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**Study on Ensuring Gender Equality
in the Recruitment and Promotion of Judges**

**Document prepared by
Dr Tabeth Masengu
Gender and Rule of Law Consultant
Affiliated Researcher with the Human Rights Centre at Ghent University**

EXECUTIVE SUMMARY

This research initiated by the European Commission for the Efficiency of Justice's (CEPEJ) working group GT-QUAL aims to examine the position of women in the judiciary in the Council of Europe (CoE) member States and to produce a study on gender equality in the recruitment process and access to positions of responsibility. This study will assist in efforts to ensure gender diversity in the functioning of the judiciaries of member States.

For decades, women have been under-represented in the judiciary, and it is only in the last decades that we have witnessed an increase in women being appointed as judges. Some Council of Europe members have women occupying most of the judicial positions, though they are mostly concentrated in courts of first instance. The proverbial glass ceiling appears to still exist in respect of appointments to courts of second instance, Supreme Courts and Constitutional Courts.

There are several justifications for gender diversity that also apply to Courts of Appeal and Constitutional Courts. Gender diversity enhances the courts' legitimacy and creates equal opportunities for all. It stresses democratic legitimacy because it includes all sections of society, and it is a symbolic representation of how far women have come.

This report relies on available literature from CoE member States and data obtained from the dissemination of a questionnaire to courts and National Correspondents (33 of 70 projected units of participants responded to the questionnaire). When coupled with the available literature, the questionnaire's responses confirm there is still much to do in terms of gender equality in higher courts. The study's findings point to the following particular issues:

- a) The majority of jurisdictions do not keep consistent and gender-disaggregated data on all judicial applicants.
- b) The feminisation of the lower courts has resulted in men's absence, especially in the district and administrative courts.
- c) No specific promotion method is advantageous to women. Women have been promoted via seniority promotion and by a competitive process.
- d) The Glass ceiling for women in leadership is only just starting to crack, but there is room for more progress.
- e) Specific actions have mitigated some obstacles facing women in the judiciary, while other obstacles may not be as obvious as expected.
- f) The absence of positive action measures does not necessarily equate to an under-representation of women in the judiciary.

These findings indicate a need to address both the lack of women in superior courts and the scarcity of men in lower courts to ensure gender parity. This report provides a breakdown of possible influencing factors for the issues identified while noting that the gender composition of appointing/examining bodies does not appear to affect efforts to increase gender diversity.

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1. INTRODUCTION

Globally discussions have progressed from justifications of why women should be represented in the judiciary to the pursuit of solutions to increase gender diversity. Much like legislatures, courts are public institutions and are, therefore, critical societal structures that need gender representation to enhance their legitimacy. This report seeks to provide a preliminary analysis of gender diversity in the Council of Europe (CoE) member States. Available resources and material limit this study's scope and breadth; however, it does provide a starting point for further research and best practices. The report commences with a methodological section that outlines the qualitative methods used for this research. It proceeds to discuss important justifications for gender diversity and the role of appointment bodies before analysing the current context in the CoE. An analysis of the questionnaire's responses follows, succeeded by a discussion of some critical findings of the study.

2. METHODOLOGY

2.1 Research Methods

This research was conducted using two methods of analysis. The first was reviewing relevant reports from the CoE and its members, global academic material, and research reports from international organisations. The second method employed a questionnaire—an example is annexed to this report. The questionnaire consisted of 26 questions divided into various categories. These categories included the recruitment process, the appointing bodies, transparency of the process, obstacles facing women, good practises, and recommendations. The CEPEJ distributed the questionnaire to four units of participants totalling 70 projected participants. These were as follows:

- a) Members of CEPEJ-GT-EVAL, including national correspondents and scientific experts: Slovenia, Germany, Malta, Spain, Switzerland, Croatia, Italy, Norway, Sweden, France, Greece;
- b) All existing Pilot Courts, namely 59 courts.

Responses were received from 33 of the projected participants, as outlined in the tables below.

Table 1: COURTS

1. District Court of Esbjerg, Denmark.
2. Court of Turin, Italy.
3. District Court, Southwest Finland.
4. Turku Administrative Court, Finland.
5. Appeal Court, Rovaniemi Finland.
6. Regional Court of Ústí nad Labem, Czech Republic.
7. District Court Prag 1, Czech Republic.
8. Frostating Court of Appeal, Norway.
9. Court of First Instance, Monaco.
10. District Court, Lublin, Poland.
11. Land Baden-Wurttemberg Court, Germany.
12. District Court Banská Bystrica, Slovakia.
13. District Court, Graz West Austria.

14. District Antwerp, Belgium.
15. Municipal Court, Varazdin Croatia.
16. District Court of Vilnius, Lithuania
17. Vilnius Regional Administrative Court, Lithuania.
18. Vilnius Regional Court, Lithuania.
19. Sheki Court of Appeal, Azerbaijan.
20. Judicial Power of the Canton, Geneva, Switzerland.
21. Commercial Court, Barcelona, Spain.
22. District Court Durrës, Albania.
23. Court of Appeal, Western Sweden.
24. Cantonal Court in Novi Travnik, Bosnia and Herzegovina.
25. Tribunal d'Arrondissement de Diekirch, Luxembourg.
26. Viru County Court, Estonia.
27. Regional Court of Veszprém, Hungary.
28. Tribunal Judiciaire of Strasbourg, France

Table 2: NATIONAL CORRESPONDENTS and CEPEJ members

1. National Correspondent, France.
2. National Correspondent, Slovenia.
3. National Member, Portugal.
4. National Correspondent, Spain.
5. National Correspondent, Latvia.

2.2 Limitations of the Methodology

One of the study's objectives is examining social, economic, and cultural reasons that provide obstacles to women's fulfilment of judicial career goals. These specific research areas are usually examined through multiple data collection forms, including in-person interviews with various stakeholders and surveys amongst professional legal and social groups. However, the scope of this study is limited to one questionnaire. Consequently, the sociological, economic, and cultural reasons provided are based on the questionnaire's responses and any available literature on this topic. All information collected is subject to the respondents' interpretation of the questions. Hence the quality and quantity of data used in this study depended on the number of responses received and how detailed they were. With 33 replies, even though the questionnaire responses were coded and analysed with triangulation of material where possible, the data herein is limited, and thus, broad generalisations cannot be formed.

3. IMPORTANCE OF GENDER DIVERSITY IN JUDICIAIRES

There are various existing justifications for gender diversity. It has been argued that women will make a difference because of their gender and innate characteristics¹ and that their presence can enhance impartiality on the bench.² The utilitarian argument has also posited that gender diversity is important because modern societies cannot afford to lose half the population's intellectual power and energy.³ Some of these arguments are contested, but some universally accepted justifications are highlighted below.

¹ These arguments draw on Carol Gilligan's "ethic of care" theory. See Carol Gilligan, *In a Different Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982).

² Tabeth Masengu, 'Gender Transformation as a Means of Enhancing Perceptions of Impartiality on the Bench', *The South African Law Journal*, 133.1 (2016), 475–90; Martha Minow, 'Stripped Down Like a Runner or Enriched by Experience Bias and Impartiality of Judges and Jurors', *William and Mary Law Review*, 3 (1991), 1201–18.

³ Cahillane, Laura (2016): Judicial Diversity in Ireland. *Irish Journal of Legal Studies*, Vol.6(1).

