a GlassHouse book

Women, Judging and the Judiciary

From difference to diversity

Erika Rackley

ROUTLEDGE

First published 2013
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
711 Third Avenue, New York, NY 10017

A GlassHouse Book

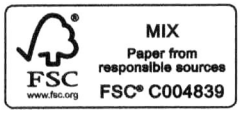
Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data
A catalog record for this book has been requested

ISBN: 978-0-415-54861-8 (hbk)
ISBN: 978-0-203-09818-9 (ebk)

Typeset in Baskerville
by RefineCatch Limited, Bungay, Suffolk



Printed and bound by CPI Group (UK) Ltd, Croydon, CR0 4YY

Women, Judging and the Judiciary

Women, Judging and the Judiciary examines debates about gender representation in the judiciary and the importance of judicial diversity. It offers a fresh look at the role of the (woman) judge and the process of judging and provides a new analysis of the assumptions which underpin and constrain debates about why we might want a more diverse judiciary, and how we might get one.

Through a theoretical engagement with the concepts of diversity and difference in adjudication, *Women, Judging and the Judiciary* contends that prevailing images of the judge work to exclude those who do not fit the judicial norm. Such has been the fate of the woman judge. However, by getting a clearer sense of what our judges really do and how they do it, the woman judge and judicial diversity more broadly no longer threaten but enrich the judiciary and judicial decision-making. So viewed, the standard opponent to measures to increase judicial diversity – appointment on merit – becomes its greatest ally: a judiciary is stronger and the justice it dispenses better the greater the diversity of its members, so if we want the best judiciary we can get, we should want one which is fully diverse.

Women, Judging and the Judiciary will be of interest to legal academics, lawyers and policy makers working in the fields of judicial diversity, gender and adjudication and, more broadly, to anyone interested in who our judges are and what they do.

Erika Rackley is a Senior Lecturer in the Law School, Durham University, UK. She is co-author, with Kirsty Horsey, of *Tort Law* (Oxford: Oxford University Press, 2nd edn, 2011) and co-editor, with Rosemary Hunter and Clare McGlynn, of *Feminist Judgments: From Theory to Practice* (Oxford: Hart, 2010) and, with Janice Richardson, *Feminist Perspectives on Tort Law* (Abingdon: Routledge, 2012).

For E. H. B. and L. J. R.

Acknowledgements

This book started as my doctoral thesis and has ended up as something quite different. Along the way it has benefited from conversations with many friends and colleagues. Particular thanks go to Joanne Conaghan and Clare McGlynn. I am indebted to them in ways that can only be imperfectly expressed here. They have gone far beyond the call of duty and friendship on more occasions than was reasonable to expect and are a constant source of encouragement and inspiration. I'm glad to have them in my corner. I am also extremely grateful for the support of Baroness Hale and for her agreeing to write the foreword for this book. Special thanks are also due to Neil Cobb whose conversations in LGS seminars and in the Head of Steam after work inform and entertain in equal measure. A number of other colleagues also took the time to comment on draft chapters or to provide me with the statistical information included in Chapters 1 and 2 – to them, and the many others with whom I have spoken about diversity, women judges and mermaids, thank you.

During the writing of this book I have been fortunate to be able to present my work at a number of conferences and workshops including the International Seminar on Women in the Legal Professions in Buenos Aires; the Workshop on Gender and Judging at the International Institute of the Sociology of Law in Onati; and at the Centre for Feminist Legal Studies at the University of British Columbia, which welcomed me as visiting scholar in the spring of 2010. The book is better for the insightful comments from those who attended these occasions. I am also grateful to the Arts and Humanities Research Council who sponsored a period of research leave during which I worked on an early draft of the book (REF: 152733/138415), to Colin Perrin for his advice when drafting the proposal for this book and to Melanie Fortmann-Brown for her patience as deadlines passed.

The writing of this book would not have been possible without the constant encouragement of my close friends and family. I am grateful for their love and support, and most of all for their knowing when to stop asking about the book. Final thanks go to Charlie for his generosity, insight and sense of perspective.

