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BREAKING THE SILENCE: GENDER MAINSTREAMING AND
THE COMPOSITION OF THE EUROPEAN COURT OF JUSTICE

(Accepted July 2002)

ABSTRACT. Why has it taken so long for member states to appoint women to the Court of Justice? Despite having won relatively significant policy instruments for equal treatment at work and high levels of legislative representation, women in the European Union have been slow to extend the demand for gender mainstreaming to courts. Prior to 1999, the Court of Justice had had one woman member until Ireland appointed Fidelma Macken in late 1999, and Germany appointed Ninon Colneric and Austria appointed Christine Stix-Hackl Advocate General in 2000. The 1995 U.N. meeting in Beijing was a catalyst for the demand for balanced participation of women and men in decision-making processes within the E.U., and it coincided with Sweden, Finland and Austria joining and championing the cause of gender equality. In 1999, the Commission published a report on women in the judiciary and women lawyers began to organise across Europe. After tracing the appointment process, I review the European Parliament's role in championing women on the Court and consider recent developments. Courts, particularly supranational and federal courts, are representative institutions even if their representative function differs from legislatures. Non-merit factors have always been a factor in judicial appointments and thus the demand for women on the bench is not a terrible deviation from merit. An all male bench is no longer legitimate.

KEY WORDS: Court of Justice, gender representation, judicial selection, women judges

1. INTRODUCTION

The walls of the robing room of the Court of Justice are lined with portraits of previous members, all men in the fifty years since it began as the court for the European Coal and Steel Community in 1952 but one. The three new women members, Judge Macken, Judge Colneric, and Advocate General Stix-Hackl, were sworn in as the European Commission issued a report that finally extended its longstanding call for the inclusion of women in positions of decision-making to the judiciary. The European Womens' Lawyer Association Congress held its founding meeting in March 2000, and in Germany, Sweden and the United Kingdom, women used employment discrimination law to challenge their exclusion from judicial positions and questioned the legitimacy of decisions issued by all-male courts.



Feminist Legal Studies 10: 257–270, 2002.

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This paper applies the concept of gender mainstreaming to judicial selection. It is not surprising that feminists have been slow to tackle the issue because the process of selection is secretive, idiosyncratic to member states, and the Court issues a single collegiate judgment and is studied more for its doctrines than its politics (de Búrca, 2001, p. 1). Scholars have mostly characterized it as favourable to feminist arguments (Barnard, 1995; Hoskyns, 1996; but see also Ellis, 2000, p. 1425). Women's organisations have only recently framed gender along with nation and legal systems as a legitimate candidate for representation. How is the concept of representation different for courts and legislatures? Who do women on the bench represent, and why is their presence important?

2. GENDER MAINSTREAMING AND COURTS

Gender mainstreaming moves beyond the arenas of equality law or even women's issues to analyse policies for their effect on equality between men and women (Beveridge and Nott, in this issue; Mazey, 2000, p. 37; Rees, 1998; Shaw, 2000). It might seem that counting and calling for women to be part of decision making is but a minor item on the agenda, a liberal feminist demand to be merely included. But if one delves deeper into why women must be present at the centre of power as issues are framed and agendas constructed, then the demand for women judges is intrinsically linked to putting all public policies under a gender lens. Contemplating the paucity of women judges leads quickly to identifying formal and informal barriers. In the United States in the 1970s (Cook, 1988) as in Britain in the 1990s (Malleon, 1999; McGlynn, 1999) feminists, as well as calling for more gender-balanced results, demanded changes in the process of selection, removing it from the exclusive purview of the elite of the legal profession and calling for the inclusion of lay members on merit advisory panels. They demanded that the pool of candidates be widened and that the list of qualifications be rethought.

But putting women on the bench was more than an end in itself, it was a means to change judicial behaviour. It is no accident that the demand for women on the bench emerged at the same time as feminists were turning to the courts for public policy changes. Feminists wanted judges to stop demeaning women lawyers, clients and witnesses (Kennedy, 1993). They wanted judges to stop blaming rape victims and battered women for their assaults. They wanted lesbians to retain custody of their children, and housewives who had sacrificed for a husband's career to receive maintenance. In short, they wanted the bench to adopt a gender analysis of all questions before the court, from criminal law, to family law, to taxation and

inheritance. They wanted to ensure that judges did not overturn their policy gains, they wanted further progress through legal interpretation, and they wanted issues framed in a feminist way. Feminists knew that part of their strategy must include having a voice at the table when judges deliberated.