3.1 Equity Arguments for Diversity

In recognising the judiciary's masculine context, Malleon proposes that a starting point to promoting gender diversity is equity arguments that explain how inherently unfair it is that men enjoy a near-monopoly of judicial power.⁴ There are no inherent attributes that make men better suited to be judges than women,⁵ and this has also been argued concerning women and leadership in the judiciary.⁶ As Lord Neuberger MR argued:

if women are not less good judges than men, why are 80% or 90% of judges male? It suggests, purely on a statistical basis, that we do not have the best people because there must be some women out there who are better than the less good men who are judges.⁷

That is why equity arguments emphasise that there should be equal opportunities for making it into the pool of possible appointees. It is not just about fairness to the individuals but also to ensure that the judiciary finds those best suited for the job—assuming that attributes relevant to judicial excellence are distributed more or less evenly.⁸

3.2 Institutional Legitimacy

Albertyn provides sound theoretical and empirical demands for women judges by echoing the view that a diverse and representative judiciary will provide greater institutional legitimacy. This legitimacy is critical for public confidence and accountability.⁹ By doing this, Albertyn encourages us to view the necessity of having more women on the bench, not only as a means to create equality between genders but also as a manner in which citizens can feel that they 'belong' when they look at the bench.¹⁰

3.3 Democratic Argument for Diversity

This argument is closely related to the legitimacy justification. Devlin *et al.* argue that 'a democratic institution must be open to the input of those upon whom it affects, and there must be an equal capacity for self-determination'.¹¹ The judiciary decisions have far-reaching consequences, and because judges enforce the law, the judiciary should not be composed of a section of society that is privileged. In this case, privileged because they are men. Rackley and Webb add that to advance the argument for democratic legitimacy, 'we need to identify which communities the judiciary should reflect'.¹² The answer to what appointments will improve the legitimacy of the courts 'will depend not just on the present make-up of the judiciary, but also, more importantly, on the social and political backdrop against which these appointments fall to be made'.¹³ Thus, it is necessary to view courts as representative institutions, even if their administrative functions differ from legislatures.¹⁴

3.4 Equality of Genders in Decision-Making

If women are viewed as representatives who are 'standing for a particular section of society', their presence in the judiciary is as significant as in the legislature.¹⁵ Not in the same manner as parliamentarians voted in by a

⁴ Kate Malleon 'Justifying Gender Equality on the Bench: Why Difference Won't Do', *Feminist Legal Studies*, 11(2003), 1- 24 (p.15).

⁵ Ibid.

⁶ Tabeth Masengu, 'A Perspective on Women and Leadership in the South African Judiciary', *South African Journal on Human Rights*, 31,15 (2015), 655–666.

⁷ Constitution Committee, 'Judicial Appointments - Constitution Committee Contents' (London: UK Parliament, 2012), p. 2

⁸ Rackley and Webb, 'Three models of Diversity', p.287.

⁹ Catherine Albertyn, 'Judicial Diversity', in *The Judiciary in South Africa*, ed. by Cora Hoexter and Morné Olivier (Cape Town: Juta, 2014), pp. 245–287.

¹⁰ Ibid, p.265.

¹¹ Richard Devlin, A.Wayne MacKay and Natasha Kim, 'Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary or towards a Triple P Judiciary', *Alberta Law Review*, 38 (2000), 734–865.

¹² Rackley and Webb, 'Three models of Diversity', p.290.

¹³ Ibid.

¹⁴ Ibid, p.130

¹⁵ Kenney, 'Gender and Judging', p. 129.

constituency, but in a way that recognises the 'other half' of the population.¹⁶ This recognition of the other half of the population is not only about having women's faces in court, but it is also revealed when women are present in the decision-making process. When they participate in the process of adjudication by either writing judgments or agreeing with those written by their peers, it is a sign that the judiciary, like other political institutions, is including those who were previously outsiders. In doing so, the bench normalises women's power and authority.¹⁷ Research has also shown that women's presence on international courts can improve the quality of deliberation and legal outcomes.¹⁸

3.5 Symbolism

In addition to judicial legitimacy and equality arguments, women judges' presence encourages lawyers and students and provides mentoring opportunities for those with judicial aspirations.¹⁹ Having women on the bench symbolises a new era where the doors of judicial office are not entirely closed to women because of their gender. It also makes courts less intimidating and instils confidence in women practitioners who appear in those courts. Hunter advances three practical arguments for diversity. The first is that women judges are more likely to be empathetic with women litigants and provide a better courtroom experience.²⁰ Secondly, she submits that women will educate male colleagues by denouncing sexist comments, gender bias and stereotyping.²¹ Finally, Hunter argues that women will bring a gendered sensibility to decision-making, sometimes altering the outcome.

4. THE ROLE OF JUDICIAL APPOINTMENT BODIES

The creation of a diverse judiciary is partially dependent on the appointing body that recruits candidates administers examinations and interviews, selects the most suitable applicants, and recommends them for appointment. Thus, if it is to instil public confidence in the appointment process, the body that selects these judges must be independent, diverse, and impartial. In particular, the importance of the selection body's diversity cannot be overstated. Research in corporate governance has shown that the lack of diversity in nominations committees can impact the decision of which candidates to interview and subsequently appoint as board members.²² Research into the absence of women in leadership found that predominantly male nomination bodies may find it hard to assess new board members suitability without bias, whether conscious or unconscious.²³ Thus, Iyer argues that 'the extent to which women are - or are not - appointed to the courts is a direct reflection of the institutions responsible for making appointments'.²⁴ Iyer's statement implies that the success or failure of any initiatives to increase the number of women judges lies at the appointing body's feet.

It is important to note that how judges are selected, appointed, and promoted vary considerably across jurisdictions. Thus, the kind of reform measures necessary to improve the ability of selection mechanisms to increase the extent of women's full and equal representation may differ depending on the specifics of the legal system in question.²⁵ The International Commission of Jurists has stated that in Civil law jurisdictions, where career judiciaries are the norm, improving women's representation in the judiciary generally necessitates particular measures designed to improve women's entry into judicial training institutions and programmes.²⁶ In

¹⁶ Ibid.

¹⁷ Nancy B. Arrington, 'Gender and Judicial Replacement', *Journal of Law and Courts*, 6.1 (2018), 127–54 (p.129).

¹⁸ Josephine J Dawuni, *African Women Judges on International Courts: Symbolic or Substantive Gains?*, *ICourts Paper Series* (Hague, 2016).

¹⁹ Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-Making', *Current Legal Problems*, 68.1 (2015), 119–41.

²⁰ Ibid.

²¹ Also see Judith Resnik, 'On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges', *Southern California Law Review*, 61 (1988), 1877–1944.

²² *Barriers to Progression* (London, 2016), https://30percentclub.org/assets/uploads/barriers_to_progression.pdf

²³ Ibid.

²⁴ Sundeep Iyer, 'The Fleeting Benefits of Appointments Commissions for Judicial Gender Equity', *Commonwealth & Comparative Politics*, 51.1 (2013), 97–121.

²⁵ International Commission of Jurists, 'Women and the Judiciary', 2013, pp. 1–78 (p.27). Available at <https://www.icj.org/wp-content/uploads/2014/10/Universal-Women-and-Judiciary-Gva-For-1-Publications-Conference-Report-2014-EN>

²⁶ Ibid, pp.27-28.

