

Why Should Gender Matter?

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African proverb: *“Corn cannot always expect justice from a court made up of chicken ”. By the same token women cannot always expect justice against men in an all-male court.*

"Gender differences, based on the social construction of biological sex distinctions, are one of the great 'fault lines' of societies — those marks of difference among categories of persons that govern the allocation of power, authority, and resources!"²

Introduction

Gender, refers to the social construction of what it means to the biological fact of being male or female. It is also widely accepted that gender — like class and race/ethnicity — is a source of inequality. That gender asymmetry is a universal fact of life is now a commonplace. In many societies around the world, women are discriminated against by law and by custom, rendering them among the vulnerable and disadvantaged social groups. ³

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² Papanek (1989)

³ Sociologist Janet Chafetz (1984) notes that sex stratification exists in degrees with one variable and one constant component. What varies is the extent of female disadvantage, while the constant is that females have never been more advantaged than males in any known society.

This note examines the relationship between legitimacy and the presence of both male and female judges in the judiciary. It argues that sex representation on the bench is an important contributor to legitimacy of any court. It argues that sex representation is necessary for both affects normative and sociological democratic legitimacy. Men and women bring different experiences lenses and perspectives to judging, they think differently and because half the world is women and there are women in the judiciary, it is necessary to have women on the bench for an impartial; judiciary. The law is only as good as the judge. Consequently, without both men and won in the judiciary, adjudication is bound to be biased and a judiciary which does not how proof of impartiality will lose the trust and confidence of the community on whose behalf it claim to adjudicate.

The rule of law is a fundamental pillar upon which peaceful and prosperous nations are built. The participation both of women in the judiciary can play an important role in the achievement of the above. Women judges can be an invaluable leverage in strengthening the rule of law both through their contributions to an impartial judiciary as well as through their role in the implementation and enforcement of laws, particularly those that provide access to justice for women and girls.

I. Does Gender Matter?

Distinguished colleagues, the above, I daresay is a rhetorical question.

In June 2012, I had the singular privilege as a Georgetown Public Policy Fellow of interviewing with Justice Ruth Beda Ginsberg US Supreme Court and invariably the question ‘Do women judges really make a difference?’ popped up.

She replied: “I will quote Justice Sandra day O’Connor who says in the end, a wise ole male judge and a wise old male judge would reach the same judgment but that does not mean there is no difference. What we bring to the table is our life’s experiences and sensitivity. For example a male judge would approach the issue of a thirteen year old girl having to be strip searched differently than a female judge. Teenage boys especially in sports teams think nothing of changing in public and so the male judge will not see a problem but to a thirteen year old girl it is an affront to her sensitivities. Justice Ruth Bader Ginsburg suggested gender does make a difference: “The presence of women on the bench made it possible for the courts to appreciate earlier than they might otherwise that sexual harassment belongs under Title VII.”

She was referring to *Safford Unified School District v Redding*, a case involving the constitutionality of the strip search of a 13-year old girl.⁴

On justice O'Connor's proposition that a wise old female judge would arrive at the same judgment as a wise old male judge former United States Appellate Court and ICTY Judge Patricia Wald wrote:

"Do women on the bench really make any difference in the development of the law? The maxim that a wise man and a wise woman will come to the same conclusions is endlessly repeated, but I think it is somewhat simplistic. And certainly different wise women will come to different conclusions. Nearer the truth, I think, is that being a woman and being treated by society as a woman can be a vital element of a judge's experience. That experience in turn can subtly affect the lens through which she views issues and solutions A judge is the sum of her experiences and if she has suffered disadvantages or discrimination as a woman, she is apt to be sensitive to its subtle expressions or to paternalism."

Justice Sotomayer another female US Supreme Court Judge would say that "a wise woman with the riches of her experiences would more often than not, reach a better conclusion than a man".

As an anecdote, Justice Sandra O'Connor always said she did not believe gender mattered

One day, in the 1996 argument of *Maryland v Wilson* O'Connor challenged a lawyer who argued that police should be able to detain passengers on the roadway while they search the driver's car.

'Suppose it's a driving snow storm, or a blinding rainstorm, and the passenger is a mother with a very young baby'

O'Connor said inside the court room. So you see, Justice O'Connor is not immune to gender sensitivity.

So does gender matter or not?

⁴ Justice Ginsburg said of her all-male colleagues: "'They have never been a 13-year-old girl.' . . . 'It's a very sensitive age for a girl.' See Neil A. Lewis, *Debate on Whether Female Judges Decide Differently Arises Anew*, NY Times A16 (June 4, 2009).

