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# Afro-Descendant Representation On Latin American Courts

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**To my mom, who taught me courage.**

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## I. The research project: Making Latin American courts' racial homogeneity visible

### 1. Introduction and contribution of the project

We live in an increasingly diverse world. At the turn of the 21st century, over 5,000 ethnic groups made a presence in over 180 independent states.[1] Some countries have tried to respond to the challenge of diverse populations by enacting laws and public policies to accommodate minorities and unprivileged majorities into political institutions.[2] However, socio-political conflict and exclusion continue to be significant threats to subordinated groups and democracies around the world.[3]

Like most countries in Latin America, Colombia is a highly diverse country in ethno-racial terms. According to Daniel Bonilla, by 2006, there were approximately 1 million indigenous persons (who belonged to 82 different peoples and spoke approximately 64 different languages) and 4.5 million Afro-descendants in the country. Unlike the indigenous peoples, Afro Colombians are—for the most part—assimilated into the majoritarian culture of the country, with the notorious exceptions of the *Palenquero* people of San Basilio, some black communities living on the Pacific basin of the country, and the *Raizal* people of the Archipelago of San Andrés, Providencia and Santa Catalina, who still preserve their cultural distinctiveness.[4]

Perhaps one of the most apparent manifestations of Afro-descendants' exclusion in Latin America is their limited presence in power positions in different areas, including public posts.[5] Afro-descendants are

[1] DANIEL BONILLA MALDONADO, LA CONSTITUCIÓN MULTICULTURAL 19 (2006).
[2] MALA HTUN, INCLUSION WITHOUT REPRESENTATION IN LATIN AMERICA: GENDER QUOTAS AND ETHNIC RESERVATIONS 2 (2016). (Noting that, by 2016, approximately 78 countries had created gender or ethnic quotas and reservations).
[3] Donna Lee Van Cott, *Building inclusive democracies: Indigenous peoples and ethnic minorities in Latin America*, 12 DEMOCRATIZATION 820–837, 821–822 (2005).
[4] BONILLA MALDONADO, *supra* note 1 at 26–27.
[5] LA SITUACIÓN DE LAS PERSONAS AFRODESCENDIENTES EN LAS AMÉRICAS, 90 22–23 (2011), http://www.acnur.org/fileadmin/Documentos/BDL/2012/8311.pdf (last visited Sep 23, 2018).

significantly excluded from political positions and high-ranking governmental offices.[6] The World Bank has warned that Afro-descendants absence from most positions of power in the region seems to be related to the significant obstacles and barriers they face at exercising their human rights.[7] As an example, Mala Htun exposes the magnitude of the problem of Afro-descendant underrepresentation in the region's legislatures by stating:

> The degree of Afro descendant underrepresentation is pronounced in Brazil (51 percent of society, compared to some 20 percent of the lower house of Congress), Colombia (11 percent of society; 5% of the lower house), and Costa Rica (8 percent of population, no deputy). In Ecuador and Perú, by contrast, Afrodescendants were close to proportionally represented in 2014, and in Perú all three Afro descendant legislators were women."[8]

The difficulties in attaining proportional representation in public institutions are even more significant for black women, who face more limited access to public offices than other women and black men.[9] By 2016, black women occupied only 0.03% of parliamentary seats in Latin America; far less than their percentage in the region's general population.[10]

The virtual absence of Afro-descendants in public institutions also means that they are excluded from the possibility of having their voices heard in the decision-making process on issues of public concern. In particular, they are excluded from participating as decision-makers in the design, public deliberation, and implementation of laws, public policies, and other official instruments that could impact their communities. As Álvaro Bello and Martha Rangel suggest, limited access to political participation and

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[6] Álvaro Bello & Marta Rangel, *Equity and exclusion in Latin America and the Caribbean: the case of Indigenous and Afro-descendant peoples*, CEPAL REV. 39–53, 47–48 (2002). (noting that one of the most striking illustrations of the situation of marginalization that Afro-descendants and indigenous peoples face in Latin America is their extremely-limited political representation and participation).
[7] 3/27/20 4:41:00 PM
[8] HTUN, *supra* note 2 at 30–31.
[9] LA SITUACIÓN DE LAS PERSONAS AFRODESCENDIENTES EN LAS AMÉRICAS, *supra* note 5 at 25–26.
[10] *Id.* at 26.

representation also means that Afro-descendants are trapped in a cycle of constant disadvantage, as political leverage is fundamental for improving a disadvantaged group's position in society.[11]

Although there is some data about Afro-descendants' exclusion from public institutions in the region, we know little about the level of representation of this group on courts. This limited knowledge is closely related to the lack of sufficient research on the issue of Latin American courts in general and judicial politics in particular. As Diana Kapiszewski & Matthew Taylor explain, it is only until recently that Latin American scholars decided to prioritize the study of courts.[12] Most political science researchers have focused their attention on more traditional political institutions, such as legislative bodies and the executive branch. The existing literature on Latin American courts centers around issues such as the judicial reform efforts of the 1980s and 1990s, transitional justice mechanisms in the post-authoritarian regimes in the region, courts' contributions to social justice, and specific issues related to judicial politics.[13]

Kapiszewski & Taylor sustain that there are three primary areas of interest for researchers in this last field: a) The relationship between courts and elected branches of government; b) the impacts that courts have on public policy processes and outcomes; and c) descriptive and taxonomic analysis of courts and legal institutions.[14] Regarding the study of judges and magistrates in the region, they notice that: "For the most part, we know little about the backgrounds, ideologies, or preferences of the region's judges and justices, and have barely begun to explore the politization of the region's judiciaries or the implications of that dynamic for those who populate Latin American courts."[15]

In Colombia, the Justice Studies Center of the Americas—CEJA—has pointed out that there is no systematic information regarding the number of Afro-descendants working for the judiciary, and that it is expectable that many Colombians would deem the gathering such figures as a potential act of racial

[11] Álvaro Bello & Marta Rangel, *Equity and exclusion in Latin America and the Caribbean: the case of Indigenous and Afro-descendant peoples*, CEPAL REV. 39–53 (2002).
[12] Diana Kapiszewski & Matthew M. Taylor, *Doing Courts Justice? Studying Judicial Politics in Latin America*, 6 PERSPECT. POLIT. 741–767, 741 (2008).
[13] *Id.* at 741–742.
[14] *Id.* at 753.
[15] *Id.* at 754.

discrimination.[16] However, the CEJA has also observed that public officials' accounts largely converge in that black Colombians are absent from relevant public positions in the judiciary and other branches of government.[17]

Brazil is, perhaps, the main exception to the lack of information regarding the ethno-racial composition of judicial institutions in Latin America. Anani Dzidzienyo asserts that, by 2003, time at which Joaquim Barbosa (a black prosecutor and law professor who had been vocal at denouncing racial injustice in Brazil) was appointed to the Supreme Federal Tribunal of his country, there were only 12 black judges among the approximately 800 federal judges and six black prosecutors among 600 federal prosecutors in Brazil.[18]

Given the lack of primary data in Latin America and other regions of the world, existing literature on minority representation on judicial bodies has been predominantly focused on the United States of America and, to a less extent, Europe and Israel.[19] This void in the literature is the one that this dissertation begins to close. By using Colombia as a case study (for reasons that I will detail in section 3 of this chapter),

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[16] FELIPE GONZÁLEZ MORALES & JORGE CONTESSE SINGH, *The Judicial System and Racism Against People of African Descent: The Cases of Brazil, Colombia, The Dominican Republic and Peru* 74 35–36 (2004), http://biblioteca.cejamericas.org/bitstream/handle/2015/3568/raz-sistema-judicial-racismo-ing.pdf?sequence=1&isAllowed=y (last visited Oct 2, 2018).

[17] *Id.* at 35–36. ("On the other side of the system, no record exists of the number of people of African descent working within the justice administration system. Some observers believe that this is due to the belief that such cataloging would itself constitute or at least contribute to racial discrimination. It is worth pointing out that during the preparatory visit for this report, the Colombian Public Defense office, aware of the need to provide such statistical information, drafted letter to be sent to all judicial, legislative and administrative state agencies requesting information on the number of Afro-Colombians working in each institution. All those interviewed agreed that there are no black people in posts of relative importance, either in the justice administration system or within any other state body.")

[18] Anani Dzidzienyo, *The Changing World of Brazilian Race Relations?*, *in* NEITHER ENEMIES NOR FRIENDS: LATINOS, BLACKS, AFRO-LATINOS 137–156, 141–142 (Anani Dzidzienyo & Suzanne Oboler eds., 2005).

[19] Barbara L. Graham, *Toward An Understanding Of Judicial Diversity In American Courts*, 10 MICH. J. RACE LAW 153–181 (2004); Jonathan K. Stubbs, *Demographic History of Federal Judicial Appointments by Sex and Race*, 26 BERKELEY RAZA LAW J. 92–128 (2016); Elaine Martin, *Gender and Judicial Selection: A Comparison of the Reagan and Carter Administration*, 71 JUDICATURE 136–142 (1987); Elliot E. Slotnick, *The Paths to the Federal Bench: Gender, Race and Judicial Recruitment Variation*, 67 JUDICATURE 371–388 (1984); Sheldon Goldman, *Should There Be Affirmative Action for the Judiciary?*, 62 JUDICATURE 488–494 (1979); Carl Tobias, *Diversity and the Federal Bench*, 87 WASH. UNIV. LAW REV. 1197–1212 (2010); Theresa M. Beiner, *What Will Diversity on the Bench Mean for Justice*, 6 MICH J GEND. L 113–152 (1999); Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches*, 85 JUDICATURE 84–92 (2001); Gregory L. Acquaviva & John D. Castiglione, *Judicial Diversity On State Supreme Courts*, 39 SETON HALL LAW REV. 1203–1251 (2009); Greg Goelzhauser, *Diversifying State Supreme Courts*, 45 LAW SOC. REV. 761–781 (2011).

my dissertation intends to expose the ethno-racial homogeneity of Latin American courts as a problem affecting Afro-descendants and judicial systems in the region, and to uncover its connection to formal and informal rules governing the composition and functioning of Latin American courts.

This dissertation is a study of Afro descendant representation on Colombia's courts. Following the work of Oliver Barbary and Fernando Urrea, by Afro-descendants, I mean "the descendants of former African enslaved persons, across generations and processes of *mestizaje*, and regardless of the level of individual or collective identity that these populations may have."[20] Similarly, following Hannah Pitkin's conceptual work, by representation, I mean descriptive representation. From this perspective, "representing is not acting with authority, or acting before being held to account, or any kind of acting at all. Rather, it depends on the representative's characteristics on what he is or is like, of being something rather than doing something."[21] In this sense, unless otherwise indicated, when I use the word representation, I refer to the inclusion or physical presence of members of a group within an institution.

The study I offer differs from previous literature in its approach to the problem of minority underrepresentation in judicial bodies. I analyze this issue based on empirical evidence collected mostly through the use of qualitative instruments. This analysis diverges from studies that have framed the issue of minority presence in public institutions purely from a normative perspective, or that have focused on regions of the Global North.

My particular interest in the courts derives from the fact that, in many Latin American countries, judicial bodies have proven to be final decision-makers on issues concerning the rights of minorities and other excluded groups.[22] Courts' power to interpret the law with authority engenders a prerogative to establish the meaning and defining the scopes of rights, including minority rights. Moreover, in modern democracies, courts may play a role in curbing governmental arbitrariness and might also function as a

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[20] Oliver Barbary & Fernando Urrea Giraldo, *Introducción*, *in* GENTE NEGRA EN COLOMBIA: DINÁMICAS SOCIOPOLÍTICAS EN CALI Y EL PACÍFICO 21–68, 52 (Olivier Barbary & Fernando Urrea Giraldo eds., 2004), http://www.humanas.unal.edu.co/colantropos/files/3714/8564/0886/Gente_Negra.pdf (last visited Dec 19, 2018).
[21] HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 61 (1967).
[22] Gretchen Helmke & Julio Rios-Figueroa, *Introduction*, *in* COURTS IN LATIN AMERICA 1–26 (Gretchen Helmke & Julio Rios-Figueroa eds., 2011).

counterweight to the majority rule in legislative bodies.[23] Therefore, adequate functioning of courts is particularly crucial for minorities, who endure significant restrictions in their possibility to access power in government or to obtain sufficient assurances in legislative bodies.[24]

A particular challenge for my research project stems from the taboo around race in Latin America. In this region, discussions about race discrimination are commonly avoided, and race is not a word usually heard in casual conversations among people.[25] This does not mean that racial discrimination is not present in Latin American societies. To the contrary, racial discrimination and inequality, as previous studies have shown, are widespread across Latin America.[26] Nevertheless, until recently, official and social accounts of Latin American societies described them as virtually free of racial discrimination.[27] The main reason for this refusal to acknowledge racial tensions is the myth of *mestizaje*: The idea that the process of miscegenation that initiated during the Iberic colonization erased distinctions among European colonizers, indigenous peoples and Africans brought to the Americas in condition of slavery, leading to the creation of a *mestizo* identity that is distinct from—but inclusive of—all previous ethno-racial identities.[28] Since many people believe that the populations of Latin American countries are the result of the *mestizaje*, some say that the region cannot have a severe problem of race discrimination as it is impossible to distinguish

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[23] Charles Geyh, *The role of courts in preserving customary independence*, *in* WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 223–251 (2006), https://eds-a-ebscohost-com.avoserv2.library.fordham.edu/eds/ebookviewer/ebook/bmxlYmtfXzMxMDExNF9fQU41?sid=ba3bbb92-f2cd-4e3f-b475-92daea56b319@sessionmgr4007&vid=4&format=EB&rid=7 (last visited Mar 10, 2019).

[24] GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA (1993), https://eds-a-ebscohost-com.avoserv2.library.fordham.edu/eds/ebookviewer/ebook/bmxlYmtfXzQ4MTg0X19BTg2?sid=ba3bbb92-f2cd-4e3f-b475-92daea56b319@sessionmgr4007&vid=8&format=EB&rid=7 (last visited Mar 10, 2020).

[25] Nancy P. Appelbaum, Anne S. Macpherson & Karin Alejandra Rosemblatt, *Introduction: Racial Nations*, *in* RACE AND NATION IN MODERN LATIN AMERICA 1–31 (Nancy P. Appelbaum, Anne S. Macpherson, & Karin Alejandra Rosemblatt eds., 2003).

[26] AFRODESCENDIENTES EN AMÉRICA LATINA Y EL CARIBE: DEL RECONOCIMIENTO ESTADÍSTICO A LA REALIZACIÓN DE DERECHOS, (Jhon Antón et al. eds., 2009), https://repositorio.cepal.org/bitstream/handle/11362/7227/1/S0900315_es.pdf (last visited Oct 8, 2018).

[27] PETER WADE, RACE AND ETHNICITY IN LATIN AMERICA 179 (second ed. 2010), http://www.oapen.org/search?identifier=625258 (last visited Jul 16, 2018). (Noting how, for example, until at least the 1950s, Brazil was internationally seen as a racially harmonious country).

[28] Appelbaum, Macpherson, and Rosemblatt, *supra* note 25.

segments of the population based on ethno-racial identity.[29] The narratives of *mestizaje* make it extremely difficult to talk about minority underrepresentation, as this issue tends to go unnoticed or other categories of analysis, such as class, are used for explaining such phenomena.

### 2. Specific research objectives

In order to accomplish the primary research goal, the dissertation has three specific objectives: First, it aims to expose Afro-descendant underrepresentation in Colombia's judicial institutions. Second, it seeks to identify some of the reasons why Afro-descendants are underrepresented in this country's judicial power and that facilitate the continuation of racial hierarchies in judicial institutions. Third, it discusses the foundations of Afro-descendant (and other groups) representation on courts.

### 3. Selection of the case study

I selected Colombia as a case study for several reasons. First, in this country, the judicial system has played a significant role in promoting the rights of Afro-descendant communities, by contrast to other state institutions such as the legislature or the presidency that have had more starring roles in other Latin American countries.[30] Second, Colombia has a significant Afro-descendant population, accounting for almost 11% of the national population according to the 2005 national census.[31] Third, I am a Colombian national who was raised in Colombia. Given my previous work on issues of race discrimination in this country, this is a setting in which I had better access to sources and the collection of data was more feasible

[29] ELISA LARKIN NASCIMENTO, THE SORCERY OF COLOR: IDENTITY, RACE, AND GENDER IN BRAZIL. (2008), http://www.myilibrary.com?id=129906 (last visited Dec 6, 2018).
[30] CÉSAR A. RODRÍGUEZ GARAVITO ET AL., RAZA Y DERECHOS HUMANOS EN COLOMBIA: INFORME SOBRE DISCRIMINACIÓN RACIAL Y DERECHOS DE LA POBLACIÓN AFROCOLOMBIANA (1 ed. 2009).
[31] Departamento Administrativo Nacional de Estadística (DANE), *Censo general 2005*, DANE: INFORMACIÓN PARA TODOS (2020), https://www.dane.gov.co/index.php/estadisticas-por-tema/demografia-y-poblacion/censo-general-2005-1 (last visited Mar 16, 2020).

in comparison to the other countries of the region.[32] Fourth, in Colombia, as in most Latin American countries, the idea of *mestizaje* coexists with political and legal declarations rooted in modern multiculturalism.[33] The paradoxical relationships between the colorblindness of racial democracy and the legal protection of different ethnic and racial groups make Colombia a case study that, in many ways, is archetypical to Latin America, where the discussions on diversity, inclusion, and minority representation are complex. Fifth, despite their numerous dissimilarities (*e.g.*, the nature of judicial review or the existence of a specific court or a general court to settle constitutional law disputes),[34] many countries in the Latin American region share with Colombia relevant aspects of their constitutional and judicial system architecture, such as "a common legal heritage, political culture, civil legal system, and presidential regime,"[35] as well as the existence of the legal action of *amparo* (in Colombia: *acción de tutela*) for the immediate protection of fundamental or constitutional rights.[36] Finally, as most countries in the region, Colombia has a history of discrimination against minorities, primarily indigenous peoples and persons of African descendant.

### 4. Study setting and context

As part of the study setting and context I will briefly discuss the history of race relations in Latin America, providing the background necessary to understand the study design and to evaluate its findings; succinctly characterize the race stratification and discrimination practices in Latin America; address the limitations on pre-existing data and the statistical invisibility of Afro-descendants in the region; reference

[32] WADE, *supra* note 27.
[33] TIANNA S. PASCHEL, BECOMING BLACK POLITICAL SUBJECTS: MOVEMENTS AND ETHNO-RACIAL RIGHTS IN COLOMBIA AND BRAZIL (2018), http://dx.doi.org/10.23943/princeton/9780691169385.001.0001 (last visited Dec 3, 2018); TANYA KATERÍ HERNÁNDEZ, RACIAL SUBORDINATION IN LATIN AMERICA: THE ROLE OF THE STATE, CUSTOMARY LAW, AND THE NEW CIVIL RIGHTS RESPONSE (2012).
[34] Teresa M. Miguel-Stearns, *Judicial Power in Latin America: a Short Survey*, 15 LEG. INF. MANAG. 100–107 (2015).
[35] Helmke and Rios-Figueroa, *supra* note 22 at 293.
[36] Miguel-Stearns, *supra* note 34.

the international, constitutional, and legal protections for Afro-descendants in Latin America, with particular emphasis in Colombia; and refer to the multiplicity of stakeholders in this discussion.

### 4.1. An introduction to race relations in Latin America, with specific emphasis in Colombia

In order to grasp modern race relations in Latin America, it is indispensable to go back in history to explore how the European colonization enterprise shaped the continent and stratified its social systems. In this section, I briefly reconstruct the main aspects of the history of race relations in Latin America, making particular references to the situation of Colombia.

According to Oliver Barbary and Fernando Urrea,[37] as in most of Latin America, the presence of Afro-descendants in Colombia can be traced back to the 16th century, when groups of Africans were brought to the Americas in the condition of slavery.[38] During the colonial period, Afro-descendant's role in the region was mostly restricted to slavery. Enslaved laborers worked in activities such as mining, farming and housework.[39] Although colonial society was highly stratified based on skin color, since the 17th century, miscegenation among African, European, and indigenous persons became common.[40] The extent of miscegenation varied depending on the region, as it was less prominent in parts of the Pacific basin and certain portions of the Caribbean Coast, such as Cartagena.[41]

Some authors argue that the differences in the magnitude of racial mixing in the Iberic and British colonies (racial mixing was more common in the Iberic than in the Anglo colonies) could have been the result of dissimilarities in the colonizers' settlement patterns.[42] The Anglo colonization practices seemed

[37] Barbary and Urrea Giraldo, *supra* note 20 at 58.
[38] *Id.* at 58.
[39] *Id.* at 51–52.
[40] *Id.* at 51–52.
[41] *Id.* at 51–52.
[42] EDWARD TELLES, PIGMENTOCRACIES: ETHNICITY, RACE, AND COLOR IN LATIN AMERICA 15 (2014), https://ebookcentral-proquest-com.avoserv2.library.fordham.edu (last visited Oct 20, 2018).

to have been family-oriented, as whole households moved from Europe to the British colonies, whereas in the Iberic colonies, the colonizers where mostly poor European men, who came to the Americas seeking wealth in extractive economies.[43] The disparity in the numbers of white men versus white women in the Iberic colonies could have encouraged interracial relations between white men and African and indigenous women, leading to more significant racial mixing than in the North American context.[44]

Demography, as Robert Cottrol points out, had a decisive role in the fluidity of racial categories and classifications in Latin America (racial mobility). Less numerous European populations meant that it was impossible for the Iberic colonies to properly fulfill their role unless persons of indigenous and African descent were allowed to move upwards in the social pyramid. Such need ultimately enabled some level of prosperity for significant groups of the new Afro-American populations, especially for those with mixed racial backgrounds.[45]

During the colonial period, the Spanish authorities, worried by the extent of miscegenation in their newly acquired colonies, developed formal racial stratification systems known as *"Sistemas de castas"* (caste systems).[46] These systems relied on the creation of human taxonomies based on ancestry and the establishment of a meticulous structure of racial classifications used for purposes such as taxation and the allocation of social benefits and burdens.[47] Edward Telles mentions that it was not uncommon that, given the extent of miscegenation in the Iberic colonies, the track of ancestry lines was lost over time, in which

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[43] *Id.* at 15.

[44] *Id.* at 15. (Telles mentions: "Throughout the colonial period, the biological reproduction of whites was generally constrained by the high sex ratio among Spanish and Portuguese colonists because their immigration to the Americas was largely male. Spanish and Portuguese males, seeking to escape poverty in Europe, came to the New World in search of wealth; in contrast, the English settlement of the United States tended to be more family-oriented, beginning with many families that were escaping religious persecution. In Latin America, the result was a relatively small, and mostly male, European population; they and their criollo (American-born) descendants focused on resource extraction economies, fueled by a large black, indigenous, and mixed-race population. The paucity of white women led to high rates of mixture between nonwhite women and white men, especially lower-class white men whose status reduced their marital prospects but whose whiteness gave them access to nonwhite women. The result was an extensive racial mixture (mestizaje), which was greater than in the United States, where a more balanced sex ratio among whites emerged from more family-based immigration in the colonial period.")

[45] Robert J. Cottrol, *The Long Lingering Shadow: Law, Liberalism, and Cultures of Racial Hierarchy and Identity in the Americas*, 76 TULANE LAW REV. 11, 34 (2001).

[46] TELLES, *supra* note 42 at 15–16.

[47] *Id.* at 15–16.

case authorities would assign people their stations in the cast system based on physical appearance, rather than lineage.[48]

The caste system provided whiteness a tangible value. White racial purity was relevant for different purposes, including marriage.[49] Advantageous unions often allowed the exchange of whiteness and wealth in order to secure access to better social or economic positions for the parties.[50] Although the use of the expression *casta* fell in disuse and was replaced by the term race, the *casta* laws remained in place at least until the beginning of the 19th century in some parts of the continent, and would not disappear entirely until the independency period, time at which most persons were declared free and formally equal before the law.[51]

Robert Cottrol asserts the Spanish law of slavery was—perhaps—the one that created the more comfortable conditions for an enslaved person to receive manumission (*i.e.*, to be freed), as slaves had the legal right to challenge their owners in court to require the enforcement of freedom agreements.[52] Likewise, Cottrol asserts that "colonial Colombia and Venezuela provided legal protection for manumission and accepted a large free Afro-American population. It also provided a cultural acceptance of, and legal protection for, a certain level of racial mobility."[53] Racial mobility manifested in situations such as the possibility for free people of color to buy patents of whiteness ("*cédulas de gracias al sacar"*), which granted them privileges associated with having pure white blood, and in the complex and detailed taxonomy of racial types present in the Spanish colonies.[54] It is also important to remark that all colonial subjects were not considered the same by colonial authorities. Peter Wade notes that:

[48] *Id.* at 15–16.
[49] *Id.* at 15–16.
[50] *Id.* at 15–16.
[51] *Id.* at 16.
[52] Cottrol, *supra* note 45 at 59.
[53] *Id.* at 59.
[54] *Id.* at 59.

> Indigenous people and Africans thus had different locations in the colonial order, both socially and conceptually. Indigenous people were, officially, to be protected as well as exploited; Africans were slaves and, although they had rights enshrined in legislation, this was piecemeal and uneven – although the Spanish did produce a code in 1789 – and the main concern was with control, rather than protection. This difference continued through the colonial period. Ideally, the Spanish would have liked to maintain three separate categories: Spanish, indigenous people and Africans; rulers, tributaries and slaves.[55]

The categories of *"Indio"* (Native) and *"Negro"* (Black) had particular meanings and occupied different places in Latin American colonies.[56] *"Indio"* was an administrative, fiscal and census category. It was clearly embedded into the colonial institutions' affairs.[57] The situation of *"Negro"* was different. Even though slaves were a clear census category, many black persons were not slaves. Therefore, the categories of black and slave were not equivalent. Non-slave blacks fell into intermediate administrative categories.[58] In the case of Nueva Granada, the category of *"libre"* (free) included *mestizos*, mulattos, indigenous persons who had abandoned their communal life in the *resguardos*, and black persons.[59] Claudia Mosquera *et al.* mention that in the Latin American colonial society, the expression *"Libres y de todos los colores"* (free of all colors) is particularly relevant.[60] Since the expression *"negro"* did not have a place in the colonial racial order in and out of itself, *free of all colors* denoted a subordinated group that would grow to occupy a buffer space between the whites, either pure blood Spanish or "*criollos"* (*i.e.,* Euro descendants born in the Americas), the tributary Indians, and the enslaved Africans.[61]

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[55] WADE, *supra* note 27 at 26–27.
[56] *Id.* at 28.
[57] *Id.* at 28.
[58] *Id.* at 28.
[59] *Id.* at 28.
[60] Claudia Mosquera, Mauricio Pardo & Odile Hoffmann, *Las Trayectorias Sociales e Identitarias de los Afrodescendientes*, *in* AFRODESCENDIENTES EN LAS AMÉRICAS: TRAYECTORIAS SOCIALES E IDENTITARIAS 612, 15 (Claudia Mosquera, Mauricio Pardo, & Odile Hoffmann eds., 1st ed. 2002), http://horizon.documentation.ird.fr/exl-doc/pleins_textes/divers11-03/010029701.pdf (last visited Nov 20, 2018).
[61] *Id.* at 15.

As Edward Telles mentions, during the colonial period, race discrimination was visible not only in slavery but also in aspects such as the harassment against free black persons, their law-sanctioned inability to be elected for the *"cabildos,"* as well as the persecution they suffered under the Inquisition because of their religious beliefs and cultural practices.[62] Due to this historical legacy of exclusion, significant tensions between the idea of formal equality and the racial stratification present in the society surrounded the nation-building process in Latin America.[63]

The racial pyramid of Latin American societies that originated in the colonial period would continue to exist during the independence era and beyond.[64] As Mara Loveman explains, in the after-independence period, the political leaders of the newly emancipated Latin American nations declared their firm intention to break away from the racial classifications used by colonial rulers and even forbade their use.[65] Nevertheless, at the same time, the new regimes allowed racial classifications to informally and, sometimes, explicitly continue to influence state affairs.[66] In many countries, slavery and the figure of the tributary Indians continued to be lawful for decades after independence.[67] Pro-independence leaders adopted and updated racial stratification norms that originated in colonial times by associating the idea citizen to the characteristics of wealthy white men.[68] Liberal leaders, such as Simón Bolívar and Domingo Sarmiento, tended to see non-white and mixed-race populations as obstacles in the consolidation of a stable and prosperous country and—on occasion—were keen to adopt confrontation politics regarding indigenous peoples, as they deemed them unfit for civility.[69]

During the 18th century, the Latin American political leadership faced significant trouble adopting the liberal idea of citizenship for their post-colonial societies in a context in which colonial subjects were

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[62] TELLES, *supra* note 42 at 81.
[63] Appelbaum, Macpherson, and Rosemblatt, *supra* note 25.
[64] MARA LOVEMAN, NATIONAL COLORS: RACIAL CLASSIFICATION AND THE STATE IN LATIN AMERICA 78–80 (2014).
[65] *Id.* at 79–80.
[66] *Id.* at 79–80.
[67] *Id.* at 80.
[68] Appelbaum, Macpherson, and Rosemblatt, *supra* note 25 at 4.
[69] *Id.* at 5.

still commonly classified according to race and social status.[70] Although these classifications were not particularly rigid, since individuals could climb up in these hierarchies (*e.g.*, by acquiring wealth), some racial groups were still subjected to specific taxes and other forms of disadvantageous treatment.[71] Edward Telles mentions that even though in some cases national elites sought the support of Afro-descendants and indigenous peoples to fight for independence —sometimes under the promises of freedom and land rights— they later declined to grant these patriots access to elevated positions in their armies, which were reserved for people of the elite.[72] Despite this apparent act of ingratitude, the early 19th century independence movements in the Viceroyalty of New Granada significantly contributed to eroding slavery, as many enslaved persons joined Simon Bolivar's pro-independence forces, which "led to large-scale manumissions."[73]

In the post-independence period, Colombia and the rest of Latin America abolished slavery. However, before the definite outlawing of slavery from Colombia and Venezuela, a majority of Afro-descendants was already free since the newly formed republics had initiated legal reforms aimed at eradicating slavery years ago; for example, by enacting the Freedom of Womb Law in 1821, 30 years before the abolition of slavery.[74]

As Claudia Mosquera *et al.* explain, after the abolition of slavery, formerly enslaved persons were left to their own means.[75] They did not obtain any form of compensation for their work, the damages caused to them, nor were other measures adopted to help them overcome their precarious socio-economic position or to address societal discrimination.[76] After independence, blacks and other social groups situated at the bottom of the racial hierarchy continued to be discriminated against based on their culture and phenotype.[77]

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[70] *Id.* at 4.
[71] *Id.* at 4.
[72] TELLES, *supra* note 42 at 16–17.
[73] Cottrol, *supra* note 45 at 50.
[74] TELLES, *supra* note 42 at 82.
[75] Mosquera, Pardo, and Hoffmann, *supra* note 60 at 16.
[76] *Id.* at 16.
[77] TELLES, *supra* note 42 at 42.

In this period, race discrimination claims were constantly undermined. Blacks were primarily excluded from society and mulattoes—despite having some change of social mobility—were mostly excluded from prominent positions of society.[78] Although racial prejudice was blatant in Colombia and Venezuela, these countries—as it was also the case of Brazil—did not have significant forms of legally sanctioned racial discrimination.[79] This lack of formal segregation was not the case in all of Latin America as, for example, Panama did have legally-sectioned forms of segregation.[80]

Since the late 19th century, Latin American national elites embraced scientific racism as a lens to read their national populations and to justify racially-biased reforms to bring development and progress to their nations.[81] In consequence, as Cottrol points out, during the decades to follow, two ideas would shape Latin American societies' race relations:

> The first was the Darwinian notion that inferior races would lose in the competition with superior races and ultimately would die out. The second was that the relative underdevelopment in Latin America could be attributed to the significant African and Indian elements in the region and the relatively small European presence.[82]

Since the predominant idea at that time was that non-white persons could be an obstacle for the region's development, political elites decided to whiten their national populations.[83] Their intention was to

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[78] *Id.* at 82–83.
[79] Cottrol, *supra* note 45 at 62–63. (According to Cottrol: "Those prejudices and stratifications would in turn be augmented by the growth of scientific racism in the latter part of the nineteenth century and the early part of the twentieth.")
[80] Edward Telles & Tianna Paschel, *Who Is Black, White, or Mixed Race? How Skin Color, Status, and Nation Shape Racial Classification in Latin America*, 120 AM. J. SOCIOL. 864–907, 865–866 (2014).
[81] Appelbaum, Macpherson, and Rosemblatt, *supra* note 25 at 6. (nothing that that: "Intellectuals borrowed frequently if selectively from the new currents of racial science emerging in Europe, avidly reading Gustave LeBon, Cesare Lombroso, Hippolyte Taine, Count Arthur de Gobineau, and Herbert Spencer. Thus, armed with the legitimizing shield of modern science, they used the resources of expanding central states to measure, count, classify—and then improve—national populations...")
[82] Cottrol, *supra* note 45 at 63.
[83] TELLES, *supra* note 42 at 17–18.

erase blackness and indigeneity of their countries.[84] Whitening was attempted, in part, through racially targeted immigration policies that promoted European immigration and restricted the arrival of people from other parts of the world, such as Africa.[85] Despite the national efforts, the ethno-racial composition of Latin American societies frustrated the success of the eugenics project, as Afro-descendant and indigenous populations continued to constitute significant portions of the region's national populations.[86] This lack of success was real even in the case of Brazil, which succeeded in attracting a substantial immigration flow from Europe.[87] European immigration was encouraged through the granting of land titles to new settlers, while at the same denying land rights to the descendants of African enslaved persons over the *"Quilombos"* they had occupied for generations.[88] Race-based immigration policies in Brazil were more successful at attracting immigrants than in other parts of the region.[89] In Brazil, pro-whitening immigration policies started as early as the 1850s, had their peak during to government of Getulio Vargas, and continued with significant force until almost the 1970s.[90]

In the early 20th century, nationalistic movements arose in different parts of Latin America, including Mexico and Cuba.[91] These movements pressured the elites to expand their national projects to embrace social groups that had historically been left at the margins of politics. In order to receive social support, nationalist leaders adopted a unifying discourse that appealed to the idea of racial homogeneity and national concord to promote alliances that transcended gender, race, and class divisions.[92] The idea that nations could work as *"cohesive races"* gained strength within Latin American political discourses, as the region's intellectuals rejected the scientific racist idea of the inferiority of Latin American peoples.[93] In this

[84] NANCY STEPAN, "THE HOUR OF EUGENICS": RACE, GENDER, AND NATION IN LATIN AMERICA (1991).
[85] Cottrol, *supra* note 45 at 65–66.
[86] *Id.* at 65–66.
[87] *Id.* at 65–66.
[88] *Id.* at 63–64.
[89] TELLES, *supra* note 42 at 18.
[90] Cottrol, *supra* note 45 at 64.
[91] Appelbaum, Macpherson, and Rosemblatt, *supra* note 25 at 6–7.
[92] *Id.* at 6–7.
[93] TELLES, *supra* note 42 at 19. (nothing: "More than just ideologies of race and ethnicity, mestizaje ideologies would present racial mixture as an essential feature of these new nations and of a national peoplehood, as they sought to

respect, poet José Martí and others called for the formation of social coalitions that included both former enslaved persons and slave owners, arguing that Cuba was a nation that did not see race and integrated all Cubans.[94]

Similar episodes occurred in different countries of the region. Intellectuals such as Gilberto Freyre, Manuel Gamio, José Vasconcelos, and Uriel García adopted the idea of *mestizaje*, which highlighted the positive consequences of the mixing of races.[95] Hence, the *mestizo* was anointed as the racial model of national identity, displacing the white-defined liberal citizenship model that had been central during the independence period. Nationalist thinkers managed to re-frame Afro-descendant and indigenous populations' legacy within Latin American nations.[96] In their discourse, these groups were no longer to be seen as a sign of backwardness, but as a particular trait of Latin American identities, whose contributions could be celebrated as an essential part of the national history: The history of the *mestizo* nations.[97] In the case of Brazil, *mestizaje* had a particular variance which would come to be known as *racial democracy.*[98]

In practice, however, the *mestizaje* narratives were more a doctrine about the origin and character of Latin American national identities than a framework for the actual transformation of the state to attain substantive equality for all. Nancy Appelbaum *et al.* explain that, even though during the late 19th and early 20th centuries the use of national identities as a form of racial identity (*e.g.*, the Chilean race) was common, there were variances in how these "national races" interacted with racially subordinated groups that lived within their national borders.[99] Specific populations, such as the indigenous peoples and Afro-descendants, were commonly placed “outside of the nation” in the *mestizaje* narratives and continued to face significant exclusion.[100] Ultimately, the nation was still defined in opposition to these others: The indigenous peoples,

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proclaim that race and nation were coterminous. Elites sought to create visions of the nation as homogeneous; in these visions, national or mestizo identities would seek to replace the previous ethnoracial identities.")

[94] Cottrol, *supra* note 45 at 66–67.
[95] *Id.* at 66–67.
[96] *Id.* at 66–67.
[97] *Id.* at 66–67.
[98] Appelbaum, Macpherson, and Rosemblatt, *supra* note 25 at 7.
[99] *Id.* at 14–15.
[100] *Id.* at 14–15.

the immigrants, the poor.[101] Moreover, the narratives of *mestizaje* did not eradicate racial subordination nor translated into an improvement in the living conditions of racially ostracized groups, who continued to be defined by exclusion and exoticization.[102] Even though the discourses of *mestizaje* was not benign to all racial groups,[103] some authors argue that the construct of Latin American nations as racially homogenous was not something that was not defended only by the elites. Instead, they argue that it was appropriated by disadvantaged social groups in order to advance their political agendas.[104]

Whitening and *mestizaje* narratives supplemented one another. Tanya Hernandez explains that different countries responded differently to the influence of eugenics, depending on their capacity to attract European immigrants and the size of their non-white groups. While some countries focused almost exclusively on whitening their national populations (*e.g.*, Chile, Argentina, and Urugüay), others invested significant effort in promoting the discourse of *mestizaje*.[105]

Moreover, Shane Greene, following the ideas of Gordon (1998), explains that the predominant narratives on *mestizaje* in Latin America begin with the mixture of white men and indigenous women as their starting point, positioning the indigenous component as an essential piece of the nation's fabric.[106] These same accounts tend to erase blackness from national memories, discarding its participation in the construction of the nation and rendering this part of the population invisible.[107] As Edward Telles and Tianna Paschel explain, blackness was a vital part of the construction of the Brazilian racial democracy,

[101] *Id.* at 14–15.
[102] Cottrol, *supra* note 45 at 66–67.
[103] Bello and Rangel, *supra* note 6 at 41. (noting that, in Latin America, the integration of black and indigenous persons has remained mostly symbolic, as their living conditions continue to be worse off than the rest of than those of the rest of the population.)
[104] Appelbaum, Macpherson, and Rosemblatt, *supra* note 25 at 21.
[105] TELLES, *supra* note 42 at 18–19.
[106] Shane Greene, *Introduction: On Race, Roots/Routes, and Sovereignty in Latin America's Afro-Indigenous Multiculturalisms*, 12 J. LAT. AM. CARIBB. ANTHROPOL. 329–355, 343 (2007).
[107] *Id.* at 343.

but was almost wholly excluded from the construction of *mestizaje* narratives in the Dominican Republic, and was reduced to its most minimalistic expression in the case of Colombia and other countries.[108]

Despite the long history of slavery and racial stratification in Latin America, the ideological power of *mestizaje* was such that it managed to project a virtually-free-of-discrimination image of the region to the world. During a good part of the 20th century, Latin American countries were internationally perceived as places characterized by racial harmony, especially when compared to the United States of America and South Africa.[109] This supposed absence of racial conflict was reinforced by governmental discourses across the region that sustained that the extensive miscegenation practices and the well-established color-blind legalist tradition had eradicated racial animosity in the region.[110] In the specific case of Colombia, Edward Telles mentions that during the second part of the 1900s, issues of race were typically understood as being subsumed in aspects of class inequality.[111] During this period, the idea of ethno-racial minorities was not salient in the national imaginary, except perhaps for indigenous peoples, who were portrayed as savages.[112] In those times, Afro-descendants continued to be politically and legally invisible, except for being included in an extended idea of *mestizaje*.[113]

However, Latin America's perceived racial harmony would start to crumble. After World War II, the impulse of the global decolonization trends and the surge of new social movements in the U.S. gave birth to social movements in the region that began to question the *mestizaje* narratives.[114] Revisionist scholars played a significant role in this process, as they evidenced racial discrimination practices in places such as Brazil and Cuba. While referring to Nicaragua, Jeffrey Gould used the expression *"the myth of mestizaje"* to contest the accounts denying the racial tensions that had been preached throughout this

[108] Edward Telles & Tianna Paschel, *Who Is Black, White, or Mixed Race? How Skin Color, Status, and Nation Shape Racial Classification in Latin America*, 120 AM. J. SOCIOL. 864–907, 865–866 (2014).
[109] PASCHEL, *supra* note 33 at 5.
[110] *Id.* at 5.
[111] TELLES, *supra* note 42 at 84.
[112] *Id.* at 84.
[113] *Id.* at 84.
[114] Appelbaum, Macpherson, and Rosemblatt, *supra* note 25 at 8.

country.[115] In his view, the idea of mestizaje was commonly used to conceal the deep patterns of race discrimination, exclusion, and violence present in Latin American societies, being in this sense nothing more than an allegory.[116] Likewise, as Deborah Yashar asserts, the increasing relevance and visibility of ethnic movements in the 20th century challenged the 19th-century idea of homogenous societies as the base of state-building processes.[117] Several Latin American thinkers opposed disputing the idea of a racially harmonious region on the grounds that it would legitimize the concept of race, which they deemed U.S.-centric and unfit for Latin America.[118]

Starting in the mid-1980s, most Latin American countries adopted new constitutions. Rodrigo Uprimny comments that these new political documents introduced significant changes to favor minorities and to embrace multiculturalism and diversity.[119] Furthermore, Tianna Paschel clarifies that these constitutional reform processes left aside the rhetoric of *mestizaje* and—instead—granted new rights to indigenous peoples and, in some cases, Afro-descendants.[120] Paschel explicates that these new changes were more radical for Afro-descendants than for indigenous peoples, as this was the first time Afro-descendants would engage with the state as a group entitled to collective rights.[121]

According to Paschel, these new forms of ethno-racial policies are not the result of a single multi-cultural turn, but instead ensued from two distinct phenomena: The first is the "multicultural alignment," which opened the door to collective ethnic rights (*e.g.*, territorial rights, political autonomy, rights to use traditional languages) in some countries. The second is the "racial equality alignment," which led to the creation of affirmative action policies (*e.g.*, equal opportunity laws and quotas in education) in some parts

[115] Deborah J. Yashar, *Democracy, Indigenous Movements, and the Postliberal Challenge in Latin America*, 52 WORLD POLIT. 76–104 (1999).
[116] *Id.*
[117] *Id.*
[118] Appelbaum, Macpherson, and Rosemblatt, *supra* note 25 at 8–9.
[119] Rodrigo Uprimny, *The recent transformation of constitutional law in Latin America: trends and challenges*, 89 TEX. LAW REV. 1587–1609, 1587–1597 (2014).
[120] PASCHEL, *supra* note 33 at 7–8.
[121] *Id.* at 8.

of the region.[122] The multicultural alignment, which was the dominant discourse in countries such as Colombia, had its roots in the adoption of ILO Convention 169 and was cemented on the principle of cultural difference. For this reason, it mainly targeted indigenous communities and some rural Afro-descendant communities.[123] In contrast, the racial equality alignment was based on the equality principle. This alignment was tailored to reach general black populations, had particular influence in Brazil, and was anchored in the International Convention for the Elimination of All Forms of Racial Discrimination and the Durban Conference.[124] César Rodríguez and Carlos Baquero recognize that these legal changes advanced the protection of diversity in Latin American societies.[125] Although, they also assert that the region's states have only been open to the idea of protecting indigenous and Afro-descendants when their claims do not entail economic redistribution policies, being in this sense a form of "neoliberal multiculturalism."[126]

The Economic Commission for Latin America and the Caribbean—ECLAC—has reported that, by the end of 2017, at least 14 countries in the Latin American region had some type of racial equality or Afro descendant rights policy, and that additional public programs against racism and race discrimination were expected in the coming years.[127] Many Latin American countries have established specialized governmental agencies and institutions to handle cases of race discrimination.[128] In the case of Bolivia, for example, the national government has a plan for the eradication of race discrimination and ethnic and cultural exclusion, which includes a diagnostic of the scope of the problem, a map of key actors to address

[122] *Id.* at 20–21.
[123] *Id.* at 21–22.
[124] *Id.* at 21–22.
[125] CESAR RODRIGUEZ GARAVITO & CARLOS ANDRES BAQUERO DIAZ, RECONOCIMIENTO CON REDISTRIBUCIÓN: EL DERECHO Y LA JUSTICIA ÉTNICO-RACIAL EN AMÉRICA LATINA (2015), https://www.dejusticia.org/publication/reconocimiento-con-redistribucion-el-derecho-y-la-justicia-etnico-racial-en-america-latina/ (last visited Sep 17, 2018).
[126] *Id.* at 20–22.
[127] UNITED NATIONS: ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, *Situación de las personas afrodescendientes en América Latina y desafíos de políticas para la garantía de sus derechos* 189 9 (12/17), https://repositorio.cepal.org/bitstream/handle/11362/42654/1/S1701063_es.pdf (last visited Oct 19, 2018).
[128] Sérgio Costa & Guilherme Leite Gonçalves, *Human Rights as Collective Entitlement? Afro-Descendants in Latin America and the Caribbean*, 5 J. HUM. RIGHTS Z. FÜR MENSCHENRECHTE 52–71, 55–56 (2011).

violations, a strategic plan with general and specific objectives to accomplish the plan's goals, and a system of oversight and evaluation.[129]

In Colombia, many institutions are in charge of promoting the rights of Afro-descendant populations, including the Direction for Black, Afro Colombian, Raizal and Palenquero Communities of the Ministry of Interior; the Direction of Populations of the Ministry of Culture; and the Vice-Ministry for Participation and Equality of Rights.[130] Additionally, Afro-descendants also find participation in other institutional arrangements, including the National Planning Council, the High-Level Advisory Commission for Black, Afro Colombian, Raizal and Palenquero Communities; the Pedagogic Commission of Black Communities; the National Culture Council, among others.[131]

### 4.2. Characterizing the Latin American racial order

In Latin America, racial hierarchies can be described using a pyramidal shape, in which whiteness is located at the top and blackness and indigenousness at the bottom.[132] Yesilernis Peña *et al*. conducted a study in which they compared levels of racial prejudice in three countries in Latin America (Cuba, the Dominican Republic, and Puerto Rico) and the United States.[133] They were looking to see whether they could find empirical evidence to support the Iberian exceptionalism (racial democracy) thesis, which denies the existence of significant levels of racial prejudice and discrimination in Latin America, or at least similar

[129] John Anton & Fernando Garcia, *Plan Nacional Para Eliminar la Discriminación Racial y la Exclusión Étnica y Cultural 2009 - 2012* (2010), https://unesdoc.unesco.org/in/documentViewer.xhtml?id=p::usmarcdef_0000187968&file=/in/rest/annotationSVC/DownloadWatermarkedAttachment/attach_import_7ef7f046-a038-4b2d-b743-05cdd359c7a0%3F_%3D187968spa.pdf&locale=en&multi=true&ark=/ark:/48223/pf0000187968/PDF/187968spa.pdf#page=34 (last visited Dec 19, 2018).
[130] UNITED NATIONS: ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, *supra* note 127 at 148–151.
[131] *Id.* at 148–151.
[132] WADE, *supra* note 27.
[133] Yesilernis Peña, Jim Sidanius & Mark Sawyer, *Racial Democracy in the Americas: A Latin and U.S. Comparison*, 35 J. CROSS-CULT. PSYCHOL. 749–762 (2004).

levels of prejudice than in the U.S.[134] The results revealed that racial prejudice could be found in all Latin American countries. The authors concluded that:

> Not only were both explicit and implicit prejudice in the Caribbean higher than in the United States, but it is also noteworthy that the levels of both forms of racial prejudice in socialist (ostensibly classless) Cuba appeared no less severe than that found in either the Dominican Republic or the American-controlled island of Puerto Rico.[135]

In addition to being widespread, racism and racial discrimination seem to manifest in particular ways in this region. Oliver Barbary and Fernando Urrea differentiate between direct and indirect discrimination in their characterization of racism in Latin America.[136] The authors mention that forms of indirect discrimination are, since the abolition of slavery, the most prevalent manifestation of racism in this region.[137] Despite the number of laws and public policies aimed at protecting Afro-descendant populations, situations of disparate negative impact on ethno-racial minorities continue to be frequent in the region.[138] According to a World Bank report, this is due, at least in part, to the fact that discrimination is rooted in informal forms of expression and practices–often considered benign—that have naturalized racism, making it almost invisible.[139] In this respect, Rita Segato asserts that, unlike in the U.S., where racism tends to be made visible in the relationship of subordination between different racial groups, in Latin America, racism

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[134] *Id.* at 752–753.
[135] *Id.* at 759–760.
[136] Barbary and Urrea Giraldo, *supra* note 20.
[137] *Id.* at 57.
[138] AFRO-DESCENDANTS IN LATIN AMERICA: TOWARD A FRAMEWORK OF INCLUSION, 133 19 (2018), https://www.worldbank.org/en/region/lac/brief/afro-descendants-in-latin-america. (The World Bank has noted: "This is because discrimination is ingrained in informal expressions of everyday life that naturalize ethno-racial hierarchies and reinforce their associated biases—from humor and hiring practices to police and judicial profiling—without individuals even realizing their existence or effects. Thus, while ethno-racial discrimination may appear intangible to most people, it has very palpable consequences for Afro-descendants, penetrating institutions and impairing their access to markets, services, and spaces. Discriminatory representations of Afro-descendants in school textbooks and class dynamics contribute to higher dropout rates, for example, limiting their career choices and employment opportunities later in life.")
[139] *Id.* at 19.

is constructed in the interactions among individuals, being in that sense an inter-personal rather than an inter-group relationship.[140]

A particular characteristic of Latin America's racial order is that phenotype, and particularly skin color, plays a determinant role in the processes of racialization. Anani Dzidzienyo writes that race relations in Brazil, as in much of Latin America, have been characterized by two parallel situations.[141] The first is that phenotype and physical appearance have significant relevance in defining racial privilege and subordination, with whiteness being praised and blackness decried. The second is that these assessments of racial value coexist with narratives of formal racial equality, which in theory secured an equal opportunity for everyone to participate of racial mixing, but contributed in practice to the exclusion of non-white persons (indigenous and black) from power positions in the social, economic and cultural spheres.[142]

Regarding the role of skin color in race discrimination, Eunice Aparecida de Jesus has written about how, in Brazil, racial prejudice hits harder individuals who have more prominent black features.[143] She warns that the more visible these black features are in a person, the greater are the difficulties that they face in their lives.[144] Along the same vein, Hebe Clementi describes Latin America as a *pigmentocracy*, in which the color of the skin is particularly important hierarchy marker.[145] Edward Telles uses this same term in the description of the results of the Project on Ethnicity and Race in Latin America (PERLA)–an empirical study based primarily on topics of race, ethnicity, and color. PERLA concluded that, in Latin America, skin color closely correlates to social stratification.[146] At describing some of the findings of PERLA, Telles mentions that, in Colombia, skin color correlates with aspects such as educational attainment, parents' level

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[140] RITA LAURA SEGATO, LA NACIÓN Y SUS OTROS RAZA, ETNICIDAD Y DIVERSIDAS RELIGIOSA EN TIEMPOS DE POLITICAS DE LA IDENTIDAD 123 (2007).
[141] Dzidzienyo, *supra* note 18 at 137.
[142] *Id.* at 137.
[143] Eunice Aparecida de Jesus, *Preconceito Racial e Igualdade Jurídica no Brasil*, 1980, http://www.teses.usp.br/teses/disponiveis/2/2134/tde-03032008-103152/pt-br.php (last visited Nov 27, 2018).
[144] *Id.* at 213–214.
[145] Hebe Clementi, *El Negro En América Latina*, *in* DISCRIMINACIÓN Y RACISMO EN AMÉRICA LATINA 37–50, 39 (Ignacio F. Klich & Mario Rapoport eds., 1997).
[146] TELLES, *supra* note 42 at 3–4.

of education, type of employment, monthly income, and discrimination experiences. In all of these areas, lighter-skinned individuals fair better than darker-skinned persons.[147] Telles also documented other patters of color-based residential segregation in Brazil.[148]

From a similar perspective, Tanya Hernandez stresses that phenotype is at the core of racial identities in Latin America. She indicates that "for instance, before a racial designation of Black is deemed appropriate, custom dictates an informal visual assessment of an individual's hair texture, nose width, thickness of lips, and degree of dark pigmentation for consistency with what is stereotypically viewed as a Black person."[149] In this sense—Hernandez notes—racial classifications can be described as a "prejudice of mark," as two people with similar ancestries but different phenotypes can be classified differently based on their physical traits.[150] In contrast, Elisa Larkin Nascimento sustains that there is little difference between the prejudice of mark (color) and the prejudice of origin (ancestry), as color is nothing more than the sign of origin, which is the ultimate factor leading to rejection and discrimination.[151]

Despite the evidence suggesting that color constitutes the basis of the racial stratification system in Latin America, some believe that color differences—and the privileges or burdens that are attached to them—are not explicitly connected to race discrimination.[152] While discussing the case of Brazil, Elisa Larkin Nascimento sustains that even though racial classifications are enforced based on skin color and physical traits (rather than blood or ancestry), the idea that preferences are based solely on appearance, potentially shields them from being decried as racist.[153] This denial of the correspondence between color

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[147] *Id.* at 100–121.
[148] Edward E. Telles, *Residential Segregation by Skin Color in Brazil*, 57 AM. SOCIOL. REV. 186–197 (1992).
[149] Tanya Katerí Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, a United States-Latin America Comparison*, 87 CORNELL LAW REV. 1093, 1102 (2001).
[150] *Id.* at 1105–1106. (The author explains that "Another feature that distinguishes Latin American race ideology from the historically prevalent race ideology in the United States is its focus on the individual rather than on familial and ancestral connections when selecting a racial classification. In theory, both formal and informal Latin American practices associated with the visually based prejudice of mark permit siblings with the same ancestors to be racially designated as distinct based on the variance of their racial appearance.")
[151] LARKIN NASCIMENTO, *supra* note 29 at 18.
[152] *Id.* at 17–18.
[153] *Id.* at 17–18.

and race-based stratification is designated by this author as the "sorcery of color," as it is continuously used as a screen for hiding color-based hierarchies that shape white supremacy.[154]

The law has played a central part in the construction of racial stratification in Latin America. Following the work of Costa, who identified four types of regimes affecting Afro-descendant populations in the region, Manuel Góngora-Mera characterizes four different articulations between racial hierarchies and the law in this region since colonial times.[155] these are:

> 1) a widespread practice of noncompliance with protective provisions while formally honoring strict adherence to the letter of the law, hiding the real situation of ethno-racial groups under the appearance of legal protection; 2) the consequent tradition of unequal application of law according to the addressees of the norms, with strong correlation to racial hierarchies; 3) the legal normalization of transregional and domestic race-based inequalities; and 4) the legal inclusion/exclusion of ethno-racial groups, in line with the political interests of the elites.[156]

Góngora-Mera points out that these articulations have allowed the persistence of ethno-racial exclusion in Latin America, as they have prompted the preservation of white supremacy and reinforced racial hierarchies.[157] In this respect, he asserts that, until recently, Latin American societies denied the existence of racial discrimination in the region, hiding behind "a legal veil of formal equality."[158] Since most countries in the region had granted citizenship to non-whites at least since the time of the independence and, with few exceptions, there were no systems of formal segregation in the post-independence period,

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[154] *Id.* at 17–18.
[155] Manuel Góngora-Mera, *Transregional articulations of law and race in Latin America: A legal genealogy of inequality* 16 (2012), https://www.taylorfrancis.com/ (last visited Jul 16, 2018).
[156] *Id.* at 19.
[157] *Id.* at 29.
[158] *Id.* at 10.

some use this "formal equality argument" to deny the existence of a significant problem of race discrimination in the region.[159]

However, the use of the formal equality argument seems to disregard that subordinated ethno-racial groups were primarily excluded and ignored during vast periods of the region's history, and also that in certain parts of Latin America there were, in fact, systems of formal and informal segregation. Elisa Larkin Nascimento remembers that, in parts of Brazil, racial segregation was possible thanks to the support of public authorities.[160] Tanya Hernandez argues that the role of the law in the creation of whitening immigration policies. Hernandez also mentions that many unwritten norms (consuetudinary laws), which were enforced by public authorities, were used as an instrument for racial exclusion against different populations.[161] In the particular case of Colombia, Daniel Bonilla argues that the state has used the legal system to try to eradicate or assimilate ethnic groups into the majoritarian culture.[162]

#### 4.2.1. The nuances of racial fluidity in Latin America: Racial classifications, racial identities, and ways of naming race

A particular aspect of Latin America's racial order is that ethno-racial identities in this region are, in general, more fluid than in other countries such as South Africa and the United States.[163] By fluidity, I mean that in Latin America, ethno-racial identities may change or be contingent upon circumstances such as geographic location, class status, self-identification, sharing of a non-majoritarian culture, among others.

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[159] *Id.* at 10–11.
[160] See, Elisa Larkin Nascimento, *Aspects of Afro-Brazilian Experience*, 11 J. BLACK STUD. 195–216 (1980)., at 206 (Noting that: "Indeed, in Campinas there was ostensive legalized segregation, with 'whites only' signs in movie theaters and other public places.")
[161] HERNÁNDEZ, *supra* note 33 at 26.
[162] BONILLA MALDONADO, *supra* note 1 at 28. (Noting that: "Examples of this perverse use of the legal system are the laws and executive decrees of the 19th century that expropriated indigenous groups' ancestral lands; the rules that declare that the aboriginal peoples were savages and barbarian, and needed to be civilized; article 31 of the Penal Code of 1980, where it was affirmed that indigenous persons were not criminally liable, and the many laws and decrees that put in charge of the Catholic Church the evangelization and civilization of indigenous tribes.)
[163] Telles and Paschel, *supra* note 80 at 868–869.

In contrast to the hypo-descent rules governing race relations in the United States, the small white population in countries such as Brazil, Colombia, and Ecuador and the national aspiration of whiteness seemed to have promoted the use of distinctions between black and mix-race individuals. This situation facilitated the development of a system of racial classification that allowed people with traceable white ancestry and an advantageous social position to be considered white despite having some African ancestry, too.[164] In this respect, Edward Telles and Tianna Paschel argue that, in Latin America, racial classifications tend to be more fluid than in the United States. In this region racial classifications are based mostly on phenotype, include a significant number of intermediate categories, and they describe a spectrum of colors.[165]

Peter Wade mentions that there is significantly more ambiguity in the use of racial categories in Latin America than in other regional contexts, as the boundaries of who falls within the category of black or indigenous are far from being clear or self-evident.[166] Since in Latin America the boundaries of racial classifications have not always been stable, the definition of who is white and who is not has varied throughout the years.[167] The traits commonly associated with whiteness also vary from country to country, and different factors influence how ethno-racial classifications are defined and applied to people.[168] In a study conducted by Edward Telles and René Flores, the authors mention: "This study has shown that identifying as white, although constrained by skin color, is also shaped by age, education, and national context, as well as by the color of those one is interacting with."[169] Due to similar situations, the World Bank has stated that it is necessary to study the situation of Afro-descendants from a variety of angles and to use different ways of measuring Afro-descendants.[170]

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[164] Cottrol, *supra* note 45 at 65–66.
[165] Telles and Paschel, *supra* note 80 at 865.
[166] PETER WADE, BLACKNESS AND RACE MIXTURE: THE DYNAMICS OF RACIAL IDENTITY IN COLOMBIA (1993).
[167] Edward Telles & René Flores, *Not Just Color: Whiteness, Nation, and Status in Latin America*, 93 HISP. AM. HIST. REV. 411–449, 441 (2013).
[168] *Id.* at 441.
[169] *Id.* at 441.
[170] AFRO-DESCENDANTS IN LATIN AMERICA: TOWARD A FRAMEWORK OF INCLUSION, *supra* note 138 at 18.

Different racial groups have distinct forms of fluidity or mobility in the Latin American racial stratification scale.[171] In this sense, citing Peter Wade's work on the position of both indigenous and Afro-descendants, Edward Telles refers to the differences in racial mobility of indigenous and Afro-descendant persons:

> Mobility out of the indigenous category is often achieved through demographic, cultural, or status change as indigenous is often understood on the basis of community, language, and low socioeconomic status (Patrinos and Psachoroupoulos 1994; Friedlander 1975; Sieder 2002). One can become a mestizo by moving to an urban area, speaking Spanish, or moving out of poverty. Blacks and mulattos can sometimes move out of these categories through changes in status, as in the popular phrase 'money whitens' (Schwartzman 2007), though such mobility has probably been overstated and may even be reversed (Mareletto 2012; Telles and Paschel forthcoming). Thus, social mobility seems less likely to change the racial status of individual Afro descendants compared to that of indigenous people.[172]

Also, regarding the influence of class status on racial identities and classifications in Latin America, Tanya Hernandez asserts that:

> In Latin American settings, social status informs formal racial classification, as illustrated by the common belief that persons of prominence should not be 'insulted' by referencing their visible African ancestry. Additionally, it is generally presumed that because no person of prominence could be Black, these persons should be designated distinctly.[173]

[171] TELLES, *supra* note 42.
[172] *Id.* at 32.
[173] Hernández, *supra* note 149 at 1105–1106.

This specific relation between high-class status and racial mobility has historical antecedents since, as I mentioned before, during colonial times, wealthy individuals could purchase *"cédulas de gracias al sacar,"* which allowed them to have access to some of the privileges that the caste system granted to whites.[174]

In this region, there is a robust lexicon of terms used to describe people's racial features, whose fluidity is at odds with the race-based hierarchical structure of Latin American societies.[175] Henry Gates asserts that answering the question of who is black in Latin America is a complex task since there are many ways in which Afro-descendants refer to their ethno-racial identity (*e.g.*, using words as *preto*, *negro*, *mulato*, *pardo*, *moreno*).[176] Moreover, people with similar phenotypes can be described using different racial classifications, depending on a broad range of situations, such as the intended politeness of the interaction or the level of intimacy among the parties involved.[177] Livio Sansone explains that color terminology can be particularly subjective, as it varies depending on the person doing the assessment, the purpose of such assessment, and the context in which it is done.[178] Sansone mentions that "a son can be *preto* to his mother and *moreno* to his father, or, as proven by my questionnaire, a family can be called *escuro* by their neighbors to the left and *mista* by their neighbors to the right."[179]

However, color terminology could be less related to racial classifications than one might imagine. Robin Sheriff, in her ethnological study of a community in Rio de Janeiro, affirms that the participants in her study used this variety of color terminology not to classify each other in racial terms, but rather to describe themselves and others based on physical appearance, as they continued to have a clear white-black division of the racial world.[180] Thus, she suggests that anthropologists could have misinterpreted the multiplicity of color-based terms as forms of racial categories, while they are simply adjectives to describe

[174] Telles and Flores, *supra* note 167 at 426.
[175] LOVEMAN, *supra* note 64., at xii.
[176] HENRY L. GATES, BLACK IN LATIN AMERICA 3 (2011).
[177] *Id.* at 3.
[178] LIVIO SANSONE, BLACKNESS WITHOUT ETHNICITY: CONSTRUCING RACE IN BRAZIL 46 (2003).
[179] *Id.* at 46.
[180] ROBIN E. SHERIFF, DREAMING EQUALITY: COLOR, RACE AND RACISM IN URBAN BRAZIL 31 (2001).

physical characteristics.[181] In contrast, Mara Loveman sustains that, although people in Latin America are attentive to racial differences, they are not familiar with the use of racial classifications, and most would generally describe to their race by stating their nationality.[182]

Due to the fluidity of ethno-racial categories, determining who is Afro-descendant is not easy in Latin America. According to the World Bank, the term Afro-descendant was first used by civil society organizations in the region in the early 2000s to describe a population that shared a particular common ancestry (usually linked to being the descendants of African enslaved persons that were brought to the Americas during the European colonization period) but that have significant dissimilarities among them.[183] This umbrella term includes Afro-indigenous communities, such as the *Garifuna* people, and also large portions of Latin American non-ethnic groups, such as the *pardos* in Brazil.[184]

The particularities of racial classifications, terminology, and identities in Latin America, undoubtedly, affect my research agenda, as they add a level of complexity to my inquiry.

### 5. Limitations on pre-existing data and statistical invisibility

An additional aspect to consider is the limited pre-existing information related to race discrimination in Latin America, especially in the context of the justice system. This lack of substantial previous data is a direct consequence of the myth of *mestizaje*: As racial discrimination in the region was believed to be inexistent, there was no apparent reason to collect data on race.[185] International organizations have already diagnosed the problem of the limited or total absence of data on race discrimination issues and the situation of minority populations in Latin America. They have warned about its negative consequences

[181] *Id.* at 45–46.
[182] LOVEMAN, *supra* note 64., at xii.
[183] AFRO-DESCENDANTS IN LATIN AMERICA: TOWARD A FRAMEWORK OF INCLUSION, *supra* note 138 at 16–17.
[184] *Id.* at 16–17.
[185] AFRODESCENDIENTES EN AMÉRICA LATINA Y EL CARIBE, *supra* note 26.

to guarantee the rights of Afro descendant populations in the region.[186] The ECLAC has mentioned that although Afro-descendants account for a significant share of the Latin American population, they have traditionally made invisible in the general population, and their contributions to the region's development had not been sufficiently acknowledged.[187] I will refer more extensively to the issue of statistical invisibility of the Afro descendant population when I discuss the potential factors influencing Afro descendant representation.

### 6. Institutional precariousness of Latin American judiciaries

In addition to the limited available information on issues of race, many Latin American countries also struggle with an acute institutional weakness in their judicial sectors. By institutional weakness, I refer to the severe limitations of the judicial institutions and procedures to effectively deliver justice and to efficiently process the load of cases before them with transparency. Gretchen Helmke and Julio Rios-Figueroa comment that, despite their prominent role in the political landscape of individual countries, Latin American courts face significant dangers and constrains in the work they do.[188] As an example, the authors reference that, between 1985 and 2008, high courts in the region encountered numerous situations that put their survival at risk.[189] Additionally, courts seem to have a reputation problem and they do not enjoy the confidence of the people. Their levels of trust among the population were crumbling by the early 2010s.[190]

However, authors such as Jorge Esquirol have warned that neoliberal institutions might be overstating the perceived institutional weakness of Latin American judicial systems when compared to those in the U.S.[191] In Esquirol's view, this generalized perception of Latin American "failed law" have led

[186] *Id.*
[187] UNITED NATIONS: ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, *supra* note 127.
[188] Helmke and Rios-Figueroa, *supra* note 22.
[189] *Id.* at 1.
[190] *Id.* at 2.
[191] Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. LAW 75 (2008).

to continuous and unsuccessful reform efforts which have had different objectives over time. Nevertheless, he argues that none of these reform efforts will be able to solve this perceived breakdown in judicial institutions as "the failure they purport to redress is actually a combination of features endogenous to all systems of law, problems projected on the region as a whole, and assessments contingent on political and organizational preferences."[192]

### 7. International, constitutional and legal protections for Afro-descendants in Latin America

The international law protections established for Afro-descendants have been well-received in Latin America.[193] By the end of 2017, the subscription of instruments to combat racial discrimination was standard among Latin American states. All countries in the region had ratified the Convention 111 of the International Labor Organization on Discrimination (Employment and Occupation) and the International Convention on the Elimination of All Forms of Racial Discrimination. Most countries had also ratified either the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social, and Cultural Rights, and the remain countries had adhered to these covenants.[194] A similar situation takes place with the International Convention on the Suppression and Punishment of the Crime of Apartheid and the Convention 169 on Indigenous and Tribal Peoples of the International Labor Organization. Both instruments had have been ratified or adhered to by most countries in the region.[195] Besides, the 2001 Durban Conference (as well as the Durban Declaration and Action Plan), which called for state action to guarantee Afro descendant's rights and combat racial discrimination, has had a prominent role in promoting the rights of Afro-descendant populations in the region.[196]

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[192] *Id.* at 77.
[193] Costa and Leite Gonçalves, *supra* note 128 at 57.
[194] *Id.* at 57.
[195] UNITED NATIONS: ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, *supra* note 127 at 57.
[196] Costa and Leite Gonçalves, *supra* note 128 at 57.

Within the Inter-American system, in 2005, the Inter-American Commission on Human Rights—IACHR—established the Rapporteurship on the Rights of Afro-descendants and Against Racial Discrimination.[197] In 2013 the Organization of American States—OAS—adopted the Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance, and the Inter-American Convention Against All Forms of Discrimination and Intolerance.

At a national level, attention should be paid to constitutional and legal instruments as well. During the past 30 years, countries such as Brazil, Colombia, Ecuador, Perú, Venezuela, Argentina, Paragüay, and Urugüay enacted new constitutional texts that introduced significant changes to the structure of these states, including their judicial systems.[198] This neo-constitutionalist trend has also led to what some refer to as the Latin American multicultural turn, consisting of the constitutional and legal acknowledgment that different cultures are coexisting at the interior of many Latin American countries.[199] In practice, this acknowledgment translated into the adoption of legal instruments aimed at securing, with different degrees depending on the country, the rights of ethno-racial groups in the region.[200]

### 7.1. The multicultural turn in Colombia

In Colombia, the neo-constitutional and multicultural trends materialized in the enactment of a new Constitution in 1991.[201] This political document was crafted by a National Constitutional Assembly, which included the participation of many different social and political groups.[202] The Assembly was formed after a significant number of voters supported the decision to enact a new Constitution in a special election.[203]

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[197] OEA, *OEA - Organización de los Estados Americanos: Democracia para la paz, la seguridad y el desarrollo*, DERECHOS DE LAS PERSONAS AFRODESCENDIENTES Y CONTRA LA DISCRIMINACIÓN RACIAL (2009), http://www.oas.org/es/cidh/afrodescendientes/default.asp (last visited Mar 16, 2020).
[198] Uprimny, *supra* note 119.
[199] *Id.*
[200] *Id.*
[201] Constitución Política de Colombia [C.P.].
[202] BONILLA MALDONADO, *supra* note 1 at 124.
[203] PASCHEL, *supra* note 33 at 103.

Donna Van Cott argues this constitutional process was an institutional response to a political crisis in terms of representation, participation, and legitimacy of the Colombian state.[204] The process leading to the adoption of the new Constitution occurred amid an unstable political and social period, as the violence resulting from the confrontation between the leftist guerrilla groups, the drug cartels, and the Colombian state was raging through the country.[205] The constitutional change that arose from this crisis marked a break with the liberal constitutional tradition that had dominated the political landscape since the time of independence, as this constitutional text relinquished the idea of the *mestizo* nation and recognized multiculturalism and ethnic diversity in the country.[206]

This constitutional process opened the door for different excluded groups to seek the recognition of past injustices and the granting of new fundamental rights, including indigenous peoples and Afro-descendants, who, until that moment, lacked significant legal protection for their lands.[207] The National Constitutional Assembly included the participation of three indigenous delegates, which used their positions to advance ethnic rights in the country and to achieve the recognition of cultural autonomy of their peoples.[208] These delegates argued against the disadvantageous treatment that cultural minorities had historically faced in Colombia and in favor of acknowledging the Colombian nation's diversity.[209]

According to Daniel Bonilla, the Constitution included three specific types of rights for ethnic communities: Those that secure the self-government for minority groups; those that promote the political participation of ethnic groups; and those that protect the expression and reproduction of the cultural heritage of these groups.[210] Although, these newly adopted rights have created tension between the principles of

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[204] DONNA LEE VAN COTT, THE FRIENDLY LIQUIDATION OF THE PAST: THE POLITICS OF DIVERSITY IN LATIN AMERICA 1 (Billie R. DeWalt ed. 2000).
[205] PASCHEL, *supra* note 33 at 102–103.
[206] VAN COTT, *supra* note 204 at 7–8.
[207] PASCHEL, *supra* note 33 at 103–104.
[208] BONILLA MALDONADO, *supra* note 1 at 124–140.
[209] *Id.* at 124–140.
[210] *Id.* at 29–30. (Noting that, in practice, these guarantees were specified in concrete protections, such as the recognition of the special indigenous jurisdiction, the protection of territorial and political autonomy, the creation of special districts in the Senate and the House of Representatives, and the provision of linguistic and education protections.)

cultural unity and cultural diversity incorporated in the Constitutional text, as well as between the principle of minorities' self-determination and the centralized political and juridical character of the Colombian state.[211] The new Constitution granted some ethnic groups, and particularly indigenous peoples, the rights to reserved seats in Congress, the explicit recognition of the multicultural character of the nation, the legal protection of indigenous territories, political autonomy for such territories, the legal establishment of the Special Indigenous Jurisdiction, and right to be consulted regarding resource-extraction projects in their territories.[212] Another relevant aspect of the 1991 Constitution is that its equality provision (article 13) does not only contemplate a right to formal equality before the law but also establishes that the state must promote conditions of substantive equality. This provision also orders the state to adopt special measures to favor discriminated groups.[213]

Nevertheless, Afro-descendants were not so well-positioned as indigenous peoples to benefit from the changes introduced by the new Constitution, and there was little support for this group's inclusion in the constitutional drafting process.[214] Donna Van Cott explains that, unlike indigenous peoples, Afro-descendants did not attain any seats at the Assembly elections and lack direct representation in this body.[215] This absence of representation seems to have been the consequence of several factors, including: The "lack of financing, weak politization of blackness in general, lack of support from other sectors, and fragmentation among the Pacific Coast black communities."[216]

Since Afro-descendants did not have direct representatives at the Constitutional Assembly, they lobbied delegates and formed alliances with indigenous peoples' representatives to promote their interests in the Assembly.[217] As a result of this mobilization strategy, the Assembly adopted at the last minute,

[211] *Id.* at 32.
[212] HTUN, *supra* note 2 at 96.
[213] VAN COTT, *supra* note 204 at 83–84.
[214] *Id.* at 68.
[215] *Id.* at 68.
[216] *Id.* at 68.
[217] PASCHEL, *supra* note 33 at 112.

transitory article 55,[218] which constitutionally recognized certain land rights for Afro-descendants, by allowing them to claim collective ownership over the territories that some black communities had inhabited for decades in the Pacific basin of the country.[219] It is crucial to notice that the term "black communities," coined in the Constitutional text, originally referred exclusively to the black communities of the Pacific coast, which were believed to be the descendants of *cimarrones*.[220] However, the use of this term has expanded to cover other black populations in urban and rural areas of Colombia that claim a type of ancestral ethnic identity.[221]

As a direct consequence of the constitutional process, the Colombian Congress enacted Law 70 of 1993, which operationalized transitory article 55 of the Constitution by defining the process thorough which black communities of the Pacific coast could obtain legal recognition of their communal property rights.[222] In correspondence with the ethnic paradigm of multicultural rights, this law conceptually framed Afro Colombians as ethnic groups, portraying them as rural communities that were mostly located along the Pacific Coast of the country.[223] Oliver Barbary and Fernando Urrea comment that the description of black communities as an ethnic group (which partially resembled the legal status of indigenous peoples) also had the intention of leaving behind the use of the concept of race and its perceived biological nature.[224]

Parallelly to the passing of Law 70, Congress enacted Law 47 of 1993, which established a special statute for the Archipelago of San Andrés, Providencia, and Santa Catalina and recognized ethnic rights for the *Raizal* people.[225] According to Daniel Bonilla, both Law 70 and Law 47 of 1993 were, at the time, the most recent pieces of legislation enacted to benefit Afro-descendants in Colombia since the law that freed enslaved persons in 1851.[226] More recently, the Colombian Congress has enacted new laws to protect Afro-

[218] Constitución Política de Colombia [C.P.] art. transitorio 55.
[219] PASCHEL, *supra* note 33 at 105–106.
[220] Barbary and Urrea Giraldo, *supra* note 20.
[221] *Id.*
[222] L. 70/93, agosto 27, 1993, DIARIO OFICIAL [D.O.] (Colomb.).
[223] PASCHEL, *supra* note 33 at 112.
[224] Barbary and Urrea Giraldo, *supra* note 20 at 54.
[225] L. 47/93, febrero 19, 1993, DIARIO OFICIAL [D.O.] (Colomb.).
[226] BONILLA MALDONADO, *supra* note 1 at 30–31.

descendants from discrimination, including a statute that criminalizes discrimination based on race and other factors, and a law that creates special seats in congress for black communities' representatives.[227]

The Latin American neo-constitutional trend and its multicultural turn are essential factors to keep in mind while studying the ethno-racial composition of the region's judiciaries. Not only due to the changes that these reforms introduced in the architecture of Latin American states but also because of the different protections that minority groups conquered. Such protections constitute transcendental changes in the position of these groups within the state.

### 8. The multiplicity of stakeholders

An additional aspect that is determinant to understand the study setting and context of this research is the different types of stakeholders present in the debate about the ethno-racial composition of the judiciary. Different groups may have different readings of the level Afro-descendant representation in the judicial systems and its consequences. It would be important to take into consideration the perspectives of a variety of actors. Analyzing minority representation on courts certainly is a task that usually centers around judges, but that may not be restricted to them. Judicial employees play a significant role in everyday court work. Depending on the institution, judicial employees may perform tasks such as reviewing and assessing the content of case dockets and even drafting court decisions. Thus, to study minority inclusion in the court system should also take into consideration the role and perspectives of the employees who assist judges in their duties.

[227] GONZÁLEZ MORALES AND CONTESSE SINGH, *supra* note 16 at 31.

### 9. Positionality and social position

According to Ravitch, positionality and social position are essential elements of the researcher's identity,[228] which is, in turn, a central piece in the research design.[229] In other words, the results of the inquiry will be, in the end, the results of research processes and data collection methods *vis-à-vis* the researcher's positionality and social position.[230] As the principal researcher in this project, I am *"the primary instrument of the research."*[231] In consequence, it is essential to situate my inquiry within my own personal and professional background.

I identify as a gay, Afro-Colombian man. I have middle to dark skin and curly hair. I grew up in a lower-class neighborhood of Medellín, a predominantly white-*mestizo* city in the Northwest part of Colombia. In my hometown, people would commonly describe me as *Moreno*—a word used to "politely" describe a male of black features who is not in the darker side of the skin color spectrum. Although I grew up in a context in which racially charged comments and attitudes are familiar, I did not identify as black until my late 20s. Before then, I did not have a clear consciousness about my racial identity, and I would have probably identified as *mestizo* if I had been asked. I initially started to self-identify as black after being confronted about my racial identity at the NGO I was working at as an intern. I am the only self-identified black person in my family. Despite having dark skin, my parents do not identify as black or Afro-descendant, which they understand to be an identity reserved for people with darker skin tones and probably from the coastal regions of Colombia. Additionally, I was raised in the majoritarian culture of Colombia, which is markedly catholic, heteronormative, uneven in terms of class, and with the idea of *mestizaje* as a central component of national identity.

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[228] SHARON M. RAVITCH & NICOLE MITTENFELNER CARL, QUALITATIVE RESEARCH BRIDGING THE CONCEPTUAL, THEORETICAL, AND METHODOLOGICAL 11 (2016). (Noting that "positionality […] is the researcher´s role and identity as the intersect and are in relationship to the context and setting of the research […] To fully understand researcher positionality researcher must consider social location (identity markers of researchers…")
[229] *Id.* at 10–11.
[230] *Id.* at 40.
[231] *Id.* at 40.

In terms of class, I was brought up in the context of urban poverty. My parents were low-income workers. I attended public schools and attended a private college in my hometown thanks to scholarships. Later on, and also funded by different scholarships and fellowships, I completed a master's degree in the U.S., which I specialized in critical race studies and law and sexuality. Currently, I am in the final stages of my doctoral dissertation. Due to my education, I believe that I am a person who, even though it is read as black and has specific lower-class identifiers, can often blend into spaces of privilege to some extent and who can navigate institutionalized settings with ease.

I have dedicated my career to work on human rights issues, especially in the field of race and sexual orientation discrimination. I have done so by litigating discrimination and human rights cases before Colombian courts, and by working directly with black and LGBT persons and organizations in Colombia. At an ideological level, I believe that in most western societies, and especially in the context of Latin America, there is a problem of pervasive and widespread racial discrimination, which is rooted in situations such as the enslavement of Africans and the conquest of native peoples by European nations. Both in the case of Latin America and the United States of America, I believe that this situation of discrimination has structural dimensions. Racism has been and continues to be used as a condition that justifies the unequal allocations of privileges, burdens, benefits, and responsibilities based on factors such as phenotype, ancestry, cultural background, national and regional origin.

Regarding my sexual orientation, I am openly gay to my family and friends. I believe that I have certain mannerisms that depending on the context, may indicate a non-heterosexual sexual orientation. Nevertheless, I conform to most traditional gender norms associated with masculinity in the context of Latin America.

I have work experience within the judicial system and also litigating human rights cases before the courts in Colombia. For about two years, I worked as a judicial clerk for one of the magistrates of the Constitutional Court of Colombia, one of the high courts in the country. During my time working for the court, I was surprised by the fact that this court, which has one of the best records in the region on protecting the rights of these communities, was also space where Afro-descendants and other minorities were virtually

absent. Not only there has never been any black or indigenous tenured magistrate on this bench, but the staff of the court was almost entirely white and *mestizo*. Hence, my particular interest in studying the problem of black representation in spaces of power, and particularly in the judiciary, came not only due to my general interest in issues of race discrimination but also to my particular experiences as a judicial employee. I consider that my personal experiences regarding discrimination, as well as the situations I referred to during my practice as a lawyer in Colombia, shaped my view regarding the problem of minority underrepresentation on Colombia's judicial system.

A final aspect that I deem relevant to mention is that, due to the nature of my inquiry, I will try to exalt black voices, their narratives, and perspectives about the object of this inquiry. This aspect of the research design relates to my experiences working as an advocate and a researcher. During my career, I have been in many scenarios in which situations affecting the lives, well-being, and rights of Afro-descendants are often discussed, written about, and decided upon without considering the viewpoints of black persons. More usually than not, Afro-descendants are absent from decision-making processes involving them and their future. In this particular research endeavor, I try to counter this impulse by privileging black voices and by trying to elevate them to a place where they can be elements that allow for the transformation of their reality. This research is also the production of a counternarrative, as it tries to put Afro-descendant's perspectives at the center of the debate.

## 10. Theoretical framework and bodies of literature influencing the research

The core of the theoretical framework for this study is the works of critical race scholars. Critical race studies can be understood as a "movement of left scholars, most of them scholars of color, situated in law schools, whose work challenges the ways in which race and racial power are constructed and represented in American legal culture and, more generally, in American society as a whole."[232] Critical

[232] Introduction, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii–xxxii (Kimberlé Crenshaw et al. eds., 1995). at xiii.

race theorists have inquired about the role of the law and the legal system in the preservation of white supremacy in the U.S. They have exposed the contradictions between racial inequality in the law and in society and the equality principle that is supposed to guide the functioning of the legal system.[233]

I opted for using critical race theory as the central pillar of this project's theoretical framework due to the centrality that this movement gives to the questions about race and the relationship between racial subordination, the legal system, and judicial institutions.[234] Although critical race theory was born as a movement primarily interested in the particularities of race in the U.S., I consider that many of its postulates can be useful to understand the Latin American context. The former is due to the shared place that race inequality has in the histories, processes of nation-building, and the development of social relationships in both the United States and Latin America.[235] I am, by no means, implying that Latin America and the United States of America share the same history regarding racial oppression. I am also not asserting that racial discrimination against minority groups has played out similarly in both regional contexts. Neither I am sustaining that the critical race theory's conceptual constructs can be applied to Latin America without dealing with the particularities of racial and political dynamics in this other regional context. What I want to express is that critical race theory provides a refined conceptual framework to explore how the legal system is intimately related to racial inequality. This aspect, which is common to the contexts of the United States and Latin America, provides significant justification to use this conceptual framework to study the problem of Afro-descendant underrepresentation in Latin American judiciaries. This use of the framework is especially warranted given the still nascent state of the debates on race and the law in the Latin American academic context. Therefore, it is necessary to explore different conceptualizations that may be useful to understand the region's reality.

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[233] *Id.*
[234] RICHARD DELGADO, CRITICAL RACE THEORY AN INTRODUCTION (2 ed. 2014).
[235] *See* HERNÁNDEZ, *supra* note 33. (Noting the particularities of racial subordination in Latin America and the role of the law to maintain racial hierarchies in the region.)

The second pillar of my theoretical framework comes from the works of legal realists and critical legal theorists, especially in their vision about the role of judges for the creation of law and the decision of cases.[236] The debate about judicial impartiality and the role of judges in the process of case decision is one of the most traditional jurisprudential debates.[237] It is possible to identify at least two main competing perspectives in this debate. First, there are formalist currents of thinking, which give impulse to the idea of judicial obedience to the will of the legislator as a precondition for a correctly working legal system. As Montesquieu would express regarding the separation of powers: Judges should be "no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor."[238] Second, there are realism perspectives, which dismiss the idea of judicial neutrality, instead of stressing the political role of the judicial function. Oliver Wendell Holmes, one of the most widely known realists, wrote about what constitutes the law, as the object of study of the legal discipline, that "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[239]

Depending on the line of thinking, Afro descendant representation on courts seems to have different connotations. From a formalist perspective, the judge needs to be impartial, and the nature of its task makes its identity to have less importance for the decision of cases. From a neo-realist perspective, judges are political players. Given that a democratic government's basis is a fair representation, the identity of judges, their experiences, and interests are significantly more relevant.[240] I believe, following the work of realists, that judges play an essential role in the process of knowing what the content of the law is. Judges are political actors that have the power to use the law as a way to protect their interests. I understand that such power of judges is not unrestricted, but I still believe that judges possess significant discretion in deciding

[236] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).
[237] Graham, *supra* note 19 at 159–160.
[238] CHARLES DE SECONDAT & THOMAS NUGENT, THE SPIRIT OF LAWS (2000), http://ebookcentral.proquest.com/lib/fordham-ebooks/detail.action?docID=3117782 (last visited Mar 16, 2020).
[239] Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. LAW REV. 991, 460–461 (1997).
[240] Graham, *supra* note 19.

cases.[241] Therefore, studying who judges are, their backgrounds, and the experiences informing their work is inquiring for nothing different than what the law is and how it is applied to specific cases and individuals. Consequently, to ask about judges is nothing different than to ask about the law itself.

