenging process. While in France women's access to the profession of lawyer was the result of a woman's struggle—Jeanne Chauvin's—which finally convinced the legislature to move forwards; in the US, the *turning point* originated from a judicial decision. It is now difficult to imagine how a national Court could—as the US Supreme Court did in 1873 in *Bradwell v. Illinois*³⁷—legitimize prohibiting a woman access to the Illinois Bar and prevent her from exercising her profession as a lawyer. At the time, her counsel's argument had fallen on deaf ears even though it was based on the *Cummings v. Missouri* case,³⁸ according to which professions were open to all, building on the idea that if the first clause of the 14th Amendment protected black citizens then it also had to protect citizens without distinction on the basis of race or sex.³⁹ In contrast, the Court—following the opinion of Judge Miller—distinguished between two types of citizenship: a State citizenship and a national one and, with a view to preserving States' sovereignty, recognized the latter's discretionary power to define the scope of the rights and privileges enjoyed by their respective citizens.

As a result, the Court affirmed the legitimacy of Illinois to establish admission rules to the Bar of the State and held that exercising a profession was by no means included in citizenship rights. Some judges added to this main argument the need to distinguish between the responsibilities of public and professional life, belonging to men, and the responsibilities of family life, belonging to women. Progress in the US has been slow, chaotic, full of unexpected twists, and it was not until the vote on the Civil Rights Act of 1964—whose Title VII prohibits employment discrimination on the basis of sex—and the mobilization of women alongside racial minorities with regard to this vote, as well as their growing political awareness (which gave rise to feminist movements and to their outstanding entry into the labor market) that the situation finally began to change and that the Supreme Court reversed its sexist jurisprudence.

In Europe, it is well known that the Union law and the jurisprudence of the Court of Justice played a key role in promoting gender equality in professional life. Equality between men and women, with regard to wages, access and working conditions, became the object of liberating regulations and jurisprudence. The Court of Justice, by handling the concept of indirect discrimination in an interesting way, which it literally manufactured through its decisions and finally took form in the notorious anti-discrimination directives, was able to significantly contribute to the career advancement of women by shedding light on the numerous instances of discriminations occurring under certain contractual conditions, such as part-time or agency work. It is worth noting that European Constitutional and Supreme Courts have captured this *summa divisio* between direct and indirect discrimination.⁴⁰ But to go as far as

³⁷ *Bradwell v. Illinois*, 83 U.S. 130 (1873).

³⁸ *Cummings v. Missouri*, 71 U.S. 277 (1867).

³⁹ Élisabeth Boulot, *La Cour suprême, les droits des femmes et l'égalité des sexes*, 87 REVUE FRANÇAISE D'ÉTUDES AMÉRICAINES 87 (2001) (Fr.).

⁴⁰ It is however important to recall, at this stage that the French Council of State still does not share the vision developed by the Court of Justice whose aim is the promotion of a real equality, beyond a mere formal one.

to say that discrimination against women has altogether ceased in daily life, particularly wage discrimination, would be a grossly deceptive shortcut. Reality still defies the law.⁴¹

WHAT SHALL WE THINK AT THIS STAGE OF OUR DISORDERLY AND
COMPREHENSIVE WANDERING?

First of all, while much has been achieved, changes happen in an uneven manner at the global level, as in countries facing enormous challenges to democratic governance and development, blatant discrimination with regard to marriage, succession, or property rights—just to name a few of the most emblematic examples—are still commonplace.⁴²

Next, while much has been achieved, we know too well how these gains can suffer a backlash in the form of blatant or insidious regressions at any time within societies, including democratic ones, which we thought immune from setbacks, recessions and regressions. These comforting times are gone. As cultural recessions are numerous, they can at any time result in jurisprudential and/or legislative setbacks.

Thus, regardless of the areas and angles of approach to the issue of women and jurisprudence—and on a broader level to women and law—we must acknowledge a crucial point: we cannot perpetuate the myth that women have already achieved equality, as it will be tantamount to justifying the *status quo*. Worse, we would sometimes justify the setbacks.

⁴¹ S. Darrigrand, Rémunération et égalité professionnelle femme-homme dans l'Economie sociale et solidaire (ESS), *Juris associations* 2017, n. 568, 28.

⁴² Josette Nguebou Toukam, *Les droits des femmes dans les pays de tradition juridique française*, 53 L'ANNÉE SOCIOLOGIQUE 89 (2003) (FR.).



VIVE LA DIVERSITÉ OR ALUTA CONTINUA?
ACHIEVING GENDER EQUITY ON THE AFRICAN
COURT ON HUMAN AND PEOPLES' RIGHTS

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INTRODUCTION

Gender activists and feminist legal scholars have converged on the important question of why international courts and tribunals have remained male dominant. Globally, while some courts at the domestic level have made varied progress in achieving sex balanced benches, many hurdles remain in changing the sex composition of international judiciaries. While women make up less than 20% of international benches, recent scholarship has shown that women from one region of the world—namely the continent of Africa, have been well represented on international benches.¹ Notwithstanding the gains made across Africa, there is still scant scholarly attention paid to the issue of women judges across Africa, both at the domestic and international levels. In this article, I take up the task of situating scholarly discussions on women and international courts within the African context. This article explores two interrelated questions; first, how did the African Court on Human and Peoples' Rights ("ACtHPR") achieve a sex balanced bench within the first 13 years of its existence? Second, how can the record of the ACtHPR be replicated in other regional courts?

This paper explores these questions within the context of the ACtHPR, an African regional court based in Arusha, Tanzania. As of March 2019, the ACtHPR is the most sex-balanced court among the currently constituted international courts. Women now make up six (55%) of the eleven-member bench of the Court, but this was not always the case since the first set of judges were appointed in 2006. Between 2006 and 2016, women had occupied only two seats at each judicial election cycle, accounting for a meager 18% representation. Despite the poor record of sex underrepresentation, two women were able to ascend to leadership positions within the court—Judge Sophia Akuffo of Ghana was elected twice by other judges as Vice President of the Court in 2008 and 2010, and as President in 2012; and Judge Elsie Thompson of Nigeria was elected as Vice President of the Court from 2012 to 2014.

To better understand how these changes took place, this article begins from a general discussion of the implementation of gender parity rules within the African Union ("AU"), guided by the aspiration that these rules will advance gender parity across the continent of Africa. I narrow in on two particular frameworks— The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) and the Solemn Declaration for Gender Equality in Africa ("SDGEA"). The paper contends that, notwithstanding the existence of legal instruments and mechanisms geared towards the promotion of gender equality, the outcome of the recent elections could not have been possible but for the presence of other variables. These variables include the adoption of specific strategies, the engagement of informed allies and the political will of governments to fulfill their treaty obligations.

This article makes two important contributions to the literature on gender and judging. First, this article highlights how the effective implementation of treaty obligations by governments, and sustained efforts by women's rights advocates and

¹ INTERNATIONAL COURTS AND THE AFRICAN WOMAN JUDGE: UNVEILED NARRATIVES (Josephine Jarpa Dawuni & Akua Kuenyehia eds., 2018).

other allies, can lead to substantive gains, equitable sex representation, and inclusivity in international courts and tribunals.

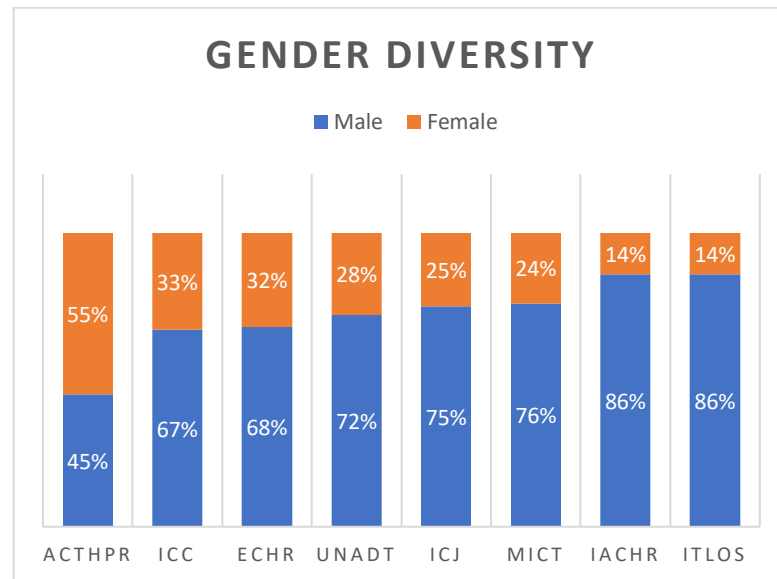
Second, it advances the argument for transnational norm diffusion in achieving sex parity on international courts. While sex diversity has been achieved in the ACtHPR—*vive la diversité!*—this article argues that vigilance is required to sustain the gains made. More importantly, it advocates for using the case of the ACtHPR as an example of institutional learning and norm diffusion to replicate the gender parity progress within other sub-regional courts, in other words, the fight must continue or—*aluta continua!*

The article proceeds as follows. The first part provides a brief theoretical background on women in international courts drawing on feminist institutional perspectives. The second part provides an overview of the African Union institutional mechanisms for achieving gender parity, drawing from the women’s rights protocol as an institutional framework for advancing the rights of women across the continent of Africa. The third part presents a multi-dimensional analysis of the factors leading to the sex parity gains at the ACtHPR. The fourth part makes recommendations for the way forward and draws the conclusion.

I. SEX BALANCE AND GENDER EQUITY IN INTERNATIONAL COURT AND TRIBUNALS

The road to achieving sex diversity on the benches of international courts and tribunals remains an uphill battle. The chart below presents data on selected international courts and tribunals, with the ratio of women to men as of early 2019. Table 1. Gender Representation in selected international courts and tribunals.²

² The courts in this chart were selected to represent regional, geographic and jurisdictional diversity. The data in this chart were collected from the individual websites of the courts and tribunals. The data is current as of March 2019. The institutions represented in the chart are: African Court on Human and Peoples’ Rights (“ACHPR”); European Court of Human Rights (“ECHR”); International Criminal Court (“ICC”); (United Nations Administrative Tribunal (“UNADT”); Mechanism for International Criminal Tribunals (“MICT”); International Court of Justice (“ICJ”); InterAmerican Court of Human Rights (“IACHR”); International Tribunal of the Law of the Sea (“ITLOS”).



Why have international courts and tribunals had such varying degrees of success in producing sex balanced benches? Some insights can be drawn from feminist institutional theory that employs feminist analyses in examining how institutional mechanisms, practices, and norms affect women's entry, retention, and mobility within institutions. Feminist institutional framework examines how gender norms seep into institutional arrangements, with the potential to direct and/or constrain the actions of actors within these institutional arrangements.³

Feminist institutional theory has traditionally been applied to studies on women in politics. Extending the debate on feminist institutional theory beyond women's access to parliaments, the executive branch, and local governance structures provides a new lens through which feminist lens can explain the paucity of women in judiciaries.⁴ Achieving gender equity and diversity requires institutional rule changes within the domestic nomination processes and the introduction of institutionalized screening at the international selection stages.⁵ These changes will allow for more transparency by minimizing gatekeeping processes that limit the likelihood of women being presented as candidates for nominations and elections.⁶

³ Fiona Mackay et al., *New Institutionalism Through a Gender Lens: Towards a Feminist Institutionalism?*, 31 INT'L POL. SCI. REV. 578–88 (2010); Mona Lena Krook & Fiona Mackay, *Introduction: Gender, Politics, and Institutions*, in GENDER, POLITICS AND INSTITUTIONS: TOWARDS A FEMINIST INSTITUTIONALISM 1–20 (Mona Lena Krook & Fiona Mackay eds., 2011).

⁴ Sally J. Kenney, *Choosing Judges: A Bumpy Road to Women's Equality and a Long Way to Go*, 2012 MICH. ST. L. REV. 1499, 1500–27 (2014).

⁵ Nienke Grossman, *Shattering the Glass Ceiling in International Adjudication*, 56 VA. J. INT'L L. 339 (2016).

⁶ *Id.*

The proliferation of international courts within the last couple of decades piqued scholarly interest in the gender composition of these courts.⁷ At the center of these debates, scholars soon found the overwhelming effect of politics on judicial nominations and elections to international courts. Increasing evidence presented by legal scholars has shown the impact of political influence exerted by powerful nation-states in the nomination and election of judges to international courts.⁸ Examined from institutional perspectives, the lack of transparency in national nomination processes,⁹ vote trading among nation-states at the election stage,¹⁰ and the masculinized standards of “merit” continue to pose gendered outcomes with fewer women being nominated and elected.¹¹

The International Court of Justice (“ICJ”), despite over 70 years of existence, continues to signal a dismal record concerning gender diversity, with women accounting for only four¹² out of the one hundred eight judges in the history of the court.¹³ The poor record on women’s representation has not been lost on other courts. For instance, in responding to feminist criticisms against the gendered institutional selection culture of the court, the European Court on Human Rights (“ECtHR”) has in recent years made improvements to its selection procedures. In an attempt to address the low number of women judges on the bench, the Parliamentary Assembly requires that states nominate at least one female candidate in their pool of nominees to the court.¹⁴

Cognizant of the poor record of women’s representation in international courts, concerted efforts were made to address this issue by drafters of the Rome Statute when establishing the International Criminal Court (“ICC”). In negotiations leading up to the establishment of the ICC, the combined effort of human rights advocates, women’s rights advocates and transnational networks of women’s advocacy groups converged to create a statute which set clear aspirational targets for achieving gender parity.¹⁵ To attain a sex-diverse bench, Article 36(8)(iii) provides that State Parties shall, in the selection of judges, take into account “a *fair representation* of female

⁷ RESEARCH HANDBOOK ON INTERNATIONAL COURTS AND TRIBUNALS (William A. Schabas & Shannonbrooke Murphy eds., 2017); RUTH MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS (2010); DANIEL TERRIS, CESARE P.R. ROMANO & LEIGH SWIGART, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD’S CASES (Brandeis U. Press 2007).

⁸ MACKENZIE ET AL., *supra* note 7.

⁹ *Id.*

¹⁰ TERRIS, ROMANO & SWIGART, *supra* note 7; APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD (Kate Malleson & Peter H. Russell eds., 2006); Erik Voeten, *The Politics of International Judicial Appointments*, 9 CHI. J. INT’L L. 387 (2009).

¹¹ Stéphanie Hennette Vauchez, *More Women—But Which Women? The Rule and the Politics of Gender Balance at the European Court of Human Rights*, 26 EUR. J. INT’L L. 195, 200 (2015).