The manuscript for the book was submitted to the publishers before the publication in March 2012 of the (disappointing) Final Report of the House of

Lords Select Committee on the Constitution Inquiry into Judicial Appointments and Alan Paterson and Chris Paterson's excellent *Guarding the Guardians?* report. Although I am grateful to have been able to incorporate a few brief references to these reports, they deserve greater consideration than I have been able to give them here. The book contains substantially revised versions of my earlier published work including: 'Representations of the (woman) judge: Hercules, the little mermaid and the vain and naked Emperor', *Legal Studies*, 22(4), 2002, 602–624; 'Difference in the House of Lords', *Social & Legal Studies*, 15(2), 2006, 163–185; 'Judicial diversity, the woman judge and fairy tale endings', *Legal Studies*, 27(1), 2007, 74–94; 'What a Difference Difference Makes: Gendered Harms and Judicial Diversity', *International Journal of the Legal Profession*, 15(1–2), 2008, 37–56; 'In Conversation with Lord Justice Etherton', *Public Law*, Oct 2010, 655–662.

Foreword

> Once we accept that who the judge is matters, then it matters who our judges are.
> (Erika Rackley, 2013)[1]

It is well known that the United Kingdom, and in particular England and Wales, lags behind most comparable Western democracies in the composition of its judiciary. We remain overwhelmingly white and male, the more so the higher one climbs the judicial ladder. While there has been some progress towards greater diversity in the lower ranks ('below the salt', as some of them feel), progress in the higher ranks has been remarkably slow. I am the lone woman in the Supreme Court of the United Kingdom, whereas a third of the US Supreme Court Justices are women and in Canada and Australia they are over 40 per cent. The confidence of Lord Chief Justices in the 1990s that all those bright young women joining the legal profession would soon 'trickle up' to the top was misplaced.

Those Lord Chief Justices clearly thought that it would be a good thing to have more women judges. This is now a truth almost universally acknowledged. But if it is such a good thing, why has it not yet happened? It could be, of course, that while those in a position to do something about it *say* that something must be done, they do not really mean it. We are lucky enough to have an extraordinarily able, hard-working and independent judiciary, so why should we mind if they are mostly white and male, and at the higher levels mostly privately and Oxbridge educated? Isn't everyone's 'default' picture of a judge a mature man with a commanding presence?

There are, as Erika Rackley explains, three sets of reasons why we should mind: legitimacy, equity and difference. Legitimacy is about the confidence of the public, and Parliament and the Government, that the judiciary is there to serve the whole population and not just a section of it. Equity is about recognising the abilities of all those able young women who have been coming into the law in numbers equal

1 See page 164 of this book.

to or greater than men for decades now. Difference is about making a difference to the way cases are actually decided, especially at the higher levels.

As Rackley shows, it is easy to agree with reasons one and two but do nothing much about it. All things being equal, it would be a good idea, both for the image of the judiciary and for women generally, to have more women judges. But of course that must not lead to appointing people just because they are women. Diversity must not be pursued at the expense of merit. It is more important to have the best man for the job. So diversity and merit are set in opposition to one another.

Some of us think that this is a false dichotomy. It is grounded in a narrow (and some may think peculiarly alpha male) concept of merit – in which everyone can be graded in order from top to bottom according to some supposedly objective criteria of judging ability. Given the variety and complexity of the qualities necessary to be a judge, it would be surprising if this were so. Given the influence which the serving judiciary still have upon the appointments system, it is not at all surprising that judges continue to be appointed mostly in their own image. As the Chief Justice of Canada has put it, 'merit is in the eye of the beholder'.

Rackley therefore turns her attention to reason three: making a difference. It is not that there is a unique or essentially different female 'voice' with which all women judges sing. This is demonstrably not true. It is in the very nature of judging. Judging is not just the mechanical application of clear rules to known facts. Judges have to make choices – when law runs out, when law is not clear, when law gives them a choice. Anyone, male or female, black or white, brings their own experience and values to making those choices. These 'inarticulate premises' have been acknowledged since the phrase was first used by Justice Holmes of the US Supreme Court more than 100 years ago. 'The reason why England needs a more diverse bench is because there needs to be greater diversity in the "inarticulate premises"'.[2] Women who have led women's lives have just as much to contribute as have men who have led men's lives. At appellate levels, judging is a collective activity and the law is enriched by a diversity of experiences contributing to the collective decision. Diverse experience of life makes for better judging not worse: 'the promise of a diverse judiciary is not the promise of a multiplicity of approaches and values each fighting for recognition, but of a judiciary enriched by its openness to viewpoints previously marginalised and decision-making which is better for being better-informed'.

Viewed in this light, diversity is an important component of merit, not in opposition to it. Rackley makes an attractive case, but frankly acknowledges that it is unlikely to cut much ice with, for example, Lord Irvine, whose evidence to the

2 See R. Stephens, 'Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World', *Legal Studies*, 24, 2004, 33.

House of Lords Constitution Committee was that 'to assert that diversity is a component of merit is sleight of hand, and not a very skilful one at that'.[3]

But there are other voices. Lord Bingham, undoubtedly the greatest judge of the early 21st century, pointed out that 'the term [merit] is not self-defining'. It 'directs attention to proven professional achievement as a necessary condition, but also enables account to be taken of wider considerations, including the virtue of gender and ethnic diversity'.[4]

What a shame that Lord Bingham is no longer with us to lend his weight to the argument!

