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Why do women in the judiciary matter? The struggle for gender diversity in European courts *

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1. Introduction: Women and judgeship

The exclusion of women from the legal world was one of the last gender inequalities to be outlawed in most Western democracies. Yet, it persisted in many countries despite the explicit constitutional prohibition of sex discrimination and the achievement of female suffrage.

In the UK, the *1919 Sex Disqualification (Removal) Act* followed the 1918 recognition of women's right to vote and paved the way for the admission of women to the legal profession: although women joined the Law Society in 1922, the first female judge was not appointed until 1962, one year before the enactment in Italy of Law no. 66 of 1963 laying down rules for the admission of women to public offices and professions, including the judiciary¹. A few years earlier, in decision no. 56 of 1958, the Italian Constitutional Court upheld Law no. 1441 of 1956 limiting the number of women magistrates in juries, implicitly arguing that the performance of judiciary duties is better suited to the male than the female intellect². Even in the US, where the first female federal judge was appointed in 1928³, the exclusion of women from juries was one of the last sex-based classifications to be declared unconstitutional. In 1994,

* Peer reviewed.

¹ Until then, Article 7 of Law No. 1176 of 1919 on the access of women to public offices expressly excluded them from roles implying jurisdictional powers.

² The Court explains how the constitutional principle of equality between women and men is not infringed upon by the legislator "taking into account, in the interest of the public service, the different attitudes of the members of each of the sexes" and that limiting the presence of women in popular juries meets "the need for a more appropriate functioning of such benches" (Decision no. 58 of 1956, available at www.cortecostituzionale.it).

³ Beverly B. Cook (1984), "Women judges: A Preface to their History", in *Golden Gate University Law Review*, 573, 604.

with its decision *J.E.B. v. Alabama ex re*, the Supreme Court held that peremptory challenges based on sex violate the equal protection rights of prospective jurors⁴. The participation of women as equals on juries has remained problematic in many other common law judicial systems where sex exemptions were not outlawed until the end of the last century⁵.

These are just a few emblematic examples of the traditional exclusion of women from judgeship and they appear sufficient to explain why it has been argued that “the exercise of judicial power is enmeshed in powerful cultural norms of masculinity”⁶.

A parallel can easily be drawn between female political representation and women judgeship. Many decades after the achievement of both women’s suffrage and the right to enter a judicial career, only two countries in the world have 50 percent or more female representatives in their single or lower houses⁷, and women are still a minority in top-ranking judicial positions like supreme, constitutional and European courts⁸. Electoral gender quotas (and, in a few Asian and African countries, reserved parliamentary seats) have been a partial response to the continuing under-representation of women in politics for many years⁹. More recently, given the fact that “the torrent of women's entry into the legal profession has not produced a pipeline to power for women in the judicial branch of government”¹⁰, some efforts have been made to include more women in the judiciary as well, with special attention to constitutional and apex courts. Some countries have adopted specific positive action policies in favour of women in the judiciary¹¹, while

⁴ Joanna L. Grossman (1994), “Women's Jury Service: Right of Citizenship or Privilege of Difference?”, in *Stanford Law Review*, 1115.

⁵ Jocelyne A. Scutt (2016), *Women and The Magna Carta: A Treaty for Control or Freedom?*, Basingstoke: Palgrave MacMillan, 40-54.

⁶ Sally J. Kenney (2012), “Choosing Judges: A Bumpy Road to Women's Equality and a Long Way to Go”, in *Michigan State Law Review*, 1499.

⁷ Inter-Parliamentary Union (IPU), *Women in national parliaments. Situation as at 1st July 2017*, available at www.ipu.org.

⁸ See table on the female share of professional judges by level of court in *CEPEJ (2016), European judicial systems Efficiency and quality of justice (2014 data)*, *CEPEJ Studies No. 23, 101, Table no. 3.14* (available at www.coe.int/cepej). *With regard to non-CoE countries, see among other data, UN Women (2011), 2011- 2012 Progress of the World's Women: In Pursuit of Justice*, UN Women, New York, Figures 2.5 and 2.6, pp. 60-61, available at www.unwomen.org, and, with specific regard to Latin America and the Caribbean, UN ECLAC – Gender Equality Observatory, <http://oig.cepal.org/en/indicators/judicial-power-percentage-women-judges-highest-court-or-supreme-court> (website accessed 6 August 2017).

⁹ See, *inter alia*, Susan Franceschet, Drude Dahlerup (eds.) (2012), *The Impact of Gender Quotas*, New York: OUP.

¹⁰ Sally J. Kenney (2012), *supra* note 6, 1499.

¹¹ With regard to constitutional courts, it’s worth mentioning the Belgian case: on 4 April 2014 the Parliament adopted the *Loi spéciale portant modification de la loi du 6 janvier 1989 sur la Cour constitutionnelle*, whose art. 12 and 38 require the Constitutional Court to be composed of at least a third of judges of each sex. Similar rules exist in other European countries but are related to ordinary courts: Austria set a gender quota for the selection of high court judges at 30%; the Norwegian Judicial Appointment Board, on the basis of the *Work Environment Act*, exerts the principle of gender allocation per quota in courts with gender imbalance (*CEPEJ (2016), European judicial systems Efficiency and quality of justice, supra note 8, 84-85*), while, in the UK, the Lord Chancellor and Lord Chief Justice have a statutory responsibility to ensure such parity (Kate Malleson (2013), “Gender Quotas for the Judiciary in England