Common law systems, judges are appointed mainly from among senior echelons of the legal profession and the selection processes often traditionally involve internal consultation processes. Here, a range of distinct or additional reforms or action steps may be necessary. The establishment of impartial and transparent recruitment processes is crucial.²⁷ In this regard, establishing an independent nominating body with clear mandates and sufficient powers may be an essential step, as may be the public announcement of vacancies.

5. THE STATE OF PLAY IN THE COUNCIL OF EUROPE

While the CoE recognises the importance of gender equality and women's participation in decision-making positions, no specific report or guidelines have previously been dedicated entirely to gender diversity in the judiciary. For instance, in 2003, the CoE made eight recommendations to the Committee of Ministers regarding the balanced participation of men and women in political and public decision-making.²⁸ The CoE's recommendations were informed by, amongst others, the recognition that in spite of the existence of *de jure* equality, the distribution of power, responsibilities and access to economic, social and cultural resources between women and men were still very unequal due to the persistence of prevailing traditional gender roles.²⁹ However, the follow-up on implementing these recommendations has looked at the justice sector in a limited way.³⁰

5.1 Relevant Guidelines and Recommendations

Suggested indicators that arose from the Committee of Ministers' recommendations to member States in 2003 included monitoring progress in the representation of women and men to be measured at the Supreme Court level, not lower. The emphasis on monitoring higher courts as opposed to lower courts was because there appeared to be a glass ceiling for women judges. A 2018 Factsheet summarised the results of a 2017 Gender Commission Analytical report on balanced participation of women and men in political and public decision-making.³¹ The Factsheet stated that despite a positive evolution regarding women in High/Supreme Courts and Constitutional Courts, very few countries reached the 40% minimum target.³² A profoundly rooted mentality, traditional unequal power relations, socio-economic and cultural barriers, as well as the prevalence of sexist language and gender-based violence, continue to limit women's participation in political and public spheres.³³ Thus, amongst other recommendations, it was advanced that states should 'consider setting gender quota laws and/or parity systems' (i.e. with a high quota percentage). It is also recommended to supplement this measure with 'rank order rules' and 'strict sanctions for non-compliance and mandatory replacement of a woman resigning from a list by another woman were also additional recommendations'.³⁴

To aid gender equality efforts in decision-making positions, the CoE introduced a Gender Equality Strategy for 2018-2023. It committed to adopting a dual-track approach, including specific policies and actions and positive action when appropriate, in critical areas for women's advancement for the realisation of *de facto* gender equality.³⁵ Of the six strategic areas identified, achieving balanced participation of women and men in political and public decision-making is directly related to judicial representation. Therefore, it is clear that CoE recognises the importance and impact of having balanced gender representation even in courts.

5.2 Recruitment of Judges in the CoE member States

²⁷ Ibid.

²⁸ Council of Europe (CoE), 'Recommendation Rec(2003)3 of the Committee of Ministers to member States on Balanced Participation of Women and Men in Political and Public Decision Making', 2003, pp. 1–8.

²⁹ Ibid.

³⁰ The Gender Equality Division of the CoE has published 3 monitoring reports on the basis of data submitted by member States. The latest report published in 2017 (with 2016 data), covered amongst others, the number of women in High/Supreme Courts; Constitutional Courts and High Councils of the Judiciary and data on Chief Prosecutors.

³¹ Gender Equality Commission, *Balanced Participation of Women and Men in Decision-Making. Analytical Report - 2016 Data*, 2017.

³² Council of Europe, 'Achieving Balanced Participation of Women and Men in Political and Public Decision-Making: A Gender Equality and Democratic Requirement', 2017.

³³ Ibid, p.4.

³⁴ Ibid, p.5.

³⁵ Council of Europe, 'Council of Europe Gender Equality Strategy' (Strasbourg, 2018), pp. 1–51.

As discussed in an earlier section, how judges are recruited is an essential part of diversifying the judiciary. By examining how, when and by whom judges are appointed, one can discover avenues that hinder women's progression and suggest improvements. The CEPEJ 2020 Evaluation Report highlights the recruitment methods for judges in 45 member States.³⁶ Fourteen member States utilise competitive examinations in the recruitment of judges, and 21 states combine exams with a procedure for legal professionals with long-term working experience.³⁷ Some states, particularly in Common law countries, have a system that relies only on experience and seniority among lawyers without a competitive exam.³⁸ Other recruitment procedures are used in 18 other member States, but regardless of how judges are recruited, the importance of an independent appointment process cannot be overstated.

The CoE has identified superior courts as a critical site for change, and that is why the promotion process for judges is worth examining. A report by the European Parliament found persistence of gender stereotypes, including gender bias (often unconscious) in the promotion processes of judges.³⁹ It also found a lack of transparency in the promotion process in some member States, which accounted for the decrease in the proportion of women at higher court levels and in seniority of positions.⁴⁰ An analysis of CoE member States reveals that a wide range of criteria is used when assessing judges for promotion. The most common of them being professional skills (and/or qualitative performance) and years of experience.⁴¹

5.3 Relevant Studies Conducted in Some member States

Studies on gender diversity in judiciaries with varied focus have been conducted in some member States. A short overview of some essential findings is presented before examining the questionnaire's responses.

In Germany in 2015, more than 46% of the judges were women, yet; it was noted that career perspectives are less favourable for women than men. Despite leaders claiming that the trickle-up effect would lead to an equal share in leadership positions, women moved up the ladder slower than their male colleagues, and the effects of the glass ceiling were felt.⁴² The bulk of women are gathered in the local courts of first instance. However, in former communist countries, women's increase in the judiciary started earlier due to the more pronounced gender equality dogma.⁴³ Nonetheless, more women on the bench in former communist states have not necessarily translated into gender parity in superior courts.

A CoE report on Georgia examined women's under-representation in management positions in the judiciary. One of its findings was that the lack of criteria for promotion in the judiciary was a contributing factor for the under-representation of women judges in management.⁴⁴ The selection of chairpersons for the Supreme Court of Justice was not competitive, and women judges usually did not even propose themselves for the chairperson position. Of interest was the difference in perspectives from NGO's and judges. The NGO sector believed the absence of set criteria and procedures for promotion to management positions is problematic. The process is not transparent and enables various groups to make subjective decisions.⁴⁵ In contrast, judges believed that setting criteria for appointing judges to management positions of the system would not be practical due to

³⁶ European Commission for the Efficiency of Justice, *European Judicial Systems CEPEJ Evaluation Report: Part 1* (Strasbourg: Council of Europe, 2020).

³⁷ *Ibid*, p.49.

³⁸ Ireland, Malta, Norway, Switzerland, UK - England and Wales and UK - Northern Ireland.

³⁹ Wheeler Sally Galligan Yvonne, Haupfiesch Renate, Irvine Lisa, Korolkova Katja, Natter Monika, Schultz Ulrike, 'Mapping the Representation of Women and Men in Legal Professions Across the EU', *European Parliament*, 2017, 1–102.

⁴⁰ *Ibid*, p.86.

⁴¹ These criteria are used by 36 member States.

⁴² Ulrike Schultz, 'Judiciary and Gender Topics. German Experience and International Perspectives', *E-Cadernos CES*, 2015, 1–4.

⁴³ Galligan Yvonne, Haupfiesch Renate, Irvine Lisa, Korolkova Katja, Natter Monika, Schultz Ulrike ' Mapping the Representation of Women and Men in Legal Professions Across the EU' p.25.