The third pillar for my inquiry is the previous work that lawyers and social scientists have done about the issue of minority and women's representation on U.S. courts. Recent discussions on group representation in U.S. public institutions have focused on the idea of diversity. This conceptual framework gained strength following Justice Powell's opinion in *Regents of the University of California v. Bakke*,[242] in which the United States Supreme Court found the need for classroom diversity to fall within the category of a compelling governmental interest. Since then, diversity has become a common point of tension in debates on affirmative action in higher education and the composition of governmental institutions.[243]

Political scientists have studied minority representation on courts in the United States since the 1970s.[244] There have been four main points of debate around this issue, which I will debate in more detail through the text: How the process of diversification of the U.S. judiciaries has taken place? What are the rationales to justify the need for judicial diversity? Do different judicial selection mechanisms lead to different judicial diversity outcomes? And what are the effects of diversity in judicial decision-making?

One of the most common concerns regarding the discussion of judicial diversity is its tension with the principle of judicial impartiality, which is a constitutional guarantee in most western democracies.[245] If judges are to be impartial, some question whether minority judges should be barred from knowingly considering minority points of view when they engage in legal reasoning.[246] Some also question whether minority judges, due to constraints present in judicial activities, are in a position to represent minority

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[241] *See* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEG. EDUC. 518 (1986).
[242] *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978)
[243] Edward M. Chen, *The Judiciary, Diversity, And Justice For All*, 91 CALIF. LAW REV. 1109–1124 (2003).
[244] Graham, *supra* note 19.
[245] Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 BOSTON COLL. LAW REV. 95–150 (1997).
[246] Graham, *supra* note 19 at 159–160.

communities' points of view. In other words, whether the expectations on minority judges to incorporate in their decision-making minority points of view may be the result of mere identity essentialism.[247] Nevertheless, there have been significant non-essentialist efforts to argue for minority representation in courts.[248]

Some authors have argued that, despite being an important goal, judicial diversity should not lead to an endorsement of just any person of color nominated to a judicial station.[249] Instead, they emphasize the idea that nominees should have representativeness.[250] In this respect, Graham subscribes to Hannah Pitkin's conceptual framework that differentiates between descriptive and substantive representation.[251] The first refers to the actual composition of institutions and the way they resemble the composition of the population they represent. The second focuses on the decisions governmental officials make concerning the interests of represented groups. How descriptive and substantive representation interrelate has been the subject of extensive debate. Some authors stress the importance of substantive representation, while others emphasize descriptive representation as a condition that increases the positive results of substantive representation. Nevertheless, debates on both aspects of representation are usually held simultaneously due to the multiple connections between them.[252]

Part of the literature has problematized the discrete role that race and gender have played in the judicial selection process at a federal level in the United States.[253] Nevertheless, for many years now, there has been an academic and public policy debate on which methods of filling court vacancies best ensure judicial diversity.[254] Through the years, some studies suggested that appointive systems are more efficient

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[247] *Id.* at 159–160.
[248] *Id.* at 179.
[249] Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH LEE REV 405–496 (2000).
[250] Johnson and Fuentes-Rohwer, *supra* note 13, at 47.
[251] PITKIN, *supra* note 21.
[252] Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"*, 61 J. POLIT. 628–657 (1999).
[253] Mark Hurwitz, *Selection System, Diversity And The Michigan Supreme Court*, 56 WAYNE LAW REV. 691–704 (2010).
[254] *Id.*

at increasing minority presence in the judiciary; others indicated that elective systems give women and minorities a higher chance of being selected. Others argued that merit-based systems are best-suited for the selection of minority and women judges.[255] Finally, some propose that judicial selection procedures no longer have an impact on judicial diversity.[256] Additionally, there are additional factors that determine minority representation in the judiciary.[257] Studies on diversity in United States state courts have concluded that governors of different political parties have different inclinations when nominating judges, with Democratic governors appointing more women and minorities than those appointed by Republicans.[258]

Feminist legal theory has energized the debate on judicial diversity, contributing studies on women's presence in the judiciary.[259] As the underrepresentation of women on judicial bodies continues to be a problem in many parts of the world, different conceptual approaches have been used to understand this issue. These frameworks include equal opportunity, representativeness, and diversity.[260] Nevertheless, some have questioned the efficacy of such rationales to "address the symbolic exclusion of women from traditional notions of judging and judicial authority."[261]

In addition to the U.S., other countries have implemented a wide range of strategies to combat the lack of minority and women presence on courts. A segment of the literature indicates that current legal rules imposing restrictions on affirmative action may the most substantial barriers for achieving diversity in the judiciary: "paradoxically, the legal framework constructed to promote equality now stands in the way of the realization of it."[262]

Minority representation on courts also appears to be a point of controversy outside of the U.S. Concerning France, where the collection on population's racial and ethnic data faces legal restrictions, there

[255] Malia Reddick, Michael J. Nelson & Rachel Paine Caufield, *Racial And Gender Diversity On State Courts An AJS Study*, 48 JUDGES J. 28–32 (2009).
[256] Hurwitz, *supra* note 253.
[257] Reddick, Nelson, and Paine Caufield, *supra* note 255.
[258] *Id.*
[259] Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 INDIANA LAW J. 891–920 (1995).
[260] Dermot Feenan, *Women Judges: Gendering Judging, Justifying Diversity*, 35 J. LAW SOC. 490–519, 491 (2008).
[261] *Id.* at 491.
[262] Kate Malleson, *Diversity in the Judiciary: The Case for Positive Action*, 36 J. LAW SOC. 376–402, 401 (2009).

have been efforts to identify how minorities and other marginalized groups are represented in the judiciary.[263] Mathilde Cohen used qualitative data to assess how discourses by judges, prosecutors, and other types of actors involved in the judicial system undermine the perceived importance of race and sexual orientation on courts.[264] According to the author, legal professionals use different mechanisms to avoid acknowledging the importance of race and sexuality in judicial bodies, while at the same time recognizing the importance of other characteristics–such as gender and socio-economic status–for the judiciary. The result of the deployment of such strategies is often a general denial of the importance of sexual orientation and racial identities in the judicial context.[265]

The final pillar of my theoretical framework, refers to the previous work that scholars have done on the issue of race relations in Latin America. In this respect, I reviewed the literature on aspects such as the role of the law in maintaining racial subordination,[266] Latin America's colonial history, the relationship between race and the nation-building processes,[267] the impact of *blanqueamiento* and *mestizaje* narratives on race-relations, the racial identity formation,[268] the issue of Afro-descendant statistical invisibility,[269] the concepts of race and ethnicity,[270] previous studies on race discrimination,[271] and scholarly texts on the legal instruments for protecting ethno-racial groups in the region, among other topics.[272] Instead of explaining each point of tension in this literature, I will use it to analyze the research project and its findings.

[263] Mathilde Cohen, *Judicial Diversity in France: The Unspoken and the Unspeakable*, 43 LAW SOC. INQ. 1542–1573 (2018).
[264] *Id.*
[265] *Id.*
[266] HERNÁNDEZ, *supra* note 33.
[267] STEPAN, *supra* note 84.
[268] MARILYN GRACE MILLER, RISE AND FALL OF THE COSMIC RACE: THE CULT OF MESTIZAJE IN LATIN AMERICA (2004).
[269] AFRODESCENDIENTES EN AMÉRICA LATINA Y EL CARIBE, *supra* note 26.
[270] WADE, *supra* note 27.
[271] Bello and Rangel, *supra* note 6.
[272] RODRIGUEZ GARAVITO AND BAQUERO DIAZ, *supra* note 125.

## 11. Research design

My research process had three stages: 1) Literature review; 2) data collection through the use of information requests; 3) data collection through interviews and site visits.

### 11.1. Literature review

At the first stage of the project, I conducted a literature review of the leading academic sources related to the two critical aspects of my inquiry: the key theoretical debates on minority representation on judicial institutions and the relationship between race and the law in Latin America. I used Zotero to collect, process, and organize the information I gathered in this process. With this information, I wrote two separate documents describing the findings this part of my research produced, which were later used to write the dissertation. I did not conduct specific searches for the critical race theory and the legal realism sources because I was already acquainted with these bodies of literature, which facilitated their use in this research endeavor.

### 11.2. Data collection through the use of information requests

In Colombia, as it is the case in most Latin American countries except Brazil, I could not find previous data on the ethno-racial composition of the region's judiciaries. Hence, it was necessary to collect primary data. I considered different alternatives to gather that data, such as conducting an on-line survey to judicial servants or even to contact judiciary administrators to explore the possibilities of conducting a judicial census (as the one judicial authorities conducted in Brazil).[273] However, due to time and financial

[273] CENSO DEL PODER JUDICIAL: VECTORES INICIALES Y DATOS ESTADISTICOS, 212 (2014), http://www.cnj.jus.br/images/dpj/CensoJudiciario.final.pdf (last visited Sep 23, 2018).

resources, I decided that the most feasible alternative to collect the information was to ask a sample group of courts to report about their gender and ethno-racial composition.

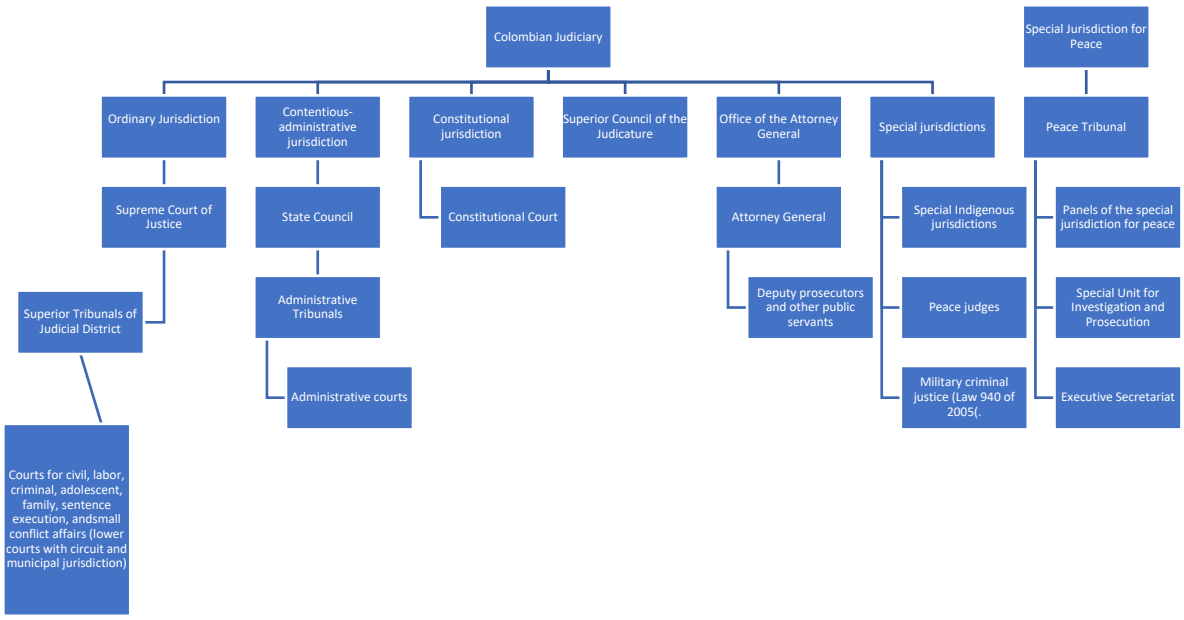
### 11.2.1. Information requests concerning the composition of high and intermediate courts

I decided to send information requests to request data on the ethno-racial composition of the court system in Colombia. I submitted requests to a group of courts asking them to self-report on the composition of the institution in terms of gender and race/ethnicity, as well as informing whether there were affirmative action policies in place for these groups. Since I had certain doubts about whether the courts would reply to my information requests, given the national reticence to discuss the racial exclusivity of its elite spheres, I submitted the information requests under the form of an administrative mechanism known as *"derecho de petición"* (right of petition). The right of petition is an administrative mechanism and constitutional right incorporated in article 23 of the Colombian Constitution, which reads: "Every individual has the right to present respectful petitions to the authorities on account of general or private interest and to secure prompt resolution of same."[274] According to the Statutory Law 1755 of 2015, which operationalizes the right of petition, any citizen may use this instrument to request information and copies of documents to public authorities.[275] In the case of rights of petition that request information, public authorities have ten days to deliver a response to the petition.[276] Given the constitutional right status of the right of petition, public authorities were, at least formally, required to provide a timely response to the requests, even if they did not deliver the demanded information.

[274] Constitución Política de Colombia [C.P.] art. 23.
[275] L. 1755/15, junio 30, 2017, DIARIO OFICIAL [D.O.] (Colomb.) art. 1-13.
[276] *Id.* art. 1-14.

Before I explain the sampling used for the information requests component of my research, I should briefly introduce the structure of the Colombian judicial system and its parallels and or distinctions from other judicial systems in the region.

### 11.2.2. Structure of the Colombian judicial system




In contrast to the US system, where there are a federal judicial system and several state judicial systems, in Colombia there is a unitary judicial system. This system includes the ordinary, contentious-administrative, and constitutional jurisdictions, each with a high court of closure, the Office of the Attorney General of the Nation, and other special jurisdictions.[277]

The Supreme Court of Justice is the court of closure of the ordinary jurisdiction. This jurisdiction also includes 33 superior tribunals of judicial district (intermediate courts), and several courts for civil, labor, criminal, adolescent, family, penalty execution, and small conflicts affairs (lower courts with circuit and municipal jurisdiction). The contentious-administrative jurisdiction has the Council of State as its highest Court and also includes 26 administrative tribunals (intermediate courts), as well as administrative

[277] Constitución Política de Colombia art. 228-257.

courts (lower courts). The constitutional jurisdiction's central institution is the Constitutional Court.[278] The Superior Council of the Judicature is in charge of the administration, management, and control of the judiciary, and it is divided into two panels, one for the decision of disciplinary cases against judges and attorneys (jurisdictional-disciplinary panel) and one for the administration of the judiciary (administrative panel).[279] The Office of the Attorney General has as its primary function to investigate and prosecute crimes before the court system, and it includes the Attorney General (Fiscal General de la Nación), a number of the deputy prosecutors, and other public servants.[280] The special jurisdictions include the justice systems of the indigenous communities, which are in charge of applying the traditional law of these communities, and the peace judges, for the resolution of individual and commentary conflicts, among others.[281]

Following the peace accords between the government of Colombia and the FARC, a Constitutional reform created the Special Jurisdiction for Peace—SJP. The SJP is the foremost institution crafted for achieving transitional justice in Colombia. Although the SJP was conceived as an autonomous organism and has a different legal regime than the rest of the judiciary, it transitionally administers justice.[282] The SJP is composed of a Peace Tribunal, which is its closure body, and three panels: The Panel for the Acknowledgement of the Truth, Responsibility, and the Establishment of Facts and Conducts; the Panel for the Definition of Legal Situations; and the panel for Amnesty and Indult. Besides, it has a Special Unit for Investigation and Prosecution and an Executive Secretariat.[283]

Despite their similarities, Latin American judicial systems have essential differences in terms of judicial authority (judicial review, *certoriati*, the value of precedent, among others),[284] as well as in other aspects of judicial institutions. In this respect, Julio Ríos-Figuero and Andrea Pozas Loyo affirm that:

[278] L. 270/96, marzo 7, 1996, DIARIO OFICIAL [D.O.] (Colomb.) art. 11.
[279] *Id.* art. 75.
[280] *Id.* art. 23.
[281] Constitución Política de Colombia art. 246-247.
[282] AL. 1/17, abril 4, 2017, DIARIO OFICIAL [D.O.] (Colomb.).
[283] *Id.* art.7.
[284] Miguel-Stearns, *supra* note 34 at 100.

> For instance, Mexico, Peru, and El Salvador have all created judicial councils, but only Peru has also created a constitutional tribunal, while both Mexico and El Salvador have transformed the Supreme Court and a chamber of it, respectively, into constitutional adjudication organs. At the same time, El Salvador allows all citizens to file suits before the constitutional organ, while Mexico and Peru provide access only to public authorities, such as a fraction of legislators or political parties. || Similar interesting differences exist in virtually every other judicial institution, from the prosecutorial organ to the appointment and tenure of supreme, lower, administrative, and constitutional judges.[285]

Furthermore, as Oswald Lara Borges and *et at.* describe, the region's countries have adopted different models to aspects such as judicial review, determining the size and composition of the high courts, duration of judges' mandate, judicial selection and appointment mechanisms over time.[286] Nevertheless, many Latin American countries still have significant similarities in respect to their hierarchical nature of the judicial system, their civil law traditions, and similar challenges in terms of transparency, effectiveness, overload, among others.[287]

### 11.2.3. Purposeful sampling

The first major decision that arose regarding the submission of the information requests was the recipients' selection. According to the statistics of the Superior Council of the Judicature, by October 10, 2018, 5,354 judges were serving in courts and tribunals across Colombia. Additionally, there were 32,298

[285] Julio Ríos-Figueroa & Andrea Pozas-Loyo, *Enacting Constitutionalism: The Origins of Independent Judicial Institutions in Latin America*, 42 COMP. POLIT. 293–311, 300 (2010).
[286] Oswald Lara-Borges, Andrea Gastagnola & Aníbal Pérez-Liñán, *Diseño constitucional y estabilidad judicial en América Latina, 1900-2009 / Constitutional Design and Judicial Stability in Latin America, 1900-2009*, 19 POLÍTICA GOB. 3–40 (2012).
[287] Shannon K. O'Neil, *Latin America Needs Better Judges*, BLOOMBERG, August 16, 2018, https://www.bloomberg.com/opinion/articles/2018-08-16/latin-america-needs-better-judges (last visited Mar 16, 2020).

judicial employees (judicial workers that are not judges nor prosecutors) working for the judiciary. Given the significant number of courts in the judicial system, I decided to concentrate my efforts in the high and intermediate levels of the ordinary and contentious-administrative jurisdictions, as well as in the constitutional jurisdiction, the Superior Council of the Judicature. Likewise, I also decided to include the SJP in my study.

I excluded the Office of the Attorney General because of the prosecutorial nature of its functions, which in general differ from the role of neutrally deciding cases associated with the courts. Additionally, the size complexity and autonomous nature of the Office of the Attorney General would require a specific inquiry for its study. Likewise, I excluded the special jurisdictions due to the specific type of cases they may decide as well as the restrictive range of their jurisdictional functions. In the particular case of the Special Indigenous Jurisdiction, since only indigenous peoples administer this type of justice, there was an additional reason for its exclusion from its study: It would have been redundant to inquire about the ethno-racial composition of indigenous jurisdictions unless one were to distinguish among the different peoples and their particular use of their jurisdictions, which exceeds the objectives of this particular research. In contrast, despite the specific mandate of the SJP, I decided to include it this research because it was the most recently created judicial institution in Colombia. Besides, the peace accords that gave birth to the SJP included specific provisions regarding its ethnic and gender composition, which created specific incentives to study minority representation in it.[288]

I concentrated my study in the high and intermediate levels of the ordinary and contentious-administrative jurisdiction because the number of high courts, superior, and administrative tribunals (61 in total) was manageable for this type of inquiry. Another important reason for including intermediate tribunals in the sample is that, as Diana Kapiszewski & Matthew Taylor point out, there is a need to expand judicial research in Latin America beyond the high courts of the region, to also focus on lower courts and other judicial bodies. In this respect, the authors remark that: "While the interventions of high courts are

[288] Acuerdo Final de Paz Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera. Signed between the Government of Colombia and the FARC-EP on Nov. 12, 2016.

doubtless important, the fact that they often transfix us can lead to insufficient attention to the 'everyday' or 'routine' justice carried out by lower courts, which can be more socially relevant and certainly influence judicial politics."[289]

Despite my eagerness to study lower courts as well, I decided to abstain from including them in this part of the process. If I had decided to extend this exercise to the circuit, municipal and administrative courts, I would have ended with a sample pool of approximately 5,000 courthouses, which was extremely difficult to manage, given the limited financial and time resources for this research. An additional advantage of concentrating in high and intermediate courts is that they have a broader geographic jurisdiction than lower courts. Similarly, this selection followed the rationale that it is likely that at these top layers of the judicial system, judges will have more impact on the creation of legal norms.[290]

In addition to the courts, I also decided to request information to the National Registry of Attorneys, an office ascribed to the Superior Council of the Judicature, which is in charge of issuing professional licenses for attorneys. I decided to send an information request to the registry to try to establish how many lawyers there were in Colombia and to see if there was information regarding their gender or ethno-racial background. As being a lawyer is a precondition to becoming a judge, it is crucial to know how many black lawyers there are.

In the end, I sent a total of 65 information requests to:

-The four highest courts in the judicial system: The Constitutional Court, the Supreme Court of Justice, the State Council, and the Superior Council of the Judicature.

-The SJP.

-The National Registry of Attorneys.

-The total number (33) of superior tribunals of judicial district.

-The total number (26) of administrative tribunals.

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[289] Kapiszewski and Taylor, *supra* note 12 at 755.

[290] Concernin the value of precedent in the Colombian legal system, *see* Jorge Andrés Contreras Calderón, *El precedente judicial en Colombia: Un análisis desde la teoría del derecho*, 41 REV. FAC. DERECHO CIENC. POLÍTICA 32 (2011).

### 11.2.4. Content of the information requests

The information requests were, in the case of the courts, addressed to the president of each court. In the case of the National Registry of Attorneys, they were sent to the responsible head of the office. The reason for directing the letters to the courts' presidents is that, as a general rule, the president of each court has the power to represent the whole institution and is the authority that could have access to the data that I required.[291]

The information requests were designed as follows: There was an introductory part stating that the right of petition had the purpose of obtaining information about the gender and ethno-racial composition of the particular court. This section also explained that this was part of my doctoral research on the issue of minority underrepresentation in judicial institutions. It mentioned that we already knew that there was minority underrepresentation in the courts of the region and that we were trying to assess the extent of the presence of women and ethno-racial minorities on Colombian courts to find alternatives to overcome this situation. This section also stated that the information request did not intend to establish the individual ethno-racial or gender identity of any particular individual, as I was just asking for anonymous statistical data.

Clarifying that I was not trying to collect data on the racial identity of any specific individual was paramount. The *habeas data* law in Colombia (a type of privacy of information law) says that data on any particular person's ethnic or racial origin is considered sensitive. Thus, it cannot be collected unless certain exceptions.[292] Fortunately, one of these exceptions is when the data about the racial origin is collected with scientific and statistical purposes, in which case it is necessary to share the data guaranteeing the anonymity of the individuals.[293]

[291] L. 270/96, marzo 7, 1996, DIARIO OFICIAL [D.O.] (Colomb.) art. 15, 64, 79, 100.
[292] L. 1581/12, octubre 17, 2012, DIARIO OFICIAL [D.O.] (Colomb.) art. 5-6.
[293] Id. art. 6.

Following this section, I asked the recipient to inform on the total number of judicial posts there were at the court. I also requested them to specify how many of these positions were occupied by women, indigenous persons, afro-descendant persons, indigenous women and afro descendent women.[294] I asked them to inform on the total number of judicial employee posts in the court and asked them how many of the employees that occupy such positions fell in the same gender and ethno-racial categories stated above. In the case of the high courts and the SJP, I formulated two separate questions regarding judicial employees: I inquired about the number and gender and ethno-racial breakdown of auxiliary magistrates and asked the same information about all other judicial employees. Third, I requested that in the case they did not provide the data about the gender or ethno-racial composition of the court, they explained why they could not do it. Fourth, I asked about the existence of programs intended to facilitate the hiring, permanence, or conditions of employment for women in the different positions at the court (affirmative action policies). In case such policies existed at the court, I asked them to explain their scope. Finally, I repeated the previous question about affirmative action policies for Afro-descendants and indigenous persons.

In the case of the Superior Council of the Judicature, in addition to the questions about the composition of that particular institution, I also requested information concerning the number, gender and ethno-racial breakdown of judges serving at Supreme Court of Justice, the Constitutional Court, the State Council, the SJP, all superior tribunals of judicial district, all administrative tribunals, all sectional councils of the judicature, and all circuit and municipal courts of the ordinary jurisdiction, as well as all administrative courts of the contentious-administrative jurisdiction.

The information request for the National Registry of Attorneys asked them to provide information regarding the total number of attorneys with valid licenses in the country. Likewise, I required them to identify how many of them were women, indigenous persons, Afro-descendant persons, indigenous women,

[294] In the information requests, next to the word Afro-descendant, there was a footnote which asked the recipient to include in this category all black, mulatto, Afro Colombian, *Raizal* or the Archipelago of San Andres, Providencia and Santa Catalina, and *Palenquero* of San Basilio persons.

and Afro-descendant women. I also asked them to indicate before which sectional council of the judicature they completed their registration.

The final section of the right of petition included contact information via e-mail, a physical address in case they decided to send a response in hard copy, and my signature. In addition to the petition, I submitted a presentation letter that confirmed my status as a doctoral student signed by my academic advisor.

#### 11.2.5. The rationale for the content the information requests

I used the verb "to inform" to ask about the composition of the courts because I wanted to let respondents decide how to assess its gender and ethno-racial composition. It is possible to think of many different methodologies and criteria to establish the gender and ethno-racial composition of a group or to determine the ethno-racial and gender identity of a person. It was possible to ask the person to self-identify in gender or ethno-racial terms, to ask another individual to hetero-identify them based on pre-established criteria, or to use standardized mechanisms as a way to identify a person (*e.g.,* color palette).

How defines ethno-racial identities in Latin America (*e.g.*, whether based on phenotype, ancestry, DNA, geographical location, cultural background, discrimination experiences, or something else) influences the assessment of the ethno-racial composition of a group. The same can be said about establishing gender identities. Due to the complex debates about ethno-racial and gender identities and the impossibility to control the gender and ethno-racial composition assessment, I decided to leave the method for assessing ethno-racial identity open for courts to decide about it. A potential critique of the data collection process is that the lack of a unified methodology to collect the ethno-racial data represents a significant problem that poses questions on the reliability of the data. However, the purpose of the rights of petition was simply to attain a general view on the courts' perspectives on minority representation within them. The idea was to use the information as a proxy for the level of Afro-descendant representation inside judicial institutions. The responses of the information requests, instead of corresponding to the number of

Afro-descendants or indigenous persons working on Colombian courts, should be understood as reports that describe the perceptions that judicial institutions have concerning the presence of minority groups in their interior. Also, I should mention that the interviews and site-visit components of the empirical work I conducted pursue the attainment of supplementary information, context, and substantive meaning to some of these perceptions.

I also consider that, despite the nuances of ethno-racial identities and classifications in Latin America, Afro-descendants are a visible minority, as people belonging to this group can be, generally speaking, classified as belonging to his group based on their physical appearance.[295] I also believe that the diversity within the black identity and the complexities of racial classifications in Colombia have been used as an excuse to undermine the politicization of race in this country. A condition that discourages the acknowledgment of racial discrimination by way of defending the idea that racial differences in this context are too subtle to be recognized.[296] My data collection process tries to refrain from the impulse to avoid asking about racial identification in Latin America due to its complexities in the region. In this respect, Mata Htun has argued that one of the main difficulties for the creation of affirmative action programs is the trouble of defining who is black. Likewise, as one of her interviewees pointed out, people in Brazil strategically use the intricacies of racial identification in the region to deny the possibility of compensatory measures for past discrimination.[297]

An additional reason for not pre-establishing a particular methodology for courts to assess their gender and ethno-racial composition is that, depending on the nature of the complexity of the task, this could have discouraged courts to provide information about the perceived number of women and minorities working for the judiciary. For example, requesting the courts to ask each judge or judicial employee to self-

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[295] Regarding the concept of visible minority, the Canadian Employment Equality Act of 1995 mentions: "members of visible minorities means persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour" This concept, therefore, applies to minority groups whose color makes them identifiable among the general population. *See* Employment Equality Act, S.C. 1995, c. 44 art. 3 (Can.).

[296] VAN COTT, *supra* note 204 at 44.

[297] MALA HTUN, *Dimensions of Political Inclusion and Exclusion in Brazil: Gender and Race* 1–33 17 (2003), http://iknowpolitics.org/sites/default/files/dimensions_of_political_inclusion_and_exclusion_in_brazil.pdf (last visited Nov 27, 2018).

identify their gender and ethno-racial identity could be read as a petition to conduct a *quasi-census*. Courts could have easily refused to such possibility, given their limitations in terms of time, legal responsibilities, and access to resources.

I decided to ask about the number of judge and employee posts because I wanted to limit the influence that the potential unfilled vacancies at the court might have in the results. Inquiring about the number of posts allowed me to compare the perceived levels of women and minority representation to the number of available posts instead of comparing them to the number of judges or employees working for each court at any particular time. I decided to inquire about the gender breakdown for three reasons: The first is that from the literature about women representation on the United States' judiciary, I anticipated that women would be underrepresented on the bench in Colombia, as women continue to face discrimination on many aspects of public life, including employment.[298] Given the still limited research on this issue in Colombia, it was essential to render this situation visible. Second, to ask about the gender composition, and especially to ask about it before asking about ethno-racial composition, was an incentive for courts to respond the questions about indigenous and Afro-descendant presence in the judiciary. I suspected that even though in Latin America is difficult to talk about gender issues publicly, it is even more challenging to talk about racial issues. If this were true, to ask about gender composition first presented an invitation to talk about ethno-racial composition without having to face address exclusively the racial component. Also, if the courts could provide data on their gender composition but not about their ethno-racial composition, there would be an immediate question about the asymmetrical treatment about gender and race. Third, to ask about gender composition also allowed me to ask about intersectionality *vis-à-vis* the presence of Afro-descendant and indigenous women on courts.

A final aspect of the gender composition questions that I should discuss is the implicit binary assumption underlying this part of the information requests. I decided to ask about women representation, assuming that men and women are the only gender identities present at these courts. Thus, by assessing the

[298] Las mujeres en Colombia ONU MUJERES | COLOMBIA (2020), https://colombia.unwomen.org/es/onu-mujeres-en-colombia/las-mujeres-en-colombia (last visited Mar 16, 2020).

number of women at the court, I could also determine the number of men at the court. This assumption is problematic since it could be possible that at least some of the judges have gender identities that scape the gender binary. There is no public information about openly trans, gender fluid, or non-binary judges in Colombia. Nevertheless, I assumed that gender non-binary individuals constitute a small fraction of the Colombian judiciary and that the gender binary presumption can be used for this analysis, despite the general undesirability of this logic for social studies.

Regarding the questions about indigenous persons, I decided to ask about their representation in the judiciary because indigenous peoples are the second-largest ethnic minority in Colombia, and they have been the central group for multiculturalist state policies in Latin America.[299] Indigenous peoples in Colombia have faced significant levels of discrimination exclusion from public spheres.[300] I anticipated that they would be significantly underrepresented in the judiciary. Hence, I considered necessary to render this situation visible.

In the case of Afro-descendants, I decided to use such a term because, as I explained before, is the most accepted to refer to black persons in Latin America. Afro-descendant is used to include both racial and ethnic identities and does not have a negative connotation, unlike the word "black" has in specific contexts. In a footnote in the information request, I asked the respondents to include within this category to all black, mulatto, Afro Colombian, *Raizal* of the Archipelago of San Andres, Providencia, and Santa Catalina, and *Palenquero* of San Basilio persons. These additional categories represent groups within the universe of Afro-descendants. Some, such as black or mulatto, tend to emphasize the racial dimension of Afro-descendant identities. In contrast, *Raizal* and *Palenquero* refer to specific ethnic groups that have a distinctive culture and are located in particular parts of the country. The questions about ethno-racial representation are based on the assumption that only Afro-descendant, indigenous, and white-*mestizo*

[299] Van Cott, *supra* note 3; Rodolfo Stavenhagen, *Indigenous Peoples and the State in Latin America: An Ongoing Debate*, *in* MULTICULTURALISM IN LATIN AMERICA 24–44 (2002), https://link.springer.com/chapter/10.1057/9781403937827_2 (last visited Jul 16, 2018); Yashar, *supra* note 115.
[300] Mario Villa, *La ONU denuncia que los indígenas siguen siendo víctimas de la discriminación*, EL PAÍS, August 9, 2017, https://www.elpais.com.co/mundo/la-onu-denuncia-que-los-indigenas-siguen-siendo-victimas-de-la-discriminacion.html (last visited Mar 16, 2020).

ethno-racial identities are present in the Colombian judiciary. Thus, it is possible to know the perceptions of the number of white-mestizo persons in the courts by subtracting the number of Afro descendant and indigenous persons from the total number of judges or judicial employees. This assumption is problematic because there might be other ethno-racial identities in the judiciary. Nevertheless, I believe that departing from this type of ethno-racial trinary logic can be pragmatic in this context, given our general knowledge on the ethno-racial composition of the country.

I also decided to ask specific questions concerning the presence of indigenous and Afro-descendant women in the courts. I suspected that, as in the U.S. context, minority women could face different obstacles to access positions in the judiciary when compared both to minority and non-minority men, as well as non-minority women.[301]

Regarding the questions about judicial employees, it is essential to clarify that, under Colombian law, any judicial servant who is not a judge or a prosecutor is considered a judicial employee.[302] In general terms, judicial employees do not have the power to conduct judicial functions. A problem with the category of judicial employees is that it encompasses a vast number of jobs that vary significantly in terms of prestige, salary, responsibilities, and hierarchy. For example, both judicial clerks and I.T. staff may be considered judicial employees, despite their job profiles being significantly different.

I decided not to ask specifically about the gender and ethno-racial of each type of judicial employee position because of the difficulties to access the job descriptions. Likewise, such breakdown could have made it more difficult for courts to respond to my questions, as they would have needed to differentiate among the different types of judicial employees in their responses. This request could have ultimately discouraged courts to provide the required information. The only exception that I made about the non-distinction among judicial employees was the specific questions that I asked about the jobs of auxiliary justices in the high courts that I sent information requests to. I specifically asked about the gender and

[301] April G. Dawson, *Missing In Action: The Absence Of Potential African American Female Supreme Court Justice Nominees--Why This Is And What Can Be Done About It*, 60 HOWARD LAW J. 177–220 (2016).
[302] L. 270/96, marzo 7, 1996, DIARIO OFICIAL [D.O.] (Colomb.) art. 125.

ethno-racial composition of auxiliary justices because they occupy posts that are particularly well-positioned within the judicial system's structure. They enjoy particular high prestige and significant income advantages when compared to other judicial employees.[303]

The request of explaining why they could not provide the data on gender or ethno-racial composition had two purposes: To provide incentives for the courts to provide the information; and to understand the reasons for the negative answer.

The questions about affirmative action policies were designed to see if the courts had implemented any measures on their own to promote women and minority representation. I was aware that there were not centralized affirmative action policies for the judiciary. However, it was still possible that particular courts had developed their own policies to promote the presence of persons belonging to certain groups in their staff. I decided to separate the gender-based from race-based affirmative action policies as special measures might be in place for women but not for indigenous or Afro-descendant persons, or *vice versa*, since that is the case in other public sectors.

Last, in the case of the information request sent to the National Registry of Attorneys, I decided to ask about the sectional councils of the judicature before which the registered attorneys applied for the license. I considered that this could provide secondary data about the ethno-racial composition of the legal profession in case there was not centralized data about the ethno-racial breakdown of lawyers in Colombia.

#### 11.2.6. Vetting

After working on an initial draft of the information requests, I undertook a vetting process of the instrument. Two Colombian colleagues, who had conducted significant research and advocacy on issues of

[303] Conozca cuál es el sueldo de los magistrados y jueces de Colombia ÁMBITO JURIDICO (2020), https://www.ambitojuridico.com/noticias/general/administracion-publica/conozca-cual-es-el-sueldo-de-los-magistrados-y-jueces-de (last visited Mar 16, 2020).

racial discrimination in Colombia, and my academic advisor participated of the vetting process. I incorporated their comments into the information request template.

### 11.2.7. Information requests' sending

The first group of information requests was sent out on October 24th, 2019. It included the rights of petition addressed to the four high courts, the SJP, the National Registry of Attorneys, and 11 superior tribunals of judicial district. On November 1st, I sent the second group of information requests addressed to the remaining superior tribunals of judicial district. Finally, on November 19, I sent all the remaining information requests addressed to the administrative tribunals. There were some information requests that were sent out on different dates that the ones formerly mentioned because their addresses were not available on those dates. The reason why the sending process was done progressively instead of in a single moment was that I wanted to make sure that people were receiving the information and that no significant adjustments were needed to the requests so that the courts could appropriately process them. As I will explain later, this precaution turned out to be vital, given the problems with courts' public contact information.

All information requests were sent from my university e-mail address since my geographic location at the time was New York City. I sent the messages to the e-mail addresses of the presidents of each court. In the case of the four high courts, I called the general secretary of each of them and asked the e-mail addresses directly. In the case of the SJP, I send the e-mail through the Concerns, Petitions, Complaints, and Grievances' format as well as the information e-mail address that I found on their webpage. In the case of the National Registry of Attorneys, I sent the message to the registry's e-mail found in the Colombian judiciary's webpage. Finally, in the case of the superior tribunals, I used the directory of the presidencies of the superior tribunals made available to the public in the Colombian judiciary's webpage. This directory included information regarding most superior tribunals, but not all of them. In the case of the missing e-mail addresses, I had to search online until I found the necessary information or even call the tribunals

directly to ask for their contact information. The process of calling to ask for the e-mail addresses was complicated in some cases. For example, a superior tribunal of the Caribbean region required me to send them my national identification number before providing me the e-mail address.

Immediately after I sent the first group of e-mails, many of those addressed to superior tribunals bounced. Many of the e-mail addresses listed as contact information for the presidencies of the superior tribunals were incorrect. Likewise, in some cases, the e-mail addresses listed for a particular tribunal corresponded to those of another tribunal. Given this situation, I had to go on-line and try to find alternative e-mail addresses for sending the information requests. I also used the general courthouse directory included in the judiciary's webpage. In many cases, I had to re-send the e-mail several times until it did not bounce. In some instances, the name listed in the directory did not correspond to the president of the tribunal. For this reason, when days later I submitted the rights of petition addressed to the administrative tribunals, I decided not to include the name of the tribunal's president, but simply direct the document to the president of the tribunal. In the case of administrative tribunals, I sent the initial e-mail directed to each tribunal to, at least, two e-mail addresses, to minimize the risk of the e-mail bouncing. I used the e-mail addresses listed in the administrative tribunals' presidencies directory, in the general courthouse directory, and others I found online.

After the information requests were sent out, I started receiving responses from the courts. In some cases, I had to send several e-mails reminding courts to respond, noticing that the legal deadline to reply had already expired. Moreover, some courts made singular requests as a precondition for responding. A tribunal that asked me to send them a scanned version of the right of petition with my original signature, as they alleged they could not process the request with my electronic signature alone. Some courts even argued that they were not legally authorized to respond to that kind of request, and therefore did not provide information or decided to forward the request to a different authority—usually to the executive director of judicial administration. Additionally, some courts would not deliver all the information required. Some, for example, gave me data about the gender composition of the court but not about its ethno-racial composition.

Hence, in order to obtain full responses, I had to engage in e-mail exchanges with the courts and perform constant oversight and follow up on the response progress.

In the end, of the total of 65 information requests I submitted, 55 of them received some type of response, representing a response rate of 84,62%. The average number of calendar days that took courts to respond was 28 days. The superior tribunals had a response rate of 87,88%, whereas the administrative tribunals had a response rate of 76,92%. All the high courts, the SJP, and the National Registry of Attorneys responded to the information requests. This is different from the number of courts that provided complete information, as some courts only provided a formal response. The last response I received from an institution was on February 25th, 2019, which means that the information was collected in about four months.

### 11.3. Information requests concerning group representation in legal education

As I will explain in more detail later, access to good quality legal education rapidly became one topic that always arose during my research process, which increased the need to gather data about Afro-descendants' access to law schools. Since there was a virtual absence of data concerning the gender and ethno-racial composition of the legal profession, I decided to submit information requests to a group of law schools to inquire about the levels of Afro-descendant, indigenous, and women's presence in legal education. According to the data provided by Colombia's National Information System of Higher Education, by 2018, there were approximately 228 active undergraduate law programs with a qualified registry in the law related areas of knowledge core.[304] However, some institutions appeared several times in the same registry, which means that the number of programs it was likely much lower. The proliferation of law programs in Colombia is extensive. I decided to send information requests only to a sample of them. The universities selected for this data collection exercise were those that had graduated Magistrates of the

[304] Sistema Nacional de Información de la Educación Superior BÚSQUEDA DE PROGRAMAS DE INSTITUCIONES DE EDUCACIÓN SUPERIOR (2018), https://snies.mineducacion.gov.co/consultasnies/programa (last visited Mar 16, 2020).

Constitutional Court of Colombia. Since the Constitutional Court is the most prominent in the country, it was likely that they had graduated from law schools that provide high-quality education. Although this was not necessarily the case, the sample had the mere intention of providing a view of the level of presence of ethno-racial minorities in this area. In addition to these institutions, I also submitted an information request directly to the Minister of Education, which asked about this same topic.

The information requests addressed to the Ministry of Education and the universities explained the purposes of my search and required them to inform on the number of undergraduate programs in law that had Ministerial approval. They were also asked to inform on the number of students matriculated and the number of graduates from such programs in the past five years, indicating how many of them are women, Afro-descendants, indigenous persons, Afro-descendant women, and indigenous women. I also asked them to explain why they could not provide such data in case they did not deliver it. Likewise, I inquired about affirmative action policies for the same population groups in these law schools.

I submitted 13 rights of petition in total, some of which were sent by e-mail and some in hard copy. The first right of petition was sent on March 3rd, 2019. A total of 9 institutions (69.2%) offered some type of response to the information requests—this is lower than the number that provided the needed data. The last response was received on June 4th, 2019, which means that the data was collected in approximately three months. 58 was the average number of calendar days that took an institution to reply.

### 11.4. Data collection through interviews and site visits

In addition to the information requests, I also decided to conduct semi-structured interviews to gather additional data, and to identify about potential reasons for the marginal level of Afro-descendant representation on Colombia's courts.

### 11.4.1. Interview process

I requested IRB approval to conduct approximately 60 interviews with four types of relevant actors in the context of Afro-descendant representation in courts. Fordham University's IRB approved my application on February 25th, 2019.

### 11.4.2. Purposeful sampling

The interviews were held with:

-Judges, the majority of whom were Afro-descendants.

-Afro-descendant judicial employees, the majority of whom were Afro-descendant.

-Afro-descendant attorneys.

In the case of judges and judicial employees, I was particularly interested in interviewing those who were Afro-descendants because I believe they are the ones who could better identify the different obstacles that they have faced at entering the court system. However, the perspectives of non-Afro descendant judges and judicial employees also proved to be essential for the study, mainly because of the anticipated dearth of Afro-descendants working in certain courts. In the case of Afro-descendant lawyers, the rationale behind interviewing them is that they could be potential applicants to become judges or judicial employees in the future, and could provide additional perspectives to understand the obstacles to become part of the court system. Attorneys could also provide insights about whether the minimal number of Afro-descendants serving in the court system impacts their work or the rights of the members of this group when they come before the tribunals. Due to the need to inquire about the relevance of certain aspects of the participant's identity, I used self-identification as a way to ascertain the ethno-racial identity in this component of my research. Asking about the experience of being an Afro-Colombian working for the courts

was only suitable for participants who self-identity with such a group. If participants did not identify with this group, the questions' pertinence would have been undermined.

Since I could not find pre-existing data to help me locate Afro-descendant judges or judicial employees, I used snowballing sampling as the methodology to identify potential interviewees. I also utilized my professional network to locate some interviewees, which in turn provided me with the contact information to reach additional participants. In the case of the attorneys, I also used a directory provided by the Racial Discrimination Watch (*Observatorio de Discriinación Racial*), a human rights consortium.[305] This database had the contact information of approximately 40 Afro-Colombian lawyers. I had worked with this organization in the past. I received e-mail authorization from the coordinator of the Racial Discrimination Watch to use the database to contact potential interviewees on January 29, 2019. I also tried to balance the regional composition of the sample by conducting a limited number of interviews in every city.

Initially, the study design contemplated two additional types of participants: Social leaders and representatives of Afro-descendant civil society organizations and judicial and public servants with a role in the judge and judicial employee selection process. These interviews were discarded after further consideration. In the case of civil society organizations, the changing nature of the civic leaders' obligations made it difficult to schedule appointments successfully. Many appointments were canceled immediately before, and, in the one case, an interview took place, but the responses of the interviewee made visible that the organization did not have a formed perspective on this particular issue. In the case of judicial servants involved in the judicial selection process, I tried to schedule an appointment with a representative of the Judicial Council of the Judicature. However, the interviewee failed to confirm the appointment or return my messages.

I interview a total of 45 participants in 8 cities of the Andean, Pacific, Caribbean, and Insular regions of Colombia, in a period between March 4th and May 15th, 2019. 35.6% of the interviewees were

[305] Observatorio de Discriminación Racial, (2019), http://www.odracial.org (last visited Mar 16, 2020).

attorneys, a similar percentage were judges, and 28.9% were judicial employees. 13.3% of the interviews were conducted in Medellín, and a similar percentage in San Andrés, 35.6% in Bogotá, 8.9% in Cartagena, 6.7% in Quibdó, 15.6% in Cali, 2.2% in Buenaventura, and a similar percentage in Tumaco. 2.2% were also completed online. The mean duration of the interviews was 46 minutes, with the shortest interview lasting 16 minutes and the most extended 102.

Of the 45 participants, 62% identified as men and 38% as women. 88.9% of the interviewees self-identified as Afro-descendant,[306] 6.7% as Indigenous, and 4.4% as White/Mestizo. The average age of the respondents who provided information about their age was 40.2 years.[307] 44.4% of participants reported being single, 33.3% married, 17.8% in a marital union and 4.4% did not provide information about their marital status. Regarding their place of origin, 6.7% reported being from Antioquia and a similar percentage from Bogotá. 13.3% from Bolívar, 4.4% from Cauca, 2.2% from Cesar, and a similar percentage from Putumayo. 20% from Chocó, 6.7% from Nariño, 8.9% from the Archipelago of San Andrés, Providencia, and Santa Catalina. 13.3% from Valle del Cauca, and 17.8% did not provide information about their place of origin. Regarding the rural-urban divide, 77.8% of respondents reported that they grew up in urban areas, 17.8% in rural areas, and 4.4% did not provide information in this regard. In terms of the highest degree of education attained, 15.5% of the sample held a bachelor's degree and the same percentage a post-graduate diploma (specialization),[308] 62.2% a master's degree, and 6.7% a doctorate. Regarding the type of institution where they completed their secondary education, 24.4% of respondents declared that they completed high school education in a private institution, 73.3% in a public institution, and 2.2% did not answer this question. The mean year of graduation of those who provided information about the year they received their bachelor's degree was 2001.[309] 60% of interviewees graduated from a private college and 40% from a public college.

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[306]. This group includes people whose ethno-racial identity was Afro-descendant, black, Raizal, Palenquero, mulatto, and Afro Colombian.
[307] 42 out of 45 respondents provided information about their age.
[308] In the Colombian education system this degree is known as "especialización."
[309] 42 out of 45 respondents provided information about the year they received their bachelor's degree.

### 11.4.3. Interview's content

The interview protocol for judges and judicial employees included four types of questions: About the experience of becoming judges or judicial employees; about the interaction of the interviewee's identity and the work they do; about their perceptions on Afro-descendant representation on the courts; about situations of discrimination. In the case of the attorneys, sections 1) and 2) were replaced by general questions about their professional experience and their perceptions of the justice system. The exact questions in the protocol can be found in the annexes.

### 11.4.4. The rationale for interview questions

I decided to use the first group of questions as a way to identify, based on their experiences, barriers, obstacles, or situations that shaped the interviewees' access to the courts and the legal profession. The second group of questions intended to capture the participants' perspectives on whether (and if so, how) judges' identities influence judicial activity. The third group of questions had the intention of gathering additional data on the ethno-racial composition of Latin American courts, and to supplement, provide context and meaning to the data collected through the information request component of the research. Lastly, the final group of questions had the intention of inquiring about experiences of discrimination in the context of the judicial system in order to identify potential prejudice-related factors affecting Afro-descendant access to judicial institutions.

### 11.4.5. Vetting

Before being submitted to the IRB approval process, my academic advisor, and a colleague who has significant experience working on Afro-descendant issues in Colombia vetted the interview protocol.

### 11.4.6. Conducting the interviews

In order to conduct the interviews, I asked permission to collect data directly to the judges, judicial employees, and attorneys. They could decide whether or not they desired to participate. In order to conduct the interviews, I visited the cities of Medellín, Bogotá, San Andrés, Cartagena, Quibdó, Cali, Buenaventura, and Tumaco. These sites were selected based on the findings acquired during stage two of the research process, their significant levels of Afro-descendant population, and their role in the public and economic life of the nation.

The interviews took place in courthouses, public offices, attorney's offices, restaurants, and other spaces at the convenience of the interviewees. In general, the interview process took place as follows: After I made initial contact with the potential interviewee, I explained the purposes of my study, its objectives, and the types of questions they would be asked if they agreed to participate. I stressed the fact that they were completely free to decline my proposition, and that no unwanted repercussions would occur to them if they chose to decline. Before I started to formulate questions, I would answer to any concerns the participants would have and provided them the informed consent forms (in Spanish), so they could sign them if they agreed to participate in the research project. Immediately after, I proceeded to conduct the interview, which was audio-recorded in two separate devices. Once the interview concluded, I would ask participants to fill out the socio-demographic questionnaire, which I used to compile certain biographic information about the interviewees. Finally, I would ask participants if they could identify other persons that fall within the selection criteria that might be interested in participating in the study. Whenever possible, the first contact and subsequent interviews with participants were conducted in person. In certain occasions, I contacted participants beforehand by phone, text messages, e-mail, or social media.

The interviews' audios were transcribed into text in the Spanish language. I used Atlas.ti, a qualitative data analysis software to code, organize and analyze the information collected through the

interview process and the notes stemming from the direct observation exercises, which I will reference in the following section.

### 11.4.7. Site Visits

In addition to the interviews, I completed a group of site visits to some courts in the cities of Medellín, Cartagena, San Andrés, Tumaco, and Buenaventura. These visits had the purpose of partially observing the composition of the judiciary in these cities and to witness some judicial proceedings taking place at the moment of my visit. During these visits, I took notes that were analyzed with the same software I used to code the data produced by the interviews. The primary purpose of these visits was to supplement the information I obtained through the interview concerning the ethno-racial composition of the judicial institutions in several cities. Notably, site visits allowed me to appreciate the level of presence or absence of Afro-descendants in the courts in locations where finding interviewees was difficult. Unlike in the interview process, in the site visits, the ethno-racial composition of the courts was assessed through hetero-identification.

In the following chapter, I will refer to the research findings.

## II. "In Colombia we are all mestizos": Afro-descendant representation on Colombian courts

In this chapter, I will refer to several aspects concerning the composition of Colombian courts, including the judicial activity and the institutional problems that affect the judicial system in Colombia; the selection mechanisms for magistrates, judges, and judicial employees; the competing narratives on race present at the courts, which became visible during the data collection process;[310] the gender and ethno-racial composition of the legal profession and judicial institutions in Colombia; and the specific impact that geographical location has on the ethno-racial composition of judicial institutions in the country.

### 1. The judicial activity and institutional problems affecting the judicial system in Colombia

During a normal day at the courthouses, judicial servers (judges and judicial employees) spend most of their time reading case-dockets, attending hearings, engaging in legal research, drafting opinions, and issuing rulings.[311] Judges and magistrates dedicate a significant part of their time to coordinate, supervise, and review the work of their chamber's judicial employees. They also debate cases with other judges (in situations of collegiate courts) and perform specific administrative duties.[312] Some of the study participants commented that, in most cases, courts operate as islands, separated from one another. A court rarely knows about the work of another court. This isolation is particularly true in the case of judges who do not serve in panels.[313]

The respondents agreed on the idea that a person must have substantive experience and outstanding academic credentials to become a judge. These qualifications facilitate the access to the bench, at least in

[310] Given the need to protect the participants' confidentiality, I will cite the interviews only by using a consecutive number. Annex 7 of this dissertation provides additional information concerning each individual interview associated to such number.
[311] Interviews 3, 15, 34 and 45.
[312] Interviews 1 and 15.
[313] Interview 3.

the cases of career positions. Working at a judicial institution has impacts on judicial servers, both inside and outside the courthouses. In the case of inter-personal interactions inside the courts, most participants describe their professional relations with colleagues as good.[314] Concerning the impact that the judicial activity has on their personal lives, some judges asserted that they need to maintain a low profile and sufficient distance from attorneys who litigate in their jurisdictions since they need to preserve the perception of impartiality.[315] Despite the general indications of positive work environments, interviewees affirmed that formalism and hierarchy characterize the judicial activity in Colombia.[316] A participant who has several years of experience working at the high court level mentioned that, in this layer of the judiciary, auxiliary magistrates are:

> a precious asset because of how the law is spoken and told in these spaces, which is different from the everyday life of regular judges. It is a superior view, a different view; the rigor that the appeal techniques demand—and that it is not easy [to learn]—leads, one way or the other, to grant preference to those who have mastered that form of expressing the law.[317]

An interviewee discussed how this hierarchy could also be felt in the subtleness of language. The participant stated that is not uncommon to hear judges calling *"my employees"* to the judicial personnel working at their chambers despite their actual employer being the judicial branch—in many cases, judges do not have the power to remove judicial employees from their stations directly.[318] Hierarchy is also visible in the architecture of judicial institutions. During my site visit to Medellín's main judicial complex, I noticed that there were three separate entrances for accessing the judicial building. One was reserved for judicial

[314] Interview 5, 6 and 34.
[315] Interview 27.
[316] Interview 11.
[317] Interview 21.
[318] Interview 40.

servers, another for attorneys, and the last one for the general public. This arrangement seems to convey a clear stratification of the different types of participants in the judicial ecosystem.[319]

Hierarchy is also present in the salary differences of judicial servers. According to data made available by a Colombian NGO, in early 2018, the monthly salaries for judicial functionaries (judges and magistrates) were approximately: 32,500,000 COP (11,000 USD) for high court magistrates; 25,100,000 COP (8,655 USD) for intermediate tribunal magistrates; 10,600,000 COP (3,655 USD) for specialized judges; 9,500,000 COP (3,275 USD) for circuit judges; and 8,100,000 COP (2,793 USD) for municipal judges.[320] A high court magistrate makes roughly four times as much as a municipal judge.[321] Similar wage differences are present in the case of judicial employees: Auxiliary magistrates and specialized professionals 33, which are the first and second highest-earning judicial employee positions, made 25,100,000 COP (8,655 USD) and 8,700,000 (3,000 USD), respectively.[322] The first position pays almost three times as much as the second one per month.

Hierarchization becomes notorious in the role that higher-ranking judges have in the evaluation of lower judges' performance.[323] Judges and judicial employees' evaluation process considers four factors: quality, efficiency, organization, and publications.[324] Magistrates of high courts and intermediate tribunals are subjected to this assessment process every two years, whereas regular judges and judicial employees are evaluated annually.[325] Functional superiors appraise the "quality" of the judges and judicial employees' work. The high courts' magistrates assess the quality of the intermediate tribunals' judges in their respective jurisdiction. These magistrates, in turn, value the work of circuit court judges.[326]

[319] Daniel Gomez-Mazo, *Fieldwork notes* (2019).
[320] Conozca cuál es el sueldo de los magistrados y jueces de Colombia, *supra* note 303.
[321] *Id.*
[322] *Id.*
[323] Interview 3.
[324] Acuerdo PSAA16-10618, diciembre 7, 2016, Consejo Superior de la Judicatura. [C.S.J.] (Colomb.) art. 22.
[325] *Id.* art. 4.
[326] Interviews 3 and 22.

Another topic that came up several times during the interviews was the judicial overload and the limited resources of the judicial system. According to the data provided by the Superior Council of the Judicature, by November 6, 2018, there were 32,298 judicial servants in Colombia, of which 5,354 were judges, and 26,944 were judicial employees. Nevertheless, the justice system is overstretched due to the high number of cases pending resolution. The number of judges and judicial employees insufficient for meeting the justice demand.[327] An interviewee claimed that in the city of Tumaco, for example, there is only one specialized criminal judge in charge of deciding approximately 800 pending cases.[328]

Overburden translates into significant delays in the processing of cases. Delays can last for several years, even for conflicts that lack significant complexity, and be more significant at the top of the judicial system.[329] An interviewee mentioned that while she was working for a high court in the year 2009, the court was issuing rulings in cases that had initiated in the year 2001.[330] Participants consistently identified judicial congestion as a factor that contributed to the denial of access to justice and legal remedies in many cases.[331] In addition to this circumstance, the Superior Council of the Judicature' case-processing goals can be exceedingly ambitious. A participant, who serves as an intermediate tribunal magistrate, mentioned that for the 2019-2021 period, the Council had established a benchmark of roughly 750 decisions per year for these tribunals. For the interviewee, this goal appeared impossible to reach.[332]

Lack of sufficient resources, insufficient institutional capacity, and inadequate infrastructure are significant problems for judicial institutions in Colombia. Courts lack adequate infrastructure and office space. I could see directly that several courthouses had cracks in their ceilings and trash accumulating in the hallways—side by side with case dockets that could not be fitted into the regular storage facilities.[333] This situation was visible even in the responses that the courts gave to my information requests concerning

[327] Interview 1.
[328] Interview 38.
[329] Interviews 31, 32.
[330] Interview 42.
[331] Interviews 1 and 32.
[332] Interview 3.
[333] Gomez-Mazo, *supra* note 319.

the composition of judicial institutions. The lack of a centralized database with the *résumes* of all judicial servants, and the absence of an updated and publicly available directory of courthouses are examples of this institutional precariousness.[334]

These findings seem to fall in line with previous literature on Latin American judiciaries' institutional precariousness.[335] Nevertheless, as Jorge Esquirol notes, it is important not to overstate the challenges that such limitations pose on the rule of law in Latin America, especially in comparison to other regions of the world.[336] Esquirol argues that the generalized perception of failure can be harmful for Latin American societies, as this image undermines the legitimacy of state institutions, discards pre-reform options present in the existing Latin American law, and weakens the position of the region's countries in the hemispheric legal relations.[337]

### 2. Selection mechanisms for magistrates, judges and judicial employees

It is crucial to differentiate among three types of judicial positions in order to explicate the different mechanisms used for judicial server selection. These are high court magistrates; career magistrates, judges, and judicial employees' positions; provisional and temporary magistrate, judges, and judicial employees' positions; and free appointment and removal judicial employees' positions.

[334] As I mentioned before, the public directories made available by the Superior Council of the Judicature were not updated, which made it more difficult to contact the courts to gather information about their composition.
[335] MARIA DAKOLIAS, *The judicial sector in Latin America and the Caribbean* 104 (1996), https://elibrary.worldbank.org/doi/abs/10.1596/0-8213-3612-6 (last visited Jul 16, 2018); Jorge Correa Sutil, *Judicial Reforms In Latin America: Good News For The Unprivileged?*, *in* THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA 255–277 (Juan E. Méndez, Guillermo A. O'Donnell, & Paulo Sérgio de M. S Pinheiro eds., 1999).
[336] Jorge L. Esquirol, *supra* note 191.
[337] *Id.* at 77.

### 2.1. High court magistrates

Each of Colombia's high courts has a different magistrate selection procedure. The requirements to become a Magistrate of the Constitutional Court, the Supreme Court of Justice and the State Council are established in article 232 of the Constitution.[338] In the case of the Constitutional Court, the Senate (the upper house of the Colombian Congress) has the power to appoint the magistrates. They select magistrates out of three-name lists of candidates. The President, the Supreme Court of Justice, and the State Council may propose three lists each.[339] The Supreme Court of Justice and the State Council's magistrates are appointed by the existing members of this court, out of a list of candidates submitted by the Administrative Chamber of the Superior Council of the Judicature.[340] The term for these positions is eight years. Magistrates cannot be reappointed.[341] It is not necessary to have been engaged in a judicial career to occupy one of these judicial positions.[342]

In the case of the Superior Council of the Judicature—Administrative Chamber, the State Council selects three of the magistrates, the Supreme Court of Justice selects two, and the Constitutional Court selects one. Congress appoints the magistrates of the Superior Council of the Judicature—Disciplinary Chamber from three-name lists that the National Government submits.[343] All Magistrates of the Superior Council of the Judicature are elected for non-renewable 8-year terms.[344]

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[338] Article 232 of the 1991 Constitution describes the requirements necessary to become a magistrate of the Constitutional Court, the Supreme Court of Justice, and the State Council. These requirements are to be Colombian national by birth and a citizen in exercise; to be a lawyer; not to have been convicted to prison, except in the cases of political or guilty crimes; to have 15 years of experience at the judicial branch, the public ministry; or have practiced as a lawyer or university professor in the legal disciplines at institutions recognized by the state. In the case of the Supreme Court and the State Council, the teaching needs to have been in the areas related to the judicial position's specialty). Constitución Política de Colombia [C.P.] art. 232.
[339] *Id.* art. 239; Law 270 of 1996, art. 38.
[340] L. 270/96, marzo 7, 1996, DIARIO OFICIAL [D.O.] (Colomb.) art. 15 and 34.
[341] Constitución Política de Colombia [C.P.] art. 233.
[342] *Id.*
[343] L. 270/96, marzo 7, 1996, DIARIO OFICIAL [D.O.] (Colomb.) art. 76.
[344] To become a magistrate in this court, a candidate must be a Colombian national by birth, a citizen in exercise, and older than 35 years of age. The candidate also needs to be a lawyer have practiced as a lawyer with good credit for at least ten years. *Id.* art. 77.

In the case of the SJP, the magistrates of the Peace Tribunal need to fulfill the same requirements established for the magistrates of the Constitutional Court, the Supreme Court, and the State Council.[345] In the case of the magistrates of the SJP's chambers, they need to comply with the same requirements of the magistrates of the superior tribunals of judicial district.[346] The magistrates of the SJP, whose term will last for the lifetime of the jurisdiction, were appointed by a selection committee.[347] This committee was composed of delegates of the Supreme Court of Justice—Penal Chamber, the United Nations General Secretary, the Permanent Commission of the State University System, the President of the European Court of Human Rights, and the International Center for Transitional Justice's mission to Colombia.[348]

The judicial selection mechanisms for the high courts are political. Putting aside the basic requirements for the positions (which many candidates can potentially meet), the institutions who nominate or elect the magistrates have broad discretion to select the persons who will be appointed. Hence, the process is not necessarily centered around the idea of "finding the best candidate." There is no obligation for the selecting institution to pick the most qualified applicant since there is a lack of specific parameters to determine who the most competent contestant might be.

### 2.2. Career magistrates, judges, and judicial employees

According to article 125 of the Colombian Constitution, as a general rule, posts at the state's organs and institutions are career positions. Access to them needs to follow the parameters established in the law to determine the merit and virtues of potential candidates.[349] In the specific case of the judiciary, article 156 of Law 270 of 1996 mentions that:

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[345] AL. 1/17, abril 4, 2017, DIARIO OFICIAL [D.O.] (Colomb.) art. 7.
[346] *Id.* (These requirements include: to be a Colombian citizen by birth, a citizen in exercise, and enjoy full civil rights; to be a lawyer; not to have an inability or incompatibility with the position, and to have at least eight years of professional experience). AL. 1/17, abril 4, 2017, DIARIO OFICIAL [D.O.] (Colomb.) art. 127 and 128.
[347] AL. 1/17, abril 4, 2017, DIARIO OFICIAL [D.O.] (Colomb.) transitory art. 7, par. 1.
[348] PD. 587/2017, abril 5, 2017, DIARIO OFICIAL [D.O.] (Colomb.) art. 2.
[349] Constitución Política de Colombia art. 125.

> The judicial career is based in the professional character of functionaries and employees, in the efficacy of their work, in the guarantee of equality of possibilities in the access to career to all citizens that are apt for it, and in the consideration of merit as the fundamental principle for the access, remaining, and promotion in service.[350]

In consequence, as a general rule, access to judicial positions should take place through merit-selection, which shall seek to retain talent, improve judicial servers' skills, and secure an adequate provision of justice services to all citizens.[351] All intermediate tribunals' magistrates, judges, and judicial employees positions that the law does not explicitly name as being of free appointment and removal are career positions. Merit selection is expected to determine access to these posts.[352] The Superior Council of the Judicature is the institution in charge of managing the judicial career.[353]

In the case of judges and magistrates, the selection process to access career positions are expected to be recurrent, open and public. The process consists of has five steps: The merit contest; the composition of a national eligibles' registry; the creation of a candidates' lists; the appointment; and the confirmation.[354] In the case of judicial employees, step two is followed directly by the conveyance of the eligibles' list and the appointment.[355]

The merit contest evaluates the applicants' knowledge, capabilities, experience, and personal conditions. The contest has two parts: The selection, which includes an assortment of the applicants to become part of the eligibles' registry—usually done through a group of tests and exams; and the classification, which involves the creation of an applicants' ranking based on merit.[356] The Superior Council

[350] L. 270/96, marzo 7, 1996, DIARIO OFICIAL [D.O.] (Colomb.) art.156.
[351] *Id.* art 157.
[352] *Id.* art. 158.
[353] Constitution, Article 256.
[354] L. 270/96, marzo 7, 1996, DIARIO OFICIAL [D.O.] (Colomb.) art.163.
[355] *Id.* art. 162.
[356] *Id.* art. 164.

of the Judicature undertakes the creation of the national eligibles' registry for the magistrates, judges, and judicial employees' vacancies, in which it includes the candidates who approved the previous stage of the process. In the registry, candidates are ranked based on merit. This registry expires after four years of being created.[357] The following step (list of candidates) is the provision of positions to be covered with the lists of names. The list shall include at least five candidates.[358] After this stage, every time there is a vacancy in a court, the nominating institution needs to notify the judicial administrators, which, in turn, will appoint the person selected to fill out the vacancy.[359]

In the case of judges and magistrates, applicants who will occupy these positions for the first time ought to pass a judicial training course.[360] This course has the purpose of training candidates to fulfill their obligations as judges. The course can be a step in the selection process, in which case it is known as *"curso-concurso"* (course-contest). The course-contest has an eliminatory function. If candidates do not approve a stage of the contest, they are removed from the selection process.[361]

Concerning the security of their positions, judges who attained their seats through merit-selection have tenure over their stations.[362] They can stay on their seats until they decide to resign, receive a pension, reach the age of mandatory retirement (70 years of age), or are removed from their positions. Removal can only occur due to negative performance in their work, because of a disciplinary or criminal process, or because of other narrowly defined circumstances.[363] These rules give a certain sense of employment stability to career judges.[364]

A significant difference between the selection process for high court magistrates and career magistrates, judges, and judicial employees is that in the case of the latter, the selection process seeks to

[357] *Id.* art. 165.
[358] *Id.* art.166.
[359] *Id.* art.167.
[360] *Id.* art.160.
[361] *Id.* art.168.
[362] *Id.* art.173.
[363] *Id.* art. 149 and173.
[364] Interview 3.

recruit the most qualified applicants. In contrast, in the case of high court magistrates, the selection is mainly political. However, according to some participants, the merit-selection process is flawed and can lead to disparate impacts on individual applicants. I will discuss these aspects in the next chapter.

### 2.3. Provisional and temporary magistrates, judges and judicial employees

As I previously explained, according to the law, judicial positions are expected to be occupied by persons who have undergone a merit-selection process. However, under certain circumstances, these positions can be left vacant, either definitively or temporarily. Vacancies open the door for the appointment of provisional or temporary judicial servers.

Provisional judicial servers (either magistrates, judges, or judicial employees) are appointed in situations in which there is a definitive vacancy (*e.g.*, resignation). Provisionality can also happen when there is a short-term vacancy that is not filled out by a temporary commission (*encargo*), or that will last more than six months.[365] A commission takes place when there is a need to appoint a judicial servant to temporarily cover another position. This commission should last for a maximum of two months, after which there must to be a new appointment (either provisional or through merit selection).[366] The law establishes that provisional judicial servants should not remain in those positions for longer than six months in cases of definitive vacancies since, by that time, a merit-based appointment should take place.[367] Although, as I will explain in more detail in another section of the manuscript, provisional appointments are, in reality, not only widespread in the judiciary but can also last for years.

There are no clear rules to appoint provisional judicial servants, which allows for the nominating institution's discretion to play a significant role in the provisional appointment of magistrates, judges, and judicial employees. The Constitutional Court has stated in several decisions that, following the principle of

[365] L. 270/96, marzo 7, 1996, DIARIO OFICIAL [D.O.] (Colomb.) art. 132.
[366] *Id.*
[367] *Id.*

merit, "… judicial functionaries shall be elected from a list or registry created through a public merit contest, regardless of the position being only temporal."[368] In theory, provisional judges should be selected from the pool of candidates included in the eligibles' list instead of being dependent upon the nominating institution's discretion. Nevertheless, the selection of provisional judicial servants continue to be discretional in many cases.

### 2.4. Free appointment and removal judicial employees

The free appointment and removal judicial employees are positions in which the judicial employee can be hired and dismissed at the discretion of the nominating authority. Free appointment and removal positions are relatively exceptional in the judicial branch, and they need to be established by law.[369] Some examples of these positions are the auxiliary magistrates and other judicial employee positions in the high courts, assistant lawyer positions, positions that are dependent upon the office of the presidency of the high courts or the office of intermediate tribunals' magistrates.[370] Several judicial employee positions of the SJP are also of free appointment and removal.[371]

## 3. The competing narratives on race present at the courts

During the data collection process, courts seemed to convey competing narratives about race and race relations in Colombia. There was a marked difference between the narratives on race articulated in the answers to the rights of petition and those that judicial servers communicated during the interviews. In their

[368] Corte Constitucional [C.C.] [Constitutional Court], julio 15, 2008, Sentencia C-713/2008 Gaceta de la Corte Constitucional [G.C.C.] (Colomb.). Corte Constitucional [C.C.] [Constitutional Court], agosto 27, 2015, Sentencia SU-553/15, Gaceta de la Corte Constitucional [G.C.C.] (Colomb.).
[369] L. 270/96, marzo 7, 1996, DIARIO OFICIAL [D.O.] (Colomb.) art. 159.
[370] *Id.* art. 130.
[371] Acuerdo 003/18, enero 26, 2018, Jurisdicción Especial de Paz. [J.E.P.] (Colomb.).

answers to the information requests, courts tended not to recognize the relevance of race in the composition of judicial institutions. In contrast, judges and judicial employees seemed to acknowledge the relevance of race and even offered accounts concerning situations of race discrimination during the interview processes. I will refer to the two narratives about race that were evident during the data collection process: The refusal to acknowledge race and the use of the *mestizaje* narratives visible in the responses to the rights of the petition and the acknowledgment of racial tensions during the interview process.

### 3.1. The refusal to acknowledge race and the use of the *mestizaje* narratives present in the responses to the rights of petition

Judicial institutions avoided discussing race in several forms in their responses to the rights of petition. This denial of race can is visible, for example, in that certain courts declined to provide information about their ethno-racial composition. The State Council refused to provide information concerning the ethno-racial composition of the institution, arguing that the racial or ethnic origin was sensible data protected by the right to *habeas data* (a type of data protection/privacy right). This answer is troubling. My information requested complied with Colombia's data protection law, which allows data-collection on race and ethnicity if the data is anonymized and used for scientific or academic purposes.[372] Also, most courts in the country, including the Constitutional Court, provided the requested data, which is additional evidence that the information could be handed out without any legal infringement.

The State Council was not the only court that declined to answer my request. Courts used different resources for not providing the requested information. The Supreme Court of Justice enunciated that such institution "is governed by principles of merit and equality," without providing any further explanation of its refusal to address the petition's queries. I believe that the use of the idea of merit in this context is strategic since it allows courts to avoid discussing issues of race in their composition. This use of the idea

[372] L. 1581/12, octubre 17, 2012, DIARIO OFICIAL [D.O.] (Colomb.) art. 5-6.

of merit as a means to not acknowledging race was also present in the courts' responses to the questions concerning affirmative action policies. Courts seemed to agree that, since the principle of merit governs the judicial career in Colombia, the law does not allow for any form of affirmative action programs in the judiciary.

A third example worth mentioning concerning how courts and judicial servants attempt to avoid discussing race is the response that the Superior Tribunal of Santa Marta gave to the right of petition. Instead of informing the ethno-racial composition of the court, the Tribunal sent me a link to the court's webpage, in which there were bios and pictures of the judicial servers—apparently suggesting that I should be the one making the assessment. After I iterated my request, the tribunal simply stated that the institution did not have among its duties the administrative affairs I was inquiring about and did not provide any further comment on the matter.

I consider that these situations convey aversion to acknowledge the relevance of race inside judicial institutions, which seems to be an example of how courts may also consider race as a *taboo*. I also think that these findings resemble those found by Mathilde Cohen when discussing judicial diversity in "colorblind" France, as she also reported different ways in which French judges would use different mechanisms to avoid discussing race in the context of the judiciary.[373]

Another type of response seemed to downplay the role of race by using *mestizaje* accounts to excuse the low levels of Afro-descendant representation on Colombian judicial institutions. For example, the answer provided by the Superior Tribunal of Armenia mentioned that, even though no Afro-descendants or indigenous persons were working at that court, "A majority of persons in Latin America descend from the indigenous peoples." Regarding how the data was collected, the Superior Tribunal of Pamplona stated: "Being Colombia a *mestizo* society, the ethno-racial aspects you asked about are answered exclusively in relation to the more general traits of them and in response to the way the servers self-refence themselves." Finally, the Superior Tribunal of Cali affirmed that, although none of the magistrates of that court self-

[373] Cohen, *supra* note 263.

identified as Afro-descendant or indigenous: "Nevertheless, in reality, in Colombia we are all *mestizos* because Spain colonized us."

These responses seem to minimize the relevance of race in the context of the judiciary. Likewise, they reflect how *mestizaje* narratives have impacted the discussion of race relations in Latin America, as documented in previous literature.[374] The myth of *mestizaje* dictates that miscegenation among European colonizers, indigenous peoples, and enslaved Africans has erased the distinctions among such groups over time. This doctrine states that miscegenation led to the creation of a *mestizo* identity that is distinct from, but inclusive of all, the previous ethno-racial identities.

*Mestizaje* has historically been used as a rationale for not recognizing racial tensions in Latin America. Tanya Hernandez explains that the cultural model of *mestizaje* has permitted states to defend the idea that, in the region, racial classifications are difficult to use,[375] and has encouraged people not to classify themselves on racial terms, as racial classifications are deemed divisive and unwarranted.[376] Likewise, Tianna Paschel explicates that the *mestizaje* narratives were a tool used to deny the existence of racial discrimination and inequality in this region.[377]

Some argue that the *mestizaje* discourses provided an egalitarian *façade* for racial domination and that they allowed Latin American national elites to create a system of racial inequality that would last longer than those of South Africa and the United States.[378] As an example, in the context of Brazil, despite the clear racial stratification of society, the lack of a state definition of race prevented for a long time Afro-descendants from developing a group consciousness with the potential to move onto collective action.[379] Similar situations have taken place in other Latin American countries, too. In Ecuador, discussions about

[374] *See* WADE, *supra* note 27; WADE, *supra* note 166; PASCHEL, *supra* note 33; HERNÁNDEZ, *supra* note 33; Marisol De La Cadena, *Reconstructing Race: Racism, Culture and Mestizaje in Latin America*, 34 NACLA REP. AM. 16–23 (2001); MILLER, *supra* note 268.
[375] Hernández, *supra* note 149 at 1107–1108.
[376] *Id.* at 1107–1108.
[377] PASCHEL, *supra* note 33 at 7.
[378] *Id.* at 7.
[379] HTUN, *supra* note 297 at 12.

racial and ethnic discrimination have turned into a controversial issue, as the idea that everybody is *mestizo* has precluded a substantive debate around this topic.[380] Thus, it is not atypical that certain courts had used *mestizaje* narratives to minimize the relevance of the low level of Afro-descendant representation in Colombia's judicial institution.

A Tianna Paschel explains, in Colombia, the idea of *mestizaje* has been more welcoming to the indigenous heritage than to its African component.[381] This condition has contributed to the erasing of Afro-descendants from country's history, their invisibilization in the national memory, and their geographic confinement.[382] Because of this, it is not strange that, at evoking *mestizaje* narratives in their answers, certain courts emphasized the indigenous component in the Colombian racial mix, disregarding the Afro-descendant legacy.

### 3.2. The broad acknowledgment of race during the interview process

A different type of judicial discourse about race offered by the courts is the one that recognizes it as a condition that shapes social relations. This type of narrative appeared to be more prevalent in the interview process. On several occasions, the participants referred to different instances at which race seemed to shape social relations. A judge in a city of the Andean region of Colombia mentioned that many of the cases before her court that involved Afro Colombian persons related to aspects such as the protection of the constitutional rights of forcibly displaced persons and the recognition of social security benefits and labor rights for construction workers. The judge mentioned that "behind great civil constructions there is a vast Afro population, because […] the men are dedicated in a very protagonist way to activities that only

[380] Scott H. Beck, Kenneth J. Mijeski & Meagan M. Stark, *¿Qué Es Racismo?: Awareness of Racism and Discrimination in Ecuador*, 46 LAT. AM. RES. REV. 102–125, 102–103 (2011).
[381] PASCHEL, *supra* note 33 at 41. (Noting that: "mestizo Colombia largely excluded blacks from the national discourse. Rather, the mixture of European and Indian blood came to signify what it was to be Colombian").
[382] *Id.* at 41–42.

they [Afro-descendant men] do."[383] Another judge mentioned that labor law litigation concerning domestic workers' rights tended to include Afro-descendant women because "as a general rule, you see many Afro-descendant domestic workers."[384] A third one enumerated several industries in which Afro-descendants were commonly engaged in, such as restaurants, construction, postal services, security, and other manual-labor jobs.[385] Similarly, another judge described that it was noticeable to him that Afro-descendants tended to be a large number of those processed by the criminal justice system in the Caribbean coast region.[386] Some judicial employees also emphasized that Afro-descendants comprise a significant portion of the victims of the internal armed conflict and those appearing before transitional justice mechanisms.[387]

I believe that these comments reflect that judicial servers are aware of how Colombian society is stratified based on race. They can see that certain types of social issues affect Afro-descendant communities more strongly than others or even provide accounts of the racialization of certain occupations. These accounts seem to convey awareness about the relevance of race and the existence of racial inequality in society, by contrast to the apparent race-less narratives that the courts tended to provide in the responses to the rights of petition. Moreover, as I will explain in the following chapters, interviewees were also aware of the lack of diversity in judicial institutions in Colombia, and even discussed racial tensions present inside the judicial system and in the interactions that take place inside of courtrooms.

I think that there are several reasons for why race was discussed differently in the responses of the rights of petition and the interview processes. In the responses to the rights of petition, the courts were providing written responses to a citizen's inquiry. During the interview process, the participants were providing individual—confidential—responses to a researcher's questionnaire. Furthermore, given the composition of the high courts and intermediate tribunals, it is likely that the responses to the rights of petition were prepared by white-*mestizo* judicial servers who could have more hegemonic views on race

[383] Interview 3.
[384] Interview 41.
[385] Interview 44.
[386] Interview 5.
[387] Interviews 10, 11, 15, 18 and 23.

relations. In contrast, Afro Colombian judges, judicial employees, and attorneys, composed most of the study's sample. Interviewees might have experiential knowledge about racial inequalities. Despite the lack of a definitive explanation for these differences, it was apparent that there were critical contrasts in how race was treated at different moments of the research process.

In the following pages, I will discuss the existing data on the composition of the legal profession and judicial institutions in Colombia.

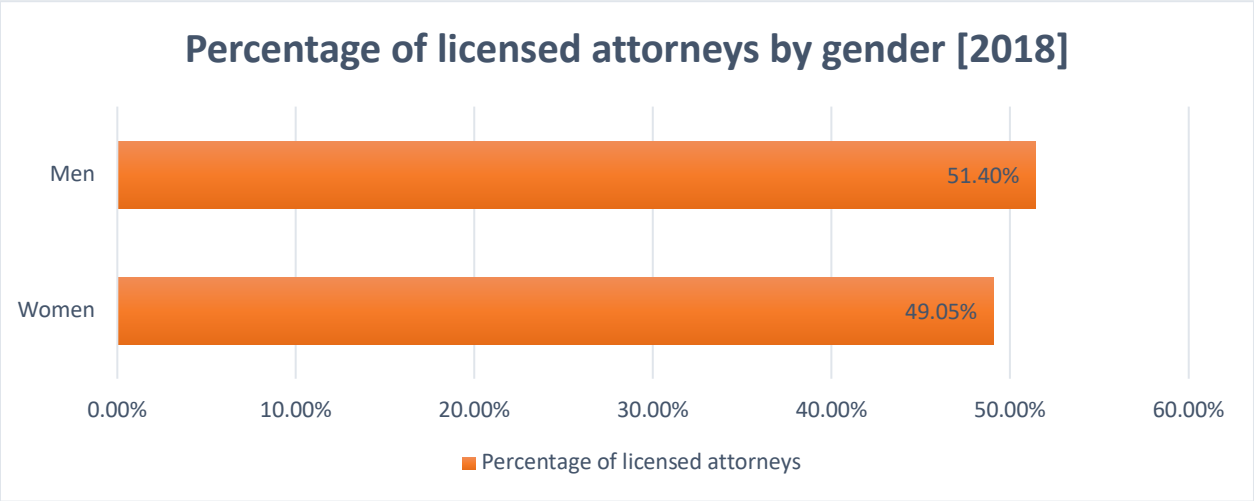
## 4. Data on the composition of the legal profession

According to the National Registry of Attorneys, by November 22nd, 2018, in Colombia, there were approximately 304,705 attorneys with valid licenses and 13,340 without valid licenses registered before the Superior Council of the Judicature. If we consider that, according to the National Administrative Department for Statistics' preliminary data on the 2018 census, Colombia's population is estimated to be approximately 45,500,000 individuals, Colombia has approximately 445 validly licensed attorneys per every 100.000 persons.[388]

### 4.1. Gender distribution

Of the total number of attorneys with valid licenses, approximately 149,449 were women, which means that women account for approximately 49.047% of the total number of attorneys with valid licenses. If we consider that women are approximately 51.4% of the country's population, then it is possible to assert that women appear to be only slightly underrepresented in the pool of licensed attorneys.[389]

[388] DANE--Información para todos. Censo Nacional de Población y Vivienda 2018, Colombia, ¿CUÁNTOS SOMOS? (2020), https://www.dane.gov.co/index.php/estadisticas-por-tema/demografia-y-poblacion/censo-nacional-de-poblacion-y-vivenda-2018/cuantos-somos (last visited Mar 17, 2020).
[389] *Id.*



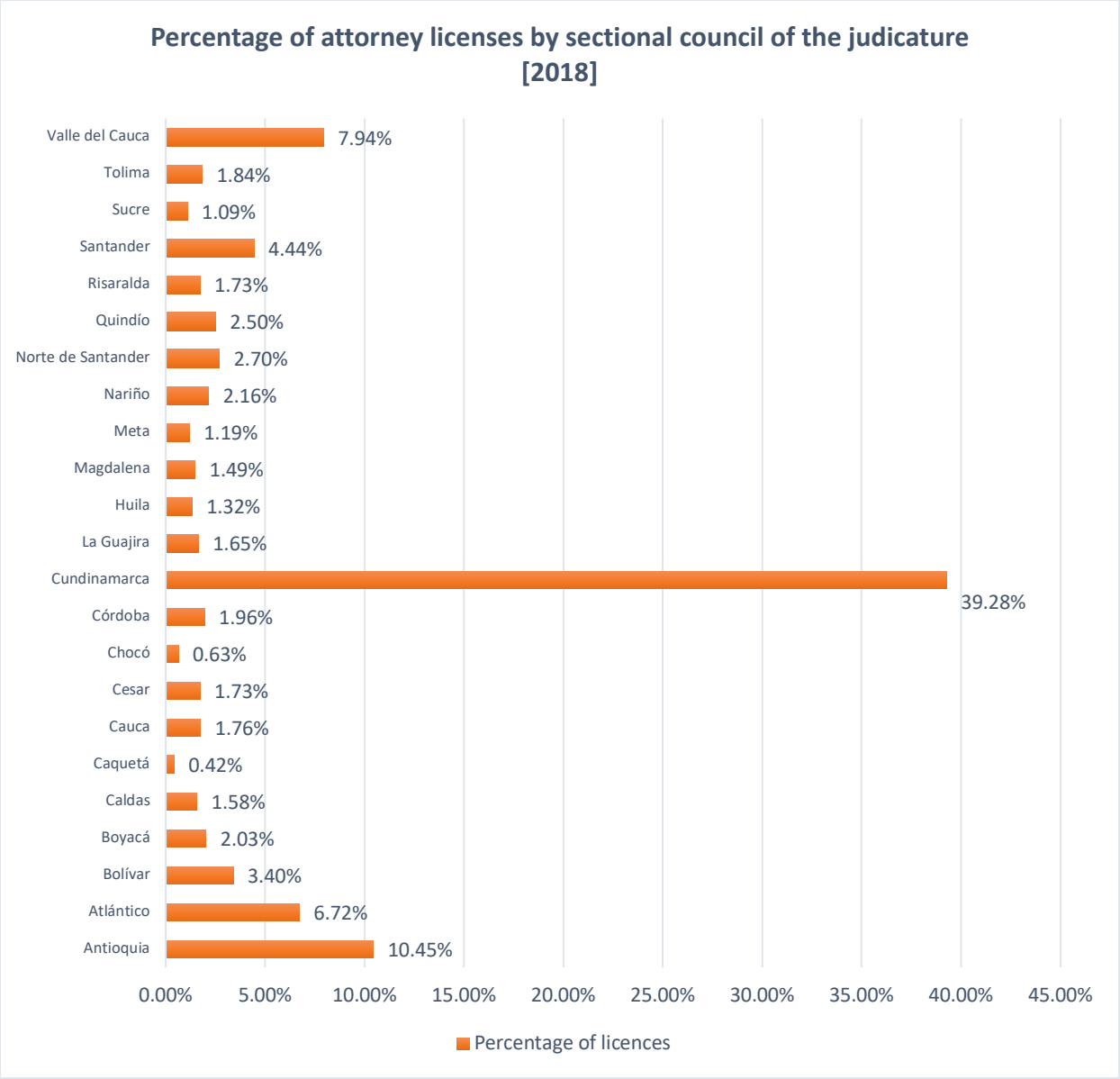

[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

### 4.2. Ethno-racial distribution

The National Registry of Attorneys does not collect data on ethno-racial identity. The registry did not provide further explanation regarding why the database could account for the gender breakdown but not for the ethno-racial breakdown. It only mentioned that the requested information is not included in the format (template) for the inscription before the registry.

### 4.3. Regional distribution

I also requested data regarding the number of licenses issued before every sectional council of the judicature. Since these institutions are located in different parts of the national territory, the data about the application request is relevant since it may suggest regional variances regarding where in the country attorneys are applying for their licenses.