Although American feminists have not embraced the term gender mainstreaming, one of their most important policy successes – the movement to undertake gender bias taskforces – could be understood under this rubric (Resnick, 1996; Schafran, 1987; Wikler, 1989). Begun first in the state of New Jersey, state supreme courts (and now federal circuits) sponsored investigations into their own practices. (It was often the women appointed to state supreme courts who called for the creation of a taskforce.) Having both the virtue and the limitation of being conducted by a committee which included judges alongside social scientists, such studies often took the form of questionnaires to members of the bar, public hearings, and investigations of particular areas of case law, most often divorce, custody and domestic violence cases. The results were compelling. Women lawyers complained of widespread harassment and demeaning treatment, studies documented enormous discrepancies in judicial treatment of cases on divorce and domestic violence, and the public testified to the perception of bias and unfairness. Perhaps most importantly, the process raised the consciousness of male judges who turned to their women colleagues for reassurance that ‘such things never happened to them’, only to be told that they did. The growing awareness of a few judges and a report documenting findings was followed by modest efforts of the judiciary itself to correct the wrongs uncovered. As more states undertook similar searching self-study, it became harder not to participate. Now, more than thirty jurisdictions have produced reports. In the U.S., the demand for women on the bench led quickly to a demand for an analysis of how courts conducted their business. Initial calls for women on the European bench, however, have not produced a similar mobilisation.

3. GENDER AND JUDICIAL APPOINTMENTS AT THE COURT

History

The E.U.’s founders considered different methods of selecting judges (Feld, 1963, p. 53, n. 68), including a role for Parliament similar to the Assembly of the Council of Europe’s role in choosing judges for the European Court of Human Rights. Article 223 of the Treaty of Amsterdam states that the judges and advocates general shall be appointed by common accord of the governments of the member states for a renewable term of six years. In practice, each member state government follows its own internal

selection procedure and simply informs the Council. Fifteen judges sit on the Court, one from each member state. Also sitting are nine advocates general. Members are former judges, civil servants, politicians, practicing lawyers, and professors.

Appointments to the Court receive little attention (Feld, 1963; Kenney, 2000; Scheingold, 1963). One explanation is that Europeans accept and consider normal a higher degree of secrecy and that, consequently, judicial appointments are one of many matters left to elites. In Britain, for example, Parliament neither scrutinises nor approves judicial appointments (Malleon, 1999, pp. 79–155). Even the appointees themselves claim to know little of the processes that lead to their own appointment. But a more powerful explanation is that law and politics are generally viewed differently. Scholars and judges alike resist classifying and studying the Court as a political institution, despite its evolving constitutional status. This denial of the political role of courts persists, notwithstanding the increasing role of national courts in shaping public policy in France (Stone, 1997), Germany (Kommers, 1997) and the United Kingdom (Sterett, 1997), as well as the growing impact of supranational courts.

Each country must face the task of representing its own set of interests and cleavages: party, language, region, legal system, governmental department. Just as the leadership of E.U. institutions must be balanced among the member states, within member states themselves, a different balancing process occurs. Parties or languages may have to be balanced across Court appointments: advocate general, judge, judge at the Court of First Instance, or across international courts such as the European Court of Human Rights or International Court of Justice. Appointments to the Court sometimes display many of the same features of diplomatic appointments: exile for a party luminary who is in trouble, a retirement prize for exemplary public service, the removal of a competitor within a party, or a consolation prize for a failed judicial appointment at home.

Appointment to the Court is political in the sense that personal connections to the appointing executive and party credentials are paramount, even if the appointments are not motivated by specific policy goals. Appointments are not made strictly on merit. Two examples illustrate this. The Belgian government's appointment of Melchior Wathelet in 1995 drew the wrath of Members of the European Parliament both on the grounds of his judicial abilities as well as concern about events during his tenure at the Belgian Ministry of Justice (Helm, 1996, p. 11; *Agence Europe*, 1997). Ireland, too, has appointed politically connected top jurists who may know little about E.C. law. O'Dalaigh, former Attorney General and Chief Justice served fewer than two years and left complaining of difficulty with both the French language and European Community law.