in most cases, the appointment of female judges can be considered a sort of ‘implicit quota’. In the US, following President Jimmy Carter’s commitment to the principle of a gender diverse bench¹², the appointment of a certain percentage of female judges to federal courts has never been called into question. With regard to the Supreme Court, women make up one-third of the members since the confirmation of Associate Justice Elena Kagan in 2010; similarly, appointments to the Supreme Court of Canada obey a customary rule requiring the presence of three women among the nine justices. More recently, gender balance in the judiciary has become an explicit aim pursued by judicial appointment commissions and other bodies involved in national and supranational judicial selection processes. The latest are emblematic of the struggle for an increased female presence in the judiciary: at the European level, judicial appointments to the European Court of Human Rights (ECtHR) and to the Court of Justice of the European Union (CJEU) have just begun to take gender into account with a view of redressing the persistent under-presence of women on both benches.

Analysis of the set of rules governing the complex procedures for the composition of the two European courts represents a starting point for addressing the main *question underpinning this chapter: what is the purpose of a judicial body reflecting the gender composition of society? In other words: is gender balance in the courts a matter of equal opportunity between women and men in access to the legal profession or should it be achieved in order to increase the representativeness of the judiciary and the quality of judicial decisions?*

Clearly, such a question *implies other more general, subtle and delicate issues* that have divided generations of feminists. To mention just a few: Do women represent women? Do women judge differently? While the first of these two questions has been widely addressed by the literature on women and politics since the Seventies, the second is strictly related to the more recent battle for greater judicial gender diversity.

2. Gender diversity in the ECtHR and in the CJEU: A more reflective and representative judiciary?

Following the EU’s active participation in the 1995 *Fourth World Conference on Women* in Beijing, balanced participation of women and men in decision-making appeared on the agenda of its political institutions and was codified in the *Fourth Action Programme for Equal Opportunities* (1996–2000)¹³. During this period,

and Wales” in Ulrike Schultz, Gisela Shaw (eds.), *Gender and Judging*, Hart Publishing, 481-499).

¹² Sally J. Kenney (2013), *Gender and Justice: Why Women in the Judiciary Really Matter*, New York and London: Routledge, 65-86. President Carter also stated that quotas in the judiciary were desirable: “If I didn’t have to get Senate confirmation of appointees, I could tell you flatly that 12 percent of all my judicial appointments would be black and three percent would be Spanish speaking and 40 percent would be women” (quoted by Nancy Scherer (2011), “Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?”, in *Northwestern University Law Review*, 587, 596).

¹³ On the EU decision to adopt gender mainstreaming and its implications, see, among others, Mark A. Pollack &

the European Commission considered that the balanced participation of women and men in decision-making was essential for the legitimacy of representative and advisory bodies, but also acknowledged for the first time that “the judiciary influences society at all levels and it is therefore crucial that women form a significant presence within it”¹⁴.

The year 1999 is considered a turning point for gender diversity in the European Union judiciary¹⁵, since a woman was appointed judge of the Court of Justice for the first time¹⁶ and European research was undertaken on the under-presence of women in the judiciary. In its *Report* on “Women and decision-making in the judiciary of the European Union”¹⁷, the EU Commission analyses the judicial power structure in both Member States and the Court of Justice. The *Report* focuses on equal opportunities between women and men in the decision-making process, with the aim of applying the concept of gender mainstreaming to judicial selection. Thus, gender balance in the courts is considered an application of the general principle of equality between the sexes: it does not appear to be a matter of legitimacy of the Court of Justice which could derive from it reflecting the society it serves, a matter that is indeed gaining more and more relevance in contemporary democratic judiciaries.

The French appointment of Simone Rozès to the Court of Justice as Advocate General in 1981 was saluted by the President of the Court as an important implementation of the EU principle of equal treatment between women and men¹⁸, without any mention of the potential impact of more female judges on the bench or, more generally, any claim for a more representative judiciary. Very recently, Lady Brenda Hale was appointed President of the UK Supreme Court. Her commitment to diversity in the judiciary is very well known¹⁹ and formed the core of her speech criticising “the inbuilt bias in choosing judges,

Emilie Hafner-Burton (2000), “Mainstreaming gender in the European Union”, in *Journal of European Public Policy*, 432.

¹⁴ Council Recommendation 96/694/EEC of 2 December 1996 on balanced participation by women and men in the decision-making process.

¹⁵ Sally J. Kenney (2013), *Gender and Justice: Why Women in the Judiciary Really Matter*, New York and London: Routledge, 120.

¹⁶ The 1999 Irish appointment of Judge Fidelma Macken followed the French designation of Simone Rozès as Advocate General in 1981.

¹⁷ Miriam Anasagatsi, Nathalie Wuyame (1999), *Women and decision-making in the judiciary in the European Union*, Brussels: European Commission, available at <https://publications.europa.eu/en/publication-detail/-/publication/04eafd0f-7ca1-403f-9abd-db05bf7b988a/language-en>.

¹⁸ Sally J. Kenney (2002), “Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice”, in *Feminist Legal Studies*, 260: the author also argues that France’s designation of Simone Rozès “had nothing to do with feminism; no evidence suggests that France appointed Rozès because of gender nor had feminists in France or the EU organised on her behalf” (261).

