

Descriptive representation of women in international courts

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Keywords: descriptive representation, gender policy, international courts, Jane Mansbridge, normative political theory

1 | INTRODUCTION

Should those who represent and govern us be similar to us? Several legal scholars have recently argued that the composition of international courts needs to better reflect the different experiences and social cleavages in society at large and called for measures to ensure increased descriptive representation. The idea is that when the composition of office holders in a governing institution does not “mirror” the distribution of certain descriptive features in the population at large, connected for example to gender, race or ethnicity, it may be justified to introduce policies to increase the presence of these features, such as fixed quotas, or requirements of having at least one person with the feature in question on a ballot or recruitment list.

Normative political theorists were for long less enthusiastic about descriptive representation, and emphasized rather the shortcomings of quota thinking and policies (see for example Pennock, 1979, but also Kymlicka, 1995; Young, 1997). However, Jane Mansbridge (1999) turned the table with her seminal article “Should Blacks represent Blacks and Women Represent Women? A Contingent ‘Yes’”. While recognizing many of the potential “costs” of descriptive representation, Mansbridge argued that descriptive representation measures may have “benefits” as well, for example in contexts where there is mistrust between groups, or disbelief in some groups’ “ability to rule”.

This article re-visits Mansbridge’s approach in light of recent discussions of women’s representation in international courts. Mansbridge develops her arguments with parliaments in mind—do her arguments hold for international courts? Are the costs she lists equally costly,

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and the benefits equally beneficial, given the different aims and functions of an international bench? And are descriptive representation measures more easily justified in some courts than in others? What is the normative relevance of the varying empirical features of courts? The article offers a comprehensive framework for assessing descriptive representation in international courts that addresses a wider range of normative concerns than previous contributions; that is “function-sensitive” in the sense of avoiding considerations of costs and benefits irrespective of institutional aim and function (Erman, 2018); and that specifies the relationship between normative assessment and factual scope conditions, linking normative theorizing on the need for “diversity” in courts to empirical research questions. It does so with a focus on the distinctive case of women’s representation at the international bench; however, with proper adaptations the proposed framework is relevant for assessments of other claims for descriptive representation as well, pertaining for example to race or ethnicity.

The first part of the article gives a brief overview of legal scholars’ discussion of the “sex on the bench” issue in the context of international judiciaries (Grossman, 2012, p. 647). We argue that this literature would profit from a more systematic treatment of the different costs and benefits of descriptive representation. For this purpose, Mansbridge’s approach provides a good starting point. In the second part, we discuss the role of the international benches. We show that several of the aims and functions of international courts bring to the fore concerns similar to those Mansbridge raised in the context of elected assemblies. Yet, a unique and primary function for the judiciary is the *adjudicative function*. The question is what this does to the calculus of descriptive representation. In the third part, we present and scrutinize Mansbridge’s approach with this in mind. Taking into account how international judiciaries have a different set of functions than parliaments, we end up with a revised assessment of both the costs and benefits of descriptive representation of women. Generally, we find that several of the costs of descriptive representation may get costlier while some of the benefits may become less significant in the international court setting. Hence, proponents of descriptive representation measures do not always have a straightforward case. Nevertheless, several potential benefits remain depending on context, and costs could be mitigated, or considered acceptable overall. A fine-grained assessment of whether measures to promote descriptive representation of women in any particular court is recommendable or needed depends moreover on a range of empirical factors. In the article’s fourth section, we list several such factors, and show how they make a difference when assessing calls for descriptive representation. The discussion draws on examples from different international courts. The final part sums up the article, notes some limitations, and outlines implications.

2 | WOMEN IN INTERNATIONAL COURTS

Descriptive representation of women in international courts has been discussed in the legal literature under headings such as “sex representativeness” (Grossman, 2012, p. 654) and “identitarian representation” (Dallara & Vauchez, 2012). Early discussions on the need for more women in international courts focused on human rights courts (for a summary, see McCauley, 1994). However, the focus was soon broadened to include international courts more generally (Charlesworth et al., 1991). A standard reference on the issue today is Nienke Grossman’s (2012) “Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?” (see also Grossman, 2011, 2016). Grossman’s argument is that the underrepresentation of women in international courts affects both the normative and sociological legitimacy of these courts. First, because the underrepresentation endangers impartiality and introduces bias insofar as

men and women judge differently (Grossman, 2012, p. 676). Second, because representativeness is an important democratic value that affects the perceived legitimacy of and trust in these courts (Grossman, 2012, p. 669). Grossman brings together legal, empirical and normative concerns in her extensive and valuable discussion. Yet, her article is symptomatic of much of the current literature in that it does not offer a systematic discussion and balancing of the various advantages in relation to the disadvantages and trade-offs that descriptive representation of women will entail for different international courts (other examples include Hale, 2001; Hunter, 2015; Tulkens, 2014, 2015).¹

There has also been a paucity of systematic empirical studies on the effects of different gender compositions and of various measures to increase women's representation in international courts.² Much of the discussion has therefore extrapolated from findings from US courts especially (Boyd, 2013; Boyd et al., 2010; Kenney, 2008), and from interviews with international female judges (Terries et al., 2007). However, more datasets with information on the role of gender in international courts are now becoming available (recently for example Shikhelman, 2017; Voeten, 2019). While results are not always conclusive, they may spark new debates about the desirable gender ratio in various judiciaries and policies that might influence it. Such debates are in need of a considered normative framework specifically adapted to this institutional context. This is what our article provides.