[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

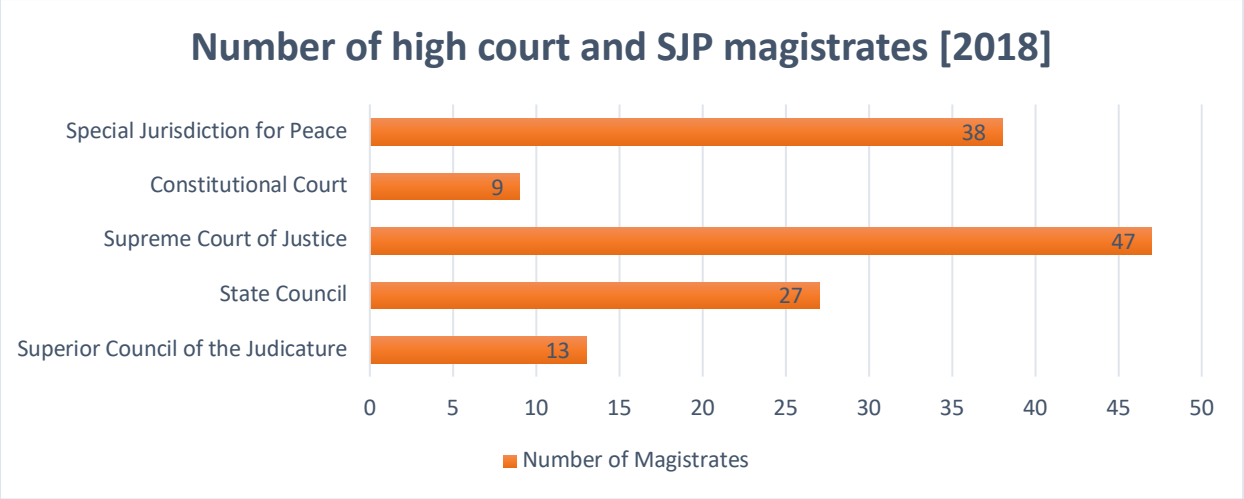
The National Registry of Attorneys' data indicates that central regions of the country, such as Cundinamarca, Antioquia, and Valle del Cauca, tend to account for higher percentages of attorney licenses issuance than other regions. This distribution could indicate that these regions might also have high percentages of legal professionals.

## 5. Data on the composition Colombian judicial institutions

### 5.1. The composition of the high courts

There are four high courts in the Colombian judiciary: The Constitutional Court, the State Council, the Supreme Court of Justice, and the Superior Council of the Judicature. In addition to these judicial bodies, my analysis also includes the SJP. In order to explain these results with more clarity, I separately refer to the data on magistrates (high court judges), auxiliary magistrates, and judicial employees.

#### 5.1.1. High court magistrates

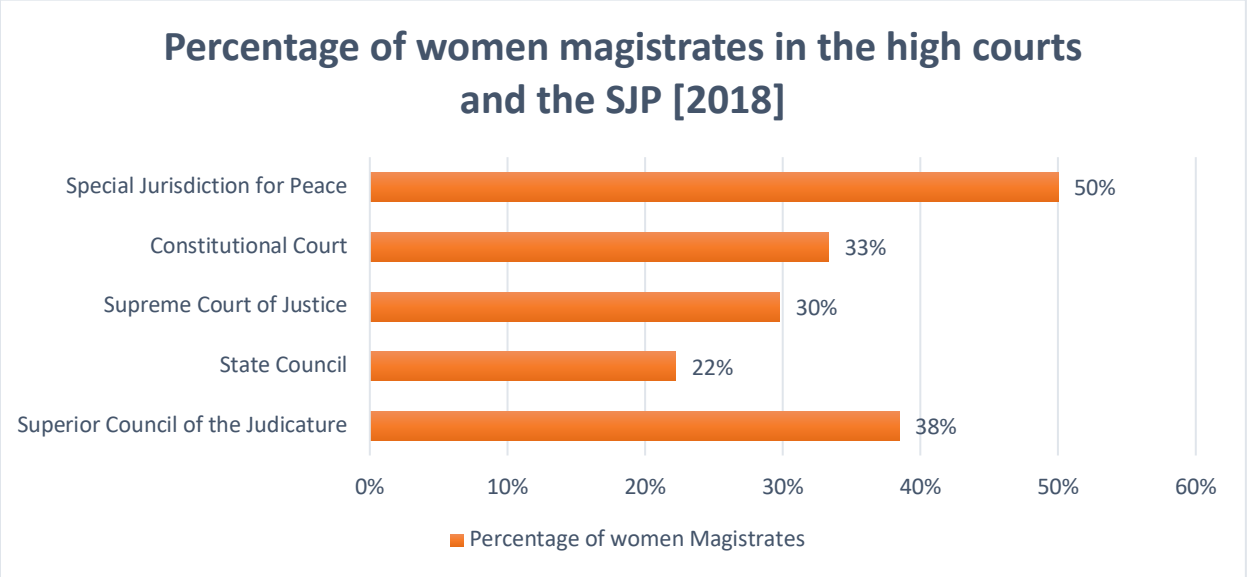



[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

According to the answers that the courts provided, 134 magistrates serve in the four high courts and the SJP. I noted that the courts' report on the number of magistrate seats and the number of those that women occupy contradicted the number of magistrate seats that the Superior Council of the Judicature reported. As an example, in the case of the State Council, that court reported that there was a total number of 27 magistrate seats, 6 of which were occupied by women. In contrast, the Superior Council of the

Judicature reported for that court a total number of 30 magistrate seats, 9 of which were occupied by women. Since these reports do not seem to match (possibly due to seat vacancies or communication issues), I decided to use, whenever possible, the numbers that the courts reported about their composition. I assume that the information that the courts reported about themselves is likely to be more accurate, given the proximity between the institution providing the information and the object that information refers to.

#### 5.1.1.1. Gender composition



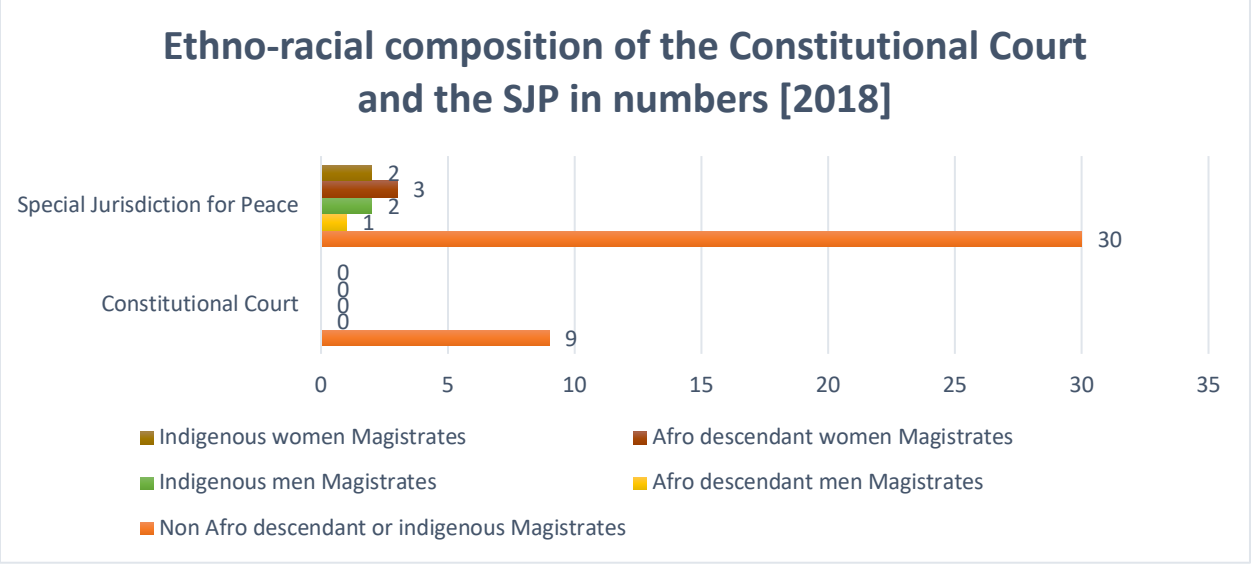

[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

According to the answers that the courts provided, women occupy 47 out of the 134 Magistrate seats in the high courts and the SJP. They account for 35% of the total of magistrates. Although generally underrepresented among the high courts, women magistrate' numbers are better (and reach parity level when compare to the total number of judges) in the SJP (19 out of 38), than in the Superior Council of the Judicature (5 out of 13), the Constitutional Court (3 of 9), the Supreme Court of Justice (14 out of 47) and the State Council (6 out of 27).

#### 5.1.1.2. Ethno-racial composition

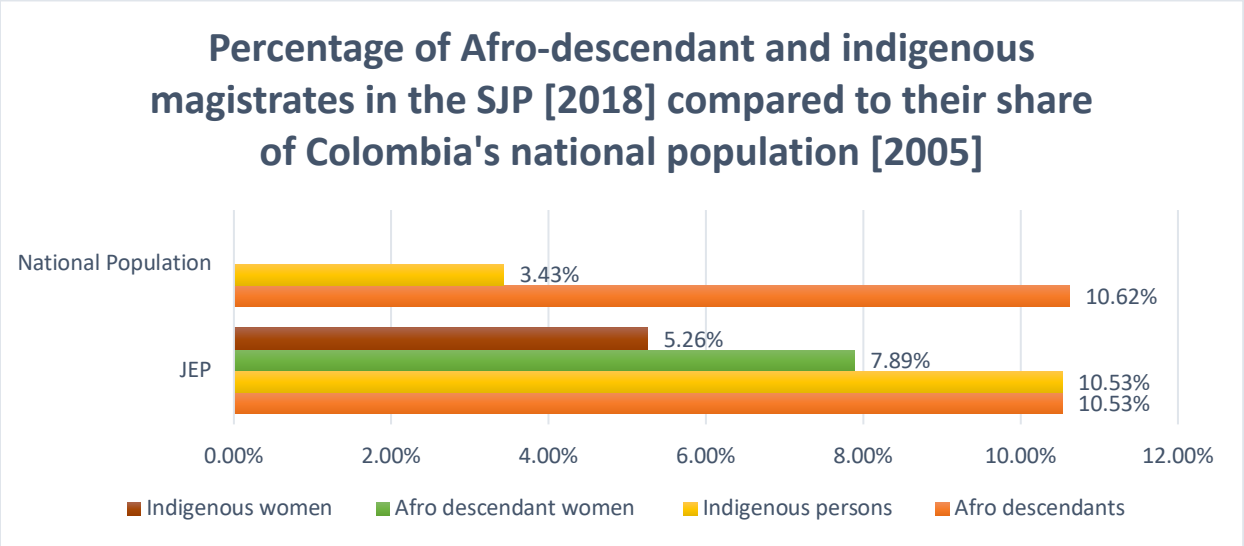
Only the Constitutional Court and the SJP provided data about their ethno-racial composition. These two courts seem to represent two opposite realities about Afro-descendants and indigenous persons' representation in judicial institutions. Of the 38 magistrates in the SJP, 4 are indigenous persons, and 4 are Afro-descendants. Each group accounts for approximately 10.53% of the magistrate seats on this court. Furthermore, there are three Afro-descendant women and two indigenous women serving on this court, which means that 7.89% of the court's magistrates are Afro-descendant women, and 5.26% are indigenous women. In contrast, in the Constitutional Court, there is not a single judge who is indigenous or Afro-descendant.

Since Afro-descendants and indigenous persons compose approximately 10.62% and 3.43% of Colombia's National Population,[390] Afro-descendants Magistrates in the SJP appear to have achieved parity representation levels between these two metrics. Indigenous magistrates have tripled their level of representation when compared to their share of the national population.




[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

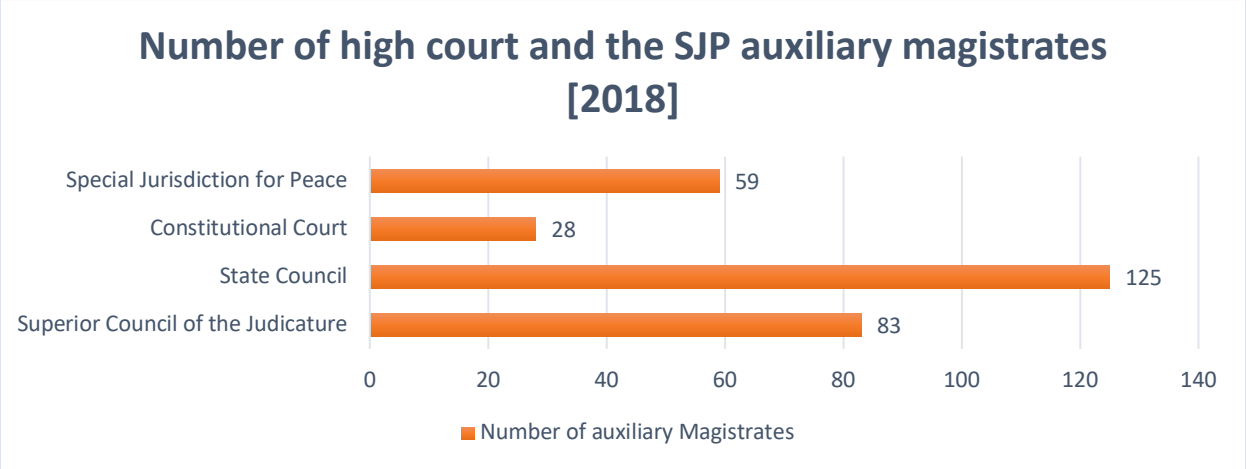
[390] ASTRID HERNÁNDEZ ROMERO, *La visibilización estadística de los grupos étnicos colombianos* 56 (2005), https://www.dane.gov.co/files/censo2005/etnia/sys/visibilidad_estadistica_etnicos.pdf (last visited Mar 10, 2020).




[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

### 5.1.2. High court auxiliary magistrates

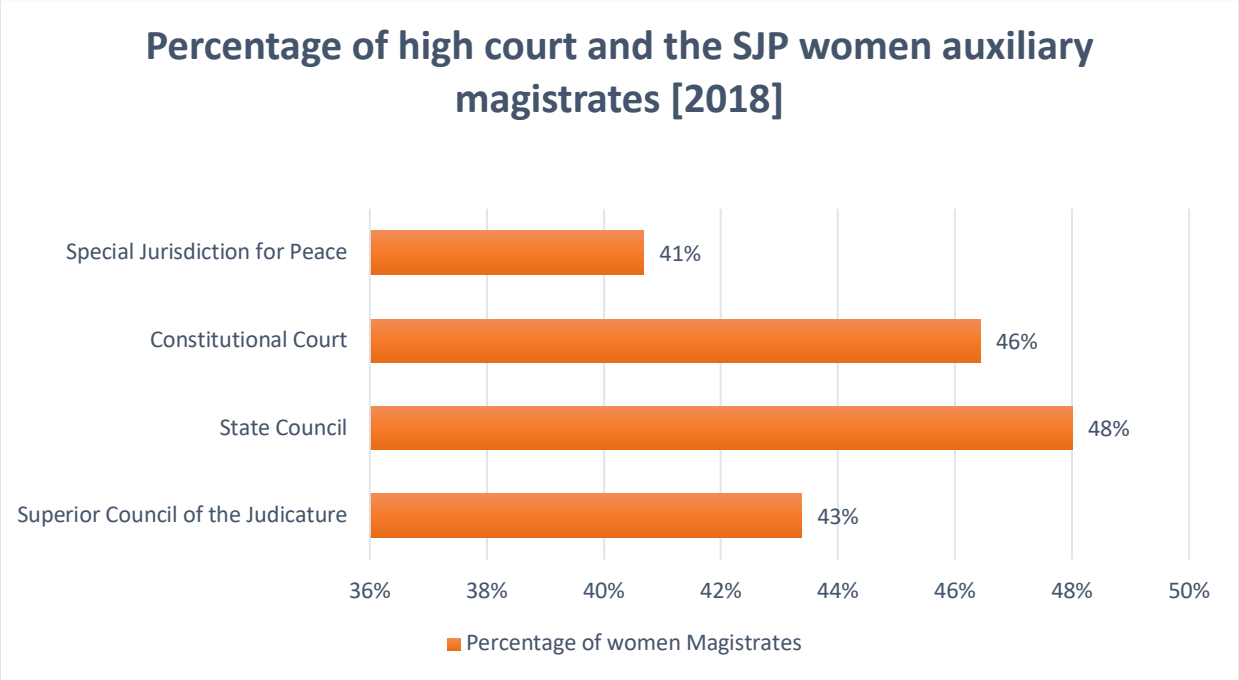
I obtained data regarding the number of auxiliary magistrates in the SJP and all the high courts, except the Supreme Court of Justice. In these institutions, there is a total of 295 auxiliary magistrates, with the State Council having the highest number of them, and the Constitutional Court having the lowest.




[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

#### 5.1.2.1. Gender composition

Out of the 295 auxiliary justices whose gender was informed, 133 were women, accounting for 45.08% of the total number. Although women are underrepresented when compared to their share of the national population, they are more numerous in the State Council (60 out of 125), than in the Constitutional Court (13 out of 28), the Superior Council of the Judicature (36 out of 83) and the SJP (24 out of 59).



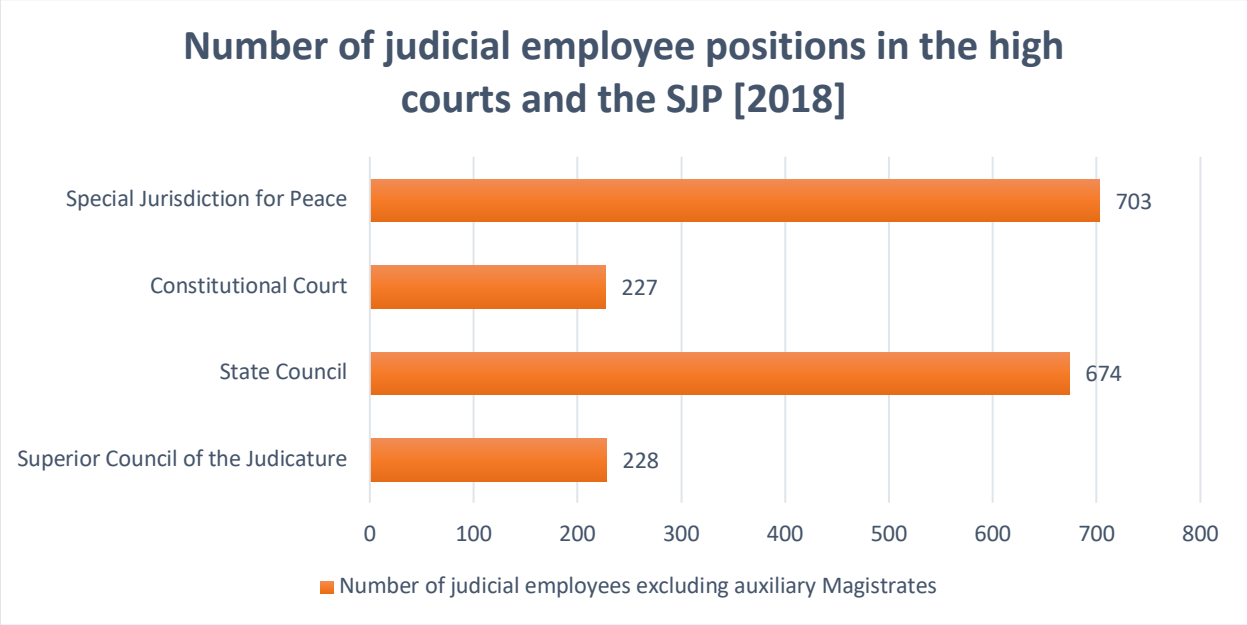

[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

#### 5.1.2.2. Ethno-racial composition

The high courts and the SJP did not provide information regarding the ethno-racial composition of their auxiliary magistrates, except in the case of the Constitutional Court, where there is not a single Afro-descendant or indigenous auxiliary magistrate.

### 5.1.3. Other judicial employees

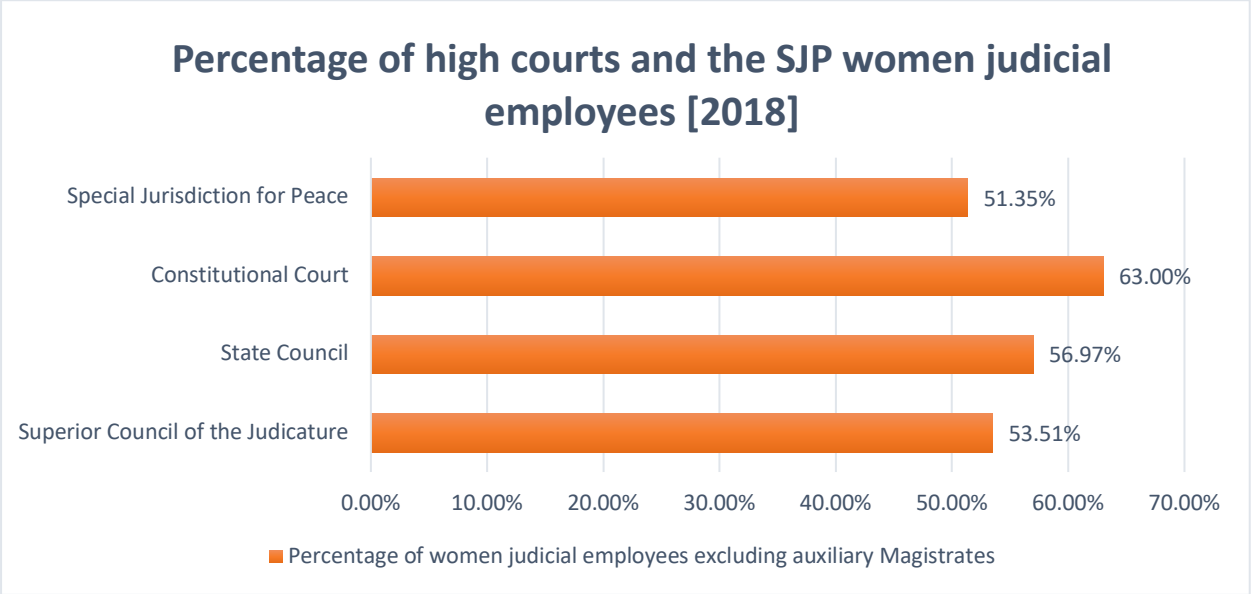
In the case of judicial employees that are not auxiliary magistrates, the high courts and the SJP reported a total of 1,832 employee positions unevenly distributed among the different courts. The Supreme Court of Justice did not inform data regarding judicial employees.




[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

#### 5.1.3.1. Gender composition

Women occupy 1,010 of the 1,832 employee positions reported for the high courts and the SJP. They comprise 55.13% of the employees working for these courts. In consequence, women are not underrepresented when compared to their share of the national population at this level of the judiciary. They surpass the level of representation that men have. Women's numbers are particularly high in the case of the Constitutional Court (143 out of 227), followed by the State Council (384 out of 674), the Superior Council of the Judicature (122 out of 228), and, finally, the SJP (361 out of 703).




[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

#### 5.1.3.2. Ethno-racial composition

In the case of judicial employees, only the Constitutional Court provided the requested information. Indigenous persons and Afro-descendants do not occupy a single one the 227 employee positions reported.

### 5.1.4. Participants' perceptions of Afro-descendant and indigenous representation on the high courts

During the interview process, participants agreed that, leaving aside the SJP, Afro-descendants are virtually absent from the high courts.[391] One of the interviewees, an Afro-descendant woman who works as a judicial employee in a city of the Andean region, described the situation as follows:

[391] Interviews 27, 28, 36, 38 and 40.

> If one goes to the other high courts, the situation is not like that [comparing it to the SJP]. They are white people, they are men, and men from Bogotá and that attended the best universities in Colombia. Then, I would say that, in general terms, excluding the SJP from the scene, to access a good position in a high court, one must have specific credentials apart from being a good lawyer, as coming from privileged contexts[392]

Some participants highlighted the low level of Afro-descendant representation on the Constitutional Court (which has a reputation of being politically progressive in the country), with one of them stating that no black person had ever been appointed as a tenured magistrate to that court.[393] However, another participant questioned this perceived absence of Afro-descendants at this court. He posed doubts about the information provided by the court in this regard and asserted that if one used phenotype to assess representation, one would find at least some Afro-descendants working at this institution.[394]

In different interviews, participants named particular Afro-descendant persons that worked or used to work for this court as evidence of at least a certain level of Afro-descendant presence. However, the names that participants referred to tended to be the same.[395] From my perspective, the fact that a singular black person (or few black people) were always mentioned when discussing Afro-descendant presence at this space, instead of being proof of inclusion or diversity, seems to evidence tokenism, or the fact that the number of persons of this ethno-racial group is so low that people can typically refer to "the one" or “the few” black persons at the institution.

In the case of the other high courts, the situations seem to be similar. An interviewee (who had previous experience working at the high courts) estimated that out of 150 judicial employees working at one of the Supreme Court of Justice's chambers only two were Afro-descendants. He also mentioned that he could not remember seeing more than three Afro-descendants among the entire court's staff, which the

[392] Interview 10.
[393] Interview 11.
[394] Interview 22.
[395] Interviews 22, 28 and 36.

interviewee estimated in between 500 and 600 judicial employees.[396] Likewise, others mentioned that the lack of Afro-descendants might be affecting the institutions' interns as well, with one interviewee mentioning that very few of the high courts' interns are black,[397] and another one, who worked as an intern for one of the high courts, mentioned that during the time she spent there, she was one of only two black interns working for that court.[398]

### 5.1.5. The particularities of the SJP

As some of the interviewees pointed out, the SJP is an exception to the trends in the composition of the high courts in Colombia.[399] Women occupy half of the tenured magistrate positions and Afro-descendants and indigenous persons have a level of representation that matches their share of the national population or exceeds this percentage, respectively.

There are particular explanations for the exceptionality of the SJP in this respect. As I previously stated, the SJP is a transitional justice mechanism created as a result of the peace process between the government of Colombia and the FARC-EP (a leftist guerrilla group).[400] The Legislative Act 01 of 2017, a constitutional reform that legally structured the SJP, ordered that: "The jurisdiction shall be conformed according to criteria that allow the fair participation between men and women, guarantees non-discrimination, and respects the ethnic and cultural diversity."[401] Moreover, the Presidential Decree 587 of 2017, which regulates the creation of the selection committee for the judges for the newly formed jurisdiction, mandates: "The Tribunal and each one of its chambers shall be formed with gender equality

[396] Interview 21.
[397] Interview 11.
[398] Interview 42.
[399] Interview 10.
[400] Acuerdo Final de Paz Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, Capítulo 2. Signed between the Government of Colombia and the FARC-EP on Nov. 12, 2016.
[401] AL. 1/17, abril 4, 2017, DIARIO OFICIAL [D.O.] (Colomb.) art. 7.

criteria and respect for the ethnic and cultural diversity."[402] As a result, the institutional design of the SJP considered that ethnic and cultural diversity factors in the magistrate selection. This difference seems to be the main reason for the higher levels of Afro-descendant and indigenous persons' presence at that level of the SJP.

As I previously stated, the SJP did not provide data on its ethno-racial composition beyond the magistrate level. Different interviewees mentioned that the level of Afro-descendant representation at the judicial employee level is higher in this judicial institution than in other high courts. Although, some of them were careful to mention that, despite the significant level of presence, Afro-descendants are still underrepresented at the SJP. One interviewee, who has significant experience working at this jurisdiction, commented: "But I would not say that we are 100% represented at the SJP […] there is an appropriate margin of representativeness, but it is not the same that I would say that is adequate concerning this institution. Nevertheless, there is a little more [presence]."[403] Similarly, another described that at an open meeting of the institution, which most employees attended, no more than 20 black persons [including all types of positions] could be counted,[404] and a third one mentioned that, to the best of his knowledge, none of the auxiliary justices of the SJP was Afro-descendant,[405] which seems to indicate that the level of Afro-descendant presence at this institution might not be as high among judicial employees as it is among the group of magistrates.

Ethnic communities took additional steps to guarantee that the representation of indigenous and Afro-descendants in this institution was not confined to the group of magistrates. During the free, prior and informed consultation process undertaken to approve the statutory bill that would make the SJP operative, the representatives of black communities asked the government to add an article to the bill that operationalized the SJP that stated that the SJP's employees would be appointed based on several criteria,

[402] PD. 587/2017, abril 5, 2017, DIARIO OFICIAL [D.O.] (Colomb.) art. 4.
[403] Interview 10.
[404] Interview 16.
[405] Interview 24.

including "gender equity [and] cultural and ethnic diversity." They also asked to add ethnic inclusion language, mentioning that "At the conformation of the SJP's staff, the inclusion of persons of ethnic peoples and communities with knowledge and expertise about the fundamental rights of ethnic groups shall be guaranteed."[406] Although the first reference (consideration of gender equity and ethnic and cultural diversity in the selection of the staff) was included in several provisions of the resulting statutory law, the second one (specifically calling for inclusion measures for members of those communities) was excluded from the final text of the law.[407]

These fair representation clauses in the legal instruments that crafted the composition of the jurisdiction were the result of the mobilization effort of the indigenous and Afro-descendant movements. Ethnic leaders worked tirelessly for the introduction of an ethnic chapter in the peace accords. They also bargained for the appointment of minorities to positions in the transitional justice institutions.[408] One of the interviewees, who had significant experience working with the Afro-descendant ethnic movement, mentioned that, amid the peace negotiations, ethnic organizations lobbied for the inclusion of Afro-descendant and indigenous persons in the SJP. Ethnic leaders successfully argued that, since these populations were some of the most harshly affected by the internal armed conflict in Colombia, they should be present inside the institutions created to resolve the conflict.[409]

The distinctive character of the SJP does not end with its composition. It also applies to its institutional design and procedures.[410] The peace accords did not only secure the inclusion of an "ethnic perspective" into this institution's work,[411] but also the SJP's magistrates contributed to this process by using the institution's internal regulations to create an ethnic commission, which has the purpose of

[406] Espacio Nacional de Consulta Previa, *Acta de Consulta Previa, Concertación y Protocolización del proyecto de ley "Estatutaria de la Jurisdicción Especial para la Paz"* (2017).
[407] L. 1957/19, julio 6, 2019, DIARIO OFICIAL [D.O.] (Colomb.) art. 100, 101, 106 and 121.
[408] Interviews 9 and 19.
[409] Interview 9.
[410] Interview 12.
[411] Acuerdo Final de Paz Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, Capítulo Étnico. Signed between the Government of Colombia and the FARC-EP on Nov. 12, 2016.

guaranteeing the implementation of the ethno-racial perspective in this transitional justice mechanism.[412] I emphasize that the SJP magistrates who belong to ethnic groups are automatic members of this commission, along with other functionaries of the jurisdiction.[413]

### 5.2. Data on the composition of intermediate tribunals

In the case of intermediate tribunals, I will divide the assessment into two segments, referring, first, to the situation of the magistrates and, second, to the situation of the judicial employees.

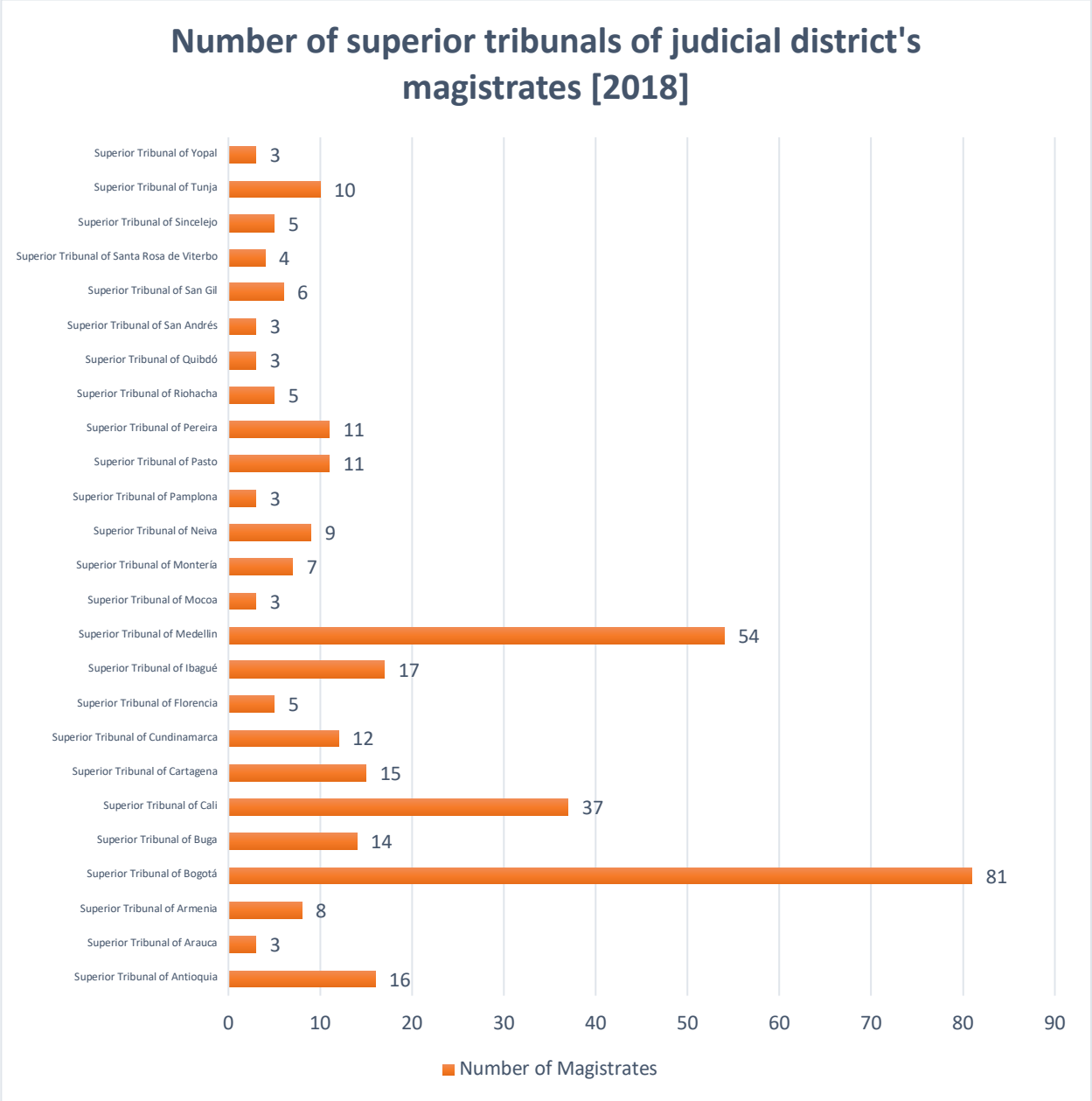
#### 5.2.1. Superior tribunals of judicial district

There is a total of 33 superior tribunals of judicial district in Colombia, distributed across the national territory. According to the data of the Superior Council of the Judicature, these tribunals represent a total of 467 magistrate positions. I could obtain data about 345 magistrates' gender and about 264 magistrates' ethno-racial identity. These last figures are the ones that I will use as the point of comparison for our assessment of gender and ethno-racial composition, respectively. The number of registries about gender is lower than the total number of magistrate seats. The Superior Tribunals of Barranquilla, Bucaramanga, Manizales, Popayán, Santa Marta, Valledupar, and Villavicencio either did not respond to the rights of petition or did not provide the required information about the gender composition. In the case of ethno-racial identity, this number is even lower since the Superior Tribunal of Bogotá (which has 81 Magistrates), provided data about the court members' gender breakdown but not about its ethno-racial composition.

[412] Acuerdo 001/18, marzo 9, 2018, Jurisdicción Especial de Paz. [J.E.P.] (Colomb.) art. 103.
[413] *Id.*

#### 5.2.1.1. Magistrates

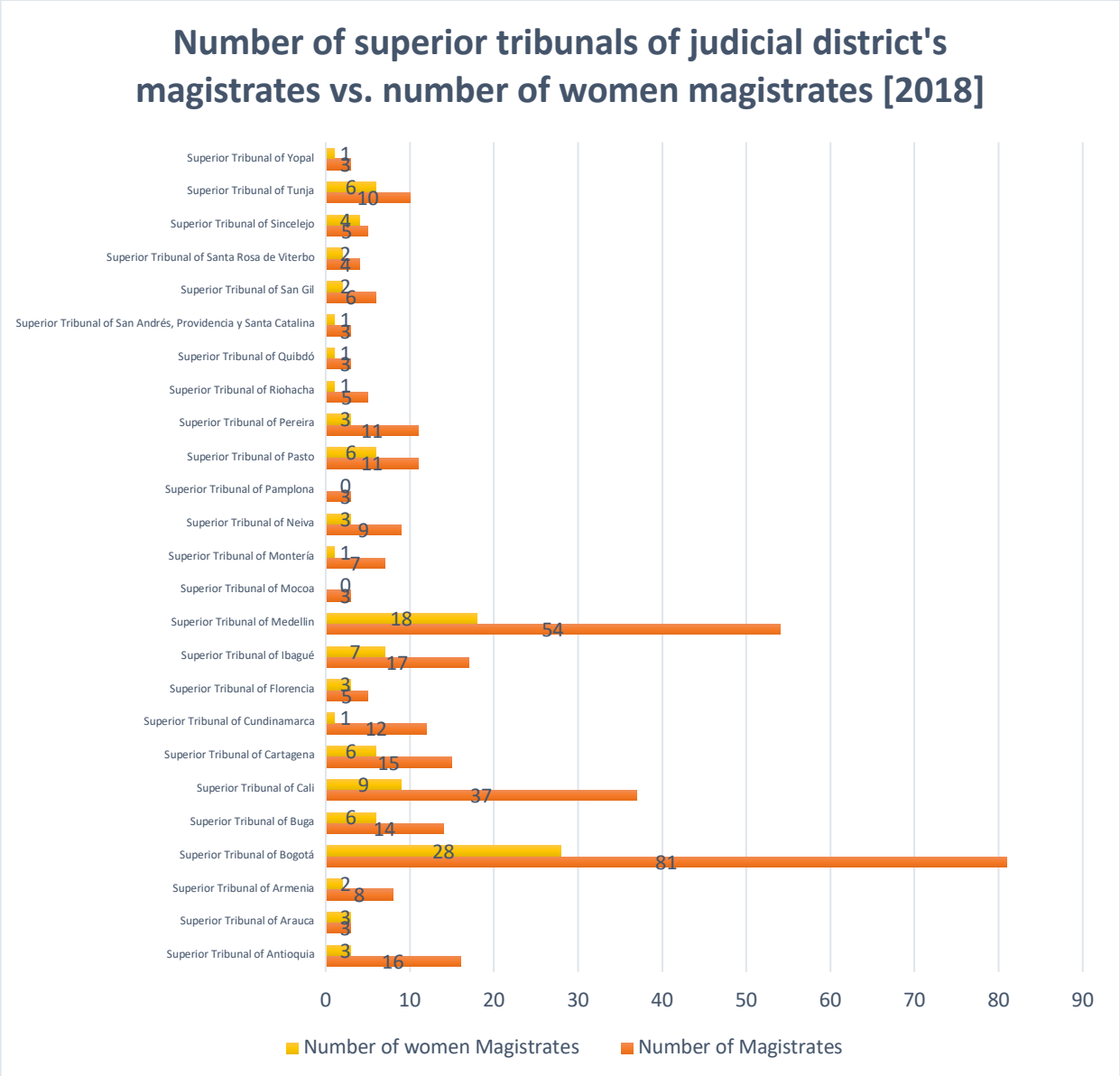
Magistrates' numbers vary drastically from one court to another, with the biggest court having a total of 81 Magistrates and the smallest courts having only three.



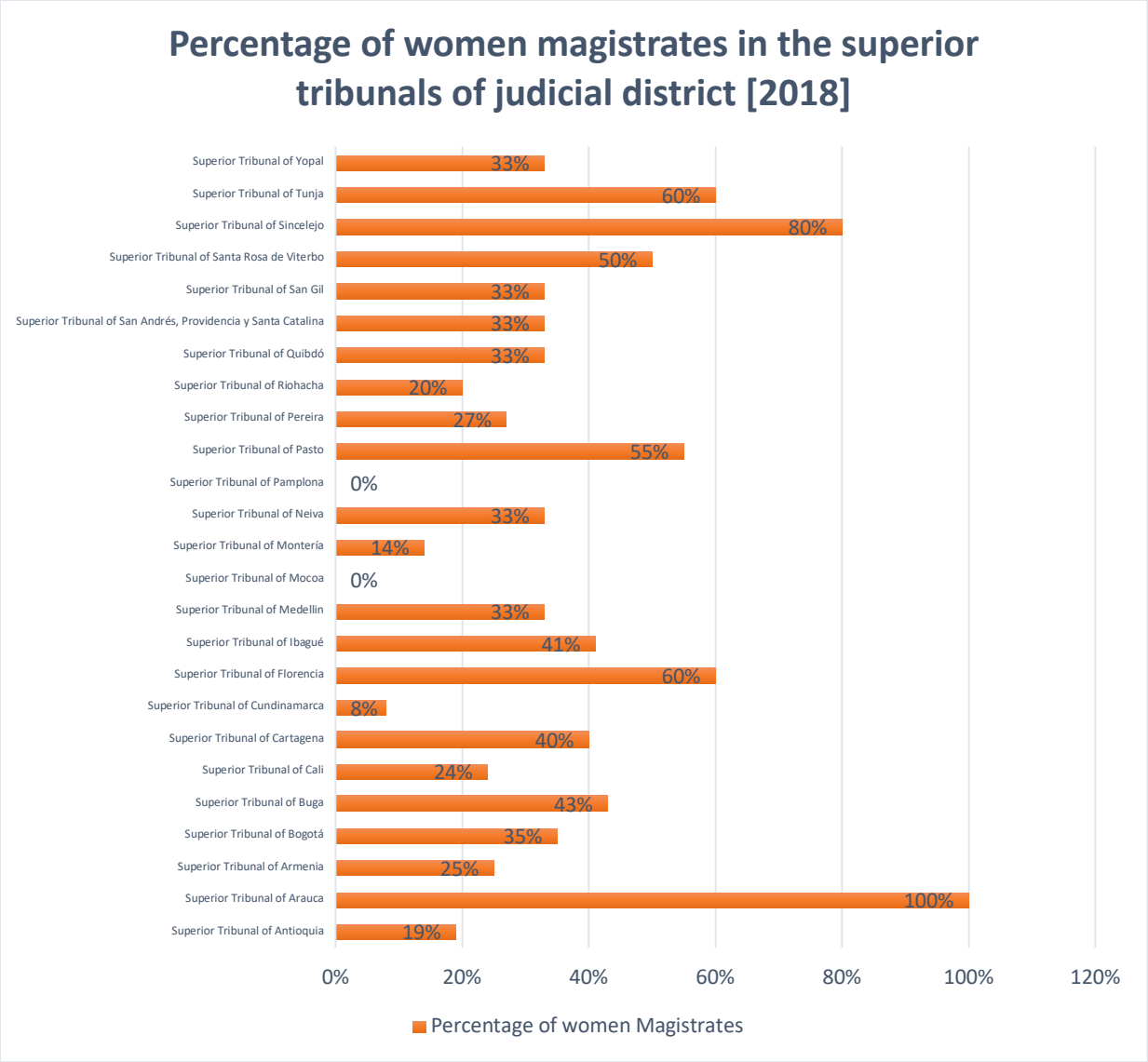

[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

#### 5.2.1.1.1. Gender composition

In the superior tribunals of judicial district, women occupy 117 out of the 345 seats we could obtain gender information about, accounting for 33.91% of all magistrates. In consequence, women appear to be significantly underrepresented in these tribunals. They are a little more than 50% of the national population, and a similar share of the number of attorneys with valid licenses.




[ Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

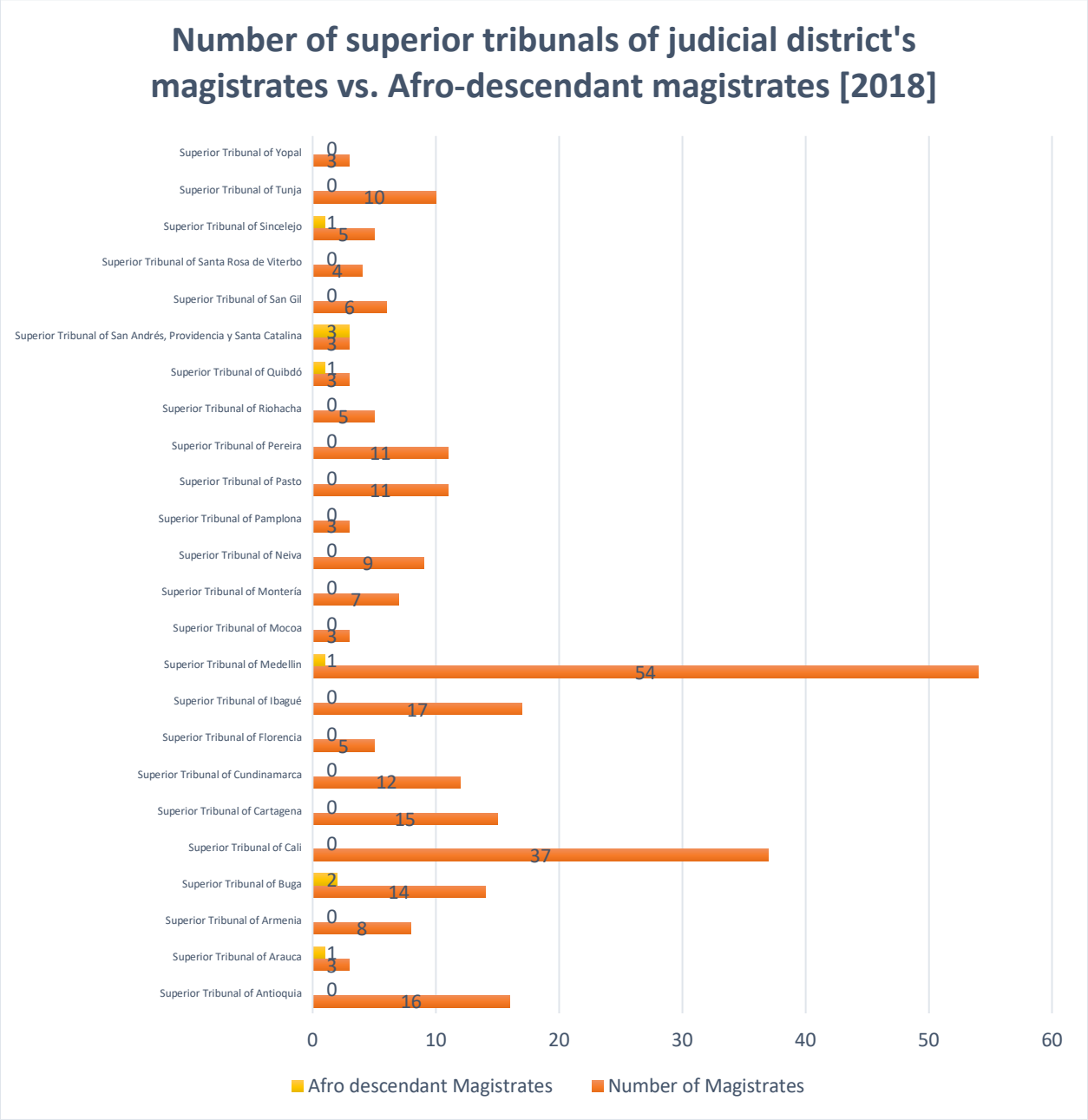



[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

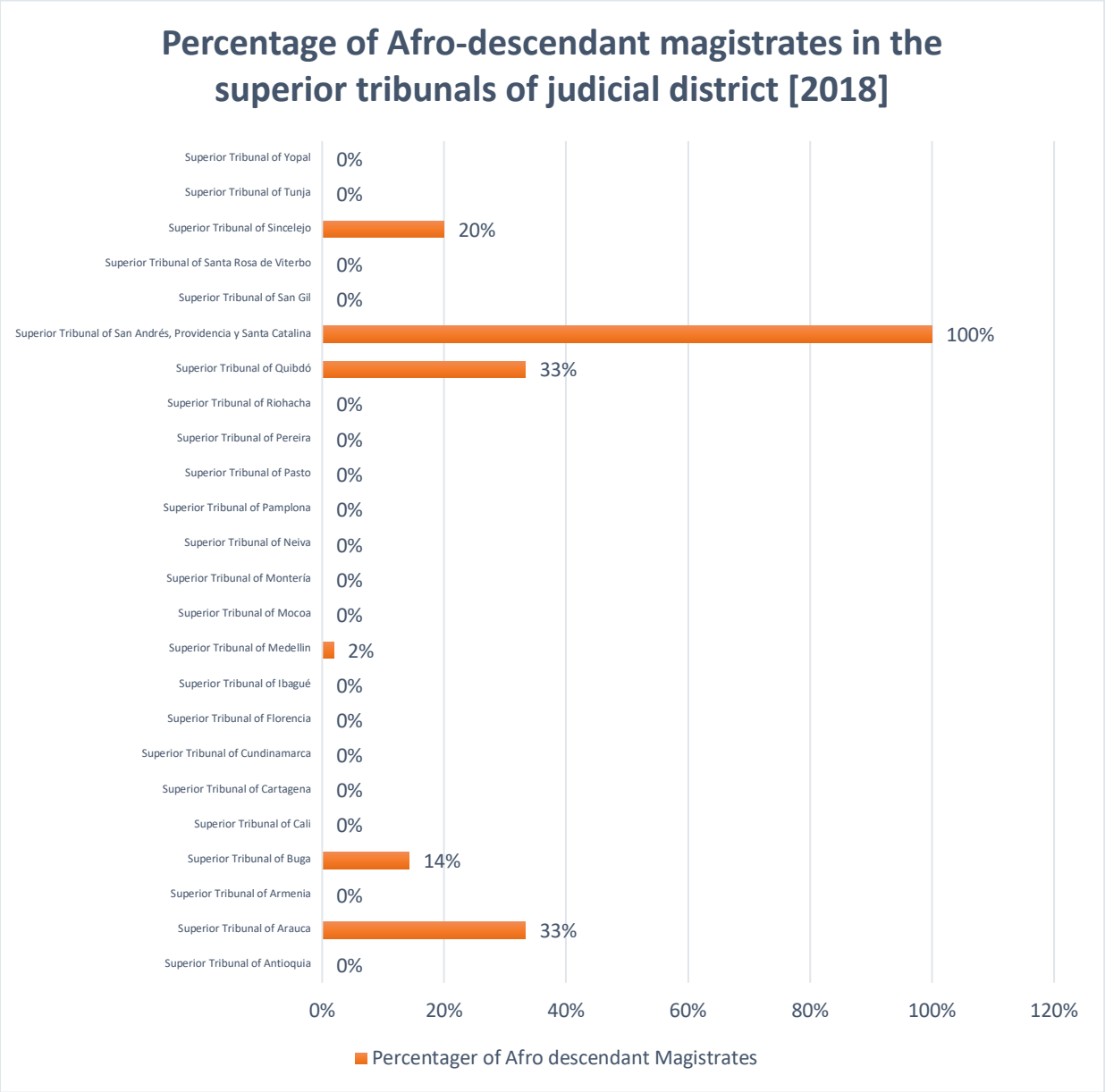
#### 5.2.1.1.2. Ethno-racial composition

I obtained data about the ethno-racial identity of 245 magistrates. Of these, 9 were Afro-descendants, with 5 of them being Afro-descendant women. Afro-descendants represented around 3.67% of all the magistrates I have registries about, being significantly underrepresented in this level of the judiciary as well. They are approximately 10.62% of the national population, according to the 2005 national

census. Afro-descendant Magistrates are present in Superior Tribunals of Arauca (1 out of 3), Buga (2 out of 14), Medellín (1 out of 54), Quibdó (1 out of 3), San Andrés, Providencia, and Santa Catalina (3 out of 3), and Sincelejo (1 out of 5). Interestingly, Afro-descendant women are slightly more numerous than Afro-descendant men. There is an Afro-descendant magistrate in each of the Superior Tribunals of Arauca, Buga, Quibdó, San Andrés, Providencia and Santa Catalina, and Sincelejo.




[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]



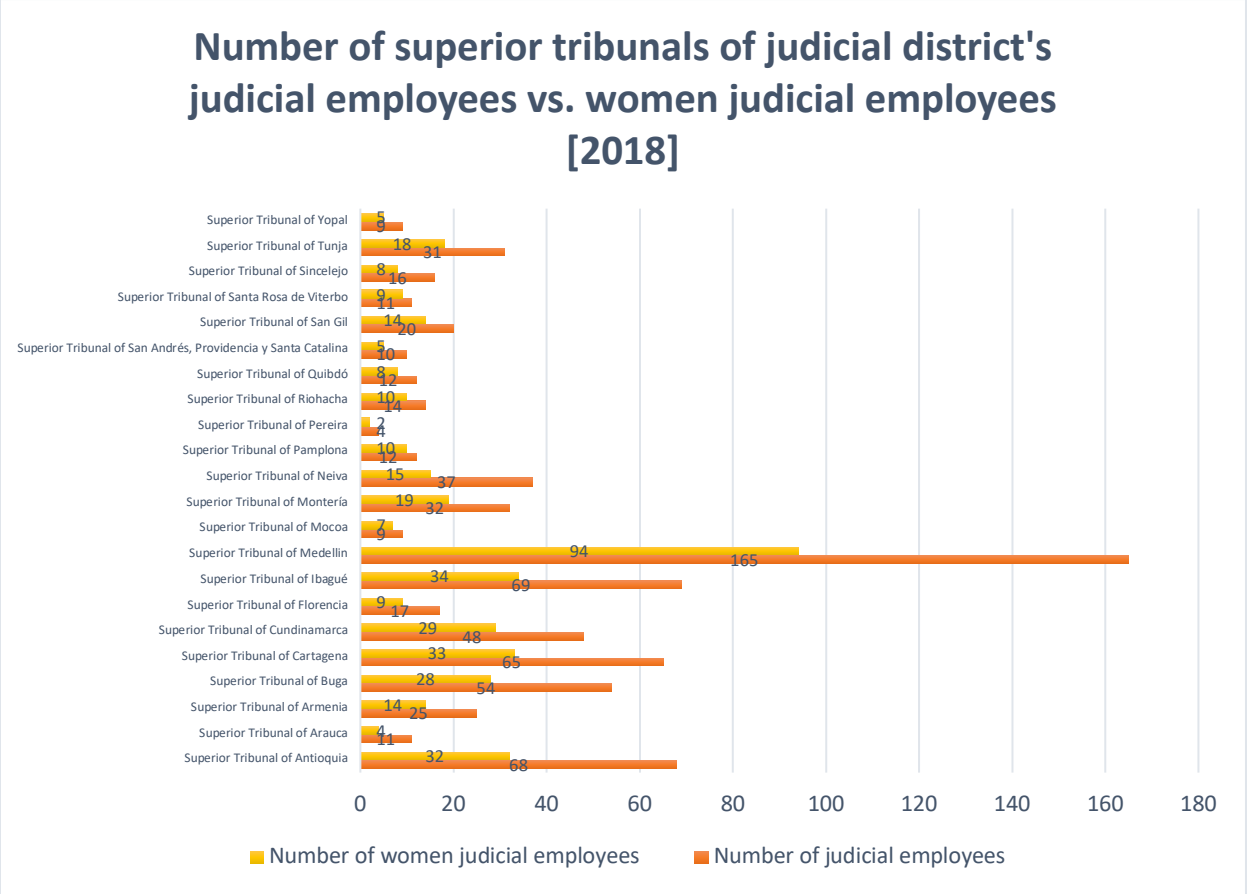

[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

Regarding the ethno-racial breakdown of superior tribunals of judicial district's magistrates, not a single tribunal informed having indigenous magistrates, which indicates that indigenous persons may be completely absent from this part of the Colombian Judiciary.

#### 5.2.1.2. Judicial employees

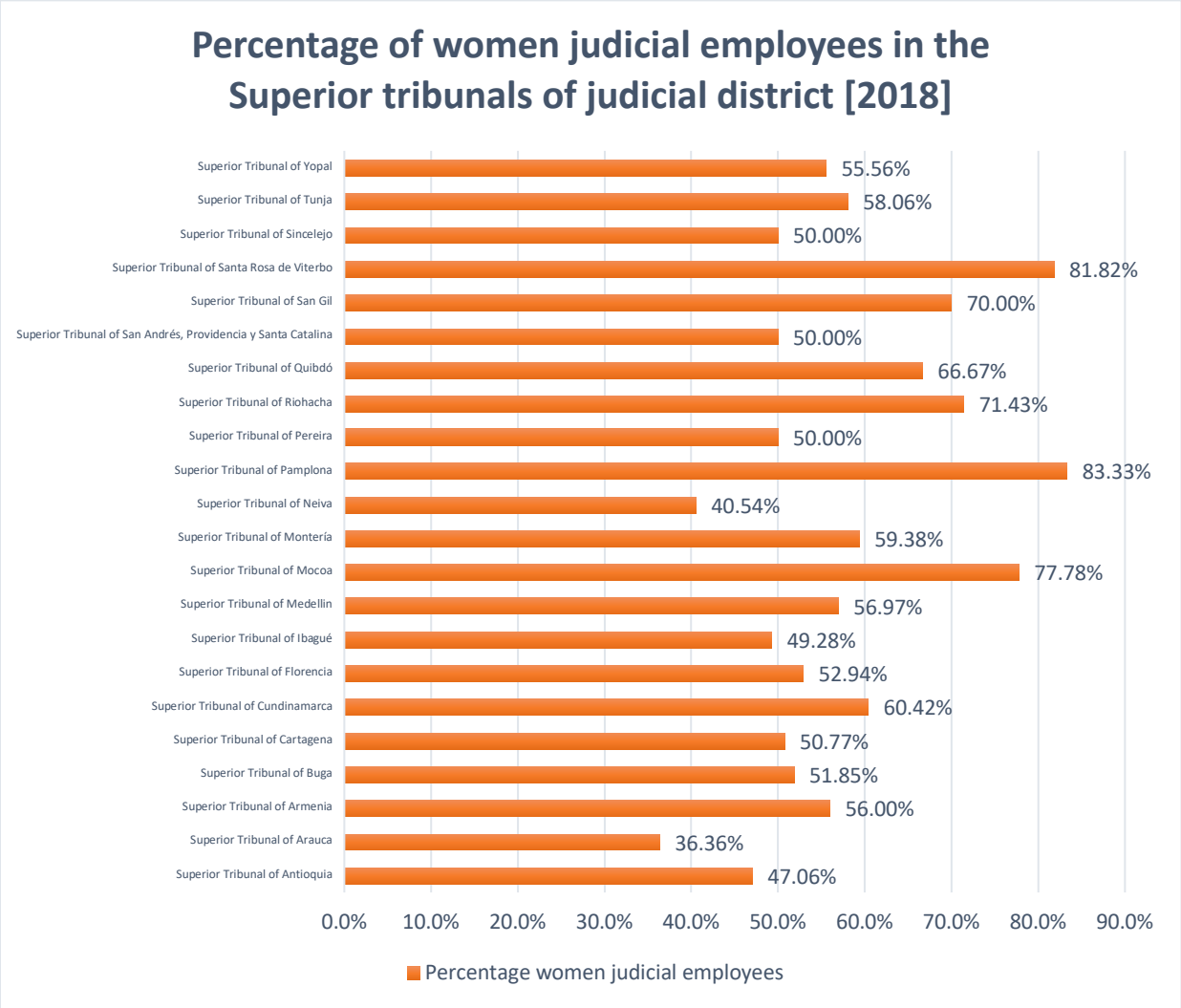
In the case of judicial employees, the superior tribunals of judicial district reported a total of 797 judicial employee positions. In addition to the tribunals that did not provide data about their composition, the superior tribunals of Bogotá and Pasto did not report on the gender and ethno-racial identity of the judicial employees that occupy these positions. The Superior Tribunal of Cali (which has 58 judicial employee positions) provided data on the ethno-racial distribution of judicial employees but did not include the data on the total number of women judicial employees. In conclusion, I had information about the 739 judicial employees' gender and 797 judicial employees' ethno-racial identity.

##### 5.2.1.2.1. Gender composition




[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

Out of the 739 judicial employee positions whose gender was reported, 407 were informed to be women. Women comprise approximately 55.07% of judicial employees in the Superior tribunals of judicial district, having surpassed gender parity levels.

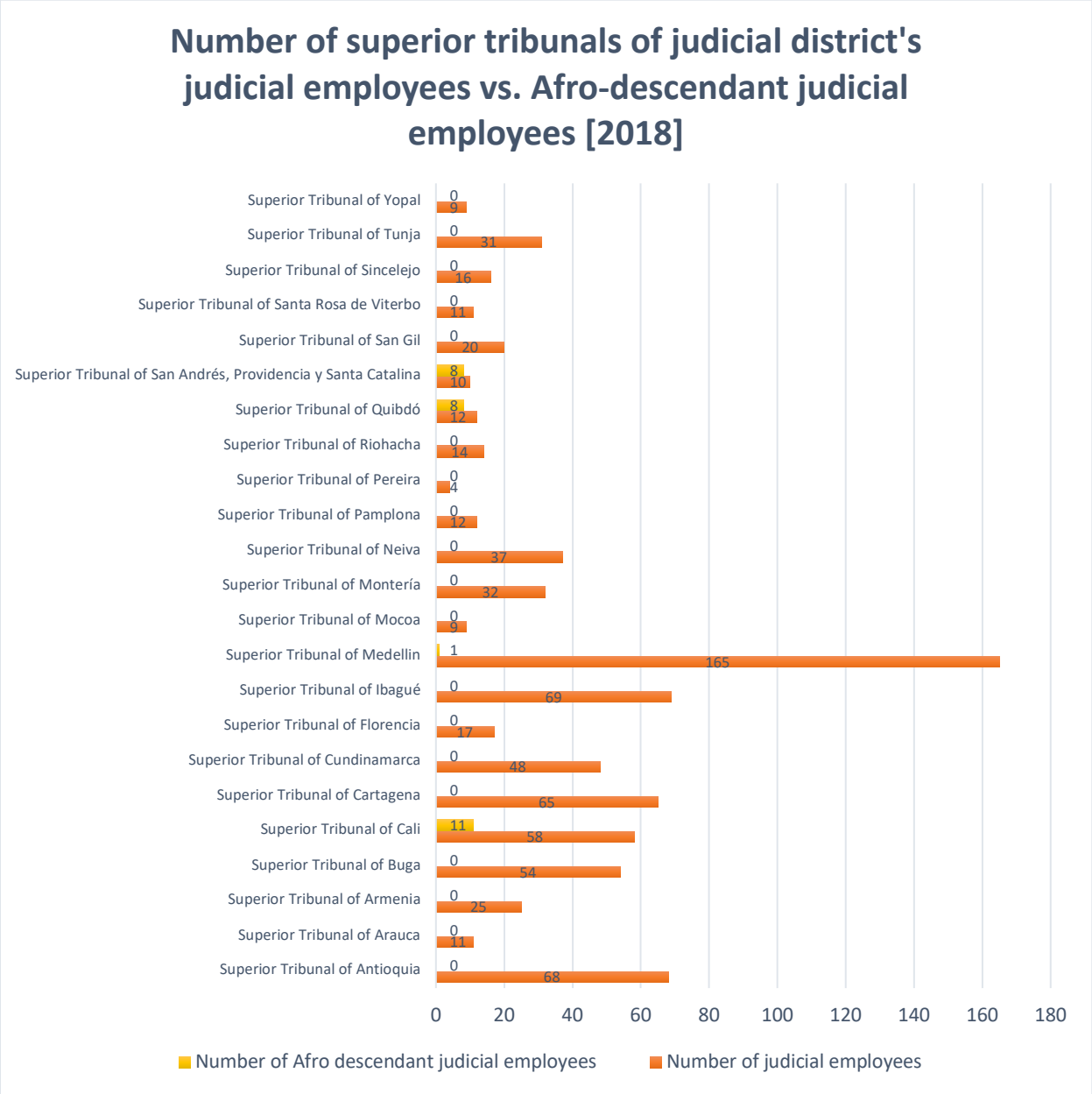



[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

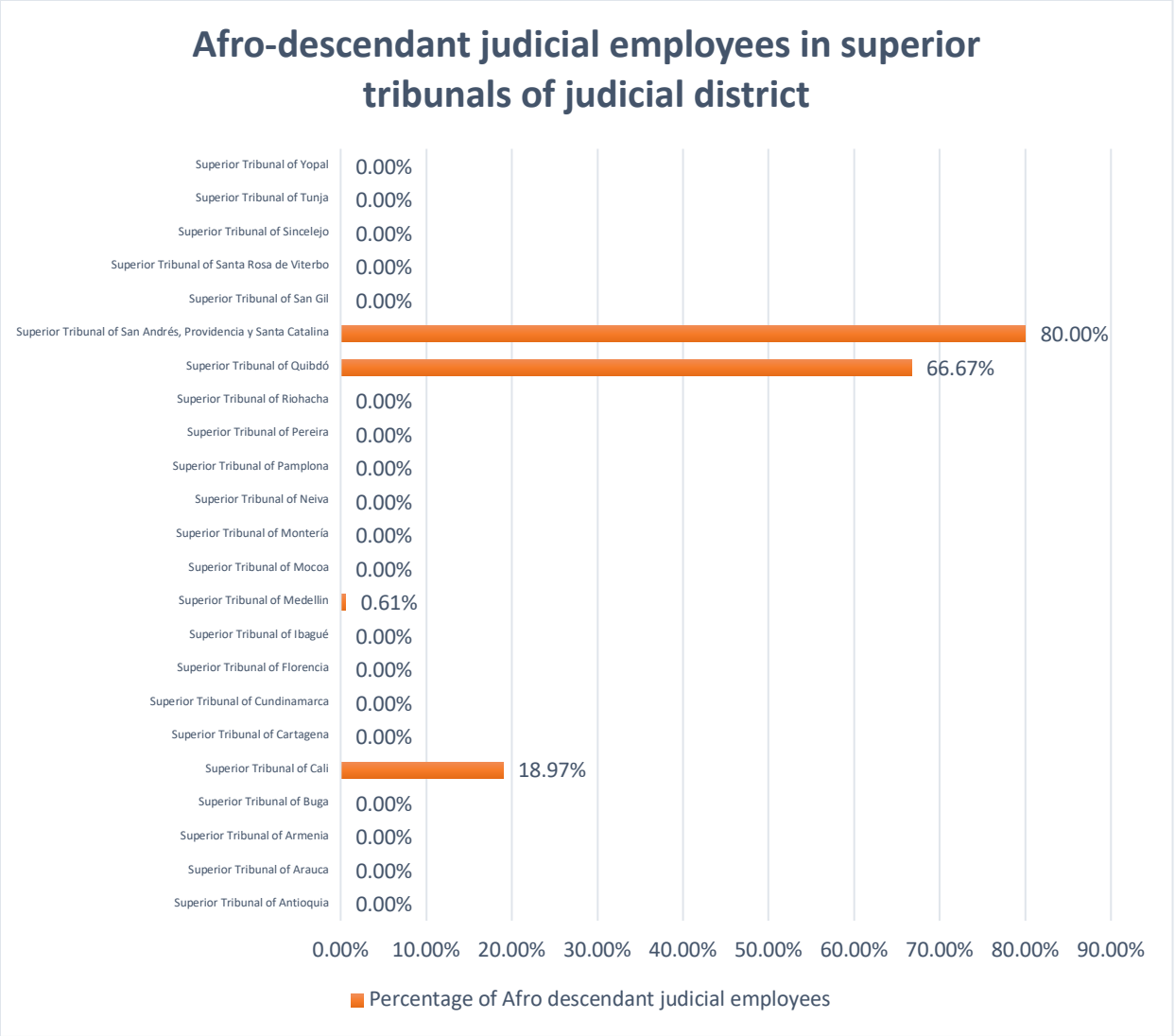
#### 5.2.1.2.2. Ethno-racial composition

According to the answers that the courts provided, 28 Afro-descendant judicial employees are working for the superior tribunals of judicial district. Afro-descendants are approximately 3.51% of the judicial employees in these tribunals, being significantly underrepresented when compared to their share of

the national population (10.62%). Of those 28 Afro-descendant judicial employees, 20 are women. Afro-descendant women are approximately 71.42% of all Afro-descendant judicial employees working in these tribunals. Only four Superior Tribunals reported having Afro-descendant judicial employees: Cali (11 out of 58), Medellín (1 out of 165), and Quibdó (8 out of 12) and San Andrés, Providencia, and Santa Catalina (8 out of 10). Only two tribunals reported having Afro-descendant men judicial employees: Cali with 6, and San Andrés, Providencia, and Santa Catalina with 3 of them.




[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]




[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

Finally, only a tribunal reported having an indigenous judicial employee, who was also a woman. One indigenous judicial employee is occupying a position out of 797 reported.

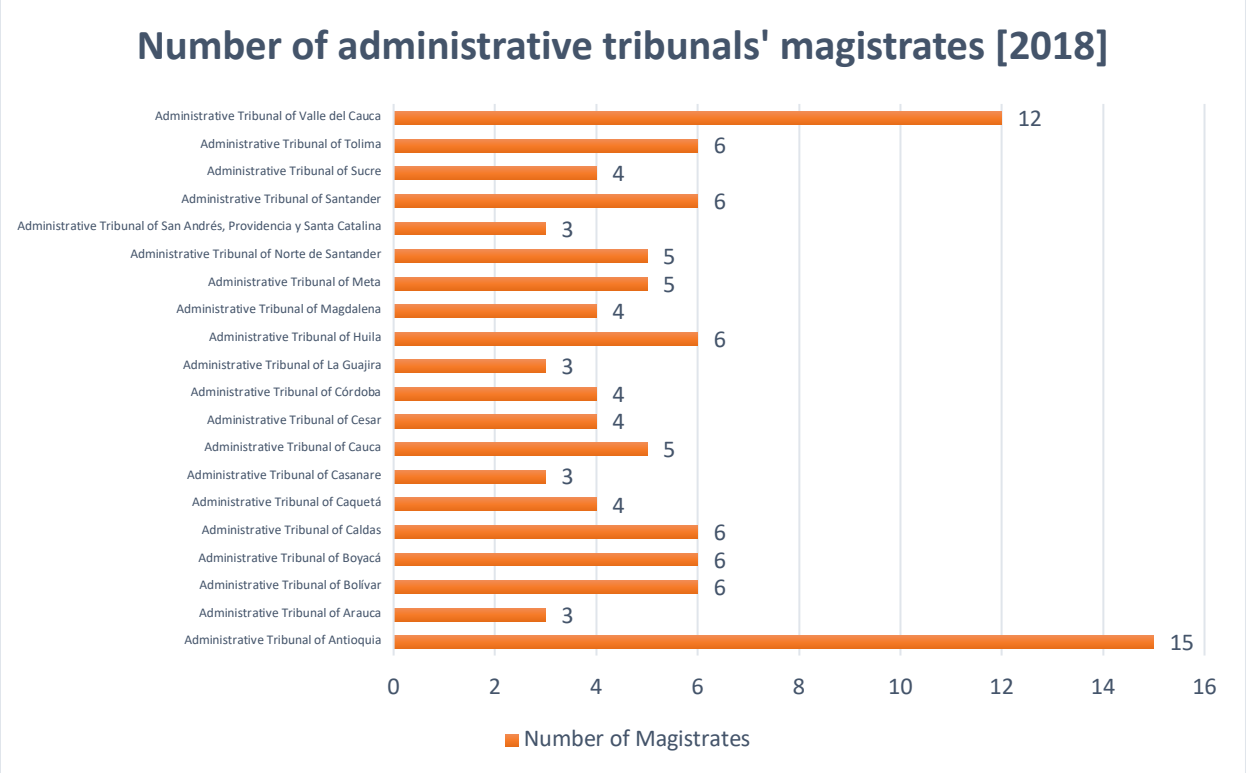
### 5.2.2. Administrative tribunals

There is a total of 26 administrative tribunals in Colombia, distributed across different regions of the national territory. According to the Superior Council of the Judicature, 175 magistrates work at these

courts. I obtained gender and ethno-racial data about 110 of these magistrates, which will be the total number to compare the ethno-racial composition of Administrative tribunals' magistrates. The administrative tribunals of Atlántico, Chocó, Nariño, Quindío, and Risaralda either did not respond to the information requests or did not provide the requested data. The Administrative Tribunal of Cundinamarca only reported data about the composition of some of the judges and their staff members. Since the data was incomplete and it was not suitable for analysis, I excluded it. I will, first, present the data regarding magistrates, and, second, the data concerning judicial employees.

#### 5.2.2.1. Magistrates

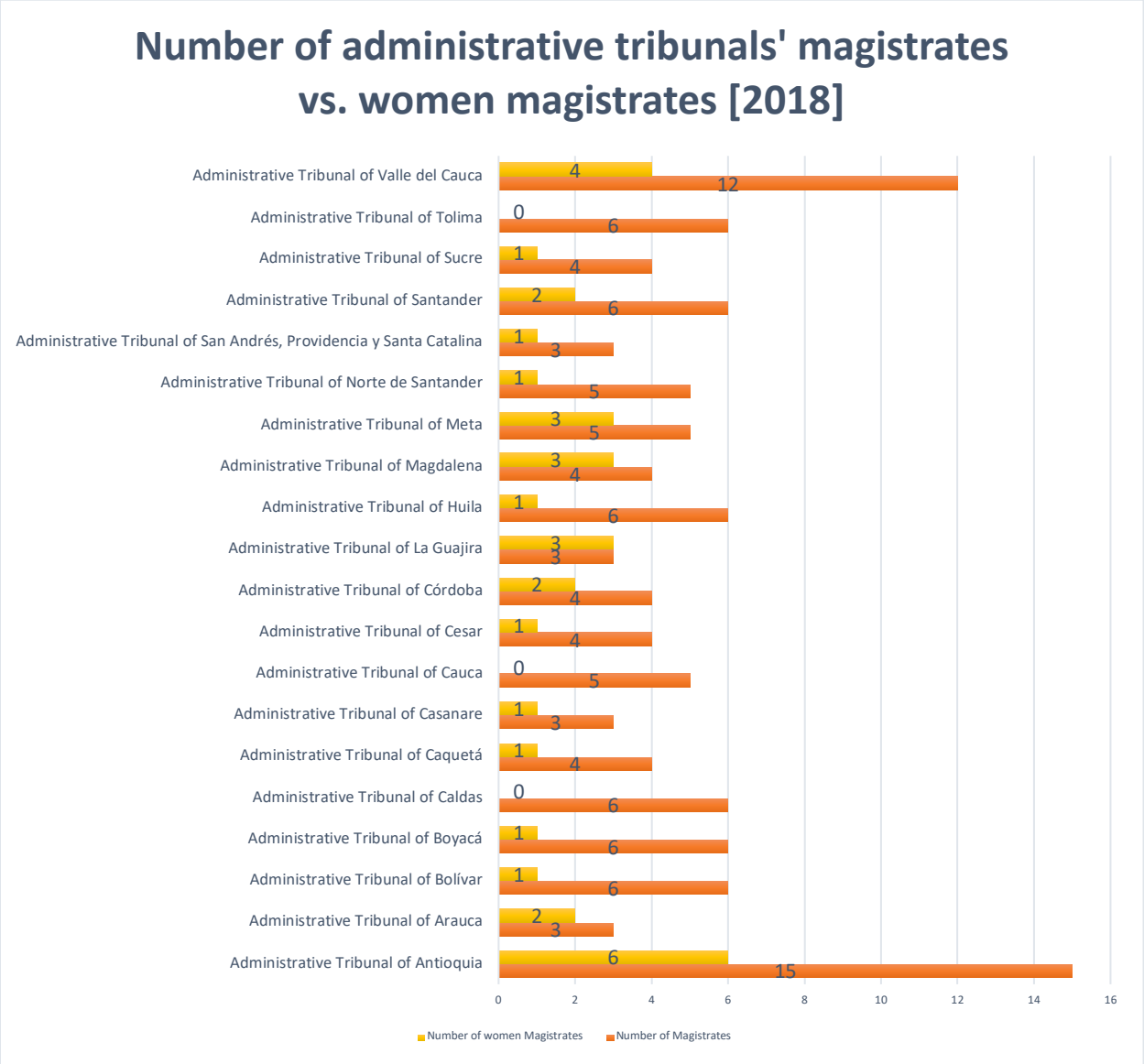
Regarding the number of magistrates *per* court, the biggest court in our analysis had 15 Magistrates and the smallest only three.



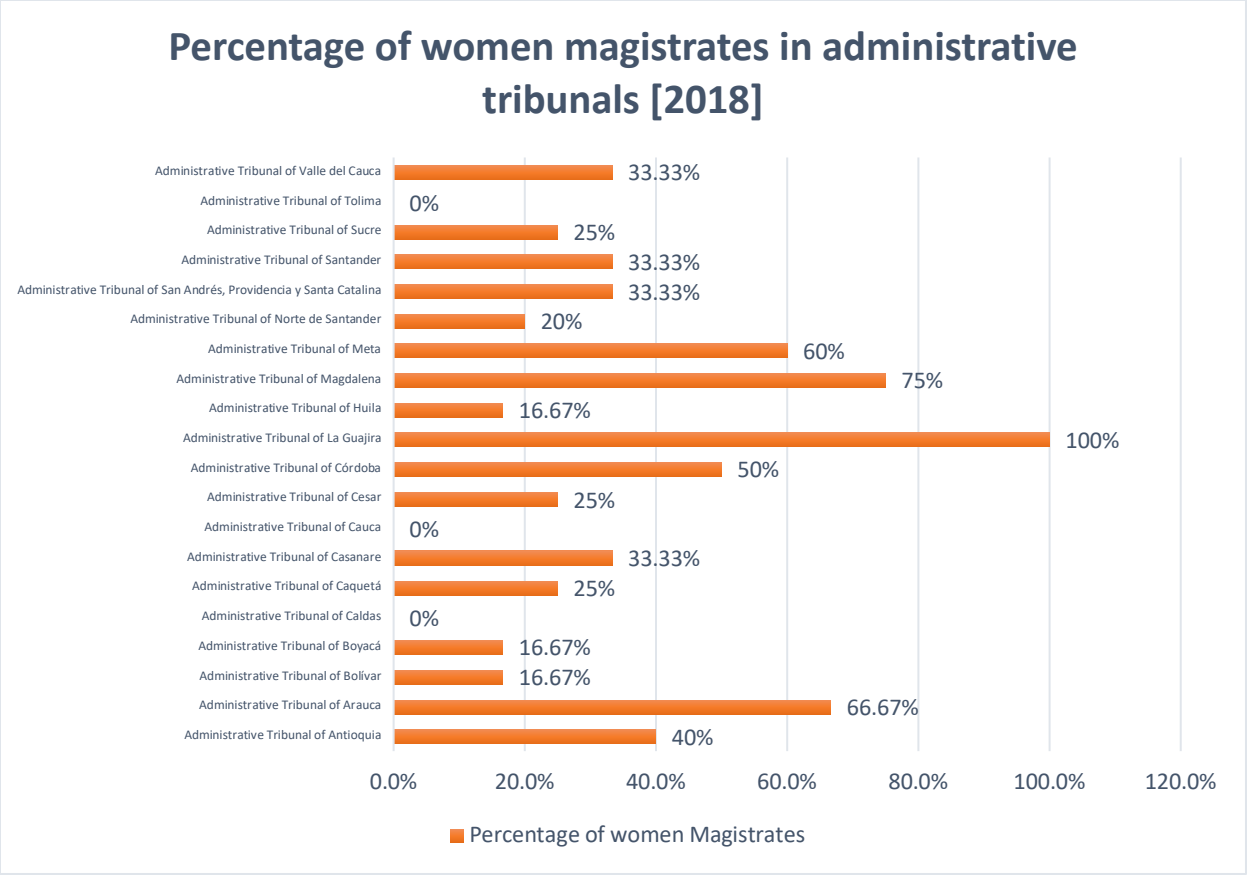

[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

#### 5.2.2.1.1. Gender composition

Women occupy 34 out of 110 judicial magistrate seats in the administrative tribunals, accounting for 30.9% of the total number of magistrates. Women appear to have less representation in the magistrate positions in administrative tribunals than in similar positions of the superior tribunals of judicial district (33.91%).



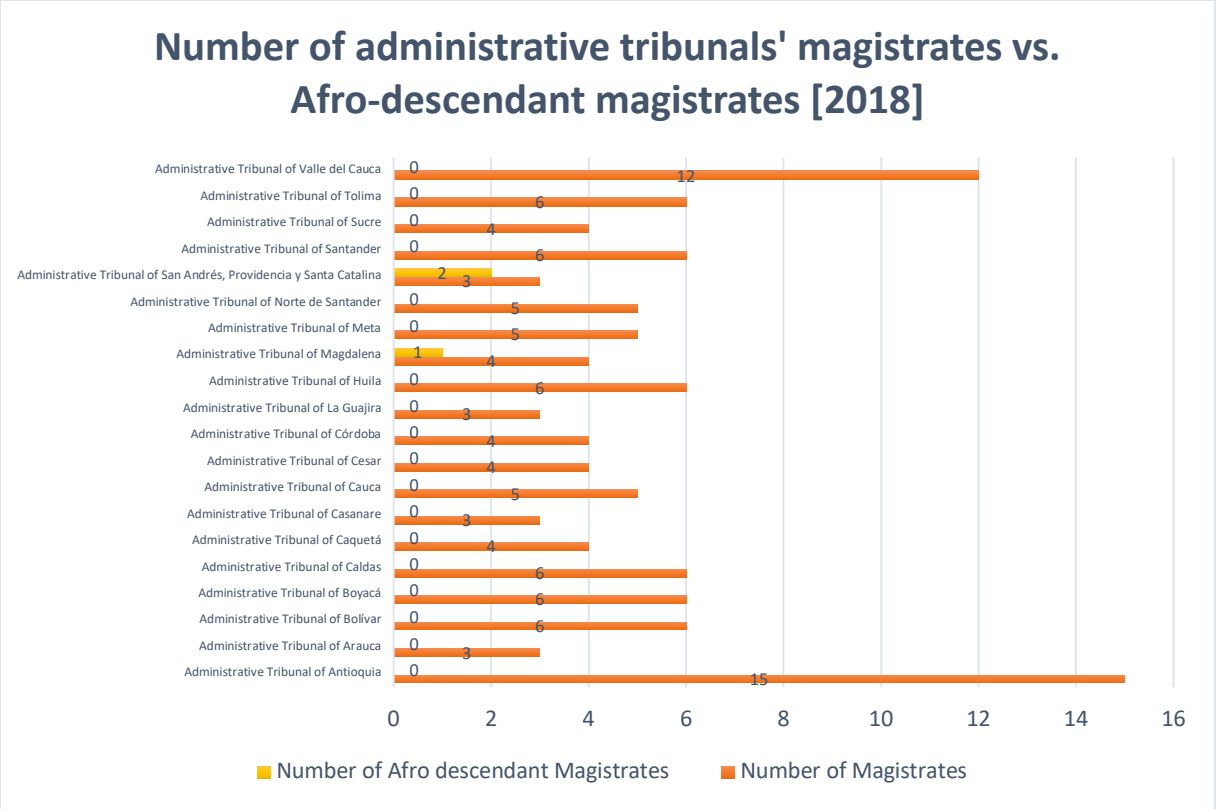

[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]



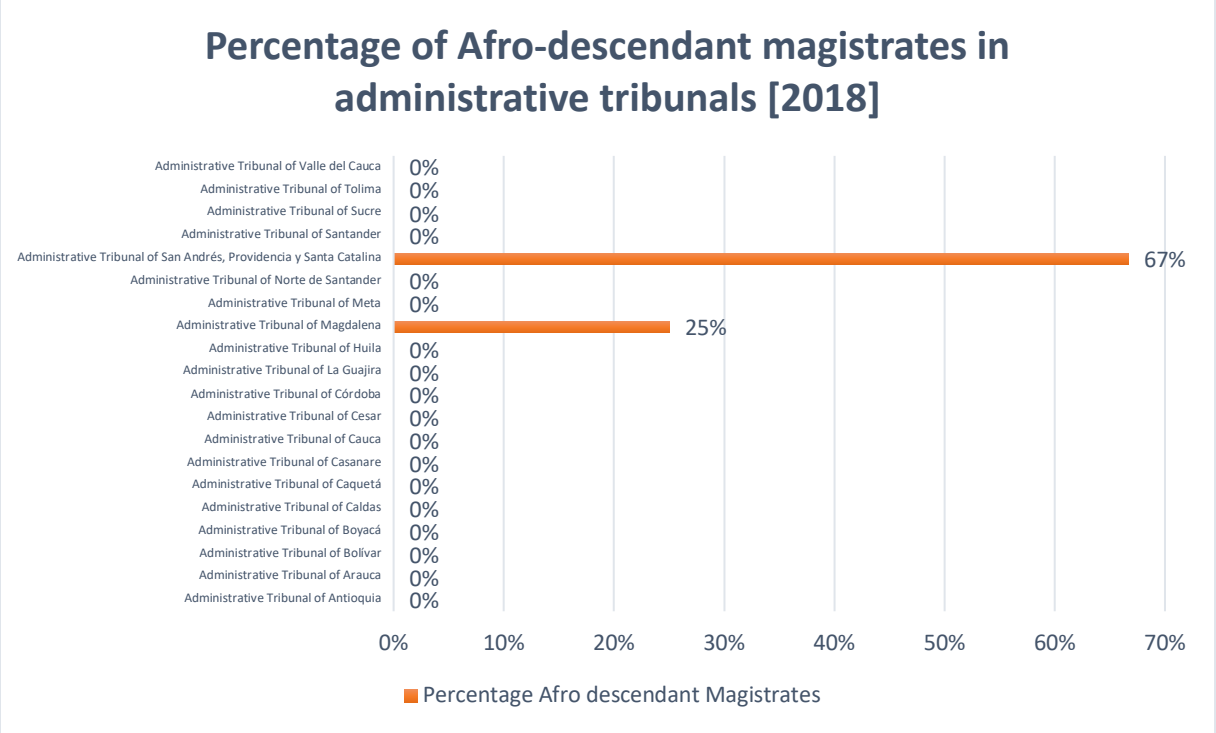

[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

#### 5.2.2.1.2. Ethno-racial composition

Out of the 110 magistrates we could obtain ethno-racial data about, only three of them were Afro-descendant. The Administrative Tribunal of Magdalena has one Afro-descendant magistrate (who is also a woman) out of four. The Administrative Tribunal of San Andrés, Providencia, and Santa Catalina has two Afro-descendant magistrates out of the three that compose the entire panel (one of them is a woman, and the other one is a man). Thus, Afro-descendants comprise about 2.73% of Administrative magistrates, being significantly underrepresented in this part of the judiciary if one considers that they comprise 10,62% of Colombia's national population. This representation level is even lower than the one they had for the group of magistrates of the Superior tribunals of judicial district (3.67%).