Brenda Hale
April 2012

3 Lord Irvine, Oral Evidence to the House of Lords Select Committee on the Constitution Inquiry into the Judicial Appointments Process, 6 July 2011, Q28.

4 'The Law Lords: who has served', in L. Blom-Cooper, B. Dickson and G. Drewry (eds), *The Judicial House of Lords 1876–2009*, Oxford: Oxford University Press, 2009, p. 126.

Contents

Introduction

Kenneth Clarke, Lord Chancellor and Secretary of State for Justice: I can't remember how many women are in the Supreme Court.
Lord Pannick: One.
Kenneth Clarke: One, is it? It remains a priority.[1]

Judicial diversity has indeed been a priority for some time now. Few would now deny, openly at least, the value of a diverse judiciary. Debates as to why we want judicial diversity, and suggestions as to how we might secure it, have become a more or less permanent fixture on the legal and political landscapes. And, with these arguments having been made for so long, it was easy to assume that diversity would follow. Yet it hasn't. We find ourselves little closer to a more representative Bench; judicial diversity is in danger of becoming a priority without priority. In the face of such slow progress we appear to have nothing new to say. We are in danger of losing an audience who has heard it all before, who have brought into the rhetoric that, although progress is 'too slow', diversity will come.[2] So, while agreement on the importance of a diverse judiciary is a start, it is clear that more needs to be said and done to make it a reality.

This book is an attempt to re-energise and re-focus debates about judicial diversity. It offers a fresh look at the role of the (woman) judge and the process of judging, and re-examines the assumptions which underpin and constrain debates about why we might want a more diverse judiciary and how we might get one.

1 House of Lords Select Committee on the Constitution, Annual Meeting with the Lord Chancellor, 19 January 2011, Q27 (unrevised transcript).

2 See, eg, Advisory Panel on Judicial Diversity, *The Report of the Advisory Panel on Judicial Diversity 2010*, London: Ministry of Justice, 2010 (Neuberger Report); Judicial Diversity Taskforce, *Improving Judicial Diversity Progress towards delivery of the 'Report of the Advisory Panel on Judicial Diversity 2010'*, London: Ministry of Justice, May 2011 (McNally Report); Judicial Appointments Commission, *Annual Report 2010/11 Building the Best Judiciary for a Diverse Society*, London: Judicial Appointments Commission, 2011; Kenneth Clarke, Oral evidence to the House of Lords Select Committee on the Constitution Inquiry into the Judicial Appointments Process, 18 January 2012, Q378.

It makes an argument for judicial diversity, grounded in the substantive difference women judges make to the quality of judicial decision-making, and demonstrates how the inclusion of varied perspectives and experiences on the Bench makes for a better judiciary, for better decision-making. This provides a counter to criticism that attempts to diversify the composition of the Bench threaten the quality of the justice dispensed. That it is the result of 'political correctness gone mad',[3] or akin to treating the judiciary as some kind of 'social experiment'.[4] It shows how the pursuit of diversity is not stymied by the primacy of appointment on merit: a judiciary is stronger and the justice it dispenses better the more diverse its members. In other words, if we want the best judiciary we can get, we should also want one which is diverse.

Before continuing, some initial explanations and clarifications are necessary. First, although this book is about judicial diversity, as is clear from its title, its focus is on the position of *women* in the judiciary. This is not intended to privilege sex over, or to deny the importance of, other identity characteristics.[5] On any view, a truly diverse judiciary requires the presence of an array of identity characteristics, backgrounds, and experiences. And so, although I focus on the place and role of women judges, this neither involves nor implies any denial of the problems – perhaps more significant problems – facing other under-represented groups and the book should be read with this in mind. Nor is it to suggest that the category woman is not differentiated by class, age, religion and so on. That said, while recognising that the reasons for the under-representation of different identity groups vary, many of the arguments I make for the importance of having more women judges of all identities and of the value of a diverse judiciary are of broader application and, I believe, could be extended, with the necessary alterations, to other groups and other diversity characteristics. I simply do not do so here.