The first women members

Prior to 1999, only France had appointed a woman, Madame Simone Rozès, as advocate general in 1981. Rozès had served as a judge on the *Tribunal de la Seine* before being appointed President of the *Tribunal de Grande Instance*. She oversaw the *École Nationale de la Magistrature* for the Ministry of Justice and subsequently left the Court to serve as First President of the *Cour de Cassation*. President Mertens de Wilmars remarked on the significance of her appointment, “a reflection of the finest spirit of modern times”, and on the Court’s commitment to equal treatment for men and women in its rulings. He concluded that she was chosen neither because of, nor in spite of her gender, but because she was the best person for the job (1982, p. 76). The appointment of Rozès had nothing to do with feminism; no evidence suggests that France appointed Rozès because of gender nor had feminists in France or the E.U. organised on her behalf.

When asked for their opinions as early as 1994, members of the Court were defensive about the absence of women. The well-rehearsed answer was that the new Scandinavian members could be counted on to appoint women members. They did not, although Finland and Sweden appointed women to the Court of First Instance in 1997. It was not until 1994 that the absence of women generated press attention (Court Chambers, 1994, p. 13).

In 1999, Ireland appointed the first woman judge, former High Court Judge, Fidelma O’Kelly Macken, a barrister specialising in commercial law who taught at Trinity College, Dublin. Characteristic of the low-level of press attention any Court matter receives, most accounts confined themselves to merely noting that she was the first woman judge. Judge Macken herself actively refused to participate in any ‘what is it like to be the first woman’ interviews, downplaying the importance of her gender. The tone of the *Financial Times*, however, was different. Entitled “Her Turn”, the article stated:

Not that the Luxembourg-based body is itself entirely free from the spectre of sexism. It seems that Macken is, amazingly, the first woman judge to sit on the court in its 47-year history. (People at the court blame the member states for only putting forward middle-aged males up to now.) It is almost worth taking action over. (September 28, 1999, p. 17)

For feminists, Germany’s appointment of Ninon Colneric to the Court is a watershed, yet it, too, generated little publicity. Colneric has a Ph.D. from the University of Munich and has been a part of the E.U.’s Equality Network. As President of the Labour Appeals Court of Schleswig-Holstein, she worked to dismantle the barriers to women serving as lay

members of industrial tribunals simply by grouping openings so that several positions could be filled simultaneously.

Advocate General Stix-Hackl came to the Court with a background in legal diplomacy. Not only had she been on the team negotiating Austria's accession to the E.U., but she had also argued cases before the Court. Austria's selection process differs from most member states; the candidates name is submitted to the legislature and both houses and the president must agree. Hearings are open and the qualifications presented and defended. She reports that gender played little role in the discourse surrounding, or justification for, her appointment.

The European Parliament champions the appointment of women

Few voices have demanded increased public participation in judicial selection. Joined by the occasional editorial writer (Carvel 1992, p. 27), and the Bavarian Minister for European Affairs, Thomas Goppel (*Agence Europe*, 1993), the *Economist* recently (1997) called for either the European Parliament or national Parliaments to play some role in judicial selection. The Court, with a few exceptions, however, is adamantly against such involvement as a threat to its independence.

Members of the European Parliament first raised the question of judicial selection and the gender composition of the European judiciary to little effect. The European Parliament's power lies more in the ability to question and scrutinise the Council than in proposing and controlling legislation, although its powers are growing concomitant with the widening scope of E.U. activities and worries over the so-called democracy deficit (Westlake, 1994, pp. 106–109). The most important decisions are made secretly by non-elected bodies (the Commission, the Council, or the Court).

