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Measuring Peace, Justice and Inclusion

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Advancing Inclusive Decision-Making for Sustainable Development: Representation in the Judiciary through SDG 16.7.1c

This brief focuses on how to promote the inclusion and participation of underrepresented groups in courts through SDG 16.7.1c, which measures representation in the judiciary. Data on judicial personnel will help to better understand the composition of the judiciary and can inform strategies to promote diversity and inclusion in the justice system. A representative judiciary is an essential step in both ensuring a more effective and responsive justice system and increasing access to justice for all, particularly population groups who are marginalized and disadvantaged. The challenges of ensuring representative decision-making – whether for women, racial or ethnic minorities, indigenous peoples, or persons with disabilities – is a universal challenge across all contexts, and with better data countries can identify entry points to better respond to increasing calls for justice and inclusion.

Representation in the judiciary

Understanding the composition of the judiciary – who is represented and more significantly who is not – is critical to promoting inclusive and participatory governance systems. Recognizing that representation in the judiciary is vital for inclusive and sustainable development, indicator 16.7.1c was adopted as part of the monitoring framework of the 2030 Agenda for Sustainable Development, and Member States are encouraged to report on it.¹

Various international normative frameworks promote the right to participate in “public

affairs”/“public life” in the context of the judiciary (see Box 1). For instance, the Committee on the Elimination of Discrimination against Women specifies that, “The political and public life of a country is a broad concept. It refers to the exercise of political power, in particular the exercise of legislative, judicial, executive and administrative powers.”² Similarly, the OSCE High Commissioner on National Minorities urges States to ensure that the composition of courts, tribunals, prosecution offices, law-enforcement agencies, correctional services, enforcement agencies and human

rights institutions ... reflect the diversity of the population at all levels.”³

However, unlike in the executive or legislative branches, promoting representation in the judiciary, particularly among judges, has only recently gained more traction.⁴ It is increasingly recognized that there are many structural factors that prevent different population groups from being represented in the judiciary, which can significantly impact judicial outcomes. A judiciary that is not reflective of the population, especially excluded and marginalized populations groups, is less likely to be able to effectively protect and promote fundamental values of “social justice” and “equality”.⁵

The composition of the judiciary often reflects where decision-making power lies in a society. Promoting change in the socio-economic demographics of who is represented in the judiciary so that it reflects the national population can be one way to spur broader justice sector reform and uphold legal and judicial principles. For instance, according to the [Bangalore Principles of Judicial Conduct](#), the principle of equality obliges a judge “to be aware of, and understand, diversity in society and differences arising from various sources, including race, colour, sex, religion, national origin, disability, age”, etc.⁶ The immense value of diversity on the bench was emphasized in 2020 by the United Nations Human Rights Council, which encourages “promoting diversity in the composition of the members of the judiciary by ... actively promoting the balanced representation of women, men ... persons belonging to minorities and other disadvantaged groups”.⁷ As for the impartiality principle, it rests on the idea that a judge shall perform his or her judicial duties without favour, bias, or prejudice.⁸ However, this principle shall not be seen as “some stance above the fray, but the characteristics of judgement made by taking into account the perspective of others”.⁹ Adding judges with a variety of backgrounds and experiences in the judiciary brings diverse perspectives into adjudication processes, allows traditionally overlooked interests to be

considered, and diminishes the possibility that only one perspective dominates.¹⁰ Thus, judges belonging to historically underrepresented groups build on their unique perspectives and life experiences shaped by their race, gender, sexual orientation, religion, or other characteristics. Even more importantly, they can share this knowledge with other members of the judiciary, thereby contributing to the realization of both individual and structural impartiality.¹¹

Box 1. Key international standards on the right to participate in public affairs and equality in the judiciary

Universal Declaration of Human Rights (Art. 2) - “Everyone has the right to equal access to public service in his country.”

Convention on the Elimination of All Forms of Discrimination against Women (Art. 7) – “State Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country.”

UN Convention on the Rights of Persons with Disabilities (Art. 29) – “State parties shall ... promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs.”

International Convention on the Elimination of All Forms of Racial Discrimination (Art. 5) – “State parties undertake to ... guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of ... (c) Political rights, in particular the right ... to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.”

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Art. 2) – “Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.” (Art. 4) “States shall take measures ... to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.”

The Framework Convention for the Protection of National Minorities (Art. 15) – “The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.”

Basic Principles on the Independent of Judiciary (Principle 10) – “In the selection of judges, there shall be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status”.

Bangalore Principles of Judicial Conduct (Para. 5.1) – “A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, color, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes (‘irrelevant grounds’).”

