

SALLY J. KENNEY

Equal Employment Opportunity and Representation: Extending the Frame to Courts

Abstract

The system of selecting judges in Britain is undergoing major transformation in the area of integration of women. Three lawsuits helped place the gender of judges on the agenda, moving the issue into the mainstream of political concern. By contributing to the extension of the concepts of equal employment opportunity and representation to encompass the selection of judges, they helped paved the way for the appointment of more women judges. In this essay I explore why discursive change matters, why the courts in Britain are an important venue for observing this change, and what this process has to do with the wider issue of the European Union's effect on national-level feminist politics.

Introduction

Like their counterparts elsewhere, many British feminists are disappointed with the results of nearly 30 years of equal employment opportunity law as courts and tribunals have applied it. Despite some notable successes and advances, progress is slow, the toll on plaintiffs high, and institutional change glacial. Similarly, British feminists would like to see more progress in (to use the European parlance) women in decision making, interpreted principally as women holding elective and appointed offices. By focusing on tangible measures of material change, however, it is easy to miss discursive changes—how people talk and think about equal employment opportunity, representation, and gender and fairness more generally. Just because it is difficult to ascertain what causes discursive change

or dissect the relationship between changing ideas and changing policies does not mean that such changes are not significant and noteworthy. What Katzenstein (1998) and Mansbridge (1995) call discursive politics, “the politics of reflection and reformulation . . . involving words and images” (Katzenstein 1998, 107) should be included in the study of public policies and social movements.

Many scholars of agenda setting and social movements ignore the role of courts as arenas of discursive contest and law as a discourse (a criticism leveled by Galanter 1983; Garth and Sarat 1998; McCann 1994, 1998)—especially in the United Kingdom, where there is little tradition of public interest litigation, where no written constitution empowers courts to review legislation, and where courts are not generally regarded as coequal political branches or as policy makers. I argue in this essay that three recent, minor lawsuits in the UK helped place the gender of judges on the agenda, moving the issue into the mainstream of political concern. By both reflecting and contributing to the extension of two concepts—equal employment opportunity and representation—to encompass the selection of judges, they paved the way for the appointment of more women judges.

British feminists may have seen little progress in the numbers of women judges, but they have enjoyed some success in changing the terms of the debate. In this article, I present some theoretical arguments for why discursive change matters, why the British courts are an important venue for observing this change, and what this process has to do with the wider issue of the European Union’s effect on national-level feminist politics. After describing the sources, I look at the specific political opportunity for feminist change in the British court system. I describe how the legal system in Britain is changing and then explain how the current judicial selection system makes it difficult to integrate the bench, and then briefly cover the changing public perceptions of judges and the role of courts. I consider the Labour Party’s historical antipathy to expanding the power of courts, its proposals for reform, and how women in Parliament are changing the political climate. I outline the role of feminists in demanding changes to the composition of the judiciary. I then examine each of the three cases in detail.

Theoretical Background: Discursive Politics

Scholars of agenda setting (e.g., Kingdon 1995) use the term *spill-over* for when a conceptual framework successfully deployed for one policy issue is applied to another. His example is privatizing governmental services. Rochon (1998) and Jenness (1995) identify the importance of a critical community as agents who prepare the terrain for

this process so that when a focusing event occurs, they have laid the discursive groundwork. Rochon argues, for example, that Anita Hill's testimony at the Clarence Thomas hearings catapulted sexual harassment onto the public agenda only because activists had been laying the groundwork for years (Rochon 1998, 78–79). Baumgartner and Jones (1993, 97) make a similar argument about Rachel Carson's *Silent Spring* and the environmental movement. Social movement scholars use the term *frame* for a “thought organizer” that cues what is relevant, what should be ignored, and the meaning to attach to symbols, images, and arguments (Ferree et al. 2002, 14; Gitlin 1980; Goffman 1974; Tarrow 1993). Frame extension is the phenomenon of applying a conceptual framework generated by one movement, such as civil rights, to another, such as women's rights, animal rights, or gay rights (Snow et al. 1997), and thus resembles the concept of spillover in policy studies.

The role of courts in this discursive process of spillover or frame extension is often neglected, in favor of studying legislatures or movements. Courts, however, are arenas for discursive contestation, and law is a discourse that constrains frames available to activists (Kenney 2003). Galanter argues we should see law “as a system of cultural and symbolic meanings (more) than as a set of operative controls” (1983, 127). McCann (1994) documents how activists in the movement for pay equity initiated lawsuits despite repeated losses and disadvantageous doctrinal developments because it was a useful organizing tool, because lawsuits garner attention, but most important, because the lawsuits helped define the terms of the debate in ways favorable to their cause. Kim Scheppele (2003) uses the term *show case* for legal cases where plaintiffs are less concerned about winning a remedy than motivated by a desire to acquire media coverage and change the terms of the debate. Ferree and colleagues' (2002) comparative study of abortion discourse in Germany and the United States is exemplary by including a discursive analysis of court cases and legal arguments, weaving the court cases into their story of social movement actors, the media, interest groups, and parties, rather than isolating legal discourse from its social and political context (as legal academics often do) and understanding how social and political structures shape discourse.

Feminists have long understood that ideas and texts matter and placed a high priority on discursive politics (Katzenstein 1998). Naming behavior “sexual harassment” rather than “flirting” matters for the consciousness of the victims as well as for the process of developing sanctions (MacKinnon 1978). We develop different policy responses depending on whether we conceptualize the harm of pornography as explicit sex or violence against women (MacKinnon

1987). Using maternalist frames to garner support for feminist policies entails risks as well as opportunities (Gordon 1994; Noonan 1997). Feminist policy successes may have done little to change the incidence of rape, but activists have placed the issue on the public agenda (Bevaqua 2000), even if they may have failed to challenge the “rapist as psychopathic stranger in the bushes” frame central to Megan’s Law (RoseCorrigan, personal communication, 2002). Constructing low wages as a rights violation emboldens activists to organize for pay equity (McCann 1994). We construct health delivery systems differently depending on whether we want to insert women’s health concerns into the mainstream medical model or return medical care to lay women’s hands (Kaplan 1996; Morgen 2002), to give just a few examples.

Considering courts as a political arena as well as legal discourse as a resource is critical to my approach. The three cases I analyze illustrate the power of ideas and arguments—discourse—in politics, which complements understanding of parties and interest groups. These cases also highlight the critical role of legal arenas in shaping public discourse, even in Britain. The advance of ideas cannot be separated from the actions of strategic players (or, as Dorothy Smith says, “texts do not speak themselves”; 1998). Some of these players are simply individuals seeking career advancement; others identify as Liberal Democrats challenging what they perceive to be an unaccountable Labour monopoly; others identify more clearly as feminists; still others see women’s rights as one part of international human rights and want to advance human rights arguments and a human rights legal practice.

The Significance of the Three Cases

These cases are as noteworthy for the entry of women’s organizations into the debate about the composition of courts as they are for the discursive changes they represent and strengthen. Although Britain has not led the way within Europe for making arguments in terms of “representation” about European courts (Kenney 2002) nor led in associations of European lawyers or international associations of women judges, some women’s groups did actively participate in the international campaign to ensure that women were appointed to the International Criminal Court, marking the beginning of the British women’s movement’s seeing courts as representative institutions and framing “more women on the bench” as a demand (Frey 2003; Spees 2003).¹ As McCann (1994) and Jenness (1995) would lead us to expect, litigation affects the parties and activists themselves, not just the elites and wider public to whom their actions are targeted.