¹² *All Members*, INT’L COURT OF JUSTICE, <http://www.icj-cij.org/en/all-members> (last visited Oct. 9, 2019) (identifying all four women Judges: Rosalyn Higgins (United Kingdom), Joan Donoghue (USA), Hanqin Xue (China) Julia Sebutinde (Uganda)).

¹³ *See id.* (listing 108 historical members as of January 9, 2019).

¹⁴ Grossman, *supra* note 5, at 366; Vauchez, *supra* note 11; Alastair Mowbray, *The Consideration of Gender in the Process of Appointing Judges to the European Court of Human Rights*, 8 HUM. RTS. L. REV. 549, 551 (2008).

¹⁵ Louise Chappell, *Gender and Judging at the International Criminal Court*, 6 POL. & GENDER 484 (2010).

and male judges.”¹⁶ With the first ICC elections in 2003, seven of the eighteen judges elected were women; this number increased in 2006 when women made up eleven of the eighteen judges on the bench. Thus, with these results, the ICC has continued to be among the international courts with commendable sex diversity. As with any gains, there are constant ebbs and flows, and it is not surprising to see that the ICC has had the number of women judges decrease from a high of eleven to six as of this writing.

With particular reference to the ACtHPR, the Protocol to the African Court on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter, The African Protocol)¹⁷ established that the court be specific with preference to ensuring geographical diversity through Article 12(1), which states, “States Parties to the Protocol may each propose up to three candidates, at least two of whom shall be nationals of that State.”¹⁸ This provision effectively establishes a clear aspirational target for safeguarding state sovereignty—with an emphasis on at least *two* judges being nationals of the nominating state. On the question of gender diversity, no such emphasis was made on achieving a minimum number. Article 12(2) on nominations provides that “*due* consideration shall be given to *adequate* gender representation in nomination processes.”¹⁹ Article 14(3) on elections of judges provides that there shall be “*adequate* consideration given to gender representation.”²⁰ Exactly what constitutes “adequate consideration” and “due consideration” is not clear, though. A critical reading of these provisions implies that they are only employed as optional considerations, and not mandatory requirements as is the case for balancing national or geographical representation in Article 12(1), with the use of the mandatory words “at least *two* of them *shall* be nationals of that State.”²¹

The ACtHPR is a regional court established by the African Protocol. Signed in 1998, the African Protocol came into force in 2004 after receiving the required number of ratifications, thereby leading to the establishment of the court in 2006. To date, twenty-four countries have signed and ratified the African Protocol, twenty-five have signed but not ratified, and five have neither signed nor ratified.²² The Court is made up of eleven judges drawn from its Member States. The African Protocol provides in Article 12(1): “[s]tate Parties to the Protocol may each propose up to three candidates, at least two of whom shall be nationals of that State.”²³ To date, judges have been drawn from all five regions of the African continent, with the largest number coming from the West Africa region. In January 2017, for the first

¹⁶ Rome Statute art. 36(8)(iii), July 17, 1998, A/CONF.183/9.

¹⁷ The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III) [hereinafter African Protocol].

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights*, AFR. COURT HUM. & PEOPLES' RTS., <https://www.achpr.org/ratificationtable?id=49> (detailing information on the African Protocol and the status of state signatories and ratifications).

²³ African Protocol, *supra* note 17.

time in the history of the court, a woman judge was elected from the North Africa region.²⁴ Judges of the court shall serve for a renewable six-year term and are eligible for reelection if nominated by their state government.²⁵

In all, available data and research have linked sex unrepresentative benches to the lack of transparency in nomination processes, the absence of aspirational targets, the lack of States' commitment to gender diversity, and the androcentric history of international law and the legal profession.²⁶ The persistence of masculinized institutional cultures will have to be addressed before sex diversity can be achieved. Feminist scholars have debunked the notion that there are not enough qualified women candidates in the pool of potential candidates for judicial positions—both at the domestic and international levels.²⁷ Breaking gendered norms within institutional arrangements can be achieved and, as the African Union has shown, the process begins with setting an agenda for achieving gender parity.

II. ASSESSING AFRICAN UNION MECHANISMS ON GENDER PARITY: THE MAPUTO PROTOCOL

A sizeable number of African nation-states have responded to national, regional and global demands for promoting women's rights. Notwithstanding continuing challenges, important strategies and actions have been undertaken towards achieving gender equality and women's empowerment within all spheres of society across the continent, with varying outcomes. At the regional level, these institutional mechanisms have included the Maputo Protocol (2005),²⁸ the SDGEA (2004),²⁹—and the African Union Gender Policy (2009),³⁰ with the goal of achieving 50/50 gender representation. Together, these mechanisms have been touted as remarkable efforts aimed at pushing forward the agenda of achieving 50/50 gender representation.

²⁴ Judge Bensaoula Chafika of Algeria was elected in January 2017 as a judge of the court, representing the first woman from the North African region. Before her election, Judge Fatsah Ouguergouz of Algeria was elected in 2006. The other male judge from North Africa that served on the court is Judge Hamdi Faraj Fanoush of Libya who was elected in 2006 for a four-year term.

²⁵ African Protocol, *supra* note 17 (article 15 provides “[t]he judges of the Court shall be elected for a period of six years and may be re-elected only once”).

²⁶ Grossman, *supra* note 5, at 403; MACKENZIE ET AL., *supra* note 7.

²⁷ Grossman *supra* note 5, at 369; Vauchez, *supra* note 11, at 202; Kenney, *supra* note 4.

²⁸ See generally EQUALITY NOW, JOURNEY TO EQUALITY: 10 YEARS OF THE PROTOCOL ON THE RIGHTS OF WOMEN IN AFRICA (Brenda Kombo et al. eds., 2013) (providing a comprehensive overview of the road to passing the Maputo Protocol and documents the achievements and challenges of fully implementing the Protocol across the region).

²⁹ Solemn Declaration on Gender Equality in Africa, African Union (2004), https://www.un.org/en/africa/osaa/pdf/au/declaration_gender_equality_2004.pdf. The Solemn Declaration on Gender Equality in Africa, adopted in 2004 by the African Union Heads of State and Government, is geared towards holding governments accountable in reporting on domestic progress made towards the attainment of gender inclusivity within all domestic spheres.

³⁰ African Gender Policy, African Union (2009), https://www.un.org/en/africa/osaa/pdf/au/gender_policy_2009.pdf. This policy calls for governments at the domestic level and regional organizations to implement policies that would lead to a 50/50 sex representation of women and men at all levels. The African Commission on Human and Peoples' Rights (African Commission), based in Banjul, The Gambia, has set the pace with a balanced number of commissioners.

At the global level, African nation-states have played fundamental roles in signing and ratifying international treaties under the United Nations system geared towards the promotion and protection of women's human rights. The landmark Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") (1979)³¹ has been signed and ratified by over 190 nation states, and the majority African nations have either signed, or signed and ratified it, except Somalia and Sudan who have not signed.³² African nations have also played important roles in attending and engaging with global women's rights events, such as the UN Decade for Women and the Women's conferences in Mexico, Kenya, Copenhagen, and Beijing.³³ These transnational engagements have no doubt contributed to the building of transnational networks of women's activist groups within the continent of Africa advocating for, and advancing the rights of, women across multiple issue areas.³⁴

Despite the active engagement of women from Africa in the international human rights mechanisms, African women's rights advocates remained cognizant of the presence of institutional gaps within the international and human rights system in addressing Africa-specific issues. Some of these gaps include the role of customary law in trampling women's constitutional rights within the domestic sphere, the contradictions inherent in the application of plural legal traditions within the different countries, the lack of enforcement of national and international women's rights instruments, and the weakness of a concerted advocacy for women's rights issues. Flowing from the momentum gained from the UN conference on Human Rights in Vienna, Austria, in 1993, African women's rights advocates met in 1995 in Lomé, Togo, and, following deliberations, they called for an African protocol within the African Union system that would be directed specifically at addressing some of the context-specific gaps outlined above.³⁵

Central to the demands of women's rights advocates was the fact that the African Charter on Human and Peoples' Rights, signed in 1981, was silent on women's rights issues. Indeed, they noted that, except for Article 2, which deals with non-discrimination,³⁶ and Article 18(3), which discusses discrimination against women,³⁷ there was no specific wording addressing women's rights.³⁸ Between 1999 and 2003, women's rights advocates, civil society organizations working with global partners,

³¹ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13.

³² *Convention on the Elimination of All Forms of Discrimination Against Women Ratification Status*, U.N. TREATY COLLECTION (last visited Oct. 12, 2019), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

³³ WOMEN'S ACTIVISM IN AFRICA (Balghis Badri & Aili Mari Tripp eds., 2017).

³⁴ Alice J. Kang, *How Civil Society Represents Women*, In REPRESENTATION: THE CASE OF WOMEN 137, 137-57 (2014); Dzodzi Tsikata, *Women's Organizing in Ghana since the 1990s*, 52 DEV. 185, 185-92 (2009).

³⁵ RACHEL MURRAY, *Women's Rights and the Organization of African Unity and the African Union: The Protocol on the Rights of Women in Africa*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 253 (Doris Buss & Ambreena Manji eds., 2005).

³⁶ African Charter on Human and Peoples' Rights ("Banjul Charter"), art. 2, Jun. 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

³⁷ *Id.* at art. 18(3).

³⁸ JOURNEY TO EQUALITY: 10 YEARS OF THE PROTOCOL ON THE RIGHTS OF WOMEN IN AFRICA (Brenda Kombo et al. eds., 2013) [hereinafter JOURNEY TO EQUALITY].

and allies focused on the task of drafting a Protocol that would specifically address women's issues across Africa. The road to the 2003 ratification of the Maputo Protocol can be summarized in three phases.

First was the drafting and consultative phase, which involved various actors, including women's rights groups, the legislative drafting unit of the African Commission on Human and Peoples' Rights, the International Commission of Jurists, and Equality Now. Together, these groups worked to produce a draft of the Protocol. Extensive consultations were carried out with the goal of ensuring that the Protocol would meet international standards and achieve the necessary government buy-in for ratification. On July 13, 2003, at the African Union Assembly of States and Governments meeting in Maputo, Mozambique, the Protocol was adopted.³⁹

The second phase began soon after the adoption of the Protocol. This phase required extensive campaigning to receive the required number of ratifications for the instrument to come into effect. While the ratification phase was slower than the advocacy phase, in 2004, Comoros became the first country to sign and ratify the Protocol.⁴⁰ To sustain the gains made and to revive the momentum for full ratification, the Solidarity for African Women's Rights ("SOAWR") was born, serving as an umbrella organization of women's rights organizations.⁴¹ Through strategies, such as the use of text messages, online article publications, outreach to Foreign Affairs at the AU consultative meetings, and fundraising for national campaigns, SOAWR was able to garner governmental support for the Protocol.

Thus, within 18 months from the time the Protocol was adopted, the second phase of the process attained another success, namely the signing and/or ratification of the Protocol by a record number of governments across the continent. To date, the Maputo Protocol still stands in the lead as the first legal instrument to have attained the fastest number of signatures and ratifications within the AU system.⁴²

The third phase of the Protocol has been the implementation phase, which like all legal instruments, unsurprisingly, appears to be the hardest and often slowest phase. Efforts were undertaken by SOAWR and other groups to pressure governments into domesticating and implementing or enforcing the Protocol. Women's groups adopted several strategies ranging from organizing joint conferences, mobilizing support to sustain momentum for the Protocol, using provisions of the Protocol to engage in strategic litigation,⁴³ and monitoring

³⁹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("Maputo Protocol"), July 11, 2003, AU, MIN/WOM/PROT II, rev.5.

⁴⁰ Comoros was the first country to ratify the Maputo protocol.

⁴¹ *About SOAWR*, THE SOLIDARITY FOR AFRICAN WOMEN'S RIGHTS ("SOAWR"), <http://www.soawr.org/content/about-soawr>.

⁴² JOURNEY TO EQUALITY, *supra* note 38.

⁴³ The first reported case of strategic litigation involving the Maputo Protocol was in October 2017 by the ECOWAS Court in Abuja, Nigeria. For more details on this case, see *ECOWAS Court Makes the First Pronouncement on Maputo Protocol: Rules in Favor of Plaintiffs in Case of Dorothy Njemanze & 3 Ors V Federal Republic of Nigeria*, THE INSTITUTE FOR HUMAN RIGHTS AND DEVELOPMENT IN AFRICA (IHRDA) (Oct. 12, 2017), <https://www.ihrda.org/2017/10/ecowas-court-makes-first-pronouncement-on-maputo-protocol-rules-in-favour-of-plaintiffs-in-case-of-dorothy-njemanze-3-ors-v-federal-republic-of-nigeria/>.

mechanisms requiring governments to report on their implementation record every two years.⁴⁴

Overall, the Maputo Protocol has made tremendous progress in centering the human rights issues of African women as critical to the development of the continent. The adoption of the African Union Agenda 2063 pillar of achieving gender equality is a testament to the overarching goals enshrined in the Maputo Protocol and SDGEA. Anchored within and between each of the three phases presented above, there are a myriad of challenges to overcome in order to come to a full realization of the aspirations of the Protocol. These challenges included: the lack of clarity on the primary goals of the draft protocol; the lack of extensive consultations among women's rights groups, governments, and ordinary citizens; and the absence of political will by governments to domesticate and implement the provisions of the Protocol fully. Additionally, there exists continuing challenges posed by treaty reservations and conflict with domestic constitutions, and the challenges associated with ensuring that women know and understand their rights—a situation partly due to the high levels of illiteracy among women.⁴⁵

Notwithstanding these challenges, the Maputo Protocol has been touted for spearheading a regional attempt to ensure the protection of women's rights in Africa. The Maputo Protocol provides a wide range of rights protections for women including political, economic, social, cultural, religious, and health matters. Yet, it appears to be the case that the scholarly analyses of the impact of the enforcement and implementation of the Maputo Protocol has centered on the gains made within women's political participation. While the judiciary is often regarded to be non-political in its functions, for purposes of this article, I draw on Article 9 of the Protocol on the rights of women to participate in political and decision-making processes. Two points are worth noting; first, Article 9 focuses on the duty of governments to ensure women's equal participation in the electoral processes and State development programs.⁴⁶ Based on this language, it is no surprise that women have capitalized on this provision to make electoral gains within the legislative arena in some African countries.⁴⁷

The second observation with regards to Article 9 is the absence of an aspirational target or benchmark for attaining women's equal participation in decision-making processes. The absence of a benchmark or target leads to ambiguity and ambivalence on the part of governments who do not prioritize gender parity. Such ambiguity poses a challenge to the effective implementation of domestic policies geared towards achieving gender parity or equal participatory outcomes for women. This is the case even in the wake of the adoption of legislative, constitutional, and party quotas across the continent that have contributed to legislative gender parity for countries such as

⁴⁴ Babatunde Joshua Omotosho, *African Union and Gender Equality in the Last Ten Years: Some Issues and Prospects for Consideration*, 5 J. INTEGRATED SOC. SCI. 92 (2015).