⁴⁴ Council of Europe, *Main Factors Contributing to the Under-Representation of Women Judges in the Management of the Common Courts in Georgia*, 2019.

⁴⁵ *Ibid*, p.6.

several reasons. One of the reasons was that the introduction of criteria would prevent many judges from nominating themselves for the position, complicating the process.

The report on Georgia also found prevailing societal beliefs about women holding traditional functions, and these beliefs did not objectively enable women to perform additional professional functions. On one side, this makes male decision-makers think that a management position will not be appealing to a woman as she has 'more to do at home.'⁴⁶ On the other side, women may create space for such thinking. Because a woman with too much extra work is not socially appealing for family members, they refuse to take managerial positions.

The challenge of balancing traditional family roles and professional roles was also highlighted in a Swiss study, which found that women judges 'feel more obliged to cope with multiple tasks and bear the ultimate social responsibility for the family, household and child-rearing or education'.⁴⁷ This dilemma between work-life balance has also been documented in Spain, England and Wales, Northern Ireland, Turkey and Georgia.⁴⁸ It has been argued that 'time poverty' is one of the most significant barriers to women's judicial aspirations.⁴⁹ Where efforts have been made to mitigate the impact of juggling family life and career, progress had been made. As far back as 2011, part-time work proved a success among judges in Switzerland, with the number of women entering the profession rising since it was introduced.⁵⁰ At the time in canton Zurich, 40% of judges were women, and in Vaud and Geneva's cantons, women outnumbered men at 54 per cent and 53 per cent, respectively.⁵¹ As of 2020, women outnumber men in the entire Swiss judiciary, with 64% of all judges in the first and second instance courts.⁵²

There have been other unexpected ways in which women have made progress in the judicial arena. In Albania, a judicial vetting process commenced in 2017 to 'weed out' corrupt judges. Coincidentally, women have significantly benefited from this process because most of the judges who have been fired are men.⁵³ The Albanian report found that women performed better in the vetting process and were considered less 'corrupted' than male judges.⁵⁴ By 2020, 93 judges and prosecutors were fired, and a majority of them were men who mostly dominated the higher courts.⁵⁵ The Constitutional Court was comprised of seven men and two women before the vetting process, and the High Court also had 17 members before the process—14 of whom were men. Some studies suggest that because women are often a minority at work, they have limited support networks at work than males. This encourages them to be more prudent and expect less protection from penalties, thus dissuading them from corrupt activities.⁵⁶

In England and Wales, the recruitment process is administered by the Judicial Appointment Commission (JAC). Across all legal JAC exercises in 2019-2020, women accounted for 50% of applicants, 45% of those shortlisted and 45% of those recommended for appointment. Of the total applicants in the period, 3,697 applicants were women, of whom 377 were recommended for appointment.⁵⁷ This is a significant improvement compared to the years before the establishment of the JAC. Nonetheless, there was still a lower representation of women in the more senior posts (26% for the High Court and above).⁵⁸ In respect of promotions, among judges already holding a judicial role, 44% of those promoted in 2019-2020 were women. Thus, while women's overall

⁴⁶ Ibid.

⁴⁷ Revital Ludewig and Juan LaLlave, 'Professional Stress, Discrimination and Coping Strategies: Similarities and Differences between Female and Male Judges in Switzerland', in *Gender and Judging*, ed. by Ulrike Schultz and Shaw (Portland: Hart Publishing, 2013), pp. 233–54.

⁴⁸ Academic articles have been published highlighting the difficulties in these jurisdictions. For example see Leah Treanor, 'Problems in the Pathways to Judicial Success: Women in the Legal Profession in Northern Ireland', *International Journal of the Legal Profession*, 27.2 (2020), 203–16.

⁴⁹ See International Development Law Organization, *Women Delivering Justice: Contributions, Barriers, Pathways*, 2018.

⁵⁰ Laureline Duvillard, 'Women Find No Justice in Law Profession', *Swaissinfo.Ch*, 2011, pp. 1–4.

⁵¹ Ibid.

⁵² Data received from Swiss response to the questionnaire.

⁵³ By 2020, about 199 judges and prosecutors had undergone the vetting process. Assets that were scrutinized include homes, cash, and cars.

⁵⁴ Vladimir Karaj, 'Gender Gap_ Why Men Are Failing Albania's Judicial Vetting _ Balkan Insight', *Balkan Insight*, 2020, available at <https://balkaninsight.com/2020/07/22/gender-gap-why-men-are-failing-albanias-judicial-vetting>

⁵⁵ Ibid.

⁵⁶ Other studies have shown that women are encouraged from childhood to be cautious while men are encouraged to take risks, so women have less experience in navigating potentially incriminating situations.

⁵⁷ Ministry of Justice, *Diversity of the Judiciary: Legal Professions, New Appointments and Current Post-Holders 2020 Statistics*, 2020.

⁵⁸ Ibid, p.16.

representation in leadership positions is still a concern, progress is being made.

6. RESPONSES TO THE QUESTIONNAIRE AND IMPORTANT FINDINGS

Specific relevant responses and findings have been selected for discussion below. These findings are not exhaustive, but instead, they represent the most pertinent responses for this study.

6.1 Lack of Data on Judicial Applicants

The questionnaire asked whether courts or jurisdictions maintained dis-aggregated gender statistics of all applicants in the appointment process. Of the 33 responses, only eight stated that they held gender statistics of applicants who applied for judicial positions. The eight positive responses were from the District Court of Turku in Finland, Spain, Land Baden-Württemberg in Germany, the Court of Appeal in Norway, Cantonal Court in Novi Travnik in Bosnia and Herzegovina, Portugal, Azerbaijan, and France.

6.2 The Shortage of Men in the Lower Courts

Previous reports from the CoE have noted that women in judiciaries were concentrated mainly in the lower courts. Of the 33 responses received, 23 provided statistics for the 2019/2020 term. Of these 23, only Monaco, Norway, Azerbaijan, and Spain had a female composition of less than 50% in their judiciaries.⁵⁹ The rest of the responses stated that women occupied the fairer share of total judicial positions.⁶⁰ In jurisdictions such as France and Slovenia, women occupied at least 70% of the courts of first instance posts.⁶¹ Men are now the minority in several district and administrative courts, which has created an imbalance in those courts, though men still dominate the superior courts. The District Court of Prague stated that their court 'suffered from a shortage of men', and this was highlighted as a possible area of improvement.⁶² A similar sentiment was expressed by the Turku Administrative Court's response in Finland, which is also in need of male judges in its court. It would seem that, at least in the courts of first instance, the feminisation of the judiciary has exceeded desired levels, and the balance has tipped in women's favour. This begs the question of why this is so.

The justifications for gender diversity in judiciaries also apply when men are in the minority. The legitimacy of the courts of first instance is possibly harmed because of the scarcity of men. Further male litigants could argue that if administrative and district courts are mostly comprised of women, this may affect the litigant's perceptions of impartiality. Besides, concern has been expressed about the damage to the court image when it is predominantly female.⁶³ As far back as 2012, the Deputy director of recruitment and skills validation in France stated that she was seeking to attract more male applicants by modifying the list of individual skills and qualities promoted by the National School for the Judiciary and highlighted in different communication media (by explicitly classifying these skills as 'male' or 'female').⁶⁴ The Netherlands has also taken measures to achieve a better sex-balance by hiring more men.⁶⁵ Such efforts are essential to ensure that courts are suitably comprised because the desire for gender parity is not just about the equitable representation of women but also about men.