3 | THE FUNCTIONS OF INTERNATIONAL COURTS

The reasons for and against descriptive representation within a governing institution will depend on the purposes or functions of the institution. As we have indicated, Mansbridge (1999, p. 636) tailors her arguments primarily toward the “ruling assemblies” of “representative democracies”, and almost all her examples are taken from elected legislative bodies (Mansbridge, 1999, p. 649). This becomes manifest by the way she formulates “the primary function” of the bodies she has in mind, which is, she says, to “represent the substantive interests of the represented” (Mansbridge, 1999, p. 630). This is no doubt the central rationale of parliaments and other democratically elected assemblies, and when considering the costs and benefits of descriptive representation in such assemblies, it seems pertinent to make interest representation the key parameter. But parliaments have other additional functions; Mansbridge highlights “the representative assembly's role in constructing social meaning” conducive to the fostering of a viable political community and equal citizenship, and in ensuring “the increased empirical (or sociological or de facto) legitimacy of the polity” (Mansbridge, 1999, p. 648, 650). Hence, assessments of the reasons for and against descriptive representation measures must consider implications for these other functions as well.

However, when we move to descriptive representation in the context of international courts, the set and ranking of functions will change substantively. Most importantly, the primary function of any court is arguably not to represent citizens' interests, but to represent and apply the law. Courts are essentially *adjudicative* bodies that are first and foremost expected to conform to standards of proper judicial practice, including standards of legal reasoning, legal interpretation, and procedural fairness, and norms of judicial independence and impartiality. Accordingly, in the case of courts, the costs and benefits of descriptive representation measures for the fulfillment of this prominent adjudicative function must take central stage.

Still, like elected assemblies, courts—and international courts more so than other courts—have a range of additional but non-trivial functions that must be considered as well. For one,

judging is not a deductive mechanical form of reasoning. It unavoidably involves a degree of discretion, both in interpretation and application of the law, in weighing of legal principles, in the interpretation of the facts, and especially when filling in gaps in the law. In addition to the primary adjudicative function, courts have thus to a lesser or larger degree a *law developing* function. A central role for international courts is to clarify and elaborate legal rules, make treaty norms, and shape international law more generally (Alter, 2013; Squatrito et al., 2018). International courts are typically more involved in law development, and even law making, than domestic courts. One reason for this is that international treaties are often more incomplete than domestic laws, and thus leave more room for interpretation (Alter & Helfer, 2010). This law developing function is in many international treaty regimes also a result of the lack of an effective legislative body that can specify the legal norms further. This makes what Mansbridge refers to as substantive interest representation a relevant concern also for international courts: Just as parliaments in democracies must make sure they represent the relevant interests, so must courts, to the extent that courts not only decide on the basis of law, but also shape what the law is or should be.

Many international courts also have the specific function of *representing states*. The primary addressees of international courts are most often the state signatories of their respective treaties, not private persons or the global citizenry. Arguably, this makes these courts particularly dependent on states' cooperation and trust. An expression of this is how geographic representativeness is often included in the courts' statutes (for an overview, see Shikhelman, 2017).

International courts' special reliance on support from states, as well as from other central addressees, can be linked to characteristics of their constitutional and political surroundings. Domestic courts in representative democracies typically operate in a context with a division of power and functions between the judiciary, the legislative and the executive branches of government. As we know, the international domain lacks a similar clear-cut set-up, and international courts thus tend to take on more tasks than domestic courts. This includes the role as law developer and sometimes even law maker, but compared to domestic courts, these courts need also to take on executive responsibilities in the shape of a more pronounced *enforcement inducing* function (Alter, 2013; Shany, 2012), as the compliance and implementation mechanisms that standardly complement courts' decisions domestically are absent when we move to the international level. In other words, to induce enforcement, international courts must operate in ways that ensure the voluntary cooperation of their addressees. This becomes even more important when we bear in mind that these courts have a central *dispute settlement* function: Most international courts—from human rights courts to investment arbitration tribunals—serve as a dispute settlement mechanism for the international community. Clearly, these settlements have little value if involved parties regard the dispute settler as illegitimate. International courts then, no less than elected assemblies, need to function in a way that ensures their own *de facto* or perceived legitimacy, as well as that of the organization or regime of which they are part.

Parliaments' role in expressing key social meanings for the political community also has a parallel in international courts' *expressive* function, i.e., the expectation that these courts express or project and help fixate certain norms of justice for the international community. This function has been highlighted for human rights courts, for example the European Court of Human Rights (ECtHR), but even more so for courts such as the International Criminal Court (ICC). The primary function of the ICC is to prosecute and punish criminals, but additional stated aims are to end impunity for international crimes, create international criminal justice, correct historical records of conflicts, and to secure justice, reparations and compensations for victims (Langvatn & Squatrito, 2016).

To sum up, when we consider the advantages and disadvantages of descriptive representation of women in international courts, we cannot ignore the effects on these courts' substantive interest representation, perceived legitimacy, and expressive function. Accordingly, the functions Mansbridge elaborates for elected assemblies are also relevant and even central for international judiciaries. Yet, the primary function of such judiciaries is still adjudication, and a key question is what descriptive representation implies for this role.

4 | DESCRIPTIVE REPRESENTATION AT THE INTERNATIONAL BENCH

Mansbridge offers several reasons for and against descriptive representation (1999, see also Mansbridge, 2005). In the case of descriptive representation of women, how do these reasons hold or change, given international judiciaries' particular set of functions? We address possible costs and benefits one by one, and give attention to a potential benefit from descriptive representation of women not discussed by Mansbridge.