The three cases I examine are both similar and different. In the first, *R. v A.*, British groups for the first time made a legal argument for a gender-representative bench, applying international treaties mandating gender balance in decision making and equality for women to the composition of the judiciary and challenging the legitimacy of decisions on gender sensitive issues made by an all-male panel. They failed to even gain the right to intervene in the case. Their failure revealed how few access points the British political opportunity structure offers (Gelb 1989; Lovenduski and Randall 1993) and the hurdles interest groups face in seeking to shape legal discourse (Kenney 1992). If one were to perceive litigation simply as a game of wins and losses, they failed to even take the field. The significance of their action, however, lies in their putting forth the argument about courts as representative institutions and linking that argument to Britain's international obligations.

In this case, the two players who joined forces include the Fawcett Society, established in 1866 to work for votes for women. The Fawcett Society is a nonpartisan group campaigning for women's equality. It has concentrated its efforts on securing women's representation in Parliament and in public bodies generally, coordinates a Women's Budget Group, and most recently has worked with the Home Office as part of an advisory group on Women and Criminal Justice policy (www.fawcettsociety.org.uk, 12–14). The other player was Matrix, a new human rights law chambers of progressive lawyers interested in harnessing the potential of international law, and also the law firm of Cherie Booth, Tony Blair's wife and a distinguished barrister and part-time judge.

The second and third cases, *Hayes* and *Coker*, used the law on equal opportunities to discredit the old boys' system for selecting judges by connecting it to the hiring practices of the unpopular figure of the previous Lord Chancellor, Derry Irvine. Whatever the shortcomings in closing the pay gap, ending the gender division of labor, or even ameliorating overall gender discrimination significantly, the laws and policies promoting equal employment opportunity have contributed to the emergence of certain employment norms, and these cases showed how these norms were available to be used in a new setting. Two norms developed by feminists and civil rights activists were deployed. First, word-of-mouth hiring is now widely recognized as potentially discriminatory, even if it is not motivated by a desire to exclude. Second, equal employment opportunity norms have made conventional the inference that when the percentage of women judges diverges sharply from the percentage of women in the eligible pool, either the decision makers are discriminating or the criteria are unfair. What is most interesting about these cases is not just

their reflection of the emergence of these norms but their application to the judiciary, or at least, the Lord Chancellor's Department, heretofore outside of employment law's reach.

The litigants had little prospect of success on the merits and were arguably committing professional suicide by challenging the extremely powerful Lord Chancellor. What made them courageous rather than foolhardy, I argue, is that their lawsuits could and did succeed in discursively extending arguments about fairness in employment practices to political and judicial hiring practices, regardless of the jurisdiction of employment law. They drew in a powerful ally in persuading the Equal Opportunities Commission (EOC) to join their cause. Like the Fawcett Society, the EOC was venturing into new territory by focusing on the issue of political and judicial appointments. Even as unsuccessful legal challenges, the cases succeeded in extending the frame and bringing new actors to the issue, thereby transforming the conversation about judicial selection. The cases garnered some media attention and, perhaps most important, constituted a powerful signal to elites where future trouble may lie. Success in such cases cannot and should not be measured solely by the outcome or remedy to the litigant but by seeing the transformation of a discursive field as the object of some legal as well as political action.

What role has Britain's membership in the European Union played in the development of feminist discursive change? British feminists may have been slow to interact with European Union-wide feminist social movements, but their equality law experts are seen as leaders. They participate in the European Commission's Committee of Experts to develop strategy and have actively used European Community law to challenge laws, policies, and practices in test cases, in part because after 18 years of Conservative rule, Britain lagged behind other EU members in implementing equality law. Thus the European Union offers some resources to feminists that they do not have at the national level as well as interacts with specifically British resources and political opportunities. Despite its many shortcomings and constraints, the British EOC, which finances test cases and develops legal strategies, is enviable (Barnard 1995). The EOC is thus the first important mechanism for introducing EU ideas into British political discourse.

Second, a wider women's rights community has taken up the idea of gender mainstreaming, which comes to Britain via the European Union, even though it had been pioneered by other EU member states. The Women's Equality Unit, the Fawcett Society, the National Alliance of Women's Organizations and others have taken up the "women in decision making" and gender mainstreaming agenda of

the European Union even if, as I argue elsewhere, they have been slow to extend it to courts (Kenney 2002). The European Union's preparation for its participation in the Beijing Conference significantly advanced the cause of trans-European Union organizing among women's groups, creating networks, capacities, and more of a global orientation.

Third, movement toward social and political integration within the European Union, and, for want of a better word, globalization, though often bemoaned, has affected everyone. Women lawyers are increasingly likely to have a practice that extends beyond the borders of the UK and attend European Union-wide conferences. Women law professors are now more likely to teach outside the UK and their students to study elsewhere in the European Union. They are likely to take their law students on trips to the European Court of Justice and the European Court of Human Rights. Human rights lawyers are increasingly networked internationally, and even judges are more exposed than ever to colleagues from other countries and increasingly cognizant of the impact of European Community and international law.

Finally, the exit of Margaret Thatcher, a vociferous opponent of greater European integration, from the political scene and the election of a Labour Government have created a more receptive climate in the UK for the European Union's agenda, and for the women's rights agenda in particular. Labour members of the European Parliament link their party's agenda to the European Union just as newer Labour MPs do not share their predecessors' isolationism and hostility to Europe.

Overall, therefore, the British courts present an opportunity for feminists to expand the discourse on representation to include courts and justify doing so by drawing on Britain's obligations under international law, draw new actors into the campaign by connecting their concerns to the campaign to appoint more women judges, and extend equal employment opportunity discourse, developed and enlarged within the European Union, to the composition of courts in the UK.

Sources and Method

To understand these three cases in their political contexts and impact on discourse and mobilization, I read and analyzed the Fawcett Society's petition to intervene (itself a full brief, really) and the House of Lords' opinion and the media's reporting of it. Through a parliamentary question graciously put by Lord Anthony Lester, I was able

to obtain data on petitions to intervene.² I interviewed the two authors of the petition from Matrix Chambers, Murray Hunt and Karen Monaghan, as well as Cherie Booth. I read and analyzed the other two cases and the media's reporting of them. I interviewed one of the plaintiffs, Josephine Hayes, and the legal director of the EOC, Alice Leonard.

This article is also part of a larger research project on the appointment of women judges. As part of that project, I have read every quality newspaper article touching on women judges, judicial selection, or the Lord Chancellor published since 1986. I read and analyzed the three consultative papers on reforming judicial selection from July 2003, as well as parliamentary hearings and reports and reports from the Lord Chancellor's Department. I interviewed senior civil servants from the Lord Chancellor's department, scrutinized many of their documents, and attended a recruiting meeting for women judges. I shadowed a woman judge, sitting on the bench with her, and interviewed several other senior women judges, such as Dame Elizabeth Butler Sloss, and leading feminist barristers, such as Lady Helena Kennedy, QC. I attended with the English delegation of women judges to the International Association of Women Judges, which included then Dame now Lady Brenda Hale. I also interviewed legal columnists, legal academics, representatives of legal reform groups (such as Justice), and representatives of women's groups, such as Frances Burton, head of the Association of Women Barristers, and Annette Lawson of the National Alliance of Women's Organizations, part of the European Network on Women.³ I now turn to an examination of the changed political climate in which feminists argue for the appointment of women judges.