6.3 Transparency of the Appointment Process and Promotion of Judges

All but one of the questionnaire responses stated that the judges' recruitment process for those entering the judiciary is well-known and well-disseminated. The information regarding how to apply to become a judge is

⁵⁹ Monaco had 39%, Norway 45%, Azerbaijan 29%, and Spain 39%.

⁶⁰ France, Czech Republic, Slovenia, Latvia, Portugal, Belgium, Croatia, Estonia, Hungary, Switzerland, and Albania all had women occupying 60% or more of the total positions in their judiciaries.

⁶¹ France had 71%, Slovenia had 81%.

⁶² Response from District Court Prag 1 to the questionnaire.

⁶³ Celine Bessiere, Sibylle Gollac, and Muriel Mille, 'The Feminization of the Judiciary : What Is the Problem ?', *Travail, Genre et Societes*, 36.2 (2016), 175–80.

⁶⁴ Bessiere, Gollac, and Mille 'The Feminization of the Judiciary : What Is the Problem ?' p.177.

⁶⁵ Ulrike Schultz, 'Judiciary and Gender Topics. German Experience and International Perspectives', *E-Cadernos CES*, 2015, 1–4.

disseminated differently. Some jurisdictions have it on their official websites; in others, it is gazetted, and in others, it is in the form of guidelines or communiqué from the Judicial Council. The Norwegian response stated that while the recruitment information is published, it is not well known by those outside of the process. The Swedish response said even though the information is publicly available, it is not well disseminated. Lithuania's response attached the published criteria for the promotion of judges, which is both clear, detailed and well communicated.⁶⁶ Such a document would be useful for jurisdictions where the promotion procedure is not well disseminated.

Regarding promotion to senior positions, fifteen responses stated that the promotion process is a competitive exercise done through applications when vacancies are published.⁶⁷ Fifteen other answers said that promotion to higher positions is done via seniority though at least three of the responses noted that this process is not always transparent or clear.⁶⁸ Other courts have alternative modes of promotion. The respondent from the Appeal Court of Rovaniemi stated that the Supreme Court of Finland makes its appointment proposals to the President of the Republic, the final decision-maker. In Norway, one has to apply for promotion, and the vacancies are also open to other lawyers who are not sitting judges. In Monaco, seniority allows for advancement within the same jurisdiction. However, for a higher court, a candidate needs a positive opinion from the High Judicial Council.

Concerning the 33 responses received, it is impossible to determine which promotion method works better for women definitively. On the one hand, literature states that when women are competing and/or are being evaluated for promotion, unintended stereotypes and social beliefs result in men being considered more competent and therefore more worthy of promotion than women.⁶⁹ However, jurisdiction such as Estonia, France, Portugal, and Slovakia⁷⁰ have many women in leadership, yet their process is competitive. A counterargument is that if a promotion is done through seniority, informal qualification structures for career posts and selection mechanisms advantage men.⁷¹ Thus, women will not automatically trickle up the ladder. This study's available data shows that jurisdictions such as Switzerland, the Czech Republic, and Lithuania have a fair number of women in leadership positions despite promotion being based on seniority. Thus, it can be surmised that no one particular promotion method guarantees a greater composition of women in higher positions.

6.4 The Glass Ceiling for Women in Leadership is Only Just Starting to Crack

There is a significant improvement in the number of women in leadership in judiciaries. All the responses to the questionnaire stated that there several women in leadership. Some jurisdictions provided specific statistics of women in leadership, while others mentioned a few examples. All the responses said that there are women heads of courts in various courts of first and second instance. Others have women chairpersons at the regional level. For the jurisdictions that provided detailed statistics, it was notable that the percentage of women in leadership decreased the more senior the court was. For example, 45% of judges in leadership positions in the Court of law in France are women, but only 36% in Appeal Courts. The composition of women leaders in the Slovenian judiciary is 66%, with 75% of women heads of court for the District and Social Labour courts. However, once at the High Court level, women's composition in leadership is only 25%. In the Czech Republic, the numbers vary depending on which regional court it is, and they range from 72% women in leadership in some

⁶⁶ Document issued by the Judicial Council in 2019, 'Assessment Criteria For Persons Pursuant To The Career Of Judges, Transferred Or Appointed'.

⁶⁷ These were from the following jurisdictions: Cantonal Court in Novi Travnik, Bosnia and Herzegovina, Esbjerg-Denmark, District Court Prag- Czech Republic, Antwerp-Belgium, District Court Lublin-Poland, Portugal, Estonia, Hungary, District Court-Slovakia, Court of Appeal-Sweden, District Court South West- Finland, Slovenia, District Court Durrës-Albania, Land Baden-Württemberg -Germany and France.

⁶⁸ The jurisdictions that decide promotion by seniority are Luxembourg, Latvia, Vilnius District Court, Vilnius Administrative Regional Court and Vilnius Regional Courts-Lithuania, Usti and Labem and District Court -Czech Republic, Turku-Finland, Spain, Court of Appeal-Azerbaijan, Varadzin- Croatia, Canton of Geneva-Switzerland, Graz West-Austria Pilot Court, Barcelona- Spain and Turin -Italy.

⁶⁹ Marieke van den Brink and Yvonne Benschop, 'Gender Practices in the Construction of Academic Excellence: Sheep with Five Legs', *Organization*, 19.4 (2012), 507–24, p. 509.

⁷⁰ In Slovakia, the President and Vice-president of the court, President of the Senate, President of the College and Chairperson of the Judicial Council are all women.

⁷¹ Galligan Yvonne, Hauptfiesch Renate, Irvine Lisa, Korolkova Katja, Natter Monika, Schultz Ulrike "Mapping the Representation of Women and Men in Legal Professions Across the EU", p.26.

courts to 30% in others. There were also examples of women heading both the first instance and appellate courts. The Appeal Court from Rovaniemi stated that women are in leadership in 20% of both courts of first instance and appellate courts. In Estonia, 50% of all chairpersons of both courts of first and second instance are women.

Notably, some jurisdictions have women occupying high leadership roles, which bodes well for the future. Examples include Slovakia, where the President and Vice-president of the Banska District Court, President of the Senate, President of the College and Chairperson of the Judicial Council are all women. The First President of the Supreme Court in Poland is a woman, and a woman also leads Lithuania's Supreme Court.⁷² In Norway, women are heading four of six Courts of Appeal. The Presidents of the Maritime and Commercial in Demark are women. In Azerbaijan, the Deputy Chairperson of the Constitutional Court, Chairperson of the Sumqait Court of Appeal, Chairperson of the chamber of Supreme Court and Chairperson of the courts of first instance are all women. However, overall, a pyramid pattern of women's representation remains in most jurisdictions surveyed.

6.5 Obstacles in the Path to Judicial Service

Some obstacles have been identified in the literature on gender diversity in the judiciary. Among them are the persistence of gender stereotypes and implicit gender bias, difficulties reconciling family and professional life, a scarcity of effective mentoring and support networks and a lack of transparency in appointment and promotion processes.⁷³ In this study, only two of the 33 responses stated that there are existing obstacles to women's judicial aspirations. France's response to the questionnaire highlighted that geographical mobility is a challenge for women expected to prioritise family life. Hence cultural and social norms that expect women to prioritise their families may impede women's judicial ambitions. Italy's response was similar and specifically identified the family versus professional career dilemma regarding women seeking promotion to leadership positions.