4.1 | Costs

The first cost addressed by Mansbridge (1999, p. 630) is that of lesser talent or *reduced competence*. It is a common criticism, she says, that representatives chosen on the basis of descriptive characteristics will be less able to perform the task of representing the citizenry's substantive interests than representatives selected for their merits. Generally, she finds this worry to be overstated. For one, critics tend to mix up "microscopic" descriptive representation, e.g., through lottery, with "selective" descriptive representation—the idea that measures should ensure an increase in the number of persons with certain descriptive characteristics among representatives, to better mirror their proportion in the constituency (Mansbridge, 1999, p. 631). Mansbridge believes microscopic representation may reduce parliaments' competence levels, since representatives that run for elections will be better trained and have higher political skills than those chosen in a random lottery. However, defenders of descriptive representation typically argue for selective representation measures. According to Mansbridge, such measures will not result in significant loss of talent or competence insofar as the descriptive characteristic in question is widely held, and the low proportion of persons with this characteristic among representatives can be explained by biased selection mechanisms (for example when stereotypes of women's "inability to rule" are allowed to affect recruitment) (Mansbridge, 1999, pp. 632–633).

Considering effects of descriptive representation of women on international courts' competence levels, microscopic representation would seem costly; judges that apply for positions in international courts will most often have more relevant training and skills than a randomly selected group of people, or even of lawyers. Yet, also in the case of courts, what one has in mind is selective descriptive representation. To be a female is moreover a widely shared criterion, whereas the existence of adverse selection mechanisms such as direct or indirect discrimination against women is likely to vary between courts. Still, even when there is evidence that male bias shapes the selection of judges, reduced competence may be a cost depending on the need for specialized training and on the availability of female candidates with adequate competences in the recruitment pool. Generally, the gendered composition of the relevant recruitment pool and the required level of special skills could vary between courts. However, overall, the

potential trade-off between competence and descriptive representation would tend to be larger in courts than in elected assemblies, since the requirements of expertise—in legal reasoning and practice—is typically higher in courts, while the availability of female candidates with adequate competences could be limited. In addition, international courts often have other selective descriptive representation criteria than sex, such as nationality or region, and as Mansbridge says, “adding any criterion (...) to a mix of criteria for selection will always dilute to some degree the impact of the other criteria of selection” (Mansbridge, 1999, p. 633).

The next potential cost on Mansbridge’s list stems from *the difficulty, or even impossibility, of representing all relevant descriptive characteristics*. Critics who state this worry typically assume that formulations of principle-based guidelines for groups that ought to be represented will inevitably be random and controversial (Mansbridge, 1999, p. 634). If women, why not “left-handers or redheads. What of Lithuanians? Italians? Jews? The uneducated?”³ Yet, as noted by Mansbridge, we are not without guidelines; however, these will vary, depending on whether we regard substantive interests as the outcome of deliberative or aggregative processes. For parliaments to represent substantive interests properly in *deliberations*, they must, Mansbridge says, include “at least one representative who can speak for every group that might provide new information, perspectives, or ongoing insights relevant to the understanding that leads to a decision” (Mansbridge, 1999, p. 634). Similarly, the idea that legitimate decisions are the outcome of the *aggregation* of conflicting interests in the constituency seems to require that all conflicting interests have their representatives. At the same time, there are cases where non-descriptive representatives will be more able and willing to represent the interests of a group than descriptive representatives,⁴ and, according to Mansbridge (1999, p. 635), non-descriptive representatives can more easily replace descriptive representatives in interest aggregation than in deliberation. Still, it will often be the case that representatives who are “existentially close” to the issue have “communicative and informational advantages” when it comes to representing interests (Mansbridge, 1999, pp. 635–636). In many cases, moreover, a single descriptive representative, or even a “critical mass” will not do, and proportionality is called for since “a variety of representatives is usually needed to represent the heterogeneous, varied inflections and internal oppositions that together constitute the complex and internally contested perspectives, opinions, and interests characteristic of any group” (Mansbridge, 1999, p. 636).

As we have argued, substantive interest representation is also among international judiciaries’ functions, and based on the above, descriptive representation of women could be justified, despite what may be of costs, particularly when it can be argued that women as a group systematically bring new perspectives and insights to the deliberations and decisions of the bench. Still, the extent to which there are systematic gender differences in judges’ approaches and adjudication is likely to vary between issue areas and courts. An additional concern, is that other group differences also matter, for example whether there are disabled judges on the bench in a court case of proclaimed discrimination against disabled, or a religiously pluralist bench in a court case concerning religious practice, and due to how selection criteria may “dilute” one another (Mansbridge, 1999, p. 633), the importance of representing women must sometimes be weighed against the importance of representing other descriptive features. The upshot is that the optimal group composition of judges may differ across courts depending on their case portfolios.

A key difference between parliaments and courts is moreover size. It is easier to include all the different relevant groups, not to mention a “heterogeneous” sample of the different groups, in large parliamentary assemblies than in a smaller group of judges. In international courts even the “critical mass” ambition could prove difficult. That several international courts have geographic descriptive representation as an initial requirement only increases this complexity.

Overall then, selection based on gender may compete with selection based on other relevant descriptive criteria, and trade-offs may become more acute in international courts than in parliaments due to the limited size of the bench, and the extent to which descriptive representation of women should take priority over the representation of other relevant descriptive features, will vary between courts. Moreover, since the primary function of international courts is adjudication, the advantages of descriptive representation as a means to improve substantive interest representation may have to be weighed against the need for high-level legal competence.