The Changing Legal Profession

Unlike the United States, where at both the federal and state levels the composition of the judiciary is a deeply contested political issue, the courts in the UK are not regarded as a third political branch. Legal formalism is the hegemonic tale (Ewick and Silbey 1995; Olson and Batjer 1999); moreover, judges are chosen from a narrow pool of mostly barristers, not solicitors, of the top 10% of the Bar (Queen's Counsel) and from judges who have sat part-time. Women are disproportionately excluded from each winnowing, yet the system is defended as deeply meritocratic and largely safe from political considerations (defined as meddling). The UK lags behind Western democracies by only appointing the first woman to its highest appellate court late in 2003 (Kenney 2004), more than 20 years after the

United States and Canada appointed women, and by the low numbers of women (12%) holding high judicial office.⁴ The 10-fold increase in the size of the judiciary in England and Wales from 300 in 1970 to 3,000 in 2000 (Malleon, 2003, 177) has not resulted in a more gender-diverse bench in the UK.

Signs point to change afoot. First, the legal profession has changed dramatically. Women make up a majority of law students and those preparing to be solicitors and barristers.⁵ Second, the judicial selection process is undergoing significant reform, and feminists may be able to tie their demands to reform efforts that have little to do with gender (Kenney 2003). Third, the UK is an international outlier among Commonwealth countries and the European Union. As part of both the European Union and the Council of Europe, the UK is in the awkward position of demanding that new entrants have a gender-diverse bench when it does not have one itself. Fourth, the cause enjoys the support of powerful elites, such as Cherie Booth and legal correspondents of quality newspapers, who regularly criticize the gender imbalance.

But such conditions do not make the gender integration of the bench inevitable nor determine the timing of change. The previous Lord Chancellor did not increase the percentages of women in high judicial office. Women's groups inside the legal profession have been slow to organize and unable to capitalize on opportunities. Although women's groups outside the legal community call for greater representation in legislatures, for the most part they did not address their calls for equal opportunity or representation to the composition of the courts. Unless the new Secretary of State for Constitutional Affairs, Lord Falconer, and a new judicial selection commission champion the appointment of women, demographic and international pressures will not inevitably produce change; they do provide resources but require that social movement actors and policy entrepreneurs actively capitalize on them. This is made particularly difficult by the distance that the Labour Party, the fulcrum on which feminist efforts to lever change in the political system rests, has kept from the courts.

Why So Few Women Judges?

One reason so few women are members of the higher judiciary is not merely the singular gatekeeper of the Lord Chancellor but the overly restrictive pool from which he chooses. Lord Irvine argued that so few women were judges because few were in the pipeline. The percentage of women appointed to the bench has not grown, despite

the changing composition of legal studies and increases in the size of the judiciary. Twelve percent of the judiciary are currently women compared to 25% worldwide (Malleon 2003, 177). The pool from which judges may be chosen is small. First, although the legal ban has been lifted, in practice only barristers are chosen for high judicial office, not solicitors. One must also be a Queen's Counsel (QC), the top 10% of the Bar, and in elite chambers. About 6% of new QCs each year are women (Malleon 2003; Malleon and Banda 2000). The next step is sitting as a part-time judge. The British have always prided themselves on not having a career judiciary, unlike the Continent, where people choose the judiciary as a civil service position straight from law school (Malleon 1999, 79). For the most part, academics are excluded from consideration, as are so-called employed barristers, those who work within firms or for a governmental department.⁶ The junior judicial appointments are open to a wider pool of barristers and solicitors, but from such positions one has little hope of advancement to the High Court bench. The changes in selection procedures heralded by the Lord Chancellor have been for the junior judicial posts.⁷

The Changing Role of Judges and the Beginnings of Reform

A number of factors coalesced to raise public awareness about why it matters who judges are and calling into question the independence of the judiciary and the judicial selection procedure that have little to do with gender or the women's movement. Perhaps most important in this discursive process were the high-profile miscarriage of justice cases involving IRA bombings (*Guardian*, 7 July 1993) (see the Labour Party's 1992 manifesto, available online at www.psr.keele.ac.uk/area/uk/man/lab92.htm, for example.). These cases highlighted judicial fallibility and spread the perception that judges were out of step with everyday people and ordinary life (Berlins and Dyer 2000, 71; *Guardian*, 27 January 1995). The *Pinochet* case heightened awareness of judges as individuals and the political power of the judiciary (Malleon 2000, 119) and the impact of international law.⁸ Not only could international law, such as the Convention on Torture, determine the outcome in English courts but also the luck of the draw on a House of Lords panel could affect the decision. Courts in the UK had had 30 years of applying EC law directly in cases before them and had had cases referred to the European Court of Human Rights, but the passage of the Human Rights Act in 1998 crystallized the growing internationalisation of English law and raised awareness of the growing power of judges.⁹

The Political Opportunity Structure under a Labour Government

Historically, the Labour movement has been very suspicious of courts because of judges' roles in suppressing the trade union movement. Strategically, it has favored collective bargaining over seeking legal protection. J. A. G. Griffith's classic 1977 work, *The Politics of the Judiciary*, documented how most judges were male, from upper-middle-class families, educated in public (i.e. private) schools, graduates of Oxford or Cambridge, and Conservatives. But 18 years of opposition convinced many left-wing constitutional thinkers that Britain, too, needed to strengthen the courts as a check on government. The 1992 Labour Manifesto called for reducing the powers of the Lord Chancellor and creating a judicial appointments commission. When Labour came closer to assuming power, however, that proposal vanished from the manifesto. For six years, until Blair fired him in June 2003, the Lord Chancellor, Derry Irvine, vigorously opposed both changes.¹⁰

Labour's relation to the courts is also defined by the recent and powerful relationship between dominant personalities in both systems. Taking a moment to discuss the larger-than-life figure of former Lord Chancellor Lord Irvine of Lairg is justified first, because he exclusively had the power to choose judges,¹¹ and, because of their long-standing relationship, Prime Minister Blair had heretofore been reluctant to force him to move forward on reform or to remove him from office. Second, the arguments feminists made about cronyism and abuse of power in legal appointments resonated because of public perceptions about Irvine. Lord Irvine was "one of the most politically powerful Lord Chancellors in modern times (*Lawyer*, 28 October 1997). Both Cherie Booth and Tony Blair did their legal apprenticeships in his chambers. Irvine assisted Labour in a series of legal actions against the left wing of the party that earned him a peerage in 1987 (*Lawyer*, 28 October 1997). As a close personal advisor of the prime minister and close personal friend of both Blair and Booth, Irvine enjoyed unrivaled political power, chairing numerous Cabinet committees (*Lawyer*, 17 June 1997). Widely regarded as arrogant, Irvine weathered several significant scandals.¹² He was charged with cronyism in judicial appointments, soliciting contributions for the Labour Party from prospective nominees (*Times*, February 25, 2002), and choosing barristers from his former chambers twice as often as others for governmental work (*Observer*, November 5, 2000).