⁴⁵ *Id.*; MURRAY, *supra* note 35.

⁴⁶ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *supra* note 39, at art. 9.

⁴⁷ Melinda Adams et al., *The Representation of Women in African Legislatures and Cabinets: An Examination with Reference to Ghana*, 37 J. WOMEN POL. & POL'Y 145 (2016); Dzodzi Tsikata, *Women's Organizing in Ghana since the 1990s: From individual organizations to three individual coalitions*, 52 DEV.: SOC'Y FOR INT'L DEV. 185 (2009).

Rwanda, South Africa, and Senegal.⁴⁸ Still, many countries are lagging behind and it remains to be seen what impact regional diffusion will have on other states across the continent.⁴⁹

III. CONVERGING FACTORS AND ACHIEVING SEX PARITY ON THE AFRICAN COURT

As of March 2019, the ACtHPR is currently the most sex-balanced bench in the world, with women occupying 55% (6 out of 11) of the seats on the bench. This development is a far cry from the historical 18% (2 out of 11) seats women occupied in the court between 2006 and 2017. The progress made on the ACtHPR is a remarkable achievement for international law, women's activism, and feminist legal scholars, who for years have critiqued the international legal system and international courts as lacking in gender diversity.⁵⁰

Even though the Maputo Protocol does not contain specific wording for achieving sex parity in domestic or regional bodies, the overarching provision in Article 9, with particular reference to women's roles in decision-making, provides a context and basis for demanding sex parity in other bodies. The Maputo Protocol, the SDGEA, and the AU Gender Policy and Action Plan⁵¹ were important institutional arrangements from which advocates of gender parity drew on in advocating for sex balance on the ACtHPR bench. Lessons drawn from this article highlight the case of the ACtHPR's gender-balanced bench to support the argument that effective implementation of institutional arrangements, such as Article 9 of the Maputo Protocol, can be used as a strategic tool by women's rights advocates in demanding governmental accountability in decision-making bodies. Nonetheless, as feminist scholarship has shown, institutional mechanisms are not enough to achieve gender and sex parity. In this article, I argue that the adoption of innovative strategies in achieving the ideals and rights espoused in the Protocol required the convergence of three other substantial factors—*specific strategies*, *informed allies*, and *political will on the part of governments*. I now proceed to discuss how these three converged to produce a gender-balanced court.

A. *Specific Strategies*

There are a growing number of international courts across the continent of Africa, most of which are sub-regional courts.⁵² Among these courts, only the

⁴⁸ JOURNEY TO EQUALITY, *supra* note 38.

⁴⁹ Sylvia Bawa & Francis Sanyare, *Women's Participation and Representation in Politics: Perspectives from Ghana*, 36 INT'L J. PUB. ADMIN. 282 (2013).

⁵⁰ HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000); *see also* Grossman, *supra* note 5; Josephine Dawuni, *African Women Judges on International Courts: Symbolic or Substantive Gains?*, 47 U. BALT. L. REV. 199 (2018); Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts*, 12 CHI. J. INT'L L. 647 (2012).

⁵¹ African Union Gender Policy, *supra* note 30 (noting a political commitment by governments to promote the rights of women).

⁵² The African Court of Human and People's Rights is the primary court at the Africa regional level to which member states from any part of the region can belong. I classify courts that have a focus on any

ACtHPR has set an aspirational target for considering gender in the nomination and election of judges to the bench. Even so, the use of the phrase "*adequate* gender representation" (emphasis added) in the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, in Article 12(2)⁵³ on nominations, uses the word "*due consideration*" to gender representation in the nomination of judges. Also, Article 14(3)⁵⁴ on elections uses the word "adequate gender representation," both of these phrases thus leave room for subjective interpretations of what exactly it means to have "due consideration" and "adequate gender representation" of women in the nomination and election processes. The fluidity and ambiguity of the words "*adequate* gender representation" and "due consideration" partly explain why it took the Court eleven years to finally make good on the aspiration of prioritizing gender equality with the election held in January 2017 where the number of women moved up to four.

Remarkably, the Economic Community of Western African States ("ECOWAS") Court of Justice, a sub-regional court based in Abuja, Nigeria serving the West African region, does not have a quota nor an aspirational target for the election of judges. To date, women have accounted for 30% of all judges, placing it among the group of international courts nearing sex parity records—if viewed over the span of time since the court's establishment in 2001. The East African Court of Justice ("EACJ") serving the members of the East Africa economic zone has recorded only five women judges to have ever served on the court out of a total of twenty-eight judges—or 18%—since coming into force in 1999.

The ebb and flow of the sex equality on the bench of the ECOWAS Court does not lend itself to an easy analysis of the impact of aspirational targets or quotas. The data presented above partially confirms Nienke Grossman's argument to the effect that courts without aspirational targets or quotas have the lowest number of women judges. Nienke Grossman's argument is only a partial confirmation because, in spite of lacking an aspirational target, the ECOWAS Court has historically done well regarding women's representation. Nonetheless, if viewed in the light of the fact that by mid-2017, the ECOWAS Court only had one woman, out of six men on the bench, which fully confirms Grossman's thesis. Following the decision to reduce the

one of the five main regions of the continent as sub-regional courts. These include for instance the East African Court of Justice ("EACJ"), the Court of Justice of the Economic Community of West African States ("ECOWAS"), and the Tribunal of the Southern African Development Community ("SADC"). For a current listing of international courts across Africa, see *iCourts*, COURT FINDER, <https://www.google.com/maps/d/viewer?mid=1BN1dCyoptF0um-nY31rVs7-TPLo&ll=18.711292638373763%2C-19.138612999999964&z=3> (last visited Oct. 12, 2019).

⁵³ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (Herein after African Court Protocol), Article 12 (1) provides "States Parties to the Protocol may each propose up to three candidates, at least two of whom shall be nationals of that State; Article 12 (2) provides "*due consideration* shall be given to adequate gender representation in the nomination process". (emphasis mine ---to show that the wording here does not necessarily place a legal obligation on states but is rather recommendatory in tone).

⁵⁴ The African Court Protocol, in Article 14 (3) provides that "in the election of judges, the Assembly shall ensure that there is *adequate* (emphasis mine) gender representation. The word "adequate" once again does not provide specific numbers as to what exactly will be considered adequate gender representation.

number of judges from seven to five, the elections held in July 2018, resulted in the election of two women (40%) and three men (60%) to the court.⁵⁵ The 2018 electoral outcomes can be linked to the fact that an increasing number of women judges, are becoming aware of the existence of the court and, therefore, positioning themselves to be nominated by their domestic governments. Another explanatory fact is the increased global judicial nominations standards, which now require that governments advertise available vacant positions in order to increase the diversity in the pool of eligible candidates.

To date, what has been the sex parity report card for the three sub-regional courts? Viewed from a historical perspective, the ACtHPR leads the pack, standing at ten women (35%) out of a total of twenty-nine judges since 2006. The ECOWAS court comes in next with seven women (30%) out of a total of twenty-three judges since 2001, and the last of the three is the EACJ at five women (18%), out of a total of twenty-eight judges to have served on the court since 2001. Notwithstanding the record setting pace of the ACtHPR, it is instructive to examine how the ACtHPR moved from an 11-year record of two women on the bench at any given time to six out of eleven, as currently constituted. Before I proceed to address this change, let me first caution against what I choose to refer to as *guarded optimism*, because gender parity on international courts can quickly erode, evidenced by the fluctuations in the gender parity record of the International Criminal Court (ICC) over its 15-year existence. Guarded optimism therefore allows feminist legal scholars and gender activists to constantly keep in mind that the gender parity gains made on the bench of ACtHPR is still too early to be taken as the “norm.”

I raise three preliminary questions here. First, what strategies account for the gender parity outcome? Second, how can feminist legal scholars and gender advocates sustain and build upon these strategies? Third and most importantly, how do we replicate these strategies and develop new models across other sub-regional courts such as the ECOWAS Court and the EACJ? In addressing these strategies, I highlight two specific strategies that were adopted. First, activists for gender parity on the ACtHPR adopted existing institutional arrangements within the AU gender architecture aimed at addressing gender equality. The AU’s six-pillar architecture includes: a *constitutional framework*, Article 4(L) of the Constitutive Act enshrining the gender equality principle;⁵⁶ a *legal framework*—the Maputo Protocol;⁵⁷ and a *reporting framework*—SDGEA.⁵⁸ The rest are: the *policy framework*—the AU

⁵⁵ *Sierra Leone Expresses Support for the Restoration of the Number of Judges of the ECOWAS Court*, COMMUNITY COURT OF JUSTICE, <http://prod.courtecowas.org/2019/03/13/sierra-leone-expresses-support-for-the-restoration-of-the-number-of-judges-of-the-ecowas-court/> (last visited Oct. 12, 2019) (noting that various stakeholders have expressed concern on the reduction of judges from seven to five. In March 2019, the Vice President of Sierra Leone, Dr. Mohamed Juldeh Jalloh reiterated these concerns, calling on a restoration of judges to the original seven in order to help address the increasing case load of the court).

⁵⁶ Organization of African Unity, African Union Constitutive Act, art. 4(I), July 1, 2001, <https://au.int/en/constitutive-act> (enshrining the gender equality principle).

⁵⁷ Protocol to the African Charter on Human and Peoples’ Rights of Women in Africa, *supra* note 39.

⁵⁸ Solemn Declaration on Gender Equality in Africa, *supra* note 29.

Gender Policy;⁵⁹ the *implementation framework*—the African Women’s Decade (2010-2020);⁶⁰ and, the *financing mechanism*—the Fund for African Women. Each one of these pillars has been used at various points to demand gender parity in the work and functioning of the African Court and other institutional arrangements within the African Union, such as the African Commission on Human Rights.

Second, due to the nature of judicial appointments to international courts, using targeted or specific strategies such as open and transparent nomination processes at the domestic level are a necessary first step to achieving gender parity.⁶¹ Within the ACtHPR, where judges are eligible for six-year renewable terms, the politics of judicial re-nomination by a judge’s nation-state and subsequent re-election by the Heads of State and government can pose challenges for maintaining gender gains on the court. For instance, take the case of Justice Justina Kellelo Mafoso-Guni Lesotho, who was one of the first women elected to the court in 2006. After serving out her first term on the court, the government of Lesotho failed to nominate her for reelection. As Ellett has suggested, for her first nomination to the court Justice Kellelo Mafoso-Guni was unaware of the vacancies on the ACtHPR until she was nominated, once again confirming the initial lack of information on the existence of that court.⁶² Her unsuccessful bid at re-nomination by her home government is indicative of the lack of transparency and the politics of judicial nomination processes in international courts, which have the potential to adversely affect women more than men. In the case of Kellelo Mafoso-Guni, Ellett notes that her bid for renomination failed because she had encouraged her government to ratify the additional protocol allowing individuals and nongovernmental organizations to have direct access to the African Court. Besides institutional strategies, networking, professional mentoring, access to gatekeepers, and the personal agency of women judges are all critical strategies in positioning women to fill judicial vacancies on international courts.⁶³

1. Informed Allies

International treaties, domestic policies, and laws do not function in a vacuum. It takes the presence of critical allies in advancing the implementation of gender parity rules both at the domestic and international levels for real change to happen. For implementation strategies to be successful, it requires not only strategists but allies who are informed and who possess the necessary skills and networks to push the agenda forward. At the global level, this has been the case with the rallying of allies such as the Women’s Initiatives for Gender Justice (WIGJ) in their advocacy to ensure that gender diversity on the bench was considered during the drafting of

⁵⁹ African Union Gender Policy, *supra* note 30.

⁶⁰ The African Women’s Decade 2010–2020: Policy Brief on African Women and Environment, <https://europa.eu/capacity4dev/help/file/30021/download?token=uRv1qnGP>.

⁶¹ Grossman, *supra* note 5.

⁶² Rachel Ellett, *Justina Kelelo Mafoso-Guni: The Gendering of Judicial Appointment Processes in African Courts*, in INTERNATIONAL COURTS AND THE AFRICAN WOMAN JUDGE 107 (Josephine Jarpa Dawuni & Akua Kuenyehia, eds., 2018).

⁶³ Josephine Jarpa Dawuni & Akua Kuenyehia, *Conclusion: International Courts and the African Woman Judge: Unlocking Doors, Leaving a Legacy*, in INTERNATIONAL COURTS AND THE AFRICAN WOMAN JUDGE: UNVEILED NARRATIVES 141 (Josephine Dawuni & Akua Kuenyehia eds., 2018).

the Rome Statute establishing the ICC.⁶⁴ Sally Kenney also notes the impact of active allies working both as "insiders" and "outsiders" as essential to having the desired effects of achieving a representative bench.⁶⁵ Jean-Marie Kamatalie presents a similar argument on the role of insider-outsider collaboration in the case of the Rwandan judiciary, where at one point in time the Minister in the Office of the President—with a mandate covering matters of justice—and the Chief Justice were both women who pushed forward the agenda for gender equality.⁶⁶ Kamatalie credits their combined stay in office for eight years as critical for the increase in the number of women judges in Rwanda in the mid-2000s.

In the case of the ACtHPR, a critical factor that appears to have contributed to the success in the 2017 election of women judges can be linked to the advocacy for the enforcement of gender equity provisions by civil society organizations, such as the Solidarity for African Women's Rights ("SOAWR"). SOAWR is an umbrella organization, formed in 2004 for purposes of advocating for the signing and ratification of the Maputo Protocol, has morphed into a group that continues to advocate for the implementation of women's rights instruments. SOAWR has continued to engage in broad-based and targeted efforts to promote the implementation of the Maputo Protocol at all levels. These activities included engaging in high-level meetings with Ministers of Foreign Affairs and the African Union Commissions to advocate for the nomination of women.⁶⁷

Other vital allies and strategists include the Pan-African Lawyers Union ("PALU") and national Bar Associations and Law Societies across the continent who continued to advocate for open and transparent nomination processes.⁶⁸ While Grossman's arguments for transparent nomination processes is a first step to solving the problem of unrepresentative gender benches, it is equally important for the allies and strategists involved in holding governments accountable to be fully informed of the processes from start to finish. SOAWR and PALU are two critical civil society actors who are informed and intentional in the strategies that they have adopted in pushing for gender parity on the Court. They have held governments accountable to their obligations under the protocol establishing the court, the provisions in Article 9 of the Maputo Protocol as well as the plethora of international treaties and protocols on the rights of women in decision-making processes, through issuing statements and direct lobbying.