The third cost of descriptive representation mentioned by Mansbridge is that of *essentialism*, “the assumption that members of certain groups have an essential identity that all members of that group share and of which no others can partake” (Mansbridge, 1999, pp. 637–39). Essentialism makes it harder to recognize within-group conflicts and interests and is a risk for all groups that mobilize politically based on descriptive features (Mansbridge, 2005). Yet, Mansbridge argues (1999, p. 638) that essentialism can be “mitigated (...) by stressing the nonessentialist and contingent reasons” for the selection of groups, for example a particular historical situation, or when it can be shown that lack of proportional representation is due to prejudices. Once more, it is important that the representatives for the group in question are so many that they can reflect the internal variation of views.

One must be aware of the challenge of essentialism, and how essentialist thinking may distort interest representation, also in the case of international judiciary bodies. We should for example not assume that elite lawyers from Europe or the US have privileged insight in gender specific experiences and interests across cultures and classes. The courts' important expressive function could also be distorted: Rather than solidifying central justice norms, essentialism contributes to confirming limiting group stereotypes. In general, however, essentialism could be mitigated with similar strategies in courts and parliaments alike; arguments for women's quotas and similar measures need to be anchored in specific analyses of historical or institutional path-dependencies and connected to the existence of persuasive discrimination patterns. Again, it is a problem with court benches that they are relatively small, meaning that there is limited scope for capturing the potentially large variation within group categories.

The fourth potential problem with descriptive representation taken up by Mansbridge is *weaker ties of unity*. Descriptive representation may strengthen some citizens' inclination to see themselves more as members of the target group than of the political community. In the case of descriptive representation of women at the international bench, weaker ties of unity could be a challenge as well. One scenario is that judges see themselves as representing particular gendered interests in a way that reduces their loyalty to the court and the legal regime. Another scenario is that descriptive representation measures spur a perception among stakeholders that the judges have a stronger commitment to their gender than to the law.

Whether “disunity” can occur as a problem would however vary between courts and depend on the strength of unifying ties and the perceived legitimacy of the legal regime, the judges' professional commitment to legal norms and proper legal practice, and the strength of in-group ties among judges along gender lines. If the latter proves to be high, and plays an undue role, the cost will tend to be more severe in the case of courts compared to elected assemblies, as this potentially affects not only interest representation, public support, and the expression of the value of political community across cleavages as a key social meaning, but also endangers the fulfillment of the court's primary function of adjudicating impartially.

Finally, Mansbridge (1999, p. 640) mentions the risk of *reduced accountability* when the descriptive characteristics of a representative can “lull voters” into thinking, falsely, that their substantive interests are being represented. This danger of “blind loyalty” is however reduced

when there are more descriptive representatives, so that the represented can compare their performances. This potential cost may seem less relevant in the context of courts, since judges are not on election and there are thus no voters that can be “lulled”. However, since substantive interest representation is a concern also here, the “lulling” problem may still be salient, for example if women’s rights campaigners believe their complaints are addressed properly simply because more women are recruited to the benches. It can moreover be a problem for the courts’ perceived legitimacy over time if the courts’ addressees regard its decision as correct, not due the quality of legal proceedings, but because judges have particular descriptive characteristics. In addition, parliaments could typically have a range of descriptive representatives, enabling comparison of performance, whereas this is more of a challenge in the smaller crowds of judges in international courts.

4.2 | Benefits

When we turn to the benefits of descriptive representation, Mansbridge (1999, p. 641) lists first the benefit of *facilitating communication* between the represented and the representatives under conditions where “a history of dominance and subordination” has bred “inattention, even arrogance, on the part of the dominant group and distrust on the part of the subordinate group”. In such situations, the experiences of oppression that voters and descriptive representatives share will often spur both better communication and the development of more trusting relations. Moreover, the deeper the communicative chasm, the more descriptive representation is justified (Mansbridge, 1999, p. 641); the greater the potential benefits, the more bearable the costs.

Initially, it must be noted that the relationship between international court judges and the courts’ addressees does not to the same extent rely on the kind of vertical communication that the representative relationship between elected and voters is utterly dependent upon. Still, as we have argued, even if impartial adjudication is courts’ primary function, international courts are also dependent on trust among its addressees to ensure perceived legitimacy, and involved in the expression of central justice norms and in substantive interest representation. They thus need to communicate that all interests, including those of subordinated groups, are counted in. In the case of international courts, there can also be situations characterized by deep historical injustices and communicative chasms where descriptive representation contributes to building a needed trust. The extent to which courts operate in cultural contexts where patriarchal relations shape fundamentally distrustful relations between women and men, or whether other types of chasms are deeper, will however vary. Mansbridge (1999, p. 642) herself notes how communicative chasms between men and women certainly exists; yet may be smaller than chasms created by race, ethnicity, nationality or class.

Another way in which descriptive representation can be beneficial, according to Mansbridge (1999, p. 643), is in situations where involved *interests are relatively “un-crystallized”*, in the sense that the issues “have not been on the political agenda long, candidates have not taken political positions on them, and political parties are not organized around them”. Under such conditions, the safest bet is arguably to rely on representatives with descriptive characteristics that match ones’ own, assuming that people who are alike react and respond in a similar vein. Furthermore, Mansbridge (1999, p. 648) notes, being a member of an affected group will often give the representative a “certain moral force in making an argument” on these un-crystallized interests, which facilitates authority in communications among the elected, and trust among voters. Moreover,

in such situations with relatively unsettled issues, it will yet again be decisive to have a variety of voices from the descriptive category in question represented.

Also in the case of international judiciaries, the issues dealt with can be novel and have a short history on the public agenda making involved interests relatively un-crystallized, in the sense outlined by Mansbridge. If so, descriptive representation can be overall advantageous for the substantive interest representation such courts are involved in, and bolster trust among addressees. Nevertheless, descriptive representation will always have costs that must be mitigated as far as possible to achieve an optimal calculus. First of all, the international bench's primary adjudicative function must be adequately ensured. It can also prove difficult to have a multitude of point of views from the descriptive category present among a court's limited group of judges.