The other 31 responses mentioned no cultural, social, or economic obstacles for women concerning judicial appointments. This was surprising considering the documented literature globally on women's challenges in the judiciary.⁷⁴ There are three possible explanations of why the majority said there are no obstacles facing women. The first is that because several of the judiciaries have a large proportion of women, it is therefore taken for granted that challenges to women's judicial ambitions do not exist. While this may be true for appointment to courts of first instance, the composition in second instance courts, Supreme Courts and Constitutional Courts may indicate a different position. Sex discrimination has been touted as a possible explanation for why women are not ascending to higher courts.⁷⁵ There still exists a largely unacknowledged gender dimension to traditional understandings of adjudication, with the 'voice of woman' deviating from the norm.⁷⁶ Multiple and intersecting forms of discrimination, culture and stereotypes can prevent women from having full and equal access to all levels of decision-making processes.⁷⁷ The persistence of gender stereotypes and stereotypical bias creates an invisible barrier to women's advancement that is difficult to combat or even detect.⁷⁸ Thus, perceptions that women face no social, cultural, or economic obstacles may exist because the manner in which barriers exist is insidious.

The second possible explanation is the unit of respondents and the method of collecting empirical data. In this case, the unit of respondents was limited to assigned members of relevant courts and National correspondents. Thus, the responses were based on the available knowledge of those who responded to the questionnaire. The

⁷² The Chairperson of Lithuania's Civil Division is also a woman.

⁷³ Galligan Yvonne, Hauptfiesch Renate, Irvine Lisa, Korolkova Katja, Natter Monika, Schultz Ulrike "Mapping the Representation of Women and Men in Legal Professions Across the EU", p.12

⁷⁴ See International Development Law Organization, *Women Delivering Justice: Contributions, Barriers, Pathways*, 2018.

⁷⁵ Mónica García Goldar, 'The Glass Ceiling at the Highest Levels of the Spanish Judiciary', *International Journal of the Legal Profession*, 27.2 (2020), 189–202.

⁷⁶ Erika Rackley, 'Judicial Diversity, the Woman Judge and Fairy Tale Endings', *Legal Studies*, 27.1 (2007), 74–94.

⁷⁷ Council of Europe, 'Council of Europe Gender Equality Strategy' (Strasbourg, 2018), p. 28

⁷⁸ Mónica García Goldar, 'The Glass Ceiling at the Highest Levels of the Spanish Judiciary', *International Journal of the Legal Profession*, 27.2 (2020), 189–202, p. 196.

absence of NGO's, Women's Lawyers Associations, Women Judges Association, and academic officials in the survey meant that it is difficult to assess whether there are no obstacles for women.

The third explanation is that many jurisdictions have found a way to navigate one of the most significant obstacles that face women in any profession- the balance of work and family life. In jurisdictions such as Spain, Switzerland, Latvia, Sweden, Hungary, Finland and the Czech Republic, judges generally have flexible working conditions such as flexible working hours or teleworking.⁷⁹ Some jurisdictions such as Albania, France, Belgium, Slovakia, Bosnia and Herzegovina, Poland, Portugal, Slovenia and Estonia have special working conditions for new mothers and judges with young children.⁸⁰ Hence, by adapting women's work schedules to parental responsibilities, jurisdictions can eliminate the dilemma that many women face when they have to choose between their careers and parental responsibilities.

6.6 Positive Action Measures- Gender Quotas and Targets

A previous recommendation from the Gender Equality Commission of the CoE recommended that member States consider 'possible constitutional and/or legislative changes, including positive action measures, which would facilitate a more balanced participation of women and men in political and public decision-making.'⁸¹ In this study, seven responses to the questionnaire confirmed that their jurisdictions use positive action measures to ensure gender diversity in their judiciaries.⁸² The majority of the responses stated that their jurisdictions do not use gender quotas to increase the number of women in their courts. Gender targets apply when a selection system seeks to make a certain proportion of appointments from under-represented groups. Hence, they are aspirational.

On the other hand, quotas are compulsory in nature because they represent the practical articulation of fully blown affirmative action.⁸³ There is contention over whether quotas are useful or necessary. Arguments favouring quotas are that they work and are effective; they are not new for the judiciary (because geographical or religious quotas have been accepted), and the variety of quota models and design options make them a flexible instrument that can be tailored to the context.⁸⁴

Arguments against quotas state that quotas may undermine the merit principle and contradict gender equality law. Further, it has been argued that quotas have a patronising character and send the message that candidates are appointed merely because of their sex.⁸⁵ When one compares the responses in this study, the jurisdictions with positive action measures are not necessarily more gender diverse than those that do not. As per the responses, the five jurisdictions with the highest number of women in total were Latvia (81%), Czech Republic (80%), France (71%), Hungary (69%) and Luxembourg (66%). None of these jurisdictions has any positive action measures for women in their judiciaries. Of the seven jurisdictions with positive action measures, the highest composition was in Croatia, with 62% women. In the absence of more empirical data, two possible theories are submitted.

Firstly, positive action measures have not been necessary for some jurisdictions because of other gender equality legislation and guidelines that have benefitted all women—including those in the judiciaries. Several jurisdictions have passed Gender Equality laws⁸⁶ or have gender equality as a fundamental national value.⁸⁷ Others have a dedicated official and /or body to oversee gender equality and ensure non-discrimination.⁸⁸

⁷⁹ Responses provided by the participants in this study.

⁸⁰ For example, women judges who are carers of young children in Slovakia are exempted from working outside their municipal locality and from hearing emergency cases.

⁸¹ Gender Equality Commission, *Balanced Participation of Women and Men in Decision-Making. Analytical Report* p.117.

⁸² Responses from Croatia, two from Spain National Correspondent, Germany, Norway, one response from Finland and Albania.

⁸³ Ibid.

⁸⁴ Wheeler Sally Galligan Yvonne, Haupfiesch Renate, Irvine Lisa, Korolkova Katja, Natter Monika, Schultz Ulrike, 'Mapping the Representation of Women and Men in Legal Professions Across the EU', p.40.

⁸⁵ Ibid, p.41.

⁸⁶ Croatia passed Law on Gender Equality in 2008, Germany passed an Equal Opportunities Act in 2006 and Bosnia and Herzegovina have a Gender Action Plan for the period 2018-2022.

⁸⁷ Sweden and Denmark.

⁸⁸ Portugal has a Commission for Citizenship and Gender Equality, France has a Senior official overseeing professional equality between men and women, Luxembourg has an assigned magistrate and Estonia has a Commissioner of Equal

Hence, these and other initiatives have been enough to bolster women's representation in the judiciary, at least in the lower courts.

The second possibility is that the jurisdictions with positive action measures have benefitted from these measures, enabling them to reach the 50% threshold.⁸⁹ It must be noted that the presence of positive action measures does not always translate into higher statistics of women in the judiciary—at least not still in the short term. For instance, despite Spain's detailed Strategic Plans for Equality in the Judicial Career⁹⁰, the composition of women judges as of 2020 was 39%.⁹¹ Thus while quotas are useful, they have not borne much fruit in the absence of a concerted effort from stakeholders.