This argument is backed up by a growing body of research that analyses the influence of judges’ demographics on judicial decision-making. Evidence suggests that a judge’s individual characteristics may have an effect both on individual decision-making (“individual effect”) and also on the substantive interests of the group they represent (*active/substantial representation*), since they are better positioned to understand and take seriously the views held within their own community.

For instance, in harassment or gender-based violence cases, female judges may draw from their own experience of harassment and discrimination, among other factors to better understand the context; this can lead to a more informed decision affecting women specifically. Studies have also found that female judges are more likely than their male counterparts to rule in favour of plaintiffs in sexual harassment and employment discrimination cases.¹² The judge’s background may also impact the behaviour of other judges and thereby create a “panel

effect”.¹³ For example, some studies show that the random assignment of minority judges to a three-judge panel in affirmative action cases enhances the quality of judicial deliberations,¹⁴ increasing the chances for approving the affirmative action (see Box 2).

Diversity on the bench not only benefits the quality of judicial adjudication, but it is also **fundamental for sustaining public trust in a judicial system**. According to the European Court of Human Rights, courts not only need to be impartial, they “must also be seen to be impartial”.¹⁵ The evidence suggests that lack of diversity in the judiciary may significantly impact the public’s confidence and trust in the administration of justice and negatively affect the overall legitimacy of the judiciary.¹⁶ So, with increased diversity on the bench, the society or various groups may feel that they are represented more fairly and their unique

concerns are better understood (*symbolic representation*).

Inclusion of various underrepresented groups in the courts also **reaps important benefits for the accessibility of justice by signalling that justice is not the prerogative of one particular group**,¹⁷ which is particularly important in conflict-affected environments.¹⁸ The presence of judges from various backgrounds helps to improve the courtroom experience for litigants and lawyers and encourages the various underrepresented groups to seek and access justice services. For example, research has shown that in proceedings chaired by a female judge, judge at the International Criminal Tribunal for the Former Yugoslavia, defence lawyers have been more respectful when questioning female witnesses, resulting in female witnesses speaking more freely.¹⁹ Similarly, female judges in Rwanda’s Gacaca courts encouraged women

Box 2. Studies on the benefits of building a representative judiciary

- The probability of a female judge deciding in favor of the party alleging sex discrimination is about 10% higher than it is for the male judge in the **United States**. A female presence on a panel increases the chances of voting in favor of plaintiffs alleging discrimination.
- As compared to male judges, female judges with prior experience in women’s rights had a higher average grant rate for asylum seekers in **Canada**, particularly in cases involving female claimants and in relation to gender-based persecution.
- Adding a black judge to the all-non-black three-judge panel of the Court of Appeals increased the chance of voting in favor of affirmative action in the **United States**. Diversity in a panel also improved the quality of the panel’s deliberations.
- Women judges were found more likely to rule statutes unconstitutional if they violate the equal protection, due process, or freedom of association rights of people who identify as LGBTQ in the **United States**.
- Participation of women judges in the Gacaca courts of **Rwanda** has assisted female victims to overcome resistance and report gender-based violence cases.
- The *Nari Adalats* in **India** were established as grassroots mechanisms to address increasing violence against women and respond to women’s reluctance to go to the formal judicial mechanism. With a panel of female judges, it provides women with an accessible alternative dispute resolution method that creates a safe and respectful environment for women.

Sources: J. P. Kestellec, *Racial Diversity and Judicial Influence on Appellate Courts*, (2012); C. Boyd, L. Epstein, A. Martin, *Untangling the Causal Effects of Sex on Judging*, (2010); R. Sean, *Do Women Refugee Judges Really Make a Difference?*, (2011); F. O. Smith, *Gendered Justice: Do Male and Female Judges Rule Differently on Questions of Gay Rights?*, (2005); UNDP, UNWOMEN, UNICEF, *Informal justice systems charting a course for human rights-based engagement*, (2013); The Fund for [Global Human Rights](#), *Justice for Women, by Women: How Women-Run Courts are Changing the Game in India*, (2018); Namita Rajee, [Nari Adalat - Case Study](#), (2017).

to report gender-based violence, which is frequently not reported because of the stigma associated with being a victim (*see Box 2*).²⁰

Furthermore, it is essential to consider intersectionality when discussing representation in the judiciary.²¹ Marginalization of specific groups can be cumulative, aggregating different factors of exclusion. Alongside sex and gender, for example, it is important to also consider factors such as race, ethnicity, religion and disability status. For example, while Black women have been shortlisted for the US Supreme Court, they have not yet been appointed to the bench.²²

Employing underrepresented groups in the judiciary does not automatically eliminate discriminatory practices and guarantee equal participation in judicial decision-making. However, increasing diversity among judges and registrars is a first key step towards promoting diversity and inclusion in the court system and increasing access to justice for the most disadvantaged groups.