Thirdly, descriptive representation may be beneficial in contexts where members of particular social groups historically have been *considered unable to rule* (for example been denied the right to vote), and where membership in these groups still signals, more or less subtly, a lack of, or limited, ruling abilities. In such contexts, it is easy to infer from the fact that persons in these groups "do not rule" or "rule less", to a confirmation of the view that they are not fit to rule (Mansbridge, 1999, p. 649). To counter this, it is paramount to create "new" and more inclusive "social meanings" of who are "first-class" citizens and fit to rule (Mansbridge, 1999, p. 650). Here descriptive representation can be a central facilitator that brings people from major societal groups more proportionally into government and shows their de facto ability to rule. However, Mansbridge (1999, p. 650) stresses how this should be considered "a historically specific and contextual dynamic": It is not enough to establish general patterns of historical injustice; the injustice must have ongoing non-trivial effects on understandings of citizenship and ruling abilities. In addition, it must be made plausible that descriptive representation, despite potential costs, is preferable to other ways of intervening in the societal production of meanings.

Such precautions need to be taken also when we move to the context of international courts. Even if the historical legacy of the oppression of women is overall strong, and it is likely that descriptive representation will contribute to strengthen ideas of women's equal abilities to rule, this does not automatically justify descriptive representation in a particular court at a particular time, if costs are large, and societal views of women are already transforming progressively. Moreover, female international judges will typically be less visible to the public than, for example, female parliamentarians, and this may limit the descriptive representation's effect on the broader production of social meanings in society. Still, descriptive representation of women to international courts can have significant effects on recruiters and the recruitment pool: Female lawyers can more easily come to see themselves as "able to judge", and those who assess them for court positions will already have examples around that visibly falsify the idea that women are not fit to be judges. Consequently, descriptive representation as a facilitator of "new social meanings" can be sensible, not only in light of courts' responsibilities to express central justice norms—here: that both women and men can rule, but also because an adequate fulfillment of the adjudicative function requires that recruitment takes place largely on the basis of merit.

Finally, descriptive representation could be beneficial when governing bodies *suffer from particular expertise deficits*, and those from groups with particular descriptive characteristics are more likely to have (or have the ability to cultivate) the competence and skills relevant to reduce the deficits. This potential benefit—that we add to Mansbridge's list—follows from the argument outlined previously about how people that are alike are more likely to respond alike in situations with un-crystallized interests. In the context of international courts, female judges may have scarce and valuable competence in situations where issues have yet to be properly conceptualized and interpreted in legal terms in ways that consider women's interests on par with men's.

Descriptive representation of women could be advantageous then, not only for these courts' role in interest representation and for their other secondary functions, but also because it advances the impartial and correct understanding and use of the law.⁵ Still, yet again, this gain will vary with courts' case portfolio—how central are gender perspectives likely to be?—and needs to be seen in context of the potential costs of descriptive representation.

4.3 | A re-revised calculus

In summary, when we move from Mansbridge's context of elected assemblies to our case of descriptive representation of women in international judicial bodies, we find, first, that all the problems and benefits which Mansbridge lists are still relevant to consider. This is so in part because parliaments and courts have overlapping functions when it comes to interest representation, norm expression and cultivation of trust, and in part because descriptive representation also affects the courts' primary function of ensuring decisions in accordance with proper legal practice. Another general finding is that several of the costs of descriptive representation may be more costly in the context of international courts, insofar as there is a trade-off between the adjudicative function and concerns for descriptive representation, and because courts are smaller assemblies than the elected bodies Mansbridge typically has in mind. These factors may complicate the mitigation of costs. Furthermore, even if there are contexts where descriptive representation of women can have advantages, several of the identified benefits connect with international courts' secondary functions. This does not imply that descriptive representation in international courts is indefensible and generally non-recommendable. However, it is a reminder that proponents cannot always consider their case obvious or easy.

Nevertheless, in our discussions we have also highlighted how some problems, such as the pitfalls of essentialist thinking, seems to have comparable significance when we move from the parliamentary setting to that of the international bench. The worry that the represented could be lulled into believing that their concerns are taken care of by representatives' descriptive characteristics refers primarily to an obstacle for proper interest representation, and so for one of courts' significant, but secondary functions. Importantly, from the perspective of international courts' central task of adjudication, one of the benefits of descriptive representation of women mentioned by Mansbridge becomes more salient: Given how stereotypes of women may hamper merit-based assessments of female recruits, the creation of new and more inclusive understandings of who are able and fit to rule, can be central to ensure recruitment of judges with the highest legal competence. There is furthermore the additional benefit, not taken up by Mansbridge, that adjudication in issue areas where gender perspectives are central may be better served, if courts include female judges more likely to possess or develop the expertise required to advance judicial categories and arguments in adequate directions.

Finally, the most crucial lesson from the above discussion is how a detailed assessment of the costs and benefits of descriptive representation of women connects with empirical dimensions or variables. In the section that follows, we elaborate on some central empirical indicators. The list of indicators is non-exhaustive, but all are derived from this section's considerations, and show how descriptive representation of women in different international courts can be more or less defensible depending on the courts' scores on these indicators. Still, what we present is not anything close to a final assessment of whether descriptive representation of women is justified in any of the mentioned courts. The point is to explicate some key variables and show how they matter for such assessments.

