



FEMALE REPRESENTATION IN WESTERN REGIONAL COURTS: COURT OF JUSTICE OF THE EUROPEAN UNION, INTER-AMERICAN COURT OF HUMAN RIGHTS AND AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS

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Summary

The social scientific study of the courts raises a number of interesting questions, mainly for the equality of opportunities for the female gender in the posts of judges of the Court of Justice of the European Union, of the Inter-American Court of Human Rights and of the African Court of Human and Human Rights. Peoples. It seeks to highlight the representativeness of the female gender and the potential evolution of judgments with a greater variety of judges, including the judges' personal characteristics. There is an analysis of two important Courts located on the continents of America and Europe to study the representativeness of that gender.

Keywords: Court of Justice of the European Union; Inter-American Court of Human Rights; African Court on Human and Peoples' Rights; Representativeness; Feminine; Diversity.

Introduction

Every human activity involves choices and therefore decision making.

Given how endemic decision-making is to human experience, perhaps the representativeness of the people responsible for these decisions deserves further

study by academia and the degree to which representativeness can affect the diversity of Courts.

This article seeks to analyze the representation of the female gender in the position of Judges of the Court of Justice of the European Union, the Inter-American Court of Human Rights and the African Court of Human and Peoples' Rights, from an internal-administrative perspective, from the point of view of view of the presuppositions of a legal system and the coherence of the legal reasoning of the Courts, based on what could be considered the broader values of the system.

The political protagonist of the Judiciary as a whole is more evident from the extensive media coverage as the courts are called upon to decide on issues that are prominent in the national public policy agenda.

In recent years, the Court of Justice of the European Union has been called upon to decide on issues, validity of international agreements, adequacy to the principle of non-discrimination¹, effectiveness of Union Directives to the Member State², the implementation of the “doctrine of the direct effect of directives”³, application of fundamental rights to all member states of the Union.⁴

From the perspective of the Inter-American Court of Human Rights, issues directly linked to human rights are brought to the fore at various times in its existence.^{5[5]} The Court made important demonstrations of how fundamental rights must be respected by nations, with judgments concerning violations of the rights of people with mental disorders⁶, the inviolability of communications⁷, to persecutions in times of dictatorships, spatially, in South America.⁸

¹ Process C-120/78. **Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein**. Judgment on: 20 February 1979.

² Process C-433/93. **Commission of the European Communities v Federal Republic of Germany**. Judgment on: 11 August 1995.

³ Process C-26/62. **NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos v Netherlands Tax Administration**. Judgment on: 05 February 1963.

⁴ Process C-617/10. **Aklagaren v. Hans Åkerberg Fransson [GS]**. Judgment on: February 26, 2013.

⁵ RABBIT, Rodrigo Meirelles Gaspar. **International protection of human rights: the Inter-American Court and the implementation of its judgments in Brazil**. Curitiba: Juruá, 2008, p. 120-126.

⁶ BORGES, Nadine. Damião Ximenes: **First condemnation of Brazil in the Inter-American Court of Human Rights**. Rio de Janeiro: Revan, 2009, p. 66.

⁷ See INTER-AMERICAN COURT OF HUMAN RIGHTS. **If Escher et al Brazil**. Judgment on July 6, 2009. Series C, No. 200, p. 29-32. Available in: <http://www.corteidh.or.cr/casos.cfm>. Accessed on 13 October 2021.

⁸ GARCÍA SAYÁN, Diego. **U in viva interaction: interamerican court and internal courts**. In INTER-AMERICAN COURT OF HUMAN RIGHTS. *The Inter-American Court of Human Rights: a quarter of the siglo: 1979-2004*. San José: Inter-American Court of Human Rights, 2005, p. 338-339.

In relation to the African Court of Human and Peoples' Rights, it is seen as the fundamental pole in the struggle for the promotion and realization of dignity, freedoms and human well-being in Africa.⁹

From the references absorbed from the scientific text *Setting the size of the Supreme Court*, by Andrew F. Hessick and Samuel P. Jordan, it is necessary to verify the diversity of the position of Judge of the Court of Justice of the European Union and of the Inter-American Court of Human Rights, through the practical verification of the female gender, in the year 2021.¹⁰

The search for equal opportunities for women in Europe dates back to March 25, 1957, when the Treaties of Rome were signed, that is, the Treaty establishing the European Economic Community (EEC) and the Treaty establishing the European Atomic Energy Community (CEEA or EURATOM), as well as in the Pact of San José in Costa Rica¹¹ in America.¹²

Thus, in this article, we examine whether the representation of the female gender can be included in the decision-making characteristic of the Courts. First, the functioning of the Courts and how the judges that make them up are chosen will be demonstrated. The second aspect will describe, in a simple way, the debate on the representation of the female gender in the positions of Judges of the Courts. In the

⁹ MURRAY, Rachel. **The Human Rights Jurisdiction of the African Court of Justice and Human and People's Rights**. Cambridge University Press. 2019.