Parliament has made repeated requests for a greater role in judicial selection. As early as 1980, MEPs Sieglerschmidt and Glinne submitted written questions to the Council asking why Parliament had no role and why the process differed from the Council of Europe's (Jackson, 1993, p. 220; Linehan, 2001). In 1982, as part of a proposed reform of the Treaties, Parliament once more called for greater participation. In 1989, with the creation of the Court of First Instance, 261 members signed a written declaration calling for member states to appoint women to the Court of First Instance. In 1993, the European Parliament passed a resolution calling for Parliament, in conjunction with the Council, to appoint judges to the Court by majority vote for a non-renewable terms of nine-years, a proposal that was incorporated into Parliament's proposed Constitution. Furthermore, in 1993, MEPs Alber and Medina argued that

the Court's transformation into a constitutional court rendered the inter-governmental method of selection outdated. MEP Ortega claimed the Court lacked "transparency and democratic accountability" and called on the Council to consult the Committee on Legal Affairs and Citizens Rights. Neither members of the Legal Affairs Committee nor the Women's Committee seem to have pressed the issue recently, although feminists have protested against the small number of women appointed to the convention to draft a new constitution (*CREW Reports*, 2002, pp. 1–2).

Why 1999? The pipeline or pool argument does not provide a satisfactory explanation (Cook, 1987). Although women in Europe have joined the legal profession in numbers comparable to the U.S., they have not been able to penetrate the inner circles from which prestigious judicial appointments are made. In the United Kingdom, for example, women may be barristers, professors, or even Queen's Counsel (top 10% of the Bar) but they have not served as Treasury counsel. Ireland, likewise, has always sent one of its top three judicial officers. Fidelma Macken was a barrister, professor and 'only' a high court judge. Qualified women abound, but, if member states set as the criterion cabinet member and best friend to the prime minister, rather than competent jurist, fewer women may have the necessary 'qualifications'. If the Council, or even member states, made judicial appointments in groups rather than singularly, they would be more likely to look for balance and representativeness.

Recent developments

In 1995 two things happened. First, the E.U. actively participated in the Fourth World Conference on Women in Beijing (Pollack and Hafner-Burton, 2000, p. 435) which resulted in calls for the balanced participation of women and men in decision making, codified in the Fourth Action Programme for Equal Opportunities (1996–2000) and supported by a Council Recommendation to Member States (Anasagasti and Wuiame, 1999; Mazey, 2000, p. 342; Shaw, 2001b, pp. 2–7). Second, appointees from three new member states (Austria, Finland, and Sweden) actively promoted greater gender equality.

The demand for equal participation in decision making took some time to trickle into the legal arena. Anasagasti and Wuiame's 1999 report, *Women and Decision-making in the Judiciary in the European Union*, was the first occasion that the Council, the Commission, the Directorate-General for Employment and the Equal Treatment Unit addressed the paucity of women on the European bench. The report recognised that balanced participation is necessary for the legitimacy of all representative bodies and pointed to the increasing law-making power of judges.

The report mirrored the gender bias taskforce investigations in the United States. The investigators conducted a survey of men and women on the bench and collected data, and whilst they recognised that the number of women judges is increasing, they documented both vertical segregation (the glass ceiling) and horizontal segregation (ghettoising women into a few specialties). The recommendations of the report are familiar: to identify the discretionary criteria (politics) that enables some judges (men) to rise to higher levels of appointment, to make the procedures more open and transparent, to generate policy support at top levels and monitor the percentage of women, and lastly, the report challenged member states and the E.U. to examine working patterns that favour male norms, and that make family life difficult and create hostile working environments and conditions.

The survey revealed that a significant minority of judges (more women than men) believe that gender makes a difference in certain kinds of cases, such as violence against women. The report discusses the structure of the judiciary and path to higher office in member states and notes that only Austria and Sweden have a positive action policy in favour of women in the judiciary. Their interviews reveal criticism both of the number-of-years-of-service criterion for promotion, as well as the objectivity of so-called merit criteria. The variation among the number of women judges in member states is intriguing and the gap between the number of women lawyers, women in member state courts, and women in European courts is unexplained. Public prosecutors were the most vocal about barriers to achievement and the survey revealed that women judges were more likely than men judges to report barriers to women's advancement.