It will be unfair and unwise to assume the stereotype or paradigm that male judges will always decide in favour of men while female judges are wont to decide in favour of women. That in itself is a bias and bias impedes justice.

To cite examples from Cameroon, there have been many ground breaking decisions that significantly enhanced women's rights from all male panels. The decision in the Supreme Court case of *Estate of Chibikom*⁵ the locus classicus for the issue of inheritance rights of the married girl child wherein it was decided that any custom which states that a girl child, married or unmarried cannot inherit her father's property is a custom repugnant to natural justice, equity and good conscience and also contrary to the written law, was by an all male panel. Likewise *Nanje Joseph Okia v James Modika and Ors*⁶, an all male panel of the South West Court of Appeal reiterated the position that the first in line for letters of administration is the surviving spouse – in this case the widow, (followed by the children of the deceased) and not the brothers of the deceased and not the other way round.

In Cameroon for instance, we have had some single male judges particularly champion the locus of women. One of these is His Lordship Epuli Aloh Mathias who while he was at the High Court and Court of Appeal takes credit for many landmark decisions in favour of women. In *Estate of Nchari*⁷, Epuli J would state:

Where a man dies intestate and leaves issue then whether he is survived by a parent or brother or sister, the sole beneficiaries of his estate shall be the surviving spouse and issue. Under these circumstances, the parents and siblings of the deceased have no legal claim on his estate; whatever they get from it will depend on the goodwill and compassion of the beneficiaries and not on any right.

His Lordship went on to determine that when a marriage is monogamous, the widow assumes exactly the same position as a widow in England

However, from my twenty six year's experience in the Cameroon judiciary, the face of justice significantly changed for women when women began to sit in courts which decided on the status of women, matrimonial causes, property rights and other issues affecting women.

⁵ Supreme Court Judgment No. 14/L of 4 February 1993.

⁶ CASWP/22/91, Judgment of 11 March 1992

⁷ 1999 GLR 59 (Gender Law Report)

II. The Millennium Development Goals were adopted (specifically Goal 3) ”to Promote Gender Equality Empower Women and Eliminate gender disparity at all levels by 2015”

The necessity of giving women access to policy making positions cannot be over emphasized. There is already evidence that female leaders make different policy choices once in office, specifically ones that better reflect women’s preferences: ⁸

Rwanda is one country which applies this practice. As soon as the goals were implemented in Rwanda, in 2003 Rwanda women topped the world rankings of women, by securing 49 per cent of representation in the national parliament. By 2008, Rwanda reinforced its position at the top of the leader board by electing more than 56 percent women members to its lower house.

One result of women representation in the Rwanda parliament is that Rwanda has banished archaic patriarchal laws that are still enforced in many African societies, such as those that prevent women from inheriting land. The legislature has passed bills aimed at ending domestic violence and child abuse, while a committee is now combing through the legal code to purge it of discriminatory laws. While significant progress has been made in adopting laws throughout the developing world in a variety of areas.

Laws without implementation and enforcement not only render such legal reform ineffective, but also may serve to undermine rule of law by eroding public trust in the institutions that govern. Women judges can thus play an important role in each of these areas.

First, women’s participation in the judiciary is important to establishing a judiciary that is reflective of the society of whose laws it interprets.

People are more likely to put their trust and confidence in courts that represent all of the individuals that constitute a society. Furthermore, a judiciary comprised of judges with diverse experience may provide a more balanced and thus impartial perspective on matters before the court.

⁸ (Raghabendra Chattopadhyay Esther Duflo Women as Policy Makers 2004 Evidence from a Randomized Policy Experiment in India).

Women in policy making positions invariably advance the cause of women. Again in illustrating this point, I will be biased in favour of Cameroon.

Cameroon's Appointment of Female Judges to policy making positions – overturning the status quo:

Prior to 1989, there were very few female judges in policy-making positions in Cameroon. In the history of the Cameroon judiciary a total of three females had been head of a court and only one (Judge Arrey) had ever sat in the High Court and Courts of Appeal which determine issues relating to the status of persons including gender issues, matrimonial and property rights. In 1989, with a review of the Judicial organization, female judges (and young ones at that) began to accede to the High Courts and policy making positions and in 1998, Justice Arrey saw to it that 40% of both State Prosecutors and Presidents of Courts were women while many female judges were appointed to the Courts of Appeal. (Women make approximately 37% of the Judiciary in Cameroon).