¹⁰ HESSICK, F. Andrew; JORDAN, Samuel P. **Setting the size of the Supreme Court**. Arizona State Law Journal, Vol. 41, p. 645 - 708. 2009.

¹¹ BRAZIL. Decree No. 591, OF JULY 6, 1992. International acts. **International Covenant on Economic, Social and Cultural Rights**. Brasília: Presidency of the Republic, 1992.

¹² In its article 119:

"ARTICLE 119

Chaque État membre assure le cours de la première étape, et maintient pour la suite, l'application du principe de l'égalité de rémunérations entre les travailleurs masculins et les travailleurs féminins pour un même travail.

Par rémunération il faut entendre, au sens du présent article, le salaire ou base ou minimum traitement ordinaire, et tous autres avantages payés directement ou indirectement, en espèces ou en nature, par l'employeur au travailleur en raison de l'emploi de ce dernier.

L'égalité de rémunération, sans discrimination fondée sur le sexe, implique:

a) that the remuneration accordée pour un même travail payé à la tâche soit établie sur la base d'une même unité de mesure,

b) that the remuneration accordée pour un travail payé au temps est la même pour un même poste de travail." (EUROPEAN UNION. TRAITÉ instituant la Communauté Économique Européenne et documents annexes. 1957. Available at: <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11957E/TXT&from=PT>. Accessed on: 09 June 2021).

third topic, it will be demonstrated how the indications of the judges who make up the Courts can be influenced by the debate on decision-making.

1. The Courts

Established by the Treaty of Paris, in 1952, as the jurisdictional body of the European Coal and Steel Community, the Court of Justice of the European Union – initially called the Court of Justice of the European Community, since its inception, was responsible for a secure construction of the order of the Union. Its decisions have represented, over the years, a harmonious body of construction of the Union's law.¹³

In the wake of these actions, the Court of Justice, whose function is to interpret community law as a whole, and through this prerogative, decide on the set of disputes that arise between the various community institutions among themselves, among the member states, among the Member States and the institutions of the Union, and finally, between private persons and the States and institutions of the Union.¹⁴

With the entry into force of the Treaty of Lisbon, its name was changed to Court of Justice of the European Union.¹⁵ Thus, the relationship of Union law with national laws is based on the autonomy of the former in relation to the latter; in the direct applicability of Union law in national legal systems and in its primacy over national laws.¹⁶

The lack of hierarchy between the Court of Justice and national jurisdictions is highlighted, as the Court does not reformulate local decisions, serving as a supervisory body, which allows that, due to having to protect the order of the Union, can reproach them when due.¹⁷

¹³ MANCINI, Federico G. **The Making of a Constitution for Europe**. Common Market Law Review 1989. PP. 595-614.

¹⁴ MANCINI, Federico G. **The Making of a Constitution for Europe**. Common Market Law Review 1989. PP. 595-614.

¹⁵ GOMES, José Caramelo. **European Union Law Lessons**. Coimbra: Almedina. 2009.

¹⁶ STARR-DEELEN, Donna; BART Deel. **The European Court of Justice as a Federator**. Publius, Vol. 26. No. 4. PP. 81-97. 1996.

¹⁷ SCHEPEL, Harm. **Reconstructing Constitutionalization: Law and Politics in the European Court of Justice** Oxford Journal of Legal Studies. Vol. 20. No. 3. 2000. PP. 457-468.

Still, a clarification. It is common for the Court of Justice of the European Union to be confused with the European Court of Human Rights, based in Strasbourg. However, while the Court of Justice of the European Union is one of the seven institutions of the European Union, the European Court of Human Rights is not part of the European Union, but part of the Council of Europe.¹⁸

America established its Inter-American Court of Human Rights in 1979, as a result of the entry into force of the American Declaration of the Rights and Duties of Man, in 1978, by the OAS (Organization of American States).¹⁹ The Court's actions aim to apply and interpret the American Convention.