Second, the book focuses primarily on the senior judiciary in England and Wales – the High Court, Court of Appeal and (UK) Supreme Court.[6] This is not to suggest that diversity is not important across the judiciary as a whole. However, it is clear that there are greater problems with increasing diversity at its highest levels. Moreover, despite efforts to facilitate greater progression within the judiciary, promotion from the Circuit bench to the High Court remains rare. As a result,

3 Shami Chakrabarti, 'The Judiciary: Why Diversity and Merit Matter' in *Judicial Appointments: Balancing Independence, Accountability and Legitimacy*, London: Judicial Appointments Commission, 2010, p. 67, 69.

4 Lord Irvine, Oral evidence to the Home Affairs Select Committee, The Work of the Lord Chancellor's Department, 13 October 1997 [69].

5 These include, but are not limited to, the protected characteristics listed in the Equality Act 2010 – age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, gender and sexual orientation (s 4) – as well as class, professional and educational background.

6 The UK Supreme Court is the highest court in England and Wales, as well as for Northern Ireland and Scotland. Scotland and Northern Ireland have a separate court system and judiciary below this which do not form part of my discussion in this book. That said, it is likely that the theoretical arguments for judicial diversity made here will have application beyond the book's main jurisdictional focus.

while efforts to increase diversity across the lower judiciary have met with some success, this is unlikely to trickle-up to the senior judiciary in the near future. Looking at diversity across the judiciary as a whole can therefore give a distorted picture both of the progress so far and the chances of improvement in the future. More fundamentally, we might think that the upper echelons of the judiciary is where diversity matters the most, not only in terms of public confidence and democratic legitimacy but also – and importantly for the purposes of this book – because it is where women judges might have the bigger impact on the law and judicial decision-making.

Finally, a note on terminology is appropriate here. The distinction between sex (as a biological category) and gender (as a social process) is well established, although not without controversy.[7] On this basis, we might distinguish women (and men) judges as categories addressed to their gender, from female (and male) judges as categories addressed to their sex. The argument made in this book concerns the impact of *gender* on judicial decision-making, that is the difference *the experience* of being a woman, or indeed being a man, makes to how women and men judge. While this argument assumes that women and men have different gendered experiences of society and the world none of this is to suggest that *all* women, or *all* men, share certain innate characteristics or have the same experiences: gender, while an important feature of one's identity and personality, is not all-defining. Throughout this book I use women and female, and male and men, interchangeably – often opposing women judges with male judges. I do so not because I am unaware of, or seeking to open up and engage with, distinctions between sex and gender, but for a far more mundane and pragmatic reason: to avoid linguistic awkwardness.[8]

7 See generally, Cynthia Fuchs Epstein, *Deceptive Distinctions*, New Haven: Yale University Press, 1988; Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, New York: Routledge, 1990; Judith Lorber, *Paradoxes of Gender*, New Haven: Yale University Press, 1994; Mimi Marinucci, *Feminism is Queer*, London: Zed Books, 2010, pp. 67–82.

8 It might also be argued that referring to *women* judges is 'vaguely offensive', that the *prefix* draws attention to the fact women judges are unusual (Marinucci, *Feminism is Queer*, p. 73), paradoxically reinforcing the assumption of the judge as male (see, eg, Regina Graycar, 'The Gender of Judgments: An Introduction' in Margaret Thornton (ed), *Public and Private – Feminist Legal Debates*, Oxford: Oxford University Press, 1995, p. 262, 264–265). However, given the historical and intuitive symmetry between men and judges the term 'judge' is not gender-neutral as this argument suggests. It is important therefore to make explicit and direct references to *women* judges not only to avoid ambiguity, but also to expose hidden gendered assumptions highlighting relevant and significant differences between men and women in the role, albeit while still working toward a time when such a prefix is superfluous. To this end, this book is, like Clare McGlynn's *The Woman Lawyer – Making the Difference*, unashamedly about *women* judges. Like McGlynn, I believe that 'if we never say "woman judge", we will almost always think of a man . . . If we do not consider the fact that women are disadvantaged, because we fear drawing attention to the fact that women are different from men, we will not be able to start to tackle the cause of such disadvantage' (Clare McGlynn, *The Woman Lawyer – Making the Difference*, London: Butterworths, 1998, p. 4). However, this is not to deny that male lawyers and judges who fail to conform to the 'masculine' norm are also disadvantaged and as such become 'other' (see, eg, Richard Collier, '"Nutty Professors", "Men in Suits" and "New Entrepreneurs": Corporality, Subjectivity and Change in the Law School and Legal Practice', *Social & Legal Studies*, 7, 2008, 27).