¹⁹ Brenda Hale (2001), “Equality and the Judiciary: Why Should We Want More Women Judges?”, in *Public Law*, 489. More recently, she recalled the importance of a diverse judiciary in her “Equality in the Judiciary” speech at the Kuttan Menon Memorial Lecture (21 February 2013, available at <https://www.supremecourt.uk/docs/speech-130221.pdf>).

and the dependence on ‘soundings’ from judges, as producing a judiciary that is not only mainly male, overwhelmingly white, but also largely the product of a limited range of educational institutions and social backgrounds”²⁰. Commenting on her appointment, the Bar Council stressed that it will “serve as encouragement to all for greater diversity in law”²¹.

How can this difference of meaning given to a woman making it to the highest judicial position in UK and to a woman entering the highest European court be explained?

First, the time factor cannot be undervalued. Diversity is not one of the traditional requirements judiciaries are supposed to meet: it has become an important factor influencing courts’ accountability only quite recently, beginning at the end of the past century, when the political role of supreme, constitutional and human rights courts began to be acknowledged. It is worth recalling how US Supreme Court decisions eliminating legal barriers to jury service for women, and for African Americans a few years earlier²², were based more on the rights of citizens to serve on juries than on the right of defendants to be tried by a representative jury, considering jury service an essential duty of citizenship, “carrying an independent right not to be excluded on the basis of group membership”²³.

Secondly, the contemporary UK context is quite peculiar. Under the *Constitutional Reform Act 2005*, a Judicial Appointments Commission was set up with the mandate to operate a transparent system based on applications and appointment on merit, and to increase the diversity of those applying for judicial office: furthermore, an Advisory Panel on Judicial Diversity was established in 2009 with one of its main focuses being gender balance²⁴, which might require the use of positive action measures²⁵.

Diversity of the judiciary does not appear to be an issue for EU lawmakers even today. In fact, it is explicitly addressed only through the principle of nationality: art. 19 (2) TEU states that both the Court of Justice and the General Court must consist of one judge from each of the Member States. The exact role of such a provision is not yet entirely clear: in the first place, its wording does not seem to require a candidate to be a citizen of his or her appointing State (although some countries do explicitly require that

²⁰ Haaron Siddique, “Brenda Hale appointed as UK Supreme Court's first female President”, in *The Guardian*, 21 July 2017.

²¹ Clive Coleman, “Baroness Hale: The Supreme Court trailblazer”, in “BBC News”, 21 July 2017, available at <http://www.bbc.com/news/uk>.

²² With *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court ruled that a prosecutor's use of peremptory challenge in a criminal case may not be used to exclude jurors based solely on their race. A series of cases later extended the *Batson* doctrine to the use of race-based peremptory challenges in civil as well as criminal cases and regardless of whether the parties and the excluded jurors share the same race.

²³ Joanna L. Grossman (1994), *supra* note 4, 1116.

²⁴ On the new judicial appointment procedure with regard to gender balance see E. Rackley (2013), *Women, Judging and the Judiciary: From Difference to Diversity*, New York and London: Routledge, 69-106.

²⁵ Kate Malleon (2013), *supra* note 11.

any candidate it considers for appointment should have its nationality); additionally, panels can decide cases without the presence of the judge of the Member State involved and judges are required to exercise their mandate in full independence of their Member States. Still, the ‘one State-one judge’ convention cannot be considered only ‘internally’ beneficial aiming at the Court’s knowledge of all EU legal systems (thus underestimating the fact that some countries have more than one legal system): it is a common belief that it may also generate external legitimacy through representation since “each Member State feels that ‘our’ judge was present, even though he/she will not generally be present when a case originating from their Member State is being decided”²⁶. This is a peculiar understanding of ‘representation’, introducing the concept of ‘descriptive representation’ that will be explored later in this chapter²⁷.

The Court of Justice is composed of 28 judges and 11 Advocates General²⁸, while the General Court now consists of 45 judges²⁹.

Judges have always been appointed by common accord of the governments of the Member States for a renewable term of office of six years. They are chosen from among individuals whose independence is above suspicion and who possess the qualifications required for appointment to the highest judicial offices in their respective countries, or who are of recognised competence. After the 2006 Lisbon Treaty, in force since 2009, appointments are still made by State governments (art. 253 of the TFEU), but are preceded by consultation of a panel responsible for issuing an opinion on the candidates' suitability to perform their duties. The panel was established under art. 255 of the TFEU, which states that it “shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament”. It appears evident that both the composition and the operating rules of the Panel are of great importance for the judicial selection procedure and, according to the same Treaty provision, such competence lies with the Council, which adopted two decisions setting up the new body in 2010³⁰.

²⁶ Michal Bobeck (2014), “The Court of Justice of the European Union”, in *European Legal Studies - Research Papers in Law* no. 2, 10.

²⁷ *Infra*, § 3.

²⁸ According to art. 252 TFEU, the Court is assisted by eight advocates-general, whose number may be increased by the Council if the Court so requests. Council decision 2013/336/EU increased the number of advocates general to eleven with effect from 7 October 2015.

²⁹ In 2019, this number will increase to 56 (two judges from each Member State). The Civil Service Tribunal, established on 2 December 2005, ceased to exist on 1 September 2016: its latest composition comprised seven judges.

³⁰ Council Decisions of 25 February 2010 (2010/125/EU) and (2010/124/EU).