Not only did the E.U.'s equality policy make a dramatic shift from equal employment opportunity to gender mainstreaming in the 1990s, but the Amsterdam Treaty made equality between men and women (as opposed to just equal treatment in employment) a central goal of the European Union and explicitly affirmed positive action (Fredman, 1998). The German *Länder* had each actively debated their equal opportunities policies and had come up with different results (Colneric, 1996). Yet according to Judge Colneric, when the Court struck down an affirmative action policy in *Kalanke v. Land Bremen* (Case C-450/93 [1995] ECR I-3051), German feminists for the first time openly criticised the all-male composition of the Court. British feminists made similar arguments about the illegitimacy of the all-male House of Lords deciding whether a rape shield law violated a defendant's human right to a fair trial. Furthermore, courageous women in the U.K. and Sweden argued that their countries' methods of selecting judges are indirectly discriminatory. The extension to the bench of the

discourse on balanced decision-making coincided with the application of the principles of employment discrimination to the informal methods of judicial selection operative in most member states. What is more, the critique of an all male bench resonated, not only because principles of equality and gender mainstreaming were becoming more central in the E.U., but because the E.U. itself craved greater democratic legitimacy and public approval.

In addition, women lawyers were beginning to organise. The Association of Women Solicitors and Association of Women Barristers in the U.K. in the 1990s joined the Equal Opportunities Commission in demanding that the Lord Chancellor appoint more women to the bench and reform the judicial appointment system (AWB, 1996, pp. 191–197; AWS, 1996, pp. 198–200; EOC, 1996, pp. 210–215). The European Women Lawyer's Association held its founding conference in 2000 (Schmidt am Busch, 2000). Moreover leading women lawyers such as Cherie Booth (wife of the British Prime Minister), a barrister, Queens Counsel and part-time judge, called the figures for the number of women judges “discouraging”. She said that if the higher ranks of lawyers and judges did not become more representative of the community, public confidence in the law and justice system would not be maintained (Dyer, 2000, p. 13). Thus women began to marry the discourses of balanced decision-making and equal employment opportunity to question the legitimacy of an all-male bench.

4. JUDGES AND REPRESENTATION

Why does it matter who judges are? Why is an all-male bench unacceptable? Should courts be representative? Should representativeness be a more important factor of consideration in the appointment of judges to supranational or international courts than to national courts? Representative means many things. Pitkin distinguishes two different meanings of representation: ‘standing for’ and ‘acting for’. Legislators are clearly engaged in the latter – whether one sees their function as merely conveying fully formed pre-existing interests and preferences, or as deliberating, constructing the policy agenda and actively constructing what is best for the public, or at least constituents. Perry argues that any kind of ‘acting for’ representation conflicts with judicial independence (1991, p. 10). She distinguishes between appointments based on merit and representativeness. Clearly, if judges are representatives, the nature of that representation is very different from legislators. Rather than taking instructions from constituents, or at least acting on their interests and making bargains so as to ensure re-election, the judicial role requires judges to be independent

rather than delegates. In a democratic system, judges are to decide cases according to law, not popular opinion, governmental instruction, or even their own policy preferences.

Perry's conceptual dividing line, however, obscures the fact both that representativeness and other non-merit factors have *always* been a factor in judicial appointments (Hale, 2001, p. 493), particularly in judicial appointments to federal, constitutional, international and supranational courts and, more importantly, are defensible and legitimate considerations. The question is merely what factors need representing? Geography and political entity (region, state and nation) have always been central. It is convention and not treaty that has dictated that there be one judge from each member state. As the European Union enlarges, such a system may be unworkable (Arnulf, 1999b, p. 522; van Gerven, 1996, pp. 217–219; Weiler, 2001). The political consequences of not having a judge from each member state and the consequent problem of legitimacy become apparent when one considers whether Ireland would accept a decision by the Court that it had to allow the advertisement of abortion services available in London if no Irish judge had sat on the case? Or whether Denmark would accept that it had illegally restricted contractors on a bridge to Danish contractors if a Danish judge had not been president of the Court which issued the ruling? Or whether the United Kingdom would accept that the Equal Treatment Directive did indeed mean that employers could not fire pregnant workers if a former chairman of its own national Employment Appeal Tribunal had not sat on the case? Ensuring the compliance of national courts and governments has been difficult even when a member from the country concerned, who can explain and defend the Court's rulings, has participated in the case (Weiler, 2001, p. 219).