Of the 35 (thirty-five) States that make up the OAS, 20 (twenty) recognize the contentious jurisdiction of the Court.²⁰

As for the African Court on Human and Peoples' Rights, it only came into operation in November 2006 and it is the jurisdictional body of the African Union, with powers to interpret and apply the African Charter on the Rights of Men and Peoples.²¹ The African Court admits cases brought by States, but also by individuals and NGOs, as provided for in §3 of article 5.²²

Therefore, it is verified that the three Courts have jurisdiction over the interpretation and application of the Regional Norms on Human Rights, inserted in their territorial competences.

2. Representative of Gender in the Positions of Judges

The Court of the European Union, at the moment, is made up of 02 (two) judges from each member state, and with the departure of the United Kingdom in

¹⁸ BLANKE, Hermann-Josef. The Protection of Fundamental Rights in Europe. *In* BLANKE, Hermann-Josef; MANGIAMELLI, Stelio (Eds.) **The European Union after Lisbon — Constitutional Basis, Economic Order and External Action**. Berlin: Springer. 2012. P. 159.

¹⁹ INTER-AMERICAN COURT OF HUMAN RIGHTS. **2017 Annual Report**. Available at: https://www.corteidh.or.cr/sitios/informes/docs/POR/por_2017.pdf. Accessed on: 13 October 2021.

²⁰ They are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, El Salvador, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname and Uruguay (CORTE INTER-AMERICAN HUMAN RIGHTS, **Annual Report 2017**. Available at: https://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2017.pdf. Accessed on: 13 October 2021).

²¹ MURRAY, Rachel. **The Human Rights Jurisdiction of the African Court of Justice and Human and Peoples' Rights**. Cambridge University Press. 2019.

²² MURRAY, Rachel. **The Human Rights Jurisdiction of the African Court of Justice and Human and Peoples' Rights**. Cambridge University Press. 2019.

2020, the European Union is made up of 27 countries, so, as a rule, the Court has 54 (fifty-four), which are appointed by each of the member countries.²³

Judges and Advocates General are elected for a six-year term, with the President of the Court serving a three-year term and being chosen by his or her colleagues.²⁴

The judges are appointed by common accord of the governments of the Member States, after consulting a committee responsible for giving an opinion on the suitability of candidates for the exercise of the functions in question.²⁵

They are chosen from among persons who offer all the guarantees of independence and who possess the qualifications required, in the respective countries, to be appointed to the highest jurisdictional functions, or who are of recognized competence.²⁶

At the moment, there are 51 (fifty-one) judges appointed to the Court, 35 (thirty-five) of which are male and 15 (fifteen) females, and the average age of the judges is 54.7 years old. The presidency and vice-presidency of the Court are held by a Dutchman and a Greek, respectively. The judgment sections are exercised by 07 (seven) men and 03 (three) women, given that the average age of the section presidents is 56.6 years.²⁷

In this regard, it is possible to observe that women only occupy about 29% (twenty-nine percent) of the positions of judges of the Court, which demonstrates the clear disparity in the number of women in the position of judges of the highest Court of the Court. European Union.

²³ EUROPEAN UNION. **General Court**. Available at: http://curia.europa.eu/jcms/jcms/Jo2_7033/. Accessed on: April 19, 2021.

²⁴ EUROPEAN UNION. **The Treaty on European Union and the Treaty Establishing the European Community**. Official Journal of the European Union, European Union. P. 1-331. 2006. Available at: <https://eur-lex.europa.eu/legal-content/PT/TXT/HTML/?uri=CELEX:12016M/TXT&from=PT#d1e397-201-1>. Accessed on: April 19, 2021.

²⁵ EUROPEAN UNION. **The Treaty on European Union and the Treaty Establishing the European Community**. Official Journal of the European Union, European Union. P. 1-331. 2006. Available at: <https://eur-lex.europa.eu/legal-content/PT/TXT/HTML/?uri=CELEX:12016M/TXT&from=PT#d1e397-201-1>. Accessed on: April 19, 2021.

²⁶ EUROPEAN UNION. **The Treaty on European Union and the Treaty Establishing the European Community**. Official Journal of the European Union, European Union. P. 1-331. 2006. Available at: <https://eur-lex.europa.eu/legal-content/PT/TXT/HTML/?uri=CELEX:12016M/TXT&from=PT#d1e397-201-1>. Accessed on: April 19, 2021.

²⁷ EUROPEAN UNION. **Presentation of members**. Available at: https://curia.europa.eu/jcms/jcms/Jo2_7035/en/. Accessed on: April 19, 2021.