[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

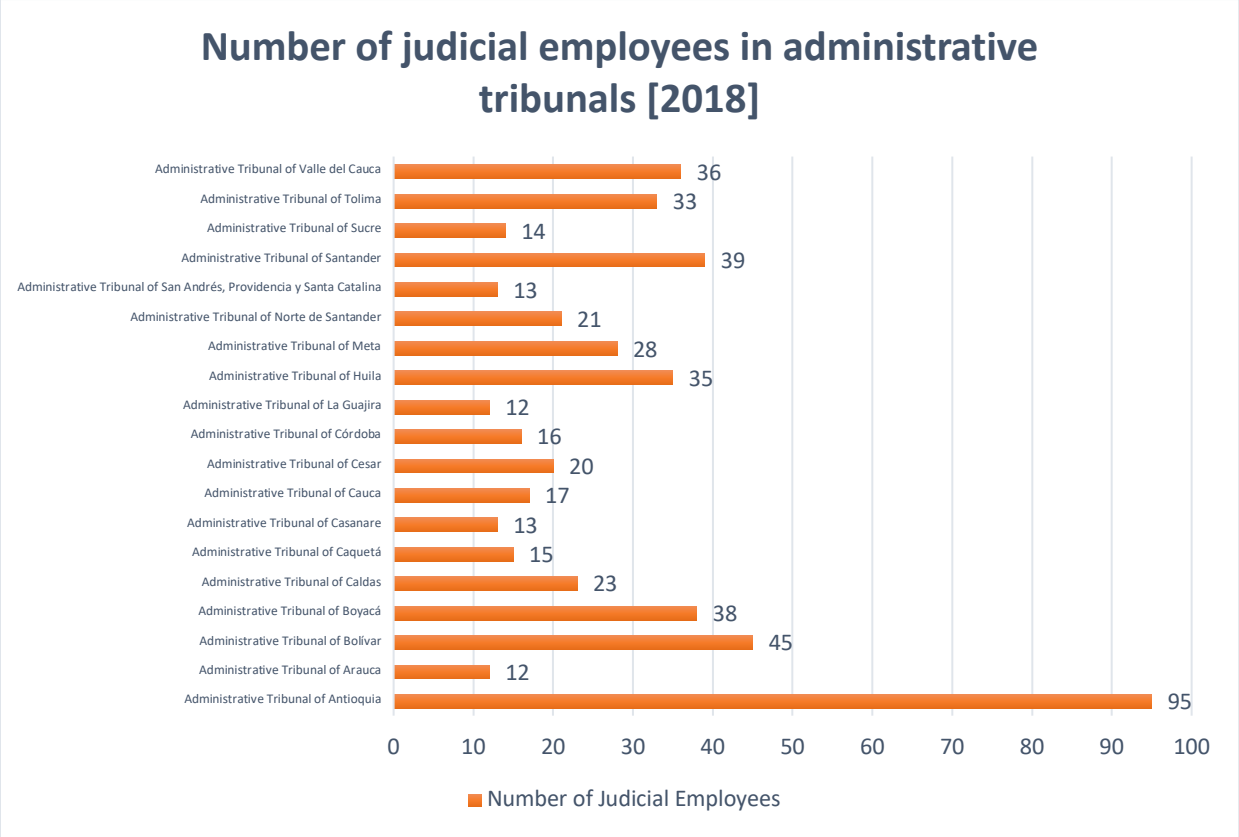



[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

As it happened with the superior tribunals of judicial district, indigenous persons appear to have no representation at all in the group of magistrates of the administrative tribunals.

#### 5.2.2.2. Judicial employees

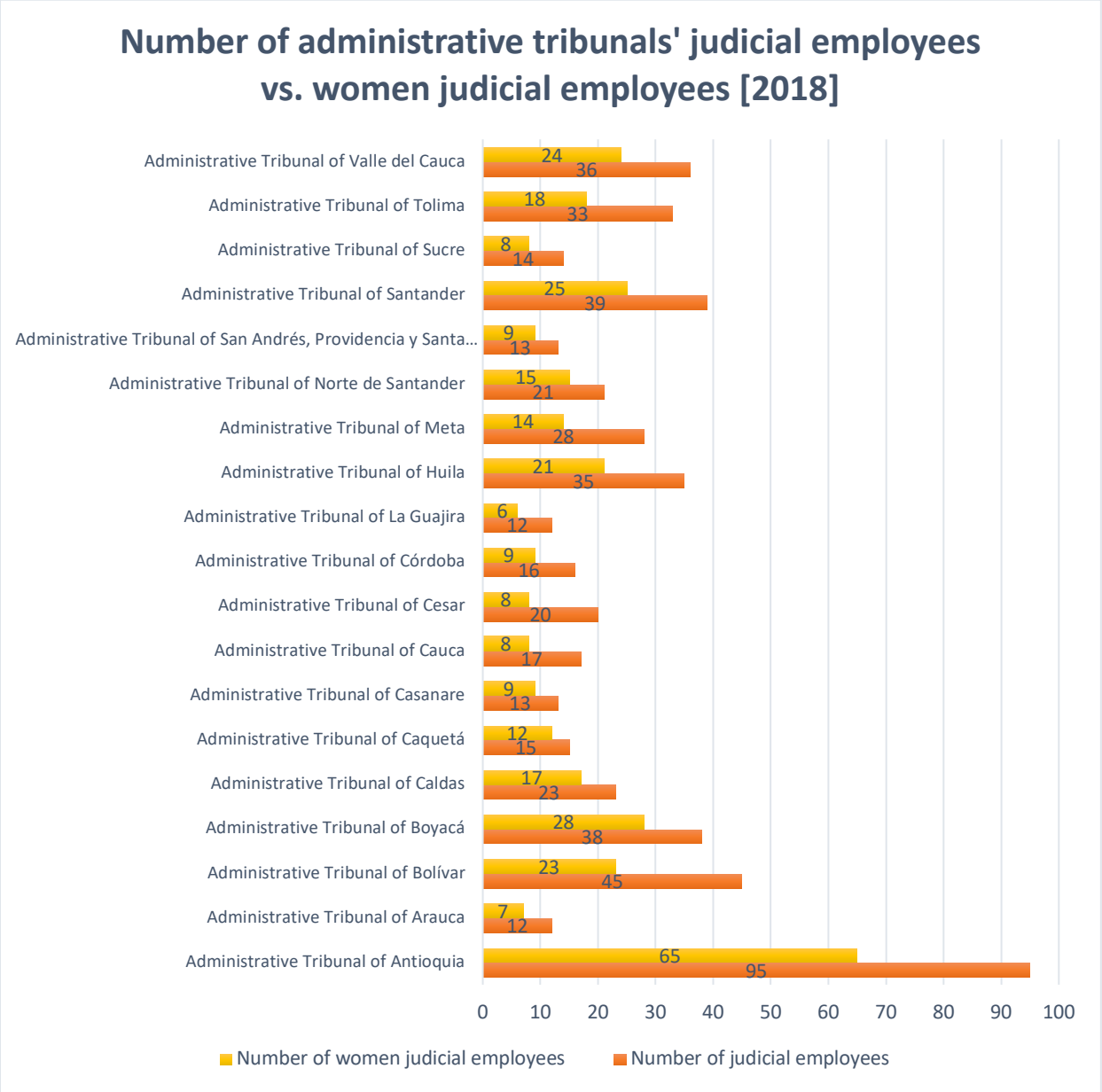
The administrative tribunals informed a total number of 525 judicial employee positions, unevenly distributed among the different tribunals. The Administrative Tribunal of Magdalena did not report data on judicial employees, and the Administrative Tribunal of Valle del Cauca only reported data about judicial employees working in the magistrates' chambers. Since the number of employees working in chambers is usually higher than those working for other parts of a tribunal, I decided to include the data reported for the Administrative Tribunal of Valle del Cauca.



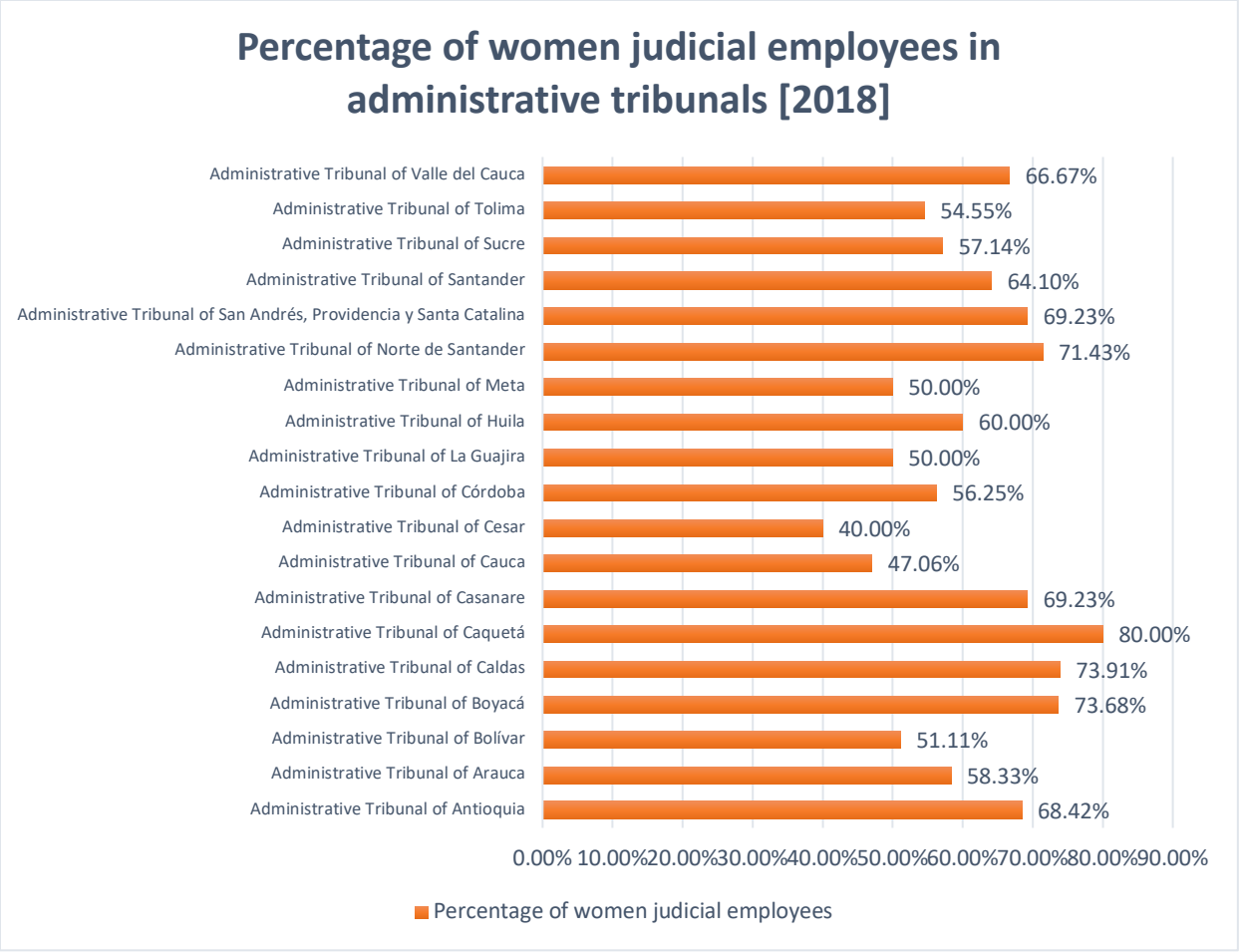

[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

#### 5.2.2.2.1. Gender composition

Women accounted for 326 of the total number of judicial employees reported in the administrative tribunals (525), which translates into a percentage of women representation of 62.1%. Similar to what occurs in the superior tribunals of judicial district, where 55.07% of judicial employees are women, women seem to be overrepresented among administrative tribunals' judicial employees.




[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

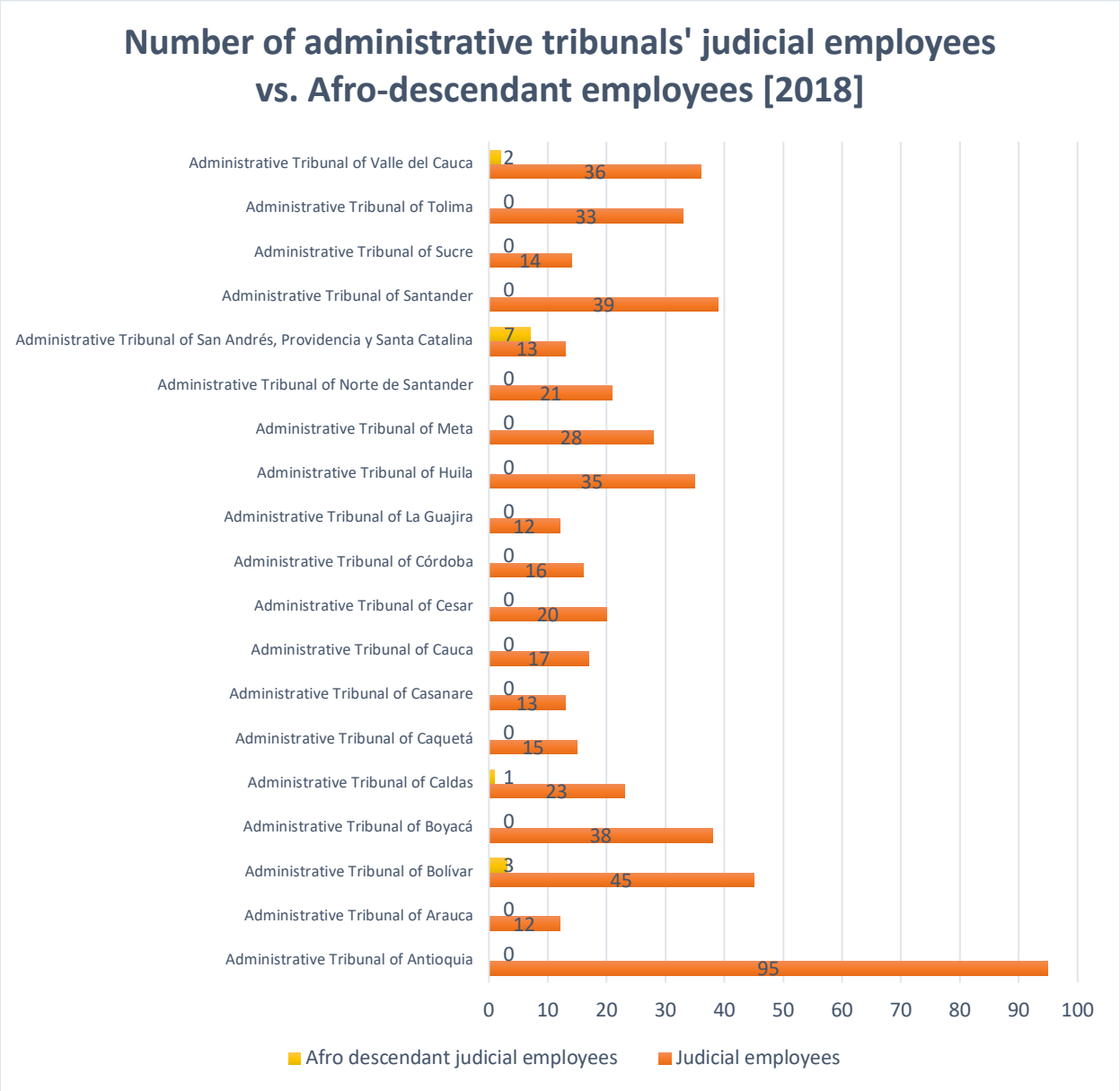



[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

#### 5.2.2.2.2. Ethno-racial composition

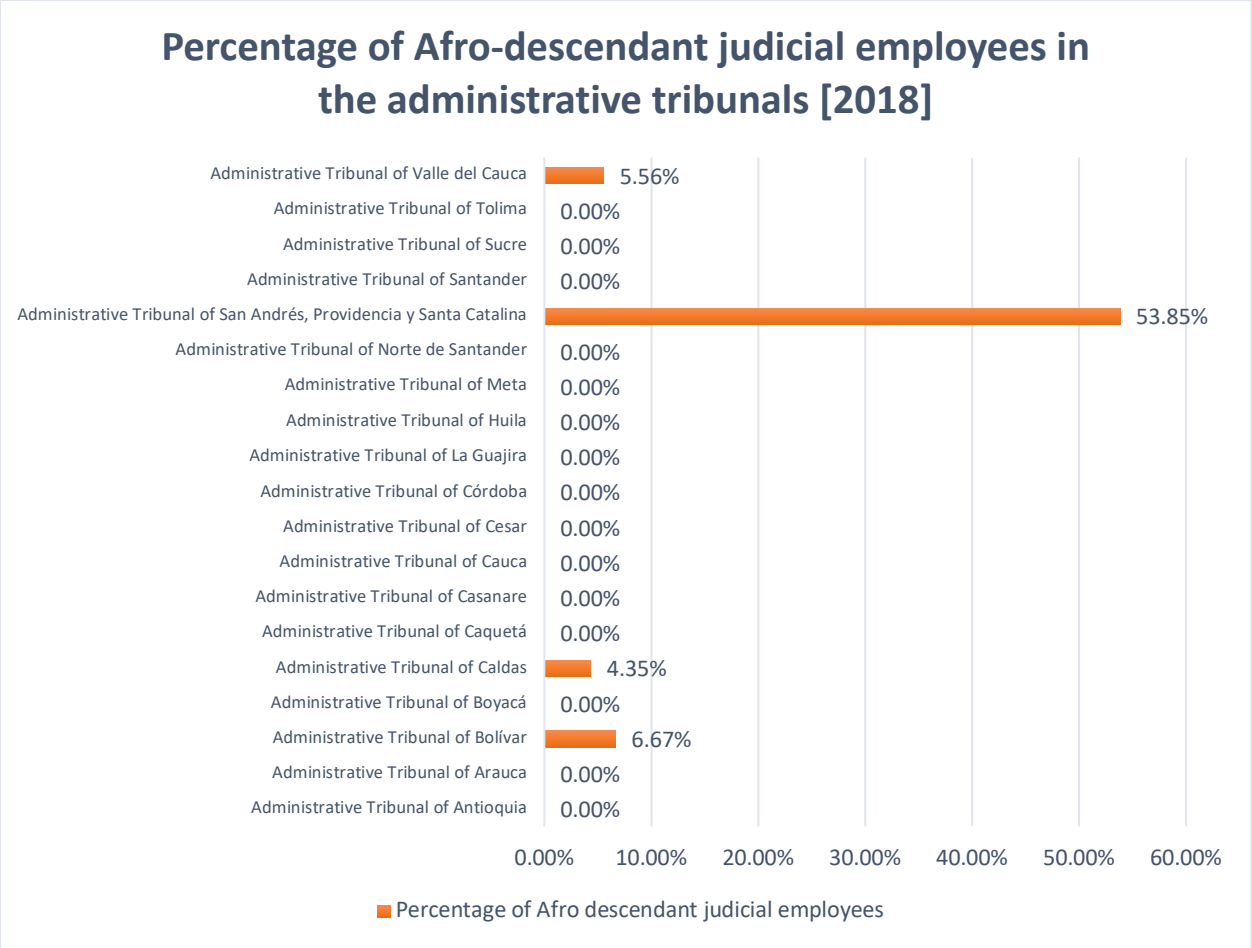
The information requests' responses indicate that there are 13 Afro-descendant judicial employees in the administrative tribunals. Since the total number of judicial employees reported was 526, the percentage of Afro-descendant representation among administrative tribunals' judicial employees is roughly 2.47%. Afro-descendants are significantly underrepresented among this group. They are also more underrepresented among judicial employees of Administrative tribunals than among judicial employees in superior tribunals of judicial district. Only four administrative tribunals reported having Afro-descendant judicial employees: Bolívar (3 out of 45), Caldas (1 out of 23), San Andrés, Providencia, and Santa Catalina

(7 out of 13), and Valle del Cauca (2 out of 36). Of the 13 Afro-descendant judicial employees reported in the different Administrative tribunals, 9 of them are women, and they work in all four tribunals who reported having Afro-descendant judicial employees.




[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

Finally, none of the administrative tribunals informed having indigenous judicial employees, which means there is not a single one reported within the total of 525.



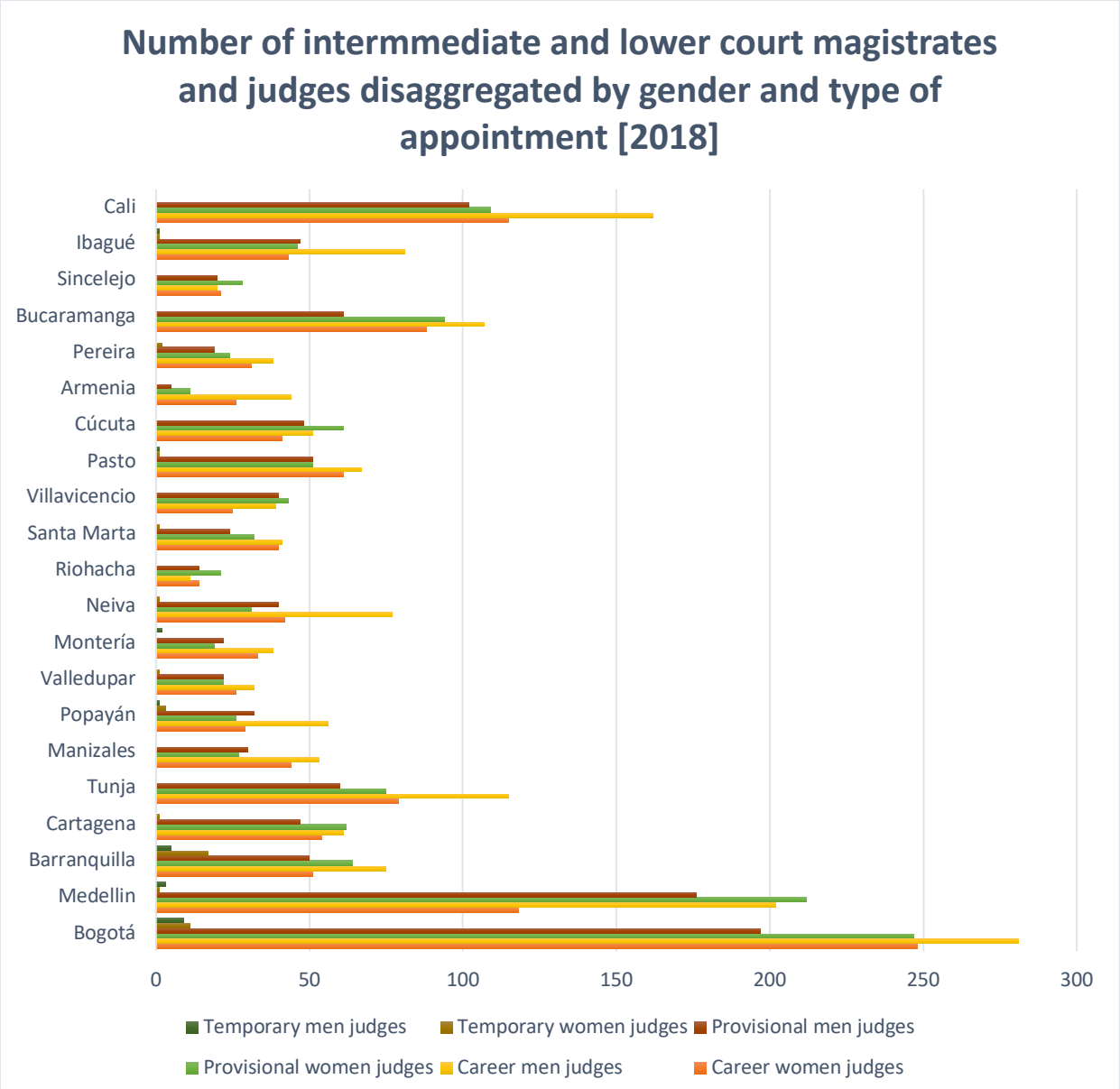

[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

### 5.2.3. Data on the general composition of the judiciary

As I mentioned before, I did not send information requests to the lower courts (circuit and municipal courts). However, the Superior Council of the Judicature provided additional information concerning the composition of the Colombian judiciary in terms of gender and type of appointment disaggregated by judicial sectional (a geographical administrative subdivision). The additional information did not provide disaggregated data on an ethno-racial basis. According to Superior Council of the Judicature, as of October 10, 2018, there was a total of 32,298 judicial servants in all judicial sectionals (this information excludes the high courts). Of these, 17,371 were women (53.78%) and 14,927 were men (46.22%).

#### 5.2.3.1. Magistrates and judges

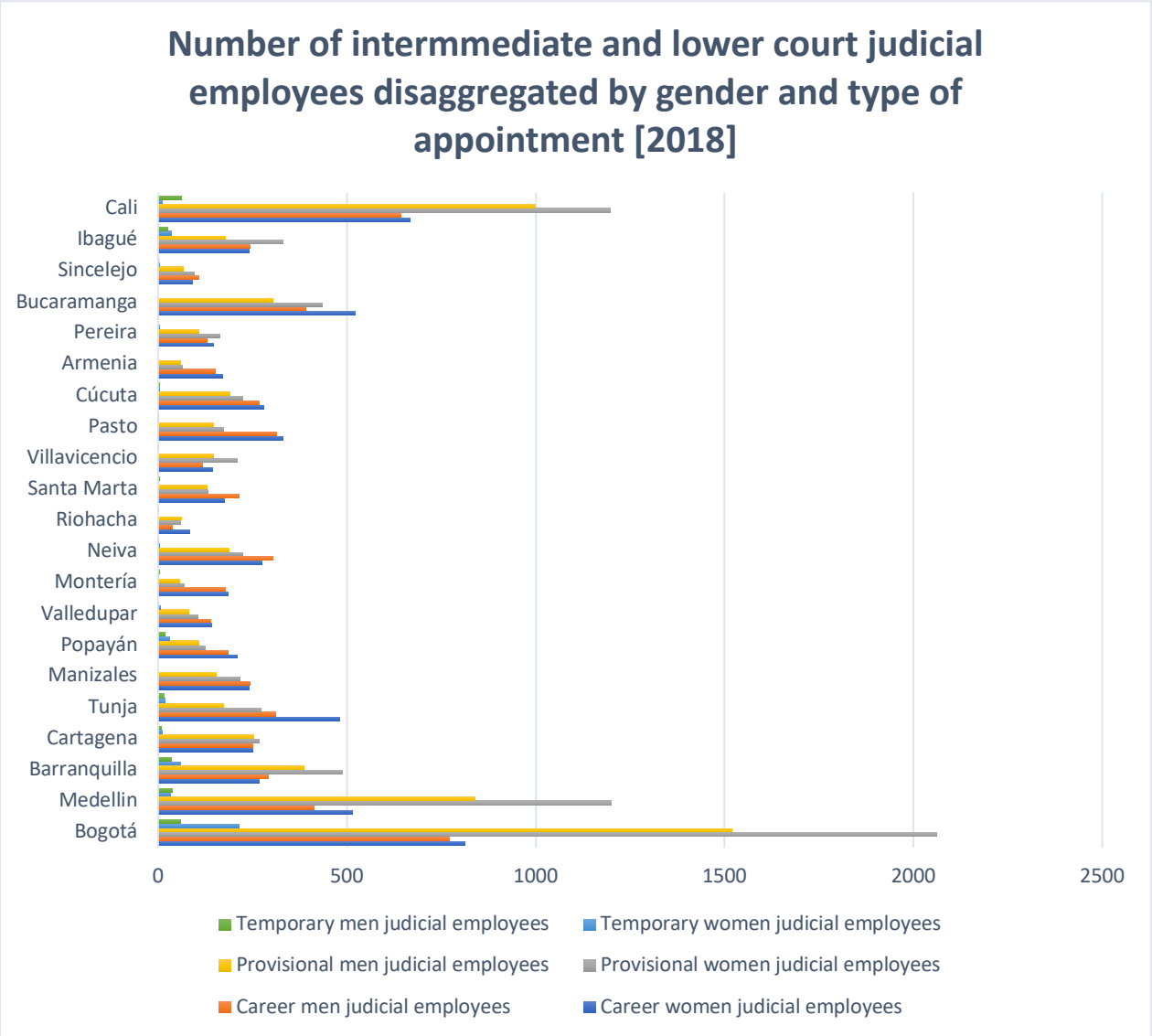
In the case of functionaries (magistrates and judges), there was a total of 5,354 judges and magistrates in the intermediate and lower courts of Colombia, of which 2,780 (51.92%) were women and 2,574 men (48.08%). The total number of career judges and magistrates was 2,880 (53.79%), the number of those in provisional positions was 2,412 (45.05%), and there were 62 (1.16%) in temporary positions.




[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

When the gender and the type of appointment are crossed, women occupy 42.67% of the career magistrate and judge positions at these levels, 54.10% of the provisional positions, and 64.51% of the transitory positions. In contrast, men occupy 57.33% of the tenured magistrate and judge positions, 45.89% of the provisional positions, and 35.48% of temporary positions. Conversely, 47.75% of women judges and magistrates in these levels of the judiciary occupy career positions, 50.70% occupy provisional positions, and 1.55% occupy temporary positions.

#### 5.2.3.2. Judicial employees




[Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

There was a total of 26,944 judicial employees in these levels of the judiciary, of which 12,174 were men (45.08%) and 14,797 were women (54.92%). The total number of career judicial employees was 11,949 (44.35%). The number of those in provisional positions was 14,273 (52.97%). There were 722 in temporary positions (2.68%). When gender and type of appointment are crossed, women occupy 52.21% of career judicial employee positions, 56.87% of provisional positions, 60.80% of temporary positions. In contrast, men account for 47.79% of career judicial employee positions, 43.11% of provisional positions, and 39.2% of temporary positions. Conversely, 42.16% of women judicial employee positions in these levels of the judiciary occupy career positions, 54.88% occupy provisional positions, and 2.97% occupy temporary positions.

### 5.2.4. Interviewees' perceptions on the level of Afro-descendant representation in the Colombian judiciary

Some respondents manifested their perceptions about the level of representation that Afro-descendants have in the Colombian judiciary. Interviewees commented that, even though levels of Afro-descendant presence can vary from one region to another, across the country, Afro-descendants are scarce in judicial institutions. Some respondents assessed their level of representation as void.[414] An Afro-descendant judge, mentioned: "I do not want to speak only about the judiciary. I think that in the different branches of government, in essence, [our presence] es minimal; this is, the percentage of Afro population in these places continues to be very low."[415] Another one, an Afro-descendant judicial employee, suggested that there are very few Afro-descendant judges in the country, especially when compared to the number of litigants of the same ethno-racial background.[416] Similarly, some of the indigenous participants also

[414] Interviews 8 and 9.
[415] Interviews 15 and 17
[416] Interview 16.

reported a similar situation in the case of indigenous persons, whose presence in the country's courts was qualified as "very low." [417]

Perhaps one of the best ways to dimension the low level of representation that Afro-descendants have in judicial institutions in Colombia is a comment made by one of the interviewees (an Afro-descendant judge with several years of judicial experience). She mentioned: "[a judicial employee] asked if I knew Afro representatives in the judiciary of Cartagena. She asked me yesterday. I fell asleep thinking about whom I knew in the judiciary who was Afro, and I do not know, I mean, I could not name any, I could not remember [any]."[418]

### 5.3. Preliminary conclusions

Based on the data gathered through the interview process and the site visits, it is possible to conclude that Afro-descendants seem to be underrepresented among Colombia's judicial institutions. Furthermore, this country's judicial system seems to take the shape of a stratified structure according to ethno-racial and gender factors.

From the gender perspective, the Colombian judicial system can be described as a pyramid, in which women's level of representation in judge and magistrate positions is less significative at the higher courts and increases as one goes down onto the base of the pyramid (glass ceiling). Although women represent approximately half of attorneys with valid licenses in the country, they comprise only 35% of the high court magistrates. They are underrepresented in all high courts except in the SJP. At the intermediate level of the judiciary, women are still underrepresented, but less so than in the higher courts. In the superior tribunals of judicial district they are 33.9% of magistrates, and in the administrative tribunals 30.9% of magistrates. When the intermediate tribunals are considered jointly with the lower courts, women represent

[417] Interview 12.
[418] Interview 26.

51.92% of magistrates and judges in the intermediate and lower levels of the judicial pyramid, which indicates that they may even be a majority among the lower court judges. Women magistrates and judges in the intermediate and lower levels of the judiciary tend to occupy positions that are less stable in terms of the continuity of the jobs, as only 46% of them are in career positions, whereas 50.70% are in provisional and 1.6% are in temporary positions, respectively.

In the case of judicial employees, the situation is similar. According to the data that the courts reported, women account for 45% of auxiliary magistrate positions and 55% of high court judicial employee positions in the high courts—this last percentage does not include the SJP. At the intermediate level, women occupy 55% of superior tribunals of judicial district's judicial employee positions, and 62% of administrative tribunals judicial employee positions. Furthermore, when the intermediate tribunals and the lower courts are considered jointly, women comprise approximately 55% of all judicial employees in these levels of the judiciary. As it happened with women judges and magistrates, women judicial employees tend to have more precarious jobs in terms of the type of appointment. In these levels of the judiciary, only 42.6% of women are in career positions, whereas 54.88% are in provisional positions, and 2.97% are in temporary positions. In conclusion, women tend the have lower levels of representation at the higher ranks of the judicial pyramid, have a more robust level of representation as judicial employees than among judges. Also, they occupy provisional positions at a higher rate than tenured positions.

From the ethno-racial perspective, despite data being scarcer than in the case of gender, it is possible to conclude that Afro-descendants are, in general, significantly underrepresented in Colombian judicial institutions. Unlike in the case of women, whose presence in the judicial institutions tends to increase as one goes down to the lower levels of the judiciary, the available data seems to suggest that the Afro-descendant level of representation tends to remain steadily low in the high and intermediate levels of the judiciary. Not a single Afro-descendant person was reported in the group of magistrates, auxiliary magistrates, and judicial employees in the constitutional court. Interviewees tended to agree that in the other high courts (except for the SJP), Afro-descendant magistrates were only a few, as it was also the case of black judicial employees. At the intermediate level, Afro-descendants were reported to comprise 3.67% of

magistrates and 3.51% of judicial employees in the superior tribunals of judicial district; and 2.73% of magistrates and 2.47% of judicial employees in the administrative tribunals.

The SJP is a particular case. In this court, Afro-descendants have attained a level of representation similar to that of their share of the national populations, and indigenous peoples have surpassed it. Although there is no significant data on the ethno-racial composition of the lower courts, my impression is that Afro-descendants account for only a dearth the total number of magistrates and judges in Colombia. Although they might be more common among judicial employees, they could still be underrepresented among this group. Outside of the SJP, I could only find information concerning a single indigenous person working at a high or intermediate court, which seems to indicate that indigenous peoples are almost entirely excluded from the judicial institutions in Colombia.

With this preliminary conclusion, I will proceed to discuss the impact of geography on the composition of judicial institutions in Colombia.

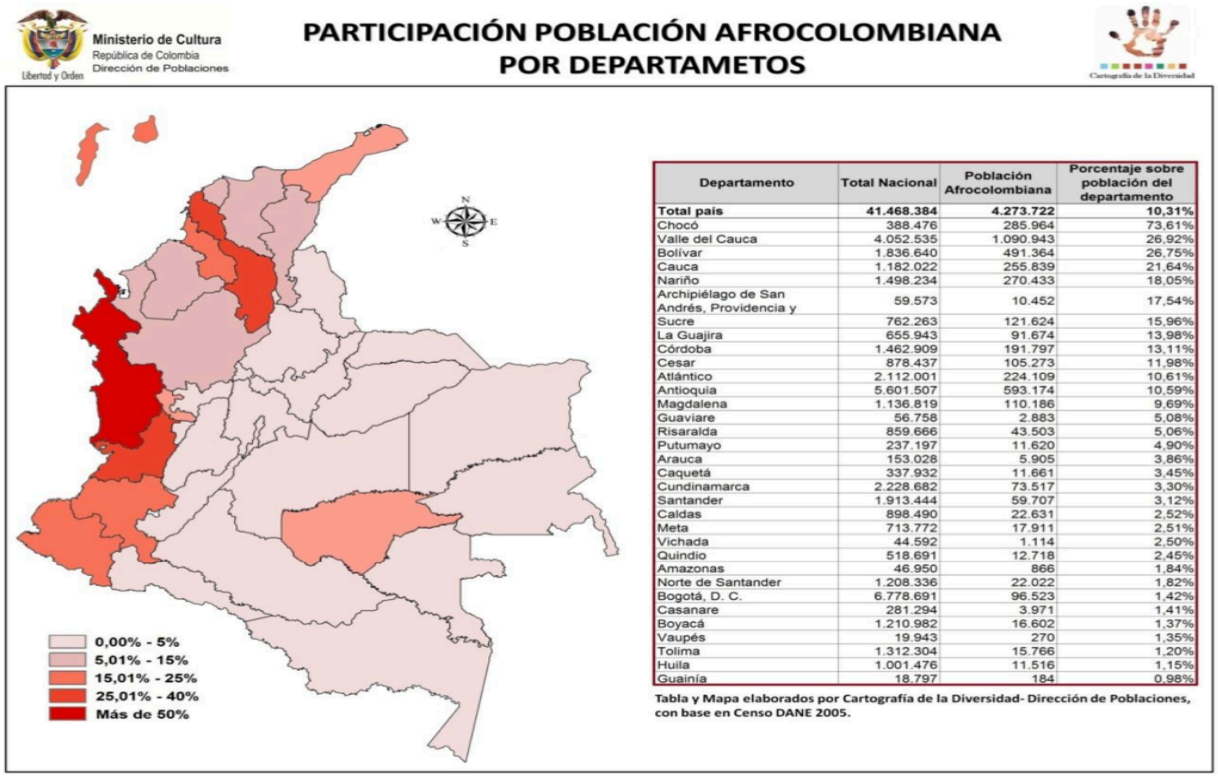
## 6. The impact of geographic location on the composition of judicial institutions in Colombia

I will comment on how geographical location impacts, and even conditions, the representation of Afro-descendants in the judicial institutions of different regions of Colombia. In order to accomplish this goal I will provide an introduction to the relationship between race and region in Latin America, introduce the research findings on the relationship between the ethno-racial composition of courts and geography, and analyze regional differences in the ethno-racial composition of courts in Colombia.

### 6.1. An introduction to the relationship between race and region in Latin America

Afro-descendants are asymmetrically distributed across the Latin American region. Not only the number of people of African ancestry varies from country to country, but also from one region to another within the same country.

Hebe Clementi asserts that the current geographic distribution of the black population in Latin America can be traced back to colonial times, as their current location within the region tends to correspond with the production sites that used enslaved African workforce.[419] Sugar, cacao, tobacco, and cotton were some of the industries that more heavily relied on enslaved work, and therefore, regions hosting these industries tend to have larger Afro-descendant populations.[420] Furthermore, nation-specific historical processes also contributed to the unequal distribution of Afro-descendant populations. The significant presence of Afro-descendants in parts of the Caribbean coast of Colombia is commonly believed to be a consequence of the tradition of *cimarronaje* (African enslaved persons' escape from slavery) and the existence of *palenques* (free enclaves for *cimarrones*) during the colonial time.[421]




| Departamento | Total Nacional | Población Afrocolombiana | Porcentaje sobre población del departamento |
|---|---|---|---|
| **Total país** | **41.468.384** | **4.273.722** | **10,31%** |
| Chocó | 388.476 | 285.964 | 73,61% |
| Valle del Cauca | 4.052.535 | 1.090.943 | 26,92% |
| Bolívar | 1.836.640 | 491.364 | 26,75% |
| Cauca | 1.182.022 | 255.839 | 21,64% |
| Nariño | 1.498.234 | 270.433 | 18,05% |
| Archipiélago de San Andrés, Providencia y | 59.573 | 10.452 | 17,54% |
| Sucre | 762.263 | 121.624 | 15,96% |
| La Guajira | 655.943 | 91.674 | 13,98% |
| Córdoba | 1.462.909 | 191.797 | 13,11% |
| Cesar | 878.437 | 105.273 | 11,98% |
| Atlántico | 2.112.001 | 224.109 | 10,61% |
| Antioquia | 5.601.507 | 593.174 | 10,59% |
| Magdalena | 1.136.819 | 110.186 | 9,69% |
| Guaviare | 56.758 | 2.883 | 5,08% |
| Risaralda | 859.666 | 43.503 | 5,06% |
| Putumayo | 237.197 | 11.620 | 4,90% |
| Arauca | 153.028 | 5.905 | 3,86% |
| Caquetá | 337.932 | 11.661 | 3,45% |
| Cundinamarca | 2.228.682 | 73.517 | 3,30% |
| Santander | 1.913.444 | 59.707 | 3,12% |
| Caldas | 898.490 | 22.631 | 2,52% |
| Meta | 713.772 | 17.911 | 2,51% |
| Vichada | 44.592 | 1.114 | 2,50% |
| Quindío | 518.691 | 12.718 | 2,45% |
| Amazonas | 46.950 | 866 | 1,84% |
| Norte de Santander | 1.208.336 | 22.022 | 1,82% |
| Bogotá, D. C. | 6.778.691 | 96.523 | 1,42% |
| Casanare | 281.294 | 3.971 | 1,41% |
| Boyacá | 1.210.982 | 16.602 | 1,37% |
| Vaupés | 19.943 | 270 | 1,35% |
| Tolima | 1.312.304 | 15.766 | 1,20% |
| Huila | 1.001.476 | 11.516 | 1,15% |
| Guainía | 18.797 | 184 | 0,98% |

Tabla y Mapa elaborados por Cartografía de la Diversidad- Dirección de Poblaciones, con base en Censo DANE 2005.

Source: Colombia, Ministry of Culture.[422]

[419] Clementi, *supra* note 145 at 37.
[420] *Id.* at 37.
[421] VAN COTT, *supra* note 204 at 43–44.
[422] AFROCOLOMBIANOS, POBLACIÓN CON HUELLAS DE AFRICANÍA, 13 4 (2010), https://www.mincultura.gov.co/areas/poblaciones/comunidades-negras-afrocolombianas-raizales-y-

The construction of *mestizaje* in Colombia has been central to the development of the national identity. *Mestizaje* has not unfolded homogeneously across the country's regions either. Since colonial times, differences in demography, geography, and socio-economic context influenced the process of racial mixing and the narratives around it.[423] Peter Wade writes:

> What this amount to is that in the process of Colombian society constituting itself spatially, or becoming concrete in space, regions were created, and these had very different racial mixes. In short, at the very general level, race became regionalized. The Andean highlands emerged as a white-mestizo region with Indian-white mixtures being common. The Pacific coast became a mainly black region. The Caribbean coast developed a tri-ethnic mix with strong black and Indian heritage in the lower classes and some pure black and Indian enclaves. And the Amazon region remained predominantly Indian. There is a distinctive spatial pattern to the overall structure of Colombian nationhood and its racial order.[424]

In addition to demographic differences, as Nancy Applebaum notes, spatial frontiers in Latin America tend to correlate to "racialized ideas of progress and modernity."[425] Applebaum argues that regional differences in Latin America are racialized. Certain racial groups are concentrated in specific areas. The regions where indigenous peoples of Afro-descendants live are often considered backward when compared to those that are inhabited by "whiter" populations.[426] As an example, Barbara Weinstein describes how, in Brazil, the region São Paulo and its inhabitants, commonly known as *"Paulistas,"* are associated with the ideas of industriousness, development, progress, and whiteness.[427] This narrative tended

palenqueras/Documents/Caracterización%20comunidades%20negras%20y%20afrocolombianas.pdf (last visited Mar 10, 2020).

[423] WADE, *supra* note 166 at 54–56.

[424] *Id.* at 57–58.

[425] Appelbaum, Macpherson, and Rosemblatt, *supra* note 25 at 10.

[426] *Id.* at 10.

[427] Barbara Weinstein, *Racializing Regional Difference: Sao Paulo versus Brazil, 1932*, *in* RACE AND NATION IN LATIN AMERICA 237–262 (Nancy P. Appelbaum, Anne S. Macpherson, & Karin Alejandra Rosemblatt eds., 2003).

to downplay the role of Afro-descendants in the history of this Brazilian state. The discourse that argued for the *Paulista* superiority was particularly intense from 1931 to 1932, during the Getúlio Vargas provisional government, coinciding with the 1932 revolution.[428] During this period, São Paulo intellectuals and political leaders publicly exalted the virtues of *Paulistas*, which they deemed superior to the inhabitants of other regions of Brazil, and especially those of the North-East, where many Afro-descendants live.[429]

In the particular case of Colombia, Peter Wade explains that the country developed a "cultural topography of race,"[430] in which region served as a proxy for race. Regional differences and identities often work as forms of expressing cultural and racial hierarchies in a formally colorblind manner, while concealing race's meaningful and material effects. Tianna Paschel asserts that:

> Colombia's highlands were widely considered the place of beauty, industriousness, and whiteness, while its coasts were associated with laziness and hypersexuality. Such entanglements between race and region reflected not only a symbolic national imaginary but also an underlying material reality in which black Colombians found themselves disproportionately in the poorest of regions. To be sure, the states that were largely abandoned by the state were also the ones with higher concentrations of black Colombians, such as the Chocó. Today these remain the poorest in the country. Nevertheless, these regional inequalities are often naturalized, seen as a reflection of moral and intellectual differences between the people who inhabit them rather than as a consequence of racialized state policies.[431]

In Colombia, as in other countries of Latin America, naming regional differences is a coded form for the naming of race. Regional stereotypes often disguise racial stereotypes, and racial hierarchies are embedded in the language of regional superiority. With these ideas in mind, I will describe how region and

[428] *Id.*
[429] *Id.*
[430] WADE, *supra* note 166.
[431] PASCHEL, *supra* note 33 at 43.

race seem to interact concerning Afro-descendant representation in judicial institutions. First, I will discuss some of the regional gradations of race that I found during my data collection process in Antioquia, Chocó, San Andrés, Bolívar, Valle del Cauca, and Nariño. Second, I will provide some preliminary conclusions in this respect.

### 6.2. Medellín, Antioquia

Antioquia is a region located in northwest Colombia. The majority of its territory is situated in the Andean section of the country, with a smaller part (Urabá) extending onto the coastal regions.[432] Antioquia is the second most populous region of Colombia, only led by Bogotá, the capital of the country. According to the 2005 census, the region has approximately 5,600,000 inhabitants.[433] 10.59% of the population is Afro-descendant.[434] Its capital is Medellin, a city of approximately 2,343,000 people.[435] According to the 2005 census, 6.5% of Medellin's population is Afro-descendant, and 0.1% is indigenous; the rest is primarily white/mestizo.[436] Antioquia's economy represents a significant share of the national GDP, The region hosts some of the largest companies in the country.[437] The provision of public services is adequate. Medellín hosts several higher education institutions, some of which occupy the top positions of the national

[432] Datos de Antioquia, GOBERNACIÓN DE ANTIOQUIA, UNIDOS (2020), http://antioquia.gov.co/index.php/antioquia/datos-de-antioquia (last visited Mar 17, 2020).
[433] Departamento Administrativo Nacional de Estadística (DANE), *supra* note 31.
[434] AFROCOLOMBIANOS, POBLACIÓN CON HUELLAS DE AFRICANÍA, *supra* note 422 at 4.
[435] BOLETÍN CENSO GENERAL 2005: PERFIL MEDELLÍN ANTIOQUIA, 6 1 (2010), https://www.dane.gov.co/files/censo2005/PERFIL_PDF_CG2005/05001T7T000.PDF (last visited Mar 10, 2020).
[436] *Id.* at 2.
[437] Cuentas nacionales departamentales: PIB por departamento, DANE: INFORMACIÓN PARA TODOS (2020), https://www.dane.gov.co/index.php/estadisticas-por-tema/cuentas-nacionales/cuentas-nacionales-departamentales (last visited Mar 17, 2020).

university rankings.[438] There is a multiplicity of law schools with different levels of quality and cost in Medellín.[439]

According to the interviews and the site visit that I conducted in this region, Afro-descendants are, in general, absent from the judicial institutions of Antioquia and, particularly, Medellín. According to the data collected through the rights of petition, only 1 of the 85 magistrates of the Superior Tribunal of Antioquia, the Superior Tribunal of Medellin, and the Administrative Tribunal of Antioquia was reported as Afro-descendant. Similarly, one of the attorneys that I interviewed in the city of Medellín mentioned: "The Palace of Justice of Medellin has 26 floors, and in those 26 floors I think you cannot find 20 Afro-descendants working for the judiciary, and if you do find them working for the judiciary, if you find a judge, which I am still to do, I think that would be too many."[440] This comment represents not only the generalized perception that Afro-descendants are virtually nonexistent in courts of this region, but also that when they are present, they usually occupy judicial employee stations, instead of judge positions. Another respondent warned that at a party held for the magistrates and judicial employees of one of the city's tribunals, she could only count 4 Afro-descendant persons within a group of over 100 attendees.[441] A third interviewee, with several years of experience in the criminal law litigation, commented that he could only remember two Afro-descendant judges in the group of approximately 30 in circuit courts for the criminal jurisdiction in Medellín. Furthermore, he declared that he had not met a single Afro-descendant judge in the group of approximately 40 criminal municipal courts of the city.[442] This impression was later corroborated by another interviewee, who affirmed that he knew that there was only one Afro-descendant judge in all the municipal criminal courts of the city.[443]

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[438] Carlos Roberto Peña / SRG CEO, *Ranking de las mejores universidades de Colombia 2019 | U-Sapiens*, SAPIENS RESEARCH GROUP (2020), https://www.srg.com.co (last visited Mar 17, 2020).
[439] Las mejores universidades en derecho en Colombia 2018, DINERO, May 24, 2018, https://www.dinero.com/edicion-impresa/caratula/articulo/las-mejores-universidades-en-derecho-en-colombia-2018/258791 (last visited Mar 17, 2020).
[440] Interview 1.
[441] Interview 3.
[442] Interview 4.
[443] Interview 5.

During my visit to the judicial complex in the administrative center of *La Alpujarra*, which hosts a large number of courthouses, I could see by myself that Afro-descendant judges are scarce in Medellín. Although Afro-descendants are more common in the judicial employee positions, they still account for just a few per floor. This situation contrasted with the quantity of Afro-descendant lawyers, detainees, and users of judicial services, which were more numerous.

Some of the respondents explained the limited number of Afro-descendants on this region's courts based on demography. One of the interviewees expressed that she had encountered only a few Afro-descendant judicial employees at the courthouses, which could be attributed to the numeric minority condition that Afro-descendants have in the country.[444] Another one, a judge with several years of professional experience, expressed that it was regional, rather than national demographics, which explained this level of Afro-descendant presence on Antioquia's courts. She mentioned: "What happens is that I am located in the city of Medellin, and in the city of Medellín, the Afro population is not the majority anyway. I do not know what the answer would be if you were doing this interview, perhaps, in the Pacific, in Valle del Cauca, or maybe in Chocó."[445] A third respondent mentioned that during his tenure as a judge in Medellín, he could only remember 4 or 5 Afro-descendant litigators and immediately mentioned that he considered that this was: "a low number because, even though this is a region that comes from a majority of white people, Chocó is very close by."[446] Likewise, another interviewee, while referring to the ethno-racial composition of the legal profession in this city, declared: "In relation to the lawyers, there are very few, very few Afro-descendants in this part of the country where I work. Isn´t that right? Contrary to what happens in Chocó, where the great majority is Afro-descendant."[447]

An issue that I see in the demography argument is that judicial selection processes are held at a national level. Candidates from all over the country may apply to judgeships in any region of the country.

[444] Interview 2.
[445] Interview 3.
[446] Interview 5.
[447] Interview 6.

In general, there is no residence requirement. Furthermore, even though the Afro-descendant population in Antioquia, and particularly Medellin, is not as high as it is in other regions, it is not as low as these answers might suggest since approximately 10.59% of Antioquia's population is Afro-descendant. I think that these answers also convey the projection of a stereotype concerning the ethno-racial identity of Antioquia's population, especially when compared to the region of Chocó. Unlike Chocó and other coastal areas that are often described as black people's land (*tierra de negros*), Antioquia is typically considered to be the opposite: A land with a strong *mestizo* identity. The use of demography to justify Afro-descendant absence from positions of power is not endemic to Colombia either. In her empirical study about race relations in Brazil, France Twine described how participants in her study explained the absence of black persons from positions of power in their community by referring to demography. They alleged that since whites were the majority in the specific locations where they lived, it was foreseeable that they would occupy the power positions.[448]

This idea of racialized regions also comes attached to other more prescriptive racial stereotypes. While the coastal regions are often thought of as the land of depravity, backwardness, and poverty within national discourses about the regions, Antioquia is often portrayed as a land of progress, productiveness, and entrepreneurship. I want to stress that I believe that demography is, of course, a significant part of the explanation of the regional variances in Afro-descendant presence in judicial institutions in Colombia. However, I also think that the low levels of presence that this group has on Antioquia's courts cannot be explained solely on this basis. The comparison that is often made between Antioquia and other regions (and especially concerning Chocó) is not only cemented on demographic distinctions; it is also the affirmation of a racial stereotype.

Antioquia is labeled as a region of *mestizaje* and its deterministic advantages. In contrast, Chocó is characterized as a region of blacks and its subsequent misfortunes. In this respect, Peter Wade contrasts how the regions of Chocó and Antioquia are often described as two opposite sides of a coin concerning the

[448] FRANCE WINDDANCE TWINE, RACISM IN A RACIAL DEMOCRACY: THE MAINTENANCE OF WHITE SUPREMACY IN BRAZIL 74 (1998).

depiction of racial identities and hierarchies in the country. Although both regions present high levels of racism, in the case of Chocó, racism tends to be materialized through the oppression of a black majority by a white minority. In Antioquia, racism was present thorough the "denial of blackness." This trait was symbolically erased from the imaginaries on the region's identity and character and physically erased by its absorption by the general population.[449]

### 6.3. Quibdó, Chocó

The region of Chocó is located on the Pacific coast of Colombia, near the border with Panamá. Claudia Mosquera *et al.* explain that the alienated space that Afro-descendants have occupied in Colombia forced them to develop different strategies for survival, including their migration (starting in the 18th century) to parts of the national territory that the elites, located at the center of the country, did not control.[450] This migration took place primarily along the Pacific coast of the country.[451] Over time, Afro Colombians founded small villages at the riverbanks and near mining areas of the Pacific basin. In these places that the state deemed unexplored territories, Afro-Colombians developed their own culture, traditions, and ways of economic production,[452] with a distinct black ethnic identity emerging as soon as the early 19th century.[453] In the 20th century, the Pacific coast attracted substantial economic interests, predominantly concerning extractive industries,[454] which endangered Afro Colombian's possession over the territories they had now occupied for decades, but over which they had no legally recognized rights until the enactment of the 1991 Constitution.[455]

[449] WADE, *supra* note 166.
[450] Mosquera, Pardo, and Hoffmann, *supra* note 60 at 16.
[451] *Id.* at 16.
[452] *Id.* at 16.
[453] VAN COTT, *supra* note 204 at 43–44.
[454] Mosquera, Pardo, and Hoffmann, *supra* note 60 at 17.
[455] *Id.* at 17–18.

In contrast to Antioquia, Afro-descendants comprise a significant portion of Chocó's judicial servants. Although the Administrative Tribunal of Chocó did not provide information in this regard, the Superior Tribunal of Quibdó reported having that one-third of the magistrates (1 of 3), and two-thirds of judicial employees (8 out of 12) of that court were Afro-descendant. Moreover, as I could observe during my site visit to the Palace of Justice of Quibdó, Afro-descendants have a significant presence in the region's courts. This impression was corroborated by the interviewees, who affirmed that Afro-descendants' presence in the courts of Chocó is substantial,[456] with some even qualifying it as "very high."[457] However, indigenous presence in this region is as low as in the intermediate tribunals and the majority of high courts.[458]

From my perspective, the level of Afro-descendant representation at the tribunal level is still low if one considers that approximately 73% of the inhabitants that Chocó had in 2005 were Afro-descendants (285,964 out of 388,476).[459] Moreover, I believe it conveys a specific racial stratification in the region's judicial institutions. The higher positions in Chocó's judicial systems continue to be occupied by white-*mestizo* persons in a region where the majority of the population is black. Some of the interviewees highlighted this situation. One of them asserted, with a sense of strangeness: "I know, for example, that the Magistrates of the Tribunal of Quibdó are White."[460] This assertion emphasized the contrast between the ethno-racial composition of the region and that of the tribunal. Another participant described the stratification of the judicial institutions by using the expression "managing the ghetto," to describe how, in Chocó, Afro-descendant judges are often found in the low level of the judiciary and the most remote areas.[461]

[456] Interviews 6, 13, 17, 34, 35, 39, 40 and 44.
[457] Interview 22.
[458] Interview 36.
[459] AFROCOLOMBIANOS, POBLACIÓN CON HUELLAS DE AFRICANÍA, *supra* note 422 at 4.
[460] Interview 3.
[461] Interview 23.

Some participants suggested several explanations for the sizable level of representation that Afro-descendants have inside this region's judicial institutions. One of them asserted, for example, that judges prefer to stay in their native regions and that, the case of judicial employees, most of the persons who apply to merit section processes come from the region where the vacancies are located.[462]

Another aspect that appears to be relevant is the possibility of accessing higher education in Chocó. Unlike other majority-Afro-descendant regions of Colombia, in Quibdó there is a public university that hosts a law school.[463] This aspect noticeably facilitates access to legal education in this region when compared to other Afro-descendant areas. Some interviewees from Chocó mentioned that they graduated from this university. Nevertheless, some participants stressed that, although they had access to legal education, the quality of such education was not particularly good.[464] Also, according to the participants, the costs of studying law in Chocó were higher than in other public universities in Colombia.[465]

A striking feature of Chocó is the idea that the high level of representation that this group has in judicial institutions is, at least in part, a consequence of the undesirability of this region for people coming from the central part of the country.[466] In simpler terms, interviewees suggested that there is a high number of Afro-descendants working in judicial institutions in Chocó because white-*mestizo* people from the interior of the country do not want to work there. Several participants used the expression "punishment" to reflect how white-mestizo judges from the interior of the country thought of the idea of living in Chocó.[467] In this respect, one of the interviewees stated:

> Another determinant factor is that many judges and magistrates from the center of the country do not want to go to these areas, because they are far, the access is difficult, [and] they have their

[462] Interviews 6 and 13.
[463] Universidad Tecnológica del Chocó, Diego Luis Cordoba, DERECHO (2020), https://www.utch.edu.co/portal/es/menu-prog-academicos-derecho.html (last visited Mar 17, 2020).
[464] Interview 8.
[465] Interviews 8, 35 and 36.
[466] Interview 35.
[467] Interviews 9, 34 and 43.

> families. Then, there are experiences of many magistrates that have been appointed for the Superior Tribunal of Quibdó but were not capable of adapting there, or they found that [this place] is very complicated and end up asking to be reassigned to another location. Then, because of that, vacancies are much more open and available for locals.[468]

The undesirability of Chocó seems to manifest in other ways as well. An Afro-descendant judge, with several years of experience working in this region, mentioned that it was widely known that judges who came from other regions to work in Chocó preferred not to settle in this region. Instead, they commonly flown back-and-forth from their places of origin, sometimes even seeking accommodation in Quibdó by days. They do not have a permanent residence in Quibdó.[469] These "traveling judges," were referenced not only in Chocó but also in other places such as Tumaco and San Andrés.[470] Besides, similar practices were reported to occur in other public institutions, besides the judicial branch.[471]

These findings seem to fall in line with previous research on racial relations in Chocó. Peter Wade describes this region as being at the bottom of the Colombian racial order, as it is commonly seen as a place characterized by scarcity, geographic isolation, and blackness.[472] Chocó is commonly imagined as a place where nature is rough. Humidity, copious rain, high temperatures, and the jungle ecosystem create conditions that make survival difficult and the living conditions miserable.[473] Wade also explains that besides poverty and geography, blackness is often seen by Colombians as another hardship of Chocó.[474] All of these circumstances have historically made Chocó an undesirable place to live for most Colombians, and especially for those living in the White-*mestizo* regions of the Andean highlands. Wade writes about

[468] Interview 13.
[469] Interview 34, 36. (This situation was particularly patent for judges in high-ranking positions).
[470] Interview 9, 25, 37 and 39.
[471] Interview 36.
[472] WADE, *supra* note 166 at 95.
[473] *Id.* at 96.
[474] *Id.* at 97–98.

how Europeans did not settle in Chocó in significant numbers during the colonization process, but rather approach to this territory with particularly extractive purposes:

> Chocó was, for them, unpleasant and unhealthy; for their purposes, impermanent settlement sufficed for mining enterprises, and settlement in the area's small urban centers was sufficient since they could engage in lucrative commerce without having to invest much in infrastructure or public service of any kind. The blacks remained there precisely to avoid the whites and because colonial society outside the area was unaccepting of them as blacks as they were unprepared for it after years of slaving in the mines.[475]

Because of these imaginaries, Chocó is often perceived as the "natural place for blackness" in Colombia. Thus, the region is usually targeted by racism disguised as regionalism. As Tianna Paschel explains referring to her fieldwork in Colombia:

> Because I am African American and Colombians saw me as black, people would typically guess that I was from the southern Pacific Coast or the Atlantic Coast, two regions are known for having a black population. However, neither region was seen –as the Chocó was—as the space of original or pure blackness. When I would ask why they hadn't guessed of Chocó, countless cab drivers, doormen, shop-keepers, and friends of friends would explain to me that my facial features were "too refined" (finos) or my skin color too light for me to be from the Chocó. These were meant, of course, as compliments, that I was supposed to gracially accept.[476]

Because of all of these reasons, it is not strange that white-*mestizo* judicial servers from the interior of Colombia might see Chocó as an undesirable place to live or work. This undesirability contributes to the significant level of Afro-descendant representation on this region's courts. I should emphasize that

[475] *Id.* at 105.
[476] PASCHEL, *supra* note 33 at 43.

situations of direct racial discrimination seem to be rare in Chocó, something that interviewees explained as a result of demography. Since the majority of the population of Chocó is black, the perception of prejudice tends to be lower.[477] Instead, people from Chocó experience structural discrimination in their region and overt discrimination when they travel to other areas where Afro-descendants are less numerous.[478] This divide might explain why Paschel's experience in the taxicab occurred in the city of Bogotá, which has a small Afro-descendant population.

### 6.4. The Archipelago of San Andrés, Providencia, and Santa Catalina

The Archipelago of San Andrés, Providencia, and Santa Catalina is a group of islands located on the Caribbean sea, approximately 720 Km off the coast of Colombia and 110 Km off the coast of Nicaragua.[479] The Archipelago has nearly 68,200 habitants, of which roughly 18.7% self-identify as black, mulatto, Afro-descendant, or Afro Colombian, and 35.7% self-identify as *Raizal*.[480] The *Raizal* (native Afro-descendant population) presence in the archipelago is the result of the English colonization of these islands, as West African and black population from Jamaica were brought in the condition of slavery to work in this area.[481] The *Raizal* people developed a particular type of culture that is defined by the Protestant religion, the English *creole* language, and traditions that include elements of the British, Caribbean, and African populations.[482]

The case of San Andrés is an exception to the general rule of Afro-descendant underrepresentation on Colombian courts. As several of the interviewees mentioned, and I could also observe directly during

[477] Interviews 35 and 39.
[478] Interview 14.
[479] Geografia del Archipiélago GOBERNACIÓN DEL ARCHIPIÉLAGO DE SAN ANDRÉS, PROVIDENCIA Y SANTA CATALINA (2020), https://sanandres.gov.co/index.php/archipielago/informacion-general/geografia (last visited Mar 17, 2020).
[480] BOLETÍN CENSO GENERAL 2005: PERFIL SAN ANDRÉS, ARCHIP. DE SAN ANDRÉS, 6 (2010), https://web.archive.org/web/20160304204428/https:/www.dane.gov.co/files/censo2005/PERFIL_PDF_CG2005/88001T7T000.PDF (last visited Mar 10, 2020).
[481] VAN COTT, *supra* note 204 at 43–44.
[482] *Id.* at 43–44.

my visit to the San Andrés, Afro-descendants are a significant portion of the total number of judges, magistrates, and judicial employees in the archipelago. According to the data provided by the courts, Afro-descendants occupy all the magistrate positions (3) and 80% of the judicial employee positions (8 out of 10) of the Superior Tribunal of San Andrés; and 66.66% (2 out of 3) of the magistrate positions and 53.85% of judicial employee positions in the administrative tribunal of this region (7 out of 13).

One of the judges I interviewed, who had been actively engaged in different professional activities with the majority of the judges in the archipelago, calculated that out of a total number of 22 judges and magistrates seats in the region, *Raizals* occupy approximately 12, which is slightly more than 50%.[483] Similarly, according to what I could witness during my visit to the main courthouse of the island, Afro-descendants also occupy a majority of the judicial employee positions in this region.[484] This significant level of Afro-descendant presence on courts seems to be relatively recent.[485] One of the interviewees mentioned that before the 2000s-decade, Afro-descendants only exceptionally occupied judge positions on the island. After this period that their number started to grow until it reached significant levels. This comment about the recent change in the composition of San Andrés' courts seems to corroborate previous reports on the issue. In 2004, a report from the CEJA had stated that:

> on the island, of a total of eight judges (with common jurisdiction) and six magistrates (with special or appeals jurisdiction), one can only find in San Andrés' Municipal Court a half-native woman (on her father's side). Also, not one of the seven prosecutors working on the island was of Raizal origin. Finally, in the Center for Technical Investigation (CTI –a Prosecutor agency that carries out judicial investigations) from a total staff of approximately five people, only one was Raizal.[486]

[483] Interview 24.
[484] Interview 25.
[485] Interview 24.
[486] GONZÁLEZ MORALES AND CONTESSE SINGH, *supra* note 16 at 36.

Despite the significant number of Afro-descendant—and specially *Raizal*—judges and judicial employees in the archipelago, it is essential to mention that there is still a considerable number of white-*mestizo* judges in this region, most of which came from the continent. According to the participants, it is not rare practice that judges coming from the central areas of the country do not resettle themselves in San Andrés (similarly to what happens in the region of Chocó). This situation creates several problems from the perspective of the interviewees. In general, they questioned the efficacy and legitimacy of the administration of justice in these areas.

Among the different reasons that explain the significant level of representation that Afro-descendants have in the judicial institutions in San Andrés, the *creole* language proficiency requirement is, perhaps, the most salient. Article 310 of the 1991 Colombian Constitution determined that San Andrés would have a specific law to govern different aspects of the life of the archipelago, including limitations for circulation and residence, controls of population density, the protection of the cultural identity of the region's native communities, among others.[487] In fulfillment of this constitutional mandate, the Colombian Congress issued Law 47 of 1993[488], which is commonly known as the "Special Statute of San Andrés." Article 42 of this law establishes that in San Andrés, both English, which is commonly spoken by the native communities of the Archipelago, and Castilian (Spanish), the language of the majority of the Colombian population, shall have the status of official languages. Additionally, article 45 of the statute declares that: "Public employees who exercise their functions within the territory of the Archipelago department and have a direct relationship with the public, must speak the Spanish and English languages."[489] This particular requisite of being proficient in English (which some respondents interpret as having to be *creole* English specifically) also applies for judges and judicial employees. In general, the participants of the study seemed to agree that this unique language requisite was partially responsible for the higher level of representation that *Raizals* have in the judicial institutions of San Andrés. This requirement gives native people of the

[487] Constitución Política de Colombia art. 310.
[488] L. 47/93, febrero 19, 1993, DIARIO OFICIAL [D.O.] (Colomb.) art. 42.
[489] *Id.* art. 45.

region a particular advantage for accessing positions within the judiciary. Nevertheless, the interviewees also mentioned that the public authorities do not strictly enforce the language requirement in the archipelago. Some judges from the continent are in their positions despite not speaking English, much less *creole* English.[490] Some participants affirmed that seating judges had been removed from their positions for failing to meet this requirement in the past. However, participants agreed on the fact that this requisite is continuously overlooked.[491]

Albeit being located in San Andrés, the judicial institutions in this region are in many aspects administratively dependent upon the judicial administration of the region of Bolívar, which is situated in the continent. This type of administrative dependency from institutions located in other regions is not uncommon in areas with high levels of Afro-descendant population, and it can also be found in other institutions besides the judiciary. San Andrés' dependency upon institutions located in the continent creates discomfort among some native judges in the archipelago. Locals allege to have experienced contempt from judicial administrators in Cartagena because of their origin.[492]

Another reason why the hierarchical structure and administrative dependency is relevant for this research is because of how provisional judges are selected. The institution that selects the judges has a significant influence on who will fill out a vacancy. The selection of provisional magistrates in the superior and administrative tribunals of San Andrés fall within the competencies of the Supreme Court of Justice and the State Council, respectively, located in Bogotá. The participants' perception is that the selection of white-*mestizo* magistrates to intermediate tribunals leads to the selection of non-native judges to lower court vacancies in the archipelago. This effect occurs because magistrates are in charge of selecting provisional judges for the lower courts. Therefore, the center-periphery relations are of particular significance in this regard.[493]

[490] Interview 28.
[491] Interview 26.
[492] Interview 28.
[493] Interview 27.

Judicial employees, in addition to the language requirement, also need to comply with a residency requirement to serve in the archipelago's courts. Since San Andrés has specific migration and population density controls, people who are not from the archipelago need to meet a number of requirements to move to this region. A directive from the Superior Council of the Judicature—Administrative Chamber (Acuerdo No. 574 of 1999) established that the persons who wish to apply to positions in courts located in the Archipelago of San Andrés, Providencia, and Santa Catalina, need to prove that they speak English. This requirement is additional to residing in this region, which must be proved with a certification issued by the Office for the Control of Circulation and Residency of San Andrés (OCCRE).

The residency requirement applies to judicial employees, but not to judges. The Constitutional Court's ruling C-530 of 1993 declared that the specific norms incorporated in Legislative Decree 2762 of 1991 (which regulates the population density of the archipelago of San Andrés, Providencia, and Santa Catalina) should apply with restrictions in the case of the national public servants that exercise jurisdiction or public authority. This exception includes judicial authorities who enter the islands to exercise their functions, in which case the temporary resident card has a function of a mere registry, instead of population control.[494] This means that judges who are not San Andrés' residents do not need to comply with the temporary residency card requirement.

An additional factor that helps to explain the significant level of representation that Afro-descendants have in the judicial institutions of San Andrés is undesirability of this region as a place to work for people of the interior of the country. One of the interviewees, while referring to San Andrés, mentioned that many people from other areas of the country were not interested in occupying positions in judicial institutions in San Andrés, given the restricted nature of public services and recreational activities in the archipelago.[495] Another participant mentioned how the high costs of residing on the island also deterred

[494] Corte Constitucional [C.C.] [Constitutional Court], noviembre 11, 1993, Sentencia C-530/1993 Gaceta de la Corte Constitucional [G.C.C.] (Colomb.).
[495] Interview 24.

people from other places from coming to San Andrés to reside.[496] A third explained that San Andrés possesses the good attributes of a Caribbean island, but also has significant difficulties, especially for people who are not used to the living conditions of the island.[497] San Andrés does not possess aqueduct or sewerage systems for the entire region.[498] According to some respondents, the government's priority has been to improve the necessary infrastructure in tourist areas.[499] Most people in the archipelago use rain as the primary source of water supply and have septic tanks to deal with drainage.[500]

Similarly, another aspect that is relevant for understanding the unusual situation of San Andrés regarding Afro-descendant representation in the judicial system is the absence of law schools in the Archipelago. San Andrés does not have a single law school on its territory and that the only option to study law is to leave the region and move to cities in the continent.[501] This alternative is often only available for individuals who come from families that have the economic capacity to relocate their children to a major city and to cover the tuition and other educational costs. My impression is that the people of San Andrés face some of the most significant challenges to access legal education in Colombia, given their geographical location and the costs associated with traveling between San Andrés and major cities in Colombia. I think that that the reason why the difficulties in accessing legal education do not seem to have a sensible impact on the level of presence of Afro-descendants in the judiciary of this region is that the size of the judiciary in San Andrés is significantly small. Furthermore, there are some affluent residents of the archipelago who can afford to send their children to universities on the continent.

Another aspect that needs to be considered is that, except for the SJP, San Andrés is the only context in which I could find any form of social mobilization regarding the issue of Afro-descendant representation

[496] Interview 26.
[497] Interview 25.
[498] Redacción Nacional, *Firman acta para mejorar redes de acueductos en San Andrés y Providencia*, EL ESPECTADOR, February 26, 2019, https://www.elespectador.com/noticias/nacional/firman-acta-para-mejorar-redes-de-acueductos-en-san-andres-y-providencia-articulo-841974 (last visited Mar 10, 2020).
[499] Interview 25.
[500] *Id.*
[501] Interviews 24, 25, 26, 27, 28 and 29.

on judicial institutional in particular, and in the public sector in general. In San Andrés, this mobilization has extended for decades and has had different demands at different points in time. In the late 1990s, attorneys from the archipelago requested the Superior Council of the Judicature to allow them to sit for the judge-selection exam in the archipelago. Until that point, they had to travel to the continent to take the test.[502] Their efforts were fruitful. Since then, lawyers who wish to take the eliminatory exam to become judges can do so without having to leave the region.[503]

Different interviewees mentioned that around the 2000s-decade, San Andrés' lawyers requested the Superior Council of the Judicature to select local judges to fill out court vacancies in the region. In their view, this is the leading cause of the significant level of Afro-descendant presence on the courts of San Andrés.[504] One participant mentioned that:

> In the country, [Afro-descendant representation on courts] it is deficient, but in San Andrés is high. That is the product of a fight that years ago some leaders, lawyers, undertook, as they appeared before the Superior Council to request that native people were allowed to become judges, and not only to occupy judicial employee positions but also of functionaries [judges and magistrates].[505]

Before this moment, Afro-descendants were working for the courts, but in low-rank positions.[506] This social mobilization consisted of protests before the courthouses, petitioning before central governmental and judicial authorities, meetings with representatives of the Superior Council of the Judicature, marches, demonstrations, among other actions.[507] According to the participant's accounts, the

[502] Interviews 26, 28 and 29.
[503] Interview 26.
[504] Interviews 26, 27, 28 and 29.
[505] Interview 25.
[506] Interview 24.
[507] Interview 27.

result of these efforts was the designation of native people in provisional magistrate positions in the tribunals of the archipelago, which, in turn, designated natives as provisional judges in the lower courts.[508]

These mobilization actions that can be framed within a broader type of social mobilization aimed at protecting the natives' cultural traditions and rights, including the use of their *creole* English language. In this respect, some of the interviewees mentioned that teachers, religious leaders, students, and the general population have also participated in the marches since it is a social concern that is was not limited to judicial institutions nor judicial servants.[509]

I consider that, in addition to protecting the cultural rights of the native population, mobilization efforts are also a manifestation of a deeper fight over resources and, particularly, employment opportunities in a region where stable high-earning jobs are not always for grasp. This situation became clear to me after finding out that public demonstrations took place immediately after it was announced that several locals that occupied judicial employee positions in the archipelago were going to be replaced in their jobs by people coming from the continent. This decision led, according to her account, "for judicial employees to come together and have a powerful protest, demanding that the local people's right to work and the special norms were respected. At that time, the Council of the Judicature did not follow up with its decision to remove them [the locals] from their positions."[510]

### 6.5. Cartagena, Bolívar

The region of Bolívar is located in the Caribbean region of Colombia. According to the 2005 census, Bolívar was the third region of Colombia by the percentage of the Afro-descendant population, only behind Chocó and Valle del Cauca. 26.75% of Bolívar's population (1,836,640 inhabitants) was Afro-

[508] Interviews 28 and 29.
[509] Interview 27.
[510] Interview 28.

descendant.[511] Cartagena is the region's capital and a special administrative district. The city is located in the northern part of the region. Cartagena is a major domestic and international tourist destination. According to the 2005 national census, Afro-descendants comprise 36.1% of the city's population, which means that they are more numerous in the city than in the region as a whole.[512] This figure might be a low estimate, given the census limitations to collect ethno-racial data in this region and across the country.[513] The University of Cartagena, which is public, has a law school.[514] Moreover, several other institutions offer law programs of different quality levels.[515]

In the data obtained through the rights of petition, not a single magistrate of the Superior Tribunal of Cartagena or the Administrative Tribunal of Bolívar was reported as Afro-descendant. When considered together, only 2.72% (3 of the 110) judicial employees in both of these courts were counted as Afro-descendant. The lack of Afro-descendant representation among the group of judges seems to extend to other municipalities in the region of Bolívar and into the lower courts of Cartagena.[516] One of the interviewees, who used to work for one of the courts in this city, commented that he "sees with awe the absence of Afro-descendant persons in the judiciary, at least in Cartagena,"[517] which he described as a *"Ciudad de negros"* (city of blacks), and mentioned that Afro-descendants are scarce even in judicial employee positions in the city's courts.[518] Likewise, another interviewee, who attended the judicial formation course in Cartagena, mentioned that she could not remember any Afro-descendant persons in her judicial preparation course.[519]

Despite these accounts, my reading of the situation of Afro-descendant representation in the city's courts was slightly different. I visited different judicial buildings in the city's historic center. Although

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[511] AFROCOLOMBIANOS, POBLACIÓN CON HUELLAS DE AFRICANÍA, *supra* note 422 at 4.
[512] BOLETÍN CENSO GENERAL 2005: PERFIL CARTAGENA, BOLÍVAR, 6 2 (2010), https://www.dane.gov.co/files/censo2005/PERFIL_PDF_CG2005/13001T7T000.PDF (last visited Mar 10, 2020).
[513] HERNÁNDEZ ROMERO, *supra* note 390.
[514] Facultad de Derecho y Ciencias Políticas, UNIVERSIDAD DE CARTAGENA (2020), http://derecho.unicartagena.edu.co/programas-academicos/derecho/informacion-general (last visited Mar 17, 2020).
[515] Interview 33.
[516] Interviews 5 and 10.
[517] Interview 5.
[518] Interview 5.
[519] Interview 25.

Afro-descendants were far more numerous on the streets than inside courthouses, they had a certain level of presence on the courts. During my visit to the intermediate tribunals, I could see several Afro-descendant judicial employees working in these courts, at least more than the three that were reported by the courts in their response to the rights of petition. I think that my perception of greater Afro-descendant representation on Cartagena's courts, when compared to the perception of the interviewees and the courts, could be due to the complexities of racial self-identification in Cartagena.[520] I ponder that when the interviewees (and potentially the judicial servants who responded to my right of petition) described the low levels of Afro-descendant presence in these courts, they were making specific reference to those that self-identify as such. One of the participants emphasized that:

> One can go and watch, and take a walk by the courthouses, and see that the judges, at least that self-identify as Afro, are very few, very few the ones we see. They are mostly judges that do not have practically any form of ethnic connection as such or that self-identify as part of a particular ethnicity, which indicates that it is very low the level of people working as judges that are, that self-identify as Afro, *Raizal*, and *Palenquero*.[521]

Furthermore, he added: "We can see a couple of cases at least in the tribunal's labor or administrative chambers, I have seen [some], but I haven't seen that they had self-recognized as such"[522] In contrast, during my visit to the courthouses, my reading of courts' ethno-racial compositions did not depart from their staff's self-identification, but rather from hetero-identification based on phenotypical identifiers *vis-à-vis* skin color. I think that differences in the method for identifying Afro-descendancy (self-identification *v.* hetero-identification) were partly to blame for this diverging assessment.

[520] Interview 33.
[521] Interview 30.
[522] *Id.*

In my experience, self-identification in Cartagena is particularly complex when compared to other regions of Colombia. Despite the high Afro-descendant population in this region, the *mestizaje* and *blanqueamiento* narratives seem to be exceptionally resilient. People who are clearly labeled as Afro-descendants are those who have particularly marked black phenotypical features (darker skin, tight hair), or who have a clear black ethnic identity. This is the case of the *Palenquero* people, situated in the proximity of the city.[523] As a participant from this city mentioned: "The impression that it creates in me is that being black [in Cartagena] is to be darker.[524]

I should clarify that, despite these differences in the appraisal, I concur with their overall impression that Afro-descendants do not have an adequate level of representation in Cartagena's courts, at least when compared to their share of the city's population. This situation becomes evident when one considers that the 36.1% figure (that according to the census corresponds to the percentage of Afro-descendant population of Cartagena) also departs from self-identification, which possibly means (as experience dictates) that the number of Afro-descendants in Cartagena might be much higher.[525] Some interviewees seem to coincide with this reading, as one of them affirmed that "if we stick to phenotypical traits, the representation is not very high," while referring to the situation of both judges and judicial employees.[526]

### 6.6. Cali and Buenaventura, Valle del Cauca

Valle del Cauca is located in Western Colombia. Part of this territory lies in the Pacific Basin. Another part is located in the Andean region of the country. According to the 2005 census, 26.75% of the population of this region is Afro-descendant (1,090,943 out of 4,052,535).[527] Cali, Valle del Cauca's capital, is located in the Andean part of the region and is the third-most populous city in Colombia with

[523] Interview 32.
[524] Interview 31.
[525] Interview 32.
[526] Interview 31.
[527] AFROCOLOMBIANOS, POBLACIÓN CON HUELLAS DE AFRICANÍA, *supra* note 422 at 4.

2,244,000 inhabitants in 2005.[528] Cali hosts a high number of businesses and services, being an epicenter for commerce and industrial production. In Cali, 26.2% of the population self-identified as Afro-descendant in 2005.[529] In addition to Cali, during my fieldwork, I also visited the city of Buenaventura, located on the coast of Valle del Cauca. Buenaventura is the principal seaport of Colombia. A majority of goods imported to Colombia and exported to other countries pass through this city. Buenaventura is, just as Cartagena, a "city of blacks." According to the 2005 census, 88.5% of the 362,000 residents of this city are Afro-descendant.[530]

In the data collected through the rights of petition, the Superior Tribunal of Cali reported having zero Afro-descendant magistrates in the group of 37 that seat on that court, and 11 Afro-descendant judicial employees in a group of 58 (19%). The Superior Tribunal of the neighboring city of Buga, in the same region, reported 2 Afro-descendant magistrates in a group of 14 that compose that institution (14.29%). Paradoxically, this same tribunal reported not even a single Afro-descendant in the group of 58 judicial employees that serve on that court. In the case of the Administrative Tribunal of Valle, none of the 12 magistrates was reported as Afro-descendant, and only two of the 36 judicial employees were counted as part of that group (5.56%).

One of the interviewees, who has experience working for the judiciary in this city, mentioned that, as an example of the low level of Afro-descendant representation on courts in Cali, only 3 out of 21 administrative judges in the city fell in this category,[531] a figure that a second interviewee confirmed.[532] Another participant estimated that only three of the 18 circuit labor judges, and one of six small labor conflict judges were Afro-descendant. He added that there could even be certain types of specialized courts

[528] Departamento Administrativo Nacional de Estadística (DANE), *supra* note 31.
[529] BOLETÍN CENSO GENERAL 2005: PERFIL CALI, VALLE DEL CAUCA, 6 (2010), https://www.dane.gov.co/files/censo2005/PERFIL_PDF_CG2005/76001T7T000.PDF (last visited Mar 10, 2020).
[530] BOLETÍN CENSO GENERAL 2005: PERFIL BUENAVENTURA, VALLE DEL CAUCA, 6 (2010), https://www.dane.gov.co/files/censo2005/PERFIL_PDF_CG2005/76109T7T000.PDF (last visited Mar 10, 2020).
[531] Interview 40.
[532] Interview 45.

that do not have any Afro-descendant judges serving in them.[533] A third one mentioned that, despite having a more substantial presence than in most cities in Colombia, Afro-descendants' presence in Cali's courts was still low.[534] The low Afro-descendant presence in Cali's courts appears to extend even into the group of judicial employees, as one of the interviewees remarked the limited number of blacks occupying this type of position.[535] Despite the little representation that at the judge-level Afro-descendants seem to have in Cali's judicial institutions, some of the participants manifested their perception that Afro-descendants seem to have better opportunities in Cali than in other cities of Colombia.[536]

In the case of Buenaventura, the situation seems to be similar.[537] One of the participants narrated that, approximately 4 or 5 years ago, many of the judges in the city were not from Buenaventura (also implying that they were also not black).[538] Another one, an attorney, with several years of experience litigating in the city, mentioned that in Buenaventura:

> [The situation] is regrettable. I do not know any Afro-descendant judges. I do not know any. I have been litigating there for years, and I have not seen the first. A few years ago, I started seeing black [judicial] employees, but it is very little; sporadic the Afro-descendant participation. You see, *per* court, a maximum of two Afro-descendant persons. The rest are *mestizo*, the majority named by finger [expression meaning nepotism]. I imagine that recently some [positions] were filled out by merit selection and well, in that case, it does not matter who the person is. It should be the one who wins the process. However, the situation in Buenaventura is unfortunate. Imagine that […] the majority of the staff is mestizo, being an Afro-descendant territory, with a majority of Afro-descendant population, the majority of judges are *mestizo*, the employees are *mestizo*, and they do not live in Buenaventura.[539]

[533] Interview 41.
[534] Interview 42.
[535] Interview 44.
[536] Interviews 21 and 45.
[537] Interview 43.
[538] Interview 16.
[539] Interview 39.

It appears that in Buenaventura, there is a significant division in the ethno-racial composition of the group of judges and judicial employees. One participant warned that Afro-descendants occupied judicial employee positions and *mestizos* coming from other cities occupied judge positions.[540] Another interviewee suggested that this situation is related to how provisional appointments are made in this region. The Superior Tribunal of Buga, located over 100 Km away, can provisionally appoint judges to fill out vacancies in Buenaventura. Participants believe that this type of appointment limits the possibilities of local attorneys to occupy judge positions in this municipality.[541] From the participant's perception, the Superior Tribunal of Buga has favored non-residents at filling out vacancies, which impacts black presence at these institutions.[542] Another one agreed with this opinion. He stated that the reason for this preference towards *mestizo* candidates was because the inner circle of the tribunal magistrates was mostly *mestizo*, which meant that the people they knew and decided to appoint also shared this identity.[543] However, another interviewee had a different reading on this aspect. He mentioned that it was not due to the provisional positions, but rather the tenured positions, which could explain the low level of Afro-descendant representation among Buenaventura's judges. In his view, people who passed the merit selection process chose Buenaventura as their place of work.[544]

The fact that power positions, such as judgeships, in majority-black towns happen to be occupied by whites is not surprising if one considers previous literature about this topic in Latin American cities. In the case of Ecuador, for example, Beck *et al.* (reverberating the work of Whitten) mention that even in towns where the majority of the populace was black, "whites, mestizos, or mulattos ran all the administrative and commercial centers, and the only elected black officials were rural police."[545]

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[540] Interview 16.
[541] Interview 17.
[542] *Id.*
[543] Interview 39.
[544] Interview 38.
[545] Beck, Mijeski, and Stark, *supra* note 380 at 104.