If, as has been pointed out in the past, judicial appointments to the Luxembourg Court during the first years of its functioning were characterized by a high degree of secrecy in the national nomination processes as well as in the poor scrutiny at the EU level prior to appointment³¹, nothing seems to have changed as a result of the partially renewed procedure. First, information on selections of candidates is not publicly accessible in most countries. Second, the Panel hears the proposed candidate in private, its deliberations are held *in camera* and, although it is required to give a reasoned opinion on each candidate, such opinion is forwarded only to the Representatives of the Governments of Member States in order to protect the privacy of the candidates, especially of those who do not receive a favourable opinion³². Additionally, the criteria adopted during the candidate's evaluation have been criticized, since the Panel lacks any form of democratic control and has considerable discretion in interpreting the Treaty provisions concerning the requirement for holding judicial office³³.

All the aforementioned recommendations for a greater gender balance coming from the EU Commission have not yet been transposed into enforceable rules.

The only reference to female judgeship in the rules concerning the composition and functioning of the CJEU is recent, confined to a “whereas” of a regulation, and merely concerns the composition of the former Court of First Instance. Indeed, the EU legislature recently decided on the reform of the General Court through Regulation 2015/2422 which explains: “It is of high importance to ensure gender balance within the General Court. In order to achieve that objective, partial replacements in the 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”³⁴.

Although political pressure for an increased gender balance in the judiciary has been kept up, consideration of the candidate's sex is not yet a formal requirement, nor has the Panel adopted any explicit criterion aimed at promoting sex equality³⁵. The most recent Fourth Activity Report of the Panel lacks

³¹ Among the scholars exploring the issue of judicial diversity, see Iyiola Solanke (2009), “Independence and Diversity in the European Court of Justice”, in *Columbia Journal of European Law*, 89, 120, stressing how the opacity in ECJ nominations was likely to undermine the Court's independence and credibility.

³² Jean-Marc Sauvé (2015), “Selecting the European Union's Judges: The Practice of art. 255 Panel”, in Michal Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*, Oxford: OUP, 78.

³³ Tomas Dumbrovský, Bilyana Petkova and Marijn Van der Sluis (2014), “Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States”, in *Common Market Law Review*, 455, 457.

³⁴ 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, Whereas No. 11.

³⁵ Bilyana Petkova (2015), “Spillovers in Selecting Europe's Judges. Will the Criterion of Gender Equality Make it to Luxembourg?”, in Michal Bobek (ed.), *supra* note 27, 221.

any reference to gender equality in judicial appointments³⁶, while a clear commitment to judicial gender diversity has instead been made by the Strasbourg counterpart, i.e. the Parliamentary Committee on the election of judges.

According to Article 22 of the European Convention of Human Rights (ECHR), judges of the ECtHR “shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party”. The Assembly proceeds to vote on the candidates in a secret ballot, following the recommendations of its Committee on the Election of Judges. An absolute majority of votes cast is required in the first round and if this is not achieved, a second round is held: the candidate with the most votes is elected to serve on the Court for a single term of nine years.

Immediately following the adoption of Protocol no. 11 introducing a single European Court of Human Rights on a permanent basis to replace the existing Commission and Court, with Resolution 1082 (1996), the Parliamentary Assembly began taking steps to improve the procedure for examining candidatures for the election of judges. This Resolution was immediately followed by Order No. 519 (1996) instructing its Committee on Legal Affairs and Human Rights to examine the question of the qualifications and manner of appointment of judges with a view to achieving a balanced representation of the sexes. A few years later, through Recommendation No. 1429 (1999), the Parliamentary Assembly recommended that the Committee of Ministers invite the governments of the Member States to apply different criteria when drawing up lists of candidates for the office of judge and to “select candidates of both sexes in every case”³⁷. A new Order was then adopted to address the previous instruction serving the purpose of a greater gender balance in the ECtHR to the Sub-Committee on the election of judges³⁸, which recently recalled all previous orders and recommendations on the importance of considering gender in national submissions of candidates³⁹.

Therefore, States are now asked to put forward at least one candidate from ‘the under-represented sex’ unless exceptional circumstances exist which permit them to not do so.

Convergence of the two European judicial appointment panels today appears not only desirable, but likely to happen soon, given the fact that the ECtHR’s Advisory Panel has followed the path traced by

³⁶ Report published on 10 February 2017, available at <http://www.consilium.europa.eu/it/press/press-releases/2017/04/19-fourth-report-article-255/>

³⁷ § 6.3 of the Recommendation.

³⁸ Order No. 558 (1999) instructing the Committee “to make sure that in future elections to the Court member states apply the criteria which it has drawn up for the establishment of lists of candidates, and in particular the presence of candidates of both sexes”.

³⁹ Information Document AS/Cdh/Inf (2017) 01 rev 4, 27 April 2017, § 7.

art. 255 in many regards. While the evolution of gender equality protection under the ECHR system owes much to EU primary and secondary legal provisions and to the huge body of Court of Justice judgments, the case of judicial gender diversity shows “a potential future spillover regarding sex equality [flowing] in the opposite direction: from Strasbourg to Luxembourg”⁴⁰.

3. Engendering courts as a means of achieving equal opportunities between women and men.

Anything else?

Regarding the slow process of increasing the number of female judges in the Court of Justice, it has been considered that “the important point is not that there should be a more equal gender balance, the important point is the benefits a more equal gender balance can bring”⁴¹. I could not agree less. Increasing the female presence in the judiciary and, in particular, in apex and European courts is an aim in itself that must be pursued independently of its positive side effects. The very first argument of this chapter is that engendering courts is essential for the implementation of the basic principle of equality between women and men enshrined in EU primary law as well as in the ECHR.