To her credit, all Chief justices of the South West Court of Appeal since Justice Arrey left have been women, the present being Chief justice Lucy Asuagbor.

Before 1986, there were no female judges in the High Courts and Courts of Appeal. Those were the days when to quote the infamous decision in **Rose Ndollo Achu v. Richard Achu**⁹.

“Woman is property and property cannot own property”

In another case¹⁰, the customary court even gave the woman one of three houses and the court of Appeal took it away, claiming that the customary court had no jurisdiction. Thus women's claim to property either upon divorce or death remained puny.

Having been given an opportunity to sit as the first female judge in the High Court and Court of appeal of the North West, Arrey J quickly seized the first chance to turn the tables in *Veronica Fodje v. Ndangsi Kette*¹¹ when she decided that a customary law wife is entitled to property upon divorce.

As more women judges were appointed to the bench, justice for women advanced and more and more women began to see victory in divorce cases while the property rights of women was incrementally

⁹ (North West Court of Appeal No BCA/62/86 (unreported))

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¹¹ Appeal No. BCA/45/ 86 (unreported)

entrenched. One of the most remarkable was the case of **Kang Nsume v Kang Nsume** ¹² where a **female judge (Mbaacha (J))** ordered the sale of the lone house of the couple and a distribution of the proceeds between the ex-spouse making sure that two years' arrears of maintenance owed the wife was paid.

In **David Tchakokam V KOEU Magdalene** ¹³Ngassa (J) a female judge declared the petitioner's demand to force his levirate wife back and declare her his property the most obnoxious and unconscionable action to have been brought to court on the eve of the 3rd millennium.

Similarly, in the area of domestic abuse, there was little or no justice for women until women were appointed to decision making positions in the judiciary. There is yet no law against domestic violence in Cameroon. In 1972 an all-male Supreme Court had ruled that a husband has the traditional right to box or chastise his wife¹⁴. The situation for women seeking redress for domestic abuse remained bleak until 2004 a female prosecutor and female judge brought justice for battered wives in a series of cases in Kumba. ¹⁵

In 1998, after an IAWJ seminar on The Application of International Instruments in Local cases, Justice Arrey as Chief Justice issued practice directives that the above, especially the CEDAW document be applied to fill any lacunae in local cases. She set the pace by applying CEDAW to outlaw forced customary marriage in the appeal of **TCHAKOKAM v KOEU** and thereafter the other judges followed suit in using CEDAW to relieve female litigants where local laws are either silent, absent or oppressive e.g. **ESTATE of NANA (Ngassa)** where CEDAW was used to give a customary law widow access to her husband's property

The Present Chief Justice of the South West Lucy Asuagbor when she became president of High Court of Wouri issued directives in divorce suits that if one partner had to leave the matrimonial home it would be the husband

Women judges from around the world have taken active roles in such pioneering work. For example, Chief Justice Georgina Wood, the first female Chief Justice in the history of Ghana, is

¹² (HCF/38/96)

¹³ (HCK/AE/38/97) 1999 Gender Law Report

¹⁴(CS Arret no 42/L of 4th January 1972)

¹⁵ The People vs Gharba Aboubakari km/1042/2004 and The People vs Rev Ibrahim Cole Joseph -km/400c/2004(both unreported) - Ngassa (State Prosecutor) successfully secured convictions for spousal abuse thanks to the foresight of an activist Judge Ntuba This is the subject of the BBC international award-winnig documentary 'sisters In Law'

paying particular attention to the way the law impacts women and children. To that end, has built a specialized Family Justice Center that will identify and address critical issues affecting women and children in the judicial process, with a focus on how the court adjudicates cases relating to gender-based violence.

Justice Elena Ines Highton de Nolasco, Vice President of the Supreme Court of Argentina, created the first Domestic Violence Office of the Supreme Court of Argentina (Oficina de Violencia Doméstica, or OVD) The OVD focuses exclusively on issues of domestic violence and utilizes an interdisciplinary team of legal, medical, and other professionals in seeking to provide access to justice to victims of domestic violence.