Additionally, actors have, at various points in time, contributed as informed allies in attempts to advance women's rights on the continent of Africa. However, feminist scholars and human rights advocates must guard against the tendency to negate the achievements of African women and to rob them of their personal and collective agency in advocating for and advancing their rights. At a recent conference, I was asked whether the gains made on the ACtHPR were a result of

⁶⁴ See generally Chapell, *supra* note 15, at 484–94.

⁶⁵ Kenney, *supra* note 4, at 1514.

⁶⁶ Jean-Marie Kamatalie, *Women in the Rwanda's Judiciary: The Struggle to Balance the Gender Quota with the need for an Independent Judiciary*, in GENDER AND THE JUDICIARY IN AFRICA: FROM OBSCURITY TO PARITY? (Gretchen Bauer & Josephine Dawuni eds., 2016).

⁶⁷ Osai Justina Ojigbo, *In pursuit of gender parity at the African Court*, PAMBAZUKA NEWS (Sept. 13, 2012), <http://www.pambazuka.org/gender-minorities/pursuit-gender-parity-african-court>.

⁶⁸ Ellett, *supra* note 62.

foreign aid and the demands by donors to promote gender parity in institutions on the continent. If one were to assume that gender parity across Africa is due to the “push or demand” by western donors, why were the same outcomes not happening at a faster rate in the international courts based in Europe? I was especially curious as to how the European Court of Human Rights (ECHR), which has been in existence since 1959, has still not achieved a gender-balanced bench, especially considering the changes introduced by the Parliamentary Assembly of the Council of Europe requiring countries to include in their list of nominees at least one-woman candidate. I was also curious as to why it took the European Court of Justice 47 years since its establishment, in 1952, for Fidelma O’Kelly Macken of Ireland to be appointed as the first woman judge to that court in 1999.⁶⁹ More importantly, we must be puzzled by the history of the ICJ, which, in its over 70 years of existence, and as currently constituted, can only boast four women judges out of a total number of one hundred eight judges and counting.

So, before we jump to the lazy conclusion that foreign or western donors are once again to be credited for positive gender developments on the African continent, we need to check the gender scorecard of the benches of international courts of these “gender empowering states.” Irrespective of one’s position on the role of strategists or allies in the implementation of promoting gender parity laws and treaties, the most crucial goal is achieving the desired outcome. However, reaching desired results must not be carried out at the expense of negating the roles played by the individual judicial candidates; in this case, the women themselves who are the most informed and strategic allies to the personal goals they set out to achieve.

2. Political Will of Governments

The recent gender parity outcome at the ACtHPR is a demonstration of the actualization of political will at two levels. First, at the nomination stage, the Office of the Legal Counsel of the African Union took steps to ensure that women candidates were on the list of nominees by disqualifying nomination lists that did not contain the name of at least one woman. At the election stage, political will was forcefully demonstrated by the decision of the Assembly of Heads of State and Government to postpone further elections for filling the last two vacancies until there were women nominees on the ballot.⁷⁰ In the case of the ACtHPR, we see that beyond quotas and aspirational targets, it required another step—the actualization of political will by the electing bodies to breathe life into the aspirational provisions to make them a reality.

The January 2017 election was preceded by the 27th African Union Summit held on July 10-18, 2016 in Kigali, Rwanda, during which there were four vacancies to

⁶⁹ Prior to the appointment of Irish High Court Judge Fidelma O’Kelley Macken as the first woman judge to the ECJ, France had taken the lead in breaking the gender barrier with the appointment of Simone Rozès as the first woman Advocate General in 1981. As Kenney notes, Advocate Generals in the ECJ are considered as important as judges since they draft the opinions judges often follow. SALLY J. KENNEY, *GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER* (2012).

⁷⁰ Josephine J. Dawuni, *African Women Judges and Gender Parity on the African Court on Human and Peoples’ Rights*, Africa at LSE (Mar. 13, 2017), <https://blogs.lse.ac.uk/africaatlse/2017/03/13/african-women-judges-and-gender-parity-on-the-african-court-on-human-and-peoples-rights/>.

be filled on the ACtHPR. At this meeting, the Assembly of Heads of State and Government of the AU elected only two judges, who were both women: Justice Ntyam Ondo Mengu from Cameroon and Justice Marie Thérèse Mukamulisa from Rwanda. The postponement of the election to fill the two vacancies appears to have been a deliberate action on the part of the AU to make good on its gender parity promise. The list of names presented by some member countries for election did not contain a single woman, thereby causing the AU to request these states to nominate at least one female judge, as provided for in Article 12(2) and Article 14(3) of the Protocol establishing the court, which respectively require “adequate” nomination and election of women judges.⁷¹

The last two elections to the ACtHPR in 2017 and 2018 have shown that where there is political will to make good on institutional requirements, increasing the chances of achieving sex parity benchmarks exponentially. What was different about the most recent elections? In the *note verbale* communications sent out to States during vacancies on the court, the Office of the Legal Counsel specifically asks States to fulfil their treaty obligations by nominating qualified women candidates. The punitive measure adopted by the Office of Legal Counsel to disqualify states without women nominees and the decision of the Assembly of Heads of State and Government to postpone elections until all nominating countries had at least one-woman nominee has become a commendable norm and game changer. For scholars concerned with achieving sex diverse benches, both at the domestic and international levels, the recent election of four women judges to the ACtHPR provides some glimmers of hope and a learning moment. I argue that this recent development is a lesson. It is a hope that should not remain in one court but must be replicated at other sub-regional courts on the continent.

IV. DISCUSSION & RECOMMENDATIONS

Effective implementation of women’s rights treaties and laws, such as the Maputo Protocol, cannot be achieved in isolation. In the case of elections to international courts at the regional level, it is necessary for widely advertising vacancies, using transparent and openly publicized nomination procedures at the domestic level, involving civil society actors, and seeking outstanding candidates. Articles 11 and 12 of the Protocol establishing the court state that at least one of three possible nominees should be a woman.⁷² Other factors such as advocacy by allies and the growing awareness of women judges in positions on international courts are also crucial elements to producing the diverse gender benches feminist scholars and advocates desire.

Implementing Article 9 of the Maputo Protocol across regional courts in Africa with a goal of increasing the number of women judges on the ECOWAS Court and the EACJ is possible if there is regional diffusion and learning across institutions. The identification of specific strategies, strategists, and allies within the sub-regions will be necessary in producing the desired outcomes. As the case may be, the strategic political calculations and interests of the domestic governments will differ

⁷¹ African Protocol, *supra* note 17, art. 12.2.

⁷² *Id.* at art. 11–12.

as compared to their political interests at the regional level. Thus, the stakes may be lower at the sub-regional level for States to engage fully with the question of which candidate to nominate to these courts, as compared to the higher stakes at international courts such as the International Criminal Court (“ICC”) or the International Court of Justice. As I have documented earlier, African women judges have, to date, accounted for the largest number of women judges from one geographic region to serve on the ICC. The fact that African women hold this record is indicative that African women judges have the right qualifications to fill vacancies on courts at the regional and continental levels—thus the limited pool argument does not hold much sway.

Let us return now to an important question: “How to sustain these sex parity gains?” The simple answer is—*aluta continua.... the struggle must continue!* Gender parity is never a given and women must continuously negotiate power hierarchies to maintain the achievements and gains made at any given point in time. While the ACtHPR can be commended for achieving gender parity within 11 years of its creation, especially as compared to other international courts, the ACtHPR has the difficult task of maintaining and replicating such gains. The fact that the African Commission has maintained a high number of women commissioners since its inception may provide some lessons for sustaining the gains made on the ACtHPR. Feminist legal scholars and women’s rights advocates must also consider the future and ask if these gains will be eroded if the jurisdiction of the ACtHPR were to be expanded to include a criminal chamber, as has been suggested. The proposed expansion will give the new court jurisdiction over crimes under international law and transnational crimes as enumerated in the 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).⁷³

I expressed some reservations relating to the Malabo Protocol, such as whether the restrictions on non-governmental organizations (NGO) access to the court, could have some detrimental effects on the work done by NGOs in advocating for gender parity during nomination and election of judges. Will an expansion in the jurisdiction of the court increase the stakes and the political calculations member States make in their nomination and election of judges? To address this conundrum and to maintain the recent gender parity gains at the ACtHPR, I suggest that states, civil society organizations, and women judges’ organizations must continue to assert the important roles they play in preparing strong candidates for future vacancies on international courts and tribunals.

It becomes the duty of States Parties to nominate the strongest female candidates; nonetheless, women judges will also have to be intentional about gaining access to nomination processes and gatekeepers. Preliminary evidence on the record of African women’s success at the international level, as discussed in *International Courts and the African Woman Judge: Unveiled Narratives*, strongly indicates that there is a sizeable pool of qualified women from which to draw women nominees for

⁷³ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, June 27, 2014, <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>.

international courts.⁷⁴ Additional important variables need to be considered without an over-fixation on only the numbers, and two questions need to be further explored. First, whether female candidates know about these courts; and, second, whether they are interested in positions on these courts? This is where the role of networking and awareness raising becomes crucial in programs such as open dialogues, and intentional and targeted mentoring.

Lastly, let me opine on the issue of how to learn from the gains made in the ACtHPR to sub-regional courts such as the ECOWAS Court and the EACJ. Dawuni and Kang have identified the centrality of regional diffusion to the evolution of women in judicial leadership positions in Africa.⁷⁵ The ACtHPR is better positioned to have a regional ripple effect, given that it sits at the top of the hierarchy of regional courts across the continent of Africa. For one, the development on the bench of the ACtHPR challenges the pool argument, because when the Assembly of Heads of State and Government demanded that qualified women be nominated, they found them! Besides regional diffusion, I submit further, that if more nation-states ratify and accede to the jurisdiction of the court, (currently only 30 out of 54 states on the continent), chances are that more women judges will be available from the pool of candidates from which nominees are drawn from.

CONCLUSION

The ACtHPR's current composition of six women and five men makes it one of the most gender-balanced courts in the history of international courts. The outcome from these elections shows that where governments adhere to the rules and implement them, gender parity can be achieved on the Court and other institutions within the AU system. The effective implementation of the Maputo Protocol and other regional and international instruments can spur the attainment of balanced gender institutions across the continent.

Maintaining the gains made thus far requires awareness-raising among women judges at the national level on the possibilities and requirements for serving on these courts. Lastly, steps must be taken to set clear guidelines and policies for nomination procedures at the national level, and these policies must be made available to all judges. While some scholars have suggested the use of temporary mandatory quotas to expand access for women on the benches of international courts, the case of the ACtHPR shows that gender parity can be achieved without gender quotas. In essence, the ACtHPR has set a roadmap to gender parity, it is now time for all interested stakeholders to sustain these goals and to that, I say *viva la diversité!*

⁷⁴ See generally INTERNATIONAL COURTS AND THE AFRICAN WOMAN JUDGE: UNVEILED NARRATIVES (Josephine Dawuni and Akua Kuenyehia eds., 2018).

⁷⁵ Josephine Dawuni & Alice Kang, *Her Ladyship the Chief Justice: The Rise of Female Leaders in the Judiciary in Africa*, 62 AFRICA TODAY 45, 45–46, 62–63 (2015).



TOWARDS A LESS ESSENTIALIST, MORE
INTERSECTIONAL, AND INSTITUTIONAL
APPROACH TO GENDER AND JUDGING

Sally J. Kenney

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INTRODUCTION

The convictions that it profoundly matters who judges are, what they believe about the world, and what their approach to law and judging is motivates my work. My work as a scholar of comparative pregnancy discrimination, the European Court of Justice, judicial selection, gender and judging, sexual assault, and now mass incarceration further strengthens that position; as does my professional service helping to establish a collaborative research network on Gender and Judging of more than 140 scholars from more than 17 countries.¹ The resolute position that who judges are matters informs my activism ranging from working on civil rights oversight of the Equal Opportunities Commission for the U.S. Congress, serving as a court monitor in cases of domestic violence and sexual assault, working with the National and International Associations of Women Judges and women judges across Latin America and in Kenya, helping establish a national movement called Courts Matter,² advising the Obama Administration on judicial selection, working for US AID with women judges in Tbilisi, Georgia and Cairo, Egypt, and conducting judicial education for judges in Louisiana. Lastly, my enjoyment of popular culture reinforces that position. Whether it is reading Paula Sharpe's novel, *Crows Over a Wheatfield*³—which greatly influenced me at a critical career juncture—or watching *Judging Amy*, *Spiral*, *The Good Wife*, *The Good Fight*; and reading many mysteries and watching way too many crime series on television. I offer this context so as to leave no doubt about my commitment to feminist social change or the importance of gender. I argue that an anti-essentialist and intersectional approach to gender and judging requires that we consider the question of whether women judges decide cases differently from men as settled in the negative⁴ and turn our attention to gender and feminist judging, or perhaps, gender-just judging.⁵ Such an approach would not only improve the accumulation of knowledge about judging, courts, and law, but it will strengthen our ability to advocate for a diverse and representative judiciary.

I. BACKGROUND

The International Criminal Court was the first judicial body whose creators took seriously gender diversity and sought to mandate it through a quota system built into

¹ *Sally J. Kenney Ph.D. Biography* (2019), TULANE UNIVERSITY, <https://newcomb.tulane.edu/content/sally-j-kenney-phd> (last visited Oct. 12, 2019); COLLABORATIVE RESEARCH NETWORKS <https://www.lawandsociety.org/crn.html#32>, (last visited Oct. 12, 2019); *Scholar Network*, GENDER AND JUDGING, <http://genderandjudging.org/scholar-network/> (last visited Oct. 12, 2019).

² WHY COURTS MATTER, <https://whycourtsmatter.org>.

³ PAULA SHARP, *CROWS OVER A WHEATFIELD* (1996).

⁴ More evidence may exist for women's difference in legislative arenas. KELLY DITTMAR, KIRA SANBONMATSU & SUSAN J. CARROLL, *A SEAT AT THE TABLE: CONGRESSWOMEN'S PERSPECTIVES ON WHY THEIR PRESENCE MATTERS* (2018).