An important aspect to consider about Cali is that the leading public university of the city, the University of Valle, does not have a law school.[546] Many respondents considered that access to high-quality legal education was more difficult in this region than in others.[547] The lack of an adequate public education offer meant that only those who could afford to attend a private university could have access to high-quality legal education. A similar situation takes place in Buenaventura since the two leading universities with a presence in the city (the University of Valle—Pacific branch, and the University of the Pacific) do not offer law programs.[548]

In the city of Buenaventura, just as it happens in Quibdó, there were also reports about "traveling judges." These judges decide not to resettle in Buenaventura, but rather maintain their residences in Cali or Tuluá, and only come to Buenaventura during the week for work.[549] This situation was problematic for the interviewees. They interpreted it as a sign of contempt for the city and its people. One of them commented that the *mestizo* judges from outside of Buenaventura do not move to this city because:

> They do not like the black [way] of organizing. They do not like Afro traditions. They are there because they have an economic opportunity, that is because they have a chance to go [there] and make a good salary, good benefits. However, they hate it there […] They see of Buenaventura: the corruption, the ugly streets, the dirty streets, the lousy food, everything that is bad about Buenaventura. I am not from Buenaventura, but I am an Afro-descendant. I have had a strong connection with that place, and I am troubled to find out about the comments [that judges make].[550]

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[546] Pregrado UNIVERSIDAD DEL VALLE / CALI, COLOMBIA (2020), https://www.univalle.edu.co/formacion/pregrado (last visited Mar 17, 2020).
[547] Interviews 15, 16, 18, 38 and 42.
[548] Sede Pacífico UNIVERSIDAD DEL VALLE / CALI, COLOMBIA (2020), http://pacifico.univalle.edu.co/ (last visited Mar 17, 2020); Universidad del Pacífico UNIVERSIDAD DEL PACÍFICO (2020), http://www.unipacifico.edu.co:8095/web3.0/inicio.jsp (last visited Mar 17, 2020). Interviews 38 and 43.
[549] Interview 39.
[550] *Id.*

Moreover, one of the interviewees also mentioned that *mestizo* judges who come to work in Buenaventura tend to dissociate themselves from the local population, as "when they arrive at that territory they only meet with their people, among them."[551]

### 6.7. Tumaco, Nariño

The last region that I visited in fieldwork was Nariño, located in the southwestern part of Colombia, on the border with Ecuador. Just as in the case of Valle del Cauca, part of Nariño's territory is located on the pacific coast, and another part in the Andean region of the country (*la sierra*). This division sharply marked the distribution of the population according to race and ethnicity. Although in Nariño 18.05% of the population was reported as Afro-descendant in the 2005 census (270,433 of the 1,498,234 inhabitants),[552] in Pasto, the region's capital city located on the Andean portion of the region, the percentage of Afro-descendants was only 1.6% of the total population. In contrast, the largest Afro-descendant municipality in Nariño is Tumaco, located on the coast, in which 88.8% of the 179,000 residents were reported as Afro-descendants.[553] In this city, I conducted my final site visit and concluded my fieldwork.

According to the data collected through the rights of petition, none of the 11 magistrates of the Superior Tribunal of Pasto are Afro-descendants, and the court did not provide information concerning the ethno-racial composition of its staff. Likewise, no data was reported on the Administrative Tribunal of Nariño, also located in Pasto. Respondents concurred in that there are very few Afro-descendant judges in Tumaco. One participant, who has significant knowledge of the composition and work if the judiciary in this city, mentioned: "Yesterday, when you called me and told me the topic of your research, I started thinking: How many Afro-descendant judges do I know here, in Tumaco? And I continued to think, and I

[551] *Id.*
[552] AFROCOLOMBIANOS, POBLACIÓN CON HUELLAS DE AFRICANÍA, *supra* note 422 at 4.
[553] BOLETÍN CENSO GENERAL 2005: PERFIL TUMACO, NARIÑO, 6 (2010), https://www.dane.gov.co/files/censo2005/PERFIL_PDF_CG2005/52835T7T000.PDF (last visited Mar 10, 2020).

do not remember any."[554] Moreover, the respondent also pointed out that, despite the number of local Afro-descendant lawyers in Tumaco, a similar situation occurs with judicial employee positions, most of which (but not all) are occupied by professionals from Pasto. This answer implied that they are white or *mestizo*.[555] I could see this directly during the site visit I conducted to the courts in this city, as most of the judicial employees and judges I could see in this building were white or *mestizo*, unlike the majority of Tumaco's inhabitants.

Just like in Buenaventura, in Tumaco, there is not a single university that offers a law program. The leading university with a presence in the city (the National University of Colombia—Tumaco branch) does not offer this type of academic program, which limits the possibility of the local population to access legal education or positions in the judiciary.[556]

Similarly to the situation of Quibdó, Tumaco and other municipalities of Nariño's coast seem to be locations where people from the interior of the country do not want to go and work. These municipalities struggle with the lack of resources, infrastructure, services, and also with the significant impact of the internal armed conflict. The internal armed conflict has been particularly hard in this region because of its strategic location near Colombia's southern border, which makes them strategic points to the narcotrafficking business.[557] One of the interviewees, who worked as a judge in one of these municipalities, mentioned that she chose to work there in a provisional post because nobody else wanted to work there.[558] Moreover, she narrates that the position that she ended up occupying had been offered to several of her colleagues at the court where she used to work as a judicial employee, but:

> Everybody said: 'No, I will not go. What will I do over there? No, it is bad. How can you even think about it? […] that faraway place, distant from the hand of the lord…' And I said: 'I will go!' and

[554] Interview 37.
[555] *Id.*
[556] Sede Tumaco, *Sede Tumaco*, UNIVERSIDAD NACIONAL DE COLOMBIA (2020), http://tumaco-pacifico.unal.edu.co/ (last visited Mar 17, 2020). Interview 43.
[557] Interview 18.
[558] *Id.*

> effectively, I went to work to a municipality that has […] that has horrible roads, that has an electric grid, but where there are black-outs all the time, that does not have [running] water, that has illegal mining, in which the river water has mercury in it… in some horrible conditions and it was because nobody else wanted to go there.[559]

In Tumaco, the presence of "traveling judges" was also reported. One of the interviewees described that the judges of Tumaco: "Do not live here. They do not know our realities. They do not feel the issues of this place. They feel that they come to deliver a service because they have to. Because they got an opportunity, but with the aspiration of one day moving back to Pasto."[560] Moreover, just as in Chocó, participants mentioned the idea that working in Tumaco is a type of punishment.[561]

## 6.8. Analyzing regional differences in the ethno-racial composition of courts in Colombia

As we could see in the previous sections, there are a significant number of ways in which geographical location and race intertwine to help to create regional differences on the ethno-racial composition of Colombia's judicial institutions. Some of the most relevant are:

### 6.8.1. Demographic differences among the country's regions

As I previously mentioned, ethno-racial groups are not evenly distributed across the different regions in Colombia. Therefore, it is natural for the demographic differences in terms of the ethno-racial composition of the country's regions to have a sensible impact on the composition of the judicial institutions

[559] *Id.*
[560] Interview 37.
[561] Interview 43.

therein located. Afro-descendants seem to have a sizeable level of representation on the courts of regions such as Chocó, where 73.6% of the population share this ethno-racial identity, but lack a significant presence in the courts of Antioquia, an Andean region where only 10.59% of the population was reported to be Afro-descendant.[562]

Additionally, other demographic differences, such as the presence of ethnic-Afro-descendant population, also influence the level of representation that this group possesses in the judicial institutions of a particular region. In certain parts of the country, such as the archipelago of San Andrés, Providencia, and Santa Catalina, legal instruments for the protection of ethnic groups, may have the effect to secure, at least to a certain extent, Afro-descendants' representation on the courts of some regions.

### 6.8.2. The institutional dependency relations between central and peripherical areas of the country

Geographic location is also essential for discussing the issue Afro-descendant representation on Colombian courts because of the administrative dependency of peripherical regions upon central regions. Regions with high levels of Afro-descendant population are, in most cases, peripherical areas. This status is not the exclusive effect of their location within the national territory. It is also due to their weight in the nation's economy, politics, and government presence. Due to these conditions, regions with large Afro-descendant populations have historically had a relation of administrative dependency not only with the country's capital (Bogotá) but also with other regions where the institutional presence of the state is sufficient. These regions, which I describe as central, host state institutions in which decisions impacting peripherical regions are often made. This relation of dependency between central and peripherical areas of the country influences the ethno-racial composition of the courts since the designation of judges that will

[562] AFROCOLOMBIANOS, POBLACIÓN CON HUELLAS DE AFRICANÍA, *supra* note 422 at 4.

serve in the periphery of the country is made by institutions located in central regions. Moreover, institutions tend to privilege candidates that are not local nor Afro-descendants for filling out judicial vacancies.

### 6.8.3. Regional differences in access to services and structural discrimination

Access to certain services and structural discrimination also seem to play a significant role in explaining the regional differences in the Afro-descendant representation on courts. As I explained before, regions that have high levels of Afro-descendant population are commonly located in peripherical areas of the country, where the provision of specific goods and services is scarce. This is the case of education and, particularly, legal education. Certain regions with a high concentration of Afro-descendants do not have universities hosting law programs. Also, as some of the interviewees stressed, the quality of higher education in these areas is significantly lower than in the big urban areas located in the Andean (mostly white-*mestizo*) section of the country. Having a law degree is indispensable to become a judge and, in some cases, to occupy certain judicial employee positions. Thus, regional differences in terms of access to education have a sensible impact on black representation in courts.

Paradoxically, the deficiencies in certain essential services in regions that Afro-descendants densely populate seem to be a factor that, under certain conditions, could enable higher levels of access to judicial positions for Afro-descendants. In this respect, people from the interior of the country often reject working in peripherical areas of the country due to the severe living conditions in these areas. Also, many interviewees mentioned the idea that people from the central part of the country (mostly white-*mestizo* areas) being sent out to work in regions such as Chocó was seen as a type of punishment that should be avoided at all costs. In synthesis, the lack of interest of white-*mestizo* people from the interior of the country to occupy court positions in neglected areas seems to have the effect of enabling Afro-descendants to hold positions that they usually cannot occupy in other areas of the country.

### 6.8.4. The conflation of racial and regional identities, and the persistence of racial stereotypes

Another aspect that helps to explain the regional differences in the access to judicial positions for Afro-descendants is how regional and racial identities get conflated within the national public discourse, and how racial stereotypes are commonly masked as—allegedly acceptable—regional stereotypes. Given the uneven presence of the Afro-descendant population in Colombia, race, and region and inextricably intertwined. This is the reason why, for example, it is not uncommon to hear that Afro-descendants who live in Andean cities are often questioned about their regional origin. It also explains why regional identities are often used as a coded way for the naming of race. Subsequently, regional stereotypes are also commonly conflated with racial stereotypes. Some regional stereotypes, such as those that accuse people of the coastal regions of being lazy or corrupt, are charged with racial undertones. In these areas of the country, a significant part of the population in Afro-descendant. These racial and regional stereotypes play a significant role in determining not only who can have access to a particular judicial position, but also where. For example, in Antioquia, where blackness is commonly depicted as foreign and disconnected to the identity and demographic composition of the region, Afro-descendant presence was minimal.

### 6.8.5. Lack of self-identification among the Afro-descendant population in certain regions

An additional condition that seems to contribute to the regional differences in the ethno-racial composition of judicial institutions in Colombia is the way racial self-identification appears to be less prominent among the Afro-descendant population of specific regions. In this respect, as I commented when discussing the specific situation of Cartagena, some Afro-descendant persons who are working inside judicial institutions do not self-identify as such. This situation is closely linked to the particularities of ethno-racial identities in Latin America. The lack of self-identification restricts the conversation about

Afro-descendant representation on courts and, I believe, can be a vital element to consider at explaining the apparent low levels of Afro-descendant presence in the courts of some regions.

### 6.8.6. Social mobilization around Afro-descendant representation on courts

A final aspect that needs to be considered is the impact that, in certain instances, social mobilization has had on the level of representation of Afro-descendants in judicial institutions. As I explained concerning San Andrés, several interviewees seemed to connect the high levels of Afro-descendant presence on the courts with the activism displayed by the region's leaders before the Superior Council of the Judicature and other state institutions. According to the participants, social mobilization calling for a more inclusive judiciary is one of the leading causes for the presence of *Raizals* in San Andrés' courts. A similar situation seems to happen in the SJP, although not from a geographic perspective. The sizable level of presence that indigenous persons and Afro-descendants have in this court appears to be, at least in part, the consequence of the social mobilization efforts of the ethnic movements to attain representation in the transitional justice mechanism. In contrast, the lack of social mobilization around the issue of Afro-descendant presence on the courts in other regions could also help to explain the limited level of Afro-descendant presence in these areas.

In the following chapter, I will discuss some of the factors that are potentially responsible for the low level of Afro-descendant representation on Colombia’s courts and the racial stratification of the judicial system.

## III. "We need to prove we are capable; despite the fact we are black": Factors contributing to Afro-descendant underrepresentation on Colombia's courts and the stratification of the judicial system

In this chapter, I will discuss some factors contributing to Afro-descendant underrepresentation and the stratification of the judicial system in Colombia. My purpose is not to present a "list of causes" of Afro-descendant underrepresentation on the courts of Colombia. Such a taxonomical process would require a multiplicity of interdisciplinary studies that exceed the scope of this dissertation. Rather, my purpose is to explore a group of conditions that might help to explain the low level of presence that Afro-descendants have in judicial institutions in this country, which should be further analyzed and tested in future research endeavors on this matter.

I will refer to the following aspects: The statistical invisibility of Afro-descendants; the overlapping of race and class forms of oppression in the Afro-descendant population; the inequalities and difficulties to access education and, particularly, higher education; the interaction of race- and gender-based forms of oppression; the influence of race, color, and identity; the inequalities and disparate impacts of judicial selection mechanisms; and the systemic racial discrimination within judicial institutions and in the legal profession.

### 1. The statistical invisibility of Afro-descendants

A factor that seems to be closely linked with the low level of Afro-descendant presence on judicial institutions in Colombia is the absence of data on this regard and, more extensively, the great challenge that statistical invisibility represents for the equality claims of subordinated ethno-racial groups. The lack of ethno-racial data concerning the composition of the Colombian judiciary is an element that contributes to the Afro-descendant representation on the courts because it facilitates the concealment of this problem. The limitations in data collection on ethno-racial identities in the judiciary facilitates that the racial homogeneity

of the judicial system continues to go unnoticed and unchallenged. Ethno-racial statistical invisibility is a powerful tool to maintain racial subordination. The lack of ethno-racial statistics empowers the misperception that race is not an issue that needs to be researched in the *mestizo* nation. This understanding leads to a vicious cycle: Statistic invisibility hides racial disparities in Latin American countries, which, in turn, justifies the lack of data collection on race and ethnicity.

Regarding the impact of statistical invisibility on ethno-racial groups, Hugo Ñopo mentions that the absence of data is partially to blame for the lack of more substantive research on income inequality affecting minorities in Latin America. Ñopo affirms that the lack of census data disaggregated by ethnicity and the under-registry of people belonging to ethnic minorities in public records and identity documents "is a sign of the inferior situation in which ethnic minorities often live".[563] Likewise, Rita Segato suggests that acknowledging race in Latin America should be considered as a form of decolonial action.[564]

During the interview process, several participants made references to statistical invisibility and the deficiency in reliable data on ethno-racial identities in the judiciary as problem to establish Afro-descendant representation on the courts. One of them sustained that ascertaining the level of Afro-descendant representation on the courts was difficult due to the lack of data collection on the ethno-racial composition of the courts.[565] Others noted that there was also an absence of race-related data concerning the people who came before the courts to resolve conflicts, which represented a significant barrier for establishing whether the justice system similarly treats Afro-descendant and not-Afro-descendant litigants.[566]

The problem of Afro-descendant statistical invisibility is not either new, particular to Colombia, or exclusive of the judicial sector. This situation is rooted in a long-lasting tradition present in the region of excluding minorities and rendering them invisible. Mara Loveman explains that modern states use

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[563] HUGO ÑOPO, NEW CENTURY, OLD DISPARITIES: GENDER AND ETHNIC EARNINGS GAPS IN LATIN AMERICA AND THE CARIBBEAN 245 (2012), https://elibrary.worldbank.org/doi/abs/10.1596/978-0-8213-8686-6 (last visited Jul 16, 2018).
[564] Rita Laura Segato, *El color de la cárcel en América Latina: Apuntes sobre la colonialidad de la justicia en un continente en desconstrucción*, NUEVA SOC. 142–161, 144 (2007).
[565] Interview 9.
[566] Interviews 15 and 22.

population classifications to know and understand those who are part of the societies they govern, as well as to impose burdens and grant benefits.[567] In Latin America, ethno-racial classifications' use in censuses has depended on large scale socio-political coordinates related to the construction of modern national states.[568] Loveman remarks that most national censuses that took place in the region after independence included questions about race or color.[569] Most countries included race-related questions in at least one of their censuses in the first part of the 20th century, too.[570] In this period, "Latin America's census reports often equated national progress with racial progress. In turn, racial progress meant the 'whitening' populations."[571] Thus, censuses of this period tended to emphasize aspects such as immigration and *mestizaje* rates, which were believed to be good indicators of demographic improvement.[572]

The second half of the 20th century saw a rapid decline of race or color questions in the Latin American national censuses.[573] Loveman describes that, unexpectedly, the exclusion of racial classification questions from national censuses in this period seems to be linked to the decline of ideas that served as grounds for collecting data on race. These decaying ideas included the validity of concept of race and the belief that a country's racial composition is connected to its national progress.[574] In this period, Afro-descendants became invisible in the national census. In contrast, indigenous people, continued to be classified based on their cultural difference.[575] Due to this situation, "by the 1960s only two countries (Brazil and Cuba) still included racial variables in their censuses."[576]

Mala Htun mentions that "though Brazil and Cuba had collected data on race/color for many decades, only in the 1990s did an additional country—Colombia—begin to collect data on

[567] LOVEMAN, *supra* note 64 at 1–5.
[568] *Id.* at 1–5.
[569] *Id.* at 208.
[570] *Id.* at 208.
[571] *Id.* at 209.
[572] *Id.* at 209.
[573] *Id.* at 209.
[574] *Id.* at 209.
[575] *Id.* at 210.
[576] AFRO-DESCENDANTS IN LATIN AMERICA: TOWARD A FRAMEWORK OF INCLUSION, *supra* note 138 at 17.

Afrodescendancy."[577] It took until the last decades of the 20th century for Latin American countries to reintroduce questions about race in their censuses and to provide visibility to their Afro-descendant populations once again.[578] In recent years, social and political changes in the region led to the constitutional recognition of new rights for Afro-descendant populations.[579] This change has contributed to greater visibility of this group in different countries. In the 2000s decade, approximately half of the countries of the region had included ethno-racial variables in their national censuses.[580]

Despite this shift towards Afro-descendant statistical visibility, Álvaro Bello & Marta Rangel express that assessing the population numbers for this group is not an easy task in Latin America.[581] Even recently, many countries' national censuses do not collect information on this variable. Furthermore, in countries where this information is collected, "the response of the interviewee is conditioned by a number of factors, such as income and education levels, awareness of negritude, and the need for 'whitening.'"[582] The World Bank suggested that there are considerable challenges in the collection of data about Afro-descendants in the Latin American region. Many countries in this part of the world deny ethno-racial discrimination and block the collection of data on this population.[583] The *mestizaje*'s description of Latin American countries as both racially homogenous and racially harmonious has been used to assert that collecting data on Afro-descendant populations could constitute an act of racial discrimination in and of itself.[584]

Edward Telles remarks that, in Latin America, race and ethnicity have a multi-dimensional nature. The measurement of such characteristics in the region's population depends on different aspects: "How ethnoracial questions are worded, which categories are used, and who answers the question."[585] Telles urges

[577] HTUN, *supra* note 2 at 24.
[578] LOVEMAN, *supra* note 64 at 249.
[579] Uprimny, *supra* note 119.
[580] AFRO-DESCENDANTS IN LATIN AMERICA: TOWARD A FRAMEWORK OF INCLUSION, *supra* note 138 at 17.
[581] Bello and Rangel, *supra* note 6.
[582] *Id.* at 48.
[583] AFRO-DESCENDANTS IN LATIN AMERICA: TOWARD A FRAMEWORK OF INCLUSION, *supra* note 138 at 17.
[584] *Id.* at 17.
[585] TELLES, *supra* note 42 at 4.

Latin American states to consider using tools that do not only depend on self-identification for monitoring racial inequality and discrimination since a person's race is often determined through perception.[586] Moreover, he asserts that two people who self-identify as members of the same racial group (*e .g. mestizo, negro, indígena*) could face unique situations of discrimination based on skin color differences.[587]

In the case of Colombia, Oliver Barbary and Fernando Urrea mention that, following the enactment of Law 70 of 1993, the 1993 national census included a question on ethnic identity.[588] This question intended to solve the problem of statistic invisibility of Afro Colombians, using the territorial and cultural characteristics that would define an ethnic group as a way of counting them. However, the census of 1993 ended up undercounting Afro Colombians.[589] Even the governmental agency in charge of conducting the census—DANE—recognized that the ethnic question had a bias that benefited indigenous peoples. Many respondents declared that they belonged to an ethnic group without specifying to which one, which made it very difficult to differentiate between Afro-descendant and indigenous respondents.[590] Moreover, this census's ethnic question did not ask people to report on their skin color. The lack of a color question was a problem because, as the government later declared, many Afro Colombians did not see themselves as being part of an ethnic group, which in the end explains why only 1.52% of the national population was counted as black.[591] In conclusion, as Barbary and Urrea explain, it is unlikely that Afro Colombians can be made statistically visible under the concept of ethnic groups since the idea of ethnicity is still artificial and unknown for many of them. The category of race is still the one that has a more significant impact.[592]

The problems affecting the 1993 census seem to persist even today. In November 2019, the Colombian National Administrative Department of Statistics—DANE—released the preliminary results of the 2018 national census, which presented a dramatic decrease in the number and percentage of the Afro-

[586] *Id.* at 10.
[587] *Id.* at 11–12.
[588] Barbary and Urrea Giraldo, *supra* note 20.
[589] HTUN, *supra* note 2 at 24.
[590] Barbary and Urrea Giraldo, *supra* note 20 at 58–59.
[591] *Id.* at 58–59.
[592] *Id.* at 61.

descendant population in the country when compared to the 2005 census.[593] According to the DANE, whereas, in 2005, 4,311,757 persons counted as Afro Colombians in the census, in 2018, this number was only 2,982,224, which represents a decrease of approximately 30.8% of the counted Afro Colombian population.[594] This decrease is not due to external factors, such as mass migration or deaths. The DANE recognizes that the geographical reach of the census, the difficulties with the application of the ethno-racial question, and the low self-identification levels among the Afro Colombian population are likely causes for this decrease. The astounding decline in the counted number of Afro-descendants provides an example of the problem of statistical invisibility of this group and the difficulties that arise when one tries to collect data on ethno-racial identity in this context. Furthermore, Edward Telles mentions that the estimates of the Afro-descendant population in Colombia jump dramatically depending on the type of mechanism used for counting them:

> Estimates based on PERLA data varied from 19.4 percent obtained by asking the 2005 census question on self-identification, 18.6 percent using the open-ended question on racial identity, and 15.1 percent based on the number of respondents who claimed to have black or African ancestors. Given the size of the data set, there is about a 3 percent range of error, but the relative sizes using these three criteria remain.[595]

Likewise, Tianna Paschel describes that there are different official estimations regarding the percentage of the national population that is Afro Colombian, with some as low as 1.52% and some as high as 26%.[596] Differences in the estimations are partially a consequence of the lack of consistency of ethno-racial data collection in national censuses: "Between 1,905 and 2,005, only four of Colombia's eleven

[593] POBLACIÓN NEGRA, AFROCOLOMBIANA, RAIZAL Y PALENQUERA: RESULTADOS DEL CENSO NACIONAL DE POBLACIÓN Y VIVIENDA 2018, 69 16 (2019), https://www.dane.gov.co/files/investigaciones/boletines/grupos-etnicos/presentacion-grupos-etnicos-poblacion-NARP-2019.pdf (last visited Mar 10, 2020).
[594] *Id.* at 16.
[595] TELLES, *supra* note 42 at 97.
[596] PASCHEL, *supra* note 33 at 133.

national censuses included a question aimed at counting its black population."[597] All these censuses provided significantly different measurements about the share of the national population that is Afro Colombian. The censuses of 1912 and 1918 concluded a 6% of Colombians were Afro-descendants. The 1993 census concluded that only 1.5% were so, while the 2005 census delivered a percentage of 10.5%. These radical changes seem to be the effect of situations such as reclassification, shifts on the definitions of who counts as Afro Colombian, as well as changes in the census question about ethno-racial identity.[598]

In conclusion, there is a significant problem of statistical invisibility affecting Afro-descendants in Colombia and, more extensively, Latin America. I consider that the lack of reliable data on the ethno-racial composition of judicial institutions and the Colombian society is a relevant factor that might help to explain the problem of Afro-descendant representation on judicial institutions and the racial hierarchization of the judicial system. The lack of data in this respect prevents public officials, civil society, and academia from engaging in an informed conversation about the limited presence that minorities have on the court system, which, in turn, limits potential actions to address the situation.

### 2. The overlapping of race and class forms of oppression in the Afro-descendant population

Socio-economic inequality is the second aspect that helps to explain the low level of Afro-descendant representation in judicial institutions. More precisely, the correlation between subordinated ethno-racial identities and low-class status. The ECLAC has pointed out that race and class are two forces that shape the hierarchization of Latin American societies.[599] A person's class status may result from the accumulation of race-based privileges or burdens throughout the years—or even across generations.[600] Mala Htun states that in most Latin American countries, race and class divisions tend to overlap with each

[597] *Id.* at 133.
[598] *Id.* at 133.
[599] UNITED NATIONS: ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, *supra* note 127.
[600] *Id.*

other. This phenomenon leads to the racial dimensions of inequality to remain invisible since they are explained as class differences that, some argue, can and should be resolved through universal social programs.[601]

Discussions about class issues and socio-economic inequality were prevalent during the interview process. Participants were outspoken about how Afro-descendants faced significant levels of poverty across the country and were located in the lowest ranks of the socio-economic system.[602] Class factors were relevant at characterizing the experiences that interviewees had in their access to the legal profession and at attaining positions within judicial institutions. Participants pointed out that socio-economic disadvantage undermined Afro-descendants' access to high-quality legal education.[603]

Afro-descendant participants were candid about their own experiences of class inequality, with several of them describing that they grew up in low-income families and that had to work and study to be able to attend college. Many were the first professionals in their families, had to go into debt to pay for school, and faced financial limitations that severely conditioned the selection of their professions and the universities they attended. Some feared they could not finish school due to a lack of funding or had to study at night. Most of them grew up in impoverished neighborhoods that have severe limitations in access to public services. Some reported that their parents were illiterate or employed in manual labor positions. Most of their peers became technicians instead of professionals.[604] Scholarships and other forms of academic awards played a decisive role in the access to education for many of these professionals. Some of them explained that this was, perhaps, the only way in which they could have had access to higher education.[605]

Several of the accounts also described situations of inter-generational economic disadvantage and how these conditions shaped their paths toward education and employment. This issue was noticeable, for

[601] HTUN, *supra* note 297 at 21.
[602] Interview 1.
[603] Interviews 1, 3 and 17.
[604] Interviews 4, 8, 9, 14, 16, 17, 18, 20, 23, 25, 27, 30, 32, 34, 35, 36, 39, 40, 41, 43, 44 and 45.
[605] Interviews 13 and 17.

example, in how many of the respondents mentioned that their parents were teachers,[606] which is a type of position that Afro Colombians commonly use to climb up the socio-economic ladder, or in the different accounts in which the participants referred to low-class experiences as a source of motivation to attain the highest possible level of education: A participant mentioned:

> When I had four years of age, I already know how to read. I do not remember myself before I could read. That is because of my mom. When she was little, she lived in a town on the Pacific coast of Nariño called [name of town]. My mom was born in a rural area of the municipality of that town. I mean, she lived there a big part of her infancy. Later on, she left that town and went working as a domestic worker in Cali. She arrived at that house to be a domestic worker, but at that time, it was a truly rough time in which domestic work was very similar to slavery. However, she did get to a family that, when they found out she did not know how to read, registered her at night school. My mom was also very insistent about that. She wanted to go because she wanted to study. She wanted to learn how to read. My mom learned how to read when she was 15 years old. Then, she was obsessed with the idea that she was going to die, and her daughters would be left out without having learnt how to read. Because of that, all of my games were with letters. While everybody else had building blocks to play with, I had letters to learn, so I learned how to read since I was very young. My mom taught us how to read to my sister and me. She had this obsession that we had to know how to read. She was obsessed with the idea that we had to finish high school and then go to college. I mean, it was like neurolinguistics on the go. My sister and I studied. We studied a lot.[607]

Alvaro Bello and Marta Rangel mention that many Afro-descendants in Latin America do not possess means of production and have been forced to leave their ancestral territories to find better economic opportunities.[608] Likewise, Sérgio Costa and Guilherme Leite note that "on average, Afro-Latin Americans,

[606] Interviews 23, 26, 32, 39, 40 and 41.
[607] Interview 18.
[608] Bello and Rangel, *supra* note 6 at 40–41.

in particular women, have a shorter life expectancy, live in poorer conditions, have lower levels of formal education, and have more limited access to public services than the Latin American population as a whole."[609] In 2017, the ECLAC issued a report on the rights situation of Afro-descendants in Latin America, in which it verified the situation of structural inequality that this population faces in the region.[610] The institution highlighted Afro-descendant women's particular concerning condition. Black women face particular challenges in the enjoyment of their rights when compared to other women.[611]

The ECLAC also pointed out that Afro-descendant populations in Latin America tend to be located in urban areas.[612] The indicators of poverty and extreme poverty are higher among Afro-descendants than among the non-Afro-descendant population.[613] This situation of deprivation seems to be correlated with the types of employment and compensation they receive in the labor market.[614] Similarly, In 2018, the World Bank released a report in which the institution asserted that despite the importance of Afro-descendant inclusion for the future of the Latin American region:

> Afro-descendants are disproportionately represented among the poor. In Brazil, Colombia, Ecuador, Panama, Peru, and Uruguay combined, Afro-descendants represent 38 percent of the total population, but about half of all the people living in extreme poverty. They also have fewer years of education and are more often victims of crime and violence. Despite their growing visibility, they are still vastly underrepresented in decision-making positions, both in private and in the public sector. They also have fewer chances of social mobility, as they are 2.5 times more likely to be chronically poor.[615]

[609] Costa and Leite Gonçalves, *supra* note 128 at 54.
[610] UNITED NATIONS: ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, *supra* note 127.
[611] *Id.* at 45.
[612] *Id.* at 56.
[613] *Id.* at 74.
[614] *Id.* at 74.
[615] *Id.* at 15.

The World Bank recognizes that there has been a significant poverty reduction among the Afro-descendant population in the region during the last decade. Nevertheless, this institution also highlights that Afro-descendants have beneficiated less than whites and *mestizos* in terms of poverty reduction rates.[616] Because of this gap in the poverty reduction rates, the World Bank stated that "poverty is over twice as high for Afro-descendants in Brazil and three times higher in Uruguay, and over 10 percentage points higher in Colombia, Ecuador, and Peru."[617] Therefore, children born in Afro-descendant families in the region are more likely to be poor, which decreases their opportunities in life.[618] Additionally, Afro-descendants have fewer chances of social mobility than other ethno-racial groups, as "they are 2.5 times more likely to be chronically poor."[619] This situation creates a "poverty trap" that Afro-descendants can hardly scape. Other aspects worsen this condition of vulnerability, such as rural-urban divide and gender inequalities.[620]

The dreadful perspective on Afro-descendant socioeconomic status is shared by Hugo Ñopo, who asserts that ethnic groups in Latin America are significantly disadvantaged when compared to white persons. According to Ñopo, Afro-descendants have higher poverty rates, lower access to public services, do not have adequate political representation, encounter difficulties for accessing employment, and face significant discrimination.[621] Likewise, Tianna Paschel and Mark Sawyer emphasize that Afro-descendants are among the most economically disadvantaged groups in Latin America, a region with very high levels of poverty.[622]

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[616] AFRO-DESCENDANTS IN LATIN AMERICA: TOWARD A FRAMEWORK OF INCLUSION, *supra* note 138 at 21. (The report warns: "Thus, although Afro-Peruvians and Afro-Uruguayans saw extraordinary annualized poverty decreases of 7 percent and 10 percent respectively in the 2005– 15 period, non-Afro-descendants experienced annualized decreases of 9 percent and 14.5 percent respectively, widening the relative distance between the two groups in each country.")
[617] *Id.* at 21.
[618] *Id.* at 22.
[619] *Id.* at 22.
[620] *Id.* at 22.
[621] ÑOPO, *supra* note 563 at 6.
[622] Tianna S. Paschel & Mark Q. Sawyer, *Contesting Politics as Usual: Black Social Movements, Globalization, and Race Policy in Latin America*, 10 SOULS 197–214, 201 (2008). (Noting that "In addition to state repression, Black populations have also faced the problem of poverty. Afro-descendants are among the poorest in the Americas, a region with more inequality than any other region in the world. While activists are frequently middle class, the mass of the population struggles for everyday survival. Most Latin American countries have very small Black middle classes that might support sustained mass racial social movements., at the same time, scholars—Black and otherwise, from Latin America and abroad—have played an essential role in supporting social movements").

Despite the significant overlapping of race and class subordination, I should mention that a part of the participants of the study seem to come from privileged backgrounds. 25% of respondents who provided data about the institutions where they completed high school informed that they graduated from private schools. 75% declared that they graduated from public school. If one uses this information as a proxy for class, this could mean that least a quarter of them seem to have grown up in middle-class or above contexts.

Nevertheless, certain participants who came from middle and upper-middle-class families indicated that they were exceptions to the general condition of socio-economic exclusion that prevents Afro-descendants from accessing legal education and judicial employee positions.[623] The impact of class privileges was also sensible in individual accounts. A woman Afro-descendant judicial employee described a sensible difference in the treatment that Afro-descendant judges receive in comparison to other less-affluent people with the same ethno-racial identity. The participant mentioned: "When you are a judge, and eventually become a magistrate, people see you differently. Yes, you are black, but you are seen differently. When a magistrate arrives in certain places, he arrives with his bodyguards. I arrive with my backpack, and let's say that things change a little."[624] In contrast, some participants affirmed that they had experienced discrimination because they were presumed to be due to their ethno-racial identity.[625]

The overlapping of racial subordination and low-class status seems to be one a reason for Afro-descendant underrepresentation in judicial institutions. Afro-descendants have, in general, less access to good-quality education, fewer employment opportunities, and more restricted professional networks. These conditions ultimately limit their chances to become judges and judicial employees—I will discuss some of these aspects in greater detail in the following sections. Similarly, class status seems to be a factor to consider not only to assess whether Afro-descendants have adequate access to judicial positions, but also which Afro-descendants do. As I could observe during the interview process, a high-class status undeniably facilitates Afro-descendants' access to judicial institutions since class privileges can help to remove some

[623] Interviews 1, 23, 24, 25 and 42.
[624] Interview 16.
[625] Interview 1.

of the race-based obstacles that they experience when they try to reach such positions. Thus, race and class intertwine to define the stratification of judicial institutions in Colombia.

### 3. Inequalities and difficulties in accessing education and, particularly, higher education

Deeply connected to the previous element, another aspect that was very prominent in the interviewee's accounts concerning the potential reasons for Afro-descendant underrepresentation in the judicial system was the multiple difficulties that this group experiences in accessing education and, especially, high-quality legal education. Afro-descendant access to legal education is another field in which the problem of statistical invisibility presents significant challenges to my research. As described in chapter 1 of the manuscript, I submitted an information request to the Ministry of Education. I asked for data concerning the number of law programs authorized to function in the country and of students in each one of these programs disaggregated by gender and ethno-racial identity. I inquired about the total number of graduates in the past five years disaggregated according to the same identity characteristics and also asked about affirmative action programs for women, indigenous persons, and Afro-descendants.

In response to my petition, the Ministry provided information concerning the number of active law programs, currently enrolled students, and graduates from the 2013-2017 period, and even presented disaggregated data by gender for the number of enrolled students and graduates. However, as it happened in the case of the judiciary, no data was provided regarding ethno-racial identity in higher education institutions. The Ministry of Education declared:

> With respect to the ethnic identification data, we indicate you that the information report of the population by ethnic group is based on self-recognition and self-identification processes, and the completion and reporting of the variable before the information systems of the National Ministry of Education is responsibility of the higher education institutions in accordance with article 7 of the Decree 1767 of 2006. Currently, the ethnic identity variable shows a high level of underreporting

by the institutions. In consequence, the statistics that are obtained from this variable do not represent the totality of the attention of this population in the country's higher education system.

The Ministry recognizes that even though the data collection instrument does include an ethnic identity variable, universities are failing to comply with their duty to report this information, which, in turn, leads to a general underreporting of the ethno-racial composition of higher-education institutions. No additional information was provided about why the universities did not provide such information, nor concerning whether the Ministry has taken any action to increase compliance of this reporting duty.

Given the lack of data, I also submitted information requests directed to a group of universities located in different cities of the country to try to obtain at least some data concerning the composition of the student body and faculty. The criteria for selecting these institutions was that they had graduated Constitutional Court magistrates. I sent these rights of petition to the Externado de Colombia University, the University of Medellín, the University of the Andes, the National University of Colombia, Javeriana University, the University of Antioquia, Our Lady of the Rosary University, the Free University of Colombia, the University of the Atlantic, the University of Caldas, the Latin American Autonomous University, and the University of Cartagena. The University of Medellín, Javeriana University, the University of the Atlantic, and the Latin American Autonomous University did not respond to the petition. Besides, only the University of Cartagena, Our Lady of the Rosary University, Externado de Colombia University provided data about the ethno-racial composition of the student body in their law programs.

In all the institutions that reported data, Afro-descendant students appeared to be scarce. This assertion that seems to be equally true for the University of Cartagena, located in a Caribbean coast city where a significant portion of the population (36.1%) is Afro-descendant,[626] and in Our Lady of the Rosary University and Externado de Colombia University, both located in Bogotá, where the Afro-descendant

[626] BOLETÍN CENSO GENERAL 2005: PERFIL CARTAGENA, BOLÍVAR, *supra* note 512 at 2.

population is low (1.5%).[627] Despite the differences in demography, the level of Afro-descendant presence among the law student body in all three universities looks to be lower than the one corresponding to their share of the population in the city where they are located. Furthermore, the University of Caldas provided data concerning the ethno-racial composition of the law school faculty, asserting that Afro-descendants or indigenous persons occupied none of the 35 faculty positions in the university's law school (including full-time and partial-time faculty).

| Ethno-racial composition of law student body [2018-2019] | | | | | | |
|---|---|---|---|---|---|---|
| **Institution** | Number of enrolled law students | Number of women law students | Number of Afro-descendant law students | Number of Afro-descendant women law students | Number of indigenous law students | Number of indigenous women law students |
| **University of Cartagena** | 925 | 544 (58.81%) | 51 (5.51%) | 23 (2.48%) | 13 (1.41%) | 4 (0.43%) |
| **Our Lady of the Rosary University** | Approx. 1225.[628] | Approx. 671[629] (54.8%) | 16 (1.31%) | Missing data | 15 (1.22%) | Missing data |
| **Externado de Colombia University** | 1744 | 1043 (59.81%) | 12 (0.69%) | 8 (0.46%) | 12 (0.69%) | 5 (0.27%) |

[ Source: Answers to the rights of petition. The main researcher conducted the number's tabulation]

Many participants referred to the limited number of Afro-descendant students at higher education institutions as well.[630] Several of them pointed out that during their time in law schools, the number of Afro-descendant students was in very low, with some of them even stating that they had the experience of being the only ones in their respective classes.[631] A similar situation happened in the case of indigenous interviewees, who described the experience of being "the only indigenous person" in their class.[632] An

[627] BOLETÍN CENSO GENERAL 2005: PERFIL BOGOTÁ, BOGOTÁ, 6 2 (2010), https://www.dane.gov.co/files/censo2005/PERFIL_PDF_CG2005/11001T7T000.PDF (last visited Mar 10, 2020).
[628] BOLETÍN ESTADÍSTICO 2018, 56 20 (2019), https://repository.urosario.edu.co/bitstream/handle/10336/19887/Boletin%20Estad%C3%ADstico%202018.pdf?sequence=1 (last visited Mar 10, 2020).
[629] *Id.* at 20.
[630] Interviews 4, 5, 6, 7, 8, 9, 11, 12, 22, 24, 26, 27, 29, 33, 37, 40, 41, 42, 43 and 44.
[631] Interviews 9, 12, 24, 41.
[632] Interview 11.

Afro-descendant judge who attended a private law school in a majoritarian Afro-descendant city in the Caribbean region, mentioned:

> I think I was the only Afro-descendant in my class. I refer to brown people (*gente morena*). Obviously, among the Afro-descendants, some of us have more melanin than others. However, in my class, and I tell you, that is a good question, during the five years I attended [law school], I think I was the only Afro. The darkest in the classroom.[633]

However, the actual number of Afro-descendant persons enrolled in law schools could be higher than the one that participants report since n this context, too, self-identification becomes a limitation to assess representation.[634]

The World Bank has declared that there has been significant progress regarding Afro-descendants' access to education across the Latin American region. This improvement has benefited the general population in Latin American countries. However, noteworthy access barriers persist.[635] Afro-descendants still have considerably worse educational accomplishment levels than other groups (64% of Afro-descendants versus 80% of non-Afro-descendants at primary level).[636] This disparity persists regardless of socio-economic status.[637] Education gaps are more prominent in secondary and tertiary education and had not been reducing in recent years.[638] Afro-descendants not only have higher secondary education dropout rates but also account for only 12% of the people with tertiary education degrees, despite representing a quarter of the population over 25 years of age in the region.[639]

[633] Interview 5.
[634] Interview 33.
[635] AFRO-DESCENDANTS IN LATIN AMERICA: TOWARD A FRAMEWORK OF INCLUSION, *supra* note 138 at 23.
[636] *Id.* at 23.
[637] *Id.* at 23.
[638] *Id.* at 23.
[639] *Id.* at 23.

The limited number of Afro-descendant students in law schools seems to be concerning in public and private universities alike, and particularly severe in "elite" institutions.[640] In the case of private universities and particularly expensive private universities, the low level of Afro-descendant presence seems to be directly linked to the elevated tuition costs. In the case of public universities, the low Afro-descendant access appears to be connected to the law school admission processes. In public universities, applicants' selection tends to heavily rely on standardized tests that, some participants believe, play against candidates who graduated from public schools, where the quality of education is perceived to be worse.[641] One of the participants mentioned: “Well, I was admitted to a public university, which is, contrary to what one might think, pretty hard for a public school student to study in a public university. Those who can pass the test are those coming from good schools."[642]

There are exceptions to the general perception of Afro-descendant absence from law schools in Colombia. Some participants mentioned that a significant portion of their law school class was Afro-descendant.[643] The lack of statistical data in this respect does not allow me to identify these universities fully. Nevertheless, my perception is that these institutions tend to be private universities located in areas with particularly numerous Afro-descendant populations. According to participants, in these institutions, the quality of education is not good.[644]

Regarding the quality of higher education that Afro-descendants receive, some respondents pointed out that this was, in general terms, of inferior quality, given the economic restrictions to attend high-quality private universities and the educational deficiencies in primary and secondary education.[645] One of the interviewees asserted:

[640] Interview 44.
[641] Interviews 20, 23 and 40.
[642] Interview 10.
[643] Interviews 18, 21, 30, 31, 32, 35, 38 and 45.
[644] Interview 18.
[645] Interview 32.

> [Afro-descendants face] all the difficulties, all the difficulties, because the universities from which they graduate are not the best. They do not attend [name of prestigious private university]; they are not those prestigious universities. They do not attend [name of prestigious private university]. They are universities with deficient academic standards. Above all, in many private universities in Cartagena, on the [Caribbean] coast, we are just a few black persons who can attend the [name of a prestigious private university]. For example, due to the high cost of these universities. Then, we are forced to attend to low-quality universities, where the cost of the semester is 2 or 3 million pesos, which is easier to cover.[646]

Another participant declared:

> I attended a university in the province. It was a university that educates legal professionals. In that respect, in that context, I acknowledge that the conditions in which our university educates students are not the best. That is not only my case, but the case of all communities located on the outskirts of the country. Of course, there are Afro Colombians that can have access to great opportunities and attend outstanding universities, the best in the country. However, probably the economic position of their parents that facilitates such a situation, or their academic performance allows them to find someone to fund them. That is not the common denominator. The common denominator is to attend a university in a province that offers average, almost low, quality of education, and with those skills go out into the professional world to try to defend everybody's interests.[647]

Most Afro-descendants in Latin America do not have access to high-quality education, much less to institutions of education that consider culture, language, and religious particularities of Afro-descendants

[646] Interview 32.
[647] Interview 35.

who have a particular culture.[648] In 1992, only 2% of the students at the University of São Paulo were black.[649] Also, in Brazil, Afro-descendant children:

> have greater difficulty in entering, remaining in and progressing through the educational system and keeping up to the standards set for their age group. They also attend worse-quality schools, the result of all this being that they are more likely to be failed or to fall behind the standards set for their age group than are white students.[650]

Parallelly to the issue of the quality of education, some participants noted that Afro-descendants have limited access to institutions that are known for graduating lawyers who later occupy positions in the judiciary.[651] They asserted that certain law schools have contact networks or specific profiles that enable their *alumni* to enter the judiciary.[652] Some suggested that there are informal hierarchies that play out at the Colombian courts' recruitment practices and personnel selection.[653] The universities that seem to have these particular connections with the judicial branch appear to be, in a majority of cases, high-cost private institutions.[654]

Class status heavily conditions Afro-descendants' access to higher education. Given the high cost generally associated with legal education, and the limited resources that most Afro-descendants possess, some of the participants referenced having to work and study to be able to afford attending university, which, in many cases, forced them to study at night or under conditions that delayed their graduation.[655]

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[648] Bello and Rangel, *supra* note 6 at 60.
[649] *Id.* at 60.
[650] *Id.* at 50.
[651] Interviews 4, 14, 17, 29, 30 and 37.
[652] *Id.*
[653] Interview 14.
[654] Interview 37.
[655] Interviews 4, 21, 31 and 42.

Scholarships, fellowships, and affirmative action programs played a significant role in enabling access to higher education for certain Afro-descendants and facilitated their access to postgraduate programs.[656] Some participants declared that without these types of awards, it is unlikely they could have been able to become lawyers.[657] A similar situation happens with public universities, in which the costs of attendance are more accessible for low-income students.[658] Nevertheless, scholarships were sometimes partial, which led to some Afro-descendant law students to use loans or other forms of funding to cover their education costs.[659]

In the field of affirmative action programs, several Latin American countries have made significant progress to better guarantee access to education for Afro-descendant populations. The most notable example is Brazil, where Law 12,711 of 2012 put in place a system of quotas for public federal universities for Afro Brazilians.[660] The program takes into consideration different criteria and reserves 50% of seats for students graduating from public schools and who come from low-income backgrounds. Within this percentage, it creates a quota for Afro-descendant and indigenous students, corresponding their share of the population in the respective state.[661] Following this law, some universities established independent affirmative action measures for graduate programs.[662] These initiatives are also independent of the benefits established in Law 11,096 of 2005, which establishes scholarships for students from low-income families to attend private universities.[663]

In the case of Colombia, affirmative action and scholarship programs for Afro-descendants have been modest. Decree 1627 of 1996 established a special system of education loans for low-income Afro Colombians with outstanding academic performance and educational achievement.[664] Additionally, some

[656] Interviews 8, 10, 13, 15, 22, 29, 30, 36, 37 and 40.
[657] Interview 31.
[658] Interviews 25 and 36.
[659] Interviews 17 and 37.
[660] UNITED NATIONS: ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, *supra* note 127 at 127.
[661] *Id.* at 127.
[662] *Id.* at 127.
[663] *Id.* at 127.
[664] D. 1627/96, septiembre 10, 1996, DIARIO OFICIAL [D.O.] (Colomb.).

universities have established independent affirmative action programs. However, most of them are relatively limited in their scope.[665] In this regard, although according to the Ministry of Interior, approximately 60 Colombian universities and institutions of higher education offer scholarships and other incentives for Afro-descendant students, these tend to provide only partial funding or, in the case of quotas, only reserve a few seats *per* academic program or department.[666]

The urban-rural division and the geographic location condition effective enjoyment of the education service. As I explained in chapter 2, some regions that concentrate large Afro-descendant populations (*e.g.*, San Andrés, Tumaco, and Buenaventura) do not have any law schools, which constitutes a significant obstacle for the group's access to legal education. A judge from an Andean city of Colombia commented:

> If you are in a city like Medellín, you can quickly get a postgraduate degree after another. In a few years, you can get a post-graduate degree in family law, in administrative law, in civil law, in criminal law. You can get 5 or 6 postgraduate degrees. In the end, every one of them gives you a score [in the selection process]. If you are living in a region that does not offer postgraduate degrees, if you are working there, if you have your initial degree, some postgraduate degrees you did online, or are traveling to other cities, if that is where you are living and have your professional activity, that supply, that supply of knowledge, and the supply of this type of studies are not available.[667]

This comment exemplifies how inequality in access to legal education constrains the possibility of some Afro-descendants to acquire the academic credentials necessary to have access to judicial positions. As I explained in chapter 2, Afro-descendants comprise a significant part of the population in peripherical

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[665] *Id.*
[666] Ministerio del Interior, *Listado de Universidades que Otorgan Descuento a las Comunidades Negras, Afrocolombianas, Raizales y Palenqueras*, https://dacn.mininterior.gov.co/sites/default/files/listado_de_universidades_que_aplican_descuento_mayo_2018.pdf (last visited Mar 10, 2020).
[667] Interview 3.

areas of the country, which means that they often lack an adequate provision of services, including education. In this respect, an interviewee declared:

> It is known that there are vast differences between an alumnus of the University of the Pacífico or a university in Barranquilla or Cartagena, and an alumnus of the University of Antioquia, EAFIT or the University of Medellín. The opportunities are different. Maybe because of the conditions of development of those cities and the peripherical conditions of ours. Therefore, we do not have the same training, nor the same opportunity to, for example, having similar conditions to compete for those positions, at least through a merit-selection process.[668]

The barriers to access higher education often leads to forms of migration.[669] Many of the participants asserted they had to leave their cities and regions of origin because they could not receive higher education there. I call this phenomenon *"educational migration.*[670] One of them mentioned: "My process to become a lawyer started by having to leave my city of origin [name of the city], in the region of Chocó, because by the time I was in school there were no universities in that geographic area that offered a law program."[671] In certain situations, these experiences of educational migration are inter-generational. Some participants explained that their parents underwent migration processes due to this same reason.[672] Most of the migrating students move to central cities of the country, such as Bogotá, Medellín, Cali, or Cartagena, where the educational offer is robust.[673] As one might expect, class status often conditions the possibility of migrating to study in other cities due to the significant costs associated with educational expenses, relocation, and establishment in a new city.[674] A participant mentioned:

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[668] Interview 35.
[669] Interview 3.
[670] Interviews 6, 7, 14, 20, 23, 24, 27, 31, 33, 36, 39, 40, 41, 42, 43 and 44.
[671] Interview 6.
[672] Interview 7.
[673] Interview 8.
[674] Interview 14.

> In San Andrés, access to education is not easy because of the costs. It is an economic matter, and well, also social. For youths, everything is fast. However, financially, it is very demanding because the parents had to create another home [in a different city] to send their child to. Even if it is to a dormitory, they have to cover the room, board, tuition, and additional expenses. That is tough.[675]

Likewise, class status also conditions the destinations of educational migrants. In some cases, middle-income families send their children to cities where they can reside with family or friends, or where their older siblings have already relocated to. This decision lowers the costs associated with this practice.[676] Furthermore, many Afro-descendants who become educational migrants face significant financial hardships to cover their maintenance and school-related costs.[677] They also undergo processes of uprooting, given the difficulties to afford the costs associated with visiting their families and the cultural clash they experience in their new homes. An Afro-descendant woman judge in a Caribbean city of Colombia stated:

> The students, thanks to the great effort of our parents, had to go for the entire year because we did not have the opportunity to come back home in June. At that time, there were not the same communication alternatives that you see today, much less the transport systems that you see today, with lower fares. At that time, it was costly. Our parents had to send us away in January, and we could come back in December to spend Christmas with our families.[678]

A final element to consider is discrimination in this specific setting. Although I will refer more extensively to the issue of racial discrimination within judicial institutions and the legal profession in the final section of this chapter, I would like to highlight some aspects regarding racial discrimination

[675] Interview 25.
[676] Interviews 14 and 27.
[677] Interview 20, 33 and 36.
[678] Interview 26.

experiences in the context of higher education. Participants pointed out not only to situations of structural discrimination and socio-economic inequality,[679] but also to events to overt racial discrimination during their time at law school.[680] In this respect, a woman Afro-descendant judge living in the city of Bogotá described that while she was a law student, she experienced multiple situations of discrimination from faculty, which ultimately led her to transfer to another university. She mentioned that:

> The last straw was that one day I had a final exam, in which we delivered a group paper, and that was the final grade. When they returned our paper, next to the names, there were the grades. Nevertheless, she [her partner] got a five, and I got a four. I said: 'this must be a mistake' because it was only one paper, there was not oral defense, just the paper. Then I went to talk to the professor with my classmate and we told him: 'We think that there was a mistake, because you gave her a five, and you gave me a four'. The answer that the professor gave me was: 'you should be thankful that I gave you that grade because you know that at this university black people do not study [enough], and what they do is to lean on white people to be able to pass the classes, so you should thank me I gave you a 4.' At that moment I knew I was in the wrong place and that I needed to leave.[681]

The discriminatory language was a collective experience in the lives of Afro-descendant students. One of them mentioned that during her time in law school, other students called her *"pelo de alambre"* (wire hair),[682] another participant described how even faculty tended to call her *"Negrita"* (little black girl),[683] and a third one referred to the frequent use of racially biased expressions in the classroom that tended to go unnoticed, to the point of describing how one of her classmates, a white-*mestizo* attorney working on human rights law, during one of the classes said:

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[679] Interviews 1, 3, 4, 5, 8, 10, 13, 14, 16, 17, 18, 21, 25, 27, 28, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45.
[680] Interviews 2, 6, 12, 15, 16, 19, 27, 33, 40 and 42.
[681] Interview 15.
[682] Interview 33.
[683] Interview 16.

> Excuse me! [there were three Afro-descendant students in the same class, including the participant], but I have always believed that the people from the Pacific and the Atlantic coasts complain a lot. If they are poor is because they are lazy. They do not want to work and decide to cry over it instead. Black people only like parties and buzz.[684]

Several participants, particularly women, had experiences in which they were confused with cleaning services employees at their places of education, due to their gender and race.[685] Discrimination manifested through the denial of Afro-descendant's contributions to knowledge and society, too. One of the interviewees described that when he proposed to have a seminar on African philosophy at the university where he studied, the school administrators replied by denying that African philosophy existed at all.[686] The participant commented that: "In education, the exclusion of knowledge, history, and contributions of black people is widespread."[687] Moreover, participants coincided that they did not receive any sort of training regarding ethnic rights or Afro-descendants' rights while they were in law school since such academic offer did not exist.[688] Participants suggested that experiences of discrimination undermined their academic performance and affected their relationships with their peers, to the point of not being able to say their names in class without fear.[689]

I consider that racial discrimination in education plays an essential role in explaining the situation of Afro-descendant underrepresentation in the judiciary. Experiences of discrimination do not only exclude people from educational settings; they block their access to different positions and impair the development of their academic potential in institutions of higher education. The World Bank has asserted that the

[684] Interview 37.
[685] Interview 19.
[686] Interview 23.
[687] *Id.*
[688] Interview 25.
[689] Interview 16.

differential educational outcomes between Afro-descendants and non-Afro-descendants in Latin America are, in part, the effect of ethno-racial discrimination:

> Discrimination plays a vital role in explaining some educational gaps and outcomes. Education systems across the region fail to promote the recognition of Afro-descendant identities; on the contrary, they contribute to promoting stereotypical and folklore-driven representations. Lack of public funding, inadequate facilities and class materials, and unsupported faculty are other factors that have been found to limit the performance of Afro-descendant youths and children. Afro-descendant families also face obstacles in covering school-related expenses, including tuition, transportation, and school supplies.[690]

In conclusion, the role of education inequalities, racial discrimination in education, and the difficulties in accessing higher education are factors that appear to be contributing to the underrepresentation of Afro-descendants in Latin American courts. Additional research efforts should analyze the relative weight that this variable has on this problem.

### 4. The interaction of race- and gender-based forms of oppression

Similarly to what occurs with class dynamics, gender directly influences the issue of racial stratification of judicial institutions in Latin America. Gender subordination played a sensitive role in the participants' responses (particularly of women's responses) concerning the ethno-racial composition of Colombian judicial institutions and in the answers offered to the rights of petition. This entanglement of race and gender is not surprising. As Peter Wade asserted, these two categories have historically been

[690] AFRO-DESCENDANTS IN LATIN AMERICA: TOWARD A FRAMEWORK OF INCLUSION, *supra* note 138 at 23.

intertwined.[691] This bond between race and gender in Latin America is deeply related to the *mestizaje* narratives. During colonial and post-colonial periods, the *mestizo* nation project demanded the acceptance of a specific type of interracial relations (those involving white men and indigenous and black women) and the rejection of others (the relations between black and indigenous men and white women).[692] Furthermore, Tianna Paschel remembers that the cult of *mestizaje* has also created a smokescreen behind which the sexual coercion and violence against African and indigenous women hide.[693] Because of this historical relation, Wade asserts that, in Latin America, race and sex, instead of being seen as categories that intersect, should be understood as conditions that mutually constitute one another.[694] He argues that in social orders where race is used as a form to stratify society based on ancestry, the control of human sexuality and, mainly, women's sexuality is critical to maintaining such stratified order in place.[695]

There are two main ways in which race and gender seemed to interact during the data-collection process: The intersectionality of race and gender discrimination and the differences in the judicial institutions' treatment of race and gender.

### 4.1. Intersectional race and gender discrimination

Afro-descendant women participants narrated how their gender and race placed them in a position of considerable disadvantage in the legal profession and within judicial institutions. An Afro-descendant judge stressed the differences in life experiences that Afro-descendant men and women encounter in their lives. These differences shape their access to the legal and judicial positions. She mentioned that: "It is not the same, it is not the same, for an Afro man judge than for an Afro woman, I believe that these are also

[691] Peter Wade, *Debates contemporáneos sobre raza, etnicidad, género y sexualidad en las ciencias sociales*, *in* RAZA, ETNICIDAD Y SEXUALIDADES: CIUDADANÍA Y MULTICULTURALISMO EN AMÉRICA LATINA 41–66, 50 (Peter Wade, Fernando Urrea Giraldo, & Mara Viveros eds., 2008).
[692] *Id.* at 50.
[693] PASCHEL, *supra* note 33 at 5–6.
[694] PETER WADE, RACE AND SEX IN LATIN AMERICA 2 (2009).
[695] *Id.* at 58–59.

different fights. For being women, we are seen as weak for this type of position."[696] Some Afro-descendant women participants had specific burdens since an early age. An Afro-descendant woman judicial employee remembered that, during an informal conversation with a professor she had in law school, he told her: "you have three problems: you are a woman, you are poor, and you are black. You need to study much more than these other women [referring to her classmates]". This assertion came to her as a shock, but she eventually agreed with her professor:

> After some time, I realized that those three things that he had said were wisdom because being a woman had already a burden, but being a black woman had an additional burden, and coming from a family that has been socially climbing, but that still has not reached a certain [socio-economic] level, had other complications.[697]

Moreover, participants tended to emphasize that black women's work and accomplishments are consistently overlooked or underestimated.[698] In this respect, one of the participants commented that: "Being a black woman is a barrier in other people's minds to believe what I am, or to associate my profession to my ethnic and gender condition".[699]

A particular area in which indigenous and Afro-descendant women tended to make visible the specific burdens they face due to the interaction of their gender and racial identities was in the way in which they needed to reconcile their family responsibilities with their work.[700] Maternity was also a particularly visible aspect, not only in the participants' narratives but during the interview process itself. During a couple of interviews, I noticed that Afro-descendant women interviewees had brought their children to work or

[696] Interview 15.
[697] Interview 16.
[698] Interview 20.
[699] Interview 8.
[700] Interview 12.

had specific time restraints associated with their parental responsibilities. In contrast, Afro-descendant men appeared not to have this type of responsibility.

Certain stereotypes concerning black women also appeared evident during the interviews. Participants mentioned how they were commonly confused with domestic workers and general services personnel or felt that they could be stereotyped as such, as black women are commonly associated with this type of labor.[701] One of the participants explained that stereotypes make their way into the work environment, which puts Afro-descendant women in an awkward position in professional spaces. She mentioned: "The black woman [is seen] as the domestic worker, or as a woman that is very humorous or sexually active. In the end, it is challenging that, once you move to a professional setting, you can transform that imaginary".[702] In certain instances, black men were the ones who engaged in stereotyping and discrimination against black women.[703] In the case of indigenous women, they also made references to how they faced significant gender-based barriers in the interior of their communities. For example, they were excluded from the possibility of participating in their traditional justice systems.[704]

These reinforced experiences of discrimination faced by Afro-descendant women (and indigenous women) seem to be supported by previous research on intersectional discrimination in Latin America. The ECLAC has pointed out that, in Latin America, gender, race, class, and ethnicity interact and alter how different types of women experience discrimination and inequality.[705] Social indicators, when disaggregated in terms of sex and race/ethnicity, show that Afro-descendant and indigenous women fare worse in different social metrics than other groups of women.[706] These differences might indicate that race could play a more determinant nature than gender at explaining their disadvantageous place in society.[707]

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[701] Interview 8.
[702] *Id.*
[703] *Id.*
[704] Interview 12.
[705] UNITED NATIONS: ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, *supra* note 127 at 45.
[706] *Id.* at 45.
[707] *Id.* at 45.

The specific challenges and burdens that Afro-descendant and indigenous women face in the legal and judicial professions were, sometimes, mentioned as a condition that motivated women to join judicial institutions. These women acknowledged the symbolic relevance that their presence in these positions of power could have for young Afro-descendant women and girls and the black women's social movement.[708]

I should state, however, that Afro-descendant women appear to be in similar, and sometimes, slightly better positions than Afro-descendant men in terms of presence in the judiciary. Out of the 9 Afro-descendant magistrates reported for the superior tribunals of judicial district, 5 were women, and 2 out of 3 magistrates reported in this same category for the administrative tribunals were also Afro-descendant women. In the case of judicial employees, 20 of the 28 Afro-descendant judicial employees reported for the superior tribunals of judicial district were women, and 9 of the 13 Afro-descendants reported in these same positions in the administrative tribunals were women. A similar situation takes place in the case of the SJP, where 3 of the 4 Afro-descendant magistrates are also women.

However, interviewees' accounts seemed to emphasize the specific barriers that Afro-descendant women face (when compared to Afro-descendant men) working in the judicial system. One could interpret that these barriers manifest not as an aggravated barrier for Afro-descendant women to access positions in the judiciary, but as specific situations of discrimination and exclusion in their lived experiences as legal and judicial professionals. Also, although Afro-descendant women seem to be in a slighter better position than Afro-descendant men in terms of access to positions inside judicial institutions, they also appear to be heavily underrepresented in judicial institutions, as the general Afro-descendant population is.

### 4.2. Different treatment of race and gender by judicial institutions

Another aspect that I should mention is how race and gender compare to one another within judicial institutions and the legal profession. There were several ways in which the different treatment of race and

[708] Interview 15.

gender by judicial institutions became evident during the data collection process. The most palpable was, perhaps, the dissimilarities in the available data concerning each identity category. The Superior Council of the Judicature had data on the composition of the Colombian judiciary disaggregated by gender, the National Registry of Attorneys had pre-existing data on the gender composition of the legal profession, certain courts, such as the State Council, provided data concerning the gender composition of the institution. However, these same institutions failed to provide similar data disaggregated by ethno-racial identity. Besides, in their responses to the rights of petition, courts seemed to be more willing to discuss issues of gender than issues of race. As an example, the Administrative Tribunal of Santander sustained: "The corporation has always seen as vital the participation of women in the different positions [of the institution], which materializes in the number of women that currently work in the institution, regardless of the existence of a program or inclusion policy." At the same time, the tribunal avoided any mention of indigenous or Afro-descendant persons.

In addition to these asymmetric treatments of race and gender, inclusion policies based on gender have been more effective than ethno-racial inclusion policies in Latin American judiciaries in specific ways. This greater effectiveness of gender inclusion policies is patent in aspects such as the establishment of a gender commission for the Colombian judiciary, which publishes reports and promotes the inclusion of gender perspectives into judicial decision-making.[709] Another example is the gender quota law, which seeks to guarantee a minimum level of women's representation (30%) in high-level state positions, including the high courts.[710]

Similarly, respondents revealed different instances in which judicial institutions treated gender and race differently. As an example, one of the participants described how, in the SJP, the idea of granting a significant level of representation for women among the group of judicial employees faced less opposition

[709] Comisión Nacional de Género--Rama Judicial, RAMA JUDICIAL DE COLOMBIA (2020), https://www.ramajudicial.gov.co/web/comision-nacional-de-genero/leyes-y-decretos (last visited Mar 18, 2020).
[710] L. 581/00, mayo 31, 2000, DIARIO OFICIAL [D.O.] (Colomb.)

that the idea of adopting similar policies for Afro-descendants and indigenous persons.[711] This different treatment was justified on the basis that it was easier to find qualified women to occupy positions at this institution than it was to find qualified indigenous or Afro-descendant candidates for the same type of positions. According to the interviewee: "… the matter is that many of the magistrates that were appointed, when the ethnic topic was mentioned, [they] left the negotiation table when the characteristics of the [auxiliary] justices were being discussed."[712]

This different treatment of race and gender inclusion claims seems to be consistent with previous literature on this topic. Regarding the interactions between ethno-racial and gender-based social movements in Latin America, Mala Htun describes how countries in the region have opted for an array of mechanisms to guarantee these groups' inclusion at an institutional level.[713] The preferred options have depended on factors such as country-specific political traditions and institutional designs, but also on the structural characteristics of the groups that were trying to be included in society and public institutions.[714] Htun asserts that the easier it is to define the boundary of a group, the simpler it is "for political institutions to target benefits and sort voters by group. When group boundaries are more ambiguous the application of group-specific policies–whether on political inclusion or access to higher education–poses practical difficulties."[715] The author targets a significant difference between ethno-racial groups and women in Latin America. The boundaries used to differentiate between women and men tend to be (at least traditionally) easier to mark than ethno-racial boundaries. Ethno-racial limits are more difficult to demarcate given the extended levels of miscegenation, the complexities of racial classifications, and the history of race relations.[716]

[711] Interview 9.
[712] *Id.*
[713] HTUN, *supra* note 2., at 7.
[714] *Id.* at 7.
[715] *Id.* at 7.
[716] *Id.* at 7–8.

Htun identifies several significant differences between the path that women and ethno-racial groups in Latin America have taken in order to conquer political inclusion policies.[717] She mentions that since class and race divisions tend to overlap in this part of the world profoundly, race-based affirmative action measures may appear threatening to national ruling elites. These policies could introduce new class interests into the democratic debate, in contradiction to the elite's wishes.[718] This threat is not present in affirmative action policies for women. Gander based policies do not experience similar class conflicts with men, as their inclusion in political institutions does not necessarily lead to the incorporation of perceived destabilizing class interests in these areas.[719]

In conclusion, the interactions of race and gender forms of oppression are fundamental to understand the racial stratification of Latin American judicial institutions. This relation exceeds intersectional analysis and the aggravated forms of discrimination that Afro-descendant women experience since Judicial institutions' dissimilarly treat ethno-racial and gender identities. Courts appear to be more receptive to produce information and engage in action to accommodate women's inclusion than Afro-descendant and indigenous' inclusion. Nevertheless, I should also be clear to assert that this differential treatment may be negligible, if one considers the significant challenges that women inclusion and gender justice face in the judicial system.

### 5. The influence of race, color, and identity

There were instances in which participants discussed the relevance of skin color and other physical characteristics in their experiences in judicial institutions. As I explained in chapter 1, authors such as Anani

[717] HTUN, *supra* note 297 at 22.
[718] *Id.* at 22.
[719] *Id.* at 22.

Dzidzienyo,[720] Eunice Aparecida de Jesus,[721] Hebe Clementi,[722] Edward Telles and Tianna Paschel,[723] Tanya Hernandez,[724] Elisa Larkin Nascimento,[725] Peter Wade,[726] and many others coincide in that skin color plays a determinant role in the construction of racial subordination in Latin America. This role is so essential that some of them have used the concept of *pigmentocracy* to define racial relations in this region.[727] Edward Telles expresses that in the case of Colombia, skin color and other phenotypic identifiers seem to be more determinant (or a better predictor) of social status and the benefits and burdens associated with it than racial self-identification.[728] This situation repeats in other countries in Latin America, except for Brazil, as "in all the PERLA countries, skin color was a more reliable predictor of racial inequality, with the exception of Brazil, where identity and appearance tend to be more correlated."[729] In this sense, racial discrimination in Latin America appears to be more aligned with color differences than with ethno-racial identity differences.

Some of the participants stressed that darker skin colors and other prominent physical traits commonly associated with Afro descendancy are factors that can increase the risk of suffering discrimination.[730] The darker the skin, the higher the risk of being excluded or discriminated against, and conversely. A participant described how one of her law school classmates seemed to inflict different forms of racial discrimination based on phenotype against black persons. The interviewee described that:

> We had a classmate who was also Afro [descendant], then that guy [the bully] believed that we came in tones—not all blacks are the same—her hair color was similar to [the color of] petroleum, then

[720] Dzidzienyo, *supra* note 18.
[721] Aparecida de Jesus, *supra* note 143.
[722] Clementi, *supra* note 145.
[723] TELLES, *supra* note 42; Telles, *supra* note 148; Telles and Paschel, *supra* note 80.
[724] HERNÁNDEZ, *supra* note 33.
[725] LARKIN NASCIMENTO, *supra* note 29.
[726] WADE, *supra* note 166; WADE, *supra* note 27; Wade, *supra* note 691; WADE, *supra* note 694.
[727] TELLES, *supra* note 42.
[728] *Id.* at 121.
[729] *Id.* at 126.
[730] Interview 2.

> that guy came and said to her: 'that black blouse, you cannot even tell the difference.' That was how he rolled. And I used to tell him: 'but I am also black.' And he replied: 'No, you are not so black' [referencing her lighter skin color]. Or certain things happened, like [he said]: 'No, you are black, but you are smart; you are black, but you are pretty.[731]

Some participants also seemed to note that lightness in skin color not only allows for some degree of racial privilege but could also facilitate whitening. Afro descendants who have lighter skin can more easily transit into one of the *mestizo* racial categories and self-identify as non-Afro-descendant. People with darker skin tones do not have such a possibility.[732] On certain occasions, Afro-descendant interviewees mentioned that specific facts (such as being light-skinned or coming from higher socio-economic backgrounds) made them question the authenticity of their experience as Afro-descendants in the legal profession and in their personal lives. A light-skinned upper-middle-class Afro-descendant woman attorney living in an Andean city of Colombia stated:

> When I was born, I was living in Laureles [name of an upper-middle-class neighborhood], and that was it. So I feel bad saying that I am an Afro-descendent because I have not suffered it. I feel that when [one] self-identifies before public authorities is to receive a benefit or something, and I do not, for my economic position nor in esthetic terms [referencing her light-skin], manifest that.

I find particularly interesting about this account that the participant seems to directly connect the "authenticity" of the Afro-descendant identity with a low-class status *vis-à-vis* equating being Afro-descendant to being poor. This narrative exemplifies the idea that "money whitens" that some scholars have documented.[733] The participant also acknowledged that her lighter-skin allows her to evade certain forms of race discrimination, which appears to suggest that lighter skin Afro-descendant can more easily transit

[731] Interview 16.
[732] Interviews 7 and 9.
[733] TELLES, *supra* note 42 at 42.

into intermediate racial categories. In this respect, the discussion about color discrimination is part of a broader conversation about the self-recognition of the Afro-descendant population and the mobilization of black identities.

As I had previously discussed, self-identification is a significant issue among Afro-descendants in Latin America. Despite being racialized as black, many Afro-descendants will not identify with any Afro-descendant identity. Some respondents seemed to understand that the lack of self-identification as Afro-descendants was a form of avoiding further experiences of discrimination,[734] while others read it as a manifestation of shame and internalized racism. One of the participants used the expression *"negros vergonzantes"* (shameful blacks) as a way to refer to Afro-descendants who actively seek not to be referenced as black or try to underemphasize this part of their identities.[735] In the respondent's views, the origin of this "shame," is related to the meaning that blackness has in Colombia's history. He asserted that to acknowledge one's African heritage is also to recognize the legacy of slavery and that, as the same participant described it, "you came here in chains.[736] Moreover, several interviewees discussed individual trajectories towards self-recognizing as Afro-descendants and their battles amid this process.[737]

The embracement of Afro-descendant identity limits the debate about Afro-descendant representation in the courts in different ways. For example, in the case of Cartagena, many Afro-descendants that work for the judiciary do not self-identify as such. Hence, the process of assessing the level of representation that Afro-descendants have on the courts is more difficult, given the lack of self-identification of the local population.[738]

[734] Interview 7.
[735] Interview 23.
[736] Interview 23.
[737] Interviews 16, 22, 23, 30 and 31.
[738] Interviews 22, 30, 31 and 33.

## 6. Inequalities and disparate impacts of judicial selection mechanisms

There has been limited research on the issue of Latin American judiciaries' gender and ethno-racial composition, including on how selection mechanisms influence certain groups' access to judicial posts. In the context of the U.S., however, several scholars have studied the impact of judicial selection mechanisms on the composition of courts at the state and federal levels. Before referring to the specific findings attained concerning judicial selection mechanisms influence on group representation on courts, I will briefly summarize the U.S. literature on this topic. Despite the apparent differences in the judicial selection mechanisms used in this national context *vis-à-vis* Latin America, I believe that this literature may illuminate particular challenges that ethno-racial minorities face in their access to the bench.

### 6.1. U.S. literature on judicial selection mechanisms and their impact on women and ethno-racial minorities representation on the judiciary

One of the most salient points of academic debate regarding group representation on U.S. courts is the relationship between minorities' presence in the judiciary and judicial selection mechanisms employed to fill out vacancies. The question about whether certain judicial selection mechanisms create better conditions for increasing the number of non-traditional judges has led to significant debate. Some authors have criticized the use of particular selection mechanisms, such as merit selection, under the belief that these mechanisms could make it more difficult for women and minorities to attain a seat on the bench.[739] They argue that non-white-male judges "are not a part of the prior status quo or do not have the same experiences or opportunities as do other judicial candidates, which militates against their chances of being selected."[740]

[739] Mark Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity across 20 Years*, 29 JUSTICE SYST. J. 47, 50 (2008).
[740] *Id.* at 49.

A paper published by Mark Hurwitz in 2010 argues that, although differences in judicial selection mechanisms used to play a significant role in judicial diversity on courts, such effect has been vanishing over time.[741] The paper, based on a previously published work,[742] suggests that, although in 1985 minority judges had higher chances to sit on state appellate benches if judges were appointed by the state governor instead of selected by a merit commission, by 1999 and 2005 minorities had the same chances of becoming judges if a merit selection plan, a governor's appointment, or a judicial election mechanism was employed fill out vacancies.[743] The research, which looked at the composition of state appellate courts at different points in time, concluded that "while there once may have been some correlation between selection system and diversity, there no longer is any such relationship."[744]

Despite this, Sherrilyn Ifill objects to the benign nature of different judicial selection mechanisms to enhance minority representation in the judiciary. In her view, empirical studies analyzing the effect of different systems of judicial selection have produced conflicting results and have exclusively focused on the number of women and minorities on the bench, disregarding the importance of structural impartiality—different ideas and life experiences—to assess judicial diversity.[745] Due to the controversial nature of this topic, I will examine the relationship between the mechanisms used for judicial selection at the federal and state levels and the representation of women and minorities on such benches.

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[741] Hurwitz, *supra* note 253 at 699. (The authors note: "while selection mechanisms may have been associated with differing levels of diversity at a point in time in the past, there no longer appears to be a relationship between diversity and selection system.")
[742] Hurwitz and Noble Lanier, *supra* note 19.
[743] Hurwitz, *supra* note 253 at 699–700.
[744] *Id.* at 699–700.
[745] Sherrilyn A. Ifill, *Through The Lens Of Diversity: The Fight For Judicial Elections After Republican Party Of Minnesota V. White*, 10 MICH. J. RACE LAW 55, 85 (2004). (In Ifill's view, "Diversity cannot be measured solely by counting black or brown faces on the bench. To get beyond cosmetic diversity, we must examine as well whether diverse perspectives are represented on the bench, and whether black judges appointed to the bench are those who would be endorsed by the black community.")

### 6.1.1. Federal courts

In the case of article III judges, the process for selecting a judge to fill a vacancy consists of two main steps: presidential nomination of the candidate, followed by a confirmation process before the Senate.[746] According to Sheldon Goldman, since the late 1970s, the confirmation of federal judges has become increasingly contentious.[747] The so-called "confirmation wars" are the result of a clash between liberals and conservatives in Congress. Both groups are trying to ideologically align with their views on the role of the judicial system to address politically divisive issues, such as sexual and reproductive rights, crime, the bill of rights, among others.[748] Kevin Johnson warns about how the polarization around judicial confirmations is likely to continue in the future. Johnson points out that the ideological divisiveness surrounding the confirmation processes will likely have a particularly harsh impact on minority judicial nominees.[749] He asserts that the ideological divisions in the confirmation processes have harmed minority representation on the federal bench. Johnson argues that to select candidates who generate fewer controversies in the Senate, the President will be inclined to nominate traditional candidates to the bench, which could translate into a more homogenous judiciary.[750]

In the case of federal courts, non-white-male nominees have faced complicated confirmation processes in the Senate, which some allege are the consequence of the legislature's discomfort with women and minorities serving as judges.[751] In the context of the Supreme Court justices' confirmation processes, Kevin Johnson notes: “The process for a minority Supreme Court Justice has been nothing less than a ritualized hazing of people of color that sends a clear message to the greater national community that racial

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[746] Hurwitz and Noble Lanier, *supra* note 739 at 50.
[747] Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U RICH REV 871–908 (2005).
[748] *Id.* at 891–892.
[749] Kevin Johnson, *How Political Ideology Undermines Racial And Gender Diversity In Federal Judicial Selection: The Prospects For Judicial Diversity In The Trump Years*, 2017 WIS. LAW REV. 345, 347 (2017).
[750] *Id.* at 358–359.
[751] Kevin R. Johnson, *An Essay on the Nomination and Confirmation of the First Latina Justice on the U.S. Supreme Court: The Assimilation Demand at Work*, 30 CHICANAO-LAT. LAW REV. 97–162 (2011).

minorities should be the subject of suspicion."[752] As an example, in the case of Sonia Sotomayor, Johnson explains how, despite her outstanding credentials and history of moderation as a judge, she was the target of accusations of engaging in judicial activism and holding anti-white bias.[753] In his view, the confirmation process before the Senate tends to be particularly harsh on minority nominees because the Senate uses the confirmation as a way to determine whether or not the candidate has "assimilated into mainstream values on race and civil rights."[754] Similarly, Linda Green remembers that the difficult confirmation process of non-traditional nominees seems to be a constant, using Thurgood Marshall—the first African American justice—and Louis Brandeis—the first Jewish justice—as examples of this situation.[755]

Regarding the confirmation process of Sonia Sotomayor and Elena Kagan, Theresa Beiner describes how it is likely that their diverse views on issues of public interest—such as race discrimination and sexuality—led to difficult confirmation processes in the Senate. In the case of Sotomayor, the difficulties arose due to her much-publicized "wise Latina" comments.[756] In the case of Kagan, they were the result of her views on LGBTQ rights, and especially her opposition to the military's "Don't Ask, Don't Tell" policy during her tenure as Harvard Law School's dean. Some used these positions as the basis to describe Kagan as anti-military and even suggested she might be a lesbian.[757]

Theresa Beiner's concern about Kagan and Sotomayor's confirmation processes are based on the apparent contradiction between the political support for the idea of diversifying the judiciary—which is partially based on the idea that women and minorities could bring new ideas to the bench—, and the Senators attacks against non-traditional candidates because of their diverse opinions.[758] Ultimately, Beiner

[752] *Id.* at 104.
[753] *Id.* at 101–102.
[754] *Id.* at 105.
[755] Linda S. Greene, *A Tale Of Two Justices: Brandeis, Marshall, And Federal Court Judicial Diversity*, 2017 WIS. LAW REV. 401–423 (2017).
[756] Theresa M. Beiner, *White Male Heterosexism In The Confirmation Process*, 32 WOMENS RIGHTS LAW REPORT. 105–142, 135–145 (2011).
[757] *Id.* at 135–145.
[758] *Id.* at 146.

asks whether the Senate's acceptance of women and minority nominees could come as a prize for non-white-male appointees' who do not openly support the agendas of historically discriminated groups.[759]

Discussing federal judges more broadly, Beiner claims that there has been "extended scrutiny of female appointees,"[760] and other non-traditional judicial nominees during their confirmation processes before the U.S. Senate. During the Clinton presidency, white-male nominees for district court judgeships required an average of 6 weeks less from the moment of their nomination to the moment when they were granted a hearing before the Senate. They also needed 46 days less on average from the time of their nomination to be confirmed as judges.[761] This gap was even more significant in the case of appellate court nominees, as white-males needed an average of two months less to be granted a hearing since their nomination, and 146 days to be confirmed, counted from the same date.[762] A similar situation took place during the confirmation processes of George H.W. Bush's judicial nominees, in which the Senate democratic majority also delayed the confirmation of women nominees.[763] According to Beiner, this situation seems to have the effect of forcing the President to appoint women and minorities to the bench that have a more traditional career path or more conservative political views, especially in the case of democratic presidents.[764]

Similarly, Sylvia Lazos Vargas affirms that the performance of a racial identity that can make members of Congress feel uncomfortable is a factor that may hurt the confirmation chances of minority candidates, as it could trigger negative racial stereotypes in the senators' minds.[765] Moreover, Lazos Vargas argues that these conditions could lead to a situation in which minority candidates who conform to white behavior have higher chances of being confirmed to the bench than those who do not. This difference could

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[759] *Id.* at 105.
[760] Theresa M. Beiner, *How the Contentious Nature of Federal Judicial Appointments Affects Diversity on the Bench*, 39 U RICH REV 849-870., 853 (2005).
[761] *Id.* at 852–853.
[762] *Id.* at 852.
[763] *Id.* at 853.
[764] *Id.* at 855.
[765] Sylvia R. Lazos Vargas, *Only Skin Deep: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 INDIANA LAW J. 1423–1480 (2008).

result in the exclusion of critical voices of color—those that do not conform to expectations about how racial identity should be actively performed—from the federal judiciary.[766] In this scenario, according to the Lazos Vargas, the substantive benefits of diversity are lost, since the presence of non-traditional judges comes to the cost of leaving aside their perspectives.[767] Furthermore, she criticizes how the discord in the confirmation processes is limiting the presence of voices of color in the judiciary, both liberal and conservative, which may ultimately limit the quality of the judicial decision-making process.[768]

Likewise, Lee Epstein *et al.* criticize the custom of requiring prior judicial experience for judicial appointments to the United States Supreme Court.[769] According to the authors, this type of selection requirement reduces the level of career path diversity—which is highly influential in judicial decision-making. It also limits the ability of women and minorities to become justices, as their access to job positions that give candidates an advantage to be appointed as judges is highly constrained when compared to white men.[770] Hence, they suggest that if the President were to consider appointing highly qualified lawyers that had different work experiences, the pool of potential women and minority candidates would expand.[771]

Regarding the access of minority women to the Supreme Court, April Dawson states that, in past decades, more non-ideological *de facto* requirements have been established for candidates who want to become justices of the highest court in the country.[772] These requirements include having a law degree from an Ivy League school, possessing previous judicial experience at the federal appellate level, and even having clerked for a Supreme Court justice. According to the author, the reiterated use of these requirements to select Supreme Court candidates has had the effect of reducing the pool of potential candidates for this court. Such reduction has particularly had a strong effect on women minority candidates due to conditions

[766] *Id.* at 1474.
[767] *Id.* at 1525–1526.
[768] *Id.* at 1550.
[769] Lee Epstein, Jack Knight & Andrew Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CALIF. LAW REV. 903–966 (2003).
[770] *Id.* at 905.
[771] *Id.* at 958–959.
[772] Dawson, *supra* note 301.

of discrimination in the legal profession. These candidates are less likely to fulfill these requirements than white men.[773] The author proposes specific alternatives to increase the likelihood of minority women to become Supreme Court justices, such as including state court judges among the potential nominees for these positions and using merit selection commissions to recruit potential candidates and ensure diversity in the judiciary.[774]

Likewise, Carl Tobias has emphasized that the use of nominating commissions could have facilitated the increasing women representation on the federal bench, as such instrument allowed greater outreach to a larger pool of candidates for judicial positions.[775] However, he also acknowledged the importance of ideology during the nomination and confirmation process.[776]

### 6.1.2. U.S. State Courts

One of the main difficulties of studying the relationship between judicial selection mechanisms at the state level comes from the fact that virtually every state in the U.S. has a different process for selecting judges. K.O. Myers explains that:

> The judicial selection system is, for all intents and purposes, unique in each state. Both across and within states, different methods are used to select (1) appellate judges and trial judges; (2) statewide and local judges; (3) candidates who are eligible for initial terms; (4) judges who are eligible for retention; (5) judges to fill seats at the end of a regular term; and (6) judges to fill interim vacancies on the bench. In some states, like in Indiana, the selection method differs by county.[777]

[773] *Id.* at 214–219.
[774] *Id.* at 214–219.
[775] Carl Tobias, *The Federal Judiciary Engendered*, 5 WIS. WOMENS LAW J. 123–126, 125 (1990).
[776] *Id.* at 124–125.
[777] K.O. Myers, *Merit Selection And Diversity On The Bench*, 46 INDIANA LAW REV. 46–57, 47–48 (2013).