To manage its burgeoning caseload, the Court increasingly hears cases by 'chambers' – panels of three or five judges. This presents the possibility that judges from smaller member states could make rules binding the larger member states. A concerned President Mackenzie Stuart stated:

I dislike the word 'representative' although it is one much used by commentators, particularly in the responsible government departments of Member States, since we do not 'represent' anyone, but none the less it is a word of some significance, if understood in the proper way. That is to say, in order to carry conviction, both to the litigant and the Member States, a decision of this Court should be pronounced by a body which represents a sufficiently broad spectrum of legal thinking. In the eyes of many, a Court of three is too restricted. (Mackenzie Stuart, 1983, p. 126)

Nation, then, becomes a proxy for legal thinking, despite the fact that several countries have more than one legal system.

A third factor long recognised as important in the representativeness of courts has been political party (Volcansek and Labron, 1988, pp. 15–

41). In the E.U., each member state makes its own decisions as to how to balance party. In Germany, for example, judicial appointments alternate between the parties, and in Austria, party affiliation is an indispensable qualification.

Other exceptions to merit are the obvious ones of friendship, political connections and political ideology. Rewarding friends, getting rid of competitors, or, as speculation would suggest, avoiding having to appoint particular women to seemingly more important domestic courts, are all concerns that have shaped the composition of the Court. Representativeness, thus, is not some horrible deviation from the ideal or practice of strict merit appointments; the Council does not choose the most qualified person in the entire E.U. when a vacancy arises, it chooses one per member state.

The concept of merit does have some content. Judges should be well versed in E.C. law (although not all have been), be fluent in French (although not all have been), have astute legal minds and have strong research and writing skills (Weiler, 2001, pp. 221, 224). But once past this threshold, in the top echelons of the legal profession merit does not, nor should it, solely determine who gets appointed. Just as Pitkin and Phillips would argue that in order to understand representation we need to know how we conceptualise democracy and legislative activity, similarly, in order to think about how judges should be representative, we need first a theory of what judging is. Some decision-making is discovering the right legal answer in the sense that some decisions are more consistent with precedent or treaty provisions than others. But other forms of decisions mean complex policy choices rather than the simple application of technical legal rules. So what does merit mean in such cases? The person who can recite the most case law? Or the person who makes the wisest balance between competing claims? The one who has argued the most cases before the Court? Or the person most committed to the European ideal rather than defending national sovereignty? Once judging is conceived as making choices about public policy, less justification exists for allowing only a narrow segment of the legal profession to serve, rather than those with different kinds of expertise. Such a recognition also leads to demands for greater public accountability in judicial selection. For good or for ill, we are on a trajectory of transferring more political power to courts, from the South African Constitutional Court to the International Criminal Court, and how we decide who sits on these courts will only become more important over time.

If judges are neither legal technicians nor legislators, how should we think of them as representatives? (Cook, 1988; Martin, 1993; Stevens, 1997). Pitkin dismisses descriptive representation because she sees legis-

lators as 'acting for' not 'standing for' constituents. For Pitkin, no necessary relationship exists between one's characteristics and one's ability to represent one's constituency. Feminist men judges can advance the equality agenda just as antifeminist women judges can impede it. Justifications for the inclusion of women often quickly dissolve into discussions of women's difference, a discussion that is perilous. Arguing for difference contradicts the arguments of the last century for the integration of women into the legal profession in which feminists argued that women were as capable of reason as men. Furthermore, asserted differences between men and women are prone to reification, to being essentialised and, ultimately, rebound against women as a group (Kenney, 1992). They may also lead to challenges to the partiality of women judges. Much of the strand of the 'different voice' research on women judges has drawn upon the work of Carol Gilligan (1982). Applied to law, Gilligan would argue that women judges employ a moral calculus of justice more concerned with the connection of relationships than a hierarchy of abstract principles. They employ an ethics of care; they are more rooted in social context than in legal abstractions and are legal realists as opposed to legal formalists. One of the many problems with this line of argument is that it does not appear to be empirically true (Davis, 1992, 1993). Social scientists have found little evidence that women on the bench have a different voice and women judges themselves vociferously deny that they reason differently from men (Hale, 2001, pp. 498–501; Wald, 1992).