⁵ Rosemary Grey & Louise Chappell, '*Gender Just Judging*' in *International Criminal Courts: New Directions for Research*, in RESEARCH HANDBOOK ON FEMINIST ENGAGEMENT WITH INTERNATIONAL LAW 213 (Kate Ogg & Susan Harris Rimmer eds., 2018); NANCY FRASER, *SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD* (2010); Nancy Fraser, *Feminist Politics in the Age of Recognition: A Two-Dimensional Approach to Gender Justice*, 1 *STUD. SOC. JUST.* 23 (2007); Anne-Marie Goetz, *Gender Justice, Citizenship and Entitlements: Core Concepts, Central Debates, and New Directions for Research*, in GENDER JUSTICE, CITIZENSHIP AND DEVELOPMENT 15 (Maitrayee Mukhopadhyay & Navsharan Singh eds., 2007).

its complex voting system.⁶ The European Court of Human Rights strongly suggests Member States submit slates of three candidates that include both genders.⁷ Similarly, the African Court of Human and People's Rights must have adequate gender representation.⁸ It is no surprise, then, that all three have led the way in the number of women judges, even though a quota, gender inclusive slate of candidates, or commitment to "adequate" gender representation are not guarantees of automatically achieving gender equality. As Madeleine Albright commented, "women do things, but they don't stay done," (referring to efforts of the UN Security Council to mandate gender diversity on international courts).⁹ Progress is fragile and easily reversed.

The most effective way to ensure an inclusive, diverse, and representative court is to mandate it in the founding documents, train selectors to be recruiters rather than mere selectors,¹⁰ and facilitate constant monitoring by legal counsel, media, and outside groups.¹¹ Some procedures may be more likely to produce a gender diverse court than others. The Council of Europe mandates short lists that include different genders,¹² rather than leaving Member States free to nominate only men may produce a more diverse European Court of Human Rights.¹³ Selecting leaders by seniority may be more effective than letting an executive or the judges choose themselves,¹⁴ and having a general legal counsel willing to postpone nominations until states nominate women¹⁵ are all associated with higher gender diversity.

Few scholars have examined the gender diversity of international courts.¹⁶ As more feminists have entered the field of international law and recognized that international courts have lagged behind national courts in their representation of

⁶ See Louise Chappell, *Gender and Judging at the International Criminal Court*, 6 POL. & GENDER 484, 487–88 (2010); LOUISE CHAPPELL, *THE POLITICS OF GENDER JUSTICE AT THE INTERNATIONAL CRIMINAL COURT: LEGACIES AND LEGITIMACY* (2016).

⁷ Alastair Mowbray, *The Consideration of Gender in the Process of Appointing Judges to the European Court of Human Rights*, 8 HUM. RTS. L. REV. 549 (2008); Stéphanie Hennette Vauchez, *More Women—But Which Women? The Rule and the Politics of Gender Balance at the European Court of Human Rights*, 26 EUR. J. INT'L L. 195, 203–04 (2015).

⁸ Josephine J. Dawuni, *African Women Judges on International Courts: Symbolic or Substantive Gains?*, 47 U. BALT. L. REV. 199, 203–04 (2018).

⁹ *Gender Diversity in the Courts*, C-SPAN (Feb. 8, 2013), <https://www.c-span.org/video/?310892-4/gender-diversity-courts>.

¹⁰ Ciara Torres-Spelliscy, Monique Chase & Emma Greenman, *Improving Judicial Diversity*, BRENNAN CENTER FOR JUSTICE (2010), http://www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf.

¹¹ Sally J. Kenney, *Which Judicial Selection Systems Generate the Most Women Judges? Lessons from the United States*, in GENDER AND JUDGING 461 (Ulrike Schultz et al. eds., 2013).

¹² I see no evidence that the Council considered gender, non-binary persons in their mandate.

¹³ Vauchez, *supra* note 7.

¹⁴ Sally J. Kenney & Jason Windett, *Diffusion of Innovation or State Political Culture? Explaining the First Women State Supreme Court Justices* (Feb. 2012) (unpublished manuscript) (on file with the author).

¹⁵ See Dawuni, *supra* note 8, at 204–07.

¹⁶ See Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991); GRETCHEN BAUER & JOSEPHINE DAWUNI, GENDER AND THE JUDICIARY IN AFRICA: FROM OBSCURITY TO PARITY? (2018); Susan D. Franck et al., *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*, 53 COLUM. J. TRANSNAT'L L. 429 (2015); Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?* 12 CHI. J. INT'L L. 647 (2012); Nienke Grossman, *Sex Representation on the Bench and the Legitimacy of International Criminal Courts*, 11 INT'L. CRIM. L. REV. 643 (2016); Nienke Grossman, *Shattering the Glass Ceiling in International Adjudication*, VA. J. INT'L L. (2016); Vauchez, *supra* note 7.

women,¹⁷ it is not surprising that scholars began exploring the underrepresentation of women. Nearly all scholars who have done so have endeavored to have their work reflect the current thinking of the field, calling for an anti-essentialist and intersectional approach to understanding gender.¹⁸

Such an approach requires one to distinguish between sex as a variable for analysis and an understanding of gender as a social process which varies across cultures and institutions. Conflating sex with feminism and presuming that all women are different from all men in ways that are significant for judicial decision making and other behaviors constitutes essentialism. We should treat the question of gender-based difference as an empirical one—for which scholars have adduced only fleeting evidence—rather than as a presumption we all know to be true.¹⁹ Although I think researchers should move on from using sex as a variable to “uncover” whether women are different from men to exploring gender as a social process in interesting ways the scholars I discuss in this article do, I do find utility in both quantitative analysis and using sex as a variable. Such inquiry can discern whether judicial selection processes discriminate against women, for example, by ascertaining whether selectors take longer to approve women candidates than men, or whether selectors require women but not men to have prior judicial experience to be eligible for high judicial office, or whether men are cronies of selectors more so than women who may spend more time parenting than golfing.²⁰

Treating gender as a social process and uncovering the specificities of gendered institutions raises far more interesting questions than whether women decide cases differently from men. Gender may play a role in Member States not only “exiling” rivals to an international arena, as is the case worldwide for those who want to keep potential rivals in check, but also be a way of ensuring national courts are not “polluted” by highly effective advocates of gender equality.²¹ That sort of evidence is difficult to uncover, but judges, selectors, and informed observers do speculate and adduce evidence about others’ motives even if we cannot read their minds. As I discovered in my interviews of members of the European Court of Justice, judges and advocate generals may not be the most knowledgeable informants as to what factors led selectors to choose them.²² Similarly, S. Hennette Vauchez²³ alleges that

¹⁷ Franck et al., *supra* note 16; Nienke Grossman & Dana Schmalz, *It's Not About "Women's Issues": An Interview with Nienke Grossman*, ACADEMIA, https://www.academia.edu/32798339/It_s_not_about_women_s_issues__An_interview_with_Nienke_Grossman (last visited Oct. 19, 2019).

¹⁸ SALMON A. SHOMADE, DECISION MAKING AND CONTROVERSIES IN STATE SUPREME COURTS (2018).

¹⁹ Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice*, 6 MICH. J. GENDER & L 113 (1999); Theresa M. Beiner, *The Elusive (but Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597 (2003); Theresa M. Beiner, *Female Judging*, 36 U. TOL. L. REV. 821 (2005); SALLY J. KENNEY, GENDER & JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER (2013).

²⁰ KENNEY, *supra* note 19; Hilary Sommerlad et al., *Diversity in the Legal Profession in England and Wales: A Qualitative Study of Barriers and Individual Choices*, U. WESTMINSTER (2010), available at http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lbs_diversity_in_the_legal_profession_final_rev.pdf; HILARY SOMMERLAD & PETER SANDERSON, GENDER, CHOICE, AND COMMITMENT: WOMEN SOLICITORS IN ENGLAND AND WALES AND THE STRUGGLE FOR EQUAL STATUS (1998).

²¹ KENNEY, *supra* note 19; Fionnuala Ni Aolain, *More Women—But Which Women? A Reply to Stephanie Hennette Vauchez*, 26 EUR. J. INT'L L. 229 (2015); Françoise Tulkens, *More Women—But Which Women? A Reply to Stephanie Hennette Vauchez*, 26 EUR. J. INT'L L. 223 (2015).

²² Sally J. Kenney, *The Members of the European Court of Justice*, 5 COLUM. J. EUR. L. 101 (1998).

²³ Vauchez, *supra* note 7, at 218–20.

some member states resistant to gender equality deliberately put forward weaker women candidates in order to ensure that the preferred male candidate would shine, and selectors would choose him.²⁴

Nienke Grossman's work has demonstrated that the same disturbing patterns we find in domestic courts hold true for international courts. First, the number of women serving does not steadily rise in proportion to the percentage, longevity, or quality of women in the qualified labor pool. Steady progress is not inevitable; nor is the number of women on the bench a reflection of the pool of qualified women. Second, women's representation in the judiciary does not neatly form a pyramid with more women on the bottom steadily increasing the numbers at the top proportionately. Women can serve in high numbers at lower courts without ever creating genuine pressure on higher courts, as in France, where virtually no women serve on the top national courts and France has never nominated a woman to serve on an international court.²⁵ Women can serve in higher numbers and percentages at the top of the pyramid while almost no women serve at lower levels, as in Egypt.²⁶ Third, no necessary relationship exists between perceived national norms of gender equality, the number of women lawyers, and the number of women judges; instead, we may see more women serving on international courts from Argentina, Africa, or Eastern Europe than from Western Europe and Scandinavia.²⁷

In this article, I shall first examine how essentialism continues to creep back into our studies of diversity and the judiciary and, second, describe how we can move toward a more intersectional approach given the difficulties of small studies and limited evidence.

II. ANTI-ESSENTIALISM

Despite their best intentions, many scholars who advocate for an anti-essentialist, intersectional approach to judicial diversity still harbor some unconscious commitments to difference. In *Gender Trouble*,²⁸ Judith Butler employs a painstaking textual analysis to show how Freud, while arguing for a cultural construction of sexuality, reverted to explaining heterosexuality as natural, biologically caused. Why is a naturalist understanding of difference so tenacious?

One of the most frustrating moves many scholars make is characterizing difference arguments as *the* feminist position without acknowledging feminist critiques of them and the stronger feminist consensus against such arguments.²⁹ In

²⁴ Tulkens, *supra* note 21.

²⁵ Grossman & Schmalz, *supra* note 17. France did, however, nominate the first woman member of the European Court of Justice, Madame Simone Rozès, as Advocate General in 1981. Sally J. Kenney, *Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice*, 10 FEMINIST LEGAL STUD. 257, 261 (2002).

²⁶ Sally J. Kenney, *Measuring Women's Judicial Empowerment*, in MEASURING WOMEN'S POLITICAL EMPOWERMENT ACROSS THE GLOBE: STRATEGIES, CHALLENGES AND FUTURE RESEARCH 207 (Amy Alexander et al. eds., 2018).

²⁷ U.N. Women, *2011-2012 Progress of the World's Women: In Pursuit of Justice* (2011), <http://www.unwomen.org/en/digital-library/publications/2011/7/progress-of-the-world-s-women-in-pursuit-of-justice>.

²⁸ JUDITH BUTLER, *GENDER TROUBLE* (2006).

²⁹ Mary Joe Frug, *Progressive Feminist Legal Scholarship: Can We Claim "A Different Voice"?*, 15 HARV. WOMEN'S L. J. 37 (1992); Sally J. Kenney, *Women, Feminism, Gender and Law in Political Science: Ruminations of a Feminist Academic*, 15 WOMEN & POL. 43 (1995).

the case of judging, scholars routinely cite Carol Gilligan and Suzanna Sherry as *the* feminist approach to judging.³⁰ At best, feminists have been on both sides of the difference debate. Feminists advocating for women's inclusion on juries, as just one example, divided on the issue of difference.³¹ One side argued women were the same as men in their rationality, ability to withstand hearing about disturbing issues, and capacity for fairness and objectivity. Excluding them when they were the same in key respects constituted discrimination. Others argued women were different from men, and therefore excluding women from juries denied women plaintiffs a jury of their peers and arguably male plaintiffs more lenient members of the pool. Yet both could agree the exclusion of women was a wrong and work to correct it.³²

After observing the tenacity of the difference argument within political science ever since Beverly Blair Cooke³³ first started doing research on women judges (her work refuted the difference hypothesis) and within other disciplines, I must ask the question whether the difference hypothesis is falsifiable? What would constitute evidence against it? Many scholars choose indefensibly to cite only the studies that find difference. When they find no evidence of difference, they say the evidence is mixed, inconclusive, or equivocal. Those who do not want to weigh into the difficult task of looking deeply at the methodology pronounce simply that the evidence is mixed, or that both sides contain grains of truth.³⁴ If the difference were so

³⁰ SANDRA BERNIS, *TO SPEAK AS A JUDGE: DIFFERENCE, VOICE AND POWER* (1999); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982); Kasey McLoughlin, *Situating Women Judges on the High Court of Australia: Not Just Men in Skirts?* (2016) (unpublished Ph.D. dissertation, University of Newcastle) (on file with the author); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

³¹ Kenney, *supra* note 19.

³² Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139 (1993); Joanna L. Grossman, *Women's Jury Service: Right of Citizenship or Privilege of Difference?* 46 STAN. L. REV. 1115 (1994); Holly J. McCammon et al., *Movement Framing and Discursive Opportunity Structures: The Political Successes of the U.S. Women's Jury Movements*, 72 AM. SOC. REV. 725 (2007).

³³ Lynn Mather, *Introducing a Feminist Pioneer in Judicial Politics: Beverly Blair Cook*, 27 PS: POL. SCI. & POL. 76 (2013); Lee Epstein, *Beverly Blair Cook*, in *WOMEN IN LAW: A BIO-BIBLIOGRAPHICAL SOURCEBOOK* (Rebecca Mae Salokar & Mary L. Volcansek eds., 1996); Beverly Blair Cook, *The Burger Court and Women's Rights, 1971-1977*, in *WOMEN IN THE COURTS* (Winifred L. Hepperle & Laura Crites eds., 1978); Beverly Blair Cook, *Women Judges: The End of Tokenism, 1971-1977*, in *WOMEN IN THE COURTS* 84 (Winifred L. Hepperle & Laura Crites eds., 1978); Beverly Blair Cook, *Florence Allen*, in *NOTABLE AMERICAN WOMEN: THE MODERN PERIOD—A BIOGRAPHICAL DICTIONARY* (Barbara Sicherman & Carol Hurd Green eds., 1980); Beverly Blair Cook, *Political Culture and Selection of Women Judges in Trial Courts*, in *WOMEN IN LOCAL POLITICS* (Debra W. Stewart ed., 1980); Beverly Blair Cook, *Will Women Judges Make a Difference in Women's Legal Rights? A Prediction from Attitudes and Simulated Behavior*, in *WOMEN, POWER, AND POLITICAL SYSTEMS* (Margherita Rendel ed., 1981); Beverly Blair Cook, *Women as Supreme Court Candidates: From Florence Allen to Sandra O'Connor*, 65 JUDICATURE 314 (1982); BEVERLY BLAIR COOK, *THE PATH TO THE BENCH: AMBITIONS AND ATTITUDES OF WOMEN IN THE LAW*, TRIAL 49 (1983); Beverly Blair Cook, *Women Judges: A Preface to Their History*, 14 GOLDEN GATE U. L. REV. 573 (1984); Beverly Blair Cook, *Women on the State Bench: Correlates of Access*, in *POLITICAL WOMEN: CURRENT ROLES IN STATE AND LOCAL GOVERNMENT* (Janet A. Flammang ed., 1984); Beverly Blair Cook, *Women Judges in the Opportunity Structure*, in *WOMEN, THE COURTS, AND EQUALITY* (Laura L. Crites & Winifred L. Hepperle eds., 1987); Beverly Blair Cook, *Women as Judges*, in *WOMEN IN THE JUDICIAL PROCESS* (Beverly Blair Cook et al. eds., 1988); Beverly Blair Cook, *Justice Sandra Day O'Connor: Transition to a Republican Court Agenda*, in *THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES* (Charles M. Lamb & Stephen C. Halpern eds., 1991); Beverly Blair Cook, *Rose Bird*, AMERICAN BIOGRAPHY ONLINE (2001), <http://www.amb.org.floyd.lib.umn.edu/articles/11/11-01013-print.html> (last visited Feb 20, 2019).