Regarding the selection of state supreme court judges, Kathleen Bratton & Rorie Spill studied the influence of judges' selection mechanisms on women's representation on courts of last resort.[778] Their research used data regarding the selection of state supreme court judges from 1980 to 1996. It concluded that "women are significantly more likely to be selected to a state high court when initially appointed."[779] The authors suggested that appointive systems for judge selection tend to be better at securing gender diversity on state supreme courts. Furthermore, such an effect was more salient when the appointive governor was a democrat and when an all-male benches were to receive their first woman judge.[780] They also established that under appointive selection systems, "women are much more likely to be appointed to an all-male court than to a gender-diverse court."[781]

Writing about the judicial selection in Virginia and South Carolina, Constance Anastopoulo & Daniel Crooks suggest that the lack of transparency of judicial selection mechanisms, low wages, and the politicization of judicial institutions make it more difficult for minorities to be represented in the judiciary. These conditions discourage qualified minority lawyers from becoming candidates for judgeships.[782] In the case of the states that they examined—in which the entire process of judicial selection is in the hands of the legislature—the authors argue that the legislature-controlled selection mechanism has turned out to be reasonably effective at increasing minority representation levels in the judiciary.[783] To improve such situation, the authors suggest reducing the participation of legislators on merit-selection commissions; determining a reasonable number of names sent to the ultimate selection organism; requiring merit-selection commissions to consider decisions of a tribunal of ethics concerning candidates; and to allow participation of the state bar association in the process of judicial selection.[784]

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[778] Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCI. Q. 504–518, 504 (2002).
[779] *Id.* at 504.
[780] *Id.* at 514.
[781] *Id.* at 514.
[782] Constance A. Anastopoulo & Daniel J. Crooks III, *Race And Gender On the Bench: How Best Achieve Diversity in Judicial Selection*, 8 NORTHWEST. J. LAW SOC. POLICY 174–204, 176–177 (2013).
[783] *Id.* at 177.
[784] *Id.* at 174.

From a different perspective, Sherrilyn Ifill opposes to the idea of states changing elective systems of judicial selection for appointive systems. She explains that, following the Supreme Court's decision in *Republican Party of Minnesota v. White*,[785] in which the court decided to strike down a provision of the Minnesota Code of Judicial Conduct that prevented judicial candidates from publicly expressing their views on controversial issues, a heated debate arose on whether judicial elections could be reconciled with the idea of judicial impartiality. There were also concerns about whether the court's decision in the case mentioned above should be interpreted as an endorsement of appointive systems over elective systems of judicial selection.[786] Ifill suggests that, instead of moving away from elective systems, states should try to introduce modifications to make judicial elections more compatible with the ideas of diversity and structural impartiality.[787] The author rejects the widespread implementation of appointive systems, arguing that such judicial selection mechanisms could decrease the leverage that black communities have on the election of judges. She believes that, in certain states in the South, this could mean that judicial election would not be subjected to federal oversight under the Voting Rights Act.[788] Moreover, she argues that such change could further provoke dilution of the minority voting power, while not guaranteeing the retention of minority judges in certain states.[789]

K. O. Myers asserts the need to improve merit commissions as a way to increase diversity on the bench.[790] According to the author, merit-selection systems have similar potential to create diverse judiciaries than other judicial selection methods, such as judicial elections. Besides, merit-selection has a particular advantage as it is possible to include diversity criteria for screening of candidates.[791] The author

[785] *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002)
[786] Ifill, *supra* note 745 at 56.
[787] *Id.* at 56.
[788] *Id.* at 57-58-85–87.
[789] *Id.* at 57-58-85–87.
[790] Myers, *supra* note 777; Ciara Torres-Spelliscy, *A Bench That Looks Like America Diversity Among Appointed State Court Judges*, 48 JUDGES J. 12–17 (2009).)
[791] Myers, *supra* note 777.

suggests that diversifying the composition of merit-commissions themselves could have a positive impact on improving diversity on the bench.[792]

Similarly, Leo Romero emphasizes the need to guarantee the legitimacy of judicial selection mechanisms and particularly of merit-selection commissions.[793] In his view, nominating commissions, despite having significant control over the list of candidates to judgeships, are bodies that, for the most part, lack accountability to the public.[794] Therefore, the author proposes that appointive systems guarantee minority and women's representation in the composition of nominating commissions and in the evaluation and selection of candidates. Likewise, he argues that the selection process should be made as transparent as possible in order the secure equal opportunity for different types of candidates.[795] Finally, the system should have accountability mechanisms to enforce the respect of diversity and transparency principles.[796]

Clara Torres-Spelliscy conducted an empirical study and interviewed members of nominating commissions in different states.[797] Her results indicate that although members of nominating commissions are usually opened to the idea of increasing diversity in judicial institutions, "nonetheless, top candidates from diverse backgrounds are not applying for, being nominated for, or being appointed to judicial openings in proportionate numbers."[798] In her view, implicit bias could be the condition that prevents the appointment of non-traditional judges to reach higher numbers.[799] In order to increase the levels of political minorities' representation in the judiciary, the author proposes several good practices, including acknowledging and

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[792] *Id.* at 52–53.
[793] Leo M. Romero, *Enhancing Diversity In An Appointive System Of Selecting Judges*, 34 FORDHAM URBAN LAW J. 485–500 (2007).
[794] *Id.* at 486.
[795] Iyiola Solanke, *Diversity And Independence In The European Court Of Justice*, 15 COLUMBIA J. EUR. LAW 89–121 (2008). (In a different context, Iyiola Solanke argues that lack of transparency in the selection mechanisms employed for filling out vacancies at the European Court of Justice can be a relevant factor to explain the lack of ethnic diversity on that bench).
[796] Romero, *supra* note 793 at 485–486.
[797] Torres-Spelliscy, *supra* note 790 at 13.
[798] *Id.* at 13.
[799] *Id.* at 14. ("Implicit bias is a likely culprit in driving down the numbers of women and minorities appointed to serve. New research from the field of cognitive science on the implicit biases that all humans possess may explain in part why racial and gender disparities on the bench persist even when nominating commissions believe they are open to all applicants.")

taking action to neutralize implicit bias in nominating commissions; the active recruitment of potential minority and women candidates to fill judicial vacancies; to include provisions in the statutes and laws regulating nominating commissions that specify the role of diversity in the nominating process; guaranteeing transparency in the process of receiving applications and formulating nominations; providing commission members with training to better fulfill their recruitment and nominating task; introducing the figure of "diversity ombudsman;" changing the law to guarantee diverse nominating commissions; demanding nominees to have high standards of quality; raising judges' wages to attract better candidates; and maintaining data of past applicants to keep track of the progress in the process of diversifying the judiciary.[800]

In the particular context of state trial court judges, Linda Merola & Jon Gould published a qualitative study in which they expressed that minority judges tend to emphasize the impact of networking, mentorship, politics, and access to different types of resources in their success to be selected as judges.[801] John Brittain & Kenneth Chandler arrived at similar conclusions regarding the factors driving successful candidacies.[802] The involvement of the candidate in political activities (partisan and not partisan), campaigning activities, political networking, fundraising events, public image management, and even advertising, as well as receiving political support from prominent figures in the legal or political systems (*e. g.* bar associations, legislators, high court judges), were identified to have a significant roles in the election of minority judges.[803]

[800] *Id.* at 16–17.
[801] Linda M. Merola & Jon B. Gould, *New Judges Speak About The Process And Its Impact On Judicial Diversity*, 93 JUDICATURE 184–193, 185 (2010).
[802] John C. Brittain & Kenneth W. Chandler, *What Was Key To Becoming A Judge? A Survey Of Minorities And Women On The Bench*, 48 JUDGES J. 10–13 (2009).
[803] Merola and Gould, *supra* note 801 at 185–192.

### 6.1.3. Conclusions of the U.S. Literature

From the debates on judicial selection mechanisms and its relationship with minorities and women's representation on U.S. courts it is possible to reach certain conclusions: 1) Although at some point in the past certain judicial selection systems—such as appointive systems—performed better at facilitating the presence of women and minority on courts when compared to others, currently, different judicial selection mechanisms may produce similar results in this respect; 2) in the context of the federal judiciary, women and minorities nominated for article III courts have historically faced significant challenges—in comparison to white-males—in their confirmation processes before the Senate; 3) the difficulties that women and minorities encounter during congressional confirmation have worsen due to the increasing partisanship amid the confirmation processes; 4) most authors agree in the need to reform existing judicial selection mechanisms at the state level to improve the level of women and minorities' representation on courts, as well as the impartiality, transparency, and accountability of current judicial selection systems; 5) transforming current judicial selection mechanisms may not lead by itself to improve women and minorities' representation on courts, as their level of representation if connected to other institutional, social, economic and political factors, such as mentorship, networking and political capital.

## 6.2. Study findings on the impact of judicial selection mechanisms in Afro-descendant representation in Colombian judicial institutions

Amid the qualitative data analysis, several findings arose concerning the impact of judicial selection mechanism on Afro-descendant presence on Colombian courts. In order to convey these findings in an orderly fashion, I will divide them according to the different types of judicial positions/judicial selection mechanism they refer to.

### 6.2.1. High court magistrates

A common denominator in the accounts of participants regarding high court magistrates is the emphasis on the political nature of selection mechanisms used for filling out vacancies.[804] As I explained in the preceding chapter, although different high courts have different selection processes and minimum requirements for their magistrates, these are not career positions. In general, the selection process is not particularly tailored to select the "most qualified" applicant. In words of one of the participants: “It is a highly politicized process, in which it is required to have contacts or to belong to our society's power groups [in order] to have access to those positions.”[805] Similar to what happens in the case of U.S. Supreme Court appointments, the high strata of successful candidates to high court magistrate positions in Colombia means that Afro-descendants are virtually barred from the possibility of accessing such positions. This limitation is a consequence of their lack the adequate connections and social capital necessary to be successful in the selection process.[806] In the case of potential magistrate candidates who live in the periphery of the country, this situation can be aggravated by distance, as they rarely have access to the venues where the lobbying for the selection of the final appointment takes place.[807]

The participants' generalized perception is that class status, political influence, a privileged education, and elitism are forces that shape the selection process for high court magistrates. A process in which, as a participant asserted: "There is not a selection power of the ethnic subjects.”[808] An exception to this reality is the SJP. In this particular court, ethnic identity was a specific criteria for the appointment of the magistrates, which allowed ethnic organizations to participate in the conformation of the court actively.[809] One of the interviewees confirmed this intuition. The participant claimed that, despite having

[804] Interviews 7, 11, 17, 18, 21, 22, 23, 27, 35, 36, 39, 40 and 43.
[805] Interview 7.
[806] Interview 8.
[807] Interview 35.
[808] Interview 11.
[809] *Id.*

adequate credentials to occupy a high court magistrate positions, once he applied to fill out a vacancy, he was not selected. In his view, this was the case because "the names [of those nominated] had been previously selected."[810] Another interviewee described that in a previous process to fill out vacancies at a high court, there were several Afro-descendant candidates but not a single one was even shortlisted for the ultimate selection.[811]

The perception of nepotism in the high court magistrate selection is more concerning due to the apparent lack of transparency. Not only the selection process is, in many cases, not completely visible to the public, but also there is a deficiency of specific reasons to justify the selection of a candidate over others.[812] This worry resembles the apprehension that some U.S. scholars, such as Anastopoulo & Crooks,[813] have shown regarding transparency in the judicial selection process at the state level. Although the works of these authors refer to the U.S. context, I believe they are relevant for the Colombian context because of the similarities of both countries regarding the lack of public oversight and transparency over judicial selection processes.

### 6.2.2. Career magistrates, judges, and judicial employees

In general, interviewees appeared to have a better impression of the merit selection process than of other selection mechanisms.[814] Since the career judge selection process normally involves an exam, participants see it as more objective. Some of the Afro-descendant participants working for the judiciary stressed the impression that if it were not for the use of merit selection, it is unlikely that they would have had access to their positions.[815] An Afro-descendant judge in an Andean city of Colombia declared: "If

[810] Interview 17.
[811] Interviews 21 and 34.
[812] Interview 34.
[813] Anastopoulo and Crooks III, *supra* note 782.
[814] Interviews 1, 6, 9, 11, 17, 27, 34, 41, 42, 43 and 44.
[815] Interview 39.

there had not been a merit contest, I think I would have never become a judge or a magistrate because I am a person that do not have many interpersonal relations with people that handle those types of appointments directly."[816]

Certain participants, who attained their positions through merit selection processes, appeared to display a particular type of pride for having accessed their positions that way since they believed it stressed that their paths to the courts were transparent.[817] Furthermore, some interviewees suggested the existence of merit selection processes was a condition that enabled a greater level of representation for Afro-descendants in the judiciary, although my research is inconclusive in this regard.[818] An Afro-descendant judge in an Andean city declared: "Within the organs that do not have a [merit] contest, Afro-descendant participation is void. It is zero because there is discrimination and, even if you demonstrate outstanding skills and capacity, they do not stop seeing you as what it is: A black person, an Afro-descendant."[819]

Despite this situation, several participants manifested their distrust of the merit selection process to fill out career position vacancies.[820] The most common aspects subjected to criticism were the thematic contents and abilities that were evaluated in the exam component of the merit selection process and the issues related to the lack of mechanisms that secured judges' cultural competency to deliver justice in ethnic territories.[821] Several participants argued that the contents and professional skills assessed in the exams had little connection with those that one might expect from a competent judge.[822] Some respondents also criticized the definition of merit in these selection processes. They believed that the facially-neutral definition of merit concealed a racialized conceptualization of this value.[823] One of the participants asserted:

[816] Interview 6.
[817] Interviews 25, 40 and 41.
[818] Interview 41.
[819] Interview 17.
[820] Interviews 8, 9, 17 and 27.
[821] Interviews 12, 26, 27, 31, 32 and 36.
[822] Interviews 1 and 11.
[823] Interviews 17 and 23.

> Well, from the point of view, let's say of career positions, we can say that the selection is based on merit. However, we both know that merit is a subjective category. It is presented that way, but really [having] merit is to be a white man. Everything you call merit is being a white man. And well, being a white man is attending such university, of such characteristics. Generally, what they call having merit is to be a white man, and, lately, with the strength that the [gender] equality aspect has acquired, it can mean being a white woman, too.[824]

Participants also named invisible barriers to participate in the merit selection processes that appear to affect Afro-descendant candidates disproportionately.[825] Some of them asserted that access to the judicial exam could be a problem for people living in rural areas and small cities, as candidates need to travel to be able to sit for the test. Likewise, some participants also asserted that those who pass the test faced the reality of having to constantly travel during a period of up to a year to participate in the course-contest phase of the selection process, as courses are held in a few major urban centers of the country.[826] The centralized selection process creates significant obstacles for candidates living in peripherical regions and rural areas, who need to travel to attend the classes and cover all costs related to transportation, lodging, and food.[827] They receive no funding or financial support.[828] In this respect, one of the participants, a mestizo judge in an Andean city highlighted that while she was completing her merit selection process, she could observe that:

> People from Quibdó [a city with a majority of Afro Colombian population], for example, had to complete the course in Medellín. This meant that they had to stay [in Medellín] Friday, Saturday, Sunday, and Monday. They came from Chocó by plane since Friday. They stayed here from Friday until Monday, attend the course, and then dealt with their chamber's affairs in Quibdó, once they

[824] Interview 23.
[825] Interview 40.
[826] Interviews 3, 6, 24, 27, 36, 40, 41 and 45.
[827] Interviews 3, 6, 27 and 45.
[828] *Id.*

went back, with all the difficulties of the financial costs that come with it, in a clear and notorious disadvantage when compared to those of us who lived in Medellín.[829]

These costs can be very burdensome for many Afro-descendant lawyers, especially those who do not have high incomes. A participant even asserted that he had to permanently relocate to another city to participate in the course-contest phase of the merit selection process, given the costs and inconveniences associated with the attendance to classes.[830]

Likewise, there have been reports of exams questions being discarded after applied in the test and exams being wrongfully graded. This situation happened, for example, with the merit selection processes undertaken to fill out judicial vacancies in the year 2018.[831] Due to a mistake, the questions' order was altered and then graded with a wrong answer key. The mistake led to several questions of the test being incorrectly marked.[832] Due to situations such as the formerly described, it is common that a high number of lawsuits against the judiciary are initiated following the merit selection processes.[833] These issues ultimately make merit selection processes excessively long and extenuating for participants. According to some of our interviewees, different administrative delays caused the merit selection processes through which they became career judges to take as long as 5 or 6 years to conclude.[834]

Another common complaint had to do with situations of corruption and meddling in the merit-selection process.[835] Several participants manifested that they believed that the merit selection processes

[829] Interview 3.
[830] Interview 40.
[831] Acuerdo PCSJA18-11077, agosto 16, 2018, Consejo Superior de la Judicatura. [C.S.J.] (Colomb.).
[832] Consejo Superior de la Judicatura Universidad Nacional de Colombia, *Comunicado a los aspirantes de la convocatoria 27 del Consejo Superior de la Judicatura y a la comunidad en general* (2019), http://actosadministrativos.ramajudicial.gov.co/GetFile.ashx?url=%7E%2FApp_Data%2FUpload%2FPCSJA18-11077a.pdf (last visited Mar 10, 2020).
[833] Por errores en examen para jueces, demandarán concurso de la Rama, ASUNTOS LEGALES, June 27, 2019, https://www.asuntoslegales.com.co/actualidad/por-errores-en-examen-para-jueces-demandaran-concurso-de-la-rama-2878389 (last visited Mar 18, 2020). (As an example, lawsuits were announced against the judiciary for the 2018 merit selection process' deficiencies).
[834] Interviews 40 and 43.
[835] Interviews 2, 4, 8, 15, 23, 25, 30, 31, 42 and 43.

were not transparent and that corruption situations occurred with a certain frequency. One of the interviewees, an Afro-descendant judicial employee, mentioned: "We cannot say that all merit contests are tainted, but contacts are the most important part, let's say, in the reality of how things move."[836] Another one described a case involving his business partner who, after obtaining very high scores in the exam and the course-contest components of the judicial selection process, was unable to become a judge. The candidate received a low score in the interview component. Such low score, according to the interviewee, seemed to be related to situations of corruption since the interview component is the one that can be more easily manipulated.[837] In this respect, several corruption scandals in all levels of the judicial pyramid have shocked the Colombian judiciary in recent years, including cases of corruption affecting the merit selection process for magistrates, judges, and judicial employees.[838]

I consider that this widespread perception of corruption is relevant for understanding Afro-descendant representation in judicial institutions because it can deter people from participating in the selection process. Candidates believed that they would not stand a fair chance of being selected due to their lack of connections and being outsiders to the circles of nepotism.[839] For example, an Afro-descendant judge in an Andean city of Colombia mentioned that she almost did not participate in a judge-selection process because she was afraid that she might have to "sell her soul to the devil" to be successful in her candidacy.[840]

[836] Interview 22.
[837] Interview 4.
[838] Diario La Opinión, *Piden investigar fraude en examen de jueces*, LA OPINIÓN, 2019, https://www.laopinion.com.co/piden-investigar-fraude-en-examen-de-jueces-85647 (last visited Mar 18, 2020).
[839] Interview 43.
[840] Interview 15.

### 6.2.3. Provisional magistrates, judges and judicial employees

In the case of the provisional magistrate, judge, and judicial employee positions, participants were emphatic to highlight that nepotism played a decisive role in the filling out of provisional positions in the judiciary.[841] This aspect is not minor if one considers that by October 10th, 2018, approximately 45% of all magistrates and judges and 53% of all judicial employees working at the intermediate tribunals and lower courts were in provisional positions. According to the information that the Superior Council of the Judicature provided, these positions account for nearly half of the judicial branch (excluding the high courts and the Attorney General's Office). Although provisional appointments are expected not to last long, people can occupy these positions lengthy periods. I could verify this reality during the interview process. Several participants commented that they had been in provisional posts for years.[842]

I should emphasize that the Constitutional Court has issued several rulings aimed at decreasing the level of discretion that judges and magistrates have the appointment of provisional judges and judicial employees.[843] However, in certain situations (*e.g.,* when the eligibles' list has been exhausted or expired), the level of discretion of nominating authorities increases.[844] These events open the door to nepotism. Likewise, not all judicial authorities in charge of provisionally filling out vacancies might follow the parameters that the constitutional court established. Some participants suggested that several nominating judicial authorities knowingly decide to disregard these guides to benefit individual judicial servers.[845] In this respect, one of the participants mentioned:

[841] Interviews 1 and 2.
[842] Interviews 5 and 27.
[843] *See* Corte Constitucional [C.C.] [Constitutional Court], julio 15, 2008, Sentencia C-713/2008 Gaceta de la Corte Constitucional [G.C.C.] (Colomb.). Corte Constitucional [C.C.] [Constitutional Court], agosto 27, 2015, Sentencia SU-553/15, Gaceta de la Corte Constitucional [G.C.C.] (Colomb.).
[844] Interview 40.
[845] Interview 39.

> Some positions are occupied due to vacancies, and for those vacant positions, in most cases, [the selection process] is if one knows a tribunal magistrate, if one knows a judge, if one knows someone that can recommend you to have access to those spaces, which are, in many cases, very closed, very scarce. Many times it is not necessarily contingent upon qualifications because there are many highly qualified persons, but they do not know someone who can recommend them. They find it very hard.[846]

The significant role that personal, familiar and professional relationships play in the selection of provisional magistrate, judges, and judicial employees, seems to have a negative influence on Afro-descendant applicants in most cases, given their lack of the adequate contact networks for such endeavor.[847] Moreover, as I had mentioned when I discussed regional variances of race, geographic location also plays a vital role in this regard, as some participants stated that nominating judicial authorities, sometimes, tended to prefer appointing people coming from their close circle to these positions,[848] despite the fact that these candidates were not from the geographical area or had any ties or experience in the places where they would be sent out to work.[849]

### 6.2.4. Free appointment and removal judicial employees

In the case of judicial employees that occupy positions of free appointment and removal, personal and professional connections play a determinant role in their selection, as the deciding factor for the appointment to one of these positions is the will of the nominating judge or magistrate.[850] Low-class status and racial segregation seem to be significant barriers in the access of Afro-descendant professionals to these

[846] Interview 13.
[847] Interviews 18 and 42.
[848] Interview 41.
[849] Interviews 28 and 38.
[850] Interview 15.

positions since they lack the adequate social, professional, and personal connections that generate strategic advantages to access these posts.[851] In this respect, a *mestizo* judge in an Andean city described that she had never hired Afro-descendants to work in her chambers because she selected her staff members from the pool of recently graduated law students from the university where she served as an adjunct. Since the number of Afro-descendant students at that institution was minimal, she never had an Afro-descendant student to whom she could offer a job.[852] Another interviewee suggested that one of the reasons why there were so few Afro-descendants working as judicial employees for the high courts is because many of the people who occupy these positions had previously served as *ad honorem* interns at these institutions. Internships allowed them to gain visibility and develop networks that would later open the gates of judicial employment.[853] In the case of many Afro-descendant law students, this is not a possibility since they might have studied in peripherical areas of the country and could not afford to move to Bogotá to undertake an internship.[854]

The significant role that personal and professional connections play in the selection process for this type of position also seemed to be confirmed by the fact that several of the interviewees that occupy these jobs describe that previous personal relationships were determinant in their selection for such positions,[855] and by the mentions that some interviewees made about how they found out about potential employment opportunities at the high courts through their college friends, university professors, former employers, and social contacts.[856]

A participant mentioned that, in the case of high courts' free appointment and removal posts, the potential appointment of more Afro-descendant magistrates could open the door for other Afro-descendants to become judicial employees.[857] He described this effect as a *"rosca legítima"* (an expression meaning

[851] Interviews 10 and 15.
[852] Interview 3.
[853] Interview 15.
[854] *Id.*
[855] Interviews 13 and 21.
[856] Interviews 7, 9, 16, 18, 21, 22, 24, 25, 29, 35, 37, 40 and 41.
[857] Interviews 13 and 22.

legitimate nepotism).[858] Another participant mentioned that at the court in which she serves, the arrival of an Afro-descendant judge opened the door for other Afro-descendants to start working at this institution as judicial employees. The new judge decided to appoint them to free appointment and removal positions.[859]

In conclusion, diverse problems affecting different selection mechanisms appear to be contributing to Afro-descendant underrepresentation in judicial institutions. Among all the factors mentioned above, I would like to stress the role that professional and personal networks have in the process of finding employment in Colombia's judicial institutions. This situation appears to work against Afro-descendant candidates significantly, given the impact that residential segregation, class inequality, and discrimination has on their ability to acquire the proper connections for these positions, regardless of the type of selection mechanism used to fill out vacancies.

### 7. Racial discrimination within judicial institutions and in the legal profession

The last factor that I consider relevant for explaining the low level of Afro-descendant representation in judicial institutions in Colombia is the situations of racial discrimination at the interior of the judicial system. Racial discrimination is a crucial aspect of this debate because it excludes people from positions in the judiciary. Furthermore, discrimination influences the experiences of the Afro-descendants already present in these types of professional settings and helps to keep the racial stratification of the judicial system in place.

So far, I have discussed some instances in which judicial servers experience discrimination because of their ethno-racial identity (*e.g.*, in education) and how factors such as low-class status and the intersectionality of race and gender transform these situations of exclusion for certain Afro-descendants. In

[858] *Id.*
[859] Interview 3.

the following pages, I will expand on this component of my research to present an image of the way racial exclusion manifests within the courts and the legal profession.

### 7.1. Racial discrimination: From the streets to the bench

Before I introduce the findings concerning the issue of race discrimination against legal professionals and judicial servers, I should state that, although race discrimination situations inside judicial institutions and the legal profession are of particular interest for my research agenda, these expressions of white supremacy are in a continuum with similar practices taking place outside of the courthouses. For Afro-descendants, race discrimination does not start (nor end) at the doorsteps of the courthouses or law firms. As I could attest from the interviews, Afro-descendant magistrates, judges, and judicial employees face discrimination based on race inside of the courts as much as they do outside of them.

Participants were outspoken about the role that racial discrimination has played in their lives. Afro-descendant attorneys, judges, and judicial employees narrated experiences of racism against themselves and their relatives:[860] They were subjected to ridicule for being the offspring of interracial couples,[861] they were denied housing they could afford because the potential landlord was "not convinced" of their credentials,[862] they were questioned about why black men would refuse to dance at a party,[863] they experienced being the object of suspicion by strangers in the street despite having done nothing wrong,[864] they have difficulties hailing taxis in the cities,[865] and endure entire soccer games hearing "well-intentioned" expressions like *"¡vamos mi negro!"* (come on, my black man!) or worse,[866] they have been

[860] Interview 2.
[861] Interview 7.
[862] Interview 13.
[863] Interview 23.
[864] Interviews 24 and 32.
[865] Interview 39.
[866] Interviews 23 and 37.

called foreigners in their own land,[867] and been the object of racially-charged regional stereotypes.[868] While in school, they were forced to clean the classrooms three times more often than their peers,[869] and today, as parents, they have to assert their children's rights to wear their natural hair.[870] In the case of women, race discrimination also meant to be continuously labeled as domestic workers because of their skin color,[871] being introduced to hair-straightening from an early age, sometimes under the argument that curly hair was not hygienic.[872] Some indigenous interviewees narrated similar episodes of discrimination, such as being stopped by strangers on the street who asked for photos with their traditional attires,[873] being questioned about whether or not they used underwear,[874] and even presumed to have supernatural abilities.[875]

Racist expressions were, perhaps, the most common type of discriminatory experience among participants, as many of them expressed that hearing phrases such as *"Negro ni el teléfono"* (Black not even for the phone),[876] *"eres negra, pero bonita"* (You are black but beautiful),[877] *"¡negros tenían que ser!"* (You had to be black!), *"negro que corre es ratero, blanco que corre es atleta"* (a black who runs is a thief, a white who runs is an athlete),[878] *"negro que no la caga a la entrada, la caga a la salida; pero la caga"* (a black person who does not fail at the beginning, fails at the end; but they fail),[879] or simply being called *"black"* instead of their names, was a recurrent experience in their lives.[880] As previous literature on

[867] Interview 29
[868] Interview 39.
[869] Interview 32.
[870] *Id.*
[871] Interviews 10 and 27.
[872] Interviews 10 and 33.
[873] Interview 12.
[874] *Id.*
[875] *Id.*
[876] Interview 7.
[877] Interviews 10 and 45.
[878] Interview 1.
[879] Interview 1.
[880] Interviews 30 and 34.

this topic has documented, situations of race discrimination, and particularly racist language, are common in Latin America.[881] In this regard, Tanya Hernandez mentions that:

> In Latin America, where Jim Crow state-mandated exclusion never existed, racist speech about Afro-descendants is ubiquitous and facilitates the social exclusion of Afro-descendants. In addition to the term "negro" (black/negro) being derogatory, Afro-descendants are stereotyped and referred to as inherently criminal, intellectually inferior, overly sexual, and animalistic. Because the racialized stereotypes of Afro-descendants are pervasive, they are commonly understood to smell like animals and, in particular, monkeys.[882]

Beyond listing situations of discrimination that Afro-descendants experience on a daily basis, the point that I would like to emphasize is that, by the time they arrive at their positions inside judicial institutions, these professionals have already undergone a lifetime of racist episodes. Some are small, and

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[881] Tanya Kateri Hernández, *Hate Speech and the Language of Racism in Latin America: A Lens for Reconsidering Global Hate Speech Restrictions and Legislation Models*, 32 UNIV. PA. J. INT. LAW 805–841 (2010).

[882] *Id.* at 816–818. (Hernández also notes: "In addition to the commonalities in anti-black expression in Latin America, each country has also developed its own subset of derogatory phrases for blacks and blackness. In Argentina, 'negro de mierda' ("shitty negro") is a popular expression, and 'negro' is viewed as the worst of insults. As a result, even children's songs in Argentina are replete with anti-black references. In Brazil, Afro-descendants are referred to as 'macaco' (monkey), 'besta' (animal), 'vagabundo' (bum), 'filho de puta' (son of a whore), 'safado' (insolent person), 'ladrao' (thief), and 'nega fedorentas' (stinking nigger). In fact, the Brazilian insults are viewed as being coterminous with blackness. This also is unfortunately manifested in Brazilian primary school textbooks in which black people are consistently depicted as animal-like, as socially subordinate, and in other stereotyped manners. In Colombian newspapers, even the polluted air of Cali is blamed on the presumed dirtiness of blacks. In Costa Rica, blacks are typically described as 'pigs,' 'stinking,' 'unkempt,' and 'ugly.' In Cuba, 'doing things like a black person' is a common expression to describe a poorly done task or acts of delinquency. In fact, the Cuban Academy of Sciences found in 2003, that dozens of Cuban phrases are used to connect blacks with delinquency and inferiority. This is best exemplified by the popular phrases 'it had to be a negro' and 'there is no such thing as a good black or a sweet tamarind.' In Ecuador, an often-repeated joke is that 'a black person running is a thief, a white person running is an athlete.' This helps to account for the 2009 survey findings in Ecuador, demonstrating that five out of seven Ecuadorians harbor racial prejudice against blacks. In Mexico, Afro-Mexicans respond to the stereotypes that they are 'ugly' and 'dark' with the focus on marrying lighter-skinned partners in the Latin American hope to lighten and thus "improv[e] the race" of their progeny. In Nicaragua, the phrase '100 negroes for one horse' ties to how blacks are viewed as drug addicts and drunks. In Peru, the common statements about blacks are that they are criminals, can only work in low-level positions, that they only think until midday, that they are delinquents and live badly, that they are a leisurely race, and that black women are prostitutes. A study of Peruvian newspapers from 2008, found a total of 159 different racist adjectives for describing Afro-descendants. In Venezuela, despite the national pride in being a mixed-race 'café con leche' (coffee with milk) society, the plethora of racist sayings commonly iterated includes the phrase 'kill a negro and live a Pepsi [enchanted] day.'.")

some are big, but all, in conjunction, condition how they deal with discrimination in the workplace and inside predominantly white-*mestizo* institutions. Moreover, due to the multiplicity and repetition of these racist experiences, they tend to be naturalized and commonly go unnoticed, even by those who experience them.

Participants described similar situations of racial discrimination inside the courthouses and the legal profession as those described in everyday life. In this respect, Afro-descendant judicial employees narrated episodes of judicial employees saying phrases like: "They [Afro-descendants] are the ones who put on their chains,"[883] "there are people who are here because of affirmative action,"[884] "it is good to know you got assigned the case of the blacks,"[885] "[they work at] the Caribbean rhythm,"[886] "they [Afro-descendants] are lazy and don't like to work,"[887] or calling colleagues *"negrito"* (little black man),[888] or *"india"* (Indian woman).[889] Additionally, they also recounted situations in which judicial employees were confused with cleaning services staff at the courthouse,[890] white-mestizo judicial employees touched black judicial employees' hair without their consent,[891] magistrates had difficulties receiving their government cars because those responsible for supplying them did not believe a black woman could have attained such high station,[892] a judge baptized a law firm integrated mainly by Afro-descendant lawyers as "the darkest law firm in Cali,"[893] and *Raizal* judicial employees were forbidden speaking *English Creole* at the courts in their territories.[894]

[883] Interviews 10, 14 and 16.
[884] Interview 16.
[885] Interview 22.
[886] Interview 24.
[887] *Id.*
[888] Interviews 13 and 17.
[889] Interview 22.
[890] Interviews 13 and 19.
[891] Interview 23.
[892] Interview 13.
[893] Interview 16.
[894] Interview 25.

Participants emphasized the idea that most situations of discrimination were subtle, trying to highlight the fact that they consisted of micro-aggressions or in the use of racially charged language that often goes unnoticed or is deemed irrelevant by most Colombians.[895] The subtle nature of racism in Latin America means that it is often difficult to identify, even for the people who are directly affected by it, and even more difficult to prove.[896] This subtleness is particularly true in cases in which differential treatment on account of race is not verbally linked to the victim's ethno-racial identity.[897] In this respect, one of them asserted that:

> One feels it, but I would not dare to say: 'I can give you proof' because it is very subtle. Because it sometimes is very camouflaged, very hidden in shape and even more, I insist, sometimes it is very unconscious how it occurs. However, how can it be perceived? The person does not deal with you the same way, that they make you wait, that the first reaction they have when you talk to them is the voice tone in which they address you, see, the initial rejection, like that initial undermining. I perceive it. I have seen it many times.[898]

Moreover, given the frequency of this micro-aggressions, some participants appeared to describe a sensation of numbness that led them to allow these types of situations to continue to go unnoticed. One of them asserted: “It comes a moment at which one wants to let it pass through to stop processing and rationalizing it all the time because it makes you unhappy. However, when you understand it and learn how to read it, you can hardly live calmed with it."[899]

Regarding the inconspicuousness of racism in Latin America, Tanya Hernandez sustains that racism in Latin America is pervasive, commonly excused, and naturalized.[900] Racial stereotypes and slurs

[895] Interviews 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 23, 27, 30, 34, 37 and 42.
[896] Interviews 7 and 13.
[897] Interview 8.
[898] Interview 4.
[899] Interview 14.
[900] HERNÁNDEZ, *supra* note 33 at 18–26.

are commonly used in everyday interactions, with people continually denying their discriminatory content.[901] Sometimes racist language is justified in the idea that it was used the intention to flatter or compliment the person it is directed at, as if the benign intention could compensate from any harms arising from it. Hernandez characterizes this belief as a remembrance of "slavery paternalism."[902] Moreover, when extremely abhorrent cases of race discrimination take place, they are usually portrayed as if they were isolated incidents that cannot be representative of the tolerant *ethos* of Latin American societies.[903]

Hernandez has also points out that despite Afro-descendants being historically marginalized and excluded from social and public life, the prevailing narrative in the region denies the existence of racial discrimination.[904] Discrimination is frequently denied appealing to the idea of *mestizaje*, as a condition that prevents the existence of racial discrimination, or by alleging that the region did not experience legally mandated segregation as U.S.[905] Several of the participants also used the U.S. history of racism to compare it to the types of discrimination lived in Colombia, sometimes to minimize the seriousness of this problem in their national context.[906]

As an example of the racial discrimination denial in Latin America, many Ecuadorian intellectuals denied the existence racism in that country despite the pervasive idea of inferiority that was imposed upon Afro Ecuadorians during the second part of the 20th century.[907] Intellectuals sustained that, unlike in the U.S. and South Africa, the black persons in Ecuador could enjoy public spaces and accommodations without any limitations. In theory, they could even become high ranking public officials. Discrimination in Ecuador, some intellectuals believed, could be a matter of class, but not of race.[908] However, in Ecuador, the work of social scientists has proven over time that "there are numerous stereotypes about black

[901] *Id.* at 18–26.
[902] *Id.* at 22.
[903] *Id.* at 22.
[904] *Id.* at 14–15.
[905] *Id.* at 14–15.
[906] Interviews 2, 8, 15, 31 and 42.
[907] Beck, Mijeski, and Stark, *supra* note 380 at 105.
[908] *Id.* at 104.

Ecuadorians that persist, such as a natural proclivity toward laziness, violence, and crime, as well as abilities in music and sports."[909] Congruently, Marisol De La Cadena mentions that, in Latin America, racist practices tend to coexist with a denial of racism, as racism is not perceived as such because it is not based on phenotype but in cultural difference.[910] Also, Peter Wade describes that, in Colombia, people tend to repudiate the idea that the country has a severe race discrimination problem, especially one affecting the Afro-descendant population.[911]

Previous literature has documented the many ways in which Afro-descendants face discrimination and exclusion in the context of employment and public life.[912] Limitations in access to education for Afro-descendants in Latin America translate into disadvantages for this group in the employment market.[913] The World Bank has pointed out that Afro-descendants join the job market unevenly when compared to other racial groups, due to factors such as limited education and lower return of their education investments. Because of this situation: "Afro-descendants have higher levels of unemployment in all countries, and among those employed, a larger share of them work in low-skilled occupations."[914]

Besides, Afro-descendants also face significant income gaps, which are related to a lower remuneration in their jobs when compared with similarly qualified non-Afro-descendant colleagues. The members of this group encounter glass ceilings in their occupations and are commonly denied promotions.[915] Regarding income inequality, Hugo Ñopo asserts that, even though earning gaps between men and women and ethnic-minorities and majorities have been decreasing over time, "the pace at which

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[909] *Id.* at 104.
[910] De La Cadena, *supra* note 374 at 16.
[911] WADE, *supra* note 166 at 3.
[912] Bello and Rangel, *supra* note 6 at 50.
[913] *Id.* at 50.
[914] AFRO-DESCENDANTS IN LATIN AMERICA: TOWARD A FRAMEWORK OF INCLUSION, *supra* note 138 at 22.
[915] *Id.* at 22. (A World Bank report states that: "One of the biggest gaps between Afro-descendants and non-Afro-descendants is in income levels. In many countries, the wage gap increases with educational attainment. Comparing workers with the same level of education, age, gender, marital status, experience, sector of work, and household characteristics, but different race, Afro-descendants tend to earn 16 percent less for the same types of jobs in Brazil, 11 percent less in Uruguay, and 6.5 percent less in Peru. They are also confronted with glass ceilings in their career development, representing as little as 0.8 percent of the managers in Uruguay and under 6 percent in Brazil.")

they are doing so, however, does not seem commensurate with the pace at which women, indigenous people, and Afro-descendants have been acquiring education and human capital."[916]

Discrimination in employment is prevalent in Latin America. In the case of Brazil, Graziella Da Silva & Elisa Reis conducted a study in which they evaluated the perceptions of discrimination of black professionals in Rio de Janeiro.[917] The authors conducted a total of 80 semi-structured interviews with black and brown (*pretos e pardos*) professionals in that city between the years of 2007 and 2008. The interviewees in the study narrated situations that the researchers would later describe as "generalized prejudice" and "particularized universalism."[918] These two phenomena refer to the fact that, even though there are high levels of prejudice, people are more likely to identify discrimination in anonymous/public interactions than in the context of private/personal relationships, in which racism remains invisible or cannot be talked about.[919] Moreover, the study accounted for some of the difficulties that respondents faced when they tried to address racism in the context of Brazilian society and that they felt that their experiences of injustice are more associated with race than class status.[920] However, Da Silva & Reis also describe that respondents did not believe that these incidents of discrimination impacted their social mobility since participants considered that their situation was similar to that of lower-class white persons, being the result of their class status.[921]

### 7.2. Presumption of incompetence and the requirement of extra effort

One of the most visible ways in which racial discrimination against Afro-descendants manifest itself inside judicial institutions is through a *presumption of incompetence*. This expression refers to the feeling

[916] ÑOPO, *supra* note 563 at 304.
[917] Graziella Da Silva Moraes & Elisa P. Reis, *Perceptions of Racial Discrimination Among Black Professionals in Rio De Janeiro*, 46 LAT. AM. RES. REV. 55–78 (2011).
[918] *Id.*
[919] *Id.* at 56.
[920] *Id.* at 56.
[921] *Id.* at 76.

of distrust in their capacities, credentials, and the value of their work that many Afro-descendant professional experiences, despite their personal accomplishments, professional achievements, and contributions. The concept of presumption of incompetence had already been used in previous scholarly works. Angela P. Harris & Carmen G. González coined this term to describe the experiences of women of color and low-income women in academia.[922] The term refers to the many ways in which they are disadvantaged because they do not meet the "distinctly white, heterosexual, and middle- and upper-middle-class" demographics and culture that dominates academic settings.[923]

According to several participants, this lack of trust in Afro-descendant aptitude for work and intellectual capacity was manifested in different behaviors and instances.[924] One of the participants, who is acquainted with the put in march of the SJP, mentioned that during the debates at the interior of this judicial institution, magistrates showed their discomfort with the idea of adopting special measures to secure Afro-descendant presence at this court.[925] These magistrates had the impression that there were few qualified minority candidates to fill out positions at the SJP. The participant mentioned that:

> Hence, the inclusion of ethnic personnel has faced many more obstacles than the gender aspect. Why? Because there is an idea that the positions are available, but there are no qualified candidates. That was one of the big discussions we had even with some auxiliary magistrates that said that 'There should not be an ethnic quota because the ethnic [candidates] are not qualified. The gender quota, of course, there is plenty of qualified women, but the ethnic aspect that would be to do them a favor.' I cannot tell you more because I could get fired.[926]

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[922] Angela P. Harris & Carmen G. González, *Introduction*, *in* PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA 1–14, 3 (Gabriella Gutiérrez y Muhs et al. eds., 2012), https://eds-b-ebscohost-com.avoserv2.library.fordham.edu/eds/ebookviewer/ebook/ZTAwMHhuYV9fNDg5NzAwX19BTg2?sid=3ba78d87-15fd-42d3-8abf-d1c2f5e5f3e9@pdc-v-sessmgr03&vid=2&format=EB&rid=3 (last visited Feb 25, 2020).
[923] *Id.* at 3.
[924] Interviews 1, 24, 27, 30 and 37.
[925] Interview 9.
[926] *Id.*

Like other forms of racial discrimination, the presumption of incompetence is a type of disadvantageous treatment that accompanies Afro-descendant attorneys during most of their professional lives.[927] An attorney I had the opportunity to interview mentioned that, while he was working as an in-house lawyer for a company, his colleagues distrusted his capacities for the position he was occupying despite being found the most competent person for the job.[928] Likewise, he also mentioned that during the time that he worked as a litigator, he would be hired over phone-call to litigate cases. On a few occasions, when his clients met him in person for the first time, they would manifest their surprise about the fact he [a black man] was the lawyer someone had recommended to them.[929] Other participants also referred to similar situations in which people would appear incredulous about the fact that they were attorneys,[930] or in which Afro-descendants were restricted in their access to positions due to the belief that they were not competent because of their race.[931] This happened to some Afro-descendant attorneys who studied law in peripherical regions of the country but decided to practice in central areas of Colombia. These professionals found significant obstacles finding employment due to the common belief that they were not well-qualified despite not existing any proof about it.[932] In this respect, regional and racial stereotypes seem to be conflated in order to exclude Afro-descendant attorneys form legal practice.[933]

The presumption of incompetence appears to be an issue not only for staff selection but also in less visible aspects, such as the surprise shown by people whom Afro-descendant professionals had interacted with once they found out they were attorneys or judges[934] Their race was, apparently, in contradiction with their profession. This occurred to a participant who heard one of her colleagues saying that Afro-descendant and indigenous lawyers do not know how you write well because they were better for orality.[935] Such

[927] Interview 36.
[928] Interview 4.
[929] *Id.*
[930] Interview 8.
[931] Interviews 9 and 16
[932] *Id.*
[933] Interviews 34, 37 and 39.
[934] Interviews 4, 8, 9 and 41.
[935] Interview 10.

comment did only disregard black and indigenous professionals' academic credentials but also assumed that their ethnicity made them unfit for the written word. Furthermore, the distrust in Afro-descendants' skills may also significant impacts in aspects such as promotions, as it was manifested by an Afro-descendant woman working in the Caribbean region of Colombia, who asserted that she underwent difficulties climbing up positions in her work of judicial employee because a *mestizo* magistrate (who was not from that region) distrusted her abilities.[936]

In the case of indigenous participants, exoticism accompanies the presumption of incompetence.[937] One interviewee affirmed that although her presence at the judicial institutions was consistently celebrated, she felt her colleagues treated her more as an exotic symbol of inclusion than as a valuable member of the team that could make substantive professional contributions.[938] She described this experience as "epistemic discrimination" due to the value that was given to certain types of knowledge above others.[939]

In my view, the presumption of incompetence is inextricably linked with racial stereotypes concerning the intellectual capacity of Afro-descendants and the activities they are good at. One of the participants also shared this position:

> I believe that such an idea, such pigeonholing that exists about blacks being suitable only for physical activities, for activities, for activities that require strength, but not for cognitive tasks, is a historical stereotype. Many people will tell you: 'I have never thought such thing,' but at teatime is a barrier that it has not been [broken][940]

Furthermore, in Latin America, labor is racialized. Underprivileged ethno-racial groups tend to have occupations that either reflect stereotypes or that offer low remunerations for arduous work.

[936] Interview 24.
[937] Interview 12
[938] Interviews 12 and 20.
[939] Interview 12.
[940] Interview 9.

Concerning Brazil, for example, Álvaro Bello and Marta Rangel mention that at the turn of the 21st century, "about 60% of black and mulatto men carry out manual work in industry, against 37% of white men. While some 40% of black and mulatto women work as domestic servants, the figure for white women is just 15%."[941] Likewise, Carlos De la Torre describes how Afro-Ecuadorian men tend to have easy access to employment positions that require physical strength, like construction, agriculture, or security guard positions. In the case of Afro-Ecuadorian women, many of them work as domestic workers, and it is not uncommon that several female members of the same family are domestic workers.[942]

My impression is that Afro-descendant legal professionals, judges, and judicial employees are contradicting a deeply rooted stereotype concerning black intellectual inferiority by their mere presence in judicial forums. Black bodies are transcending beyond the traditionally accepted occupational activities (cleaning services, security services, the arts, the sports) and physical spaces (the rural areas, the poor neighborhoods, prisons) in which blackness is allowed to exist. They are invaders of spaces and roles that were a fortress for whiteness. Hence, this type of racial discrimination deeply connected to the subversive act of refuting racial stereotypes.

This act of invasion can be burdensome for Afro-descendants in the judiciary and the legal profession. The transgression can create the sensation of feeling like an "intruder,"[943] due to the lack of connection with the elite that has traditionally dominated such spaces. Likewise, in many cases, Afro-descendant presence in these "white spaces" is limited to just one or perhaps a few persons of this ethno-racial identity, which can produce a sense of isolation in the pioneers.[944] The first Afro-descendant in a university, a law school, a court, a tribunal, or a high court.[945]

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[941] Bello and Rangel, *supra* note 6 at 50.
[942] Carlos De La Torre, *Afro-Ecuadorian Responses to Racism: Between Citizenship and Corporatism*, *in* NEITHER ENEMIES NOR FRIENDS: LATINOS, BLACKS, AFRO-LATINOS 61–74, 64 (Anani Dzidzienyo & Suzanne Oboler eds., 2005).
[943] Interviews 4, 9 and 10.
[944] Interviews 14, 15, 16 and 37.
[945] Interviews 1, 2, 7, 9, 13, 14, 15, 16, 23, 25, 28, 29, 36, 37 and 43.

In addition, several participants manifested that they felt they had to do extra work (that was not required for their colleagues) in order to counteract the presumption of incompetence that lay on top of their work.[946] A participant asserted that in order to be considered for positions, Afro-descendant applicants had to present, in general, superior credentials to the ones of other applicants, as additional proof that would not be required of a white or *mestizo* person.[947] This "higher scrutiny" of their work is felt by judges and judicial employees in aspects such as the double or even multiple reviews of their written documents by their superiors,[948] being frequently asked about which law school they attended, and even when inquired about their law school grades.[949] In this respect, a woman Afro-descendant judge mentioned:

> What I am saying is that it is evident that for us [Afro-descendants] to get to those positions, we need to do a superior academic and professional effort to the one that a mestizo person needs to do. Then, what does need to be done? I would tell Afro-descendant persons that after they realize that they need to make a more significant academic and professional effort, 'you are clear,' as we use to say. You cannot measure yourself with the same bar you measure mestizos.[950]

One of the areas in which the Afro-descendant extra effort can be seen is in their aesthetics as legal professionals and judicial servers.[951] Several participants mentioned the need to be overly careful about the way they dressed, wore their hair, and, in general, physically presented themselves, as this was one of the most obvious ways in which they were scrutinized or treated unfairly.[952] In this respect, the idea of having to "play the part" of a judge, judicial employee or even attorney was widespread among participants, since the failure to do so might mean facing uncomfortable or even discriminatory situations.[953] For example, a

[946] Interviews 1, 8, 10, 15, 16, 21, 24, 27, 28 and 44.
[947] Interview 10.
[948] Interview 10.
[949] Interviews 15 and 16.
[950] Interview 15.
[951] Interviews 16 and 18.
[952] Interview 16.
[953] Interview 18.

participant reminded that while she was working as a judge in a small municipality on the Pacific coast, she had to be very careful about how she dressed.[954] On several occasions, people assumed that white people present at the courthouse were the judges since they did not initially consider the possibility of a black woman to occupy a judicial post, even in a majority-black community like the one in which the participant lived.[955]

It is essential to highlight that the type of aesthetic requirements for Afro-descendants that I am talking about exceeds those corresponding to the *habitus* of judicial servers or legal professionals. Perhaps the most evident case I could find was the one of a participant who, while working as *notificador* –which is one of the lowest-ranked judicial employee positions in the judiciary—praised himself of being "the only *notificador* of any courthouse in Cali that wore a tie all the time,"[956] since this was a practice that allowed him to receive a "different treatment" from that dispensed to others in a similar position.[957] Furthermore, on some occasions, this aesthetic requirements for Afro-descendants consist of disguising or diminishing the salience of their ethno-racial identity, as an interviewee in the city of Cartagena pointed out when she mentioned: "You will not see a judge with curls in the judiciary. If she has curls or has an Afro, she will smooth her hair."[958]

In conclusion, Afro-descendant participants are presumed to be incompetent at their roles in the judiciary and the legal profession. They are also subjected to double standards in the appraisal of their work. These issues forced them to do extra work to be treated or valued in the same way as their colleagues. These experiences can be synthesized in the word of an Afro-descendant judge, who asserted: "We need to prove we are capable; despite the fact we are black."[959]

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[954] *Id.*
[955] *Id.*
[956] Interview 21
[957] *Id.*
[958] Interview 33.
[959] Interview 17.

### 7.3. Mechanisms to cope with racial discrimination within the judiciary and the legal profession

A final element that I would like to discuss regarding situations of race discrimination within judicial institutions and the legal profession is how Afro-descendant lawyers, judges, and judicial employees deal with such a problem and, correspondingly, how judicial institutions address these situations. Before discussing this aspect, I should stress that the very discussion of racial discrimination in Latin America is often avoided. Robin Sheriff sustains that in the case of Brazil, racism is silent.[960] She describes that the absence of discussion about race discrimination within families and among friends can be described as a form of *cultural censorship*, which occurs across racial lines and social classes.[961] Some authors also link this refusal to debate racism to ignorance about the types of practices that could be cataloged as racist. In this respect, Beck *et al.* report that, even though Ecuadorians are significantly aware of racial differences among the population, a large percentage of Ecuadorians do not know what racism, race discrimination, or racial prejudice are.[962] Finally, as Tianna Paschel and Mark Sawyer describe, in Latin America, it is common that people who claim to be the victims of race discrimination are often stigmatized as racist themselves. They are often accused of "creating racism where it did not previously exist," if they dare to render discriminatory practices visible. Stigmatization contributes to the lack of denunciation and public debate about racist practices.[963]

Participants referred to several mechanisms they used to deal with situations of racial discrimination within judicial institutions. Paradoxically, one of the most common consisted of either disregarding these situations or trying to refute the racist stereotypes with their behavior.[964] In this respect,

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[960] SHERIFF, *supra* note 180 at 62.
[961] *Id.* at 62.
[962] Beck, Mijeski, and Stark, *supra* note 380 at 120. (Noting that "slightly less than half of the respondents—and by extension, half of all Ecuadorians—claimed not to know what racism was, slightly less than two-thirds said they did not know what racial discrimination was, and almost 70 percent claimed not to know anything about racial prejudice.")
[963] Paschel and Sawyer, *supra* note 622 at 199.
[964] Interviews 1, 12, 23 and 40.

several participants seemed to enunciate the idea according to which they prevented being in a position in which they could be discriminated against by excelling at their work or doing additional work.[965] Some of them went as far as to assert that "I am never discriminated against, but because I do not allow it to happen to me,"[966] implying that they had the power to prevent discriminatory situations from occurring to them by using their high-quality work as a shield against prejudice.[967]

Some participants mentioned that they had rendered visible discriminatory acts. Also, in fewer cases, institutional mechanisms had been activated to address these events.[968] However, in a majority of cases, the institutional channels failed to deal with the situation effectively, and those responsible experienced little accountability.[969] One of the interviewees mentioned that:

> Not much has happened [with the discrimination reports] because usually the issue of discrimination, although today we have a criminal statute, well, it is still seen as a very subjective matter. I mean, that 'you imagined [the discrimination act],' that it is a mere opinion and that he [the attacker] has a right to express himself.[970]

Due to the difficulties of making situations of race discrimination visible, and the apparent inefficacy of the institutional mechanisms to address these situations, institutional responses to address situations of racial discrimination appear to be equally week. An exception to the lack of institutional response seems to be, once again, the SJP. Although several participants reported acts of racial discrimination within this court, they also mentioned that there appeared to be a good faith effort of the institution to address these situations and to prevent them in the future.[971] Some participants referred to

[965] Interviews 1, 2, 4, 9 and 14.
[966] Interview 17.
[967] Interviews 17, 21, 28, 32, 40 and 43.
[968] Interview 8.
[969] Interviews 8, 15, 24, 28 and 32.
[970] Interview 8.
[971] Interview 15.

how this institution tried to train their staff on non-discrimination practices in the workplace, and some senior staff members have publicly addressed specific racial discrimination events in this court.[972] Although additional actions could be undertaken inside the SJP to address situations of race discrimination, I consider it important to recognize that there appears to be some institutional effort in that direction.

As a conclusion for this section, I would like to stress that racial discrimination practices appear to have a decisive role in explaining the low level of representation that Afro-descendants have in judicial institutions in Colombia. Racism appears not only to be creating obstacles for Afro-descendant legal professionals to access positions within judicial institutions but, once they are inside the courts, it also impacts the experiences and work of these professionals. With this conclusion, in chapter 4 I will discuss the relevance and impact of Afro-descendant representation on courts.

[972] Interviews 10, 13, 15 and 16.

## IV. The foundations of Afro-descendant representation in judicial institutions

In the preceding chapters, I introduced the debate on Afro-descendant underrepresentation in Colombia's judicial institutions. I conveyed my empirical study findings on the level of presence that this group has on the country's courts. Besides, I presented a list of conditions that, *prima facie,* seem to be influencing the limited level of Afro-descendant presence on Colombian courts. In this chapter, I will present the grounds for minority representation on courts, with a particular emphasis on Afro-descendants. I will engage in answering two questions: What are the principal rationales invoked for calling for minority representation in judicial institutions? What might be the potential effects of increased Afro-descendant representation in judicial institutions? In order to accomplish this goal, first, I will present the grounds for supporting ethno-racial and gender representation in judicial institutions. Second, I will discuss the potential impact that excluded groups' representation on courts might have on judicial decision-making. Finally, I will debate on the particular aspect of whether strengthened Afro-descendant representation might have an impact on diminishing racial discrimination in the judicial system.

In this chapter, I will introduce the participants' perception of the foundations of Afro-descendant representation on courts and the perceived impact that women and minority presence in judicial institutions may have on judicial decision-making. Additionally, I will reconstruct, in some detail, the central theoretical debates in the U.S. academic literature about the reasons for group representation on courts to analyze the participants' perceptions. I should make two clarifications in this respect. The first is that while the participant perspectives are useful for understanding the current state of the debate about group representation on Colombian courts, these views should not be determinative of a society's inclination to lobby for excluded groups' representation on courts. The citizenry's opinion is the one that should matter in this respect since the population's perspectives are the ones that are decisive at assessing the legitimacy of judicial institutions.

The second is that I delve into the particularities of the scholarly debates because the qualitative study's participants presented several rationales that have been previously invoked in this academic literature. Reconstructing these academic debates is essential because the study participants presented similar contradictions and diversity of perspectives than scholars. Therefore, the academic sources might help to theorize on the tensions arising from debating on minority representation in courts.

Although my dissertation focuses on the Latin American context, in this chapter, I will be referring primarily to the U.S. academic literature in order to account for these scholarly debates. The reasons for using U.S. sources as the main point of reference is twofold: First, U.S. jurisprudence has been significantly influential on foreign courts—and especially Latin American Courts.[973] Thus, the debates on group representation on U.S. courts might influence future debates about women and minorities' representation in the Latin American judiciaries. Second, by contrast to the Latin American context, minority representation on courts have been the object of extensive research and debate in the U.S. legal and social science academia. Consequently, a large portion of the evidence and arguments produced in this area have been based on the U.S. experience.

Before I begin, I shall also iterate a terminological clarification. For the most part, academic debates about the presence of women and minorities in judicial bodies have been held under the conceptual framework of "diversity." The expression "judicial diversity" has become a paradigm to enunciate the inclusion of women and minorities on courts. A judiciary is diverse when the numbers of women and minorities on courts reach meaningful levels. Some authors use this term to also encompass other types of subordinate identity groups (*e.g.*, LGBTQ persons, persons with disabilities, religious minorities) and individuals with career paths that most judges have not traditionally pursued before their appointment to the bench. Despite the traction of the judicial diversity terminology, I consider that this framework is inadequate for my inquiry since it separates the debate of subordinated groups' underrepresentation from its historical roots. This framework ignores the conditions of discrimination and inequality that led to the

[973] Phanor J. Eder, *The Impact of the Common Law on Latin America*, 4 U MIAMI REV 435 (1950). (Noting the influence of U.S. and English law on Latin American legal systems).

exclusion of traditionally marginalized persons from public and private institutions. As Athena Mutua explains:

> The concept of diversity, as many critics have noted, is deeply problematic as currently conceptualized because it disconnects diversity from historical racial and gender injustice, among other things. In addition, in practice, few of the many who pledge loyalty to the idea, seem committed to doing the hard work of reorganizing social and institutional priorities to ensure diversity or even to tracking any potential progress where changes have been made. This is undoubtedly the case in the context of "diversifying the judiciary," particularly among the state judicial benches.[974]

Thus, while many scholars use the concept of "judicial diversity" at explaining minority presence on courts, I will use the framework of representation to refer to their studies. When I use the word representation, I will be referring to the presence of a particular group in an institution or group of institutions. This idea of representation corresponds to Hanna Pitkin's explanation of the concept of descriptive representation.[975] Descriptive representation ensues when the composition of a representative body corresponds to that of the represented group; when the representative mirrors the represented, as it is an act of "standing for."[976]

### 1. The foundations of ethno-racial and gender representation in judicial institutions

In this section, I will analyze the different grounds identified by participants and found in the preexisting literature for justifying gender and ethno-racial representation in judicial institutions. Several

[974] Athena Mutua, *Disparity In Judicial Misconduct Cases: Color-Blind Diversity?*, 23 AM. UNIV. J. GEND. SOC. POLICY LAW 23–105, 30–31 (2014).
[975] PITKIN, *supra* note 21.
[976] *Id.*

rationales have been used to argue for the need to increase minority representation in the judiciary. I will try to differentiate among them. However, I must warn the readers that study participants and scholars usually subscribe to several types of justifications at once, as these are not mutually exclusive. Besides, different types of rationales tend to intertwine with others, making it difficult to distinguish among them clearly.

I could identify three main grounds for women and minority representation in judicial institutions: Role model rationales, altered or improved decision-making rationales, and fairness and legitimacy rationales. Additionally, during the qualitative study, I identified an additional rationale: Equality in access to resources. I will move on to explain the content of each one of these.

### 1.1. Role Model Rationales

Some participants of the qualitative study endorsed the idea that Afro-descendant representation in the judicial institutions was necessary due to the symbolic value of their presence in judicial institutions. This rationale was evident, for example, in an interview with an Afro-descendant judicial employee. She discussed how black women in a particular community were very excited to meet a black woman magistrate that visited their neighborhood since they had not met any black woman judge before.[977] The participant underlined the importance of these types of appointments for dismantling racial and gender forms of prejudice: "It is a chance to break stereotypes: that blacks do not think, that they cannot be in academic spaces."[978] Likewise, another participant stressed the symbolic effects of Afro-descendant representation on courts with regards to the image of the country, mentioning that the lack of black judges portrayed Colombia as a country that did not have a black population.[979]

[977] Interview 14.
[978] *Id.*
[979] Interview 27.

Furthermore, an Afro-descendant woman magistrate sustained that she decided to become a judge because other black women had asked her to do it since there were very few people like her in similar positions. She asserted that the symbolic role that an Afro-descendant woman serving as a magistrate might have on younger black women and girls was decisive for her decision.[980] Another participant, an Afro-descendant attorney, also stressed the relevance of this rationale, by mentioning that she decided to become a lawyer following the steps of another Afro-descendant attorney that served as her career inspiration.[981] In summary: According to participants, role model rationales are important grounds for women and minority representation on the courts, given the symbolic nature of the judicial function in society.

Analogously, in the academic literature, the importance of judges as role models for lawyers, specific communities, and the society is one of the most invoked—and less controversial—rationales to justify gender and ethno-racial inclusion policies in the judicial system. Theresa Beiner explains that: "Diversity on the bench also 'provides role models for those historically excluded.' Women judges themselves agree that they serve as positive role models for women attorneys. These judges also have encouraged other women to become judges."[982] Non-traditional judges fulfill a symbolic role, encouraging members of the community to overcome obstacles and pursue leadership positions in public service. Like Anna Blackburne-Rigsby asserts: "Minority role models in the judiciary are symbolically important to encourage other individuals with diverse backgrounds to join the bench."[983]

Sylvia Lazos Vargas articulates the role model rationale for diversifying the judiciary in terms of symbolic representation. In her view: "In appointing minorities or women with 'rags to riches' stories, the appointing executive makes a statement about his or her values, more specifically, the executive's belief that leadership in American government should be accessible to all citizens, regardless of their background."[984] Nevertheless, Lazos Vargas warns that symbolic representation, which usually acquires

[980] Interview 15.
[981] Interview 42.
[982] Beiner, *supra* note 19 at 117–118.
[983] Anna Blackburne-Rigsby, *The Importance Of A Diverse Judiciary To Closing The Historic "Health" Gap Between Blacks And Whites, And President Obama's Legacy*, 60 HOWARD LAW J. 641–662, 644 (2017).
[984] Lazos Vargas, *supra* note 765 at 1430.

most relevance when the first non-traditional judges are appointed to a particular court, tends to be used as a way to deny the need for structural changes in the judicial system.[985] Token appointments are presented as proof of the effectiveness of the merit system already in place.

An obvious critique of this type of rationale is whether or not the idea of minority and women judges as role models is—by itself—sufficiently powerful to justify state action to ensure a certain level representation for these groups in the judicial system. Some might argue that the mere symbolic effects of having more women and minority judges are not enough to justify special measures, unless other types of benefits could come out of such representation.

### 1.2. Altered or improved judicial decision-making rationales

Altered or improved decision-making rationales assert that an increase in minority representation on courts could lead to a transformation in the content of judicial decisions. Several participants articulated various versions of the altered or improved decision-making rationales.[986] Interviewees asserted that the lack of Afro-descendant presence on Colombia's courts might prevent the development of actions to address social inequality in the country,[987] and that an increase in the number of Afro-descendant judges might bring new perspectives to the bench on social justice issues.[988]

In some cases, participants suggested that these potential changes in the judicial decision-making process might be the result of a better capacity of Afro-descendants to empathize with people in unfavorable social conditions since they might have personally experienced them.[989] Nevertheless, in general, participants rejected the idea that Afro-descendants are different as judges when compared to individuals

[985] *Id.* at 1431–1432.
[986] Interviews 8 and 9.
[987] Interview 1.
[988] Interviews 7 and 8.
[989] Interviews 1, 2, 10, 13, 14, 15, 17, 20, 24, 30, 33, 35, 36, 37, 40, 41 and 44.

from other ethno-racial groups.[990] Interviewees commonly articulated anti-essentialist narratives, relying on principles of formal equality, or naming the judicial activity's impartiality duty.[991] As a response to my question concerning the interaction between his ethno-racial identity and his role in the judiciary, a high ranking Afro-descendant judicial employee, responded with the phrase: "The law has no color."[992] Despite this assertion, participants appeared to be well-aware of jurisprudential and legal theory debates about the issue of judicial discretion in the decision of cases.[993]

Some respondents were careful to explain that while they believed the judicial system could beneficiate from having more Afro-descendant judges, such benefits would not stem from their identity but from the use of their experiences and perspectives in their roles within the judiciary. In this respect, one interviewee mentioned:

> I believe that the ideologic, political pluralism that the judiciary has can also be expressed in that way, and it can be, let's say, enriched that way. Not because the Afro-descendants must have a certain [x] ideology. What I believe is that in those social contexts, I think, the life experience that one has conditions in many forms how one sees life, sees things, understands the law, sees social conflicts. Then, those people may contribute a lot. We could say the same of the white or *mestizo* races, or of any other person. I believe that in that sense, there must be an important balance.[994]

Likewise, it is interesting that some participants appeared to be more receptive to the idea that gender might influence judicial decision-making than they were to the same idea about race. As an example, an Afro-descendant attorney living in an Andean city of Colombia asserted that, while he did not think that the race of the judge could influence judicial decision-making, gender might. He believed that cases in

[990] Interviews 3, 5, 6 and 45.
[991] *Id.*
[992] Interview 21.
[993] Interviews 6, 8, 9, 17, 1, 22 and 23.
[994] Interview 4.

which women judges or prosecutors were involved in criminal cases involving certain types of crimes (possibly violent crimes committed against women), they might act differently from men judges or prosecutors.[995]

In the case of indigenous participants, they seemed, in general, more skeptical about the potential influence that ethnic identities could have on judging.[996] They stressed the fact that, in the majority of cases, judges with ethnic identities are not in their positions *because of th*at *reason* and that the formalistic and regulated nature of the judicial activity would prevent them from relying on their ethnic identity for the execution of their functions.[997] Nevertheless, an indigenous participant acknowledged that, in some areas of the law—as the newly created SJP—, there could be a more significant opportunity for ethnic identities to impact judicial decision-making. In their view, this effect might be a consequence of the significant presence of Afro-descendant and indigenous magistrates and judicial employees on this court and the thematic nature of this jurisdiction (apparently referring to the specific impact that the internal armed conflict had had on ethnic communities in Colombia).[998]

An essential element to consider in the case of indigenous participants is that, *prima facie*, they seemed less inclined than Afro-descendant participants to subscribe to the idea that they are representatives (in the substantive sense) of their ethnic group. This difference is significant. Indigenous participants asserted that their role within the judiciary is not to "channel the perspective" of their people, but rather to open doors and facilitate dialogue between traditional indigenous authorities and the majoritarian system of justice.[999] As an example, an indigenous participant declared: "One could tell: 'Oh wow, I am the representative of the indigenous peoples.' [But] One is not the representative, one belongs to a people and,

[995] *Id.*
[996] Interview 11.
[997] *Id.*
[998] *Id.*
[999] Interviews 11 and 12.

with dignity, will continue to strengthen that here. However, there are the [traditional] authorities there. One must open ways for their active participation and coordination." [1000]

In the specific case of the SJP, which is the high court with the highest level of minority representation in the country, even though the magistrate selection process was sensible to gender and ethnic diversity criteria, in compliance with the Legislative Act 01 of 2017, the Constitutional Court, in the ruling C-080 of 2018, clarified that:

> In consequence, although the magistrate selection responded to 'equitable participation between men and women criteria, non-discrimination guarantees, and respect for ethnic and cultural diversity' (section 11 of transitory article 7 of the Legislative Act 01 of 2017), these do not represent the populations to which they belong to, despite their gender, ethnicity or culture had been considered in their selection. As judicial authorities, they are subjected only to the rule of law and the Constitution.[1001]

The former means that, at least in the legal sense, the transitional justice magistrates should not be considered representatives of their identity groups, due to the need to guarantee judicial independence. However, the former does not preclude the possibility that magistrates incorporate in their decisions the knowledge and values that, under the rule of law, might respond to their lived experiences as women, Afro-descendants or indigenous persons.

Given the diversity of opinions concerning this rationale, it is crucial to analyze it through the lenses of the existing literature on this topic. Altered judicial decision-making rationales have been—without any doubt—the ones that have received more considerable attention, and have been the main object of critique, in scholarly debates. Although some authors have suggested that the effects of more women and minority

[1000] Interview 12.
[1001] Corte Constitucional [C.C.] [Constitutional Court], agosto 15, 2018, Sentencia C-080/2008 Gaceta de la Corte Constitucional [G.C.C.] (Colomb.).

representation in the judiciary on case outcomes could be understood out of common sense, others have stressed the need for empirical verification of such causation. As I will explain in the next section, social scientists have carried this endeavor.[1002]

Assessing the impact of women and minorities' representation on judicial decisions has implications. Perhaps the most visible is that they might further demystify the judicial function. Traditional understandings of the judicial role claim that judges decide cases bound to neutrally apply legal norms. There is a prohibition of using personal values in the decision of cases instead of the law.[1003] As Theresa Beiner describes, the assumption is that "if all judges should theoretically apply neutral principles alike, then admitting that there is a difference in how judges vote based on background factors such as their race and gender undermines the entire myth (or, perhaps, goal) of a neutral and impartial judiciary."[1004]

Jeffrey Segal & Harold Spaeth discuss three models of judicial decision-making for predicting the decisions of the Supreme Court of the United States: The legal model, the attitudinal model, and the rational choice model.[1005] The legal model is a spectrum of theoretical positions that share "the belief that, in one form or another, the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the framers, and/or precedent."[1006] The archetypical example of the legal model is the mechanical jurisprudence school of thought, according to which judges are supposed to act as operators who apply legal rules in an almost mechanic fashion.[1007] In contrast, the attitudinal model defends the idea that "the Supreme Court decides disputes in light of the facts of the case *vis-à-vis* the ideological attitudes and values of justices."[1008] Finally, the rational-choice model encompasses a broad set of approaches that perceive judges as rational actors. This model rests on two

[1002] Beiner, *supra* note 756 at 116–117.
[1003] SEGAL AND SPAETH, *supra* note 236 at 44.
[1004] Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U C DAVIS REV 597–618, 598 (2003).
[1005] SEGAL AND SPAETH, *supra* note 236.
[1006] *Id.* at 48.
[1007] *Id.* at 48.
[1008] *Id.* at 86. (Noting that it would be ideological differences rather than legal instruments and the facts of a case that would ultimately govern the outcome of cases on courts)

assumptions: First, judges may come out with a fluid hierarchy of preferences at deciding cases. Second, judges would choose from their available options aiming to obtain as much satisfaction as possible from their decision-making.[1009] In addition to the three models already discussed, Theresa Beiner explains that, recently, some academics have incorporated in their analysis the effects of institutional factors on decision-making by using strategic theory in their study of judicial behavior.[1010] According to this approach, which builds on rational-choice theory, internal and external factors and actors have the potential to influence judges' decisions on legal disputes.[1011]

A part of the literature that has adopted altered or enhanced decision-making rationales for increasing minority representation on the bench have taken Segal & Spaeth's attitudinal model as a point of reference,[1012] under the belief that such a model is compatible with the legal realism and critical legal studies' approaches to judicial decision-making.[1013] In this sense, Theresa Beiner suggests that racial and gender representation could also lead to ideological inclusion, as life experiences—which are mediated by race and gender—have the potential to influence political ideology.[1014]

However, both legal scholars and political scientists have elevated sharp critiques against the attitudinal model. Some believe that the evidence supporting the model has focused on the Supreme Court's decisions, which cast doubts about the model's effectiveness for predicting lower court's judicial decisions. Likewise, others have accused the model of oversimplifying the judicial decision-making by concentrating their analysis on case outcomes instead of analyzing the judicial process more broadly.[1015]

It is necessary to keep in mind that legal scholars' use of the attitudinal model as a point of reference has not meant that they have ultimately rejected the use of the legal model of judicial decision-making.

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[1009] SEGAL AND SPAETH, *supra* note 236. (To describe the rational choice model, Segal and Spaeth adopt William Riker's theoretical framework.)
[1010] Beiner, *supra* note 756 at 135–136.
[1011] *Id.* at 135–136.
[1012] SEGAL AND SPAETH, *supra* note 236; JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).
[1013] Beiner, *supra* note 756 at 130.
[1014] *Id.* at 130.
[1015] *Id.* at 133–134.

Hybrid models of judicial decision-making are widely used. Moreover, the legal model continues to be dominant in the teaching of law and judges public accounts case decisions in the U.S. Ultimately, the debate on how broad or narrow is judicial discretion remains as one of the most debated issues in jurisprudence,[1016] with some asserting that:

> Many judges attempt to use the legal method in resolving cases. The research of Ashenfelter, Eisenberg, and Schwab supports this and suggests, contrary to findings of political scientists, that in the average case judges use the traditional legal method-look at precedent, and follow it in the case at hand. The result is that case outcomes are relatively consistent. This does not mean that the judge's identity has no impact on the outcome of a particular case or on the law itself. Instead, it suggests that, at least in certain types of cases, outcomes are reasonably predictable.[1017]

Just as some participants suggested, some scholars have claimed that increased women and minority representation on courts could have specific impacts on certain areas of the law. Theresa Beiner argues that increased diversity in the judiciary has the potential for improving the enforcement of civil rights legislation by the courts.[1018] Following some legal scholars and political scientists who affirm that increased presence of women and minorities on courts could lead to the consideration of additional viewpoints in judicial decision-making.[1019] Beiner asserts that descriptive representation in the judiciary could also lead to substantive representation, which, according to Hanna Pitkin, refers to "acting for others," or the defense and procurement of somebody's interests.[1020]

In this same line of argument, Anna Blackburn-Rigsby proposed that a diverse judiciary could help narrow down the health-gap between whites and blacks in the United States.[1021] In her view, the

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[1016] Edited by David Kennedy, *The Canon of American Legal Thought*, 52 AM. J. JURISPRUD. 319 (2007); Duncan Kennedy, *supra* note 241.
[1017] Beiner, *supra* note 19 at 149–150.
[1018] Beiner, *supra* note 756.
[1019] *Id.* at 116–117.
[1020] PITKIN, *supra* note 21 at 113–115.
[1021] Blackburne-Rigsby, *supra* note 983.

diversification of the judiciary could have a positive impact on closing the health gap between racial groups, as judicial leadership is necessary to increase legal aid for underserved communities, which could ultimately reflect upon minorities' access to the health system.[1022]

Analogously, Joy Milligan argues that the diversification of the judiciary could open the path to improved judicial decision-making in the field of political morality.[1023] According to her theory, race and ethnicity are factors that inform the public's perception of issues of political morality and that, in such cases, judges should consider all available points of view before making decisions. Milligan argues that a higher level of minority representation in the judiciary could potentially enable the judiciary to consider additional perspectives on public morality because minority judges could be better positioned to seriously take into consideration perceptions that are held within their communities.[1024] The interaction and deliberation between majority and minority judges could lead to new or better judicial decisions, as:

> Openness to alternative legal resolutions prevents us from discarding meritorious resolutions out of hand, provides us with new information about the contours of the legal problem, and potentially produces new and better answers based on compromise. Most significantly, the collective experience of living with alternative moral solutions may be the surest way for us to agree on which solutions are the correct ones.[1025]

Likewise, Sylvia Lazos Vargas affirms that a more diverse judiciary could be an avenue for courts to achieve an enhanced understanding of racial tensions, which could finally translate into a rule of law that is inclusive of the narratives of the majority and the minorities.[1026] She asserts that increased minority representation on courts could foster a conversation about the roles and purposes of using race as a category

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[1022] *Id.* at 662.
[1023] Joy Milligan, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions about Political Morality*, 81 NU REV 1206–1248 (2006).
[1024] *Id.*
[1025] *Id.* at 1212.
[1026] Sylvia R. Lazos Vargas, *Does A Diverse Judiciary Attain A Rule Of Law That Is Inclusive?: What Grutter V. Bollinger Has To Say About Diversity On The Bench*, 10 MICH. J. RACE LAW 101–152 (2004).

in U.S. law. Lazos Vargas is careful to warn that "it is a fallacy to equate descriptive minority representation with the substance of a deeper racial dialogue on problematic constitutional issues,"[1027] as "greater minority representation on the bench only increases the chances that a racial dialogue can be developed."[1028] In this respect, the complexities of judging turn the descriptive representation of excluded groups into a condition that facilitates cross-identity debates on racial issues but does not guarantee such viewpoint exchange.

Other authors have focused on the importance of minority representation on courts for specific ethno-racial groups. Some scholars have asserted that the presence of certain racial groups on courts could lead to better judicial decision-making due to the particular life experiences attached to different racial identities. In the case of Asian Americans, Pat Chew & Luke Kelley-Chew seem to suggest a potential connection between the low levels of representation of this racial group in the judiciary with their difficulties to be successful plaintiffs in workplace racial harassment cases.[1029] According to their findings, Asian American plaintiffs were successful litigants in only 19.4% of these type of cases, and, along with African Americans, had the highest dismissal rate among all racial groups in this type of litigation.[1030] Furthermore, Chew & Kelley-Chew argue that Asian Americans experience discrimination in a different way than other racial groups and that the members of this group may have a particular racial perspective on this issue. Ultimately, the authors argue that increasing the number of judges that share this ethno-racial identity may enrich the judicial decision-making process in this particular type of case, beneficiating not only Asian American plaintiffs but the general public.[1031] Serafin Tagarao *et al.* also endorse this position in the case of Filipino-Americans.[1032]

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[1027] *Id.* at 152.
[1028] *Id.* at 152.
[1029] Pat Chew & Luke Kelley-Chew, *The Missing Minority Judges*, 14 J. GEND. RACE JUSTICE 179–197 (2010).
[1030] *Id.* at 185.
[1031] *Id.* at 192–194.
[1032] Serafin Tagarao, Edward Dailo & Christine J. Gonong, *Filipinos On The Bench: Challenges And Solutions For Today And Tomorrow's Generations*, 22 ASIAN PAC. AM. LAW J. 57–67 (2016).

Similarly, Josh Hsu wonders whether the identity and experiences of judges of this group could influence their perspective on specific legal issues.[1033] He studied Asian American judges' decisions and biographies and concluded that "some judges have explicitly stated that their Asian American identities affect their analyses, while in other instances, language in their opinions suggests the same. Statistical evidence alone, however, has not supported these claims."[1034]

In the case of Native Americans, Paige Hoster affirms that an increased level of representation of this group in the judiciary could enhance judicial decision-making, as a diverse judiciary is better situated to approach with empathy to different legal disputes.[1035] According to Hoster, sufficient Native American representation on the federal bench is crucial for this group's interests, as the judicial system tends to downplay claims regarding Native interests. Hence, increased representation could translate into a fairer study of Native American cases before U.S. courts.[1036] Similarly, Robert Saunooke states: "We underestimate profoundly the impact of the lack of diversity within the judiciary—especially the impact of the void caused by the dearth of Native Americans in the federal judiciary."[1037]

In the case of Latinos/as, Kevin Johnson argued–before the confirmation of Justice Sonia Sotomayor–that having a Latino justice in the Supreme Court could potentially benefit the court as an institution, the community of Latinos/as, and the country as a whole.[1038] In his view, a Latino/a justice could bring new approaches to the court; enriching its decision-making process on a range of issues, including constitutional law and civil rights.[1039] Also, he asserted that the appointment of a Latino/a to the Supreme Court could also send a powerful message of inclusion for this segment of the country's population.[1040]

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[1033] Josh Hsu, *Asian American Judges: Identity, Their Narratives & Diversity On The Bench*, 11 ASIAN PAC. AM. LAW J. 92–119 (2006).
[1034] *Id.* at 114.
[1035] Paige E. Hoster, *Understanding The Value Of Judicial Diversity Through The Native American Lens*, 36 AM. INDIAN LAW REV. 457–487 (2012).
[1036] *Id.*
[1037] Robert O. Saunooke, *Native Americans And The Federal Bench: The Time Has Come*, 48 JUDGES J. 25–27, 26 (2009).
[1038] Kevin R. Johnson, *On the Appointment of a Latina/o to the Supreme Court*, 5 HARV LAT. REV 1–16 (2002).
[1039] *Id.*
[1040] *Id.* at 7–13.

Likewise, concerning African Americans, Kevin Johnson & Luis Fuentes-Rohwer stressed the impact that Thurgood Marshall had on the Supreme Court during his tenure as an associate justice. They explain that "other justices on the Court credited him with adding much to the Court's deliberations due to his experiences as an African American civil rights activist in the days of great upheaval and enduring change to the social fabric of the United States."[1041] Even more conservative justices, such as Anthony Kennedy and Sandra Day O'Connor, have acknowledged Marshall's influence on the court and its members, especially on issues related to social justice and criminal law.[1042]

I should note that some black scholars have been among the most consistent supporters of altered decision-making rationales as foundations for minority representation on the bench. As an example, Sherrilyn Ifill argued that the main benefit of granting representation to minorities in the judiciary is to include an array of voices that have historically been excluded from courts. She sustained that these voices have the potential to improve the quality of judicial decisions due to the interaction of different perspectives.[1043] Carl Tobias has also supported this idea concerning the prospective impact of LGBT judges on courts' decisions.[1044]

Ifill trusts that minorities' representation may also lead to the substantive representation of minorities' values and points of view. She believes that racial identities influence how minorities in the U.S. perceive in the world,[1045] and that those racial identities could also inform judges' legal analysis, their interpretation of the law, and their decisions on legal disputes.[1046] The author recognizes that some people could find it problematic to overtly acknowledge the use of personal experiences in judicial decision-making—due to the need to guarantee judicial impartiality. Nevertheless, she argues that in the case of judges, individual impartiality should not require judges to leave aside their life experiences and principles,

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[1041] *Id.* at 26–27.
[1042] Anthony M. Kennedy, *The Voice of Thurgood Marshall*, 44 STANFORD LAW REV. 1221–1225 (1992); Sandra D. O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STANFORD LAW REV. 1217–1220 (1992).
[1043] Ifill, *supra* note 249 at 409–410.
[1044] Carl Tobias, *Considering Lesbian, Gay, Transgender, and Bisexual Nominees for the Federal Courts*, 90 WASH. UNIV. LAW REV. 577–586, 583 (2012).
[1045] Ifill, *supra* note 249 at 417–418.
[1046] *Id.* at 432–433.

but rather to have an openness of mind when deciding particular cases.[1047] Nonetheless, Ifill's focus on the decision-making effects also means that she does not believe that descriptive representation will be sufficient—or even necessary—to accomplish such purpose.[1048] She asserts: "Minority judicial candidates who are explicitly promoted to fulfill diversity objectives, however, must offer more than their racial 'face' to demonstrate that they can bring diversity to the bench"[1049], discarding the idea that any minority candidate for a judicial vacancy could serve the purpose of diversifying the bench. Furthermore, she goes as far as to assert that, in some instances, white candidates could be functional as "diversity candidates" if they are capable and willing to serve as representatives of minority points of view.[1050]

The idea that descriptive representation is a precondition for substantive representation has certainly been controversial in the political science scholarship. Jane Mansbridge asserts that descriptive representation is not always the best alternative for minorities, as in a representative democracy, the core concern of representation involves the deliberation about substantive interests.[1051] Nevertheless, she also affirms that there are conditions under which descriptive representation could be beneficial for traditionally excluded groups,[1052] including when the interests at stake are unclear, there is distrust among the parties, or the institutions' legitimacy is low, or there is longstanding political subordination in society.[1053]

Similar to Sherrilyn Ifill's position, Angela Onwachi-Willig affirms that the transformation of the judiciary in terms of race and gender—as well as class, religion, sexuality, and other categories—will lead to the introduction of a variety of voices that will enhance the judicial decision-making process.[1054] Furthermore, she introduces a proposal to increase the number of justices that compose the Supreme Court of the United States from 9 to 15, in order to allow different demographic groups to achieve representation

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[1047] *Id.* at 461.
[1048] Sherrilyn A. Ifill, *Judicial Diversity*, 13 GREEN BAG ENTERTAIN. J. LAW 1–10 (2009).
[1049] Ifill, *supra* note 249 at 415.
[1050] Ifill, *supra* note 245 at 122.
[1051] Mansbridge, *supra* note 252 at 629.
[1052] *Id.* at 628.
[1053] *Id.* at 628.
[1054] Angela Onwuachi-Willig, *Representative Government, Representative Court - The Supreme Court as a Representative Body*, 90 MINN REV 1252–1274 (2006).

in the highest level of the federal judiciary.[1055] In her proposal, she highlights the negative effect of tokenism in the judiciary. She notes that "once one minority is on the bench, the politicians who hold the responsibility of appointing people to the bench believe their job is done, and they have little political incentive to create further diversity on that court."[1056]

It is essential to highlight that Onwachi-Willig does not assert that the diversification of the judiciary will necessarily mean that these judges will be of a liberal or progressive line of thought. As an example, she interprets Justice Thomas' votes on cases involving racial issues as being an expression of black conservative thinking in the U.S.[1057] According to the author, experiences of racial subordination in the life of Clarence Thomas have possibly influenced his role as a judge, but in a way in which they have made him a voice speaking a narrative of black conservatism. She believes that Justice Thomas's voice is also a diverse voice with the potential to enrich the judicial decision-making processes.[1058]

A similar debate to the one concerning the impact of minorities on judicial decision-making has taken place regarding women representation in the judiciary, especially given the influence that the work of the psychologist Carol Gilligan has had on feminist legal theory.[1059] As Jilda Aliotta describes:

> Feminist legal theorists have also argued that women judges will speak with a 'different voice.' Several of these theorists find their inspiration in the work of psychologist Carol Gilligan, who argues that women's styles of reasoning and approaches to problem solving differ from those of men. According to Gilligan, while men tend to view the world atomistically and to search for abstract principles to resolve moral problems, women are more likely to see the world as

[1055] *Id.*
[1056] *Id.* at 1268.
[1057] Angela Onwuachi-Willig, *Just Another Brother on the SCT? What Justice Clarence Thomas Teaches Us About The Influence of Racial Identity.*, 90 IOWA LAW REV. 931–1010 (2005).
[1058] *Id.*
[1059] Carol Gilligan, *In a different voice: Women's conceptions of self and morality*, *in* GENDER AND PSYCHOLOGY. 33–74 (Viv Burr & Viv Burr (Ed) eds., 2015).