Another example is Belgium, where a quota system exists for appointments to the Constitutional Court.⁹² After the expiry of a transition period, a representation of at least one-third of the least numerous group is required⁹³, which means that at least four of the twelve judges should be women. However, since the quota was introduced in 2014, there have been no more than three women sitting on the Constitutional Court at the same time.

7. DISCUSSION

7.1 Women and the Appointment Process

It has been suggested that when considering gender diversity in judiciaries, it is not just about how many women are present in judiciaries, but who the women are also matters.⁹⁴ It should be both a qualitative and quantitative exercise to distinguish between those chosen on legal capital and those selected on political capital.⁹⁵ One way of determining this is by examining the method of recruitment of judges and the relevant appointment bodies. All the responses received stated that their appointing bodies comprise various members, judges, lawyers, and officials from the Ministry of Justice. Different methods are utilised to appoint these bodies. Some jurisdictions use election from the magistracy and senate. Parliament appoints others, and others are appointed by the executive after a recommendation from Judicial High Councils.

The composition and method of appointing members of appointing bodies ensure greater independence and minimum avenues for interference. Thus, it could be concluded that it is unlikely that women are being selected for political expediency, but instead, they are being appointed on merit. Only a small number of responses detailed a greater or equal representation of women on their appointing bodies⁹⁶, yet this has not harmed efforts to increase gender diversity in the judiciary, as has been argued in some academic literature.

7.2 The Shortage of Men in Lower Courts

It is a concern that there is a lack of men in several district and administrative courts. One suggested theory is that in Civil law jurisdictions, judging is considered a deferential act, while in Common law countries, it is an act of 'power'.⁹⁷ This is because the judicial system structure allows for more authority and jurisprudential freedom in Common law countries than in Civil law countries. Hence, jurisdictions like France, The Netherlands, Slovenia, and others will have a higher percentage of women judges because the positions are less powerful

Opportunities.

⁸⁹ This applies to Germany, Albania, and Finland.

⁹⁰ There have been two Strategic Plans for Equality in the Judicial Career (2013 and 2020).

⁹¹ It has been argued that one possible reason for this is sex discrimination present in the General Board of the Judiciary Mónica García Goldar, 'The Glass Ceiling at the Highest Levels of the Spanish Judiciary', p.195-96.

⁹² The Bill was passed on April 4th, 2014.

⁹³ Arne Cools, Cédric Labens et al 'Ideological balance in US Supreme Court and Belgian Constitutional Court', <http://belconlawblog.com/2016/04/20/ideological-balance-in-us-supreme-court-and-belgian-constitutional-court/>

⁹⁴ Stéphanie Hennette Vauchez, 'More Women – But Which Women? The Rule and the Politics of Gender Balance at the European Court of Human Rights', *The European Journal of International Law*, 26.1 (2015), 195–221.

⁹⁵ *Ibid*, p.202-221

⁹⁶ France, Luxembourg, Norway, Lithuania, Portugal, and Albania.

⁹⁷ Adelaide Remiche, 'When-Judging-Is-Power', *Journal of Law and Courts*, 3.1 (2015), 95–114.

than in the United Kingdom, Malta, Ireland, and other Common law jurisdictions. The numbers of men increase in both Common and Civil Law jurisdictions as one ascends the court hierarchy, and the role becomes more powerful. Due to the absence of any responses from Common law jurisdictions, we cannot ascertain their latest judicial compositions. However, the CoE evaluation report of 2018 showed that Ireland⁹⁸, Malta, UK-England and Wales and UK-Scotland still have not experienced a feminisation of their judiciaries.⁹⁹

The remuneration for judicial work is a second possible reason for the scarcity of men in first instance courts in Civil law jurisdictions. In some jurisdictions such as Poland, lawyers in other professions earn more than judges, especially in large cities, making the judiciary less attractive to men.¹⁰⁰ The CEPEJ Evaluation Report of 2020 listed only Civil law jurisdictions in the lowest tier of average gross salaries of judges.¹⁰¹ Amongst them are jurisdictions with some of the highest representation of women judges, such as France, Belgium, Slovenia, Latvia, Hungary, and Luxembourg. The response to this study from Luxembourg also confirmed that the jurisdiction has challenges recruiting lawyers (both men and women) to join the judiciary. Low salary and benefits could be a strong justification for men to avoid the bench because of societal beliefs that men are and should be the providers.

Financial remuneration is not only a relevant concern in Civil law jurisdictions. In Ireland, senior barristers believed that cuts to judicial pay and pensions deterred highly qualified members of the profession from applying for places on the bench.¹⁰² An examination of the jurisdictions with the highest remuneration for judges showed that the top five jurisdictions were Armenia, Azerbaijan, Malta, Romania, and Northern Ireland.¹⁰³ Of these five jurisdictions, Malta and Northern Ireland are common law jurisdictions. In 2018, Malta had a 42% composition of women, while in 2019, Northern Ireland's judiciary was only comprised of 30% of women. These two cases appear to confirm the earlier view that there are fewer women in Common law jurisdictions because of the power and prestige associated with being a judge.

Conversely, despite being Civil law jurisdictions, Armenia had 25% women in its jurisdiction in 2018, while Azerbaijan had 29% in 2020. Here we see the same pattern as in Common law jurisdictions; more men are present when the job is highly remunerated. Yet, Romania is an anomaly. Like other Civil law countries mentioned earlier, it has a high composition of women—74% as of the CoE report of 2018.¹⁰⁴ Yet its position in the top five highest-paying jurisdictions contradicts the argument that where there are power and more financial gain, there are more men.

A third suggestion that correlates to the previous one is that women jurists in Civil law countries prefer the judiciary to other legal work fields. It provides the advantages of the civil service with maternal and parental leave gender-neutral remuneration and the possibility to work part-time.¹⁰⁵ The judiciary's additional appeal is that it offers a relatively elevated position even if no career steps are taken, a moderate or at least plannable workload, and little competitive pressure¹⁰⁶. This was confirmed in the questionnaire responses, where several respondents indicated that their jurisdiction allows for flexible working conditions. Denmark's answer also stated that a position as a judge is attractive for women due to a good work/balance ratio.¹⁰⁷ Thus, the presumption is that men prefer a more challenging environment. In some countries, the decrease in male appointees might be because men prefer high salary and profile positions in large international law firms.¹⁰⁸

⁹⁸ 2020 statistics for Ireland show that they were 63 women judges of a total of 167 in total. However, Ireland had women holding four of the nine Supreme Court positions and seven of the 15 Court of Appeal positions.

⁹⁹ European Commission for the Efficiency of Justice, *European Judicial Systems: Efficiency and Quality of Justice CEPEJ STUDIES No. 26, Cepej*, 2018.

¹⁰⁰ Kaja Gadowska, 'Poland: Opening the Legal Professions', in *Lawyers in 21st Century Societies: Volume 1: National Reports*, ed. by Richard L Abel and others, 1st edn (Hart Publishing, 2020), pp. 309–30.

¹⁰¹ European Commission for the Efficiency of Justice, *European Judicial Systems CEPEJ Evaluation Report: Part 1* p.67.

¹⁰² Ruadhán Mac Cormaic, 'High Court President Urges Women to Apply for Senior Judicial Posts', June 2, 2014 available at <https://www.irishtimes.com/news/crime-and-law/high-court-president-urges-women-to-apply-for-senior-judicial-posts-1.1817066>

¹⁰³ The second tier of well-paying jurisdictions includes Denmark, Ireland, England and Wales and Scotland.