5 | DESCRIPTIVE REPRESENTATION OF WOMEN IN INTERNATIONAL COURTS? SOME CENTRAL INDICATORS

A first indicator to consider is that of *the required legal or other expertise*: Descriptive representation of women may—or may not—reduce a court’s competence levels, depending on the exclusiveness of the expert knowledge and experiences needed among judges for the court to function adequately. Most international courts have fairly general and non-specific criteria for office. The criteria for office for judges at the ECtHR for example says that judges “shall be of high moral character” and that they “must either possess the qualification required for appointment to high judicial office or be juriconsults of recognized competence”.⁶ Many lawyers, both male and female, would obviously qualify according to these criteria.

However, other courts require qualifications and experiences of a more specific kind. The World Trade Organization’s Appellate Body has a formal specification of expertise—it “shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally”⁷—while the ICC has an even more specified requirement for office: Candidates must have “established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings”, or “have established competence in relevant areas (...) such as international humanitarian law and the law of human rights”, and “extensive experience in a professional legal capacity (...)”.⁸ These courts exemplify international judicial bodies where the needed expertise and merits are more exclusive, and where there is *prima facie* reason to believe that fewer lawyers will qualify as judges. This is not to rule out that representation based on gender or other descriptive characteristics can be beneficial overall, but strict requirements of expertise increase the probability of a trade-off between competence and representative concerns.

However, *the size of the recruitment pool* must also be taken into consideration. A court’s proper fulfilment of its primary adjudicative function is more likely to suffer from descriptive representation measures if there are few competent candidates available with the relevant descriptive characteristics, and the pool of eligible shrinks if the threshold of required expertise is high. Yet, a limited recruitment pool can be a problem even for courts where the competence criteria are rather general. In 2004, The Council of Europe’s parliamentary assembly (PACE) adopted a resolution that established a new rule requiring at least one woman on the list that each member state should present for the post of judge at the ECtHR. Opponents against the resolution in the Council of Europe argued that “the criterion of gender (...) could play out to the detriment of the other criteria (for being a judge)” (Vauchez, 2015). Malta presented all-male lists in both 2004 and 2006, claiming that there were *no* sufficiently qualified female candidates available. The result was a watering down of the rule in an amendment to the resolution, and it now allows for states to derogate from the gender composition requirement in “exceptional circumstances”, for example if no qualified women have applied for the position.

When the recruitment pool is large, however, it is unlikely that descriptive representation of women has any negative effects on competence levels. Moreover, there has been a tendency to overstate recruitment challenges as an explanation for uneven sex ratios (Grossman, 2016, pp. 84–87). Even in cases where the criteria for office require high levels of specialized expertise, the pool of qualified women is often considerable. International investment arbitration is illustrative. Only between 3% and 7% of arbitrators appointed at the International Centre for Settlement of Investment Disputes are women (Grossman, 2016, p. 82 fn 1, citing Franck, 2007 and Greenwood & Baker, 2012), and a common view is that the low proportion of female

arbitrators stems from a lack of qualified women. However, a recent study estimates that 1/3 of the eligible pool are in fact female (Langford et al., 2017). Given such numbers, there is little reason to fear a trade-off between descriptive representation of women and a proper fulfillment of the adjudicative function, even in a court with quite narrow and demanding expertise requirements.

However, a third indicator, *the size of the bench*, must also be considered. As our discussion has brought to the fore, there are several reasons for why the low number of judges may make several of the costs of descriptive representation more costly in courts than in larger elected assemblies. When only few people are supposed to represent the internal variation of the descriptive category in question, it is harder to avoid that some descriptive features are privileged over others in a way that seem unjustified, more difficult to mitigate essentialism, and the risk of reduced accountability also increases. The potential benefits of descriptive representation in contexts of un-crystallized interests also depend on a plurality of views from the target group being present. However, the number of seats varies among courts as well. The International Court of Justice, for example, has only 15 judges. This makes the scope of ensuring variation of whatever sort inevitably limited. Similarly, the WTO Appellate Body is normally a 7-seat bench. Here there has never been more than two women on the bench simultaneously, and the four women who have been Appellate Body members represent only two states: two from China, and two from the US.⁹ Other courts are larger. The Court of Justice of the European Union (CJEU), for example, has 28 judges, but hears cases in panels of 3, 5, or 15 judges. The ECtHR currently has 47 judges, while cases are heard in chambers with 7 judges or in a Grand Chamber with 17.

Another challenge for ensuring variation both between and within descriptive categories in courts like the ECtHR and the CJEU is that they have full geographic representation, so that the number of judges is equal to or proportional to the number of member states. In addition, a large number of international courts have a fixed number of seats, where each member state nominates a judge, but is not guaranteed to have a sitting judge. Typically, a member state will nominate a judge who incorporates several of the characteristics and qualifications they see as desirable. This can limit the overall share of women on the court. Another implication may be limited variation among the female judges that are recruited.

Not only the size of the bench per se matters then, but also *the appointment and selection procedures*, and how well the selected judges, however few, tap *the relevant diversity*: Descriptive representation of women can be more or less viable depending on selection procedures, and on whether other diversities are just as relevant, or even more relevant, for a proper functioning of the court. For example, out of 18 ICC judges 6 are currently women. These come from different continents, legal traditions, and legal specializations, and vary also in age and background experience, some with experience from private law, others from the UN system, or the NGO sector.¹⁰ Whether such a mix or other mixes of judges on the bench are overall adequate, or if descriptive concerns pertaining to gender should be given more weight, must be considered in relation to the way the composition fits with the focus and tasks of the specific court, an in relation to the court's appointment and selection rules that can be more or less amendable.