> interconnected and to perceive most moral problems as requiring an accommodation between self and community.[1060]

Aliotta explains that this current of thought believes that the American legal system is constructed from a male perspective, as it rests heavily on individualistic values, and it seeks to resolve cases based on abstract principles. Hence, increasing the number of women judges could have the potential for introducing new perspectives to judicial decision-making, as women might behave differently from men on how they approach the legal analysis of cases.[1061] Other authors such as Shirley Abrahamson, who has acknowledged that her gender has played a significant role in her work as a judge, also support this position.[1062]

Some authors, such as Sue Davis, have tried to empirically assess the theory of a distinctive women's voice in the context of the judiciary by trying to identify it in specific judicial opinions.[1063] Davis concludes that, sometimes, women speak in a different voice; at other times, they do not.[1064] She asserts that sometimes men can speak in a different voice, too. Hence, regarding the results of her research, she affirms that these "do not provide empirical support for the theory that the presence of women judges will transform the very nature of the law."[1065] In contrast, regarding the question about the potential feminine voice of Justice Sandra Day O'Connor, Jilda Aliotta argues that it is not possible to find such a voice in the opinions of this specific justice. Moreover, she disputes the existence of significant evidence supporting the idea that men and women, as a general rule, would reach different decisions in their role as judges.[1066]

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[1060] Jilda M. Aliotta, *Justice O'Connor and the Equal Protection Clause: A Feminine Voice*, 78 JUDICATURE 232–235, 232–233 (1995).
[1061] *Id.* at 233.
[1062] Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLD. GATE U REV 489–504 (1984).
[1063] Sue Davis, *Do Women Judges Speak in a Different Voice--Carol Gilligan, Feminist Legal Theory, and the Ninth Circuit*, 8 WIS WOMENS LAW J. 143–174 (1992).
[1064] *Id.* at 157. (Noting that "the hypothesis that women judges speak in a different voice would be supported if, in cases involving discrimination, women judges focus on the importance of membership and full participation and the problem of exclusion while men judges tend to treat discrimination more as a problem of individual autonomy. The hypothesis would also be supported if women judges but not men judges ask 'the woman question' in resolving claims of discrimination by examining factors that could serve to disadvantage women or members of other groups."
[1065] *Id.* at 171.
[1066] Aliotta, *supra* note 1060.

Another form in which women's presence in the judiciary might impact judicial decision-making could be thorough the use of feminist legal methods. Katharine Bartlett explains that feminist legal methods include an array of non-traditional approaches to the creation of law, which seek to uncover aspects of the legal system that tend to be left unnoticed in traditional legal doctrine and epistemology.[1067] These methods include tools such as asking the woman question, feminist practical reasoning, and consciousness-raising.[1068] Although some of these methods are not of exclusive use of feminists or even women, she believes that it is reasonable to think that an increase in women's representation in the judiciary could open the doors for broader use of feminist legal methods in judicial decision-making.

In opposition to Bartlett's view, Michael Solimine & Susan Wheatly argue against the idea of increasing the number of women judges over the basis of their alleged impact on judicial decision-making.[1069] The authors argue that the idea that women judges will be able to use feminist legal theory in their work is problematic since the feminist theory is not a single coherent current of thought.[1070] Furthermore, there are no reasons to believe either that women judges would use feminist methods while acting as judicial decision-makers, or that men could not use them if situated in an analog position.[1071] Therefore, the authors argue that more women judges could be desirable from the perspective of intuitive fairness, as evidence about the impact of gender in judging is still inconclusive.[1072]

Perhaps one of the contexts in which altered judicial decision-making rationales acquired public visibility was during Sonia Sotomayor's confirmation as a Supreme Court Justice. Sotomayor was criticized for having stated in public: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."[1073] Regarding this episode, Pat Chew identifies that the core of the critiques against Sotomayor was based both

[1067] Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV REV 829–888, 836–837 (1990).
[1068] *Id.* at 836–837.
[1069] Solimine and Wheatley, *supra* note 259.
[1070] *Id.* at 907.
[1071] *Id.* at 907.
[1072] *Id.* at 918–919.
[1073] Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY RAZA LAW J. 87–94 (2002).

on her acknowledgment that identity informs judicial decision-making, as well as on the idea that her identity could lead to non-impartial judicial decisions.[1074] Chew beliefs that it is true that judges' race and gender affect their decision-making and uses political science evidence to support such association. However, she disputes the idea that women and minority judges would be biased or prejudicial in their judicial role. Chew affirms that this would mean that white-male judges' perceptions are not to be understood as the standard for impartiality.[1075] Moreover, when judges exchange opinions with other judges with different racial and gender identities, this could lead to an in-depth analysis of legal disputes, which could be beneficial for judicial decision-making as a whole.[1076]

Regarding the modified decision-making rationales, perhaps the question is so much not whether descriptive representation will lead to substantive representation for women and minorities, but rather under what conditions such effects may arise. In this regard, the theories of representative bureaucracy could have some answers.[1077] According to Lael Keiser *et al.*, some factors influence the transformation of a type of representation into another, including "discretion, the gendering of a given policy issue, mission/socialization, hierarchy, stratification, critical mass, and professionalization."[1078]

Authors such as Maya Sen have argued that, even in modern times, when the educational and career backgrounds of women and minority judges tend to be becoming similar to those of white-male judges, women and minorities still tend to be more liberal than traditional judges.[1079] This a significant change since, as Elliot Slotnick & Mary Clark explain, years ago, the career paths of non-white-male judges and traditional judges were noticeably different.[1080] Sen's research indicates that in recent years, women and minority judges have acquired similar career paths and education to white-male judges, including access to

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[1074] Pat K. Chew, *Anticipating The Wise Latina Judge*, 91 DENVER UNIV. LAW REV. 853–868, 853 (2014).
[1075] *Id.* at 868.
[1076] *Id.* at 868.
[1077] Lael R. Keiser et al., *Lipstick and Logarithms: Gender, Institutional Context, and Representative Bureaucracy*, 96 AM. POLIT. SCI. REV. 553–564 (2002).
[1078] *Id.* at 557.
[1079] Maya Sen, *Diversity, Qualifications, And Ideology: How Female And Minority Judges Have Changed, Or Not Changed, Over Time*, 2017 WIS. LAW REV. 367–399 (2017).
[1080] Slotnick, *supra* note 19; Mary L. Clark, *One Man's Token Is Another Woman's Breakthrough? The Appointment Of The First Women Federal Judges?*, 49 VILLANOVA LAW REV. 486–550, 533 (2004).

legal education in top law schools and previous judicial experience. In her view, this situation could potentially allow us to assert that "the interests of women and minorities are being represented, even as the professional and educational profiles of female and minority judges appear to slowly be converging toward the Ivy League, private-practice oriented experience of white male judges."[1081]

I should mention that the most common criticism of post-modern legal theorists against the idea of using descriptive representation as an instrument to achieve substantive representation in the judiciary is that it could be based on essentialism.[1082] As Theresa Beiner explains: "Indeed, the very idea that, for example, women will decide a certain way in 'women's cases' is essentialist. It assumes a commonality of perspective among women that is likely unjustified."[1083] Although Beiner recognizes that certain empirical studies have concluded that gender and racial identities may influence judicial decision-making, she acknowledges that in most circumstances, traditional and non-traditional judges will decide cases similarly.[1084]

In conclusion, the academic literature concerning altered or improved decision-making as grounds for minority and women representation on courts has a similar diversity of opinions and analog contradictions than the participant responses invoking this type of rationale. In the next section, I will present a specific finding in the participants' responses concerning the impact of the race-ethnicity divide on the interviewees' narratives invoking altered decision-making rationales.

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[1081] Sen, *supra* note 1079 at 396–397.
[1082] Mansbridge, *supra* note 252 at 637–638. (Mansbridge explains that: "Essentialism involves assuming a single or essential trait, or nature, that binds every member of a descriptive group together, giving them common interests that, in the most extreme versions of the idea, transcend the interests that divide them. Such an assumption leads not only to refusing to recognize major lines of cleavage in a group but also to assimilating minority or subordinate interests in those of the dominant group without even recognizing their existence.")
[1083] Beiner, *supra* note 756 at 116–117.
[1084] *Id.* at 116–117.

### 1.2.1. The race-ethnicity divide's effect on the altered decision-making rationales as a foundation for Afro-descendant representation on Colombian courts

An aspect that became noticeable in the participant's undertaking of the potential effects of Afro-descendant presence on courts concerning judging is their differential treatment of Afro-descendant identity in its racial and ethnic dimensions. In general, interviewees were more open to endorse altered or improved judicial decision-making rationales when they were discussing the contributions of Afro-descendant judges that have a distinct ethnic identity (a cultural identity that is different from majoritarian society) to judicial decision-making, than when they referred only to Afro-descendants as a racial group (a form of difference that is asserted based on discrimination experiences that follow phenotype).[1085] In this respect, an Afro-descendant judge stressed that while racial identities should not have a significant impact on judicial decision-making, cultural identities, since the judges that have stronger ties to the Afro-descendant community (which he named as judges that are "more Afro") could contribute to debates with a view that those who are not "as Afro" might not provide. Likewise, an Afro-descendant woman who works as a judicial employee for a high court, while answering to the question of whether being an Afro-descendant was a circumstance that impacted her role within this institution, mentioned that:

> Yes, just as I was telling you. Just because of the way you have a vision on the collective, even if you are not an ethnic person. Then, I do not know, a case of rape, a theft, a murder, a person who was killed by their husband. What happened to that family? What injuries did it suffer? How was the community affected by it? The neighborhood? Let's say that the answers will only come from the idea of the collective, which is very ethnic.[1086]

[1085] WADE, *supra* note 27.
[1086] Interview 9.

Furthermore, in response to a question about whether increased Afro-descendant representation on courts might beneficiate the judicial system, this participant declared:

> I think that it depends on the type of Afro-descendant. Then, I do not know if you are familiar with the concept of 'oreo.' These are black [people] in the outside, but white [people] in the inside. Then, they have been raised as a mestizo person, and they are only identified based on their skin color. Then, having a person like this, that has a way of thinking openly like a mestizo, then, what difference does it make? Only the color of the skin. It is different from having an Afro-descendant with cultural background, with ethnic background, that will have a perspective, a different type of analysis. Then, here the matter is not only about skin color but about identity and cultural recognition. Then, what would be the gain be?[1087]

I believe this interview is revealing because it shows that some participants believe in the existence of specific "black" and "*mestizo*" ways of seeing the world. Likewise, I find intriguing the differential relevance that the participant gives to ethnic difference, in contrast to racial difference.

Some less essentialist perspectives verbalized such asymmetry in terms that were closer to the idea of cultural competency: Asserting that the lack of knowledge about the traditions and ways of living of ethnic communities could lead to injustice in judicial decision-making.[1088] More than the ethnic identity itself, participants underscored the relevance of knowledge of their cultures, territories, conditions of structural disadvantage.[1089] I should note, however, that other participants defended a different position, explicitly naming as a stereotype the idea that an Afro-descendent person might be proficient on issues of Afro-descendant rights just because of their identity, ethnic or not.[1090]

[1087] Interview 9.
[1088] Interview 13.
[1089] Interviews 16, 20, 24, 26, 35 and 43.
[1090] Interview 10.

I consider that the heavier weight that participants give to the ethnic Afro-descendant identity for judicial decision-making when compared to the racial aspect of it is deeply related to how ethnicity has trumped race as the acceptable framework to acknowledge the ethno-racial difference in Colombia. Regarding the ethnic and racial divide, Peter Wade mentions that the concept of race is commonly used to describe conditions such as biology, phenotype, ancestry, descendance, or an ", internal natural essence of some kind,"[1091] whereas ethnicity is commonly used to refer to a distinctive cultural or historical origin that is not anchored in biology or nature.[1092] Wade emphasizes that the use of racial classifications emerged in particular historical coordinates: Those of the European colonization enterprise. Race was used to classify colonized non-European groups.[1093] In this respect, "the concept of race is even more surely linked into a European history of thinking about difference, rather than a concept describing an objective reality that is independent of a social context."[1094]

Álvaro Bello & Marta Rangel mention that the term ethnicity is of more modern usage than the term race,[1095] and Oliver Barbary and Fernando Urrea explain that term ethnic group has been used in the anthropological sense to refer to native Amerindian populations (indigenous peoples) that inhabited the continent before the arrival of the Spanish colonizers, and whose descendants can be distinguished from the majority of the population due to their cultural characteristics.[1096] The authors also elucidate that in Colombia, the substitution of the term race by the term ethnicity, and the shift of focus from phenotype to cultural difference, are not ideal for resolving the issues involving minority populations. This limitation is a consequence of how the cultural the phenotypical dimensions of these identities are intertwined and of the risk of essentializing cultural differences.[1097]

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[1091] WADE, *supra* note 694 at 4.
[1092] *Id.* at 5.
[1093] *Id.* at 5.
[1094] WADE, *supra* note 27.
[1095] Bello and Rangel, *supra* note 6 at 44.
[1096] Barbary and Urrea Giraldo, *supra* note 20 at 54.
[1097] *Id.* at 56.

Similarly, Shane Greene highlights the necessity of considering both race and ethnicity as two objects that are inextricably related. The author asserts that instead of unlinking race from ethnicity, "we need to think in terms of the complex inter-dependency between race and ethnicity, phenotypical and cultural designators of social identity."[1098] Moreover, he suggests that "the race versus ethnicity contrast, when drawn too sharply, implicitly overlooks something extremely important in terms of the historical relationship between affirmative action, civil rights, and multiculturalism,"[1099] as it disregards the historical processes that the policies based on these rationales seek to address. Greene also declares that it is necessary to "rethink approaches that draw too simple a contrast between the apparently ethnocultural 'rootedness' of indigeneity and the apparently racialized 'rootedness' of Afro-descendants in every context."[1100]

Similarly to Greene, Bettina Ng'weno argues that race and ethnicity are co-dependent notions.[1101] While the idea of ethnicity as a form of cultural difference dependent upon a particular relationship with the land has been widely established in international law instruments and national Constitutions, the idea of race as a factor contingent on phenotype has been less relevant in recent years.[1102] The perception of race as a category that is closer to Afro-descendants and ethnicity as a concept closer to indigenous peoples is not new. It is a condition that has been essential at defining which groups could have access to certain types of rights in multicultural states, particularly in Latin America. Ng'weno mentions that in the case of Colombia, for example, Afro-descendants who are recognized as ethnic groups have access to particular legislation that guarantees them certain collective rights, including territorial rights over their ancestral land.[1103] In contrast, non-ethic Afro-descendants (those who are not part of culturally distinct cultural groups) are not protected by similar legislative measures.[1104]

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[1098] Greene, *supra* note 106 at 332.
[1099] *Id.* at 332.
[1100] Marla N. Greenstein, *The Challenge Of Maintaining Confidence In A Judiciary Lacking In Diversity*, 55 JUDGES J. 40, 342 (2016).
[1101] Bettina Ng'weno, *Can Ethnicity Replace Race? Afro-Colombians, Indigeneity and the Colombian Multicultural State*, 12 J. LAT. AM. CARIBB. ANTHROPOL. 414–440 (2007).
[1102] *Id.* at 417–418.
[1103] *Id.* at 434.
[1104] *Id.* at 434.

Similarly to Ng'weno, Juliet Hooker affirms that theorists have provided two main justifications for granting collective rights to minority groups. The first refers to the need to protect minorities' distinctive culture, language, and practices, which ultimately calls for permanent measures to secure these values. The second goes back to the idea of past discriminatory treatment and the need for reparations, which calls for the establishment of temporary measures targeted at evening the playfield for the harmed groups. Hooker argues that, in Latin America, indigenous peoples have been more successful than Afro-descendants at attaining new rights through recent reforms, since the first type of justification for collective rights has been the most widely accepted in this region:

> In almost every case of multicultural reform in the region, indigenous groups have been much more successful in gaining collective rights from the state than have Afro-Latinos. Of the fifteen Latin American countries that have implemented some type of multicultural citizenship reform, only Brazil, Colombia, Ecuador, Guatemala, Honduras, and Nicaragua extend (some) collective rights to Afro-Latinos. Even when Afro-Latinos were granted collective rights, however, in almost no instances did they gain the same rights as Indians. In fact, there are only three countries in Latin America where Indians and Afro-Latinos have exactly the same collective rights: Honduras, Guatemala and Nicaragua. Moreover, only a small subset of Afro-Latinos - generally rural communities descended from escaped slaves - has been able to win collective rights under Latin America's multicultural citizenship reforms.[1105]

Instead of considering that this asymmetry in the success of indigenous peoples and Afro-descendants in Latin America is the mere result of differences in population sizes, in mobilization efforts around collective rights, or levels of organization among the two social movements, Hooker attributes this situation to the fact that "collective rights are adjudicated on the basis of possessing a distinct group identity defined in cultural or ethnic terms. Indians are generally better positioned than most Afro-Latinos to claim

[1105] Juliet Hooker, *Afro-descendant Struggles for Collective Rights in Latin America: Between Race and Culture*, 10 SOULS 279–291, 286 (2008).

ethnic group identities separate from the national culture and have, therefore, been more successful in winning collective rights."[1106] Hence, the author warns that granting collective rights to minority groups based on the distinctiveness of their cultural identity could have the negative effect of creating incentives for these groups to mobilize around the issues of cultural recognition rather than around situations of race discrimination.[1107]

Shane Greene seems to agree with Hooker's view, as he points out that Afro-descendant populations are commonly encouraged to present themselves as more indigenous (ethnification), in order to become more visible.[1108] Although in practice this has not necessarily led to Afro-descendants to be granted fully ethnocultural recognition, when such recognition has been given to Afro-descendants, it has been usually targeted to groups that are rural communities, usually descendant from groups of *cimarrones,* and communities that are claiming ancestral-like rights.[1109] In this respect, Greene declares:

> This may mean that those Afro-descendants who do gain ethnocultural recognition are not becoming so much 'like' indigenous peoples as they are becoming the only Afro-descendants who are semi-recognizable as semi-sovereign pueblos, as 'legitimately' Afro-American peoples (*i.e.,* the most 'Africanized' peoples in the 'Americas'). Those who survived through slavery, those who navigated within slavery, those who purchased their way out of slavery and, of course, those who helped build what were originally sovereign 'criollo' nations (long before they became 'mestizo' nations) are—not unlike the re-routed and re-rooted cholos—in a position much more difficult to recognize.[1110]

My reading of the participants' greater receptiveness to discuss altered decision-making rationales when framed in terms of ethnicity than in terms of race is that this is closely linked to how multicultural discourses have unfolded in Colombia. In this country, multiculturalism has recognized Afro-descendant

[1106] *Id.* at 285.
[1107] *Id.* at 285.
[1108] Greene, *supra* note 106 at 343.
[1109] *Id.* at 343.
[1110] *Id.* at 348.

difference under the condition that it is framed in terms of cultural difference by opposition to narratives that stress the discrimination aspect of the Afro-descendant position in society. Moreover, some participants incurred in a contradiction by alleging that it was essentialist to sustain that race might influence judging but that asserting the same about ethnicity would not fall into the same quandary. I consider that this contradiction could be the effect of the Colombian multicultural model (shared by several Latin American countries), which has censored the use of race as a category of legal and social analysis, while at the same time has promoted the acknowledgment of cultural difference

I conclude that participants gave significant weight to altered decision-making rationales as a basis for Afro-descendant representation on courts. Ethnic identities were, in many respects, the primary source for the idea that an increase of this group's presence in Colombian judicial institutions may lead to a different type of judicial decision-making.

### 1.3. Fairness and legitimacy rationales

In general, fairness and legitimacy rationales sustain that the minority underrepresentation in the judicial system could lead to substantive illegitimate results in the practice of adjudication, negatively impacting the members of excluded groups who come before these courts. These rationales tend to intermix with altered decision-making rationales, especially with those that assert that these types of enhanced decision-making could better align with the interests of excluded groups. The specificity of fairness and legitimacy rationales *vis-à-vis* altered decision-making rationales is that the former stress particular substantive values (legitimacy, fairness) as foundations for women and minority representation on courts.

Some participants articulated fairness and legitimacy rationales as grounds for enhanced Afro-descendant representation in judicial institutions.[1111] For example, a participant mentioned that with more significant minority presence, "courts also gain more legitimacy. The population feels closer to the people

[1111] Interview 39.

that are making decisions for them. And the understanding of situations also changes the realities and issues."[1112] Another one stated that a more significant Afro-descendant presence in judicial institutions would not only be beneficial for the judicial system but would be necessary, referring to the multicultural character of the Colombian state as declared in the National Constitution.[1113] A third participant suggested that the lack of Afro-descendant judges, and judges with specific knowledge of the particularities of Afro-descendant territories, played against certain types of litigants, due to the current judges' lack of knowledge of their context.[1114] Besides, the participant mentioned that some residents perceived Afro-descendant underrepresentation on the courts in geographic areas that Afro-descendants traditionally populate as evidence of racism against the black population.[1115]

All of these aspects are deeply connected to fairness and legitimacy rationales for Afro-descendant representation on the courts, as they emphasize the citizenry's perceptions of the trustworthiness and substantive fairness of the judicial system. Despite its importance, fairness and legitimacy rationales received less attention from participants than other types of rationales. Perhaps, some participants assumed that altered decision-making rationales might, in and of themselves, entail fairness and legitimacy rationales as foundations for a more significant minority presence on Colombia's courts.

In the academic literature, Sylvia Lazos Vargas affirms that viewpoint diversity may promote three valuable principles for the judicial system: Improved decision-making, credibility in the rule of law, and the inclusion of underrepresented points of view.[1116] Similarly to Sherrilyn Ifill and Angela Onwuachi-Willig, Lazos Vargas uses the concept of voices of color, female voices, and queer voices to account for how experiences of discrimination may lead to the creation of a particular perspective of social reality endemic to discriminated groups.[1117] Lazos Vargas underlines the idea that there is not a single legitimate

[1112] Interview 14.
[1113] Interview 36.
[1114] Interview 37.
[1115] *Id.*
[1116] Lazos Vargas, *supra* note 765 at 1432.
[1117] *Id.* at 1433.

voice of color, but rather a multiplicity of them exist, all of which have equal legitimacy, as experiences of discrimination may be particular to each individual. Likewise, she argues that what unites minorities' voices under this concept is that "life is different for them than for white America."[1118] Lazos Vargas is an excellent example of fairness rationales because she argues that the inclusion of diverse points of view may work as a protection against bias in the judicial system.[1119] Such bias could occur if only one particular viewpoint—the majoritarian—takes over judicial decision-making. Viewpoint diversity, she argues, could also prevent the loss of credibility in the judicial system arising from a perceived lack of impartiality.[1120] Analogously, Deseriee Kennedy questions whether a court in which minorities are underrepresented is well-positioned to decide cases involving the interests of excluded groups fairly.[1121]

Sherrilyn Ifill goes a step further and argues that diversifying the judiciary is a constitutional imperative.[1122] While discussing state trial judges, and using the Supreme Court decision on *League of United Latin American Citizens Council (LULAC) v. Clementss* as evidence, she asserts that judges fulfill a representative function. In Ifill's view, the impartial judge provision in the 14th Amendment of the U.S. Constitution should be interpreted to require not only individual impartiality from judges but also structural impartiality from the judiciary. A representative role of judges would be a consequence not only from their leadership positions but also of their function as representatives of their communities' values, as they use such values in adjudication.[1123] Moreover, like Barbara Graham,[1124] Ifill notes that describing judges as representatives is a position that is usually ill-received in the legal scholarship, due to the common idea

[1118] *Id.* at 1434.
[1119] *Id.* at 1435–1436.
[1120] *Id.* at 1435–1436.
[1121] Deseriee A. Kennedy, *Judicial Review and Diversity*, 71 TENN. LAW REV. 287–301, 297 (2004).
[1122] Ifill, *supra* note 245.
[1123] *Id.* at 104–105.
[1124] Graham, *supra* note 19. (Noting that "Applying the concept of representation to judges in the context of the judicial selection debate is controversial. In general, two related criticisms have been lodged against efforts to apply the concept of representation to the judiciary: (1) judges are not representatives in the same sense that legislators are, and therefore, they are not politically accountable to special interest groups; and (2) judicial independence would be threatened if a representative judiciary were pursued as a matter of public policy. Such arguments appear to be grounded in the neo-positivist school of thought, which conceptualizes the role of law and the legal system as aligned with strict impartiality, adherence to judicial independence, and a return to true constitutional values").

that, as they need to be impartial, judges cannot fulfill a representative role.[1125] In this sense, recognizing a representative role in the judiciary is perceived to have the potential to undermine judicial impartiality and independence.[1126]

Ifill notes that, as a general rule, the limited representation of racial minorities in the judiciary is rarely questioned from a legal or constitutional perspective, but rather deploying the language of desirability and public policy.[1127] In her view, the structural impartiality of the judiciary is constitutionally mandated. According to her thesis, structural impartiality "exists when the judiciary as a whole is comprised of judges from diverse backgrounds and viewpoints."[1128] This allows different perspectives to interact in the legal debate, preventing a single one from governing judicial decision-making.

Ifill identifies two types of foreseeable objections to her argument. The first is that arguing for structural impartiality would essentialize the viewpoints of white and minority judges. The second is that such a claim could lead to a potential demand for minority judges to be the ones who decide cases involving minority plaintiffs. Regarding the first objection, Ifill declares that promoting racial diversity in the judiciary does not require to identify any particular judge's position as biased based on race, but simply to acknowledge that "the possibility of bias is increased by an all-white bench uninformed by the 'varieties of human experience,' as compared to that of a racially diverse bench."[1129] Concerning the second objection, she explains that structural impartiality would not require minority judges to hear minority litigants' cases, but only that the pool of judges that may potentially decide such cases mirrors the community in terms of identity.[1130]

Furthermore, Ifill responds to an additional objection, according to which recognizing judges as representatives could be problematic because judges would be required to decide cases according to the wishes of their constituents. She explains that "to conceive judges as representatives does not mean that

[1125] Ifill, *supra* note 245 at 97.
[1126] *Id.* at 97.
[1127] *Id.* at 97.
[1128] *Id.* at 98–99.
[1129] *Id.* at 126–127.
[1130] *Id.* at 127–128.

judges must adhere to the views of the public in judicial decisions. Instead, a representative-even a legislative representative-need only offer her constituents the opportunity to have their views translated into public policy."[1131]

Equally, Stacy Hawkins affirms that the gap between the racial composition of the governmental institutions and the governed is problematic from a political and a constitutional perspective. She understands that the representation gap does not only clash with basic pluralist democracy principles, but also with the right to equal protection of the laws.[1132] In her view, pluralism is not only a mediating principle of the right to equal protection of the laws but also an idea that informs the doctrines of the deliberative and the political processes.[1133] Thus, it is problematic that minorities do not have representation in government, as this is a limitation to the possibility of participating in the deliberative process of public decision-making.[1134]

Legitimacy rationales emphasize the idea that an enhanced presence of women and minorities on courts could make the judicial system to appear as more legitimate and, therefore, deserving of obedience, particularly in the eyes of excluded groups. Theresa Beiner binds of descriptive representation of excluded groups on the bench with the goal of enhanced legitimacy for the judicial system. In her view, as different groups gain access to positions of power within the judicial system, people will perceive the judiciary as more legitimate.[1135] Likewise, Marla Greenstein stresses the importance of courts' perceived legitimacy for the judicial system and argues that the low levels of women and minorities' representation in the judiciary affect such legitimacy in the eyes of the public.[1136] She states: "Several articles in this issue connect the composition of the courts and juries with the confidence that participants in court proceedings have in the impartiality of the ultimate judicial decision."[1137] Furthermore, Greenstein does not only argue in favor of

[1131] Ifill, *supra* note 249 at 466–467.
[1132] Stacy Hawkins, *Diversity, Democracy & Pluralism: Confronting The Reality Of Our Inequality*, 66 MERCER LAW REV. 577–649 (2015).
[1133] *Id.* at 161–162.
[1134] *Id.* at 161–162.
[1135] Beiner, *supra* note 760 at 855–856.
[1136] Greenstein, *supra* note 1100.
[1137] *Id.* at 40.

diversifying the body of judges, which she deems as just the face of judicial institutions, but also the court's staffs and jury pools, in order to make them more similar to the communities they serve.[1138]

Fairness and legitimacy rationales are deeply intertwined. Constance Anastopoulo & Daniel Crooks sustain that one of the potential benefits of judicial diversification is an improvement of courts' perceived legitimacy, as the citizens could see this as an indicator of impartiality and fairness in adjudication.[1139] In the same line, Ming Chin asserts that the perceived legitimacy of the legal system is as important as its actual fairness.[1140] If courts' legitimacy is lost in the eyes of the public, these institutions face the risk of being deemed irrelevant or labeled as tools for oppression.[1141] Finally, Josh Hsu claims that the absence of perceived legitimacy may have substantial effects on the functioning of the judicial system.[1142]

Although the idea that greater women and minorities' representation in the judiciary could improve the fairness of the judicial process and the legitimacy of courts has been, in general, well received in scholarly debates, some sectors could see these rationales as problematic. Nancy King elucubrates that, if the peremptory challenge was implemented in a particular jurisdiction—allowing a litigant to demand a change of judge assigned to a case without meaningful justification—, the parties could use it to disqualify judges from deciding cases based on race. For example, minority judges could be perceived as unfair solely because of their identity.[1143]

In an analogous context, the use of the recusal motion—allowing litigants to ask judges to remove themselves from a case due to lack of impartiality—to address cases of judicial bias has also been put into question in academic debates since the race of the judge has been used as a reason to suspect lack of impartiality of the judge to decide particular legal disputes.[1144] Frank McClellan suggests that the recusal

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[1138] *Id.* at 40.
[1139] Anastopoulo and Crooks III, *supra* note 782 at 175.
[1140] Ming W. Chin, *Keynote Address: "Fairness Or Bias?: A Symposium On Racial And Ethnic Composition And Attitudes In The Judiciary"*, 4 ASIAN LAW J. 181–194, 186–187 (1997).
[1141] *Id.* at 186–187.
[1142] Hsu, *supra* note 1033 at 116.
[1143] Nancy J. King, *Batson For The Bench? Regulating The Peremptory Challenge Of Judges*, 73 CHIC.-KENT LAW REV. 509–532 (1998).
[1144] Frank M. McClellan, *Judicial Impartiality & (and) Recusal: Reflections on the Vexing Issue of Racial Bias*, 78 TEMPLE LAW REV. 351–378, 372 (2005).

motion is not an adequate instrument to address racial bias in the judicial context. Such motion should only be used in the most extreme cases, when the use of words makes it evident that the judge will act in a prejudicial way based on race.[1145] In such cases, McClellan proposes that the lawyer of the affected party is professionally obligated to use the recusal motion and should initiate the procedures for the removal of the judge from the bench. However, he also warns that in cases in which a lawyer initiates the recusal motion against a judge for racial bias solely based on the judge's racial identity—or without having sufficient evidence of the impropriety—sanctions should be imposed on the lawyer.[1146]

### 1.4. Equality in access to resources

A final type of rationale for women and minority representation in judicial institutions is the idea of equality in access to resources. This rationale considers that judgeships and judicial employee positions are not only functionally important, but also as a means to attain access to resources (salaries, employment benefits, prestige). Thus, a new foundation for women and minority representation on the bench is allowing these groups to access these resources and benefiting from them as dominants groups in society do it. In general, this rationale has not been debated as much as others in the U.S. academic literature. However, I should note that there have been interesting debates in the U.S. concerning the idea that the government should be a model employer, which includes the government duty of not discriminating its workers.[1147] The significant level of attention that the participants gave to the equality in access to resources rationale might be due to the fact, as I will explain next, it tends to gain relevance in areas where the legal market is small and in which judicial positions are more profitable than other types of legal employment.

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[1145] McClellan, *supra* note 1144.
[1146] *Id.* at 377–378.
[1147] THE FEDERAL GOVERNMENT: A MODEL EMPLOYER OR A WORK IN PROGRESS?: PERSPECTIVES FROM 25 YEARS OF THE MERIT PRINCIPLES SURVEY, 70 52 (09/08), https://permanent.access.gpo.gov/lps126717/viewdocs.aspx.pdf (last visited Mar 10, 2020). ("Being a model employer means the Government builds on those high standards embodied in the merit principles, by developing and applying creative and forward-thinking approaches to better achieve efficiency and effectiveness in accomplishment of the Government's mission.")

Several participants appeared to embrace equality in access to resources rationales as foundations for Afro-descendant representation in judicial institutions. A participant suggested that one of the factors influencing the limited access of Afro-descendants to high-ranking positions within the judiciary is the competition over access to resources. He mentioned that the significantly high salaries of intermediate tribunals and high court magistrates led to a stiff rivalry for these positions, and that "for a black man to earn 25 million pesos a month, [in one of these posts] a lot has to happen."[1148]

My impression is that the equality on access to resources rationales appear to be more present in locations where the legal market is more reduced, such as peripherical areas of the country and rural areas. In many of these places, public employment is one of the few types of employment that offers competitive salaries, full-benefits, and stability to employees. Due to the lack of prospects, many people find it unfair that the few desirable jobs in the legal market in these areas are given to people coming from other regions and who tend to be *mestizos*, while, at the same time, the local Afro-descendant lawyers struggle to make a living.[1149] Despite the complexities that this rationale entails, participants mentioned in several occasions that this, too, should be considered in the debate about equitable access to judicial positions, since it acknowledges the economic and material aspect of this debate for legal professionals.[1150] A paradigmatic example of this situation is the archipelago of San Andrés, Providencia, and Santa Catalina. Given its isolated nature, this region has a very reduced legal market, in which judicial positions are sought after.[1151]

Mary Clark points out that among the different types of rationales that justify the need for increased women and minorities' representation in the judiciary, the one that has received the least attention has been "the significance of women's judicial appointments stems from the importance of applying equal opportunity/anti-discrimination principles."[1152] From her perspective, the appointment of women to the bench should be deemed as necessary mainly because "equality of opportunity is achieved when women

[1148] Interview 23.
[1149] Interview 26.
[1150] Id.
[1151] Interviews 26 and 35.
[1152] Clark, *supra* note 1080 at 547.

are considered for the same percentage of judgeships as they constitute in the pool of interested and qualified candidates."[1153]

Another aspect that makes part of the equality in access to resources rationale is its collective dimension. As I explained in chapter 2, there are certain are in regions in Colombia that are of majority Afro-descendant population and in which judicial positions tend to be occupied by white-*mestizo* professionals coming from other regions of the country. According to participants, on some occasions, people coming from central areas of the country to occupy these positions do not resettle in the cities where they work. Instead, they maintain their primary residence in their regions of origin, traveling back-and-forth between the two places. The existence of traveling judges is problematic from the perspective of the equality in access to resources rationale since, according to some participants, the lack of resettlement of these judges means that local economies benefit little from their incomes since they do not invest their earnings or inject money into the local markets. As one participant explained, traveling judges "do not leave anything to the region's economy. They do not leave anything! They do not rent an apartment—they rent out rooms in family houses. They do not spend a weekend here, do not hire a housekeeper, do not generate employment."[1154] Considering the already limited size of local economies, this "lost income" is another reason to increase (local) Afro-descendant representation in the judicial system in the eyes of the locals.

### 1.5. Preliminary conclusions

Regarding the different types of rationales that serve as foundations for women and minorities' representation in the judiciary, it is possible to reach the following conclusions: 1) I identified four commonly used foundations for supporting women and minority representation on courts: The idea of non-traditional judges as role models for the legal profession, marginalized communities and society as a whole; the altered or enriched judicial decision-making process that would be follow an increase of representation

[1153] *Id.* at 547.
[1154] Interview 34.

of women and minorities on courts; the idea that these groups' representation on judicial institutions is a condition for fairness in judicial-decision making and for the legitimacy of the judicial system; and the idea that women and minority representation on courts a way to secure equal access to resources for persons belonging to these groups; 2) the symbolic effect of minority representation is perhaps the less contentious rationale for justifying the diversification of the judiciary, but there are questions about the relevance and potential benefits of stressing the role of symbolic representation in the judiciary; 3) the fairness and legitimacy rationales are deeply intertwined with altered judicial decision-making rationales, as enriched decision-making resulting from a wide range of viewpoints and values is understood to be correlative with judicial impartiality and, therefore, fairness in judging, which in turn increases the legitimacy of the justice system; 4) altered decision-making rationales have received, overall, more attention by participants and scholars than other types of justifications for increasing women and minorities representation in the judiciary; 5) enriched decision-making effects of women and minority representation in the judiciary tend to be controversial, as some understand that they essentialize points of view on the basis of racial or gender identities; 6) in case of Colombia, the race-ethnicity divide presents an additional layer of complexity to the debates about altered decision-making rationales as grounds for minority representation on courts; 7) equality in the access to resources emerged as an additional rationale for women and minority representation on courts in Colombia, given the precariousness of the legal markets in some areas of the country.

I believe that minority representation in courts can be better defended using fairness and legitimacy rationales. These rationales emphasize the implications that the racial homogeneity of judicial institutions can have in countries with models of representative democracy or that have embraced multiculturalism as a formal state policy, such as Colombia. Furthermore, I consider that in a country with a genuine commitment to the principles of equality and non-discrimination, it is objectionable that the apparatus of the state is built in the absence of historically discriminated groups.

In the following section, I will concentrate on examining the available evidence concerning the impact on case outcomes of women and minorities' representation on courts.

## 2. Empirical evidence on the impact of women and minorities' representation on judicial decision-making

As I previously stated, there have been no previous studies regarding the impact of race in judging conducted in Latin America, perhaps due to the incipient Afro-descendant and indigenous representation in judicial institutions. Nevertheless, participants often invoked altered decision-making rationales as reasons for increasing Afro-descendant presence in the judiciary.

Several interviewees asserted that there were specific cases in which they considered that the ethno-racial identity of judges and judicial employees had a significant impact on the outcome of cases. An Afro-descendant woman judicial employee affirmed that the introduction of Afro-descendant and indigenous judges to the SJP had facilitated the consideration of aspects such as the right to prior consultation of ethnic groups, inter-jurisdiction coordination with indigenous justice systems, and the depositions of indigenous ex-combatants before the transitional justice jurisdiction.[1155] Another participant, an Afro-descendant women judge, asserted that having a distinctive Afro-descendant ethnic identity facilitated her work on issues related to lands and territorial rights, as there is a significant difference between the role that property legal institutions have in the majoritarian society and some ethnic communities.[1156] A third interviewee stressed how judges with ethnic identities might be better situated to decide on specific family law issues, such as those revolving around marriage arrangements in Afro descendant ethnic communities.[1157] Similarly, another participant, an Afro-descendant man judge, asserted that his ethnic identity and territorial knowledge facilitated his comprehension of certain criminal cases in the place where he worked.[1158] The same occurs concerning language barriers in territories where the Afro-descendant population speaks a

[1155] Interview 10.
[1156] Interview 25.
[1157] Interview 30.
[1158] Interview 26.

language different than Spanish since the domain of the native language (which is commonly spoken only by members of the ethnic groups) is an asset for the undertaking of judicial functions.[1159]

Given the multiplicity of testimonies that affirmed the ethno-racial identity of judicial servers might significantly influence judicial decision-making, it is essential to discuss the trajectory of the academic debates regarding the effects of race and gender on judging. Although in Latin America there has been little research on this topic, in the United States, for over 40 years, there has been a growing body of research focusing on the effects that the increased presence of women and minority judges have on judicial decision-making. This branch of political science has received the name of judicial behavioralism.[1160]

As I will discuss later, evidence about the type of impact and degree of influence that minority and women's representation in the judiciary has on the process of adjudication is, to an extent, inconclusive. The lack of certainty of these empirical studies' results may be attributed to the vast number of variables that can influence a judge's perception of a case. In this respect, Theresa Beiner explains that:

> The problem with political science data is that a single study cannot account for all the variables that may impact an individual judge's view of the law or reality. It is much more complex and involves many categories of information, including such variables as sex, race, religion, upbringing, political partisanship and ideology, judicial ideology, appointing president (where applicable), socio-economic background, region of the country in which the judge was raised or lives, among others.[1161]

Moreover, research on judicial behavioralism has been the object of diverse critiques from social scientists and legal scholars alike, due to the limitations in the different types of experiments and models that have been used to estimate the influence of judges' identities on adjudication. Beiner has criticized that most empirical studies on the impact of judges' identities on judicial decision-making have not considered

[1159] *Id.*
[1160] Lazos Vargas, *supra* note 1026 at 131–132.
[1161] Beiner, *supra* note 19 at 148.

how legal procedures and substantive law influence adjudication. Therefore, ignoring relevant variables that could have a determinant effect on how judges decide cases.[1162] Likewise, Sherrilyn Ifill has pointed out that, as many of these studies recognize, the size of the samples used for these studies were—in some cases—very small and is doubtful that their conclusions could be generalized to other cases.[1163] Furthermore, she argues that these studies are quite limited as "most studies only focus on case outcomes, not the process of judicial decision-making itself,"[1164] ignoring aspects such as judicial deliberation and substantive law. Equally, Josh Hsu has critiqued that empirical studies in this area have tried to isolate identity characteristics—such as sex and race—from other elements influencing judicial decision-making. This approach disregards some relevant aspects of the conflict, including the facts of the case, the applicable legal rules, and the sociological aspects of the decision-making process.[1165] More broadly, the studies that I will refer to are also the object of a more profound critique about methodological flaws in empirical research for the study of issues regarding racial and gender identities' issues.[1166]

Despite these critiques, I still consider that it is worth it to engage with this academic literature since it provides significant evidence on how women and minority judges impact judicial decision-making in the U.S. This literature could illuminate paths to explore this relationship in the Latin American context in the future. Besides, this type of research has been treated as deeply relevant in the work of scholars working on issues related to group-representation on courts.

In order to present the information in the most precise form possible, first, I will refer to the studies regarding the influence of race on judicial decision-making. Second, I will present those studies referring to the effects of gender on judging. Third, I will introduce the studies that encompassed both race and

[1162] *Id.* at 149.
[1163] Ifill, *supra* note 249 at 453.
[1164] *Id.* at 453. (Noting also that "other important indicators might include changes in the culture of the courthouse, the diversity of court personnel, and the fair treatment of women and minority litigants, lawyers, witnesses, and observers in the courtroom.")
[1165] Hsu, *supra* note 1033 at 101.
[1166] Deborah Jones, *Constructing Identity In Law And Social Science*, 11 J. CONTEMP. LEG. ISSUES 731–745 (2001).

gender variables. Lastly, I will reference a few studies on the influence of ethnicity on judging that were conducted outside of the U.S.

### 2.1. Studies concerning the influence of race on judicial decision-making

As soon as 1978, Thomas Uhlman published one of the first studies on the influence of race on judging, in which he compared judicial decisions on felony cases made by a group of 16 trial court black judges with those of 75 white judges.[1167] His research found that there were small differences between the behavior of black and white judges, as black judges declared defendants guilty in 55.5% of the cases analyzed, while white judges did the same in 61.1% of cases.[1168] The study also found that:

> There are no essential differences between white and black judges' treatment of white and black defendants. Black judges convicted 56.7 percent of black defendants and 50.5 percent of white defendants, for a difference of 6.2 percent, White judges convicted 63.0 percent of black defendants and 53.8 percent of white defendants, for a difference of 9.2 percent[1169]

The author explained that the differences found could be explained by the individual behavior of the judges, rather than as a consequence of the judges' race.

About a decade later, Susan Welch *et al.* published another study on the influence of race in judicial decision-making in the context of criminal cases.[1170] The research used a sample of 3,418 convicted felons from 1,968 to 1,979 in a large city in the Northeast of the U.S. It found that white and black judges treated black defendants similarly. However, black judges tended to send white defendants to prison more often

[1167] Thomas M. Uhlman, *Black Elite Decision Making: The Case of Trial Judges*, 22 AM. J. POLIT. SCI. 884–895 (1978).
[1168] *Id.* at 888.
[1169] *Id.* at 888.
[1170] Susan Welch, Michael Combs & John Gruhl, *Do Black Judges Make a Difference?*, 32 AM. J. POLIT. SCI. 126–136 (1988).

than white judges. The authors explained that "black judges tend to treat black and white defendants alike, while white judges are more severe with blacks, compared with white, defendants."[1171] They also found that black judges, in general, give shorter prison sentences to defendants than white judges, and also give lighter sentences to black defendants than white judges.[1172]

In 1990, Cassia Spohn published another study on the effect on the judges' race on the decisions regarding criminal cases.[1173] The research analyzed judicial decisions on violent felony cases in the city of Detroit from 1976 to 1978. It suggested that black judges were only slightly less likely to incarcerate defendants than white judges. The study found differences between the two groups of judges regarding the minimum sentence they ordered for defendants,[1174] and concluded that, rather than deciding according to their racial identity, "judges' sentencing decisions are determined, first and foremost, by the seriousness of the crime committed by the offender and by the length of the offender's prior criminal record-factors of explicit legal relevance to the sentence."[1175] The data also showed that, although white judges are more likely than black judges to sentence black-male defendants to prison,[1176] both groups of judges sentenced black defendants harsher: "For both black and white judges, adjusted incarceration rates for black offenders were seven percentage points higher than for white offenders."[1177]

In the context of criminal justice, in 1996, Malcolm Holmes *et al.* published a study in which they compared Anglo (non-Hispanic white) and Hispanic judges' decisions on non-capital felony cases in the county of El Paso, Texas.[1178] Their results suggested that Hispanic judges sentenced Hispanic and Anglo defendants similarly. In contrast, Anglo judges seemed to sentence Hispanic defendants similar to Hispanic

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[1171] *Id.* at 133.
[1172] *Id.* at 133.
[1173] Cassia Spohn, *The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities*, 24 LAW SOC. REV. 1197–1216 (1990).
[1174] *Id.* at 1206.
[1175] *Id.* at 1206.
[1176] *Id.* at 1206.
[1177] *Id.* at 1206.
[1178] Malcolm D. Holmes et al., *Judges' Ethnicity and Minority Sentencing: Evidence Concerning Hispanics*, 74 SOC. SCI. Q. 496–506 (1993).

judges, but they were more lenient toward Anglo defendants, which appears to suggest a preference of Anglo judges for defendants of their same racial identity.[1179]

Five years later, Darrell Steffensmeier & Chester Britt published a study on the differences in sentencing decisions of black and white judges.[1180] Their research analyzed sentencing decisions imposed by men judges from 1991 to 1994 in four Pennsylvania counties. By using logit models, the authors concluded that although white and black judges similarly evaluated cases, black judges were more likely than white judges to impose prison sentences to defendants regardless of their race.[1181]

In a study published in 2009, Chris Bonneau & Heather Rice tried to established weather white and African American judges made different decisions at deciding criminal cases.[1182] Their research was based on a sample of state supreme court non-unanimous decisions on criminal cases' appellate decisions taken between 1995 and 1998. It suggested that white and African American judges make different decisions depending on the institutional design of the judiciary. The evidence showed that "African American judges are more sympathetic to those convicted of crimes, but only in states with no intermediate appellate court."[1183]

Outside of the context of criminal justice, in the year 2000, Pat Chew and Robert Kelley published a study, made with a sample of randomly selected racial harassment cases decided in six federal circuits that ranged from the years 1981 to 2003, that compared the decisions of African American and white federal judges on cases of racial harassment in the workplace.[1184] While plaintiffs in racial harassment cases have—in general—slim chances of winning in court, Chew and Kelley's research showed that they had a better chance of success if an African American judge decided their cases. The authors stated that "plaintiffs are

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[1179] *Id.* at 501–502.
[1180] Darrell Steffensmeier & Chester L. Britt, *Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?*, 82 SOC. SCI. Q. 749–764 (2001).
[1181] *Id.* at 761.
[1182] Chris W. Bonneau & Heather M. Rice, *Impartial Judges? Race, Institutional Context, and U. S. State Supreme Courts*, 9 STATE POLIT. POLICY Q. 381–403 (2009).
[1183] *Id.* at 398.
[1184] Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH U REV 1117–1166 (2009).

successful in 46% of their cases before African American judges but less than half as often before White judges; logistic regression analysis indicated that on average, plaintiffs before African American judges are 3.3 times more likely to win than before White judges."[1185] Chew and Kelley recognized that when multiple factors (*e.g.*, the political affiliation of the judge and facts of the case) are jointly taken into consideration, the role of race tends to lose preponderance. Nevertheless, their research still suggested that white and African American judges differ on how they understand this type of case.[1186]

Almost a decade after that, the same authors published a new study on the influence of judges and plaintiffs' race on racial harassment cases' outcomes.[1187] Their research used a database "of all reported racial harassment cases brought under Title VII of the Civil Rights Act in the federal district courts of six representative circuits between 2002 and 2008."[1188] According to their findings, racial harassment plaintiffs were successful in only 22.2% of the 473 analyzed cases,[1189] with Hispanics having a higher success rate (37.3%) and Asian Americans (4.3%) and African Americans (20.7%) having the lowest. African Americans accounted for over 70% of all racial harassment complaints.[1190] Regarding the judge's race, the study found that the plaintiffs who appeared before white judges, which accounted for nearly 80% of the judges in the cases under scrutiny,[1191] had a success rate of only 20.6%, which was lower than when they appeared before African American judges (42.2%), but higher than when they did so before Hispanic judges (15.6%).[1192] The study also suggested that the race of the judge and the plaintiff interact with each other, as judges tended to be, in general, more lenient to plaintiffs of their same race.[1193] As an example: African

[1185] *Id.* at 1156.
[1186] *Id.* at 1161. (The authors assert: "However, one message is clear from the data: race matters in judicial decision making. It affects outcomes even when we take into account the judge's political affiliation or case characteristics. While we might have intuitively expected the judge's race to make a difference, this study provides empirical proof.").
[1187] Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race*, 28 HARV J RACIAL ETHN. JUST 91–116 (2012).
[1188] *Id.* at 96.
[1189] *Id.* at 98.
[1190] *Id.* at 100.
[1191] *Id.* at 103.
[1192] *Id.* at 103–104.
[1193] *Id.* at 108.

American judges had a higher success rate when judges of their same race decided their cases (47%) than when White (19%) or Hispanic (9.5%) judges were the decision-makers.[1194]

In 2014, Jason Morin published a study on the U.S. Courts of Appeals' minority judges' decisions on Title VII employment discrimination cases between 2001 and 2009.[1195] The research found that in this type of case, African American judges were, on average, more supportive of the claimant: "As the percentage of favorable votes among African American judges is about four percentage points greater than White judges."[1196] He also concluded that African American judges were nine percentage-points more likely to rule in favor of African American claimants than White judges.[1197] However, he also established that Latino judges were, in general, more averse than white and black judges to the claimants. The author stated: "The proportion of favorable rulings among Latino judges is about nine percentage-points less than White judges and more than 13 percentage-points less than African American judges."[1198]

Adam Cox & Thomas Miles published a paper regarding the influence of judges' characteristics on judicial decisions regarding the Voting Rights Act, in which they studied "every published federal case decided under section 2 of the Voting Rights Act since 1982."[1199] Their research suggested that democrat judges and African American judges tend to be more likely to find liability under section II of the Voting Rights Act, when compared to republican judges and white judges, respectively. In the case of race, which authors found to be more preponderant than political affiliation, they concluded:

> African-American judges are, on average, more than twice as likely as white judges to find that minority citizens' voting rights were violated under section 2. African-American judges vote in favor of liability more than half the time, while judges who are not African-American do so only about one-quarter of the time. Moreover, a judge's race substantially affects the votes of his

[1194] *Id.* at 107–108.
[1195] Jason L. Morin, *The Voting Behavior of Minority Judges in the U.S. Courts of Appeals: Does the Race of the Claimant Matter?*, 42 AM. POLIT. RES. 34–64 (2014).
[1196] *Id.* at 47.
[1197] *Id.* at 47–48.
[1198] *Id.* at 47.
[1199] Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUMBIA LAW REV. 1–55, 3 (2008).

> colleagues on a panel. Both Republican and Democratic appointees are substantially more likely to vote in favor of liability when they sit with an African-American judge than when they do not.[1200]

In 2013, Jonathan Kastellec published a study in which he measured the impact of race on the U.S. courts of appeals' decisions in affirmative action cases.[1201] The research sample was composed by courts of appeals' decisions on race-based affirmative action cases from 1971 to 2008 and used statistical models to assess the effects of race on case outcomes. According to his results, non-black judges had a probability of between 56% and 65% to vote in favor of affirmative action policies, depending on the model used. By contrast, black judges had a probability of about 90% of voting in favor of affirmative action policies.[1202] They also found that black judges seem to influence the votes of their colleagues. The probability of a non-black judge voting in favor of affirmative action policies was about 50% when the panel was all non-black but rose to 20% when a black judge was part of the decision panel.[1203]

### 2.2. Studies concerning the influence of gender on judicial decision-making

In the early 1980s, John Gruhl *et al.* published a study in which they assessed the impact of judges' gender on the decisions of criminal cases.[1204] The authors analyzed the convicting and sentencing decisions of men and women trial judges in over 30,000 felony cases from 1971 to 1979 in a metropolitan area in the Northeast of the U.S. The study evidenced that women judges were more likely to sentence women defendants to prison than men judges, as women judges gave prison sentences to about 20% of the convicted women. In contrast, men judges did so to only 12% of them.[1205]

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[1200] *Id.* at 48–49.
[1201] Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POLIT. SCI. 167–183 (2013).
[1202] *Id.* at 177.
[1203] *Id.* at 177.
[1204] John Gruhl, Cassia Spohn & Susan Welch, *Women as Policymakers: The Case of Trial Judges*, 23 AM. J. POLIT. SCI. 308–322 (1981).
[1205] *Id.* at 318.

Also, in the criminal justice context, Darrel Steffensmeier & Chris Hebert published a study in which they tried to establish whether or not men and women judges approached and decided criminal cases similarly.[1206] The research used a database of the sentencing decisions in Pennsylvania from 1991 to 1993. The study found that gender seems to impact criminal case outcomes. Women judges were 10% more likely to incarcerate defendants than men judges. They also tended to impose sentences that are, on average, five months longer than those determined by their male counterparts.[1207] Women judges appeared to be especially tough when sentencing black defendants who were repeated offenders.[1208] Nonetheless, the study also found that men and women tend to value criteria for similarly establishing sentences.[1209]

In a different context, David Allen & Diane Wall published a study in which they evaluated the behavior of women judges in state supreme courts to establish whether they conformed to the points of view of men judges—behaving as tokens—or presented extreme voting conduct—behaving as outsiders.[1210] The voting record of 14 women judges sitting on 14 different high courts on cases concerning women issues, criminal cases, and economic liberties were analyzed.[1211] The study found that in all three areas, women judges presented extreme voting habits, as they were very liberal in the first policy area, and either very liberal or conservative in the other two.[1212] Later on, the authors expanded their research and published another article in which they studied the behavior of 24 women justices in 21 states.[1213] This study arrived at similar conclusions: "Women justices tend to: (1) act as the most pro-women member of the court on issues of immediate concern to women, (2) occupy positions at the extreme liberal and conservative ends, and (3) tend to engage in both extreme and isolated dissenting behavior in criminal and economic cases."[1214]

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[1206] Darrell Steffensmeier & Chris Hebert, *Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?*, 77 SOC. FORCES 1163–1196 (1998).
[1207] Steffensmeier and Britt, *supra* note 1180 at 1181–1182.
[1208] Steffensmeier and Hebert, *supra* note 1206 at 1186.
[1209] *Id.* at 1186.
[1210] David W. Allen & Diane E. Wall, *The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders*, 12 JUSTICE SYST. J. 232–246 (1987).
[1211] *Id.* at 235.
[1212] *Id.* at 239–242.
[1213] *Id.* at 165.
[1214] *Id.* at 165.

In 1993, Sue Davis *et al.* presented a study in which they analyzed gender differences in judicial decision-making in the U.S. courts of appeals.[1215] The study tracked judges' voting in three areas of interest: Employment discrimination, criminal procedural rights, and obscenity from 1981 to 1990.[1216] The research found that in employment discrimination cases, women voted for plaintiffs 63% of the time. In comparison, men did so in only 46% of cases. In search and seizure cases "women judges were more likely than their male colleagues to support the claims of criminal defendants."[1217] Finally, in obscenity cases, no significant gender differences were found.[1218] A year later, the same authors published another study in the same area.[1219] They concluded that judges' gender did not seem to make a difference in how they approached search and seizure or obscenity cases. However, gender had a significant in cases of employment discrimination: "The probability that a male judge will cast a liberal vote is 38% while the estimated probability of a liberal vote by a female judge is 75%. Thus, the impact of gender appears to be quite substantial."[1220]

In 2000, Phyllis Coontz published a study in which she analyzed the influence of the judge and the litigant's gender on case outcomes.[1221] The research was conducted using a survey containing hypothetical cases, which was completed by a sample of 195 state trial judges in Pennsylvania.[1222] After evaluating the results, the study found that the characteristics of the litigants in the hypothetical cases did not seem to influence judges' decisions. However, it concluded that men and women judges showed differences in how they decided the cases. In nearly half of the decisions, statistically significant differences arose between men and women judges.[1223]

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[1215] Sue Davis, Susan Haire & Ronald R. Songer, *Voting Behavior and Gender on the U.S. Courts of Appeals*, 77 JUDICATURE 129–133 (1993).
[1216] *Id.* at 130–131.
[1217] *Id.* at 131.
[1218] *Id.* at 131–132.
[1219] Donald R. Songer, Sue Davis & Susan Haire, *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts ofAppeals*, 56 J. POLIT. 425–439 (1994).
[1220] *Id.* at 435.
[1221] Phyllis Coontz, *Gender and Judicial Decisions: Do Female Judges Decide Cases Differently than Male Judges?*, 18 GEND. ISSUES 59–73 (2000).
[1222] *Id.* at 64.
[1223] *Id.* at 68.

That same year, Linda Maule published a paper in which she assessed the impact of the gender composition of the Minnesota State Supreme Court, which was the first high court in the country where women hold the majority of seats.[1224] The study, which considered about 1250 opinions 1985 to 1994, concluded that in that particular court: "the female justices were more willing to dissent once more females were appointed. Furthermore, the female justices, despite holding different political orientations, evidenced a higher level of agreement (even more so than the court generally) when deciding family law cases."[1225]

In 2004, Sarah Westergren published a study on the effects of gender on case outcomes at the federal appellate level.[1226] The research aimed to find gender differences in how judges decided a sample of sex discrimination cases between 1994 and 2000. The study found that there was no statistically significant difference in how men and women judges voted on sex discrimination cases. However, the political affiliation of the judged seems to have a more substantial statistical impact.[1227]

In 2005, Jennifer Peresie published an article about her research on the impact of gender in judicial decision-making in the federal appellate courts.[1228] Her research was based on the analysis of all federal courts of appeals' decisions on Title VII disputes concerning sexual harassment and sex discrimination from the years 1999 to 2001. 54 women and 273 men judges were included in the study. Her research found that plaintiffs lost in about 75% of sex discrimination and sexual harassment cases. Nevertheless, the presence of a woman judge in the decision panel seemed the increase the likelihood of a victory for the plaintiff. Although women were part of the panels in 38% of cases in which the plaintiff lost, they were also present in 62% of panels in cases in which the plaintiff won.[1229] The study also found that both gender and political ideology seemed to play a significant role in how judges voted on cases: "Female judges ruled for plaintiffs

[1224] Linda Maule, *A Different Voice: The Feminine Jurisprudence of the Minnesota State Supreme Court*, 9 BUFFALO WOMENS LAW J. 295–316 (2000).
[1225] *Id.* at 316.
[1226] Sarah Westergren, *Gender Effects in the Courts of Appeals Revisited: The Data since 1994*, 92 GEORGETOWN LAW J. 689–708 (2004).
[1227] *Id.* at 701.
[1228] Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal AppellateCourts*, 114 YALE LAW J. 1759–1790 (2005).
[1229] *Id.* at 1768–1769.

more often that did male judges, and judges appointed by Democratic presidents found for plaintiffs more often than did Republican appointees."[1230] In addition to personal effects, the study also found that the presence of women judges seemed to have panel effects. The addition of a woman judge to a panel increased from 16% to 35% the chances that men judges would favor the plaintiff in a sexual harassment case and increased from 11% to 30% the likelihood that men judges would do the same in sex discrimination cases. This panel effect was similar among liberal and conservative men judges.[1231]

In 2010, Christina Boyd *et al.* published a paper in which they measured the effects of sex in judging both at the individual and panel levels by using a matching methodology of judges and assessing the differences in 13 different areas of the law.[1232] The results of the study showed that, at the individual level, in most areas of the law, men and women judges tend to arrive at similar decisions, with one exception: "Female and male judges differ significantly in their treatment of Title VII sex discrimination suits. On average, the probability of female judges voting in favor of the plaintiff in a sex discrimination case is around 0.10 higher than it is for male judges."[1233] The same was valid in the case of panel effects, in which judges' gender differences seem to play a significant role in sex-discrimination disputes, as: "The likelihood of a male judge ruling in favor of the plaintiff increases by 12% to 14% when a female sits on the panel."[1234]

That same year, Paul Collins *et al.* published a study in which they tested the critical mass theory on the U.S. district court judges.[1235] Their research "analyzes final case rulings in 38,639 cases handed down by 1,310 judges over a 24-year span, from 1977 to 2000."[1236] They found that, in some instances—such as criminal law and civil rights cases, women do present a different behavior when the city in which the district court is located has attained a critical mass of women judges.[1237]

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[1230] *Id.* at 1769.
[1231] *Id.* at 1778.
[1232] Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POLIT. SCI. 389–411 (2010).
[1233] *Id.* at 401.
[1234] *Id.* at 406.
[1235] Paul M. Collins, Kenneth L. Manning & Robert A. Carp, *Gender, Critical Mass, and Judicial Decision Making*, 32 LAW POLICY 260–281 (2010).
[1236] *Id.* at 266.
[1237] *Id.* at 274.

Finally, a year later, Pat Chew published a meta-study in which she synthesized the previous empirical research on the effects of gender on case outcomes in employment discrimination cases.[1238] After reviewing the existing literature, the author concluded that:

> First, considerable evidence supports the hypothesis that the gender of the judge does make a difference in sex discrimination cases. Female judges are more likely than male judges to hold for the plaintiffs, and a mixed-gender appellate panel is more likely to hold for the plaintiff, suggesting that female judges do influence male judges in their decision making. Second, in studies of employment discrimination cases in general (studies that include a range of discrimination claims, including sex discrimination), the pattern of gender differences is also the consensus. It may be, however, that the sex discrimination cases in those studies drive this result. A third pattern supports this possibility: in the few studies with employment discrimination cases that were not gender-related, including race discrimination and racial harassment cases, the gender of the judge did not appear to make a difference. In other words, male judges were as likely as female judges to hold for the plaintiffs. No evidence of a significant difference in their decision-making patterns surfaced.[1239]

### 2.3. Studies concerning the influence of both race and gender on judicial decision-making

In 1983, Jon Gottschall published a paper in which he examined judicial decisions from July 1st, 1979 to June 30, 1980, of the U.S. courts of appeals. The study looked at decisions on issues of criminal procedure, sex discrimination against women, and race discrimination against minorities, after these courts had just received a significant number of women and minority judges appointed by President Carter.[1240] The study found that Carter's white-women judges tended to be more liberal than white-men judges. They

[1238] Pat K. Chew, *Judges' Gender and Employment Discrimination Cases: Emerging Evidence-Based Empirical Conclusions*, 14 J. GEND. RACE JUSTICE 359–374 (2011).
[1239] *Id.* at 371.
[1240] Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165–174 (1983).

favored plaintiffs on sex discrimination cases in 66% of the cases and preferred plaintiffs in race discrimination cases in 64% of the cases, in comparison to white men who sided with plaintiffs in 57% and 59% of cases, respectively. No difference in terms of gender was found regarding criminal cases.[1241] On the impact of race, the study found that Carter's black men judges tended to side with the plaintiff in 79% of criminal cases, by comparison to 53% of Carter's white men judges. Black men judges also supported sex discrimination plaintiffs in a higher percentage (65%) that white men judges. However, they did not support race discrimination plaintiffs in a higher percentage (57%) than white men judges (59%).[1242]

Two years later, Thomas Walker & Deborah Barrow published a study in which they examined the impact of Carter's non-traditional judges on the federal judicial decision-making.[1243] The authors used a pairing methodology to study women and minority district court judges' decisions in different areas of the law. According to their research, men judges supported personal rights claims 55% of the time, while women judges did so 37% of the time.[1244] Racial comparisons were inconclusive in this regard, as differences were not statistically significant.[1245] In the criminal law context, women judges favored defendants 44% of the time, compared to men judges who favored them 51% of the time. Racial differences were, again, insignificant. However, in both cases, the authors warned that these findings might be the result of chance.[1246] In the field of economic regulation, women judges supported federal economic regulation 73% of the time, while men judges did so only 53% of the time. Racial differences were also negligible.[1247] In areas of particular interest for women, women judges and men judges did not show significant differences.[1248] In areas of particular interest for minorities, men judges sided with minorities 69% of the time, while women judges did so only 48% of the time. Both in areas of particular interest to blacks as of

[1241] *Id.* at 171–172.
[1242] *Id.* at 172.
[1243] Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POLIT. 596–617 (1985).
[1244] *Id.* at 604.
[1245] *Id.* at 605–607.
[1246] *Id.* at 607.
[1247] *Id.* at 607.
[1248] *Id.* at 607.

particular interest to non-black minorities: “Black judges supported the minority position at only a marginally higher rate than did the white judges.”[1249]

Almost a decade later, Jennifer Segal published a study on the decision making of President Clinton's non-traditional judges.[1250] The research was conducted by pairing up a group of 24 judges of different race and gender and analyzing: “Decisions published in the Federal Supplement through July 1996,”[1251] pertaining a variety of areas. The research found that black judges supported claims involving the interests of black claimants or black communities in about 50% of the cases, by contrast to white judges who only supported such claims in about 10% of the cases. A similar trend was found in cases involving women's interests, which black judges supported in 9 out of 15 cases, by comparison to white judges, who only did so in 5 of 14 cases. In other areas such as criminal rights, state economic regulation, and individual liberties, no differences were found. In the case of women judges, 50% of the decisions they wrote were supportive of the interests of minorities, by comparison to decision authored by men, which supported minorities in less than one-third of the cases. No differences were found involving women judges deciding cases involving women's issues.[1252] The authors concluded: “Our analysis of policymaking by the race of the judge consistently revealed no substantial differences between white and black jurists,"[1253] unlike in the case of women, which in specific policy areas, did present significant differences from their male counterparts.

In 1998, Gregory Sisk *et al.* published a paper in which they used the Sentencing Guideline Crisis of 1988 to explore how the facts of the case, in conjunction with other variables, influence judicial reasoning and decision-making.[1254] Their research analyzed district court judges' decisions regarding the constitutionality of the Sentencing Guidelines of 1988 and tried to identify differences in judges' decisions

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[1249] *Id.* at 608.
[1250] Jennifer A. Segal, *The Decision Making of Clinton’s Nontraditional Judicial Appointees*, 80 JUDICATURE 279 (1997).
[1251] *Id.* at 279.
[1252] *Id.* at 279.
[1253] *Id.* at 279.
[1254] Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 NU REV 1377–1500 (1998).

based on a group of variables, which included race and sex. The researchers found that the gender of the judge had minimal effect on how they decided cases involving the constitutionality of the guidelines: "Although female judges rejected the constitutionality of the Guidelines at a slightly greater rate than male judges (64% versus 61%), this difference was not statistically significant."[1255] A similar finding took place regarding the race variable: "Although minority judges invalidated the Guidelines by a larger percentage than white judges (71% versus 60%), this difference was not statistically significant."[1256] Notwithstanding, the study found a significant difference when the particular rationale of violation of due process–the denial of the defendant's right to have an independent judge to dictate an individual sentence–was used to argue against the unconstitutionality of the law. In these cases, minority judges invalidated the guidelines in 90% of the cases, as compared to all the judges, who only ruled them invalid in only 58% of the cases.[1257]

A year later, Nancy Crowe presented her doctoral dissertation in which she tried to assess the effects that gender has on judicial politics.[1258] Her research used a database containing all non-unanimous decisions taken by U.S. courts of appeals on employment discrimination cases, both based on race and gender from the years 1981 to 1996. Although her analysis was focus on issues of gender, she also included race as a variable. The study describes that, overall, judges favored employment sex discrimination plaintiffs in 48% of their votes. Women judges voted for plaintiffs on 69% of the time, and men judges 46% of the time. African American judges favored plaintiffs with 85% of their votes, by contrast to white judges, who gave them 45% of their votes.[1259] Regarding employment race discrimination cases, Crowe's study describes that judges voted for plaintiffs 45% of the time, with African American judges voting for plaintiffs in 90% of the times, compared to White judges' 41%. By contrast, gender did not seem to make a difference, as men judges voted for plaintiffs 45% of the time vs. 48% of women judges.[1260] These results seemed to suggest

[1255] *Id.* at 1453.
[1256] *Id.* at 1457.
[1257] *Id.* at 1457–1458.
[1258] Nancy E. Crowe, *The Effects of Judges' Sex And Race On Judicial Decision-Making On the U.S. Courts of Appels 1981-1996.* (1999).
[1259] *Id.* at 80.
[1260] *Id.* at 110–111.

that although African American judges were, in general, more supportive of sex discrimination plaintiffs than white judges, women judges were not significantly more supportive of race discrimination plaintiffs than men judges.[1261] Finally, Crowe also analyzed whether the composition of the decision panel influenced how the judges that compose that panel vote. The study suggested that white men are more likely to vote for race discrimination plaintiffs when they sit on a panel composed exclusively of white males, as compared to panels including African American judges.[1262]

In 2000, Elaine Martin and Barry Pyle published a study in which they assessed the effects of race, gender, and political affiliation on Michigan Supreme Court's non-unanimous decisions on discrimination, divorce, and feminist issues from 1985 to 1998.[1263] The authors found marked influences of gender on how divorce cases were decided. Likewise, they concluded: "African American Democratic justices were the most liberal in two out of three issue areas examined."[1264] Nevertheless, they determined that political affiliation was the characteristic that had the most relevance on judges' voting in that specific court.

That same year Jennifer Segal published a study assessing the representative effect of Clinton's first term appointees to the U.S. district courts.[1265] The research paired up a group of 39 judges that differed from each other in terms of race or gender and comparing the judges' rulings on a variety of issues from 1994 to 1999. The study found that "for all intents and purposes, black judges are not significantly different from their white counterparts in their support of a variety of issues before their benches. Most notable is the absence of any race differences for black issues; black judges are clearly no more supportive of black claims than white judges."[1266] Regarding gender, Segal's study found that even though men and women judges presented differences in their treatment of cases involving women's issues, it was men who were more supportive of women's interests. Hence, the study concluded that "President Clinton's black and

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[1261] *Id.* at 103.
[1262] *Id.* at 160.
[1263] Elaine Martin & Barry Pyle, *Gender, Race, and Partisanship on the Michigan Supreme Court.*, 63 ALBANY LAW REV. 1205–1236 (2000).
[1264] *Id.*
[1265] Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POLIT. RES. Q. 137–150 (2000).
[1266] *Id.* at 144.

female district court appointees are no more likely to serve the policy interests of their own communities than are his white and male appointees."[1267]

In 2003, Carol Kulik *et al.* published a study on the influence of judges' characteristics on sex discrimination cases' outcomes.[1268] The authors used a database of 143 sex discrimination cases heard by U.S. courts between 1981 and 1996. Although the authors found that characteristics such as age and political affiliation played a significant role in how judges decided cases, they did not find evidence that either gender or race had a sensitive impact on case outcomes. However, they warned that their "inability to find differences based on gender and/or race may be a function of low statistical power with respect to these variables."[1269]

One year later, Sean Farhang & Gregory Wawro published a study regarding the influence of women and minority judges on federal three-judge panels' decisions on especially sensitive issues from the perspective of race and gender.[1270] Their research, which used "a random sample of 400 published federal Court of Appeals employment discrimination cases decided in 1998 and 2000,"[1271] concluded that men judges are more likely to vote for the plaintiff when there is a woman in the panel of judges deciding over the case by about 19 percentage points. Regarding race, the differences in judges' decisions were not statistically significant.[1272]

In 2005, Max Schanzenbach published a paper on the effects on race, gender, and political affiliation in prison sentences at the district level.[1273] His research, which was based on the data collected by the U.S. Sentencing Commission, concluded that "there is little impact on average sentences from having a greater proportion of female, Democratic, or black judges."[1274] Nevertheless, the article also concluded

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[1267] *Id.* at 147.
[1268] Carol T. Kulik, Elissa L. Perry & Molly B. Pepper, *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes*, 27 LAW HUM. BEHAV. 69–86 (2003).
[1269] *Id.*
[1270] Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation under Panel Decision Making*, 20 J. LAW ECON. ORGAN. 299–330 (2004).
[1271] *Id.* at 310.
[1272] *Id.* at 320.
[1273] Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District Level Judicial Demographies*, 34 J. LEG. STUD. 57–92 (2005).
[1274] *Id.* at 73.

that the proportion of women judges in the district seems to be in direct correlation with the length of women's prison sentences, as "the greater the proportion of female judges on the district's bench, the longer the sentences received by female offenders,"[1275] and also found that "having more black judges on the bench results in lighter sentences for women and Hispanics."[1276]

In 2008, Todd Collins & Laura Moyer published a study in which they evaluated the effects of intersectional identities in judging, by using minority women judges as an example, instead of focusing solely on the judge's gender or race.[1277] The study analyzed criminal cases decided by the U.S. courts of appeals between the years 1977 and 2001 and found that judges who were minority women tended to support the defendant's claims more often than those who were Caucasian men, Caucasian women, or minority men,[1278] as "female-minority judges were approximately between 6 to 10 percent more likely to support a liberal outcome than males or Caucasian females."[1279]

### 2.4. Non-US studies concerning the effects of ethnicity on judicial decision-making

Up to this point, the empirical studies we have referenced inquired for race or gender differences in judging in the United States of America. However, in Israel, there have also been efforts to assess the impact of identity on judicial decision-making. In this respect, Oren Gazal-Ayal & Raanan Sulitzeanu-Kenan published a study about the effects of ethnic identities on judicial decision making in Israel.[1280] In their study, they compared Jewish and Arab judges' decisions in first bail hearings of Arab and Jewish suspects.[1281] Their results showed that the judges in the study had in-group preferences for suspects of their

[1275] *Id.* at 74.
[1276] *Id.* at 75.
[1277] Todd Collins & Laura Moyer, *Gender, Race, and Intersectionality on the Federal Appellate Bench*, 61 POLIT. RES. Q. 219–227 (2008).
[1278] *Id.* at 225.
[1279] *Id.* at 224.
[1280] Oren Gazal-Ayal & Raanan Sulitzeanu-Kenan, *Let My People Go: Ethnic In-Group Bias in Judicial Decisions—Evidence from a Randomized Natural Experiment*, 7 J. EMPIR. LEG. STUD. 403–428 (2010).
[1281] *Id.*

same ethnic background: "Arab suspects are 6.3 percent more likely than Jewish suspects to be released by an Arab judge, while Jewish suspects are 10.4 percent more likely than Arab suspects to be released by a Jewish judge."[1282] However, they found no differences in judges' authorized length of detention based on ethnic identity.[1283]

Likewise, Guy Grossman *et al.* published a study regarding the panel effects of ethnicity in criminal cases in Israel.[1284] The study, which looked at criminal cases decided by appellate courts between 2007 and 2011, found that panel composition (all Jewish or mixed Jewish-Arab) did not seem to have an impact on the type and severity of the punishment for Jewish defendants. However, panel composition did affect the case of Arab defendants, which were 14% to 20% less likely to be incarcerated and had sentences 15% to 26% shorter when mixed ethnic panels decided they cases than when they faced all-Jewish panels.[1285]

### 2.5. Preliminary conclusions

Regarding the existing empirical evidence concerning the impact of judges' race and gender on judicial decision-making, it is possible to reach the following conclusions: 1) Political science research on judicial behavioralism has been the object of critiques from both political scientists and legal scholars, due to methodological limitations and the focus that some studies adopted for assessing understand the effects of identity on adjudication; 2) there is no consensus on how influential the judges' race and gender may be in the context of judicial decision-making, as empirical evidence is still–in many ways–inconclusive; 3) it seems that in certain areas that are particular sensitive from a gender or race perspective (*e.g.* sexual and racial harassment in the workplace, sex discrimination, and affirmative action policies), the gender and race of the judge could play a significant role in the outcome of the cases; 4) certain studies concerning the

[1282] *Id.* at 417.
[1283] *Id.* at 418.
[1284] Guy Grossman et al., *Descriptive Representation and Judicial Outcomes in Multiethnic Societies*, 60 AM. J. POLIT. SCI. 44–69 (2016).
[1285] *Id.* at 44–58.

impact of judges' race and gender appear to contradict the idea that minorities and women are–in general–more liberal in their decision-making than white men, as some studies found that minority judges and women judges voted in a more conservative fashion than white or men judges; 5) the potential effects of gender and race in judging may not be restricted to the individual votes or decisions of women and minority judges, as some studies found that the presence of women or minority judges could have the potential to influence the votes of other (traditional) judges sitting in the decision-panel, in situations of collegiate judicial decision-making; 6) some studies also found that the effects of judges' identity in judicial decision-making tended to be stronger in situations in which there was a critical mass of non-traditional judges in a particular court or jurisdiction; 7) a portion of the studies found that different types of minorities (e.g. African Americans v. Hispanics) may have different patterns of judicial decision-making; 8) some studies also found that the impact of race or gender on judging may differ *vis-à-vis* the gender or the race of the litigants; 9) there are studies that have found evidence of different judicial decision-making on the basis of the judges' ethnicity outside of the U.S. context.

As I stated at the beginning of this section, although there is no hard evidence concerning the impacts of Afro-descendant representation on Colombian courts on case outcomes, there is anecdotal evidence suggesting that the ethno-racial identity of the judge might play a meaningful role in the judicial decision-making process. Since engaging in a more detailed discussion about this topic would exceed the purposes of this dissertation, I consider that future studies, ideally in the field of political science, should conduct an empirical analysis to test this hypothesis.

In the next section, I will discuss the issue of racial discrimination in the Colombian justice system and whether a higher representation in this country's courts might help to tackle this problem.

## 3. Racial discrimination in the Colombian justice system

In this section, I will examine the potential of Afro-descendant representation in judicial institutions to counter situations of bias and discrimination in the Latin American judicial systems. In previous sections

of the manuscript, I discussed situations of racial discrimination affecting judicial servers. I will now focus on discrimination against attorneys and the general public when they interact with judicial institutions and their representatives.

A particular aspect of the law's role in the construction of racial stratification in Latin America is how the justice system has been used for preserving racial inequality. Significant evidence to support this claim can be found in Brazil. In this country, there have been several studies about the judicial system institutions' treatment of race that have found that public institutions, including the judiciary, have historically treated Afro-descendants, the poor, and other unprivileged groups unfairly.[1286]

Likewise, participants in the qualitative study were outspoken about experiences of discrimination that they lived or witnessed in the Colombian justice system. One of the participants remarked: "I have witnessed the judicial treatment towards Afro Colombians, and it is not the same that a white or *mestizo* person receives in our society."[1287] Other participants complained about the treatment that Afro-descendants and poor people receive by the justice system. These groups often face unjustified delays in their procedures, are treated disadvantageously by judicial servers, or have to endure different forms of subtle discrimination.[1288] As a participant declared, these forms of discrimination come from all the sides present in the courtrooms: Judges, judicial employees, attorneys, the parties, and state institutions alike.[1289] However, the perception of discrimination in judicial institutions tends to be more acute in geographical areas in which Afro-descendants are a minority.[1290]

In the case of the criminal justice system, some participants shared their perception of the high (and perhaps excessive) number of incarcerated Afro-descendants. They also sustained that, on occasion, law enforcement personnel and judicial authorities use stereotypes in the fulfillment of their duties.[1291] An Afro-

[1286] Peter Fry, *Color And The Rule Of Law In Brazil*, *in* THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA 186–210, 187–188 (Juan E. Méndez, Guillermo A. O'Donnell, & Paulo Sérgio de M. S Pinheiro eds., 1999).
[1287] Interview 7
[1288] Interviews 4, 15, 16, 26, 32 and 38.
[1289] Interview 24.
[1290] Interview 35.
[1291] Interviews 4, 7, 31 and 35.

descendant woman judicial employee even affirmed that a prosecutor actively acknowledged to her that when he was assigned cases in which the defendant was black, he was particularly severe, given his dislike of Afro-descendants. According to the participant, this revelation occurred because the prosecutor did not see the participant as an Afro-descendant, given her light-skin color.[1292] This participant also recalled that, when working as an attorney with family members of forcibly disappeared Afro-descendant persons, it was not uncommon that the district attorney's office would refuse to investigate these cases. Prosecutors believed that the victims were not missing, but rather "partying out" somewhere.[1293] Likewise, the participant suggested that Afro-descendant defendants appear to be treated more ruthlessly by the criminal justice system, for example, by being subjected to pre-trial detention for even minor offenses.[1294]

During my direct observation exercises, I had the opportunity to witness a situation that, in many ways, corresponds to similar forms of discrimination in the criminal justice system that participants reported. While I was visiting the courthouses in the city of Medellín, I ran into a black young man that was surrounded by a group of *mestizo* penitentiary officers in one of the judicial complex's corridors. The prisoner was handcuffed and was holding a transparent plastic bag with some food items inside. Since criminal hearings in Colombia are, as a general rule, public, I decided to stay and observe the hearing. While I was waiting for the custodial officer to allow the public in, I saw that there was a group of people, a majority of whom were black women, waiting outside of the courtroom. From their interactions, I could tell they were the romantic partners of the men that were facing trial. A few minutes after, two groups of prisoners—one of 5 and another of 6 detainees—arrived in the courtroom handcuffed to each other. None of the 12 defendants appeared to have reached the age of 25. 11 of them were black men, one was a black woman, and the remaining one was a *mestizo* man (I made this assessment based on their skin color). A moment later, the custodial officer (a *mestizo* man) showed up. With a loud and unfriendly voice, he warned the four black women waiting to enter the courtroom that they had to turn off our cellphones and seat still,

[1292] Interview 9.
[1293] *Id.*
[1294] Interview 38.

and that if they were loud during the hearing, he would remove them from the courtroom: "You have to behave well"—the custodial officed said.

Although the courtroom was large and all the benches were empty, the custodial officer ordered the black women (and me) to sit in the back of the room, as far away as possible from detainees, leaving a significant distance between the detainees and us empty. Minutes after, the judge presiding over the case arrived. she was a light-skinned *mestizo* woman with dyed blond hair. I took a look around, and all the people present in the courtroom at that moment (the judge, the police officers, the judicial employees) were either white or *mestizo*. The exceptions were the prisoners, their families, and me.

Later on, I learned that the prisoners were on trial for the crime of aggravated robbery (*hurto calificado y agravado*) and conspiracy to commit a crime (*concierto para delinquir*). All of the detainees had a public defender arguing for them, except for one that had a private attorney. When the counselors for the defense had to identify themselves and introduced their clients, they read out their client names out of the case file. They did not know any of them out of memory, perhaps because of the high number of cases that public defendants have assigned. When it was the turn of the detainees to identify themselves, many of them did not seem to be able to remember their addresses, which prompted their family members to pass small pieces of paper on to them with the addresses written on them. From the addresses and neighborhoods that they provided, I could tell (as I had anticipated) that all of them came from some of the poorest neighborhoods in the city of Medellin, such "*El Popular*," "*Moravia*," and "*Parte Alta de Robledo*." Sometime later, the victims of the alleged crime arrived at the courthouse, all of which were white and *mestizo*.

A few minutes after the hearing began, the prosecutor and defense attorneys announced to the judge the defendants' intention to accept charges so they could receive a reduction of their sentence. This practice is allowed under Colombian law. This situation reminded me that a few moments before the hearing began, I saw the prosecutor and the defense attorneys meeting in the courtroom located across the hall, apparently discussing the case. Since the judge accepted the motion, the hearing lasted for no more than 15 minutes in total.

I consider that this hearing exemplifies many forms of discrimination and inequality that participants in the study mentioned during the interview process: The lack an adequate defense of poor Afro-descendant detainees, the incentives for criminal defendants to plead guilty in exchange of sentence reduction, and the many forms of subtle discrimination that detainees' loved-ones face in the criminal justice system (like having to sit in the back of the room).