Outline of the book

Discussions about judicial diversity typically coalesce around two issues: first, why we have not got a diverse judiciary and how might we get one? And second, why should we want greater diversity among judges? What are we seeking to gain from judicial diversity? This book is no exception. It falls broadly into two parts, mapping (with one brief exception at the end of Chapter 1) onto each of these issues in turn.

The first three chapters set the scene for the argument that follows in the rest of the book. Chapter 1 details the position of women judges in England and Wales and worldwide. It provides a statistical profile and overview of the judiciary, tracking the progress of women over the last two decades. It goes on to consider traditional arguments for judiciary diversity. It suggests that although there is a consensus that a diverse judiciary is a good thing, consideration is not always given to *why* this is the case. This matters because even though the common arguments for judiciary diversity, grounded in democratic legitimacy, equality of opportunity, and (to a lesser extent) the value of varied perspectives, all point in the same direction – the value of a diverse judiciary – they suggest different routes to how we might get there. This is developed in Chapters 2 and 3, which address what are typically seen as the two principal causes for the present lack of diversity: the make-up of the legal profession as a whole, particularly in its upper echelons, and the process by which judges are selected. Chapter 2 considers the structural and cultural barriers preventing women lawyers from progressing to the upper levels of the legal profession. It argues that the legal profession is able to dictate the pace of change and that, so long as this continues to be the case, those charged with diversifying the Bench have little room for manoeuvre. This argument is expanded in Chapter 3, which examines recent changes and proposals for reform to the judicial appointments process. It is suggested that the ability to effect substantial change has been limited by the demographics and agenda of the legal profession, as well as the failure of the Ministry of Justice and Judicial Appointments Commission to consider positive and proactive steps specifically targeted at bringing about serious changes to the make-up of the judiciary.

The remaining three chapters make the case for judicial diversity. Central to this are arguments about judicial difference, and in particular the difference of women judges. Traditionally, women judges have had a prickly relationship with claims of difference. An explanation for this is provided in Chapter 4, which suggests that the experience of the woman judge is typified by isolation and exclusion with the possibility of acceptance only at the price of the very attributes that set her apart. One lesson to be taken from this is that there is an image of the judge, what I term the 'default judge', which women simply do not fit, and which causes us to treat women judges with suspicion or hostility.

In Chapter 5, we see that this mistrust is in part true: women judges *are* different. However, where we have gone wrong is in our understanding of the judge and what judges do. Once we get a clearer sense of what judging requires and

how judges decide cases, we can see that judges do more than just apply predetermined rules, that there are times when judges – especially at senior levels – are called upon to make decisions where the existing rules provide no clear answer. In such cases the judge must turn to her own sense of justice, her own understanding of what the law should be. Insofar as this is informed, at least in part, by the judge's own background, values and experiences, these will be questions on which judges will differ. The question then is what difference *gender* makes to a judge's decision-making. Without doubt, this is tricky terrain. Arguments for judicial diversity grounded in an assumption or expectation of women judges' 'difference' have fallen out of favour in recent years. Attempts to find and articulate a common perspective, or 'different voice', shared by all (or at least most) women judges have been widely derided as essentially and evidentially flawed. However, the argument made here – that women judges make a substantive difference to the quality of judicial decision-making – does not stand and fall on an ability to identify a single, unified women's voice. Rather all we need to establish is that gender is *one* factor which influences how judges judge. Indeed, to suggest otherwise is to argue that, of all the factors that might shape a judge's views on such occasions, gender is *never* one of them. This is not only deeply implausible but runs counter to what women judges themselves are telling us.

And so, in Chapter 6, it is argued that, far from being a cause for concern, women judges' difference is an inevitable and welcome feature of a diverse judiciary. By getting a clearer sense of what our judges really do and how they do it, we can see that women judges, and judicial diversity more broadly, do not threaten but rather enrich the judiciary and judicial decision-making, that more women on the Bench would enhance the quality of the justice dispensed. Difference then becomes a means to ensuring greater diversity. In looking for, and celebrating, judicial difference, we find a better argument as to why diversity of judges and in judging is important, one that allows us to see that 'diversity is necessary to enhance the possibility of good judgment'.[9] Not only that, we have an argument that stands up to the standard opponent to measures to increase judicial diversity: the necessity of appointment on merit. The pursuit of diversity and appointment on merit go hand in hand with the common aim of ensuring that our judiciary is the best it can be.

9 Jennifer Nedelsky, 'Judgment, Diversity and Relational Autonomy' in Ronald Beiner and Jennifer Nedelsky (eds), *Judgment, Imagination and Politics*, Maryland: Rowman and Littlefield, 2001, 103, p. 118.