Thus, a more diverse and representative judiciary may:

- Improve the quality of judicial decision-making by building on the diverse voices, perspectives, and worldviews of judicial personnel.
- Have a powerful symbolic value and increase the level of public confidence in impartiality, the rule of law, and the fairness of the judiciary.
- Allow for a better understanding of the needs and concerns of particular groups in cases related to discrimination, sexual harassment, and affirmative action.
- Signal equality of opportunities and increase access to the judicial and legal profession.

Judges and registrars

SDG 16.7.1c defines two key decision-making positions in the judiciary – judges and registrars. Despite diverse judicial systems across the world, in any jurisdiction judges have immense

power to interpret and uphold the law to protect the population's fundamental rights, livelihoods, and well-being. By interpreting constitutional or legal provisions, judges play a crucial role in protecting the rights of the most vulnerable groups that are easily susceptible to discrimination or marginalization. However, judges also considerably impact the law-making process in a manner that promotes the enjoyment of fundamental rights in the society. Considering the time judges serve on the bench, the impact judicial decisions have may last for generations (*see Box 3*).²³

Another position playing a decision-making role in the judiciary is the registrar (*also called a “clerk”, “judicial officer”, “Rechtspfleger”, “secretario de estudio y cuenta”*). A registrar assists by performing administrative duties, preparing court files, conducting legal research, and drafting and executing decisions. The position of a registrar is often a first step towards pursuing a legal career. While the duties of a registrar vary from jurisdiction to jurisdiction, all judicial systems employ these professionals. In some jurisdictions they can perform judicial or quasi-judicial functions themselves, including making decisions on interlocutory applications, on damage assessments, and on applications for the entry of default judgments. Thus, depending on the extent of these duties, the registrar may have a far-reaching impact on a judicial decision, as judges heavily rely on their knowledge, expertise, and recommendations. For instance, law clerks in the Supreme Courts in the Netherlands prepare memos for judges that summarize the case facts and contain recommendations.²⁴ Registrars can also serve as liaisons or ambassadors to the other chambers

or courts, helping judges to collect information on a given issue.²⁵ Thus, registrars, on the one hand, contribute to the efficiency and quality of the judicial process, but, on the other hand, they often are a direct point of contact for litigants, lawyers, and other groups involved in the administration of justice. Therefore, the role and benefits of having diverse representation among registrars should not be underestimated. One study suggests that law clerks' ideology exercises a separate and independent influence on how judges vote on the merits of cases (*"clerk effect"*).²⁶ For example, according to a study of US Supreme Court clerks from 1882 to 2004, only 15% were female and only 6% were from racial and ethnic minorities, with the liberal judges tending to have more diverse groups of clerks.²⁷ Another study argues that the presence of LGBT individuals among the clerks changed the way the judges approached rights cases related to sexual orientation and gender identity.²⁸

Diversity in the Common and Civil Law Systems

Countries around the world typically follow common law or civil law, or in some cases, a combination of the two. Depending on the judicial system, countries may consider different approaches and tools for addressing underrepresentation in the courts.

Traditionally, the common and civil law systems differ in many ways, including the appointment of judges and their role in proceedings.

In countries with common a law tradition, the judiciary is vested with the power to interpret legal provisions expansively and thereby broaden and create the law. Thus, their decisions are an important source of law. In contrast, in civil law systems, where the law is codified to a greater extent, judges are responsible primarily for applying and interpreting the law.²⁹ Throughout the legal proceedings, a judge in civil law systems has an active role and controls both

Box 3. Judicial interpretation of gender parity laws in Costa Rica

The Amendment of 1996 to the Electoral Code of Costa Rica required political parties to ensure that at least 40% of their lists of candidates for national and provincial elections were women. However, the Code did not specify how this was to be implemented until 1998, when, based on the National Women's Institute application, the [Supreme Electoral Tribunal](#) issued a resolution clarifying the procedures. The Resolution stated that women must be listed in electable positions on all ballots, that the 40% quota must be met in each district, cantonal, and provincial assembly, and that it shall not to be calculated as an overall total. This Resolution was drafted by the first woman judge appointed to the Supreme Electoral Tribunal, Magistrada Anabelle Leon Feoli. Her opinion cited Costa Rican constitutional provisions on gender equality as well as international treaties and held that affirmative action was necessary to address the unequal participation of women and men in political life. Later resolutions issued by the Tribunal provided additional interpretations on how parties should determine "electable positions" on the ballot. Subsequently, gender parity in elections has been supported in several other court decisions. For instance, Costa Rica's Supreme Court held that a political party violated the quota law when it relegated women candidates to low positions in their list. Similarly, in 2012, the Supreme Court held that alternating between women and men did not violate men's rights to equal treatment. In 2016, the Supreme Elections Tribunal held that parties must meet "horizontal parity" by alternating between women and men as their first listed candidate on each of the seven provincial ballots. Thus, the interpretation of the constitutional and legislative provisions in a gender-responsive way by the Supreme Electoral Tribunal facilitated the gender-responsive implementation by political officials, executives, and political parties.