Another important change in the political landscape is the change in the share of women in Parliament. Although this change has little

to do with the courts or legal reform directly, it is important for both bringing new players into the system and changing the overall discourse about gender and representation. Labour's victory in 1997 doubled the number of women members of Parliament (MPs) from 60 to 120 (111 of whom were Labour) out of 659, and many assumed positions of power.¹³ The Labour Party ran women for marginal seats (ones they expected the Conservatives to win). The swing of the vote to Labour was so huge that many new women were swept into office. More important, Labour instituted a policy of women-only short lists. The Labour Party decided in 1993 that in constituencies where a sitting Labour MP was stepping down, where the seat was winnable but held by another party, or where it was a new constituency, half of such seats would have short lists of women only. An unsuccessful male applicant successfully challenged the policy under employment law in 1996. Rather than appeal, Labour legislatively overrode that decision by passing the *Sex Discrimination (Election Candidates) Act of 2002*, which permits parties to institute "positive action" to elect more women,¹⁴ thereby endorsing and legitimating the argument for women's representation, even if that argument was not explicitly extended to courts.

Labour's victory increased the presence of feminists in Government, contributing further resources for addressing gender equity. Labour's new women MPs included those with experience in feminist campaigns and committed to an equality agenda. Harriet Harman, for example, has used her position as Solicitor General to end the ban on members of the Crown Prosecution Service sitting as part-time judges, thereby widening the pool of potential judges to include more women and particularly more women of color. Moreover, the Prime Minister's wife, Cherie Booth, is a QC, part-time judge, and outspoken advocate of women's greater political participation, including more women on the bench.

On 12 June 2003, Prime Minister Blair fired Lord Irvine, announced he was abolishing the position of Lord Chancellor, and appointed Lord Falconer Secretary of State for Constitutional Affairs to bring forth proposals for establishing a judicial nominating commission, creating a Supreme Court (removing sitting judges from the legislature, the House of Lords), and abolishing the position of QC (Kenney 2003). Blair's proposed reforms mark the end of the fusion of legislative and executive powers for both the Lord Chancellor and the Law Lords, and he responded to critics who objected they had not been consulted about the reforms by framing the change as one of modernizing the judiciary, placing emphasis in the parliamentary debates on the fact that the Lord Chancellor's formal regalia includes a full-bottomed wig and, most damningly, women's tights (nylon stockings). Before I attempt to assess whether feminists will be able to capitalize on

this window of opportunity to promote the appointment of women to high judicial offices, I step back and discuss their previous efforts to change public discourse about the need for a gender diverse bench.

Feminist Mobilization

In the United States, both by the National Women's Political Caucus and the National Organization for Women (NOW) Legal Defense and Education Fund, as well as groups in individual states, waged campaigns to secure women judges in the 1970s. The National Association of Women Judges pressed President Carter to appoint a woman to the U.S. Supreme Court, but it was Ronald Reagan who made a campaign pledge to do so, seeking to neutralize the credit for Carter's success in appointing women to the lower federal courts. Moreover, activists' arguments were bolstered by the findings of numerous state and federal taskforces on gender bias that heightened awareness of the problem (Resnik 1996). In the UK, no such gender bias taskforces exist, although Lady Brenda Hale has organized an association of women judges. In the United States, it was almost always the first women appointed to state supreme courts who championed such studies and enlisted the support of male colleagues.

Although British feminists were slow to wage an organized campaign to change the composition of the judiciary, public intellectuals did connect the narrow stratum from which judges are chosen (nearly all male) and both the adverse policy outcomes in the form of judgments and the poor treatment of women in court, and activists later drew on these discursive resources. Since the beginning of the second wave of feminism, writers from Albie Sachs and Joan Hoff Wilson (*Sexism and the Law*) to Polly Patullo (*Judging Women*) to Helena Kennedy (*Eve Was Framed*) documented the sexism of judges in their opinions, their side comments, and remarks off the bench. For example, in the 1980s Judge Bertrand Richards fined a man £2,000 for raping a seventeen-year-old girl. He said the girl had been "guilty of contributory negligence" because she had hitched a ride home after missing the last bus. Women organized a mass demonstration in London (I was among them) and called for the judge to be removed from the bench. An embarrassed legal establishment rallied around Richards and stressed the importance of judicial independence. Some feminist legal theorists used such incidents to argue that the law was irretrievably male rather than help form a movement to advocate for more women on the bench. Episodic demonstrations and critiques did little to sustain a broader movement for reform. Although these works drew attention to the virtual absence of

women from the higher judiciary, gave numerous examples of the sexism of judges, and traced the deleterious policy consequences of their prejudices, they did not advance the arguments based on the concepts of representation and equal employment opportunity that developed later in the three cases I analyze.

In the 1990s, both the Association of Women Barristers and the Association of Women Solicitors organized as independent groups. Together or with other partners, they organized regular women and the law conferences beginning in 1995. At each event, the Lord Chancellor was called to account for the low numbers of women judges and QCs, something he was rarely (if ever) called to account for in Parliament or the press. The media usually covered these events, and they thus provided an opportunity to keep the lack of progress in the public eye. On the occasions when groups such as the International Bar Association or the World Women Lawyers Congress met in London, well-known public figures (such as Cherie Booth and Helena Kennedy) would use the platform and the ensuing media attention to call for more progress. At the one-day Women Lawyer's Forum in 2002, Booth issued her most hard-hitting criticisms of the system yet, saying that "an old boys' network" was to blame for women's under-representation at all levels of the legal profession. The small number of women judges, she argued, undermines public confidence in the judiciary. The Lord Chancellor, through his department, immediately replied in the press that it would be unfair to "lower standards" to increase the number of women, but that he has done much to promote equal opportunity. Although women lawyers may not have created a social movement to press for the advancement of women judges, they did create the first vehicle for holding the Lord Chancellor publicly accountable, something neither the Labour Government nor Parliament appeared able or willing to do.

British feminists have been slow to organize within the legal profession, and the wider feminist community has largely ignored courts as political institutions needing reform. What has turned the tide has been their engagement with the wider world, first through the European Union and then through international organizations more generally. At the 1993 Vienna Conference, the demand for an International Criminal Court to hear cases about crimes against humanity surfaced, including gender-based claims such as rape in war. Preparation for the 1995 Beijing Conference linked British feminists more deeply to a European Union-wide network that used the language of gender mainstreaming and called for gender balance in decision making. They had long been active in using EC equal employment opportunity law to advance a domestic equality agenda. Labour women had just battled their own party to adopt policies that would ensure

their greater representation in Parliament. British feminists were thus primed to join the wider effort for judicial reform as Labour came to power in 1997. During the campaign to appoint women to the newly established International Criminal Court, British feminists beyond a small group of international human rights lawyers joined an international coalition, mobilized for action, and deployed representational discourse to the composition of courts.

Groups such as the Women's Equality Unit, the Fawcett Society, and the National Alliance of Women's Organizations have begun to extend the European Union-led discourse about women in decision making to the judiciary. As I have argued elsewhere (Kenney 2002), however, although the European Union discourse on women in decision making, gender mainstreaming, and equal treatment for women is well developed, it was only in 1999 that the first study on European courts was done and also in 1999 that the first woman judge was appointed to the European Court of Justice.