The Contribution of NGO's and other Actors

All the above would not have been possible without the advocacy, teaching legal literacy and capacity-building of these judges by NGO's and other stake holders. The Cameroon Judiciary has particularly benefited from FIDA Cameroon and the International Association of Women Judges (IAWJ). Apart from advocacy and literacy programs at all levels, in 1999, FIDA held a gender literacy seminar for the judiciary. The outcome was significant resolutions on women's property rights. In 2008, the U.S. Department of State began hosting women judges from around the world to discuss issues of women's access to justice and combating violence against women.¹²

There, judges and judicial actors from over twenty countries convened to discuss issues of law and implementation relating to women and girls and to share success stories and lessons learned.¹³ As a result of this forum, the Avon Global Center for Women and Justice at Cornell Law School was founded with the goal of continuing the dialogue while providing concrete support to women judges across the globe through legal research and clinical projects on issues related to gender-based violence.¹⁴

III. Sex representation and legitimacy.

It is a trite saying that justice must not only be done but must be seen to be done. People look at the bench and judge the judge by race, sex, ethnicity, or religion and association. A court's legitimacy can and is affected by the ratio of the sexes. Sex representation matters to legitimacy in at least three ways: First, if it be agreed that men and women approach the law or facts differently, then both are necessary for impartiality, which is an important prerequisite of legitimate adjudication. .

Sex representation matters to legitimacy when the sexes approach differently law, facts. A glaring example can be seen in the conviction for rape as a war crime by the International Criminal Tribunals. Although rape in time of war had been condemned for centuries¹⁶ there was little inclination to prosecute the crime, in part due to the perception that sexual violence was simply one of the ‘spoils of war’.¹⁷

However, rape remained unpunished until female judges were appointed to the international Tribunals. The first such conviction was by the ICTR in the famous Akayesu case. In the Akayesu trial before the ICTR¹⁸, the prosecution team lacked the impetus to charge for rape. It took the initiative of Judge Navanethem Pillay, (as she then was) the only female judge on the ICTR panel to question witnesses about evidence of sexual violence, with the efforts of non-governmental organizations, before the indictment could be amended to include charges of sexual violence.¹⁹ The Tribunal then convicted him of the crimes against humanity of rape and of genocide founded on rape.

In the words of Richard Goldstone former prosecutor for ICTR and ICTY

“This judicial diligence in facilitating testimony on gender crimes and in urging the inclusion of such crimes in indictments, together with the diligence of Patricia Sellers and others in the Office of the Prosecutor, contributed to the significant progress that the Tribunals have made in their recognition and prosecution of gender crimes.” Judge Navanethem Pillay would later on say that “women come with a particular sensitivity and understanding about what happens to people who are raped.”

¹⁶T Meron, Rape as a Crime Under International Humanitarian Law (1993) 87(3), AJIL 424. Article 44 “Instructions for the Government of Armies of the United States in the Field,” prepared by Francis Lieber, LL.D..

¹⁷ Theodor Meron acknowledged that rape by soldiers had been prohibited for centuries citing military codes of Richard II (1385) and Henry V 1419) and its origin in modern humanitarian law can be traced as far back as the Lieber code of 1863.

¹⁸ See *Prosecutor v Akayesu*, Judgment, Case No ICTR-96-4, ¶¶ 696, 731 (ICTR Sept 2, 1998); José E. Alvarez, *Lessons from the Akayesu Judgment*, 5 ILSA J Intl & Comp L 359, 362–63 (1999).

¹⁹ (Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 Case W Res J Intl L 277, 282 (2002). See also Navanethem Pillay, *Equal Justice for Women: A Personal Journey*, 50 Ariz L Rev 657, 665–66 (2008); Terris, Romano, and Swigart, *The International Judge* at 44–45 (cited in note 34); Beth Van Schaack, *Engendering Genocide: The Akayesu Case Before the ICTR*, in Deena R. Hurwitz and Margaret L. Satterthwaite, eds, *Human Rights Advocacy Stories* 193, 200–01 (Foundation 2009) (showing that male judges were also solicitous of testimony on crimes of sexual violence in the *Akayesu* case).

Similarly, in the ICTY case of *Prosecutor v. Dragan Nikolić* lawyers felt that the evidence was insufficient charge with gender crimes. ICTY Judge Elizabeth Odio Benito “publicly exhorted” prosecutors to include gender crimes in his indictment. When the charge was accordingly amended to include gender crimes Nikolić pled guilty to a number of charges, including aiding and abetting the crime against humanity of rape.²⁰

Similarly, a former judge of the IACHR, Cecilia Medina Quiroga, described a situation where her womanly perspective affected reparations in a case involving a massacre where rape occurred in Guatemala.

