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More Women – But Which Women? A Reply to Stéphanie Hennette Vauchez

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Abstract

This article responds to a thoughtful intervention by Stéphanie Hennette Vauchez documenting the selection process for women seeking judicial appointment to the European Court of Human Rights. Written in the context of the author's experience as candidate for appointment to the Court, the analysis concentrates on the gendered dimensions of international institutional cultures, habits and practices that frame selection to judicial office as much as any formally applicable rules. I explore the ways in which ostensible access to international judicial bodies conceals the manifold ways in which Courts are coded masculine, and how female candidacy requires careful deliberation on performance, presentation and identity. Drawing on 'new institutionalism' theory, I underscore that female presence alone rarely undoes embedded institutional practices. Rather, transforming institutional practices and values must parallel female presence, thereby redefining the institution and the forms of power it exercises. The article concludes by reflecting on the importance of feminist judging, and argues that it is precisely the transformative political and legal changes sought by self-defined feminists that may stand the best chance of undoing the structures, habits and practices that continue to exclude women from being appointed and from engaging on terms of full equality when they arrive.

The article by Stéphanie Hennette Vauchez comprehensively assesses the candidacy of multiple female candidates to the European Court of Human Rights over many decades as a prism to evaluate the ways in which (or not) access to judicial appointment on the European Court of Human Rights has been enabled for women.[1] The nomination and appointment process also provides a means to address the gender dynamics of judicial appointment broadly conceived. Her

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[1] Hennette Vauchez, 'More Women – But Which Women? The Rule and the Politics of Gender Balance at the European Court of Human Rights', this issue, at 195.

article offers an empirical lens upon the accessibility of judicial appointment for women in the European institutional context. While there has been substantial scholarly writing on appointment processes, gender diversity and barriers for women judges in law and political science writings over the years,[2] much less attention has been paid to the terrain and the dynamics of international judicial appointment for women.[3]

Invariably, it seems, a focus on gendered judging raises questions of legitimacy.[4] Unlike the conversation about the vast majority of courts gendered male, asking about women's representation (equal or not) instantly raises questions about the legitimacy of legal process in the presence or absence of the female judicial appointees.[5] In an oddly circular way, the very fact of paying attention to women judges (or the absence of women as judges) singles out the female judge (or potential judge) as the representative of her sex, invokes (intentionally or not) the spectre of gender essentialism and results in a level of scrutiny for female judicial candidates and judges that their male counterparts rarely encounter on the basis of sex.

In offering some views that parallel Hennette Vauchez's article, I address two separate matters. First, drawing on the insights of feminist perspectives on new institutionalism,[6] I address the ways in which international judicial appointment processes function as an extension of the institutionalized culture being accessed. Second, I address the importance of feminist judging and the value of assessing why we should not only count the women who are appointed to international courts, but also pay attention to whether, in fact, there is any discernible commitment by women appointees to feminist method, practice and outcomes.[7]

[2] See, e.g., K. Easterling and S. Anderson, *Diversity and the Judicial Merit Selection Process: A Statistical Report*, available at www.judicialselection.us/uploads/documents/Diversity_and_the_Judicial_Merit_Se_9C4863118945B.pdf (last visited 15 Feb. 2015); Kenny, 'Choosing Judges: A Bumpy Road to Women's Equality and a Long Way to Go', *Michigan State Law Review* (2012) 1499; S. L Kimble and M. Rõwekamp (eds), *New Perspectives on European Women's Legal History* (2015)).

[3] In the context of the ECHR, only one substantial piece of writing has been generated. See Mowbray, 'The Consideration of Gender in the Process of Appointing Judges to the European Court of Human Rights', 8 *Human Rights Law Review* (2008) 549; See inter alia, Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?', 12 *Chicago Journal of International Law* (2012) 647.

[4] This question of legitimacy arises instantly in Hennette Vauchez's article, *supra* note 1, at 195–197.

[5] See, e.g., Tulkens, 'Parity on the Bench: Why? Why Not?', 6 *European Human Rights Law Review* (2014) 587, at 588–591.