The hegemonic tale of legal formalism may have delayed feminists from applying representational arguments to courts, but the discourse on women in decision making was a strategic discourse fully prepared and waiting for them to deploy. Both the European Court of Justice and the UK's higher judiciary are concerned about improving their legitimacy, and the appointment of women to the bench may be a convenient means to that end. Gender has become more salient in the Council on Europe, both in its standards for judicial independence in new members and in scrutinizing member states' nominations to the European Court of Human Rights.

From the standpoint of British feminists, rulings from the European Court of Justice to determine whether Britain had complied with European equality law were more progressive than one could expect relying solely on domestic law, even though the decision makers in both cases were almost exclusively men. British feminists who were winning their arguments for equal employment opportunity before the European Court of Justice were therefore not disposed to advance an argument about the representativeness of that court. From other locations, however, European Court of Justice rulings looked less progressive and the all-male body less acceptable. German feminists responded negatively to an all-male European Court of Justice deciding the legality of German laws promoting affirmative action, and they were successful in overturning that decision and championing equality for women in subsequent treaty negotiations.

Great minds think alike, and social movement activists often develop similar arguments, whether or not they are linked. One does not need to be immersed in gender mainstreaming language or campaigning for the International Criminal Court to recognize that all-

male bodies might exclude women's perspectives. By 1996, advocates for more women on the bench in Britain were linking case outcomes to the composition of domestic courts. In a letter to the *Times*, Josephine Hayes and Daphne Loebel, both barristers, expressed their outrage that some High Court judges were forcing women to undergo caesarian sections without their consent (4 October 1996). They asked,

Is it a coincidence that the judges of our High Court, and the appeals courts to whom they must answer, are nearly all men, while all those on the receiving end of these orders are women? We think not. What collective experience of giving birth have the higher judiciary? What collective understanding have they of the violation involved in cutting open a healthy adult's womb against her will? Half the population is virtually unrepresented on the bench.

In October 1997, the Labour Social Security Secretary and Minister for Women, Harriet Harman, issued a press release stating that as part of the Government's determination to tackle domestic violence, Lord Irvine has taken important steps to increase the number of women judges. In what the *Daily Mail* reported as "a withering slap-down" (23 October 1997), the Lord Chancellor's Department immediately responded that "we cannot have positive discrimination and all appointments must continue to be made on merit" (*Times*, 23 October 1997). Moreover, the statement said: "The Lord Chancellor has the fullest confidence that all judges, regardless of gender, already deal with cases of domestic violence with impartiality and consideration for the victims of domestic violence" (*Daily Telegraph*, 23 October 1997). Described as "the most spectacular and embarrassing public telling-off yet administered to a senior member of the Blair Government" (*Daily Mail*, 23 October 1997), the statement left no doubt as to whom the Lord Chancellor believed had exclusive right to speak about the composition of the judiciary.

Not to be deterred, however, on 5 June 2002, the *Guardian* reported that Harman was promoting a special scheme of law scholarships to bring more women and lawyers from ethnic minorities and working-class backgrounds into the judiciary and championing the right of Crown Prosecutors to become judges, noting that Black women in particular, unlike in the United States, had made few inroads into the judiciary in the UK. Harman thus joins Lady Helena Kennedy and Cherie Booth as outspoken critics within the Labour Party of the slow pace of appointment of women to the bench. They are making arguments about the legitimacy of judicial outcomes from an unrepresentative bench, not merely decrying the sexism of individual male judges.

During the 1990s, and as part of the international campaign to appoint women judges to the International Criminal Court, feminists organized within the legal profession and used nonfeminist groups to challenge the exclusion of women from higher judicial office, applying a discourse of representation to the composition of the judiciary. In the first of the three cases I analyze, this discourse of representation played the leading role. The other two cases take up the discourse of equal opportunities and extend it to the courts.

Representation

Prior to 2001, the argument that courts are representative institutions that need to include women judges for their decisions to be regarded as fair and legitimate was advanced only in the books cited previously, the occasional letter to the editor decrying a bad result and linking the outcome to the fact of an all-male decision-making body, in a speech at a conference on women and the law, or by German feminists. In *R. v A.*, the first of the three cases I analyze, the Fawcett Society expanded the discourse of representation to include courts and took its case to the House of Lords.

In this case, a male defendant charged with rape argued that the Youth Justice and Criminal Evidence Act of 1999 which, as interpreted, precluded him from adducing evidence of his own prior sexual relationship with the alleged victim, violated his right to a fair trial under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms incorporated into British law by the Human Rights Act of 1998.¹⁵ The Fawcett Society filed an application for permission to intervene in the case, which the House of Lords rejected. With this application to intervene, the Fawcett Society's focus on women in decision making led it for the first time to take on the composition of the judiciary. The application to intervene argued that without women on the panel—at least two of the five—the court would not comprise an “impartial tribunal” as required by human rights treaties. It argued that an impartial tribunal is essential for the public to have confidence in the courts in a democratic society (§21). Out of the 12 Lords of Appeal in Ordinary (“Law Lords”) and 14 other Lords of Appeal (former Lords of Appeal in Ordinary), plus the Lord Chancellor himself, all 27 eligible to hear an appeal were men (§46). The Fawcett Society argued that in the Act, Parliament sought to balance two competing rights—the right of the defendant to a fair trial and the right of the woman not to be examined on her past sexual conduct—and that if an all-male court set aside the balance struck, such a decision would have grave democratic consequences (40). When deciding this very question—one that

raises highly contentious gender issues—three women justices sat on the Canadian Supreme Court (42). The Fawcett Society argued that for a fair-minded person to conclude that justice is done, at least two women must participate in the decision.

The application received little press coverage. Legal correspondent Clare Dyer, in the *Guardian*, pointed out that a Canadian Supreme Court heard two legal challenges to Canada's rape shield law with two women justices (19 March 2001). Helena Kennedy, QC, took the opportunity to point out that Canada, Australia, New Zealand, and the United States all had women sitting on their highest appellate court and urged the Law Lords to read Canada's first woman chief justice, Beverly McLachlin's, 1991 judgment on the relevance of judges' variable experiences and attitudes to sexuality.

In its decision concluding that the defendant did have a right to question the alleged victim on a prior sexual relationship with him, therefore finding the Act inconsistent with human rights, the Law Lords made no mention of the Fawcett Society's argument, nor of any of the many international treaties and agreements cited, nor did it defend its impartiality. (Such an omission is hardly surprising once the House of Lords denied the petition to intervene in the case.)¹⁶

Equal Employment Opportunities

Since the British Parliament passed the Sex Discrimination Act of 1975 (which also brought into force the Equal Pay Act of 1970), employers have become more accustomed to having their practices scrutinized for discrimination. British equality law is bolstered and enhanced by EC law. The law prohibits employers from treating either sex less favorably than the other (direct discrimination) but also prohibits indirect discrimination, for example, using a height requirement or paying part-time workers (who are predominantly women) less than full-time workers. Discrimination law has mandated a set of practices as well as created a normative discourse about fairness, even though its critics charge it has failed to deliver equal employment opportunity and is more advantageous to male plaintiffs than to women. In business, standard personnel practices now make it more difficult for men to simply hire their friends without advertising the job, drawing up a job description, and assessing each applicant on written criteria. Discriminatory bases for evaluation ("women don't have the same level of commitment, I'm not as comfortable with those different from me") have become disfavored and at least submerged if not eliminated.