³⁴ Rosemary Hunter, *More than Just a Different Face? Judicial Diversity and Decision-making*, 68 CURRENT LEGAL PROBS. 125 (2015).

significant, would we not always find it across time, culture, court, or area of law? When we find no evidence of it, scholars conclude that it is dormant or suppressed, constrained by legal institutions, occurring only “on occasion.”³⁵ The little mermaid metaphor starts from the assumption of a different voice that is lost,³⁶ not an empirical inquiry into whether difference exists.

One reason for the persistence of difference arguments is that many advocates intuit that if they do not argue that women are different from men, no harm is done when selectors exclude women. A better frame would be to treat the issue of women’s underrepresentation as an issue of employment discrimination against prospective women judges. We do not have to show that women would do science differently from men in order to conclude it is wrong to exclude them from the enterprise altogether. Framing the question as a basic issue of citizenship, too, one needs no difference argument to argue women should enjoy the franchise. Systematically excluding groups of citizens raises important questions of legitimacy irrespective of whether their presence would change outcomes.³⁷ Vauchez refers to this view as part of “transnational (cosmopolitan?) democratic citizenship norms.”³⁸ The imperative of geographic or member state representation, an important fundamental principle of many transnational courts, furthermore, requires no such showing of difference in order to confer legitimacy.

Grossman identifies another variant of this argument distinctive to international arenas. Given the incidence of mass rape during the war in the former Yugoslavia, founders of the International Criminal Court called for both gender diversity and enhanced weight for nominees with experience of gender-based violence. The corollary appears to be that gender diversity is not important for courts that do not adjudicate on such obviously gendered issues, such as the International Tribunal for the Law of the Sea. As Grossman counters, “men do not have a monopoly over the Law of the Sea. It affects both men and women equally, and both groups should be represented on courts that are interpreting the Law of the Sea.”³⁹ As political theorist Anne Phillips has argued in the legislative arena, the burden of proof should now be on those who argue that excluding women has no harm.⁴⁰

³⁵ ERIKA RACKLEY, WOMEN, JUDGING AND THE JUDICIARY 201 (2013).

³⁶ Erika Rackley, *Representations of the (woman) Judge: Hercules, The Little Mermaid, and the Vain and Naked Emperor*, 22 LEGAL STUD. 602 (2002).

³⁷ Schmalz, *supra* note 17 (making the additional point that even if men and women do not decide cases differently, if the general public believes that they do, excluding women could create a perception of unfairness and undermine the legitimacy of courts); KENNEY, *supra* note 19; Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent “Yes”*, 61 J. POL. 628 (1999); Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515 (2003); Kristen Hessler, *Women Judges or Feminist Judges?: Gender Representation and Feminist Values in International Courts*, 23–4 (Mar. 2017) (unpublished paper presented at Gender and the International Bench Conference, Oslo).

³⁸ Vauchez, *supra* note 7, at 196.

³⁹ Grossman & Schmalz, *supra* note 17.

⁴⁰ ANNE PHILLIPS, THE POLITICS OF PRESENCE: THE POLITICAL REPRESENTATION OF GENDER, RACE, AND ETHNICITY (1995); Anne Phillips, *Democracy and Representation: Or, Why Should It Matter Who Our Representatives Are?*, in FEMINISM & POLITICS 232 (1998).

Catharine MacKinnon⁴¹ and many others,⁴² including a number of women judges themselves,⁴³ have lamented the two-edged sword of difference, a fact most who use difference arguments conveniently ignore.

Fionnuala Ni Aolain summarized the point's relevance for international courts:

In an oddly circular way, the very fact of paying attention to women judges (or the absence of women as judges) singles out the female judge (or potential judge) as the representative of her sex, invokes (intentionally or not) the spectre of gender essentialism and results in a level of scrutiny for female judicial candidates and judges that their male counterparts rarely encounter on the basis of sex.⁴⁴

The most cited international example of the importance of women's difference is the impact Judge Navanethem Pillay made on insisting that sexual violence be added to the original charges in the *Akayesu* case in Rwanda.⁴⁵ As Tuba Inal⁴⁶ demonstrated, international human rights law drafters shied away from recognizing the distinctive harm of rape as a war crime and as genocide until more women joined the drafting committee (although I should note, Eleanor Roosevelt's central role in drafting the Universal Declaration of Human Rights did NOT generate a special recognition of gendered harms).⁴⁷ Women, feminists, and people who have experience with prosecuting gender-based violence are highly likely to face motions to recuse and challenges to their objectivity,⁴⁸ as Judge Pillay did. Defense counsel objected to Judge Pillay, the only woman sitting on the Furundzija case, because she has served on the United Nations Commission on the Status of Women.⁴⁹ The same is true for judges of color and openly gay judges, yet rarely do all-male, white, or straight panels face similar challenges.⁵⁰

Judge Tulkens bristles at the characterization of women as legitimating courts:

⁴¹ CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).

⁴² SALLY J. KENNEY, *FOR WHOSE PROTECTION? REPRODUCTIVE HAZARDS AND EXCLUSIONARY POLICIES IN THE UNITED STATES AND BRITAIN* (1992).

⁴³ KENNEY, *supra* note 19, at 5–6 (noting that Justice Ginsburg was firmly in the minimizer and equal treatment camps for her entire scholarly career); Adam Liptak, *Supreme Court Says Child's Rights Violated by Strip Search*, N.Y. TIMES (June 25, 2009), <https://www.nytimes.com/2009/06/26/us/politics/26scotus.html> (stating her more recent comments about women understanding thirteen-year-old girls as an argument for women on the bench is clearly a difference argument).

⁴⁴ Aolain, *supra* note 21, at 230.

⁴⁵ Barbara Frey, *A Fair Representation: Advocating for Women's Rights in the International Criminal Court*, ACADEMIA, at 4, 9 (2004), https://www.academia.edu/826971/A_Fair_Representation_Advocating_for_Womens_Rights_in_the_International_Criminal_Court.

⁴⁶ TUBA INAL, *LOOTING AND RAPE IN WARTIME: LAW AND CHANGE IN INTERNATIONAL RELATIONS* (2013).

⁴⁷ BLANCHE WIESEN COOK, *ELEANOR ROOSEVELT, VOLUME 3: THE WAR YEARS AND AFTER, 1939-1962* (2016).

⁴⁸ Mathilde Cohen, *Judicial Diversity in France: The Unspoken and the Unspeakable*, 43 L. & SOC. INQUIRY 1542, 1550 (2018) (conveying brilliantly the doublethink of the judiciary in France where they minimize the significance of identity and political commitment, saying "We aren't supposed to be pro-gardening or anything," yet a woman judge of Moroccan origin was not assigned a case involving Moroccan pensioners because her department head feared that her 'Moroccan ancestry' would jeopardize her 'impartiality'); Dominique Simonnot, *Déraillement aux prud-hommes*, LE CANARD ENCHAÎNÉ (2015) (Fr.).

⁴⁹ Grey & Chappell, *supra* note 5; Dawuni, *supra* note 8, at 229.

⁵⁰ Sally J. Kenney, *Equal Employment Opportunity and Representation: Extending the Frame to Courts*, 11 SOC. POL. 86 (2004).

The presence of women on the bench cannot be considered in itself a condition for the legitimacy of international courts. Women are not on the bench to 'legitimate' or 'justify' anything. *Women are present at the European Court of Human Rights simply because there is no reason for them not to be there* (emphasis added). Conversely, I believe that it is the lack of women at the Court that poses a problem in terms of legitimacy.⁵¹

Tulkens suggests that her expertise both as a feminist and a human rights scholar ironically worked against Professor Eva Brems when Belgium put forward an all-woman short-list for the European Court of Human Rights, ostensibly because Belgium had already had a long-serving woman judge.⁵² Tulkens and others warn that provisions for gender inclusivity may become limiting ceilings rather than ways to ensure states fairly consider women candidates.

Any association with feminism may lead selectors to challenge nominees as biased, yet no such challenge seems to occur for anti-feminist candidates,⁵³ as evidenced when Representative Steve King expressed his hope that U.S. Supreme Court Justices Sonia Sotomayor and Elena Kagan elope to Cuba.⁵⁴ The U.S. Senate Judiciary Committee questioned then-Second Circuit Court of Appeals Judge Sonia Sotomayor extensively about her statement that a wise Latina woman might make a better decision in a case of gender-based violence than someone without her perspective and life experiences.⁵⁵ Significantly, the Minnesota case that gave rise to the comment was a case in which, to be sure, all the women judges voted together, but some male colleagues shared their reasoning and reached the same result.⁵⁶

Framing concerns about gender and the judiciary as employment discrimination allows one to draw on advancements in understandings of gender and social cognition. Rather than looking for essential gender difference, one gains more traction with arguments about gender devaluation.⁵⁷ Social psychologists have demonstrated with tests for implicit bias that it affects everyone, women as well as men.⁵⁸ Moreover, developments in the neuroscience of the brain have also demonstrated the durability of these cultural patterns of unconscious thought.⁵⁹ Studies of orchestra tryouts, administrative law panels,⁶⁰ choice of playwrights produced, and oral exams of law students, show that gender devaluation crosses sex differences.

⁵¹ Tulkens, *supra* note 21, at 224.

⁵² *Id.* at 226.

⁵³ Dawuni, *supra* note 8, at 225.

⁵⁴ Avery Anapol, *Steve King: Maybe Sotomayor and Kagan will 'elope to Cuba'*, THE HILL (Nov. 5, 2018), <https://thehill.com/homenews/house/415088-steve-king-maybe-sotomayor-and-kagan-will-elope-to-cuba>.

⁵⁵ Sally J. Kenney, *Wise Latinas, Strategic Minnesotans, and the Feminist Standpoint: The Backlash Against Women Judges*, 36 T. JEFFERSON L. REV. 43, 68–70 (2013).

⁵⁶ *Hall v. Hall*, 408 N.W. 2d. 626 (Minn. Ct. App. 1987).

⁵⁷ MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY (3rd ed. 2013).

⁵⁸ *Are You Biased Against Women Leaders?*, AM. ASS'N OF UNIV. WOMEN (Feb. 10, 2016), <https://www.aauw.org/article/implicit-association-test/>; *Preliminary Information*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> (last visited Feb 20, 2019).

⁵⁹ BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM (Eugene Borgida & Susan T. Fiske eds., 2008); Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715–741 (1997).

⁶⁰ Hazel Genn, *Tribunal Panel Decision-Making About Welfare Benefits: Does Gender or Anything Else Make a Consistent Difference?* (2012) (unpublished manuscript) (presented at the Annual Meeting of the Law & Society Association, Hawaii).

Given the fondness of certain judges (for example, Chief Justice Roberts) of using the metaphor of a baseball umpire simply calling balls and strikes,⁶¹ social psychologists have shown that baseball umpires call fewer strikes on black pitchers, despite their best intentions to be fair. The black pitchers know this, and then throw more conservatively, exacerbating the phenomenon of narrowing the strike zone for black pitchers. Coaches conclude that black pitchers, judged fairly under an objective merit standard, are just not as good as their white counterparts.⁶²

Paradoxically, feminist scholars must argue against the erasure of gender to show evidence of the continuing presence of discrimination at the same time they argue against a patriarchal or misogynistic recognition of gender which excludes women or casts them as inferior. In my analysis of Chief Justice Rose Bird's removal from the California Supreme Court,⁶³ I try to disentangle when gender is one factor contributing to an outcome, rejecting an all or nothing approach.

Essentialist approaches to women judges should have to contend with the fact that many women judges themselves are minimizers⁶⁴—holding that gender matters little to their decisions—and some women judges are virulently anti-feminist. Dealing with the former requires essentialists to reject women's accounts of their own experience, deeming women judges who minimize gender as suffering from false consciousness. Women judges want to be treated as an equal and fit in with a collegial body. Emphasizing difference can be an impediment to that process. That may explain why Judge Florence Allen, for example, described the judges on the U.S. Court of Appeals for the Sixth Circuit as welcoming her, when in fact they refused to congratulate her on her appointment; one of them took to his bed upon learning a woman was on the court, and they dined without her every day at an all-male club while she swam or heated up soup in her office.⁶⁵ In other cases, such as Rosalie Wahl, the first woman of the Minnesota Supreme Court, women judges compellingly describe the warm welcomes they received from incumbent judges on the bench.⁶⁶ How can we determine whether women judges are downplaying or oblivious to misogyny or giving us an accurate read on the salience (or lack thereof) of gender? Why do we only accept women judges at their word when they confirm the difference position and the relevance of gender?

Drawing on the sociology of work can shed light on this dilemma. In Dana Britton's interviews of senior women science faculty, many of whom were the first and only members of their departments, most women reject the metaphor of the "chilly climate"—the idea that discrimination shapes their environment in multiple gendered interactions or microaggressions—and seek to downplay their gender

⁶¹ Roberts: 'My job is to call balls and strikes and not to pitch or bat', CNN (Sept. 12, 2005), <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/>.

⁶² Christopher A. Parsons et al., *Strike Three: Umpires' Demand for Discrimination*, NAT'L BUREAU OF ECON. RESEARCH (2007).

⁶³ KENNEY, *supra* note 19, at 154–55.

⁶⁴ NANCY E. MCGLEN & MEREDITH R. SARKEES, *WOMEN IN FOREIGN POLICY: THE INSIDERS* (1993).

⁶⁵ Sally J. Kenney, *It Would Be Stupendous for Us Girls' Campaigning for Women Judges Without Waving*, in *BREAKING THE WAVE: WOMEN, THEIR ORGANIZATIONS, AND FEMINISM, 1945-1985* 209–225 (2011); FLORENCE E. ALLEN, *TO DO JUSTLY* (1965); JEANETTE E. TUVE, *FIRST LADY OF THE LAW*, FLORENCE ELLINWOOD ALLEN (1984).