Still, the connection between gender balance in the courts and judicial diversity should not be neglected despite it being neither clear nor obvious.

Interestingly, after having explained that among all aspects of diversity the focus had been on “gender, ethnic origin, disability, sexual orientation, geographical location, socio-economic background”⁴², the *2010 Report* of the previously mentioned Advisory Panel on Judicial Diversity 2010, Judiciary of England and Wales, underlined how “failure to appoint well-qualified candidates from diverse backgrounds to judicial office represents exclusion from participation in power”⁴³. Two questions then arise. First: does achieving a greater gender balance in the courts mean meeting the requirement of a diverse judiciary? Secondly: regarding the wording of this *Report*, can female judges be considered judges of ‘diverse backgrounds’?

Very similarly, one of the multiple activities aimed at supporting democracy worldwide of the *International Institute for Democracy and Electoral Assistance* (IDEA) has been the compilation of a primer covering the systems used for the selection of judges in constitutional democracies, recommending different

⁴⁰ Bilyana Petkova (2015), *supra* note 36, 233.

⁴¹ Jessica Guth, “Law as the Object and Agent of Integration: Gendering the Court of Justice of the European Union, its decisions and their impact”, in Gabriele Abels, Heather MacRae (eds.), *Gendering European Integration Theory. Engaging new Dialogues*, Barbara Budrich Publishers, 2016, 175.

⁴² Sect. 1, § 17 of the *Report*.

⁴³ Sect. 1, § 25 of the *Report*, available at <https://www.judiciary.gov.uk/publications/advisory-panel-recommendations/>.

appointment criteria deemed necessary to meet the requirements of an independent, politically impartial, honest and competent judiciary. Such criteria include “ensuring the representativeness and inclusiveness of the judiciary, especially with regard to gender, status, ethnicity or origin”⁴⁴. Gender balance is therefore expressly considered a factor contributing to the necessary representativeness of the judiciary, implicitly assuming that women represent women.

The debate is old and far from being closed. Much of the scholarship on the topic has emerged during past decades when legal feminists addressed the highly controversial issue of gender electoral quotas and female political representation. One of the arguments for the redressal of female under-presence in legislative bodies through positive action measures was the need for women’s political presence in order to advance policies favourable to women. However, harsh criticism arose, given the simple and irrefutable fact that women are not a group of interest, nor a specific diversity to be represented.

Anne Phillips pointed out that “the presumption of a clearly demarcated woman’s interest which holds true for all women in all classes and all countries, has been one of the casualties of recent feminist critique, and the exposure of multiple differences between women has undermined more global understandings of women’s interests and concerns”⁴⁵. Despite this, she remains one of the major theoretical supporters of electoral quotas for women, her gender justice argument being based precisely on the difficulty of recognizing a clear and agreed women’s interest, thus requiring an increased female presence in political assemblies⁴⁶.

Exploring the different meanings of representation, Hanna Pitkin criticized the concept of ‘descriptive representation’, dismissing “the idea of correspondence and likeness and the importance of resembling one’s constituents”⁴⁷. But this peculiar definition of representation, otherwise known as ‘standing for’⁴⁸, was soon adapted to female presence in elected assemblies⁴⁹ and, more recently, to women judgeship. The concept of descriptive representation shares certain features with symbolic representation and the importance of female role models in politics, which has always constituted a good (yet controversial and sometimes dismissed⁵⁰) argument for gender electoral quotas: female presence in parliaments would

⁴⁴ IDEA, *Judicial Appointments*, August 2014 (available at <http://www.constitutionnet.org>).

⁴⁵ Anne Phillips (1998), *Feminism and Politics*, New York: OUP, 234.

⁴⁶ *Ibidem*, 234-238.

⁴⁷ Hanna F. Pitkin (1967), *The Concept of Representation*, Berkeley: University of California Press, 111. She warned: “Think of the legislature as a pictorial representation or a sample of the nation, and you will almost certainly concentrate on its composition rather than its activities” (226).

⁴⁸ *Ibidem*, 60-93.

⁴⁹ Cindy S. Rosenthal (1995), “The Role of Gender in Descriptive Representation”, in *Political Research Quarterly*, 599; Jane Mansbridge (1999) “Should Blacks Represent Blacks and Women Represent Women? A Contingent ‘Yes,’” in *Journal of Politics* 628.

⁵⁰ Anne Phillips (1998), *supra* note 45, 228.

encourage other political participation by women and foster a discrimination- and stereotype-free environment. Similarly, increasing gender balance in the European judiciary might have effects that extend beyond the mere possibility of accessing (legal) decision-making positions. It could help alter deep-seated attitudes toward gender roles in public life, a process that, in some European countries especially, has proven particularly slow and difficult. It could also help create an environment in which it is expected that women occupy higher judicial positions. However, referencing Jane Mansbridge's analysis of gender electoral quotas⁵¹, and applying her critical mass theory, we might argue that women's descriptive (or symbolic) representation does improve women's substantive representation, in the sense that it helps reach the threshold number of women that can impact judicial decision making.