Ironically, the incremental alterations the Lord Chancellor's Department has made to the process of selecting lower court

judges—advertising the posts, writing job descriptions, convening an interview panel that includes lay members, using strict criteria to solicit comments on candidates, conducting an interview, and now even hiring personnel experts to develop a one-day series of tests and exercises that go beyond the limits of an interview panel’s ability to assess ability to be a good judge—all seem to affirm a normative consensus that modern employment practices should apply to the selection of judges.¹⁹ Criticising the secretive appointment process, for example, then chair of the Association of Women Barristers, Barbara Hewson said, “It’s a ludicrous way of going about things. You wouldn’t appoint the chair of British Gas this way” (*Lawyer*, 28 November 1995). It is not surprising, then, despite the severe professional consequences to the individuals bringing the complaints, that women lawyers would seek to apply employment discrimination law to the procedure.

The two cases bought thus far have been not, strictly speaking, on the appointment of judges but legal advisors to the government. The first was brought by Josephine Hayes, a barrister—press accounts call her “well-known campaigner for women’s rights at the Bar” (*Times*, 6 November 2001)—against the Attorney General John Morris over his appointment of Philip Sales as Treasury first junior (or “devil”), the Government’s chief advocate in the courts and the barrister who gives advice to Whitehall. (Hayes was head of the Association of Women Barristers and blasted the Lord Chancellor in fall 1997 for abandoning Labour’s preelection pledge to create a judicial appointments commission after just assembling a new working group on equal opportunities in judicial appointments, of which she was a member [*Lawyer*, 14 October 1997]). Hayes claimed that using the system of secret soundings to appoint Sales was discriminatory, especially because Sales worked at Irvine’s former chambers. The case was settled when the Attorney General contributed an undisclosed amount to charity so as to avoid an embarrassing public hearing (*Independent*, 16 November 1999). The Irwin Mitchell firm’s Web site claims “the Attorney General acknowledged in the settlement that the system of ‘secret soundings’ tended to disfavour women appointees. As a direct result of this case, the Lord Chancellor established the ‘Peach Inquiry’ to investigate the use of secret soundings in appointments to Silk and the Judiciary.”

Jane Coker and Martha Osamor brought the second case against the Lord Chancellor. In December 1997, Lord Irvine, with the approval of Prime Minister Blair, appointed Garry Hart as his special advisor without advertising the post or considering other candidates. Jane Coker was a solicitor with 20 years of experience and been short-listed for the job of assistant recorder. Martha Osamor was

Nigerian and an advisor in a law center (but not a lawyer). Both challenged the appointment under the Sex Discrimination Act and Equal Treatment Directive, and Osamor also brought suit under the Race Relations Act for both direct and indirect discrimination.

The Employment Tribunal made short shrift of the direct discrimination claim, that the Lord Chancellor approached Garry Hart directly but neither of them (*Coker and Osamor v Lord Chancellor and Lord Chancellor's Department*, [1999] IRLR 396). It did, however, in a bold and surprising move, uphold the claim of indirect discrimination. The tribunal would not dismiss the case merely because neither woman had applied for the job because the job had not been advertised. Otherwise employers could evade the law merely by not posting a vacancy ([1999] IRLR 396, 400). In response to written questions, the Lord Chancellor said he had rebuffed others who approached him about the position. Only Hart was qualified.

The law of indirect discrimination has four components: the employer must have imposed a neutral requirement or condition, fewer women than men must be able to meet it, it cannot be justifiable and must be to the detriment of the complainant. In this case, the tribunal found that the neutral requirement or condition was that all acceptable candidates must be personally well known to the Lord Chancellor. It determined that fewer women with the qualifications for the job could comply with this requirement than men, and that the Lord Chancellor failed to justify the requirement. It was to Coker's (but not Osamor's) detriment.

The tribunal found that the 1,500 pages of documents the Lord Chancellor submitted, which included equal opportunity policies for his department, merely "put into sharp relief the inadequacies of the Lord Chancellor's personal way of proceeding in respect of the appointment under scrutiny" (403). Nor were they persuaded that long-standing practice of appointing special advisors justified the practice. The tribunal also "accepted as obvious another part of her evidence that 'word-of-mouth' recruitment tends to perpetuate discrimination situations" (403). The tribunal concluded: "We do not say that all such posts should be subject to civil service recruitment standards, only that the particular minister should ensure that his selection is free from discrimination" (403). The decision received surprisingly little press coverage.

Both the Lord Chancellor and Osamor appealed. The Equal Opportunities Commission (EOC) decided to support Coker and Osamor (the Commission for Racial Equality supported Osamor) as one of the three cases it brought to promote women's greater participation in public life (*EOR* 95 2001). Julie Mellor, chair of the EOC, said:

A Government that says it is committed to raising standards in public life needs to practice what it preaches. . . . Failing to do so leaves those who make the appointments open to accusations of cronyism. . . . The arguments against his method of appointing his special adviser are exactly the same as those against the traditional way of appointing judges. Having transparent selection procedures and recruiting from a wide pool of people not only helps employers ensure they are not discriminating against certain groups of people, it also enables them to appoint the best people for the job. (EOC Press Release 2000)

The case raised the interesting question about the Human Rights Act's requirement for an impartial and independent judge. Who would preside at the Employment Appeal Tribunal (EAT), given the Lord Chancellor appoints the members of the tribunal (*EOR* 96 2001)? Lord Johnston, the presiding Employment Appeal Tribunal judge in Scotland, who is not appointed by Lord Irvine, chaired the panel, flanked by two women, Mrs. Gallico and Ms. Switzer (*Coker and Osamor v Lord Chancellor and Lord Chancellor's Department*, [2001] IRLR 116, [2001] ICR 507). It held that although the Lord Chancellor did impose a requirement that the candidate be well known to him, doing so did not have a disparate impact on women because the pool was so small, in fact, consisting of one person, Garry Hart. Moreover, because Coker did not know about the job until the announcement of Hart's appointment, she suffered no detriment.¹⁷ The EAT had no problem adding "having the trust and confidence of the Lord Chancellor" to the requirement that the person be well known to the Lord Chancellor as self-evident, even though it did not appear in the original documents. The pool would include few men, so it could not be said to include a disproportionately small number of women, the EAT concluded. "Word of mouth applications, while disproved of, could apply equally to men or women."

The Equal Opportunities Review editorialized against the tribunal's reasoning:

This case is really only about one question . . . whether there is anyone who is too big to be troubled by the constraints of discrimination law. . . . The Lord Chancellor did not regard it as appropriate to go through the process of advertising this taxpayer-funded post because he had decided on a candidate in advance. . . . Garry Hart was an excellent appointment, but that was not the point. The vacancy was filled by word-of-mouth recruitment, a process notoriously prone to discrimination. The Lord Chancellor did not regard it as appropriate to go through the process of appearing before the employment tribunal to jus-

tify the selection process. . . . This decision raises the spectre that employers can circumvent the constraints of discrimination law . . . by selecting their candidate in advance. . . . So the result of *Coker*, if it stands, would be to create a category of exceptions to the legislation that would operate in respect of appointments of specially privileged people by specially privileged people. The idea that you cannot show indirect discrimination in respect of the filling of a job vacancy if you did not know the vacancy was being filled is a novel gloss on the statute, and one with little merit to it. (2001, 48–49).