One study showed that ICTY panels with female judges imposed more severe sanctions on defendants who assaulted women, while male judges imposed more severe sanctions on defendants who assaulted men.²¹ Another study found the presence of a female on the panel actually *causes* male judges to vote in a way they otherwise would not—in favor of plaintiffs.²²

Second, even if men and women are not inherently different gender parity is important to legitimacy because at least some people seem to believe they are nonetheless.

For example, some non-government organizations and states sought to include female judges on post-World War II international criminal tribunals because they thought women would alter the development of facts and the direction of the law. Unisex courts would lack justified authority for them.

During the formation of both ad hoc tribunals and the ICC, Women’s groups thought that the presence of women judges might make a difference in the prosecution of international crimes against women. For these reasons, women’s groups lobbied hard for the election of Gabrielle Kirk McDonald and Elizabeth Odio Benito to the ICTY bench. (The National Alliance of Women’s Organizations, the Lawyers Committee for Human Rights)

When the time came to negotiate the constitutive instrument of the ICC, non-governmental organizations and many countries insisted on the inclusion of a provision requiring “a fair representation of female and male judges,” as well as expertise in violence against women and children.

²⁰ *Prosecutor v Nikolić*, Sentencing Judgment, Case No IT-94-2-S, paras 15, 21–22 (ICTY Dec 18, 2003).

²¹ King and Greening, 88 Soc Sci Q at 1049–50 (cited in note 39). See also *id* at 1065–66 (“Having a female judge on cases with female victims increases the sentences by about 46 months Female judges seem to be protecting female victims in sexual assault cases All male panels give lengthier sentences by 106 months if there is a male victim than those including female jurists”)

²² Christina L. Boyd, Lee Epstein, and Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 Am J Pol Sci 389, 390 (2010).

Both non-governmental organizations and states justified the inclusion of this language in part based on perceptions of women judges' impact on the law and facts developed by the ICTY and the ICTR. Finally, women judges matter for reasons of democratic legitimacy. As the maxim goes, half the world is woman. Justice must not only be done, it must be seen to be done. Just as there should not be a court with only jurists from one nation, tribe or religion, so too should there not be a court with only one gender. Even if the judges bend over backwards to be fair and impartial, such a court would lack justified authority. Legitimate adjudication requires both impartial judges and judges with some link to the constituencies their rulings impact. Just as geographic diversity strengthens a courts' legitimacy, so too does sex representation. This explains why steps were taken toward sex representation in the statutes of the International Criminal Court, the African Court of Human and Peoples' Rights, and for ad litem judges on the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the European Court of Human Rights. For example, the constitutive instrument of the African Court of Human and Peoples' Rights states that electors of judges should not only ensure that "there is representation of the main regions of Africa and of their principal legal traditions," but also "that there is adequate gender representation."

Representation of the various groups that make up society on the judicial bench is a common theme. For example, a European Union study of women and the judiciary shows: "The balanced participation of women and men in decision-making is considered crucial to the legitimacy of representative and advisory bodies, and therefore also of our European democracies." ²³

As Judge Gladys Kessler, a United States judge and former president of the National Association of Women Judges, would put it, "the ultimate justification for deliberately seeking judges of both sexes and all colors and backgrounds is to keep the public's trust. The public must perceive its judges as fair, impartial and representative of the diversity of those who are being judged."²⁴

Conclusion:

We have seen that because men and women have different experiences and perspectives, representation of one sex affects normative legitimacy because contributes to impartiality and introduces bias. Even if men and women do not "think differently," a sex un-representative bench harms sociological legitimacy for the who nevertheless still s believe they think differently. Finally, sex representation is important to

²³ Anasagasti and Wuiame, *Women and Decision-Making* at 7

²⁴ Wilson, 28 Osgoode Hall L J at 518

normative legitimacy of courts because representation is an important democratic value. As the saying goes, the law is only as good as the judge. A court with the right ratio of well informed and good female judges will certainly issue good law, especially in areas where sensitivity and intuition is needed.

Women have always played a critical role in the functioning of sound judiciaries. The emergence of women judges on the world stage, their contribution to the creation of impartial judiciaries, and their interest and ability to impact the implementation and enforcement of laws affecting women and girls will serve as a necessary and critical accelerator of the rule of law, justice and peace. Therefore investing in half the world's population- women and in women judges and lawyers is, as former US Secretary of State would put it" not just the right thing to do but the smart thing to do". Let us not grow weary in doing what we believe is right and smart at home and around the world.

Esteemed colleagues distinguished ladies and gentlemen, thank you very much for your kind attention.

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