Therefore, the risk of 'essentialism'⁵² should not prevent us from taking a further step towards holding that judicial gender balance makes a difference in the delivery of justice. Without underestimating the dangers of assuming the existence of a female perspective, I believe there is some justification for holding that female presence in the legal profession and, above all, in the judiciary, can play a fundamental role in the necessary activity of unveiling the myth of gender neutrality of law. Legal feminists have devoted much attention to how law constructs gender (and vice-versa), showing how "law does not simply operate on pre-existing gendered realities, but contributes to the construction of those realities"⁵³. Moreover, the focus of feminist legal studies has long (and has not ceased to be) been on law as an instrument of male supremacy⁵⁴. It does not seem to be crucial to decide whether the law was designed by male elites for the purpose of disadvantaging and dominating women⁵⁵; rather, what really matters is that "policies designed for men have fit badly with women's lives"⁵⁶. Therefore, female judges might make a difference in the

⁵¹ Jane Mansbridge (2005), "Quota Problems", in *Politics & Gender*, 622.

⁵² Essentialism is the multifaceted criticism moved to the possibility of isolating a unitary woman's experience which originated in the Nineties with special regard to the need of taking into consideration the different experiences of black women: Angela Harris (1990), "Race and Essentialism in Feminist Legal Theory", in *Stanford Law Review*, 581.

⁵³ Rosemary Hunter, Clare McGlynn and Erika Rackley (2010), *Feminist Judgements: An Introduction*, in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds.), *Feminist Judgements: From Theory to Practice*, Hart Publishing, 6, referencing Carol Smart (1989), *Feminism and Power of Law*, New York: Routledge. The topic has been largely discussed in postmodern feminist theory: Mary Joe Frug (1992), *Postmodern Legal Feminism*, New York-London: Routledge. Among Italian scholarship, see Tamar Pitch (1998), *Un diritto per due. La costruzione giuridica di genere, sesso e sessualità*, Milano: Il Saggiatore, and Barbara Pezzini (2012), "Costruzione del genere e Costituzione", in Barbara Pezzini (ed.), *La costruzione del genere. Norme e regole*, Bergamo: Sestante Edizioni, 15-73.

⁵⁴ On the origin and development of this assumption, tracing it back to the early feminist movement of the 19th Century, see Judith A. Baer (2011), "Feminist Theory and the Law", in Robert E. Goodin (ed.), *The Oxford Handbook of Political Science*, New York: OUP, 305-306.

⁵⁵ This assumption inspired the first national meeting of American feminists at Seneca Falls in 1848, and is still shared by contemporary radical feminists like Catherine MacKinnon.

⁵⁶ Judith A. Baer (2011), *supra* note 54, 307.

judiciary in the sense that their task in contemporary democracies has a great deal to do with the process of eradicating the persisting effects of “conventional legal doctrines, developed by men in a society dominated by men, [that] have a fundamental male bias even when they are ostensibly gender-neutral”⁵⁷. This might entail bringing gendered realities into gender-neutral law, continuing the activity of “uncover[ing] how law was moulded by male life experiences and values and aim[ing] to change it by writing women’s life experiences and values into such legal principles as justice and freedom”⁵⁸.

Assuming this is the desired and expected outcome of increased judicial gender diversity, do women judges really make a difference in delivering justice? This is the question any talk on reflective judiciary inevitably raises: is the presence of members of certain groups or minorities merely symbolic or does it have a real and effective impact on the delivery of justice?

Regarding female judgeship, the answer is far from simple. First, ‘female’ cannot be used as a proxy for ‘feminist’ and gender awareness is not the automatic result of an achieved gender balance in courts. One need only remember a fundamental consideration at the basis of any feminist discourse and research: “a feminist consciousness is a political achievement, not an inevitable result of being female or living life as a woman”⁵⁹. Things get even more complicated when one deepens the analysis of what ‘feminist consciousness’ means in general and what it might imply in judicial decision-making. A very convincing explanation of what judging like a feminist means was provided by Catherine Bartlett in 1990 in her ground-breaking work on feminist legal methods. Doing law as a feminist entails ‘asking the woman question’, which “is designed to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups”⁶⁰. Still, doubts may arise regarding the existence of different feminisms and their multifaceted character. This specific aspect was taken into great consideration in the Feminist Judgments Projects, aimed at analysing the potentials of a more gender diverse judiciary. Rosemary Hunter, Clare McGlynn and Erika Rackley, who coordinated the group of feminist legal scholars set out to write alternative feminist judgments in significant UK legal cases, were concerned with the issue and therefore claimed that “much broader representation not only of women, but of feminisms among the judiciary is required before anything approaching true judicial diversity could be said to be achieved”⁶¹.

⁵⁷ *Ibidem*, 306.

⁵⁸ Tove Stang Dahl (1987), *Women’s Law: An Introduction to Feminist Jurisprudence*, Oslo: Norwegian University Press, 55.

⁵⁹ Sally J. Kenney (2012), *supra* note 6, 1526.

⁶⁰ Katharine T. Bartlett (1990), “Feminist Legal Methods”, in *Harvard Law Review*, 829, 836, 837-849.

⁶¹ Rosemary Hunter, Clare McGlynn and Erika Rackley (2010), *Feminist Judgments: An Introduction*, in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds.), *Feminist Judgments: From Theory to Practice*, Hart Publishing, 13.

Similar practical exercises have been also conducted in Canada through the Women's Court of Canada that engaged in writing shadow opinions of some landmark decisions on the equality clause of the Canadian Charter of Rights and Freedoms⁶², and in the US, where a group of feminist lawyers rewrote certain Supreme Court's key judgments on issues of gender justice⁶³.

No analogous study exists with regard to the case law of the European courts, and the impact of a more gender diverse judiciary cannot be merely hypothetical.