¹⁰⁴ European Commission for the Efficiency of Justice, *European Judicial Systems CEPEJ Evaluation Report: Part 1* p.67.

¹⁰⁵ Wheeler Sally Galligan Yvonne, Hauptfiesch Renate, Irvine Lisa, Korolkova Katja, Natter Monika, Schultz Ulrike, 'Mapping the Representation of Women and Men in Legal Professions Across the EU', p.25

¹⁰⁶ Ibid.

¹⁰⁷ Response to the questionnaire from the District Court of Esbjerg.

¹⁰⁸ Schultz, Ulrike, 'Introduction: Gender and Judging: Overview and Synthesis' in *Gender and Judging* ed by , Ulrike Schultz and Gisela Shaw (Hart Publishing,2020).

7.3 Gender Inequality in Superior Courts

It was once believed that women would 'filter up' the court hierarchy once more and more women joined the judiciary.¹⁰⁹ Yet globally, it has been proven that is not always the case. The continued lack of women in the Courts of Appeal and Constitutional Courts indicates that women are not filtering up, or if they are, the progress is slow. An overview of member States shows that it would take several years to achieve gender parity on these courts. The presence of women in these courts is not only crucial for legitimacy but is also symbolic proof that the feminisation of lower courts is not just an attempt at tokenism. Where a promotion is based on seniority, women could still find themselves lagging because men previously dominated judicial positions. Thus, those who would undoubtedly be eligible based on seniority alone would be men. It was stressed that while seniority is the main criteria for promotion in some jurisdictions, it is not the only criteria. Hence, all other secondary criteria must be clearly known and disseminated. In the absence of this, women will not 'filter up' the judicial hierarchy.

In cases where promotion is by way of a competitive process, research has indicated that women require more encouragement than men to apply for such roles. Women tend to be excluded from the informal flows of information in the profession and tend not to use the same fulsome self-promoting language as men.¹¹⁰ Universally, the so-called confidence gap means that, unlike their male colleagues, many women often do not apply for roles unless they fulfil 100 per cent of the criteria.¹¹¹ Also, there is still a perception of incongruence between women and higher positions or leadership roles. Women are associated with communal characteristics that highlight others concerns, whereas men are viewed as possessing rationality and agentic characteristics that emphasise confidence, self-reliance, and dominance.¹¹² These beliefs then lead to gender-congruent choices, which can re-produce gendered norms that prevent women from ascending to higher positions. Thus, emphasis must be placed on examining informal qualification structures for career posts and selection mechanisms that may advantage men.

In some cases, positive action measures may be necessary to ensure that women are selected to higher courts. Gender quotas have proved to be powerful stimulants for change useful in parliaments. Furthermore, the arguments regarding quotas undermining merit do not apply because there are more than enough qualified women in the courts of first instance who could be promoted to courts of second instance, Supreme Courts and Constitutional Courts.

Transparency and proper dissemination of information regarding promotion to superior courts are critical in the judicial appointment process. Transparency in how promotion occurs will reflect honesty and a genuine desire to see more women appointed to higher courts. Updated and consistent data of applicants for judicial positions is critical if sincere efforts are made to ensure gender parity on higher courts. This data would help monitor whether women are applying or being considered for promotion to higher courts. Legislative measures and action plans are welcome and useful. Still, their impact is minimised if there is no manner of evaluating whether these measures are being implemented in respect of promotions to superior courts. An increase in gender diversity on superior courts will only ensue 'when procedures are fair and transparent when equality is formal and open, yet targeted invitations are issued'.¹¹³

8. CONCLUSION

There is no doubt that many jurisdictions are experiencing feminisation; this is especially so in lower courts. This feminisation has also resulted in a scarcity of men, resulting in concern for district and administrative

¹⁰⁹ Beverly B. Cook, 'Women Judges: A Preface to Their History', *Golden Gate University Law Review*, 14.3 (1984), 1–38.

¹¹⁰ Dermot Feenan, 'Judicial Appointments in Ireland in Comparative Perspective', *Judicial Studies Institute Journal*, 1 (2008), 37–66, p.48.

¹¹¹ Nancy. F Clark, 'Act Now To Shrink The Confidence Gap', *Forbes Magazine*, 2014, pp. 40–41.

¹¹² Crystal L Hoyt and Susan E Murphy, 'Managing to Clear the Air: Stereotype Threat, Women, and Leadership', *The Leadership Quarterly*, 27 (2016), 387–99, p.392.

¹¹³ Erika Rackley, 'Rethinking Judicial Diversity', in *Gender and Judging*, ed. by Ulrike Schultz and Gisela Shaw (Portland: Hart Publishing, 2014), pp. 501–22, p.507.

courts' legitimacy. Measures to increase the number of men in the courts of first instance are highly recommended. For example, France differentiates professional functions to allow for some possibility of male distinctiveness.¹¹⁴ In France and The Netherlands, a chance of a sideways move into higher positions in the judiciary now exists.¹¹⁵ Each jurisdiction's context will determine what strategy is most feasible and practical. In some cases, monetary incentives may be necessary to lure men to district and administrative courts. Flexible working conditions may not only benefit women, but they could provide men with an opportunity to pursue judicial work part-time while conducting other non-conflicting legal work.

The continued persistence of a glass ceiling for women in superior courts indicates that more proactive measures are necessary to increase gender diversity on Courts of Appeal and Constitutional Courts. Some jurisdictions, such as Albania and Montenegro, have gender aspirational gender equality principles regarding their Constitutional Courts.¹¹⁶ As mentioned earlier, Belgium has a quota system for the Constitutional court, though it is yet to be legally enforced to ensure that four women preside over the court. Gender parity on higher courts can be achieved using either aspirational values, soft targets, or quotas as long as there is political will. Quotas are most effective when there is strong public support for them, which provides the government with a firm ground to strengthen and promote gender quota laws.¹¹⁷ However, there are two critical elements necessary for quotas to succeed. The first is an effective monitoring system to evaluate whether the required targets are being met, and the second is sanctions for non-compliance. The former without the latter results in an environment where the status quo continues, hoping that the situation will change. Sanctions for non-compliance cannot be effective if consistent and detailed monitoring is absent. Hence, strong monitoring, evaluation, and implementation mechanisms must support positive action measures.

¹¹⁴ Wheeler Sally Galligan Yvonne, Hauptfiesch Renate, Irvine Lisa, Korolkova Katja, Natter Monika, Schultz Ulrike, 'Mapping the Representation of Women and Men in Legal Professions Across the EU', p.26.

¹¹⁵ Ibid. In The Netherlands, this has remained almost exclusively a male choice (97%), while in France the proportion of women and men opting for this route has been 40 per cent and 60 per cent, respectively.

¹¹⁶ Article 7a(4) of the organising statute of the Constitutional Court of Albania, directs the appointing bodies to guarantee a balance of professional experience as well as gender equality in the selection of judges. The statute on the Constitutional Court of Montenegro obliges the entry level nominating bodies 'to take into account the proportional representation of minorities and other minority groups, as well as gender-balanced representation' when presenting candidates for an appointment.

¹¹⁷ International Development Law Organization, *Women Delivering Justice: Contributions, Barriers, Pathways*, 2018, p.28.