⁶⁶ Laura Cooper & Rosalie E. Wahl, *Interview with Minnesota Supreme Court Associate Justice Rosalie E. Wahl*, SUPREME COURT JUSTICES ORAL HISTORY PROJECT (Aug. 17, 1994), <http://collections.mnhs.org/cms/display.php?irn=10445357#transcript>;

Sally J. Kenney, *Mobilizing Emotions to Elect Women: The symbolic meaning of Minnesota's first woman supreme court justice*, 15 *MOBILIZATION* 133 (2010).

identity, distancing themselves from associating with feminist collective action. Rather than seeing gender as a pervasive force that shapes interactions, they see it as an unwelcome intrusion—a punctuated equilibrium. They recount stories of interactions that reveal gender at work, such as a dean’s refusal to match the pay of a more junior man, saying “it would turn my stomach to see that woman making that much money.”⁶⁷ Britton argues, however, that these women are more willing to describe the significance of structural factors at work in their organizations; for example, how expectations about emotional labor and femininity lead universities to burden women with disproportionate service. In addition, as they ascend to leadership positions, they clearly identify direct challenges from men who resent women’s accession to power. Women dismiss many interactions as trivial or the behavior of just one person, rather than a pattern, and want to get on with the business of science just as many women want to get on with the business of judging and downplay the significance of gender.⁶⁸

A. *Kcasey McLoughlin*

Although she does not focus on a transnational court, Kcasey McLoughlin’s dissertation, “Situating Women Judges on the High Court of Australia: Not Just Men in Skirts?”⁶⁹ is illustrative of how the difference frame continues to coexist with a sophisticated and anti-essentialist method of exploring gender.⁷⁰ McLoughlin studies women judges on the High Court of Australia. Rather than taking a biographical approach⁷¹ or conducting a statistical analysis of the role of sex in legal decision making,⁷² McLoughlin tries to uncover the gender regime of the Australian High Court as an organization by using the window of maiden and farewell speeches and decisions that placed women in opposition to men: one, a highly gender-inflected case on marital rape, another, a case about offensive speech to families of veterans. In doing so, McLoughlin builds on and expands the work of her predecessors, as well as reflects deeply on the thinking of the many Feminist Judgement Projects,⁷³ particularly, the Australian one.

McLoughlin, however, assumes rather than discovers gender difference and often conflates sex and feminism. Just as Judith Butler found with Freud,⁷⁴ McLoughlin ends up assuming essential sex difference as she seeks to determine whether it exists by dismissing away evidence that finds none. When two women judges, Justices Gaudron and Crennan, minimize difference, McLoughlin

⁶⁷ Dana M. Britton, *Beyond the Chilly Climate: The Salience of Gender in Women’s Academic Careers*, 31 GENDER & SOC’Y 16 (2017).

⁶⁸ *Id.* at 5–27.

⁶⁹ McLoughlin, *supra* note 30.

⁷⁰ Carla E. Molette-Ogden, *Female Jurists: The Impact of Their Increased Presence on the Minnesota Supreme Court* (1998) (unpublished Ph.D. dissertation, Washington University) (on file with author).

⁷¹ Josephine Dawuni, *Vive la Diversité or Aluta Continua? Achieving Gender Parity on the African Court on Human and Peoples’ Rights*, 34 CONN. J. INT’L L.

⁷² Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010); Jennifer Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L. J. 1759 (2005).

⁷³ FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi et al. eds., 2017).

⁷⁴ JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1st ed. 1990).

characterizes them as hiding it.⁷⁵ She assumes that, as women, they will necessarily be disruptive, and when she finds they are not, she calls them “judges in skirts;” hypothesizing that the process of serving on the High Court forces them to conform or hide their “true” difference; or worse, that they are complicit in patriarchy,⁷⁶ dressing up as judges,⁷⁷ or “straightjacketed.”⁷⁸ She assumes women will be feminist and men cannot be. She invokes briefly evolutionary biology claims of difference that men fight or flee while women “tend and befriend.”⁷⁹

B. *Rosemary Hunter*

Even Rosemary Hunter, the scholar I see as the most theoretically sophisticated and reflective about gender and judging—and one of the main architects of the feminist judgments project⁸⁰—demonstrates a startling assumption of difference that cannot be dislodged, as revealed, ironically, in this quote where she despairs of not finding it:

Why did we think that women would transform institutions without simultaneously—or alternatively—being transformed by them? Why did we believe that women appointed to positions of power would be ‘representative’ of women as a group rather than being those who most resemble the traditional incumbents and are thus considered least likely to disturb the status quo? Why did we assume that women appointed to these positions would have the capacity to represent the whole, diverse range of women’s perspectives and experiences? And why did we imagine that individual women would want potentially to risk their newly-acquired status by taking a stand on behalf of other women, when it would be much safer for them to keep their heads down and attempt to gain some legitimacy amongst their skeptical peers and jealous subordinates?⁸¹

Women have transformative aims that institutions thwart; women have gender consciousness which makes them represent their sex, not just themselves; selectors will pick only the least feminist women; women are different but choose for reasons of cowardice not to act on it.

Hunter’s more recent work cites the interesting experiment where law students were asked to identify the gender of the author of judicial opinions and did no better than tossing a coin.⁸² When pressed on the difference point, Lady Hale pivoted quickly to feminist judging, directing the Committee on Diversity to the Feminist Judgments Project. Hunter concludes that what she now refers to as “nontraditional judges” *may* reach different decisions.⁸³ When listing what she believes are the six arguments for gender diversity, Hunter slides back into the difference assumption:

⁷⁵ McLoughlin, *supra* note 30, at 79.

⁷⁶ *Id.* at 119.

⁷⁷ *Id.* at 140.

⁷⁸ *Id.* at 148.

⁷⁹ *Id.* at 110.

⁸⁰ FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT, (Bridget J. Crawford, et al. eds., 2017).

⁸¹ Rosemary Hunter, *Can feminist judges make a difference?*, WOMEN IN THE JUDICIARY 7–8 (Ulrike Schultz & Gisela Shaw eds., 2013).

⁸² Rosemary Hunter, *More than Just a Different Face? Judicial Diversity and Decision-making*, 68 CURRENT LEGAL PROBLEMS 121 (2015).

⁸³ *Id.* at 122.

that women (not men) will challenge sexist behavior in and outside of the courtroom and mentor other women, judges, clerks, etc. Women's life experience is different from men's, to be sure, but there is no necessary relationship with their life experiences and feminist consciousness or a willingness to act, bravely, as Hunter describes it, on that feminist sensibility. Any woman worker who has assumed a senior woman would support her, or the lone woman dean failing to act against a sexual harasser, makes this false assumption to her peril. Perhaps I have spent too long living in the Fifth Circuit⁸⁴ where we have the most gender diverse court and the most anti-feminist bench, but my assessment comports more with Hunter's first quotes than the naïve assumption that sex translates into feminist sisterhood which continues to creep into her work, despite the clear movement toward examining what *feminist judging* looks like.

1. Jarpa Dawuni

Dawuni, like Grossman, is committed to an anti-essentialist intersectional approach to gender and judging.⁸⁵ She states, "the contributions of women judges may not always be easy to separate from their contributions as *judges* per se. Neither should we be fixated on their contributions as *women* per se."⁸⁶ She focuses on women judges' paths to high judicial office and their leadership contributions.

Dawuni summarizes the evidence as mixed, stronger than how I perceive it, and later declares it to be altogether moot.⁸⁷ She asks whether increasing the number of female judges on international courts increases charges of gender-based and sexual violence, pointing out that "judges can only do so much" (suggesting that women or feminist judges would do more if they only could).⁸⁸ She characterizes her interviewees as saying that they will do more to advance gender equality than men, but staunchly declaring women judges to be unbiased. She intends to be careful to not assume that all women judges are feminist without taking a position on men. She then cites Hunter for saying that even if women do not decide cases differently from men, they make a difference in all sorts of other ways, as women intervening in the gender order—a weak version of the difference position.⁸⁹ She quotes a judge who recognizes that non-feminist women will not make a difference in the ways Hunter outlines beyond judicial outcomes. She talks about the role of women in mentoring other women to be judges without recognizing that the evidence on that point, too, is very mixed. While U.S. Supreme Court Justice O'Connor sought to include at least one-woman clerk each year,⁹⁰ Justice Ginsburg's early record of selecting women

⁸⁴ Served by the United States Court of Appeals for the Fifth Circuit.

⁸⁵ Josephine Dawuni, *Matri-legal Feminism: An African Feminist Response to International Law*, in RES. HANDBOOK ON THE FUTURE OF FEMINIST ENGAGEMENT WITH INT'L L. (Susan Harris Rimmer & Kate Ogg eds., 2019); Josephine Dawuni, *To "Mother" or not to "Mother": The Representative Roles of Women Judges in Ghana*, 60 J. OF AFRICAN L. 419–40 (2016); Dawuni & Kang, *Her Ladyship Chief Justice: The Rise of Female Leaders in the Judiciary in Africa*, 62 AFRICA TODAY 45–69 (2015).

⁸⁶ Josephine Dawuni, *African Women Judges on International Courts: Symbolic or Substantive Gains?* 47 UNIV. OF BALT. L. REV. 221 (2018); Dawuni, *supra* note 71.

⁸⁷ Dawuni, *supra* note 71, at 223.

⁸⁸ Dawuni, *supra* note 71, at 148.

⁸⁹ Dawuni, *supra* note 71, at 233.

⁹⁰ Karen O'Connor & Alixandra B. Yanus, *Judging Alone: Reflections on the Importance of Women on the Court*, 6 POLITICS & GENDER 441 (2010).

clerks was not as strong,⁹¹ as just one example. Women, even feminists, do not necessarily mentor other women, and some men do. She quotes Judge Wahl for talking about the unique life experiences of women judges and how that will lead them to intervene, and later talks about women judges bringing a feminine perspective to the gendered cases by socializing their male counterparts.⁹² In the end, she calls for a critical mass of gender-conscious judges and recognizes the role of male allies.⁹³

C. *Konstantinos Alexandris Polomarkakis*

Polomarkakis rejects essentialism but claims that empirical studies have shown difference, and describes that work as seminal.⁹⁴ He recognizes the difficulties of conducting such an examination at the European Court of Justice, and international courts generally, which do not have a tradition of separately authored opinions (with the exception of the advocate general's). He cites almost exclusively the papers that find difference.⁹⁵ Like McLoughlin⁹⁶ and Boyd et al.,⁹⁷ he adopts the method of pairing the decision of a man advocate general with Kokott's gender in recommending a course of action he finds more feminist. Polomarkakis looks for the different voice not only in Kokott's opinion but its influence in shaping the opinions of her colleagues. He claims to have confirmed the hypothesis that women judges and advocate generals promote more protective and progressive interpretations in cases affecting social welfare and equal treatment—more feminist decisions.⁹⁸

I applaud Polomarkakis' exposure of how the Court has fallen far short of its goal to include women members, a flaw they would blame on the Member States. He also skillfully documents the hypocrisy of the European Union holding Member States to equality standards its institutions do not meet,⁹⁹ a feature it shares with many political institutions. Whether it is EU members judging prospective Member States by equality standards they themselves do not meet, or the U.S. Congress, who, until recently, exempted itself from all employment law, including the injunction not to discriminate. I disagree that Polomarkakis has found the different voice between women and men by looking at two opinions and by comparing one man to one woman. I also disagree on what constitutes a feminist position on surrogacy under EU law or even one drawn from a woman's or women's experiences. I would, however, encourage him to develop the critical feminist discourse analysis to all of the opinions that he aspires to, and not to assume that the most feminist position automatically goes to the one advocated by a woman.¹⁰⁰

⁹¹ Cynthia Cooper, *Women Supreme Court Clerks Striving for 'Commonplace*, 17 Q. MAG. A.B.A. COMMISSION ON WOMEN IN THE PROF. 18, 18–9, 22 (2008).

⁹² *Id.* at 241.

⁹³ *Id.* at 244.

⁹⁴ Konstantinos Alexandris Polomarkakis, *United in Diversity? Gender and Judging at the Court of Justice of the European Union (CJEU)*, 34 CONN. J. OF INT'L L. 336 (2019).

⁹⁵ *Id.*

⁹⁶ McLoughlin, *supra* note 30.

⁹⁷ Christina L. Boyd, et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. OF POL. SCI. 389, 407 (2010).

⁹⁸ See Polomarkakis, *supra* note 94.

⁹⁹ *Id.* at 350.

¹⁰⁰ *Id.*

I was drawn to study the European Court of Justice (ECJ) because of my interest in pregnancy discrimination. In the 1990s, the only progressive feminist pressure during the Thatcher Administration came from the rulings of the ECJ, requiring the U.K., for example, to see pregnancy discrimination as prohibited sex discrimination.¹⁰¹ Why was an all-male bench, drawn from the upper echelons of Member States' judiciaries, more sympathetic to equal treatment of pregnant women than their respective Member State courts? I argue that social policy was part of the Court's implementing mechanism to promote European integration—a means to an end. Policies creating equality for women are often driven, if only in part, by other instrumental values. Moreover, key judicial personnel of the ECJ had experience with discrimination (the UK member, Gordon Slynn, came from the Employment Appeal Tribunal),¹⁰² and a number of the women law clerks such as Sacha Prechal,¹⁰³ were conversant in the feminist legal scholarship on pregnancy discrimination. So, the outcomes stem not from the sex of the judges *per se*, but rather the totality of their values (European integration, European social policy), their feminist consciousness, and their legal expertise.

Feminists have long disagreed about whether to advocate for equal or special treatment with respect to pregnancy and maternity leave.¹⁰⁴ Public health scholars recognize that women's recovery time from childbirth can vary enormously depending on the method of birth, the difficulty of delivery, the ease of breastfeeding, the health of the baby (and its sleep patterns), the women's age and overall health, and the social supports she has.¹⁰⁵ Many feminists have argued, however, that the biological mothers alone do not need to supply the need for an infant to bond. The other parent or other caregivers can provide it. Feminists worry that gendered assumptions about bonding and who is responsible for care will leave women saddled with the lion's share of caretaking labor throughout childhood, while men or other women partners focus on breadwinning (this thinking was reflected in the Family and Medical Leave Act in the U.S.).¹⁰⁶ The ECJ itself has distinguished between what it is women need to recover from birth versus the time workers need to care for a newborn with respect to parental leave. Countries such as Norway have incentivized the taking of parental leave for fathers to promote the dual breadwinner/dual caretaker model.¹⁰⁷

Feminists, too, have disagreed about surrogacy.¹⁰⁸ I agree with Polomarkakis' call for a diverse and representative EU bench and applaud his effort to subject the

¹⁰¹ Sally J. Kenney, *Pregnancy Discrimination in Comparative Perspective: Toward Substantive Equality*, 10 WIS. WOMEN'S L.J. 351, 359–60 (1995).