When it comes to the Court of Justice, it has been stressed how difficult it is to study the impact of diversity including gender because judgments are given by the panels of the Court without dissenting or separate judgments and advocates general might help, but only in comparison with the judgment.

Another, easy, objection to the effective role of female judges can play concerns an incontrovertible fact: the vast majority of ECJ decisions significantly advancing women's rights were made by all-male judges. Many studies on the tribute gender equality must pay to the judiciary have pointed out the well-known fact that the development of the principle of equality between the sexes at the EU level has been a sort of 'side effect' of other policy initiatives aimed at achieving the common market and therefore functional to the free movement of goods, services and people⁶⁴. In other words, all-male panels of judges of the Court of Justice during the 1970s and 1980s made an excellent contribution to the improved situation of female workers while focusing on necessary equal labour market participation. However, until the late 1990s, "equal opportunities were acceptable so long as they did not interfere significantly with the operation of the Single Market"⁶⁵, whereas after the Amsterdam Treaty and the new mandate given to European institutions in the fight against discrimination, different forms of interventions began to be required for the advancement of women. The previously mentioned Treaty provisions in force since 1999 as well as the EU Charter of Fundamental Rights insist on the substantive dimension of the sex equality principle pervading every area of life, demanding new efforts to eliminate gender-based stereotypes, equalize care burdens between the sexes, combat gender-based violence and so on⁶⁶.

⁶² Partial results are published in the *Canadian Journal of Women and the Law* (2006), vol. 18, issue 1.

⁶³ Kathryn M. Stanchi, Linda L. Berger and Bridget J. Crawford (eds.) (2016), *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*, CUP.

⁶⁴ Heather MacRae (2010), "The EU as a Gender Equal Polity: Myths and Realities", in *Journal of Common Market Studies*, 155.

⁶⁵ Catherine Barnard (2012), *EU Employment Law*, IV ed., OUP, 255.

⁶⁶ See the *Strategic engagement for gender equality 2016-2019* setting the framework for the EU Commission's future work towards improving gender equality (available at <http://ec.europa.eu/justice/gender-equality/>)

4. Gender and judging: Some concluding remarks

This chapter has suggested that the gender composition of European courts matters. Increasing the presence of women judges is first and foremost an end in itself: women should have access to the judicial branch of government regardless of what they do with this tool of influence⁶⁷. Having said that, gender awareness in European courts seems to be more important than ever and the demand for women judges is not only a matter of equality between the sexes in the judicial decision-making process, but is intrinsically linked to the need to consider all public policies under a gender lens⁶⁸.

One of the reasons behind the recent debate concerning an increased presence of women judges in the CJEU is related to the peculiar task performed by the EU judiciary through its preliminary ruling function which is essential for the uniform application and implementation of EU law in all Member States. The integration of a gender perspective by the Luxembourg court will filter through to domestic jurisdictions in preliminary rulings with a ripple effect on national judicial behaviours: the interpretation and enforcement of EU law overtly or implicitly involving gender issues has an obvious impact on State sex equality policies and on the referral of cases that may have unintended gendered consequences. As Jessica Guth observed, the work of understanding the preliminary reference procedure from a gendered standpoint appears crucial, since “much is dependent on the judiciary in the home state as to the extent to which [...] gender questions are seen as important and worthy of referral”⁶⁹.

While judicial gender awareness might lead to different understandings and outcomes of the issues as the above-mentioned projects on feminist judgments are able to prove, the presence of female judges in the ECtHR is equally crucial. In my opinion, special attention should be devoted to the interplay between different contemporary feminisms and their impact on recent highly controversial gender-sensitive issues on which human rights courts are increasingly being asked to rule.

The most blatant example is religious dress: cases concerning Islamic veils involve many feminist issues, and decisions by both of the European courts do not show adequate judicial awareness of all of the issues contemporary feminisms argue about. The landmark Strasbourg decision *S.A.S. v. France* ruled that the French ban on face covering did not violate the ECHR’s provisions on sex equality, the right to privacy

⁶⁷ This is simply the “justice argument” much used in the debate over electoral gender quotas: equal representation is intended as an end in itself, and “women are freed from all the expectations of making - or on the contrary not making - a difference in politics” (D. Dahlerup, “The Dilemma of Quotas. Comment to Anne Phillip’s arguments for quotas”, in Anne Phillips (2000), *Democracy and the Representation of Difference and The Politics of Presence: Problems and Developments*, Aalborg: Aalborg Universitet, 27).

⁶⁸ Sally J. Kenney (2002), *supra* note 18, 257.

⁶⁹ Jessica Guth (2014), *Gendering the Court of Justice of the European Union*, paper available at paperroom.ipso.org/papers/paper_32600.pdf

and freedom of religion⁷⁰. One very interesting aspect of this decision is that gender lenses were applied, but the only feminist approach to the issue taken into consideration was the theory that Islamic religious clothing is oppressive to women, without any consideration of other theories explaining how gender inequality cannot be explained cross-culturally⁷¹. The veil issue was also addressed by the ECJ in two recent judgments ruling that an internal rule of an undertaking prohibiting the visible wearing of any political, philosophical or religious sign does not constitute direct discrimination⁷². It is quite surprising that the Court—but first of all the national referring judges—concentrated only on interpreting the concepts of direct and indirect discrimination based on religion or belief within the meaning of Directive 78/2000/EC, with no incursion into the realm of problems that an intersectional approach to discrimination creates, including the impact religious neutrality might have on women.