Another set of indicators that our discussion has identified as important for considerations about descriptive representation of women, refers to *features of the court's case portfolio*. Here, there are at least two issues to consider. First, it can be a pro-argument if women and men "approach differently law, facts, or any part of the task of judicial decision making" (Grossman, 2016, p. 656). Yet, gender differences in judging are known to vary between issue areas and will therefore vary between courts depending on their more specific portfolio. Second, courts can take up novel issues where interests are potentially largely gendered but still relatively un-crystallized, or

they can deal with a type of cases where interests are more established and well-known. There is a stronger argument to be made for descriptive representation of women in the first kind of cases.

As for gender differences in approach to judging, an often-confirmed tendency is that they play out primarily when a court deals with traditional women's issues like sexual discrimination and sexual harassment, rape and domestic violence (for example Otto, 2016), even if findings even in these areas are mixed, and the differences found are sometimes small (Boyd, 2013; St. John et al., 2018). Yet, some studies have also found female judges to be more punitive than males in criminal cases (Fox & Van Sickle, 2000; Steffensmeire & Herbert, 1999), and recent and ongoing large-scale studies from some courts indicate that gender differences in judging can be larger than previously concluded. A fresh study of the ECtHR shows not only that female judges are more favorably disposed "towards discrimination cases filed by women", but also "towards male and female applicants who allege physical integrity rights violations, such as torture" (Voeten, 2019). Considering what findings so far show about gendered differences, it would seem then that descriptive representation of women could more easily be justified in courts that deal with gendered matters such as sexual violence and discrimination, but maybe also other human rights violations. This could be international criminal tribunals and human rights courts, but also courts that have had a range of cases of gender discrimination on their table, such as the CJEU. Courts such as The Tribunal of the Law of the Sea (ITLOS), on the other hand, would tend to have a portfolio where gender differences in judging seem to play less of a role (given what we know so far).

As for courts that enter new territories where relevant concerns and interests may be gendered, but in ways that are still to be established, the ECtHR and other human rights courts that deal with new areas of biotechnology may illustrate. Developments in biotechnology have previously raised a range of questions with gendered implications, and it is likely that new issues related to stem cell technology, gene editing, and the like, could come to touch upon questions that male and female judges might approach differently. However, it cannot be ruled out that gendered implications would prove to be significant when new cases come up in a wider range of areas, for example in international environmental or trade law. When interests are yet to be crystallized this is exactly hard to predict (see also Charlesworth & Chinkin, 2000). This could be an argument for descriptive representation of women and other relevant groups in a broad set of courts, depending on the larger calculus of reasons.

An additional set of indicators concern *the extent of unjust or unfair treatment of women*. Once more, two relatively independent issues are involved. First, historical injustices, for example that women over centuries were denied basic rights, have influenced generally how societies and institutions work, and shaped ideas of citizenship. In contexts where patriarchal cultural stereotypes are persuasive, descriptive representation in courts and other governmental institutions can contribute to the production of more progressive social meanings and justice norms. Secondly, there can be direct or indirect discrimination against women in recruitment to courts that may pervert courts' proper functioning, including an adequate fulfillment of the primary adjudicative function. As indicated, promoting descriptive representation of women can be a way to compensate for this.

It follows from the first argument that the case for descriptive representation of women is stronger in international courts that include member states where institutions and norms remain gender hierarchical. In fact, since most courts include at least some state signatories with poor gender equality records, this indicator rules out very few courts. Whether or not descriptive representation of women is to be recommended in the broad set of courts where patriarchal historical legacies play a significant role in some or more member states, will depend on the overall calculus.

As for the argument about unfair treatment of women, there is a tendency in the scholarly literature to regard the presence of female judges as a “signal” of equality of opportunity for women, and so to consider uneven sex ratios as a sign of unequal chances for women and men (Hunter, 2015; see also Phillips, 2004). However, the gendered composition of international courts is typically a result of a range of different factors (the recruitment pool given eligibility criteria and case portfolio, selection procedures, etc.), where direct or indirect discrimination against women may play a larger or more limited role. Obviously, courts that are dominated by male judges will be regarded as not fulfilling their expressive function among segments of the addressees that see balanced sex ratios as a proxy for equal opportunities. Yet, closer empirical investigation is needed to identify the extent to which a disproportionate presence of female judges will hamper any particular court’s ability to perform its functions of impartial adjudication and representation of interests.

Finally, our discussion has also highlighted *the perceived legitimacy*, or the trust in and public support of the legal regime, as a relevant variable to be included in the calculus of whether or not promoting descriptive representation of women is advisable in any given court at a historical moment. Sometimes measures to increase descriptive representation of women may contribute to reducing the perceived legitimacy of the court; several of the listed costs of descriptive representation are costly in part because they put public support at risk. At the same time, measures to increase descriptive representation of women can also *increase* perceived legitimacy in situations where patriarchal values have been allowed to hollow out trust and create communicative deficits, and among addressees where balanced sex ratios signal equal opportunities. General considerations are thus hard to make, and the issue must be approached court by court. A first crucial step would be to identify the level of public support for a legal regime. For example, in the case of the CJEU and the ECtHR there are Eurobarometer data of the level of trust in EU and its various institutions, including both national and European level courts. A second step would be to investigate how descriptive representation policies or other policies affect trust in European courts in different countries and different population segments. Thirdly, effects on perceived legitimacy, as far as these can be identified, must be assessed in light of a more extensive calculus. Obviously, even if it can be shown that measures to increase descriptive representation of women in international courts is controversial among some groups of citizens and may increase short-term opposition toward a legal regime, this should not necessarily trump other important normative concern and arguments in favor of descriptive representation.