Even the European Union has a specific directive to regulate the application of the principle of equal opportunities and equal treatment between men and women in fields related to employment and professional activity, namely, Directive 2006/54/EC, which holds in its Recital 2 the following wording:

“Equality between men and women is a fundamental principle of Community law enshrined in Articles 2 and 3(2) of the Treaty, as well as in the case law of the Court of Justice. The aforementioned Treaty provisions proclaim equality between men and women as a 'task' and an 'aim' of the Community and impose a positive obligation to promote it in all its actions.”

This directive serves to regulate the terms and conditions for member states to seek the realization of a fundamental right for the European Union, namely, equality between men and women, embodied in article 8 of the Treaty on the Functioning of the Union European.

The American Court is composed of seven judges, elected from the members of the Organization, through the General Assembly. Judges are elected from a list of candidates proposed by the same States, and each State may propose up to three candidates, nationals of any State in the Organization. Candidates must hold the highest moral authority and be recognized in matters of human rights, in accordance with chapter II of the Statute of the Court.

Currently, there are 07 (seven) judges constituted before the Court, among which there are 01 (one) female, which represents 10% (ten percent) of its total composition. This low rate of females in the positions of Judges of the Court represents an inequality in the application of gender equality and the search for a diversity of thought and application of the Law.²⁸

²⁸ INTER-AMERICAN COURT OF HUMAN RIGHTS. **Meet the Jueces and Jueza**. Available at: <https://www.corteidh.or.cr/composition.cfm>. Accessed on: 13 October 2021.

In the African model, based in Arusha, Tanzania, it is made up of eleven judges, selected from citizens of unblemished reputation and notorious knowledge of human rights.²⁹

The members of the Court are elected by the Assembly of the African Union from a list with up to three nominations from each State Party. Judges serve a six-year term.³⁰

At the present time, there are 05 (five) female judges in the Court, which represents 45% (forty-five) percent, a percentage close to formal equality, but compared to the other two Courts, it is the Court with greater proximity of gender equality and which more represents the search for such a guideline.³¹

3. Diversity and Representativeness of Judges for Efficiency

Greater diversity in the Courts can increase demographic diversity, which can convey a sense of inclusion to demographic groups that would otherwise not be represented on the Court.

The second argument focuses on diversity as a means of improving Court decisions.³²

This argument holds that increasing the diversity of views of the Ministers will increase the total amount of information about the Court, which will lead to more informed and therefore better decisions.

The essential claim for demographic diversity is "that diversity matters in the Court and the Court should be a demographically representative body (...)."³³

²⁹ GOVERNMENT OF THE MEMBER STATES OF THE ORGANIZATION OF AFRICAN UNITY. **Constitutive Act of The African Union**. Available at: https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf. Accessed on 13 October 2021.

³⁰ PAIVA FERNANDES, Márcia. **The organization of African unity as an expression of the continental political project in the post-independence period: dispute and demands**. Journal of African History and African Diaspora Studies. 2016, p. 101. Available at: <http://www.revistas.usp.br/sankofa/article/view/119063/116437>. Accessed on 13 October 2021.

³¹ AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS. **Judges of the Court**. Available at: <https://www.african-court.org/wpafc/juizes-do-tribunal/?lang=pt-pt>. Accessed on: 13 October 2021.

³² HESSICK, F. Andrew; JORDAN, Samuel P. **Setting the size of the Supreme Court**. Arizona State Law Journal, Vol. 41, p. 645 - 708. 2009.

³³ OUNWUACHI-WILLING, Angela. **Representative Government, Representative Court? The Supreme Court as a Representative Body**. Vol. 17. 90 Minn. L. Rev. 2006. P. 1254.

But why exactly is diversity important? One possibility is that the inclusion of various segments of society provides a symbol of inclusion in the state's legal machinery.³⁴

The Judiciary Branch has a symbolic status associated with its position at the head of the legal system.³⁵ Appointing a judge from an underrepresented demographic group can convey a sense of representation.³⁶

It is important to note that the claim of value based on demographic diversity is not necessarily limited to the symbolic presence of different individuals. Demographic diversity also has an instrumental dimension: it can lead to greater public acceptance of Court decisions.

The European Union itself has even adopted the pursuit of gender equality as a salutary topic in its Union Action Plan for Human Rights and Democracy 2020-2024.³⁷

At the Inter-American level, the Inter-American Program on Women's Human Rights and Gender Equity and Equality (PIA), approved in 2000, and binding on member states was promoted.³⁸

And at the African level, the African Union Gender Strategy 2018-2027 establishes the guidelines for the pursuit of equal gender opportunities in that region.³⁹

If the appointment of a Hispanic justice conveys to Hispanics that they are full members of the legal system, then Hispanics—and even non-Hispanics who value inclusion—may respond by placing more trust in the legal system.