The Court of Appeal (*Coker and Osamor v Lord Chancellor and Lord Chancellor's Department*, [2001] EWCA Civ 1756, [2002] IRLR 80) characterized the questioning of the Lord Chancellor as “oppressive” and the case as “political” and criticized the EOC and CRE for sponsoring *Coker* and *Osamor*. The Lord Chancellor did not discriminate indirectly because the pool he considered consisted of one person, Garry Hart. It emphasized the party political aspects of the position.

Sometimes an employer will create a post in order to employ a specific individual. *The most common example is the husband who appoints his wife as a part-time secretary*. In such circumstances no “vacancy” ever exists, no selection for a post ever occurs and there is no question of any requirement or condition being applied to anyone else. . . . May it not have been that the Lord Chancellor decided to appoint a Special Adviser only because he thought that Mr. Hart would be of value to him in that role? (emphasis added)

It sneered at *Coker*, who “manifestly did not have the attributes required of a Special Adviser to the Lord Chancellor.” As a postscript, however, the Court of Appeal opined, “It does not follow, however, the practice [of making appointments from a circle of family, friends, and acquaintances] is unobjectionable.” It concluded that, because the Lord Chancellor considered only one person, he did not recruit by word of mouth, and so its opinion was not an endorsement of this as a practice.

In July 1996, the *Lawyer* reported on a Swedish judge who challenged her government’s decision to appoint a man, whom she considered to be less qualified, rather than her as the Swedish judge on the European Court of Justice. Brita Sundberg-Weitman’s case, applying EC principles of discrimination law to the Swedish Government’s judicial appointments decision, is pending before the European Court of Justice in Luxembourg. Yet already, Isabel Manley of the

Law Centres Federation was using the case to criticize the British system of selecting judges: “Appointments will still be based not on objective tests of legal knowledge, but on sifting a bag of whispers collected from the profession.’ She said the UK could face costly discrimination claims as a result” (*Lawyer*, 2 July 1996).

Conclusions

If we think of courts not as servants of legislators, technical machines that implement policies developed elsewhere but as arenas for debates about politics and policies, then success in setting the terms of the debate is an important outcome. Courts represent an arena that feminists, even in the UK, should not ignore. Moreover, if we think of law as a discourse, then we can track significant discursive shifts through legal claims and legal opinions. In so doing, we can move well beyond the sterile debate of whether law is inherently patriarchal or a neutral tool for social change.

How do we assess the impact of these three cases? The Fawcett Society’s brief had little legal impact—the House of Lords denied the petition to intervene and did not refer to the petition or the issue in its opinion. Yet I argue that the case is significant for three reasons. First, a public interest law firm, Matrix, made the connection between international treaty obligations on women’s political participation and the composition of the English bench. Such a connection paves the way for future cases and debates highlighting the UK, not only as a laggard in diversifying its judiciary by international standards but as arguably not in compliance with its international treaty obligations. The intervention signals to insiders that a future claim to an international tribunal might be forthcoming. Such a case would be particularly embarrassing to a Labour Government that champions women’s increased political participation, particularly if it were to be advanced by the law chambers of the Prime Minister’s wife.

Second, the Fawcett Society, originating in the movement for women’s suffrage, has made the link between its campaigns to elect more women representatives in Parliament to securing women’s representation on the bench. I believe this to be the first effort of a women’s organization not within the legal profession to make such a demand. A giant step has been taken for a women’s group outside of the legal profession to move from the criticism of sexist judges to a demand for a representative judiciary, just as the National Alliance’s emphasis on the International Criminal Court shows its increasing European and international connectedness as well as a new focus on the composition of courts.

Third, the intervention questions not just the representativeness of the judiciary but also the legitimacy of an all-male panel. Judges and leading politicians may not be concerned about equality for women, but they are concerned about public perceptions that the judiciary is out of touch (Genn 1999, 240). Working to secure more women on the bench might be a way for the English judiciary to shore up its legitimacy.

The brief's significance, then, lies in providing concrete textual evidence of an important discursive shift—a shift not so much caused by Matrix and the Fawcett Society as perhaps reflected by them. The new consultation paper, however, *Constitutional Reform: A New Way of Appointing Judges* (Department of Constitutional Affairs 2003), does state that the current system of selecting judges no longer commands public support and the judiciary is “not reflective of the society it serves.”

The other two legal claims went farther. Both, I argue, cast the previous Lord Chancellor, already seen as elitist, arrogant, and prone to cronyism, in a bad light, paving the way for Prime Minister Blair to further perceive him as a liability. They further discredited the system of consultation (secret soundings) as outside of well-developed norms of equal employment opportunity. The EOC, which has long raised the issue of the importance of women on employment tribunals (Leonard 1987), explicitly challenged the method of selecting special advisors (and by implication, judges) as unfair. The EOC's support of this case signals that this pivotal player is connecting the dots between the implementation of equal employment opportunity policy and the composition of the judiciary and that it sees the connection between its championing of women's political participation and the composition of the Lord Chancellor's Department and the bench.

None of the plaintiffs anticipated success defined as securing a job or damages for themselves. None really expected to prevail in having equal employment opportunity laws applied to judicial selection or the lord chancellor's hiring.¹⁸ What they did accomplish, however, is having the norms of procedural fairness applied to the process. The Lord Chancellor looked exclusionary in his practices, and the judicial selection process emerged as anachronistic, out of step with modern hiring norms. The legitimacy of his office as well as his conduct in that office became more debatable, opening the way for both gender and nongender political challenges to win at a later time.

More important than whether the claimants received a remedy, however, is the fact that these cases demonstrate the ascendancy of equal employment opportunity norms, even somewhat outside of the jurisdiction of equality law. The conceptual construction of seeing the selection of judges and legal advisors as an employment process governed by (ascendant) equal employment opportunity norms is a

huge discursive leap forward. The new consultation paper *Constitutional Reform* recognizes the need to “follow modern best practice” and explicitly treats judges as employees, not merely by emphasizing the need for greater gender diversity throughout, but also by announcing new legislation to comply with European directives to allow judges and members of tribunals, as employees, to bring discrimination complaints (paragraph 112).

These three cases advance the feminist argument by linking demands for women on the bench to ideas circulating about representative institutions more generally, by concepts in international law, and by established norms of equal employment opportunity. Although these cases are significant developments, they are reflections of the strength of the ideas that are circulating as much as they are causes of conceptual changes in and of themselves. Ironically, although equal employment opportunity policies may have been disappointing in bringing about widespread social change for women workers, equal employment opportunity as a norm has become dominant. Feminists can now seek to extend this frame to judicial appointments and potentially to other issues as well.

Discourses do not work all by themselves. Instead, they must be marshalled by social movement entrepreneurs and elites. Feminists in the UK have made progress in framing the argument, despite little evidence of significant mobilization behind the issue. They have linked their cause to other efforts for judicial reform. I eagerly wait to see whether they will be able to mobilize effectively to ensure that the changes in the judicial selection system result in more women judges in future years.

NOTES

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1. In an interview, Annette Lawson told me that securing women judges on the International Criminal Court was the National Alliance of Women’s Organizations’ number one policy priority.