6 | CONCLUSION, LIMITATIONS AND IMPLICATIONS

This article has argued that ongoing exchanges on the need for more descriptive representation of women at the international bench, however valuable, would profit from a more systematic treatment of the different and specific costs and benefits of descriptive representation in a court context. Based on an outline of international courts’ distinct set of functions, the article took as its point of departure the calculus of descriptive representation developed by Jane Mansbridge in the context of elected assemblies and adapted it to the international bench setting. Moving from parliaments to international courts, we found that several costs of descriptive representation measures may get costlier while some of the gains may become less significant. We related this re-assessment to the smallness of court benches compared to larger elected assemblies, but also to the different functions of parliaments and courts: Whereas courts’ main function is adjudication, other functions such as interest representation are secondary, but non-trivial. Still, several substantive potential benefits apply equally well in both contexts, and costs could be

mitigated, or considered acceptable overall. Moreover, a range of empirical factors, such as a court's expertise requirements, features of recruitment, the size of the bench, selection system, the court's issue areas, and perceived legitimacy, can affect the normative assessment of introducing measures to promote increased descriptive representation of women in a given court at a given historical moment.

Our discussion has some limitations. First, this article offers a framework for discussing costs and benefits of descriptive representation of women in the context of international courts, but does not conclude on whether any particular court should be taking descriptive representation measures.

Secondly, we have touched upon, but set largely aside, the question of when (and why) proportional descriptive representation may be preferable to a "critical mass", and vice versa (for a fuller discussion, see Childs & Crook, 2008). We have also sidestepped the question of whether some measures of descriptive representation are to be preferred above others.¹¹ Similarly, the article has had to leave aside important discussions of how to address the factors that tend to increase the costs of descriptive representation in international courts, such as limited recruitment pools (which policies can effectively increase the amount of eligible female candidates, and who are responsible for promoting and implementing such policies?).

Finally, we have revised and adapted Mansbridge's approach, but sidestepped some potential criticisms. For one thing, even if descriptive representation of women has benefits, there may be policy alternatives that are equally or more beneficial and with fewer costs. For example, even if it is the case that descriptive representation measures improve on substantive interest representation in courts and parliaments alike, other measures may be more effective.¹² Relying on Mansbridge's scheme as our main angle, we have also had to leave aside some deeper philosophical questions. For example, we focus in this article on the different instrumental arguments that could be mobilized in discussions of descriptive representation. We set thus aside the question of whether there are reasons to regard proportional distributions of positions in governing institutions as normatively desirable as such.

This article offers then an approach to be developed, and yet, some crucial groundwork that we believe adds significantly to ongoing normative discussions of women's representation in international courts. Our way of going about has moreover a couple of important general implications. First, our approach highlights the necessity of closer cooperation between normative theorists and empirically oriented scholars in the study of international courts. While systematic normative arguments can provide direction and significance to empirical studies of the bench, normative assessments of the composition of judges in different courts depends on a range of empirical features. Secondly, and more specifically, there is, we believe, a fortunate match between the new data availability in the study of international courts and some of the empirical dimensions that are key to the normative debate on descriptive representation of women. New data on features of recruitment and selection of judges, and of judges' decisions in different courts and issue areas are now becoming available and researchable. Analyses of these data will make the scholarly community better equipped to assess the normative implications of sex ratios and to contribute on a more informed basis to policy discussions.

ACKNOWLEDGEMENT

We are grateful for the thorough and insightful comments to an earlier version of this paper from Kristen Hessler, Andreas Føllesdal and an anonymous reviewer, and valuable input from the

participants at the panel “Applications of Global Public Reason” at the ECPR General Conference in 2019 in Wrocław, and at the GOODPOL kick-off workshop in Oslo in 2020, in particular Johan Christensen, Sebastian Conte, Jakob Elster, Eli Feiring, Torbjørn Gundersen, Eilev Hegstad, Robert Huseby, Thea Isaksen, Jon Christian Nordrum, Kasper Lippert-Rasmussen, and Mari Teigen.

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ENDNOTES

- ¹ Grossman does discuss some potential problems, such as the dangers of “limited pool” and essentialism. On the latter, see also Kenney (2008).
- ² There are exceptions, such as King and Greening (2007).
- ³ In this passage, Mansbridge (1999, p. 634) quotes a critic.
- ⁴ If so, this is “a major argument against descriptive representation” (Mansbridge, 1999, p. 630).
- ⁵ Similar arguments have been made by standpoint theorists in relation to science: To increase women’s presence in science is important, not primarily because it advances women’s “interests”, but because it improves on the “objectivity” and “quality” of science, as women may be more inclined to cultivate certain kinds of needed expertise (Crasnow, 2014).
- ⁶ European Convention on Human Rights, Article 21, Criteria for Office.
- ⁷ https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm#17.
- ⁸ The Rome Statutes art 36 (3b).
- ⁹ https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm#top.
- ¹⁰ <https://www.icc-cpi.int/about/judicial-divisions/biographies/Pages/current-judges.aspx>.
- ¹¹ Mansbridge’s (1999, pp. 652–653) argues for measures that are “fluid, dynamic, and easily subject to change”, and prefers generally “enabling devices” that facilitate recruitment of members of disproportionately represented groups, for example targeted training programs or scholarships, to measures such as fixed quotas.
- ¹² See for example Wägerud’s (2009) discussion of whether “state feminist apparatuses” ensure women’s substantive interests better than quota policies. A discussion along similar lines in the context of international courts would be to compare the effects of descriptive representation of women among judges with the effects of strengthening the gender expertise of courts’ secretariats and judges’ legal advisors.

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How to cite this article: Holst, C., & Langvatn, S. A. (2021). Descriptive representation of women in international courts. *Journal of Social Philosophy*, 00, 1–18. <https://doi.org/10.1111/josp.12445>