¹⁰² Roger J. Goebel, *Introduction: In Honor of Gordon Slynn, U.K. Law Lord and Judge of the EC Court of Justice*, 33 FORDHAM INT'L L.J. 1335 (2010).

¹⁰³ *Presentation of the Members*, CT. JUSTICE E.U., https://curia.europa.eu/jcms/jcms/Jo2_7026/ (last visited Oct. 12, 2019).

¹⁰⁴ Sally J. Kenney, *For Whose Protection?: Reproductive Hazards and Exclusionary Policies in the United States and Britain*, 1 CARDOZO WOMEN'S L.J. 405, 406 (1994).

¹⁰⁵ P. McGovern et al., *Postpartum Health of Employed Mothers 5 Weeks After Childbirth*, 4 ANNALS OF FAM. MED. 159 (2006).

¹⁰⁶ Sally Kenney, *THE CONSTITUTIONAL STATUS OF THE FAMILY AND MEDICAL LEAVE ACT (2004)*, https://www.academia.edu/38221583/The_Constitutional_Status_of_the_Family_and_Medical_Leave_Act (last visited Feb 21, 2019).

¹⁰⁷ JANET C. GORNICK & MARCIA K. MEYERS, *FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT* 135 (2003).

¹⁰⁸ Nadine Taube, *Surrogacy: Sorting through the Alternatives*, 4 BERKELEY J. OF GENDER, L. & JUST. 285 (1989).

ECJ's rulings to feminist analysis, but I do not feel he has uncovered the essential difference women judges make.¹⁰⁹

D. *From Women's Different Voice to Gender-Just Judging?*¹¹⁰

I am troubled by these selective examples without systematically looking at all the evidence. Carmen Argibay, Navanethem Pillay, Patricia Wald, Ruth Bader Ginsburg, Brenda Hale, Bertha Wilson, and Claire L'Heureux-Dube have made a huge difference in their jurisprudence, as have U.S. Supreme Court Justices Marshall and Brennan, and South African Justice Albie Sachs. We conveniently pass over the anti-feminist women on the U.S. Fifth Circuit Court of Appeals, or the feminist man voting alongside "the wise Latina woman," or the man judge supporting Judge Pillay's questioning of sexual assault survivors. These creeping assumptions of difference, I believe, return because we still feel we need to justify why women should serve. I also believe we should eschew difference arguments when doing so. These presumptions distort our analysis and lead us astray with our political project of equal justice for all.

The problems I have herein identified are treating the difference position as *the* feminist position, misrepresenting the empirical evidence of difference by citing only studies that purport to support the difference hypothesis, failing to fully and accurately—rather than selectively—account for what women judges say about the impact of gender on their decision making, and failing to recognize the dangers of the difference argument for women judges. A last essentialist danger is assuming a simple relationship exists between experience and consciousness. Patricia Yancey Martin wrestles with the issue of not wanting to assume a necessary relationship between biological sex and feminist judging.¹¹¹ The assumption that experience leads to feminist consciousness creeps in often. Brenda Hale talks about the experience of changing nappies,¹¹² Sotomayor qualifies Latina woman with "wise,"¹¹³ but assumes women will better understand domestic violence whether they have experienced it firsthand or not,¹¹⁴ and even Stanchi and Crawford—who critique the assumption for sex—seem to imply it with respect to class and other disadvantages.¹¹⁵ Dawuni's interviewees make similar points.¹¹⁶

¹⁰⁹ See Polomarkakis, *supra* note 94.

¹¹⁰ Grey & Chappell, *supra* note 5.

¹¹¹ Patricia Yancey Martin et al., *Gender Bias and Feminist Consciousness Among Judges and Attorneys: A Standpoint Theory Analysis*, 27 SIGNS: J. WOMEN IN CULTURE & SOC'Y 665 (2002).

¹¹² Brenda Hale, *Equality and the Judiciary: Why Should We Want More Women Judges?*, 3 PUB. L. 501 (2001).

¹¹³ Mireya Navarro, *Sotomayor Fans Claim the Phrase 'Wise Latina'*, N.Y. TIMES (Aug. 7, 2009), <https://www.nytimes.com/2009/08/09/fashion/09latina.html>.

¹¹⁴ Sally J. Kenney, *Wise Latinas, Strategic Minnesotans, and the Feminist Standpoint: The Backlash Against Women Judges*, 36 T. JEFFERSON L. REV. 43 (2013).

¹¹⁵ Kathryn Stanchi & Bridget Crawford, *Why Women? Judging Transnational Courts and Tribunals*, 34 CONN. J. INT'L L. 316 (2019).

¹¹⁶ JOSEPHINE DAWUNI, AKUA KUENYEHIA & GABRIELLE KIRK McDONALD, *INTERNATIONAL COURTS AND THE AFRICAN WOMAN JUDGE: UNVEILED NARRATIVES* (2018).

1. Intersectionality

Dara Strolovich's examination of interest groups demonstrates that while groups claim to represent the group in its entirety, in fact, they represent the most advantaged subsection.¹¹⁷ Feminists, for example, may neglect the concerns of women of color, poor women, non-heterosexual women, gender nonbinary persons, etc. Civil rights groups may neglect the concerns of women of color, poor persons of color, and sexual minorities.¹¹⁸ Class-based groups may focus on the rights and needs of working-class white men. In addition to a commitment to anti-essentialism, contemporary theorizing about diversity and courts should be intersectional. The idea of intersectionality, advanced by Kimberlé Crenshaw with respect to employment discrimination, is first a recognition that white middle-class straight women are not the only people to experience sex discrimination; but more importantly, the discrimination experienced by "other" women may be not only quantitatively larger but qualitatively different.¹¹⁹ Forms of oppression intersect, and we need to study the dynamics of those intersections. Solanke documents how poorly intersectional claims tend to fare in court.¹²⁰ Courts have tended to disaggregate intersectional claims, treating them as additive and either finding a non-prohibited reason—i.e. not gender or sex—for the policy, or finding none of the claims, when considered separately, rise to the level requiring a legal remedy.¹²¹

Most intersectional work looks at race (or state of origin) and sex.¹²² For example, I look at the difficulties Bernette Joshua Johnson—an African-American woman—had laying claim to the position of Chief Justice of the Louisiana Supreme Court, even though by law the most senior justice was entitled to that position.¹²³ At the international level, Jarpa Dawuni examines the role of African women on international courts.¹²⁴ When it comes to the difference African women judges make, Dawuni is firmly anti-essentialist. Moreover, she problematized the very category of African woman.¹²⁵ Solanke¹²⁶ and Onwauchi-Willig¹²⁷ also make compelling theoretical cases for an intersectional approach to gender and judging.

i. Cohen

¹¹⁷ Dara Z. Strolovitch, *Do Interest Groups Represent the Disadvantaged? Advocacy at the Intersections of Race, Class, and Gender*, 68 J. POL. 894 (2007).

¹¹⁸ DARA Z. STROLOVITCH, *AFFIRMATIVE ADVOCACY RACE, CLASS, AND GENDER IN INTEREST GROUP POLITICS* (2007).

¹¹⁹ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, in *FEMINIST LEGAL THEORY* (1989).

¹²⁰ Iyiola Solanke, *Diversity and Independence in the European Court of Justice*, 15 COLUM. J. EUR. L. 89 (2009).

¹²¹ Iyiola Solanke, *Intersectionality in the UK: Between the American Paradigm and the European Paradox*, *SOCIOLOGIA DEL DIRITTO* 107 (2009).

¹²² SALMON A. SHOMADE, *DECISION MAKING AND CONTROVERSIES IN STATE SUPREME COURTS* (2018).

¹²³ Sally J. Kenney, *Measuring Women's Judicial Empowerment*, in *MEASURING WOMEN'S POLITICAL EMPOWERMENT ACROSS THE GLOBE: STRATEGIES, CHALLENGES AND FUTURE RESEARCH* 207 (Amy Alexander et al. eds., 2017).

¹²⁴ Josephine Dawuni, *African Women Judges on International Courts: Symbolic or Substantive Gains?* 47 U. BALT. L. REV. 199 (2018).

¹²⁵ Dawuni, *supra* note 71.

¹²⁶ Solanke, *supra* note 120; Solanke, *supra* note 121.

¹²⁷ Angela Onwauchi-Willig, *Representative Government, Representative Court – The Supreme Court as a Representative Body*, *BERKELEY L. SCHOLARSHIP REPOSITORY* 1252 (2006).

Although it is not a study of international judges, Mathilde Cohen's work on judicial diversity in France is instructive. In her interest in breaking new ground, Cohen explores both race and sexuality on the bench, missing opportunities to observe the intersection of these identities with gender. Yet the inferences are there in her work—the Maghrebi woman being taken to be a clerk, the presumption that gay means gay man, the giggling over lesbian litigants.¹²⁸ Drawing on Ann Laura Stoler's term colonial aphasia, Cohen notes a comparable aphasia among French *magistrats* with respect to race and ethnicity.¹²⁹ In a classic example of double think, some interview subjects report never having thought of themselves as white while framing non-white jurists as foreign. One scolded her that “there are citizenship requirements to enter the judiciary and...entering the judiciary is like going through a white washing Laundromat.”¹³⁰

One of Cohen's important findings is that magistrates see race when they are judging in French territories and experience themselves as other, neither looking like the population they judge nor necessarily speaking the language.¹³¹ Stanchi and Crawford's insight that aspiring to a judiciary that looks like America, as President Obama has put it, so people who are judged do not experience themselves as judged by a class of people that does not include their kind, implicates that gender presentation is important.¹³²

Cohen identifies the qualitatively different intersectional discrimination documented in the path-breaking work about women in academia, *Presumed Incompetent*¹³³ (see particularly, Onwuachi-Willig).¹³⁴ For example, she recounts the history a woman magistrate of Tunisian ancestry reported of being taken by other judges to be a clerk.¹³⁵ Her project of describing the invisibility and erasure of differences of race and sexuality and the potential of her findings to lead to a truly intersectional approach remain largely undeveloped.

ii. Stanchi and Crawford

Stanchi and Crawford make a strong case for an exclusive focus on women on the bench in favor of a more intersectional and anti-essentialist approach to judicial diversity.

If the global culture is starting to move away from binary thinking about sex, then feminist scholars should do the same. Legal scholars who believe in the value of diverse perspectives on the bench should support methods that “erase boxes” and reconfigure the “woman question.” As already discussed, the question of “women” on the courts raises myriad definitional issues. While feminists may agree that

¹²⁸ Mathilde Cohen, *Judicial Diversity in France: The Unspoken and the Unspeakable*, 43 L. SOC. INQUIRY 1542, 1558 (2018).

¹²⁹ *Id.* at 1551.

¹³⁰ *Id.* at 1552.

¹³¹ *Id.* at 1542–73.

¹³² Kathryn Stanchi & Bridget Crawford, *Why Women? Judging Transnational Courts and Tribunals*, 34 CONN. J. OF INT'L L. 329–30 (2019).

¹³³ MUHS GABRIELLA GUTIÉRREZ Y ET AL., *PRESUMED INCOMPETENT THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA* (2012).

¹³⁴ Angela Onwuachi-Willig, *Silence of the Lambs*, in *PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA* 142 (Yolanda Flores Niemann et al. eds., 2012).

¹³⁵ Cohen, *supra* note 128, at 1554.

greater diversity on the bench is necessary for political legitimacy...counting “women” is complicated. Moreover, if feminists agree that society constructs the meaning of both sex and gender, then the feminist project must reconfigure the details of its “nasty habit of counting bodies and refusing not to notice their gender.” Without more fully considering these concepts, the inquiry is intellectually and politically precarious.¹³⁶

To ask that question is to cast persons who do not fit into the binary into unnatural outcasts, but I agree that asking the woman question cannot be the end of feminist inquiry. We must always be asking “who is left out?” and why “there is so little diversity of all kinds.”¹³⁷ I agree that we need both a capacious intellectual approach to questions about women and that feminists need to ask the “other” question to make sure we include all women, but also that we include other forms of oppression. We do not dismantle patriarchy by merely including upper-class conservative straight white women on the bench, particularly if they are anti-feminist. I do, however, argue that these women may also face gender-based discrimination that is wrong. Feminists should not deny that gender discrimination is at work when conservatives exclude women conservatives for consideration for judicial appointments, or when women reporters at Fox News are sexually harassed,¹³⁸ even if they are not feminists and none of them have lent their voices to support victims before (or even during) their own victimization. Moreover, I have argued that normalizing the exercise of judgement by women has more than merely symbolic effects, even if it is only a small portion of the feminist project.

I would argue that if the visible, as well as less visible, diversity that exists in the population is not present on the bench, we can reasonably suspect a discriminatory selection process, as we would in any employment context. When a judiciary that excludes members of their group judges transgender persons or black women, the stigma attaches that they are of a class not fit to judge. Even the French magistrates who never thought of themselves as white and deny the relevance of race in France recognized the “poor optics” of the appearance of colonial rule that excludes the “other” from the judging class.¹³⁹ We do not need to argue that women decide cases differently from men, nor that experience translates necessarily into judgment, to discern that something is amiss when the judging class systematically excludes the presence of certain categories. Much as we recognize that white liberals can be anti-racist and men can be feminist, and that blacks are not necessarily anti-racist nor women feminist; we do not want a deliberative body to exclude salient members of the population. Representation of one’s own kind, whether that rests on visible or less visible features, matters.¹⁴⁰

I hope that the good work scholars are doing on judicial diversity will at last move beyond a narrow question of sex differences and leave behind implicit and explicit gender essentialism. And, I hope that that together we can craft an approach

¹³⁶ Stanchi & Crawford, *supra* note 132, at 329.

¹³⁷ *Id.* at 3, 14.

¹³⁸ Michael M. Grynbaum & John Koblin, *Fox Settles with Gretchen Carlson over Roger Ailes Sex Harassment Claims*, N.Y. TIMES (Sept. 7, 2016), <https://www.nytimes.com/2016/09/07/business/media/fox-news-roger-ailes-gretchen-carlson-sexual-harassment-lawsuit-settlement.html>.

¹³⁹ Cohen, *supra* note 128, at 1569.

¹⁴⁰ KENNEY, *supra* note 19; Mansbridge, *supra* note 87; Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515 (2003).

that is truly intersectional, rather than studying but one category of marginalization to the exclusion and erasure of others.