Similar arguments can be made for diversity along a different axis, such as geography, economic position or even age.

³⁴HOOKS, Bell. **Feminism is for everyone: sweeping politics**. Translation: Ana Luiza Libânia. 1st Ed. Rio de Janeiro: Rosa dos Tempos. 2018.

³⁵ JOHNSON, Kevin R.; FUENTES-ROHWER, Luis. **A Principled Approach to the Quest for Racial Diversity on the Judiciary**. Vol. 5. 10 Mich J. Race & L. 2004.

³⁶ HESSICK, F. Andrew; JORDAN, Samuel P. **Setting the size of the Supreme Court**. Arizona State Law Journal, Vol. 41, p. 645 - 708. 2009.

³⁷ COUNCIL OF THE EUROPEAN UNION. **EU Action Plan on Human Rights and Democracy 2020-2024**. 2020. Available at: <https://www.consilium.europa.eu/media/46838/st12848-en20.pdf>. Accessed on: 9 June 2021.

³⁸ OAS. **The OAS and gender equality**. Available at: <https://www.oas.org/es/cim/mainstreaming.asp>. Accessed on: 13 October 2021.

³⁹ AFRICAN UNION. **African Union Gender Strategy**. Available at: https://au.int/sites/default/files/newsevents/workingdocuments/33442-wd-english_augenderstrategydrafttwo.docx. Accessed on: 13 October 2021.

But, like the inclusion argument, the acceptance argument does not go so far as to claim that the pursuit of diversity has a positive effect on the way the Court of Justice of the European Union actually works.

Other diversity arguments make just this kind of claim.

These claims consist of two steps: (i) that the tendency of judges from diverse backgrounds to see cases differently will introduce new perspectives into the decision-making process, and (ii) that decision-making will be improved by the introduction these new visions and perspectives.⁴⁰

From this point of view, we would prefer the appointment of a Hispanic judge because "a member of a previously excluded group can bring insights to the Court that the rest of its members lack"⁴¹, and we explicitly expect that decision outcomes will improve as a result.

This conception of the value of diversity carries several implications that are worth mentioning. First, because this value is disconnected from symbolism, it broadens the definition of diversity itself. If the value of diversity is symbolic inclusion, then the only forms of diversity we value are those whose symbol is important.

But if the diversity argument is rooted in the value of different perspectives, then career diversity may indeed be a desirable goal.

Second, the value here is based on contributions rather than the mere identities of diverse individuals. As a result, individuals are expected to represent various perspectives and points of view, and those who do not may not be considered diverse despite their objectively diverse characteristics.⁴²

4. Conclusion

The under-representation of women in decision-making is a very broad and multifaceted issue.

⁴⁰ HESSICK, F. Andrew; JORDAN, Samuel P. **Setting the size of the Supreme Court**. Arizona State Law Journal, Vol. 41, p. 645 - 708. 2009.

⁴¹ In a personal interview, Justice Powell referring to Justice Marshall's contribution to the work of the American Court stated "that a member of a previously excluded group can bring insights to the Court that the rest of its members lack." PERRY, Barbara A. **The "Representative" Supreme Court?: The Impact of Race, Religion, and Gender on Appointments** . New York: Greenwood Press, 1991.

⁴² HESSICK, F. Andrew; JORDAN, Samuel P. **Setting the size of the Supreme Court**. Arizona State Law Journal, Vol. 41, p. 645 - 708. 2009.

It needs to be placed in the context of a range of policy efforts aimed at improving gender equality. This includes policies to increase the employment rate of women, to reduce the gender pay gap, to combat gender segregation in education and employment, and to combat the non-transparent appointment and promotion schemes still prevalent in political and corporate cultures.

Furthermore, it is necessary to promote policies favorable to women, support a more equal distribution of responsibilities, improve the reconciliation of work and family life for women and men, and overcome gender stereotypes.

Measures must be taken to remove individual, organizational and social obstacles to women's representation in leadership positions.

It is suggested, accordingly, that the Courts establish the intention that each Member State adopt gender equality in its nominations for the positions of judges of this Court.⁴³

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⁴³ Achieving equality between men and women is achieving the Sustainable Development Goals of the UN Agenda 2030 (UNITED NATIONS. **Agenda 2030**. available at: <http://www.agenda2030.org.br/sobre/#:~:text=A%20Agenda%202030%20%C3%A9%20um,within%20of%20limits%20of%20planet>. Accessed on: 09 June 2021).

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