If women judges neither promote a singular women's point of view or different voice and style of reasoning, nor represent women in the sense of taking instructions from them, there is still a way in which their presence on the bench is important in both Pitkin's symbolic 'standing for' sense of representation as well as in the 'acting for' sense of representation. The best analogy is legal system and nationality. No one argues that British judges do or should take instructions from the British government in deciding cases. But presumably, it is important to have a British judge on cases not for the narrow purpose of advocating British interests, but for bringing to bear on deliberations British ways of considering a issue. For this to be intelligible, we have to infer neither a singular British interest nor a British point of view. The presence of the British judge is not merely for legitimacy in a limited and cynical sense to 'sell' the decision back home, but is to legitimate it through his or her agreement with the outcome and participation in the decision. If a British judge concludes that E.C. law dictates that the British government has lost its case, one has more confidence that the 'right' answer has been reached, just as when a feminist judge concludes that the current rape shield laws have gone too far to deprive defendants of their human rights.

As Phillips argues, Pitkin is too quick to dismiss the idea of descriptive representation (2001, p. 226) and perhaps should consider a weaker form of 'acting for'. In arguing for positive action to increase the number of women legislators, Phillips points out that even though we reject essentialism, we think the idea that men should speak and act for women is patronising. Increasingly, we believe that those affected by public policy should, if capable, participate in its development. To exclude them suggests that they lack the capacity for self government. Including women on the bench indicates the belief that women are capable of judging and symbolises the consideration of their experiences and perspectives.

It matters what experiences one bring to the bench. Too often, however, gender is used as a proxy for a whole range of experiences, most often motherhood, but also discrimination. Feminists should promote the distinctive perspective that women bring to the bench with caution. The experiences men bring to the bench are important and we should evaluate them alongside their legal abilities. How varied have their life experiences been? Have they made a payroll, defended the indigent, cared for sick loved ones, navigated the health care system with a debilitating disease? As we advocate the experiences women bring to the bench, we must take care not to essentialise men and women's differences. It is more significant that Ninon Colneric has been part of the Gender Equality Network than that both she and Simone Rozès are women. Sharing an identity does not directly translate into fixed judicial ideology. Still, it does matter who serves on the bench and what experiences those people bring to judging. As Phillips argues, the more ill-defined the interests and weak the methods for holding representatives accountable, the more important is the question of who the representatives are (2001, p. 236). What is more, it matters not just in the 'standing for' sense of descriptive representation, or the symbolic 'standing for' sense of representation, but in Pitkin's sense of 'acting for'. Recognising this fact does not mean that judges lack independence. As judges assume ever more policy making power, they run the risk of being further distanced from the experiences of the millions of people whose lives are shaped by their decisions. Given this awesome power, it is important that we draw judges not just from the best legal minds of the E.U., but from the diversity of experiences within it. It is not a big leap from the unquestioned position that someone from the U.K. must be on the Court, to the position that there must be women on the Court. It is better to argue for the symbolic importance (in the strong sense) of women on the bench, and the multitude of experiences (plural) women bring to the bench, than to fall into the trap of talking about women's essential difference from men and the distinctive 'voice' (singular) they add to the bench.

5. CONCLUSIONS

Gender mainstreaming calls for moving beyond tokenism towards a genuine integration of women into all aspects of decision-making; for moving beyond the elimination of formal barriers to equal employment opportunity, to challenging implicit male norms that privilege men. It calls for reflection on the gender order and gender contracts, not just after policy is made, and not just on women's policy. The demand for women on the bench shares many of these features although European efforts with regards to gender mainstreaming have not prioritised appointments to the bench. Employing Pitkin's conceptual analysis of representation allows us to reconfigure courts as representative institutions – albeit different kinds of representative institutions from legislatures. Feminists are not deviating from established norms of judicial appointments in calling for representativeness to be a factor, they are merely extending the argument to include gender along with nation, region and legal system, as one factor meriting consideration. Not only might a more diverse bench construct its answers to legal questions differently, but recent events suggest that judicial selection systems that never generate women as the best person for the job will be increasingly subject to challenge under equal opportunity norms, and that all-male judicial panels ruling on positive discrimination, caring labour, abortion and other sensitive gender issues will be increasingly called into question. Whether one wants better deliberation, truly meritorious selection, or legitimacy and compliance, all are served by a Court that includes women members.

ACKNOWLEDGMENTS

Thanks to the Atlantic Fellowship in Public Policy for funding. Thanks to Caroline Naome, Fionualla Connolly, Judge Colneric, and Advocate General Stix-Hackl for interviews and Diana Faber, Carol Harlow, Kate Malleison, and the editors for comments.

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