Moreover, the narratives of the study participants and my own experiences in the courthouse in Medellin seem to parallel the existing literature concerning the treatment of Afro-descendants by the criminal justice systems in Latin America. This evidence is, sometimes, historical. Sueann Caulfield studied the role that race played in the judicial decisions on sex-crime cases brought before the courts of Rio de Janeiro during the first part of the 20th Century.[1295] In her study, Caulfield found evidence suggesting that color played a significant role in the decisions that judges made on sex-crime cases. The author mentions that: "When both the victim and defendant were in the same category, there was no discernible difference in rates of indictment or conviction for black, *pardo*, or white men. However, indictment and conviction were less likely if the woman was darker than the man and more likely if she was lighter."[1296]

More recently, Sérgio Adorno conducted a study on race discrimination in the criminal justice system of the state of Sao Paulo.[1297] His research concluded that there is no significant difference in the potential for violent crime among blacks and whites in Brazil. However, the criminal justice system tended to give black defendants a severer treatment, which manifested in aspects such as a higher persecution rate, more considerable obstacles to access the criminal justice system, and more difficulties in exercising their right to an adequate defense.[1298] The author concludes that in this country, "color is a powerful instrument of discrimination in the distribution of justice."[1299] Similarly, Peter Fry points out that, in certain Brazilian states, such as Sao Paulo, Afro-Brazilians are disproportionately present in prisons, are significantly more

[1295] Sueann Caulfield, *Interracial Courtship in the Rio de Janeiro Courts, 1918-1940*, *in* RACE AND NATION IN MODERN LATIN AMERICA 163–186 (Nancy P. Appelbaum, Anne S. Macpherson, & Karin Alejandra Rosemblatt eds., 2003).
[1296] *Id.* at 179.
[1297] Sérgio Adorno, *Discriminação Racial E Justiça Criminal Em São Paulo*, NOVOS ESTUD. 45–63 (1995).
[1298] *Id.* at 63.
[1299] *Id.* at 63.

likely to be killed by police than whites, and are, in general, more affected by the criminal justice system.[1300] Likewise, after examining data from 1988, Michael Mitchell & Charles Wood concluded that in Brazil, black men were more likely than other men to be the objects of physical assault and suffering police aggression.[1301]

However, the evidence on this topic does not stop in Brazil. In the case of Ecuador, Carlos De La Torre argues that black people are commonly racialized as criminals. A stereotype often used to justify police violence. De La Torre mentions different cases of police brutality against black individuals in Ecuador. He sustains that, despite being reported and made public, nobody has been held accountable for these actions.[1302] Likewise, Rita Segato asserts that, in general, it is difficult to discuss the racial dimension of the criminal justice system in Latin American academic forums because:

> Trying to enunciate what one sees when entering prison, make reference to the face of the incarcerated people, is not easy because it hurts the sensibility of various hegemonic actors: of the traditional and academic left, as it requires to give bone and flesh to the mathematics of class, introducing color, culture, ethnicity and, in sum, difference; it hurts the sociologic sensibility because the numbers on that topic are scarce and very difficult to precise with objectivity due to the complexities of racial classification; and it hurts the sensibility of the law operators and the forces of legality because it suggests institutional racism.[1303]

Notwithstanding the difficulties of obtaining reliable data on the racial breakdown of inmates, Segato indicates that the available information suggests that indigenous and Afro-descendant persons are

[1300] Fry, *supra* note 1286 at 189–192.
[1301] Michael J. Mitchell & Charles H. Wood, *Ironies of Citizenship: Skin Color, Police Brutality, and the Challenge to Democracy in Brazil*, 77 SOC. FORCES 1001, 1013 (1999).
[1302] De La Torre, *supra* note 942 at 64.
[1303] Segato, *supra* note 564 at 145–146.

more often the object of criminalization policies and face worse detention conditions than other population groups in the region's prisons.[1304]

Additionally, language discrimination is particularly concerning in criminal cases. There were some accounts of defendants who did not speak Spanish and, due to the judge's lack of native language proficiency and the absence of translators, could not fully understand what has happened in the courtroom while they were on trial.[1305] As I explained in chapter 3, language discrimination was an issue in areas in which Afro-descendant populations speak a language other than Spanish, as some judicial servers who are proficient in the native languages often reject non-Spanish communication.[1306] While most language discrimination cases that I have mentioned so far involved *Raizal* persons, this is not the only Afro-descendant group that does not have Spanish as their first language. Other groups, such as the *Palenqueros*, are also language minorities and, therefore, also have language barriers when they interact with the majoritarian justice system, including the criminal justice system.[1307]

As it has been registered in the existing academic literature, some participants pointed out that racial discrimination cases were challenging to litigate. Judicial servers often believed that the injuries caused to the victims were unimportant, and that the discrimination event was the mere result of the victim's perception or could be attributed to oversensitivity of the claimant. These assumptions disregard the moral and psychological harms that discrimination can produce on people.[1308] A participant also referred to the lack of racial fluency among judicial servers, and their overall rejection to investigate situations of discrimination related to their work.[1309]

Although some situations of discrimination had their origin in the judicial servers' explicit biases, others appeared to be the result of a lack of cultural competency on Afro-descendant issues and, particularly,

[1304] *Id.* at 148–149.
[1305] Interviews 26, 27 and 28.
[1306] Interview 25.
[1307] Interview 37.
[1308] Interview 9.
[1309] Interview 23.

cultural traditions of certain Afro-descendant ethnic groups.[1310] Also, some situations of discrimination seem to have been the result of the overlapping of race and class forms of oppression.[1311] An Afro-descendant attorney mentioned that in certain cities the lack of competent legal counsel prevents poor people from presenting criminal complaints when they were the victims of certain types of crimes since they are often undermined by bureaucratic employees who use filters to decide on the merits of the case without legally having such authority.[1312]

The limited or restrictive interpretation of anti-racist legislation and the lack of knowledge about racial discrimination in Latin America has frustrated litigation efforts to address this issue in many countries. Seth Racusen mentions that, in the case of Brazil, it is common for courts to dismiss discrimination cases when the person accused of engaging in racial discrimination claims to be mixed-race, as judges tend to see this as evidence of lack of racial prejudice.[1313] Comparable situations happen in other Latin American countries, such as Perú, where the law allows employers accused of engaging in acts of racial discrimination to argue as a defense that the discrimination act was "objective and reasonable".[1314] Similarly, Antonio Guimarães writes about how laws enacted to punish acts of race discrimination are difficult to enforce in Brazil. The text of these statutes is not sufficiently clear and tries to specifically target overt acts of race discrimination, which are not the most common way in which racial prejudice manifests in this country. Besides, when judges interpret the law and apply it to cases, they tend to quickly assume that those accused of racism did not act with the intent to discriminate based on race and often narrow down the scope of anti-discrimination laws.[1315]

My perception is that Afro-descendant representation might have some potential to improve the levels of racial discrimination and prejudice in the justice system. This might not be the effect of the "more

[1310] Interview 36.
[1311] Interview 36
[1312] Interview 4.
[1313] Seth Racusen, *"A Mulato cannot be prejudiced": the legal construction of racial discrimination in contemporary Brazil*, 2002, https://dspace.mit.edu/handle/1721.1/31104 (last visited Feb 29, 2020).
[1314] Hernández, *supra* note 149 at 1131–1132.
[1315] ANTONIO SÉRGIO ALFREDO GUIMARÃES, PRECONCEITO E DISCRIMINAÇÃO: QUEIXAS DE OFENSAS E TRATAMENTO DESIGUAL DOS NEGROS NO BRASIL 37 (2004).

empathic nature" of Afro-descendant judges and judicial employees, their alleged greater awareness of how racism and race discrimination operates in the court system, or any other quasi-essentialist argument that portraits Afro-descendants as less biased. Instead, this effect might come from their presence inside judicial institutions and its potential influence in helping to dismantle the multiple negative stereotypes held against black people (their dangerousness, intellectual inferiority, and proclivity to crime). I do not necessarily believe that a more significant Afro-descendant presence on Latin American courts will change case outcomes (this effect might be contingent on other aspects besides the ethno-racial identity of judicial servers). However, ethno-racial integration could change the perceptions and imaginaries present inside judicial institutions and, through them, lessen the role of judicial institutions in the preservation of racial subordination.

In the next section, I will briefly present the dissertation's general conclusion, discuss the study limitations and introduce some recommendations for researchers, judicial institutions, judges and magistrates, and the black social movement.

## VI. Conclusions, limitations, and recommendations

In this last section, I will introduce the study's conclusions, limitations, and recommendations.

### 1. Conclusions

The main conclusion arising from this dissertation is that Afro-descendants are, in general, underrepresented on high and intermediate courts in Colombia. Afro-descendants are absent from the Constitutional Court's group of magistrates and, seemingly, from its group of judicial employees. Afro-descendants appear to be only a few among the magistrates and judicial employees of the Supreme Court of Justice, the State Council, and the Superior Council of the Judicature. This ethno-racial group might account for between approximately 2% and 4% of intermediate tribunals magistrates and judicial employees; and might be underrepresented even among the group of lower court judges, except in certain areas. Similarly, indigenous persons appear to be virtually absent from the Colombian judiciary. In the case of women, even though they are a majority of judicial servers, they also experience a crystal sealing. Women enjoy significant representation among the lower levels of the judicial pyramid, but limited representation in its upper layers.

The SJP seems to be an exception to the general rule of Afro-descendant and indigenous underrepresentation in judicial institutions since in this tribunal the level of Afro-descendant representation among magistrates resembles their share of the national population—as reported in the 2005 Colombian national census. The level of indigenous representation in the group of magistrates surpasses their percentage in the national population. Likewise, women in the SJP account for half of the magistrates on this court. A significant level of Afro-descendant and women representation also appears to exist among this court's judicial employees.

Geographic location plays a significant role in explaining Afro-descendant underrepresentation in judicial institutions in Colombia. Certain regions appear to follow the general rule of minimal representation

(*i.e.*, Medellin, Cartagena, Tumaco, Buenaventura, and Cali). In contrast, some places seem to be exceptions to such rule (*i.e.*, Quibdó and San Andrés, Providencia and Santa Catalina). Several conditions seem to explain the uneven distribution of the Afro-descendant representation among the country's courts. Regional demographic differences, the institutional dependency of peripherical regions on central regions of the country, stiff regional disparities in access to services and the effects of structural discrimination, the conflation of regional and racial identities and stereotypes, the lack of ethno-racial self-identification among the Afro-descendant population in some regions (Cartagena), the presence of social mobilization calling for increased black presence in judicial institutions in some areas, and the pervasiveness of racial stereotypes are some of these conditions.

Likewise, there appear to be several factors contributing to the underrepresentation of Afro-descendants on Colombia's courts and the stratification of judicial institutions, including the statistical invisibility of the Afro-descendant population in the country's databases; the overlapping of race and class subordination; the lack of Afro-descendants' access to good quality education and, particularly, higher education; the interaction of race and gender forms of oppression; the influence of race, color, and identity on the representation assessment; the negative disparate impacts that some judicial selection mechanisms cause on Afro-descendants; the ubiquity of different forms of racial discrimination and bias in judicial institutions and the legal profession. Moreover, courts and judicial servers seem to have competing narratives regarding the importance of race in the composition of judicial institutions, ranging from the lack of acknowledgment of racial differences to the recognition of issues of racial discrimination in judicial institutions.

Finally, from a policy perspective, several types of rationales for asserting the need for women and minorities' representation in judicial institutions have been identified in the U.S. academic literature on this topic (role model rationales, altered or improved decision-making rationales, and fairness and legitimacy rationales). The study participants appeared to elicit similar foundations in favor of increased Afro-descendant representation on Colombia's courts. They also introduced other rationales that have not had a prominent role in U.S. scholarly works (equality in access to resources).

Concerning the impact of race and gender on judicial decision-making, there has been a significant number of empirical studies on this issue. Although most of the evidence on this matter continues to be inconclusive, in some instances of a particular gender or racial salience, some studies suggest that the race and gender of the judge might play a significant role in the decision of cases. In the case of Colombia, some participants argued that, in some areas of the law, the ethno-racial identity of the judge might play an important role in judicial decision-making.

Likewise, participants described several instances in which attorneys and citizens experienced situations of discrimination in their interactions with judicial personnel, which leads to the question of whether improved Afro-descendant representation on courts also might help to prevent or to address racism in the justice system.

## 2. Study limitations

Perhaps the most visible limitation of this study were challenges arising from of having to begin the research within a vacuum in social sciences' literature regarding the ethno-racial composition of Latin American judicial systems, the absence of systematic race statistics in Colombia, and the cultural taboo of discussing racial discrimination in this region. Despite the different restrictions arising from these conditions, I consider that my dissertation helps to narrow down a knowledge gap—at least at an exploratory level—concerning the role of race in the composition of judicial institutions in Colombia, since this topic has received minimal attention from the disciplines mentioned above.

Also, my study does not depart from a unified criterion to define who counts as an Afro-descendant to assess representation in the judiciary. This aspect is, in part, the result of the fluidity of ethno-racial identities in Latin America. The consequence of this limitation is that different identification criteria (self-identification—hetero-identification) to establish Afro-descendants' presence on courts at different stages of the research process. Although this is, of course, an important limitation, I addressed some of the principal issues related to the multiple definitions of Afro-descendant identities and the methodologies used

to inquire about them. I also analyzed the participants' narratives around race and identity in the different stages of the project, therefore providing nuance and critique to the data gathered throughout the project's development. I consider that the lack of precise definitions of racial categories is not a significant barrier to the research project because, given the statistical extremity of low Afro descendant presence, the added nuance of precise definitions would not alter the conclusions. Finally, as I explained in chapter 1 of this project, despite the fluidity of Afro-descendant identities in this region, I consider that it is possible to rely on the social and cultural meanings attached to these identities for understanding issues of discrimination, exclusion, and inequality. In the end, ethno-racial identities are cultural constructs that enjoy a shared social meaning.

Another limitation is the scarcity of the data on the ethno-racial composition of the lower courts. I could not obtain data from the courts themselves in this level of the judiciary nor integrate into the study the perspectives of the judiciary's administrators (The Superior Council of the Judicature) and Afro-descendant organizations. In both cases, this was a consequence of time and access limitations. I contacted persons inside these spaces and ask them to participate. Nevertheless, they did not provide final responses to my petitions.

Likewise, the focus on Afro-descendant narratives and perspectives, although it was an outcome of the study design, does entail certain limitations. Such a focus does not fully encompass the perspectives of other ethno-racial groups that might have unique views on this debate and whose appraisals on this issue might be different.

Similarly, I would have liked to delve into the particularities of the role that color plays in the stratification of the Colombian judicial system. I consider that studying whether color differences determine which Afro-descendants attain access to judicial positions would have been relevant for this research. It could be, for example, that skin color plays an essential role in the hierarchization of minority judges and judicial employees within the judicial pyramid. Further research efforts such inquire about this aspect.

Finally, two additional study limitations are the amount of time dedicated to the fieldwork component of this research, which was completed in approximately three months, and the lack of a historical

perspective of this project. Concerning the fieldwork duration, this was, to a great extent, a consequence of financial restrictions, and, even though time was certainly limited, it did allow me to gather a significant amount of data to achieve the project's objectives. With respect to the lack of a historical perspective, it would have been essential to explore how levels of representation of women, Afro-descendants and indigenous persons have varied through time since this would have added a desirable layer of complexity to this research project. Nevertheless, the lack of available data and the scope of this project did not allow me to engage in that adjacent conversation. This is especially true if one considers that, before this research project, there was no data concerning the ethno-racial composition of the judicial system in Colombia.

## 3. Recommendations

The creation of empirical data on the ethno-racial composition of Colombia's judicial institutions and the racial dynamic within them is, perhaps, the most salient contribution of this dissertation. Based on the study findings, I would like to recommend the following actions to researchers, judicial administrators, judges, and magistrates, the Afro-descendant social movement, and universities and higher education institutions.

### 3.1. To researchers

-To create databases concerning the composition of the judicial system and the legal profession that are independent from judicial administrators' databases.

-To further study the composition of the legal profession in terms of gender, race, ethnicity, sexuality, class, and other factors in the region.

-To grant considerable attention to judicial politics in their research agendas and to conduct additional qualitative and quantitative research on the composition of the judiciary and the effects of race in judicial decision-making.

-To evaluate and empirically assess the conditions identified in chapter 3 as potentially responsible for the underrepresentation of Afro-descendants on Colombian courts.

-To research on the specific influence of color and color-based discrimination in the composition of judicial institutions and the legal profession.

-To engage in historical analysis of the ethno-racial composition of Latin American judiciaries and other state institutions.

### 3.2. To judicial administrators

-To address the statistical invisibility of Afro-descendants in the judicial system and judicial institutions by collecting data on the ethno-racial composition of courts, the legal profession and the communities they serve. An alternative for this would be to regularly conduct a judiciary census, like the one undertaken in Brazil.

-To further assess and correct the disparate impacts that judicial selection mechanisms have on Afro-descendants.

-To consider the use of affirmative action and other types of special measures for the judiciary.

-To create new judicial selection methods that are sensitive to race and ethnicity and that facilitate the recruitment of minority candidates to different judicial positions.

-To incentivize universities to guarantee Afro-descendant access to high-quality legal education and their recruitment by all sectors of the legal profession.

-To address situations of racial discrimination affecting judges, judicial employees, attorneys, and private persons in judicial institutions and the legal profession, by studying these issues, enforcing existing anti-discrimination and employment harassment laws, using their disciplinary powers, training judicial personnel on implicit bias, creating racial justice campaigns, and any other appropriate means.

### 3.3. To judges and magistrates

-To consider the gender and ethno-racial composition of the courts in hiring practices.

-To use free appointment and removal positions and provisional positions to increase the level of representation that Afro-descendants and other marginalized groups have in judicial institutions, especially in the upper layers of the judiciary.

-To address situations of racial discrimination that occur among their staff and during judicial procedures over which they preside.

-To secure training for themselves and the judicial servers that they supervise on implicit bias, Afro-descendant rights, and anti-discrimination practices.

-To incentivize fair access to high-quality legal education for Afro-descendants and indigenous persons.

### 3.4. To the Afro-descendant social movement

-To include the issue of Afro-descendant underrepresentation on courts in their mobilization agendas as a means to secure greater access of minority applicants to judicial positions.

-To require judicial institutions to address situations of racial discrimination and bias inside the courts and affecting the judicial system's users, including discrimination based on language, color, and micro-aggressions.

-To demand Afro-descendant statistical visibility in the justice sector.

### 3.5. To universities and legal education institutions

-To study and address situations of racial discrimination and bias inside higher education institutions.

-To incorporate Afro-descendant and ethnic perspectives into their research agendas and curricula.

-To provide adequate training for future lawyers on ethnic rights and anti-discrimination law and policy.

-To create student recruitment policies that are sensitive to ethno-racial difference.

-To engage in actions to close down the gap in the access to higher education that affects Afro-descendants.[1316]

[1316] TELLES, *supra* note 42 at 232. (Regarding public support for affirmative action programs, Edward Telles reported that across different Latin American countries, there was widespread support for affirmative action policies to benefit indigenous peoples and Afro-descendants. This support is especially true in the context of education, as "In all countries studied in the PERLA project […] more than 80 percent of respondents supported affirmative action policies for indigenous people and Afro-descendants in education.").

## References

### 1. Legislative materials


Acuerdo Final de Paz Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera. Signed between the Government of Colombia and the FARC-EP on Nov. 12, 2016.

A. PSAA16-10618, diciembre 7, 2016, Consejo Superior de la Judicatura. [C.S.J.] (Colomb.) art. 22.

A. 003/18, enero 26, 2018, Jurisdicción Especial de Paz. [J.E.P.] (Colomb.).

A. 001/18, marzo 9, 2018, Jurisdicción Especial de Paz. [J.E.P.] (Colomb.) art. 103.

AL. 1/17, abril 4, 2017, DIARIO OFICIAL [D.O.] (Colomb.).

Constitución Política de Colombia [C.P.].

D. 1627/96, septiembre 10, 1996, DIARIO OFICIAL [D.O.] (Colomb.).

L. 70/93, agosto 27, 1993, DIARIO OFICIAL [D.O.] (Colomb.).

L. 47/93, febrero 19, 1993, DIARIO OFICIAL [D.O.] (Colomb.).

L. 270/96, marzo 7, 1996, DIARIO OFICIAL [D.O.] (Colomb.).

L. 581/00, mayo 31, 2000, DIARIO OFICIAL [D.O.] (Colomb.).

L. 1581/12, octubre 17, 2012, DIARIO OFICIAL [D.O.] (Colomb.).

L. 1755/15, junio 30, 2017, DIARIO OFICIAL [D.O.] (Colomb.).

L. 1957/19, julio 6, 2019, DIARIO OFICIAL [D.O.] (Colomb.).

PD. 587/17, abril 5, 2017, DIARIO OFICIAL [D.O.] (Colomb.).


### 2. Court decisions


*Regents of Univ. of California v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978).

Corte Constitucional [C.C.] [Constitutional Court], noviembre 11, 1993, Sentencia C-530/1993 Gaceta de la Corte Constitucional [G.C.C.] (Colomb.).

Corte Constitucional [C.C.] [Constitutional Court], julio 15, 2008, Sentencia C-713/2008 Gaceta de la Corte Constitucional [G.C.C.] (Colomb.).

Corte Constitucional [C.C.] [Constitutional Court], agosto 27, 2015, Sentencia SU-553/15, Gaceta de la Corte Constitucional [G.C.C.] (Colomb.).

Corte Constitucional [C.C.] [Constitutional Court], agosto 15, 2018, Sentencia C-080/2008 Gaceta de la Corte Constitucional [G.C.C.] (Colomb.).

### 3. Books, articles and other sources

Abrahamson, Shirley S. "The Woman Has Robes: Four Questions." *Golden Gate U. L. Rev.* 14 (1984): 489–504.

Acquaviva, Gregory L., and John D. Castiglione. "Judicial Diversity On State Supreme Courts." *Seton Hall Law Review* 39 (2009): 1203–51.

Adorno, Sérgio. "Discriminação Racial E Justiça Criminal Em São Paulo." *Novos Estudos*, no. 43 (November 1995): 45–63.

"Afrocolombianos, población con huellas de africanía." Bogotá: Ministerio de Cultura de Colombia, 2010. https://www.mincultura.gov.co/areas/poblaciones/comunidades-negras-afrocolombianas-raizales-y-palenqueras/Documents/Caracterización%20comunidades%20negras%20y%20afrocolombianas.pdf.

"Afro-Descendants in Latin America: Toward a Framework of Inclusion." Washington D. C.: The World Bank, 2018. https://www.worldbank.org/en/region/lac/brief/afro-descendants-in-latin-america.

Aliotta, Jilda M. "Justice O'Connor and the Equal Protection Clause: A Feminine Voice." *Judicature* 78, no. 5 (April 1995): 232–35.

Allen, David W., and Diane E. Wall. "Role Orientations and Women State Supreme Court Justices." *Judicature* 77, no. 3 (December 1993): 156–65.

———. "The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders." *The Justice System Journal* 12, no. 2 (1987): 232–46.

Alves, Dina. “Rés negras, juízes brancos: Uma análise da interseccionalidade de gênero, raça e classe na produção da punição em uma prisão paulistana.” *Revista CS*, no. 21 (2017): 97–120.

Alves Dos Santos Cruz, Adriana, and Carlos Alberto Plastino. “A Discriminação Racial Contra Afrodescendentes No Brasil E O Impacto Sobre A Democracia: Um Olhar Sobre A Atuação Da Justiça Federal De Segunda Instância. [En] Racial Discrimination Against African Descendants in Brazil and the Impact on Democracy: A Look at the Performance of Federal Courts of Appeals.” Master, Pontifícia Universidade Católica Do Rio De Janeiro, 2010. https://www.maxwell.vrac.puc-rio.br/Busca_etds.php?strSecao=resultado&nrSeq=19097@2.

Anastopoulo, Constance A., and Daniel J. Crooks III. “Race And Gender On the Bench: How Best Achieve Diversity in Judicial Selection.” *Northwestern Journal of Law & Social Policy* 8 (Spring 2013): 174–204.

Antón, Jhon, Álvaro Bello, Fabiana Del Popolo, Marcelo Paixão, and Marta Rangel, eds. *Afrodescendientes en América Latina y el Caribe: del reconocimiento estadístico a la realización de derechos*. Serie población y desarrollo 87. Santiago de Chile: Naciones Unidas, CEPAL, 2009. https://repositorio.cepal.org/bitstream/handle/11362/7227/1/S0900315_es.pdf.

Antón, Jhon, Álvaro Bello, Fabiana del Popolo, Marcelo Paixão, and Marta Rangel, eds. *Afrodescendientes en América Latina y el Caribe: del reconocimiento estadístico a la realización de derechos*. Serie población y desarrollo 87. Santiago de Chile: Naciones Unidas, CEPAL, 2009.

Anton, John, and Fernando Garcia. “Plan Nacional Para Eliminar la Discriminación Racial y la Exclusión Étnica y Cultural 2009 - 2012.” Goverment of Ecuador-Ministry Coordinator of Patrimony; UNESCO, March 2010. https://unesdoc.unesco.org/in/documentViewer.xhtml?id=p::usmarcdef_0000187968&file=/in/rest/annotationSVC/DownloadWatermarkedAttachment/attach_import_7ef7f046-a038-4b2d-b743-05cdd359c7a0%3F_%3D187968spa.pdf&locale=en&multi=true&ark=/ark:/48223/pf0000187968/PDF/187968spa.pdf#page=34.

Aparecida de Jesus, Eunice. “Preconceito Racial e Igualdade Jurídica no Brasil.” Master thesis, University of Sao Paulo, 1980. http://www.teses.usp.br/teses/disponiveis/2/2134/tde-03032008-103152/pt-br.php.

Appelbaum, Nancy P., Anne S. Macpherson, and Karin Alejandra Rosemblatt. "Introduction: Racial Nations." In *Race and Nation in Modern Latin America*, edited by Nancy P. Appelbaum, Anne S. Macpherson, and Karin Alejandra Rosemblatt, 1–31. Chapel Hill: University of North Carolina Press, 2003.

Ashenfelter, Orley, Theodore Eisenberg, and Stewart J. Schwab. "Politics And The Judiciary: The Influence Of Judicial Background On Case Outcomes." *The Journal of Legal Studies* 24, no. 2 (June 1995): 257–81.

Bailey J., Frank. "Does The Federal Article I Bench Reflect the Ethnicity Of The Populations That They Serve? What If the Answer Is No?" *Judges' Journal* 55, no. 2 (Sping 2016): 21–25.

Barbary, Oliver, and Fernando Urrea Giraldo. "Introducción." In *Gente negra en Colombia: dinámicas sociopolíticas en Cali y el Pacífico*, edited by Olivier Barbary and Fernando Urrea Giraldo, 21–68. Medellin: Centro de Investigaciones y Documentación Socioeconómicas, Facultad de Ciencias Sociales y Económicas de la Universidad del Valle, 2004. http://www.humanas.unal.edu.co/colantropos/files/3714/8564/0886/Gente_Negra.pdf.

Bartlett, Katharine T. "Feminist Legal Methods." *Harv. L. Rev.* 103, no. 4 (February 1990): 829–88.

———. "Race-of-Officer Effects in Traffic Stop Outcomes Representative Bureaucracy and the Routine Traffic Stop," March 2019, 38.

Beck, Scott H., Kenneth J. Mijeski, and Meagan M. Stark. "¿Qué Es Racismo?: Awareness of Racism and Discrimination in Ecuador." *Latin American Research Review* 46, no. 1 (2011): 102–25. https://doi.org/10.1353/lar.2011.0008.

Beiner, Theresa M. "How the Contentious Nature of Federal Judicial Appointments Affects Diversity on the Bench." *U. Rich. L. Rev* 39 (2005): 849-870.

———. "The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium." *U. C. Davis L. Rev* 36 (2003): 597–618.

———. "What Will Diversity on the Bench Mean for Justice." *Mich. J. Gender & L.* 6 (1999): 113–52.

———. "White Male Heterosexism In The Confirmation Process." *Women's Rights Law Reporter* 32 (Winter/Spring 2011): 105–42.

Bello, Álvaro, and Marta Rangel. "Equity and Exclusion in Latin America and the Caribbean: The Case of Indigenous and Afro-Descendant Peoples." *Cepal Review*, no. 76 (April 2002): 39–53.

Bethell, Leslie. "Between the Law and Their Land: Afro-Brazilian Quilombo Communities' Struggle for Land Rights." Austin, Texas: Bernard and Audre Rapoport Center for Human Rights and Justice: Rapoport delegation on Afro-Brazilian Land Rights, September 22, 2008. https://law.utexas.edu/wp-content/uploads/sites/31/2016/02/brazil-eng.pdf.

Blackburne-Rigsby, Anna. "The Importance Of A Diverse Judiciary To Closing The Historic 'Health' Gap Between Blacks And Whites, And President Obama's Legacy." *Howard Law Journal* 60 (Spring 2017): 641–62.

"Boletín Censo General 2005: Perfil Bogotá, Bogotá." Institutional. Bogotá: Departamento Administrativo Nacional de Estadística (DANE), September 13, 2010. https://www.dane.gov.co/files/censo2005/PERFIL_PDF_CG2005/11001T7T000.PDF.

"Boletín Censo General 2005: Perfil Buenaventura, Valle del Cauca." Institutional. Bogotá: Departamento Administrativo Nacional de Estadística (DANE), September 14, 2010. https://www.dane.gov.co/files/censo2005/PERFIL_PDF_CG2005/76109T7T000.PDF.

"Boletín Censo General 2005: Perfil Cali, Valle del Cauca." Institutional. Bogotá: Departamento Administrativo Nacional de Estadística (DANE), September 14, 2010. https://www.dane.gov.co/files/censo2005/PERFIL_PDF_CG2005/76001T7T000.PDF.

"Boletín Censo General 2005: Perfil Cartagena, Bolívar." Institutional. Bogotá: Departamento Administrativo Nacional de Estadística (DANE), September 13, 2010. https://www.dane.gov.co/files/censo2005/PERFIL_PDF_CG2005/13001T7T000.PDF.

"Boletín Censo General 2005: Perfil Medellín Antioquia." Institutional. Bogotá: Departamento Administrativo Nacional de Estadística (DANE), September 13, 2010. https://www.dane.gov.co/files/censo2005/PERFIL_PDF_CG2005/05001T7T000.PDF.

"Boletín Censo General 2005: Perfil San Andrés, Archip. de San Andrés." Institutional. Bogotá: Departamento Administrativo Nacional de Estadística (DANE), September 14, 2010.

https://web.archive.org/web/20160304204428/https:/www.dane.gov.co/files/censo2005/PERFIL_PDF_CG2005/88001T7T000.PDF.

"Boletín Censo General 2005: Perfil Tumaco, Nariño." Institutional. Bogotá: Departamento Administrativo Nacional de Estadística (DANE), September 14, 2010. https://www.dane.gov.co/files/censo2005/PERFIL_PDF_CG2005/52835T7T000.PDF.

"Boletín Estadístico 2018." Bogotá: Universidad del Rosario, 2019. https://repository.urosario.edu.co/bitstream/handle/10336/19887/Boletin%20Estad%C3%ADstico%202018.pdf?sequence=1.

Bonilla Maldonado, Daniel. *La constitución multicultural*. Bogota: Siglo del Hombre Editores. Universidad de los Andes, Facultad de Derecho. Pontificia Universidad Javeriana, Instituto Pensar, 2006.

Bonneau, Chris W., and Heather M. Rice. "Impartial Judges? Race, Institutional Context, and U. S. State Supreme Courts." *State Politics & Policy Quarterly* 9, no. 4 (Winter 2009): 381–403.

Boyd, Christina L., Lee Epstein, and Andrew D. Martin. "Untangling the Causal Effects of Sex on Judging." *American Journal of Political Science,* 54, no. 2 (April 2010): 389–411.

Bratton, Kathleen A., and Rorie L. Spill. "Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts." *Social Science Quarterly* 83, no. 2 (June 2002): 504–18.

Brittain, John C., and Kenneth W. Chandler. "What Was Key To Becoming A Judge? A Survey Of Minorities And Women On The Bench." *Judges' Journal* 48 (Fall 2009): 10–13.

Brown-Nagin, Tomiko. "Identity Matters: The Case Of Judge Constance Baker Motley." *Columbia Law Review* 117 (2014): 1691–1739.

Caulfield, Sueann. "Interracial Courtship in the Rio de Janeiro Courts, 1918-1940." In *Race and Nation in Modern Latin America*, edited by Nancy P. Appelbaum, Anne S. Macpherson, and Karin Alejandra Rosemblatt, 163–86. Chapel Hill: University of North Carolina Press, 2003.

"Censo del Poder Judicial: Vectores Iniciales y Datos Estadisticos." Brasilia: Consejo Nacional de Justicia, 2014. http://www.cnj.jus.br/images/dpj/CensoJudiciario.final.pdf.

Carlos Roberto Peña / SRG. “Ranking de las mejores universidades de Colombia 2019 | U-Sapiens.” Sapiens Research Group, March 10, 2020. https://www.srg.com.co.

Cepeda Espinosa, Manuel Jose. “The Judicialiazation of Politics in Colombia.” In *The Judicialization of Politics in Latin America*, First Edition., 67–104. New York City: Palgrave MacMillan, 2005. https://books.google.com/books/about/The_Judicialization_of_Politics_in_Latin.html?id=_rgYDAAAQBAJ.

Chen, Edward M. “The Judiciary, Diversity, And Justice For All.” *California Law Review* 91 (2003): 1109–24.

Chew, Pat K. “Anticipating The Wise Latina Judge.” *Denver University Law Review* 91 (2014): 853–68.

———. “Judges’ Gender and Employment Discrimination Cases: Emerging Evidence-Based Empirical Conclusions.” *Journal of Gender, Race and Justice* 14 (Spring 2011): 359–74.

Chew, Pat K., and Robert E. Kelley. “Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases.” *Wash. U. L. Rev* 86 (2009): 1117–66.

———. “The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs’ Race and Judges’ Race.” *Harv. J. of Racial & Ethnic Just.* 28 (2012): 91–116.

Chew, Pat, and Luke Kelley-Chew. “The Missing Minority Judges.” *Journal of Gender, Race and Justice* 14, no. 1 (Fall 2010): 179–97.

Chin, Ming W. “Keynote Address: ‘Fairness Or Bias?: A Symposium On Racial And Ethnic Composition And Attitudes In The Judiciary.’” *Asian Law Journal* 4 (May 1997): 181–94.

Chong, Alberto, and Hugo Ñopo. “Discrimination in Latin America: An Elephant in the Room?” SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, July 1, 2007. https://papers.ssrn.com/abstract=1820904.

Clark, Mary L. “One Man’s Token Is Another Woman’s Breakthrough? The Appointment Of The First Women Federal Judges?” *Villanova Law Review* 49 (2004): 486–550.

Clementi, Hebe. “El Negro En América Latina.” In *Discriminación y Racismo en América Latina*, edited by Ignacio F. Klich and Mario Rapoport, 37–50. Buenos Aires: Nuevo Hacer, Grupo Editor Latinoamericano, 1997.

Cohen, Mathilde. "Judicial Diversity in France: The Unspoken and the Unspeakable." *Law & Social Inquiry* 43, no. 4 (Fall 2018): 1542–73. https://doi.org/10.1111/lsi.12331.

———. "Judicial Diversity in France: The Unspoken and the Unspeakable," n.d.

Collins, Paul M., Kenneth L. Manning, and Robert A. Carp. "Gender, Critical Mass, and Judicial Decision Making." *Law and Policy* 32, no. 2 (April 2010): 260–81.

Collins, Todd, and Laura Moyer. "Gender, Race, and Intersectionality on the Federal Appellate Bench." *Political Research Quarterly* 61, no. 2 (June 2008): 219–27.

Rama Judicial de Colombia. "Comisión Nacional de Género--Rama Judicial." Institutional, March 10, 2020. https://www.ramajudicial.gov.co/web/comision-nacional-de-genero/leyes-y-decretos.

Ámbito Juridico. "Conozca Cuál Es El Sueldo de Los Magistrados y Jueces de Colombia," March 12, 2020. https://www.ambitojuridico.com/noticias/general/administracion-publica/conozca-cual-es-el-sueldo-de-los-magistrados-y-jueces-de.

Contreras Calderón, Jorge Andrés. "El precedente judicial en Colombia: Un análisis desde la teoría del derecho." *Revista Facultad de Derecho Y Ciencias Políticas* 41, no. 115 (December 2011): 32.

Coontz, Phyllis. "Gender and Judicial Decisions: Do Female Judges Decide Cases Differently than Male Judges?" *Gender Issues* 18, no. 4 (Fall 2000): 59–73.

Correa Sutil, Jorge. "Judicial Reforms In Latin America: Good News For The Unprivileged?" In *The (Un)Rule of Law and the Underprivileged in Latin America*, edited by Juan E. Méndez, Guillermo A. O'Donnell, and Paulo Sérgio de M. S Pinheiro, 255–77. Notre Dame, IN: University of Notre Dame Press, 1999.

Costa, Sérgio, and Guilherme Leite Gonçalves. "Human Rights as Collective Entitlement? Afro-Descendants in Latin America and the Caribbean." *Journal for Human Rights / Zeitschrift Für Menschenrechte* 5, no. 2 (October 2011): 52–71.

Cottrol, Robert J. "The Long Lingering Shadow: Law, Liberalism, and Cultures of Racial Hierarchy and Identity in the Americas." *Tulane Law Review* 76 (2002 2001): 11.

Cox, Adam B., and Thomas J. Miles. "Judging the Voting Rights Act." *Columbia Law Review* 108, no. 1 (January 2008): 1–55.

Crenshaw, Kimberlé, Neil Gotanda, Gary Peller, and Kendall Thomas, eds. "Introduction." In *Critical Race Theory: The Key Writings That Formed the Movement*, xiii–xxxii. New York City: New Press, 1995.

Cross, Frank. "Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance." *Nw. U. L. Rev* 92, no. 1 (1998 1997): 251–326.

Crowe, Nancy E. "The Effects of Judges' Sex And Race On Judicial Decision-Making On the U.S. Courts of Appels 1981-1996." Department of Political Science, University of Chicago, June 1999.

"¿Cuántos Somos?" Accessed March 17, 2020. https://www.dane.gov.co/index.php/estadisticas-por-tema/demografia-y-poblacion/censo-nacional-de-poblacion-y-vivenda-2018/cuantos-somos.

Dane: Información para todos. "Cuentas nacionales departamentales: PIB por departamento," March 10, 2020. https://www.dane.gov.co/index.php/estadisticas-por-tema/cuentas-nacionales/cuentas-nacionales-departamentales.

Da Silva Moraes, Graziella, and Elisa P. Reis. "Perceptions of Racial Discrimination Among Black Professionals in Rio De Janeiro." *Latin American Research Review* 46, no. 2 (April 2011): 55–78. https://doi.org/10.1353/lar.2011.0026.

Dakolias, Maria. "The Judicial Sector in Latin America and the Caribbean." Technical Paper. Washington D. C.: The World Bank, June 30, 1996. https://doi.org/10.1596/0-8213-3612-6.

"DANE--Información para todos. Censo Nacional de Población y Vivienda 2018, Colombia." Institutional, March 17, 2020. https://www.dane.gov.co/index.php/estadisticas-por-tema/demografia-y-poblacion/censo-nacional-de-poblacion-y-vivenda-2018/cuantos-somos.

Gobernación de Antioquia, Unidos. "Datos de Antioquia." Institutional, March 10, 2020. http://antioquia.gov.co/index.php/antioquia/datos-de-antioquia.

Davis, Abraham L. *Blacks in the Federal Judiciary: Neutral Arbiters or Judicial Activists?* Bristol, Ind., USA: Wyndham Hall Press, 1989. http://books.google.com/books?id=uiFFAQAAIAAJ.

Davis, Sue. "Do Women Judges Speak in a Different Voice--Carol Gilligan, Feminist Legal Theory, and the Ninth Circuit." *Wis. Women's Law Journal* 8 (1993 1992): 143–74.

Davis, Sue, Susan Haire, and Ronald R. Songer. "Voting Behavior and Gender on the U.S. Courts of Appeals." *Judicature* 77, no. 3 (December 1993): 129–33.

Dawson, April G. "Missing In Action: The Absence Of Potential African American Female Supreme Court Justice Nominees--Why This Is And What Can Be Done About It." *Howard Law Journal* 60 (Fall 2016): 177–220.

De La Cadena, Marisol. "Reconstructing Race: Racism, Culture and Mestizaje in Latin America." *NACLA Report on the Americas* 34, no. 6 (May 1, 2001): 16–23. https://doi.org/10.1080/10714839.2001.11722585.

De La Torre, Carlos. "Afro-Ecuadorian Responses to Racism: Between Citizenship and Corporatism." In *Neither Enemies Nor Friends: Latinos, Blacks, Afro-Latinos*, edited by Anani Dzidzienyo and Suzanne Oboler, 61–74. New York: Palgrave Macmillan, 2005.

De Secondat, Charles, and Thomas Nugent. *The Spirit of Laws*. Kitchener, CANADA: Batoche Books, 2000. http://ebookcentral.proquest.com/lib/fordham-ebooks/detail.action?docID=3117782.

Delgado, Richard. *Critical Race Theory An Introduction*. 2nd ed. New York: NYU Press, 2014.

Departamento Administrativo Nacional de Estadística (DANE). "Censo general 2005." Institutional. Dane: Información para todos, March 10, 2020. https://www.dane.gov.co/index.php/estadisticas-por-tema/demografia-y-poblacion/censo-general-2005-1.

Diario La Opinión. "Piden investigar fraude en examen de jueces." *La Opinión*. 2019. https://www.laopinion.com.co/piden-investigar-fraude-en-examen-de-jueces-85647.

Domingo, Pilar. "Judicialization of Politics or Politicization of the Judiciary? Recent Trends in Latin America." *Democratization* 11, no. 1 (February 1, 2004): 104–26. https://doi.org/10.1080/13510340412331294152.

Dos Santos, Sales Augusto. "Historical Roots of the 'Whitening' of Brazil." *Latin American Perspectives* 29, no. 1 (01 2002): 61–82. https://doi.org/10.1177/0094582X0202900104.

———. "Who Is Black in Brazil? A Timely or a False Question in Brazilian Race Relations in the Era of Affirmative Action?" *Latin American Perspectives* 33, no. 4 (July 2006): 30–48. https://doi.org/10.1177/0094582X06290122.

Dulitzky, Ariel E. "A Region in Denial: Racial Discrimination and Racism in Latin America." In *Neither Enemies nor Friends*, edited by Anani Dzidzienyo and Suzanne Oboler, translated by David Sperling, 39–59. Palgrave Macmillan, New York, 2005. https://doi.org/10.1057/9781403982636_2.

Kennedy, Duncan. "Freedom and Constraint in Adjudication: A Critical Phenomenology." *Journal of Legal Education* 36, no. 4 (1986): 518.

Dzidzienyo, Anani. "The Changing World of Brazilian Race Relations?" In *Neither Enemies Nor Friends: Latinos, Blacks, Afro-Latinos*, edited by Anani Dzidzienyo and Suzanne Oboler, 137–56. New York: Palgrave Macmillan, 2005.

Eder, Phanor J. "The Impact of the Common Law on Latin America." *U. Miami L. Rev.* 4 (1950): 435.

Edwards, Harry. "Race and the Judiciary." *Yale Law & Policy Review* 20, no. 2 (2002): 325–30.

Epstein, Lee, Jack Knight, and Andrew Martin. "The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court." *California Law Review* 91, no. 4 (July 2003): 903–66.

Espacio Nacional de Consulta Previa. "Acta de Consulta Previa, Concertación y Protocolización del proyecto de ley 'Estatutaria de la Jurisdicción Especial para la Paz.'" Ministerio del Interior, July 19, 2017.

Universidad de Cartagena. "Facultad de Derecho y Ciencias Políticas," March 10, 2020. http://derecho.unicartagena.edu.co/programas-academicos/derecho/informacion-general.

Farhang, Sean, and Gregory Wawro. "Institutional Dynamics on the U.S. Court of Appeals: Minority Representation under Panel Decision Making." *Journal of Law, Economics, & Organization* 20, no. 2 (October 2004): 299–330.

Federal Judicial Center. "Diversity on the Bench | Federal Judicial Center." Accessed April 2, 2018. https://www.fjc.gov/node/7491.

Feenan, Dermot. "Women Judges: Gendering Judging, Justifying Diversity." *Journal of Law and Society* 35, no. 4 (2008): 490–519.

Fish, Peter. "Evaluating the Black Judicial Applicant." *Judicature* 62, no. 10 (May 1979): 495–501.

Fricke, Amber, and Angela Onwuachi-Willig. "Do Female 'Firsts' Still Matter? Why They Do For Female Judges of Color." *Michigan State Law Review*, 2012, 1529–54.

Fry, Peter. “Color And The Rule Of Law In Brazil.” In *The (Un)Rule of Law and the Underprivileged in Latin America*, edited by Juan E. Méndez, Guillermo A. O’Donnell, and Paulo Sérgio de M. S Pinheiro, 186–210. Notre Dame, IN: University of Notre Dame Press, 1999.

Garavito, César A. Rodríguez. *Etnicidad.gov: los recursos naturales, los pueblos indígenas y el derecho a la consulta previa en los campos sociales minados*. Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia, 2012.

Gates, Henry L. *Black in Latin America*. New York: New York University Press, 2011.

Gazal-Ayal, Oren, and Raanan Sulitzeanu-Kenan. “Let My People Go: Ethnic In-Group Bias in Judicial Decisions—Evidence from a Randomized Natural Experiment.” *Journal of Empirical Legal Studies* 7, no. 3 (September 2010): 403–28.

Gobernación del Archipiélago de San Andrés, Providencia y Santa Catalina. “Geografia Del Archipiélago.” Institutional, March 10, 2020. https://sanandres.gov.co/index.php/archipielago/informacion-general/geografia.

George, Tracey. “Developing a Positive Theory of Decision-Making on U.S. Courts of Appeals.” *Ohio St. L.J.* 58 (1998): 1635–96.

George, Tracey E., and Albert H. Yoon. “Measuring Justice In State Courts: The Demographics Of The State Judiciary.” *Vanderbilt Law Review* 70 (November 2017): 1887–1910.

Geyh, Charles. “The Role of Courts in Preserving Customary Independence.” In *When Courts and Congress Collide: The Struggle for Control of America’s Judicial System*, 223–51. Ann Arbor: The University of Michigan Press, 2006. https://eds-a-ebscohost-com.avoserv2.library.fordham.edu/eds/ebookviewer/ebook/bmxlYmtfXzMxMDExNF9fQU41?sid=ba3bbb92-f2cd-4e3f-b475-92daea56b319@sessionmgr4007&vid=4&format=EB&rid=7.

Gilligan, Carol. “In a Different Voice: Women’s Conceptions of Self and Morality.” In *Gender and Psychology.*, edited by Viv Burr and Viv Burr (Ed), 33–74. Critical Concepts in Psychology. New York, NY, US: Routledge/Taylor & Francis Group, 2015.

Goelzhauser, Greg. "Diversifying State Supreme Courts." *Law and Society Review* 45 (September 2011): 761–81.

Goldman, Sheldon. "Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts." *U. Rich. L. Rev.* 39 (2005): 871–908.

———. "Should There Be Affirmative Action for the Judiciary?" *Judicature* 62, no. 10 (May 1979): 488–94.

Góngora-Mera, Manuel. "Transregional Articulations of Law and Race in Latin America: A Legal Genealogy of Inequality," 2012. https://doi.org/10.4324/9781138019263-3.

González Morales, Felipe, and Jorge Contesse Singh. "The Judicial System and Racism Against People of African Descent: The Cases of Brazil, Colombia, The Dominican Republic and Peru." Santiago de Chile: Justice Studies Center of the Americas, March 2004. http://biblioteca.cejamericas.org/bitstream/handle/2015/3568/raz-sistema-judicial-racismo-ing.pdf?sequence=1&isAllowed=y.

Gottschall, Jon. "Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals." *Judicature* 67, no. 4 (October 1983): 165–74.

Graham, Barbara L. "Toward An Understanding Of Judicial Diversity In American Courts." *Michigan Journal of Race and Law* 10 (Fall 2004): 153–81.

Grbich, Carol. *Qualitative Data Analysis: An Introduction*. SAGE, 2012.

Greene, Linda S. "A Tale Of Two Justices: Brandeis, Marshall, And Federal Court Judicial Diversity." *Wisconsin Law Review* 2017 (2017): 401–23.

Greene, Shane. "Introduction: On Race, Roots/Routes, and Sovereignty in Latin America's Afro-Indigenous Multiculturalisms." *The Journal of Latin American and Caribbean Anthropology* 12, no. 2 (2007): 329–55. https://doi.org/10.1525/jlat.2007.12.2.329.

Greenstein, Marla N. "The Challenge Of Maintaining Confidence In A Judiciary Lacking In Diversity." *Judges' Journal* 55 (Sping 2016): 40.

Grossman, Guy, Oren Gazal-Ayal, Samuel D. Pimentel, and Jeremy M. Weinstein. "Descriptive Representation and Judicial Outcomes in Multiethnic Societies." *American Journal of Political Science,* 60, no. 1 (January 2016): 44–69. https://doi.org/DOI: 10.1111/ajps.12187.

Gruhl, John, Cassia Spohn, and Susan Welch. "Women as Policymakers: The Case of Trial Judges." *American Journal of Political Science,* 23, no. 2 (May 1981): 308–22.

Guimarães, Antonio Sérgio Alfredo. *Preconceito e discriminação: queixas de ofensas e tratamento desigual dos negros no Brasil*. São Paulo: Editora 34, 2004.

Guthrie, Chris, Jeffrey Rachlinski, and Andrew Wistrich. "Blinking on the Bench: How Judges Decide Cases." *Cornell L. Rev.* 93 (n.d.): 1–44.

———. "Judging by Heuristic - Cognitive Illusions in Judicial Decision Making." *Judicature* 86, no. 1 (August 2002): 44–50.

Haider-Markel, Donald P., and Mark R. Joslyn. "Bad Apples? Attributions for Police Treatment of African Americans." *Analyses of Social Issues and Public Policy*, no. 1 (2017): 358. https://doi.org/10.1111/asap.12146.

Handsley, Elizabeth, and Andrew Lynch. "Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13." *Sydney Law Review* 37 (June 2015): 187–215.

Harris, Angela P., and Carmen G. González. "Introduction." In *Presumed Incompetent: The Intersections of Race and Class for Women in Academia*, edited by Gabriella Gutiérrez y Muhs, Yolanda Flores Niemann, Carmen G. González, and Angela P. Harris, 1–14. Boulder: University Press of Colorado, 2012. https://eds-b-ebscohost-com.avoserv2.library.fordham.edu/eds/ebookviewer/ebook/ZTAwMHhuYV9fNDg5NzAwX19BTg2?sid=3ba78d87-15fd-42d3-8abf-d1c2f5e5f3e9@pdc-v-sessmgr03&vid=2&format=EB&rid=3.

Hawkins, Stacy. "Diversity, Democracy & Pluralism: Confronting The Reality Of Our Inequality." *Mercer Law Review* 66 (Spring 2015): 577–649.

Haywood, J.m. "Anti-Black Latino Racism in an Era of Trumpismo." *International Journal of Qualitative Studies in Education* 30, no. 10 (26 2017): 957–64. https://doi.org/10.1080/09518398.2017.1312613.

Helmke, Gretchen, and Julio Rios-Figueroa. "Introduction." In *Courts in Latin America*, edited by Gretchen Helmke and Julio Rios-Figueroa, 1–26. New York, NY, US: Cambridge University Press, 2011.

Hernández Romero, Astrid. "La visibilización estadística de los grupos étnicos colombianos." Documento para tomar decisiones. Bogotá: Departamento Administrativo Nacional de Estadística (DANE), 2005. https://www.dane.gov.co/files/censo2005/etnia/sys/visibilidad_estadistica_etnicos.pdf.

Hernández, Tanya K.. "The Limits of U.S. Racial Equality Without a Latin American Constitutional Right to Work -- A Thought Experiment," 2017.

Hernández, Tanya K. "Hate Speech and the Language of Racism in Latin America: A Lens for Reconsidering Global Hate Speech Restrictions and Legislation Models." *University of Pennsylvania Journal of International Law* 32 (2011 2010): 805–41.

Hernández, Tanya K. "Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, a United States-Latin America Comparison." *Cornell Law Review* 87 (2002 2001): 1093.

———. *Racial Subordination in Latin America: The Role of the State, Customary Law, and the New Civil Rights Response*. Cambridge University Press, 2012.

Holmes, Malcolm D., Harmon M. Hosch, Howard C. Daudistel, Dolores A. Perez, and Joseph B. Graves. "Judges' Ethnicity and Minority Sentencing: Evidence Concerning Hispanics." *Social Sciences Quarterly* 74, no. 3 (September 1993): 496–506.

Holmes, Oliver Wendell. *The Path of the Law*. [S.l.]: The Floating Press, 2009. https://login.avoserv2.library.fordham.edu/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=e000xna&AN=313932&site=eds-live.

Hooker, Juliet. "Afro-Descendant Struggles for Collective Rights in Latin America: Between Race and Culture." *Souls* 10, no. 3 (September 12, 2008): 279–91. https://doi.org/10.1080/10999940802347764.

———. "Indigenous Inclusion/Black Exclusion: Race, Ethnicity and Multicultural Citizenship in Latin America." *Journal of Latin American Studies* 37, no. 2 (2005): 285–310. https://doi.org/10.1017/S0022216X05009016.

———. *Race and the Politics of Solidarity*. Oxford; New York: Oxford University Press, 2009.

HoSang, Daniel, Oneka LaBennett, and Laura Pulido. *Racial Formation in the Twenty-First Century*. Berkeley: University of California Press, 2012. http://public.eblib.com/choice/publicfullrecord.aspx?p=962595.

Hoster, Paige E. "Understanding The Value Of Judicial Diversity Through The Native American Lens." *American Indian Law Review* 36 (2012): 457–87.

Hsu, Josh. "Asian American Judges: Identity, Their Narratives & Diversity On The Bench." *Asian Pacific American Law Journal* 11 (Spring 2006): 92–119.

Htun, Mala. "Dimensions of Political Inclusion and Exclusion in Brazil: Gender and Race." Technical papers. Washington D. C.: Inter-American Development Bank, December 2003. http://iknowpolitics.org/sites/default/files/dimensions_of_political_inclusion_and_exclusion_in_brazil.pdf.

———. "From 'Racial Democracy' to Affirmative Action: Changing State Policy on Race in Brazil." *Latin American Research Review* 39, no. 1 (2004): 60–89.

———. *Inclusion without Representation in Latin America: Gender Quotas and Ethnic Reservations*. New York: Cambridge University Press, 2016.

Hurwitz, Mark. "Selection System, Diversity And The Michigan Supreme Court." *Wayne Law Review* 56 (Fall 2010): 691–704.

Hurwitz, Mark, and Drew Noble Lanier. "Diversity in State and Federal Appellate Courts: Change and Continuity across 20 Years." *The Justice System Journal* 29, no. 1 (2008): 47–70.

———. "Explaining Judicial Diversity: The Differential Ability of Women and Minorities to Attain Seats on State Supreme and Appellate Courts." *State Politics & Policy Quarterly,* 3, no. 3 (Winter 2003): 329–52.

Hurwitz, Mark S., and Drew Noble Lanier. "Women and Minorities on State and Federal Appellate Benches." *Judicature* 85, no. 2 (October 2001): 84–92.

Ifill, Sherrilyn A. "Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts." *Boston College Law Review* 39 (December 1997): 95–150.

———. "Judicial Diversity." *The Green Bag An Entertaining Journal of Law* 13, no. 45 (Autumn 2009): 1–10.

———. “Racial Diversity on the Bench: Beyond Role Models and Public Confidence.” *Wash. & Lee L. Rev.* 57 (2000): 405–96.

———. “Through The Lens Of Diversity: The Fight For Judicial Elections After Republican Party Of Minnesota V. White.” *Michigan Journal of Race and Law* 10 (Fall 2004): 55–99.

Ikawa, Daniela. “The Construction of Identity and Rights: Race and Gender in Brazil.” *International Journal of Law in Context* 10, no. 4 (2014): 494–506.

“Inter-American Commission on Human Rights,” n.d.

Johnson, Angela. “Intersectionality, Life Experience & Judicial Decision Making: A New View Of Gender At The Supreme Court.” *Notre Dame Journal of Law, Ethics & Public Policy* 2014 (2014): 353–81.

Johnson, Kevin. “How Political Ideology Undermines Racial And Gender Diversity In Federal Judicial Selection: The Prospects For Judicial Diversity In The Trump Years.” *Wisconsin Law Review* 2017 (2017): 345–65.

———. “The Importance of Student and Faculty Diversity in Law Schools: One Dean’s Perspective.” *Iowa Law Review* 96 (2011): 1549-1578.

Johnson, Kevin R. “An Essay on the Nomination and Confirmation of the First Latina Justice on the U.S. Supreme Court: The Assimilation Demand at Work.” *Chicana/o-Latina/o Law Review* 30 (2011): 97–162.

———. “On the Appointment of a Latina/o to the Supreme Court.” *Harv. Latino L. Rev.* 5 (2002): 1–16.

Johnson, Kevin R., and Luis Fuentes-Rohwer. “A Principled Approach to the Quest for Racial Diversity on the Judiciary.” *Mich. J. Race & L.* 10 (Fall 2004): 5–54.

Jones, Deborah. “Constructing Identity In Law And Social Science.” *Journal of Contemporary Legal Issues* 11 (2001): 731–45.

Jorge L. Esquirol. “The Failed Law of Latin America.” *The American Journal of Comparative Law* 56, no. 1 (2008): 75.

Kalunta-Crumpton, A. *Race, Ethnicity, Crime and Criminal Justice in the Americas*. Springer, 2012.

Kapiszewski, Diana, and Matthew M. Taylor. “Doing Courts Justice? Studying Judicial Politics in Latin America.” *Perspectives on Politics* 6, no. 4 (December 2008): 741–67. https://doi.org/10.1017/S1537592708081899.

Kastellec, Jonathan P. "Racial Diversity and Judicial Influence on Appellate Courts." *American Journal of Political Science* 57, no. 1 (January 2013): 167–83. https://doi.org/DOI: 10.1111/j.1540-5907.2012.00618.x.

Keiser, Lael R., Vicky M. Wilkins, Kenneth J. Meier, and Catherine A. Holland. "Lipstick and Logarithms: Gender, Institutional Context, and Representative Bureaucracy." *The American Political Science Review* 96, no. 3 (September 2002): 553–64.

Kennedy, Anthony M. "The Voice of Thurgood Marshall." *Stanford Law Review* 44 (Summer 1992): 1221–25.

Kennedy, Deseriee A. "Judicial Review and Diversity." *Tennessee Law Review* 71 (2004): 287–301.

Kennedy, David. "The Canon of American Legal Thought." *The American Journal of Jurisprudence* 52 (January 1, 2007): 319.

King, Nancy J. "Batson For The Bench? Regulating The Peremptory Challenge Of Judges." *Chicago-Kent Law Review* 73 (1998): 509–32.

Kulik, Carol T., Elissa L. Perry, and Molly B. Pepper. "Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes." *Law and Human Behavior* 27, no. 1 (February 2003): 69–86.

"La Situación de las Personas Afrodescendientes en las Américas." Washington D. C.: Comisión Interamericana de Derechos Humanos., December 5, 2011. http://www.acnur.org/fileadmin/Documentos/BDL/2012/8311.pdf.

Lamm, Carolyn B. "Diversity And Justice: Promoting Full and Equal Participation in the Legal Profession." *Judges' Journal* 48 (Summer 2009): 1–5.

Landau, David. "The Two Discourses in Colombian Constitutional Jurisprudence: A New Approach to Modeling Judicial Behavior in Latin America." *George Washington International Law Review* 37 (2005): 687.

Lara-Borges, Oswald, Andrea Gastagnola, and Aníbal Pérez-Liñán. "Diseño Constitucional y Estabilidad Judicial En América Latina, 1900-2009 / Constitutional Design and Judicial Stability in Latin America, 1900-2009." *Política y Gobierno* 19, no. 1 (2012): 3–40.

Larkin Nascimento, Elisa. “Aspects of Afro-Brazilian Experience.” *Journal of Black Studies* 11, no. 2 (December 1980): 195–216. https://doi.org/10.1177/002193478001100203.

———. *The Sorcery of Color: Identity, Race, and Gender in Brazil.* Philadelphia: Temple University Press, 2008. http://www.myilibrary.com?id=129906.

“Las mejores universidades en derecho en Colombia 2018.” *Dinero*. May 24, 2018, sec. Tedencias. https://www.dinero.com/edicion-impresa/caratula/articulo/las-mejores-universidades-en-derecho-en-colombia-2018/258791.

ONU Mujeres | Colombia. “Las mujeres en Colombia,” March 12, 2020. https://colombia.unwomen.org/es/onu-mujeres-en-colombia/las-mujeres-en-colombia.

Lazos Vargas, Sylvia R. “Does A Diverse Judiciary Attain A Rule Of Law That Is Inclusive?: What Grutter V. Bollinger Has To Say About Diversity On The Bench.” *Michigan Journal of Race and Law* 10 (Fall 2004): 101–52.

———. “Only Skin Deep: The Cost of Partisan Politics on Minority Diversity of the Federal Bench.” *Indiana Law Journal* 83 (2008): 1423–80.

Lipshutz, Robert, and Douglas Huron. “Achieving a More Representative Federal Judiciary.” *Judicature* 62, no. 10 (May 1979): 482–85.

Loveman, Mara. *National Colors: Racial Classification and the State in Latin America*. New York, NY, US: Oxford University Press, 2014.

Malleson, Kate. “Diversity in the Judiciary: The Case for Positive Action.” *Journal of Law and Society* 36, no. 3 (2009): 376–402.

Mansbridge, Jane. “Should Blacks Represent Blacks and Women Represent Women? A Contingent ‘Yes.’” *The Journal of Politics* 61, no. 3 (August 1999): 628–57.

Martin, Elaine. “Gender and Judicial Selection: A Comparison of the Reagan and Carter Administration.” *Judicature* 71, no. 3 (November 1987): 136–42.

———. “Men and Women on the Bench: Vive La Difference.” *Judicature* 74, no. 4 (January 1990): 204–8.

Martin, Elaine, and Barry Pyle. "Gender, Race, and Partisanship on the Michigan Supreme Court." *Albany Law Review* 63 (2000): 1205–36.

Maule, Linda. "A Different Voice: The Feminine Jurisprudence of the Minnesota State Supreme Court." *Buffalo Women's Law Journal* 9 (2001 2000): 295–316.

McClellan, Frank M. "Judicial Impartiality & (and) Recusal: Reflections on the Vexing Issue of Racial Bias." *Temple Law Review* 78 (Summer 2005): 351–78.

Méndez, Juan E., Guillermo A. O'Donnell, and Paulo Sérgio de M. S Pinheiro, eds. *The (Un)Rule of Law and the Underprivileged in Latin America*. Notre Dame, IN: University of Notre Dame Press, 1999.

Merola, Linda M., and Jon B. Gould. "New Judges Speak About The Process And Its Impact On Judicial Diversity." *Judicature* 93, no. 5 (April 2010): 184–93.

Messamer, Gina. "Iowa's All-Male Supreme Court." *Iowa Law Review* 98 (November 2012): 421–63.

Miguel-Stearns, Teresa M. "Judicial Power in Latin America: A Short Survey." *Legal Information Management* 15, no. 2 (June 2015): 100–107. https://doi.org/10.1017/S1472669615000274.

Miller, Marilyn Grace. *Rise and Fall of the Cosmic Race: The Cult of Mestizaje in Latin America*. Austin, Texas: University of Texas Press, 2004.

Milligan, Joy. "Pluralism in America: Why Judicial Diversity Improves Legal Decisions about Political Morality." *N.Y.U. L. Rev* 81 (June 2006): 1206–48.

Ministerio del Interior. "Listado de Universidades que Otorgan Descuento a las Comunidades Negras, Afrocolombianas, Raizales y Palenqueras." Ministerio del Interior. Accessed March 10, 2020. https://dacn.mininterior.gov.co/sites/default/files/listado_de_universidades_que_aplican_descuento_mayo_2018.pdf.

Mitchell, Michael J., and Charles H. Wood. "Ironies of Citizenship: Skin Color, Police Brutality, and the Challenge to Democracy in Brazil." *Social Forces* 77, no. 3 (1999): 1001. https://doi.org/10.2307/3005969.

Monteiro, Fabiano Dias. "Discursos raciais e leis antirracismo no Brasil: retornando à questão da ambiguidade." *Campos - Revista de Antropologia* 12, no. 2 (2011). https://doi.org/10.5380/cam.v12i2.30617.

Morin, Jason L. "The Voting Behavior of Minority Judges in the U.S. Courts of Appeals: Does the Race of the Claimant Matter?" *American Politics Research* 42, no. 1 (2014): 34–64. https://doi.org/10.1177/1532673X13486925.

Mosquera, Claudia, Mauricio Pardo, and Odile Hoffmann. "Las Trayectorias Sociales e Identitarias de los Afrodescendientes." In *Afrodescendientes en Las Américas: Trayectorias Sociales e Identitarias*, edited by Claudia Mosquera, Mauricio Pardo, and Odile Hoffmann, 1st ed., 612. Bogota: Universidad Nacional de Colombia, 2002. http://horizon.documentation.ird.fr/exl-doc/pleins_textes/divers11-03/010029701.pdf.

Mutua, Athena. "Disparity In Judicial Misconduct Cases: Color-Blind Diversity?" *American University Journal of Gender, Social Policy and the Law* 23 (2014): 23–105.

Myers, K.O. "Merit Selection And Diversity On The Bench." *Indiana Law Review* 46 (2013): 46–57.

Nava, Michael. "The Servant Of All: Humility, Humanity, And Judicial Diversity." *Golden Gate University Law Review* 38 (Winter 2008): 175–94.

Ng'weno, Bettina. "Can Ethnicity Replace Race? Afro-Colombians, Indigeneity and the Colombian Multicultural State." *The Journal of Latin American and Caribbean Anthropology* 12, no. 2 (2007): 414–40. https://doi.org/10.1525/jlat.2007.12.2.414.

Ñopo, Hugo. *New Century, Old Disparities: Gender and Ethnic Earnings Gaps in Latin America and The Caribbean*. Latin American Development Forum. Washington D. C.: The World Bank; Inter-American Development Bank, 2012. https://doi.org/10.1596/978-0-8213-8686-6.

Ñopo, Hugo, Alberto Chong, and Andrea Moro. "What Do We Know about Discrimination in Latin America? Very Little!" In *Discrimination in Latin America: An Economic Perspective*, edited by Hugo Ñopo, Alberto Chong, and Andrea Moro, 1–12. Latin American Development Forum Series. Washington D. C.: The World Bank, 2010. http://documents.worldbank.org/curated/en/319981468054542299/pdf/520980PUB0EPI1101Official0Use0Only1.pdf.

"Observatorio de Discriminación Racial." NGO, 2019. http://www.odracial.org.

O'Connor, Sandra D. "Thurgood Marshall: The Influence of a Raconteur." *Stanford Law Review* 44 (Summer 1992): 1217–20.

OEA. "OEA - Organización de los Estados Americanos: Democracia para la paz, la seguridad y el desarrollo." Derechos de las Personas Afrodescendientes y contra la Discriminación Racial, August 1, 2009. http://www.oas.org/es/cidh/afrodescendientes/default.asp.

O'Neil, Shannon K. "Latin America Needs Better Judges." *Bloomberg*. August 16, 2018, sec. Politics & Policy. https://www.bloomberg.com/opinion/articles/2018-08-16/latin-america-needs-better-judges.

Onwuachi-Willig, Angela. "Just Another Brother on the SCT? What Justice Clarence Thomas Teaches Us About The Influence of Racial Identity." *Iowa Law Review* 90 (March 2005): 931–1010.

———. "Representative Government, Representative Court - The Supreme Court as a Representative Body." *Minn. L. Rev.* 90 (May 2006): 1252–74.

"Outsiders?: The Changing Patterns of Exclusion In Latin America And The Caribbean." Washington D. C.: Inter-American Development Bank; David Rockefeller Center for Latin American Studies, Harvard University, 2007. https://webimages.iadb.org/publications/english/document/Outsiders-The-Changing-Patterns-of-Exclusion-in-Latin-America-and-the-Caribbean.pdf.

Padgett, Tim. "Picking Sotomayor: Bridging the Black-Latino Divide." *Time*, May 27, 2009. http://content.time.com/time/nation/article/0,8599,1901249,00.html.

Paschel, Tianna S. *Becoming Black Political Subjects: Movements and Ethno-Racial Rights in Colombia and Brazil*. Princeton: Princeton University Press, 2018. http://dx.doi.org/10.23943/princeton/9780691169385.001.0001.

Paschel, Tianna S., and Mark Q. Sawyer. "Contesting Politics as Usual: Black Social Movements, Globalization, and Race Policy in Latin America." *Souls* 10, no. 3 (September 12, 2008): 197–214. https://doi.org/10.1080/10999940802347707.

Peña, Yesilernis, Jim Sidanius, and Mark Sawyer. "Racial Democracy in the Americas: A Latin and U.S. Comparison." *Journal of Cross-Cultural Psychology* 35, no. 6 (2004): 749–62.

Peresie, Jennifer L. “Female Judges Matter: Gender and Collegial Decisionmaking in the Federal AppellateCourts.” *The Yale Law Journal* 114, no. 7 (May 2005): 1759–90.

Pitkin, Hanna Fenichel. *The Concept of Representation*. Berkeley: Berkeley, University of California Press, 1967., 1967.

———. *The Concept of Representation*, n.d.

“Población Negra, Afrocolombiana, Raizal y Palenquera: Resultados del Censo Nacional de Población y Vivienda 2018.” Bogotá: Departamento Administrativo Nacional de Estadística (DANE), November 6, 2019. https://www.dane.gov.co/files/investigaciones/boletines/grupos-etnicos/presentacion-grupos-etnicos-poblacion-NARP-2019.pdf.

“Por errores en examen para jueces, demandarán concurso de la Rama.” *Asuntos legales*. June 27, 2019, sec. Legislación. https://www.asuntoslegales.com.co/actualidad/por-errores-en-examen-para-jueces-demandaran-concurso-de-la-rama-2878389.

Universidad del Valle / Cali, Colombia. “Pregrado,” March 10, 2020. https://www.univalle.edu.co/formacion/pregrado.

Prillaman, William C. *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*. Greenwood Publishing Group, 2000.

Racusen, Seth. “‘A Mulato Cannot Be Prejudiced’: The Legal Construction of Racial Discrimination in Contemporary Brazil.” Thesis, Massachusetts Institute of Technology, 2002. https://dspace.mit.edu/handle/1721.1/31104.

Ravitch, Sharon M., and Nicole Mittenfelner Carl. *Qualitative Research Bridging the Conceptual, Theoretical, and Methodological*. Los Angeles, Calif: SAGE, 2016.

Redacción Nacional. “Firman acta para mejorar redes de acueductos en San Andrés y Providencia.” *El Espectador*. February 26, 2019, sec. Nacional. https://www.elespectador.com/noticias/nacional/firman-acta-para-mejorar-redes-de-acueductos-en-san-andres-y-providencia-articulo-841974.

Reddick, Malia, Michael J. Nelson, and Rachel Paine Caufield. “Racial And Gender Diversity On State Courts An AJS Study.” *Judges’ Journal* 48 (Summer 2009): 28–32.

Ríos-Figueroa, Julio, and Andrea Pozas-Loyo. "Enacting Constitutionalism: The Origins of Independent Judicial Institutions in Latin America." *Comparative Politics* 42, no. 3 (2010): 293–311.

Rivera, Jenny. "Diversity and the Law." *Hofstra Law Review* 44 (Summer 2016): 1271–86.

Rodríguez Garavito, César A., Tatiana Alfonso Sierra, Isabel Cavelier Adarve, Eliana Fernanda Antonio Rosero, and César A. Rodríguez Garavito. *Raza y derechos humanos en Colombia: informe sobre discriminación racial y derechos de la población afrocolombiana*. 1st ed. Serie Justicia global 2. Bogotá, D.C.: Observatorio de Discriminación Racial: Programa de Justicia Global y Derechos Humanos y CIJUS, Universidad de los Andes: Proceso de Comunidades Negras (PCN); Centro de Estudios de Derecho, Justicia y Sociedad (Dejusticia), 2009.

Rodriguez Garavito, Cesar, and Carlos Andrés Baquero Díaz. *Reconocimiento con redistribución: el derecho y la justicia étnico-racial en América Latina*. Colección Dejusticia. Bogotá: Centro de Estudios de Derecho, Justicia y Sociedad, 2015. https://www.dejusticia.org/publication/reconocimiento-con-redistribucion-el-derecho-y-la-justicia-etnico-racial-en-america-latina/.

Romero, Leo M. "Enhancing Diversity In An Appointive System Of Selecting Judges." *Fordham Urban Law Journal* 34 (January 2007): 485–500.

Saad, Paulo. "Situación de las personas afrodescendientes en América Latina y desafíos de políticas para la garantía de sus derechos." Santiago de Chile: Comisión Económica para América Latina y el Caribe (CEPAL), Diciembre 2017. https://repositorio.cepal.org/bitstream/handle/11362/42654/1/S1701063_es.pdf.

Sansone, Livio. *Blackness without Ethnicity: Construcing Race in Brazil*. New York; Basingstoke: Palgrave MacMillan, 2003.

Saunooke, Robert O. "Native Americans And The Federal Bench: The Time Has Come." *Judges' Journal* 48 (Fall 2009): 25–27.

Schanzenbach, Max. "Racial and Sex Disparities in Prison Sentences: The Effect of District Level Judicial Demographies." *Journal of Legal Studies* 34, no. 1 (January 2005): 57–92.

Scherer, Nancy. "Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible." *Northwestern University Law Review* 105, no. 2 (Spring 2011): 587-634.

Universidad del Valle / Cali, Colombia. "Sede Pacífico," March 10, 2020. http://pacifico.univalle.edu.co/.

Segal, Jeffrey A., and Harold J. Spaeth. *The Supreme Court and the Attitudinal Model*. Cambridge ; New York, NY : Cambridge University Press, 1993., 1993.

———. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge, UK ; New York : Cambridge University Press, 2002., 2002.

Segal, Jennifer A. "Representative Decision Making on the Federal Bench: Clinton's District Court Appointees." *Political Research Quarterly* 53, no. 1 (March 2000): 137–50.

———. "The Decision Making of Clinton's Nontraditional Judicial Appointees." *Judicature* 80, no. 6 (June 1997): 279.

Segato, Rita Laura. "El color de la cárcel en América Latina: Apuntes sobre la colonialidad de la justicia en un continente en desconstrucción." *Nueva Sociedad*, no. 208 (2007): 142–61.

———. *La nación y sus otros raza, etnicidad y diversidas religiosa en tiempos de politicas de la identidad*. Buenos Aires: Prometeo Libros, 2007.

Sen, Maya. "Diversity, Qualifications, And Ideology: How Female And Minority Judges Have Changed, Or Not Changed, Over Time." *Wisconsin Law Review* 2017 (2017): 367–99.

Sheriff, Robin E. *Dreaming Equality: Color, Race and Racism in Urban Brazil*. New Brunswick, NJ: Rutgers University Press, 2001.

Sisk, Gregory C., Michael Heise, and Andrew P. Morriss. "Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning." *N.Y.U. L. Rev.* 73, no. 5 (November 1998): 1377–1500.

Búsqueda de programas de instituciones de educación superior. "Sistema Nacional de Información de la Educación Superior," 2018. https://snies.mineducacion.gov.co/consultasnies/programa.

Slotnick, Elliot E. "Lowering the Bench or Raising It Higher?: Affirmative Action and Judicial Selection During the Carter Administration." *Yale Law & Policy Review* 1, no. 2 (Spring 1984): 270–98.

———. “The Paths to the Federal Bench: Gender, Race and Judicial Recruitment Variation.” *Judicature* 67, no. 8 (March 1984): 371–88.

Smith, Michael David. *Race versus Robe*. Port Washington: Associated Faculty Press, 1983.

Smith, Susan. “Diversifying the Judiciary: The Influence of Gender and Race on Judging.” *University of Richmond Law Review* 28 (March 1994): 179–204.

Solanke, Iyiola. “Diversity And Independence In The European Court Of Justice.” *Columbia Journal of European Law* 15 (Winter /2009 2008): 89–121.

Solberg, Rorie Spill. “Court Size And Diversity On The Bench: The Ninth Circuit And Its Sisters.” *Arizona Law Review* 48 (Summer 2006): 247–62.

Solberg, Rorie Spill, and Kathleen Bratton. “Clinton and Diversification of the Federal Judiciary.” *Judicature* 84, no. 5 (April 2001): 256–61.

Solimine, Michael E., and Susan E. Wheatley. “Rethinking Feminist Judging.” *Indiana Law Journal* 70 (Summer 1995): 891–920.

Songer, Donald R., Sue Davis, and Susan Haire. “A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts OfAppeals.” *The Journal of Politics,* 56, no. 2 (May 1994): 425–39.

Sotomayor, Sonia. “A Latina Judge’s Voice.” *Berkeley La Raza Law Journal* 13 (2002): 87–94.

Spann, Girardeau A. *Race Against the Court: The Supreme Court and Minorities in Contemporary America*. New York: New York University Press, 1993. https://eds-a-ebscohost-com.avoserv2.library.fordham.edu/eds/ebookviewer/ebook/bmxlYmtfXzQ4MTg0X19BTg2?sid=ba3bbb92-f2cd-4e3f-b475-92daea56b319@sessionmgr4007&vid=8&format=EB&rid=7.

Spohn, Cassia. “The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities.” *Law and Society Review* 24, no. 5 (1990): 1197–1216.

Stavenhagen, Rodolfo. “Indigenous Peoples and the State in Latin America: An Ongoing Debate.” In *Multiculturalism in Latin America*, 24–44. Institute of Latin American Studies Series. Palgrave Macmillan, London, 2002. https://doi.org/10.1057/9781403937827_2.

Steffensmeier, Darrell, and Chester L. Britt. "Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?" *Social Sciences Quarterly* 82, no. 4 (December 2001): 749–64.

Steffensmeier, Darrell, and Chris Hebert. "Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?" *Social Forces* 77, no. 3 (March 1998): 1163–96.

Stepan, Nancy. *"The Hour of Eugenics": Race, Gender, and Nation in Latin America*. Ithaca: Cornell University Press, 1991.

Straus, Emily E. "Unequal Pieces of a Shrinking Pie: The Struggle between African Americans and Latinos over Education, Employment, and Empowerment in Compton, California." *History of Education Quarterly* 49, no. 4 (November 1, 2009): 507–29.

Stubbs, Jonathan K. "Demographic History of Federal Judicial Appointments by Sex and Race." *Berkeley La Raza Law Journal* 26 (2016): 92–128.

Tagarao, Serafin, Edward Dailo, and Christine J. Gonong. "Filipinos On The Bench: Challenges And Solutions For Today And Tomorrow's Generations." *Asian Pacific American Law Journal* 22 (Fall -Spring 2017 2016): 57–67.

Telles, Edward. *Pigmentocracies: Ethnicity, Race, and Color in Latin America*. Chapel Hill: UNC Press Books, 2014. https://ebookcentral-proquest-com.avoserv2.library.fordham.edu.

Telles, Edward E. "Residential Segregation by Skin Color in Brazil." *American Sociological Review* 57, no. 2 (1992): 186–97.

Telles, Edward, and René Flores. "Not Just Color: Whiteness, Nation, and Status in Latin America." *Hispanic American Historical Review* 93, no. 3 (August 1, 2013): 411–49. https://doi.org/10.1215/00182168-2210858.

Telles, Edward, and Tianna Paschel. "Who Is Black, White, or Mixed Race? How Skin Color, Status, and Nation Shape Racial Classification in Latin America." *American Journal of Sociology* 120, no. 3 (November 1, 2014): 864–907. https://doi.org/10.1086/679252.

Tharps, Lori L. *Same Family, Different Colors: Confronting Colorism in America's Diverse Families*, 2016. http://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=1141005.

"The Failed Law of Latin America on JSTOR." Accessed March 16, 2020. https://www-jstor-org.avoserv2.library.fordham.edu/stable/20454604?seq=1#metadata_info_tab_contents.

"The Federal Government: A Model Employer or a Work In Progress?: Perspectives from 25 Years of the Merit Principles Survey." Institutional. Washington D. C.: U.S. Merit Systems Protection Board, 09/08. https://permanent.access.gpo.gov/lps126717/viewdocs.aspx.pdf.

Thomas, Cheryl. "The Report of the Advisory Panel on Judicial Diversity 2010." London: Advisory Panel on Judicial Diversity, 2009. https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/report_of_the_advisory_panel_on_judicial_diversity.pdf.

Tobias, Carl. "Closing the Gender Gap on the Federal Courts." *University of Cincinnati Law Review* 61 (1993): 1237–50.

———. "Considering Lesbian, Gay, Transgender, and Bisexual Nominees for the Federal Courts." *Washington University Law Review* 90 (2012): 577–86.

———. "Diversity and the Federal Bench." *Washington University Law Review* 87 (2010): 1197–1212.

———. "The Federal Judiciary Engendered." *Wisconsin Women's Law Journal* 5 (1990): 123–26.

———. "The Gender Gap on The Federal Bench." *Hofstra Law Review* 19 (Fall 1990): 171–84.

Torres-Spelliscy, Ciara. "A Bench That Looks Like America Diversity Among Appointed State Court Judges." *Judges' Journal* 48 (Summer 2009): 12–17.

Tumaco, Sede. "Sede Tumaco." Universidad Nacional de Colombia, March 10, 2020. http://tumaco-pacifico.unal.edu.co/.

Twine, France Winddance. *Racism in a Racial Democracy: The Maintenance of White Supremacy in Brazil*. New Brunswick, N.J: Rutgers University Press, 1998.

Uhlman, Thomas M. "Black Elite Decision Making: The Case of Trial Judges." *American Journal of Political Science* 22, no. 4 (November 1978): 884–95.

United Nations: Economic Commission for Latin America and the Caribbean. "Situación de las personas afrodescendientes en América Latina y desafíos de políticas para la garantía de sus derechos." Santiago de

Chile: United Nations: Economic Commission for Latin America and the Caribbean, 12/17. https://repositorio.cepal.org/bitstream/handle/11362/42654/1/S1701063_es.pdf.

Universidad del Pacífico. "Universidad del Pacífico," March 10, 2020. http://www.unipacifico.edu.co:8095/web3.0/inicio.jsp.

Universidad Nacional de Colombia, Consejo Superior de la Judicatura. "Comunicado a los aspirantes de la convocatoria 27 del Consejo Superior de la Judicatura y a la comunidad en general," 2019. http://actosadministrativos.ramajudicial.gov.co/GetFile.ashx?url=%7E%2FApp_Data%2FUpload%2FPCSJA18-11077a.pdf.

Derecho. "Universidad Tecnológica del Chocó, Diego Luis Cordoba," March 10, 2020. https://www.utch.edu.co/portal/es/menu-prog-academicos-derecho.html.

Uprimny, Rodrigo. "The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges." *Texas Law Review* 89 (September 4, 2014): 1587–1609. https://doi.org/10.4324/9780203797655-13.

Van Cott, Donna Lee. "Building Inclusive Democracies: Indigenous Peoples and Ethnic Minorities in Latin America." *Democratization* 12, no. 5 (December 1, 2005): 820–37. https://doi.org/10.1080/13510340500322215.

———. *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America*. Billie R. DeWalt. Pitt Latin American Studies Series. Pittsburgh: University of Pittsburgh Press, 2000.

Vasaly, Mary. "Men In Black: Gender Diversity And The Eighth Circuit Bench." *William Mitchell Law Review* 36 (2010): 1703–18.

Villa, Mario. "La ONU denuncia que los indígenas siguen siendo víctimas de la discriminación." *El País*. August 9, 2017, sec. Mundo. https://www.elpais.com.co/mundo/la-onu-denuncia-que-los-indigenas-siguen-siendo-victimas-de-la-discriminacion.html.

Wade, Peter. *Blackness and Race Mixture: The Dynamics of Racial Identity in Colombia*. Baltimore; London: Johns Hopkins University Press, 1993.

———. “Debates contemporáneos sobre raza, etnicidad, género y sexualidad en las ciencias sociales.” In *Raza, etnicidad y sexualidades: ciudadanía y multiculturalismo en América Latina*, edited by Peter Wade, Fernando Urrea Giraldo, and Mara Viveros, 41–66. Bogotá: Universidad Nacional de Colombia, 2008.

———. *Race and Ethnicity in Latin America*. Second. New York: Pluto Press, 2010. http://www.oapen.org/search?identifier=625258.

———. *Race and Sex in Latin America*. London; New York, NY; New York: Pluto Press ; Distributed in the United States of America exclusively by Palgrave macmillan, 2009.

Walker, Thomas G., and Deborah J. Barrow. “The Diversification of the Federal Bench: Policy and Process Ramifications.” *The Journal of Politics* 47, no. 2 (June 1985): 596–617.

Walsh, Catherine. “Afro In/Exclusion, Resistance, and the ‘Progressive’ State.” In *Black Social Movements in Latin America*, 15–34. Palgrave Macmillan, New York, 2012. https://doi.org/10.1057/9781137031433_2.

Weinstein, Barbara. “Racializing Regional Difference: Sao Paulo versus Brazil, 1932.” In *Race and Nation in Latin America*, edited by Nancy P. Appelbaum, Anne S. Macpherson, and Karin Alejandra Rosemblatt, 237–62. Chapel Hill: University of North Carolina Press, 2003.

Welch, Susan, Michael Combs, and John Gruhl. “Do Black Judges Make a Difference?” *American Journal of Political Science,* 32, no. 1 (February 1988): 126–36.

Westergren, Sarah. “Gender Effects in the Courts of Appeals Revisited: The Data since 1994.” *Georgetown Law Journal* 92 (March 2004): 689–708.

Wilkins, Vicky M., and Lael R. Keiser. “Linking Passive and Active Representation by Gender: The Case of Child Support.” *Journal of Public Administration Research and Theory* 1 (2006): 87–102.

Wynn, James, and Eli Mazur. “Judicial Diversity: Where Independence And Accountability Meet.” *Albany Law Review* 67 (2004): 775–90.

Yancey, George. “‘Blacks Cannot Be Racist’: A Look At How European-Americans, African-Americans, Hispanic-Americans and Asian-Americans Perceive Minority Racism.” *Michigan Sociological Review* 19 (2005): 138–54.

Yashar, Deborah J. “Democracy, Indigenous Movements, and the Postliberal Challenge in Latin America.” *World Politics* 52, no. 1 (1999): 76–104.

**Interviews**

Afro-descendant man attorney. Interview 01. In person, March 4, 2019.

———. Interview 04. In person, March 6, 2019.

———. Interview 07. On-line, March 9, 2019.

———. Interview 30. In person, April 10, 2019.

———. Interview 32. In person, April 12, 2019.

———. Interview 35. In person, May 2, 2019.

———. Interview 36. In person, May 4, 2019.

Afro-descendant man judge. Interview 05. In person, March 7, 2019.

———. Interview 06. In person, March 7, 2019.

———. Interview 26. In person, April 1, 2019.

———. Interview 28. In person, April 3, 2019.

———. Interview 29. In person, April 4, 2019.

———. Interview 40. In person, May 15, 2019.

———. Interview 41. In person, May 15, 2019.

———. Interview 43. In person, May 15, 219AD.

———. Interview 44. In person, May 15, 2019.

Afro-descendant man judicial employee. Interview 21. In person, March 26, 2019.

———. Interview 23. In person, March 29, 2019.

Afro-descendant woman attorney. Interview 02. In person, March 4, 2019.

———. Interview 08. In person, March 12, 2019.

———. Interview 31. In person, April 10, 2019.

———. Interview 33. In person, April 12, 2019.

———. Interview 37. In person, May 7, 2019.

———. Interview 38. In person, May 12, 2019.

———. Interview 39. In person, May 15, 2019.

———. Interview 42. In person, May 15, 2019.

Afro-descendant woman judge. Interview 15. In person, March 15, 2019.

———. Interview 17, n.d.

———. Interview 25. In person, April 1, 2019.

———. Interview 27. In person, April 2, 2019.

———. Interview 34. In person, May 2, 2019.

———. Interview 45. In person, May 15, 2019.

Afro-descendant woman judicial employee. Interview 09. In person, March 12, 2019.

———. Interview 10. In person, March 12, 2019.

———. Interview 13. In person, March 13, 2019.

———. Interview 14. In person, March 13, 2019.

———. Interview 16. In person, March 15, 2019.

———. Interview 18. In person, March 18, 2019.

———. Interview 19. In person, March 18, 2019.

———. Interview 24. In person, March 31, 2019.

Indigenous man judicial employee. Interview 11. In person, March 12, 2019.

Indigenous woman judge. Interview 12. In person, March 13, 2019.

Indigenous woman judicial employee. Interview 20. In person, March 18, 2019.

Mestizo man judicial employee. Interview 22. In person, March 27, 2019.

Mestizo woman judge. Interview 03. In person, March 5, 2019.