Feminist legal methods might prove essential given that one of the aims and effects of ‘asking the woman question’, together with the adoption of the so-called ‘feminist practical reasoning’⁷³, is to challenge not only gender but also cultural and religious biases.

These are new challenges showing how gender equality is not fixed nor irreversible and how reality is gendered. But, if attention to gender implications in judicial decision-making is to avoid losing importance, is the achievement of a perfect gender balance in the courts likely to remain essential? Among the criteria for judicial appointments recently adopted in New Zealand, ‘reflection of society’ is explicitly mentioned and intended as the “awareness and sensitivity to the diversity of the community; knowledge of cultural and gender issues”⁷⁴. The biological sex of judges is not mentioned, perhaps because gender awareness is no longer supposed to be just a women’s issue.

Still, Sally Kenney makes a good point when, referencing Anne Phillips, she points out that “the idea that men should speak and act for women is patronising and [...] including women on the bench indicates the belief that women are capable of judging and symbolises the consideration of their experiences and perspectives”⁷⁵.

Now, given the fact that there is still little relationship between the proportion of female lawyers and the percentage of women accessing higher judicial positions in domestic and European courts, efforts for

⁷⁰ ECtHR, *S.A.S v France*, Application No. 43835/11, 1 July 2014.

⁷¹ On the feminist critique to the ban on Islamic veils see the recent Sital Kalantry (2017), “The French Veil Ban: A Transnational Legal Feminist Approach”, in *University of Baltimore Law Review*, 200.

⁷² ECJ, Case C-157/15, *Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* and Case C-188/15 *Bougnaoui and Association de défense des droits de l’homme (ADDH) v Micropole Univers*, both delivered on 14 March 2017.

⁷³ Katharine T. Bartlett (1990), *supra* note, 849-863.

⁷⁴ *Judicial Appointment Protocol 2013*, § 4, Crown Law Office, New Zealand.

⁷⁵ Sally J. Kenney (2002), *supra* note 18, 269.

increasing gender balance on the bench cannot stop. Only five of the 28 judges of the Court of Justice and ten of the 45 judges now sitting in the General Court are women, with a slightly higher presence of female Advocates General (three out of 11)⁷⁶. It appears that female presence in the European judiciary has only recently begun to shift from ‘tokenism’⁷⁷ to minority, while the move from minority towards parity seems neither automatic nor granted. It requires continuing efforts aimed at removing barriers to female lawyers’ access to judicial positions, which might include the revision of the traditional principles underlying the access and promotion procedure; the identification of criteria that might indirectly result in discrimination against women such as seniority, since the large number of years of professional experience required for some high-profile appointments works against women⁷⁸, and gender diversity in judicial appointment advisory panels⁷⁹. Moreover, domestic methods of judicial appointment and selection play a fundamental role: higher courts’ judges represent the so-called ‘qualified labour pool’⁸⁰ that needs to be expanded, since vertical segregation of women within the judiciary is still the reality in most EU Member States⁸¹. Furthermore, the high degree of politicization of the national processes of selecting candidates for both the ECtHR and the ECJ⁸² makes women breaking into the inner circles of power from which candidates are often chosen anything but irrelevant.

⁷⁶ Data available on the CJEU website (<https://curia.europa.eu/>). The Civil Service Tribunal, established on 2 December 2005, ceased to exist on 1 September 2016: its latest composition comprised two female judges out of the seven.

⁷⁷ Tokenism is intended as the isolated appointment of one or a small percentage of women in decision-making positions with the sole aim of showing that the position is formally open to women. Kenney is illuminating when she explains that “a token woman does not threaten the coding of a job—judge, or law professor—as male; instead, the token woman is exceptional, the honorary male” (Sally J. Kenney (2012), *supra* note 6, 1508). Tokenism is frequently used in the analysis of female judicial appointments: with regard to the US judiciary, Beverly B. Cook (1978), “Women Judges: The End of Tokenism”, in Winifred L. Hepperle, Laura Crites (eds.), *Women in the Courts*, Williamsburg, VA: National Center for State Courts, 84-105.

⁷⁸ These are some of the actions recommended to national jurisdictions and European institutions by the aforementioned *Report* on “Women and decision-making in the judiciary of the European Union” (*supra* note 15, at 53).

⁷⁹ It is worth noticing that the recently set up art. 255 Panel is an all-male body.

⁸⁰ This concept derives from US sex employment discrimination which is much used in the contemporary analysis of the gender underbalance in the judiciary: see for instance Sally J. Kenney (2012), *supra* note, 1506).

⁸¹ It is apparent that judicial appointments to the ECtHR and the CJEU depend to a great extent on the percentage of their presence in domestic higher judicial bodies, which varies significantly across countries but, with few exceptions, does not reach significant levels (Melody E. Valdini, Christopher Shortell (2016), “Women’s Representation in the Highest Court. A Comparative Analysis of the Appointment of Female Justices”, in *Political Research Quarterly*, 865).

⁸² Michal Bobek provided some signals of the de-politicization of the judicial selections to the European courts (Michal Bobek (2016), “The Changing Nature of Selection Procedures to the European Courts”, in Michal Bobek (2016), *supra* note 32, 10). However, non-merit criteria must not to cease to be important where judges are not career judges, recruited by public competition, but are appointed based on democratic ideas justifying the involvement of political parties and/or legislative assemblies. This is the case of most common law judges, constitutional, international and European courts.