Source: International IDEA, *From paper to lived reality: gender-responsive constitutional implementation*, Discussion Paper (2016).

pre-trial and trial processes. (See Box 3 on *judicial interpretation*)

Civil and common law countries also have different appointment procedures for judges and registrars and different career advancements paths within the judiciary.³⁰ Typically, in civil law systems, a person becomes a judge after attending a training school for judges, passing exams, and being appointed by a Judicial Council or similar agency overseeing judicial appointments. In common law systems, judges generally do not undertake the same extensive training: in most common law systems, judges are appointed either by the executive or by a judicial appointment commission.³¹ Unlike the civil law system, in common law countries judges are traditionally drawn from senior lawyers with previous experience in practicing the law or in academia.³² Thus, in this sense, the common law judiciary is not a "career judiciary", as compared to civil law systems where career advancement opportunities are more available. The appointment of registrars also differs. In some jurisdictions, registrars are assigned to a particular judge, while in others they serve as assistants to the entire court.

All these differences impact the path towards a more diverse judiciary, and, considering national legal systems, countries may choose different approaches to promote diversity in their courts. For instance, in civil law systems, the intake of underrepresented groups among new judges can be completed relatively quicker once candidates complete the basic legal education and judicial training. As a result, the proportion of women judges has gone up more quickly in countries with a civil law tradition than in common law countries in the recent decade.³³ In common law systems, diversification in the judiciary may be delayed for an extended period of time due both to judicial appointments requiring far more years of experience and to a lack of minority representation in law schools or among the legal professions.³⁴

The state of underrepresentation in the judiciary

Today the judiciary is often not reflective of the diversity of populations, and there is an alarming lack of members of historically underrepresented groups, such as women, ethnic and racial minorities, persons with disabilities and other minority population groups among judges. For instance, by 2018 while the percentage of female professional judges in first instance courts increased to 57%, resulting in a slight overrepresentation in the Council of Europe member countries, female representation still significantly varies per country and is typically lower in the higher-level courts. For instance, the ratio of women in higher courts is below 40% in Armenia, Azerbaijan, Iceland, Ireland, as well as in the United Kingdom. And women continue to be significantly underrepresented as court presidents at all levels in the Council of Europe member countries.³⁵

This challenge is pertinent to other regions and countries where the proportion of female judges and especially senior female judges also varies widely. For instance, in 39 countries of Latin America, the Caribbean and the Iberian Peninsula, the average representation of female judges in the highest courts is just 32% (See *Map*).

Many countries in the region have also recorded an increase in women judges at the highest court level (including **Jamaica, Barbados and Trinidad and Tobago** in the Caribbean and **Cuba, Chile and Dominican Republic** in Latin America in

Percentage of Female Judges in Supreme Courts/Highest Courts in Latin America



Source: Gender Equality Observatory for Latin America and the Caribbean. Data presented is the most recent available as of 2018

• Created with Datawrapper

Americans comprise 10% of sitting judges and 13% of active judges, while Hispanic judges make up about 7% and 9% of sitting and active judges, respectively.³⁹ However, there is a broadening recognition that diverse representation on the bench is vital for the effective and fair delivery of justice on both international and national levels.⁴⁰ Social movements such as *Black Lives Matter* are putting a particular spotlight on the inequities of the criminal justice system, including the role that implicit bias plays in judicial outcomes⁴¹.

The underrepresentation of certain groups is also a challenge among registrars. For example, in 2015 Asian-Americans represented 6.4% of the US working-age population but made up only 4.6% of the state clerks. Furthermore, African-Americans made up 12.6% of the US working-age population but only 4.2% of federal clerks and 6.4% of state clerks.^{42 43} The failure of the judiciary at the national level to reflect the population's makeup may also impact representation on international courts. For instance, in the majority of international or regional courts, female judges are not equally represented (*see Table 1*). Initiatives to re-evaluate appointment practices in international courts have been gradually increasing for the past decade.⁴⁴ In March 2021, the International Criminal Court appointed their first Focal Point for Gender Equality, tasked with addressing issues related to the employment conditions of women in the institution, including the gender balance at all levels of employment.⁴⁵

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