2. My interviewees feared that following the *Pinochet* case, the House of Lords was skittish about granting outside groups leave to intervene and were therefore less disposed than previously to accept its petition. The answers to the parliamentary question shows few petitions submitted, 4-7 per year. Most are granted, although in 2000 only 1 of 5 was granted and in 2001 3 of 9. (House of Lords Hansard, July 8, Column WA65, 2002 in response to Question HL4839 by Lord Lester of Herne Hill.).

3. I was a visiting research fellow of the Law Department of the London School of Economics on an Atlantic Fellowship from January to June 2002.

4. As a common-law country, Britain's closest comparators are the other Commonwealth countries. The number of women judges in member states of the European Union varies from more than 50% in France to just over 10% in Ireland and less than 10% on courts of the European Union. Those numbers are misleading because the numbers drop significantly when one analyzes only the highest courts (Anasagasti and Wuiaime 1999, 37–38).

5. In 1973, only 13% of newly admitted solicitors were women (McGlynn 1998, 95), and 10% of those called to the bar. Women are now more than half of all law students. As of 31 July 1999, the Roll of Solicitors was 35.4% women, up from 19% a decade ago. Women have been the majority of new admissions each year since 1992/93 (*EOR*, 84, March/April 1999, 9). In 2002, 22% of the practicing bar and 29% of practicing solicitors were women (Malleon 2003, 179).

6. Two of Britain's leading jurists had unconventional paths to office, yet both have unquestionably served with distinction. President of the Family Division of the High Court, Dame Butler-Sloss, did not go to university and was promoted to the High Court bench from what was regarded as the dead-end post of divorce registrar. She did, however, have the advantage of coming from a prominent legal family. Her father was a High Court judge, her brother was Attorney General and briefly Lord Chancellor, and her husband was a High Court judge in Kenya (*Guardian*, 23 March 2002). Lady Brenda Hale was a distinguished legal academic, served on the Law Commission, and specialized in family law (Kenney 2004).

7. Lord Mackay began reforms in the late 1980s when Parliament lifted the ban on solicitors arguing in lower courts. Lord Irvine had expressly encouraged women to apply for QC and judicial posts. Some judicial posts are now advertised and have job descriptions. A panel, which includes lay members, interviews candidates and makes recommendations. After the Peach Inquiry, the Appointment of Judges and Queen's Counsel recommended in December 1999 that there be a continuing independent audit of appointment procedures for judges, tribunal chairs, and QCs. The Lord Chancellor appointed Sir Colin Campbell to be the first commissioner for Judicial Appointments (*Lawyer*, 19 March 2001) and the commission issued its first report. These reforms have followed the advice of the House of Commons Home Affairs Committee's *Report on Judicial Appointment Procedures* in seeking to make the current system fairer rather than changing it.

8. 3 WLR 1456 [1998]. *R. v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte*. A Spanish magistrate granted a motion to seek to extradite Pinochet to stand trial for his alleged crimes against humanity in Spain. Pinochet, seeking medical treatment in London, appealed. The House of Lords allowed Amnesty International to intervene. On 25 November 1998 the House of Lords ruled (3–2) that Pinochet did not enjoy immunity for his alleged crimes while in office (Malleon 2000, 119). It then emerged that one of the five judges, Lord Hoffman, was a chairperson and unpaid director of Amnesty International and that his wife worked for Amnesty. Pinochet asked the House of Lords to set aside its decision, which it did. The next panel found the same result (6–1), although it reduced the possible grounds. The *Pinochet* case highlighted the importance of who

sat on the bench. Moreover, the specter was raised that the outcome of the case hinged on the luck of the draw. Lord Hoffman's name became widely known, and suddenly Britain's signature on international treaties, such as the UN Convention against Torture, had real effects.

9. The power of judicial review that it gives to the courts is limited. Rather than having the power to strike down parliamentary statutes or administrative rules on the grounds that they are inconsistent with fundamental rights, the Act gives the courts the power to declare a legislative or administrative act inconsistent, but then returns the issue to the government to remedy rather than fashioning its own.

10. Lord Irvine's record in changing the demographics of the judiciary was not inconsistent with his rhetorical opposition to change. *Labour Research*, the independent labor and trade union organization, analyzed the eighty-five appointments (one-eighth of all judges) of circuit judges and higher the Labour government had made in the two years since taking office in May 1997 (June 1999, 13–14). Only seven of eighty-five had been women. In the circuit bench and higher, women then accounted for 6% or the judiciary (45 of 692), exactly the same proportion as when Labour took office, and only marginally better than the 5% in 1994. Labour had appointed judges who are younger (55 years compared with 60) than the judiciary as a whole, but the Labour appointments were more likely to have been educated at public (i.e. private) schools (79% versus 69%) and Oxford or Cambridge (73% versus 64%) than the judiciary as a whole.

11. The Lord Chancellor appoints all judges to higher judicial office without the assistance of a nominating commission, without the need for parliamentary confirmation, and largely without any interference from Downing Street (Kenney 2003).

12. He redecorated his state apartments with wallpaper that cost £300 a roll, for a total cost of £650,000 (*Times*, 25 February 2002). Just before he was let go, he was pilloried in the press for his £22,000 pay raise and then afterward for his enormous pension. For many, Lord Irvine's lavish lifestyle is evidence that New Labour is not so much interested in changing the distribution between rich and poor as including Labour elites in the privileges of the rich, not about making government work for the disenfranchised, but ensuring Labour members access to the spoils of government.

13. Linda McDougall has written an account of the Labour women (labeled "Blair's babes" by the sneering tabloids) titled *Westminster Women* (1998).

14. See the Fawcett Society's *Selection Watch*, which monitors how the parties are doing in selecting women to stand for elective office. Available online at: <http://www.fawcettsociety.org.uk/pdfs/Archive%20Selection%20Watch%2001.pdf>.

15. *R. v A.*, [2001] 3 All ER 1. Not all feminists agree that no evidence of a victim's prior sexual history with the alleged victim should ever be allowed. At a meeting decrying the low numbers of women judges held at the House of Commons in 2002, Lady Helena Kennedy spoke passionately about women not getting their rights by denying the rights of others.

16. Impartiality, however, is a double-edged sword. If gender is a basis for impugning impartiality, then women judges are more likely than men, as the nondominant group whose difference is foregrounded in social interactions, to have their impartiality challenged by litigants. In Canada and Australia, women judges are more likely than men to have their impartiality challenged by litigants (L'Hureux-Dubé 2001). At the 2002 meeting of the International Association of Women Judges in Dublin, for example, five women judges from around the world heard a mock statutory rape case, and all rejected the prosecutor's challenge that the panel was biased because they were all women. But the laughter at the argument suggested much agreement with the opposite claim, that fairness required women to participate in judicial decision making. The argument is not going to go away. The small delegation of English women judges could not escape embarrassing comparisons to the size of the American, Canadian, Ugandan, and Taiwanese delegations.

17. The minority view of the tribunal was that Coker did indeed suffer a detriment, the opportunity to be considered for a post.

18. Hayes, at least, appears to have damaged her chances of being appointed a QC. *Independent*, 24 September 2002.

19. Additional pressure comes from the existence of a nominating commission in Scotland that has made a more diverse bench a priority, minimized the power of judges, and eliminated the use of secret soundings. See Alan Paterson 2004.

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