[6] 'New Institutionalism' describes a body of work sharing the view that institutions are important for shaping political outcomes. This work addresses sociological, economic and historical variants. Institutions are conceived of as organizations made up of a set of norms that function as actors in their own right, such as a parliament, court or executive.

[7] Clearly self-identified feminist judges include Justice Bertha Wilson of the Supreme Court of Canada, who 'demonstrate[d] an understanding and engagement with feminism'. McGlynn, 'The Status of Women Lawyers in the United Kingdom, in U. Schultz and G. Shaw (eds), *Women in the World's Legal Professions* (2003) 308. Feminist international judges include Hilary Charlesworth, ad hoc judge on the Internationational Court of Justice (2013–2014), and Justice Elizabeth Odio Benito, former Vice-President of the International Criminal Court. I note that while the title of Hennette Vauchez's article asks the question 'which women', the issue of the feminist judge is not as substantively addressed in her analysis.

I Institutional Encounters

There is a tendency, in the study of international institutions, as Barnett and Finemore have pointed out, to foreground the 'input' and 'output' of these bodies, and to pay little attention to the institutional cultures that sustain and enable their particular modalities of operation.[8] I take seriously the idea that the judicial appointment process constitutes part of the institutional culture of the European Court of Human Rights, and that the form, variance and performance requirements act as a barrier to and regulation of the entry of women to the bench – and arguably creates pathways for certain kinds of women who perform in particular ways.

Hennette Vauchez frames her analysis by reference to a cosmopolitan democratic citizenship, and its relationship to the legitimacy of international courts. In parallel, I address the ways in which a comparative analysis of the politics of gender has brought fresh attention to the operation of legal and political institutions across the globe.[9] In paying close attention to the dynamics of political and legal institutions (including courts), we have a cogent means of determining what role gender plays in shaping institutional dynamics and how this 'influences institutional outcomes and opportunities'.[10] Attention to gender also reveals what Goetz terms 'gender capture,' which follows from men's historical and modern dominance of power positions within organizational structures.[11] In the context of the European Court of Human Rights, the process of application, appointment and judicial function trigger a set of expectations about both men and women's behaviour that dovetails with social norms based on accepted ideas and practices about femininity and masculinity.[12] Self-evidently, these norms are not static, and their dynamism is revealed when, for example, women seeking high judicial office conform to expected or typical masculine performativity as a means of affirming their mastery of and suitability for highly performative judicial office. In her analysis of 'self-presentation strategies' by female candidates, the author uses curriculum vitae presentation as a way to address gender, uncovering both the elite profiles of the women who are candidates for the Court and advancing views on the ways in which 'they were actually more of a replica of the male international elite that was in the making'.[13] With that data in hand one might then unpack the ways in which the self-presentation in these fora mandate certain scripts and *de facto* exclude

[8] Barnett and Finnemore, 'The Politics, Power, and Pathologies of International Organizations', 53 *International Organization* (1999) 699 at 701.

[9] Chappell, 'Comparative Gender and Institutions: Directions for Research', 8 *Perspectives on Politics* (2010) 183.

[10] *Ibid.*

[11] Goetz, 'Gender Justice, Citizenship and Entitlements: Core Concepts, Central Debates, and New Directions for Research', in M. Mukhopadhyay and N. Singh (eds), *Gender Justice, Citizenship and Development* (2007) 16.

[12] Thus, for example, it is noted that as a candidate to the European Court of Human Rights for Ireland in 2004, I 'uncommonly chose to write [my] CV in the first person', *supra* note 1, at 214.

[13] Hennette Vauchez, *supra* note 1, at 215. I note that I am not entirely in agreement, perhaps in obviously self-interested ways, with the presumption that the 'elite' status of such women is precisely the same kind of privileged status as that occupied by the majority of men who are applicants to the Court.

others, uncovering the gender regimes at play in judicial office-seeking and more fully understanding how the masculine ideals underpinning institutional structures, practices and norms shape 'ways of valuing things, ways of behaving and ways of being'.[14]

The shaping is muted in Hennette Vauchez's article, focused on the specificity of external presentation in curriculum vitaes outlining women's suitability for high judicial office.[15] Women do not stumble into judicial applications domestically or internationally. Those in the position to make an application are rightly observed to occupy privileged academic, governmental or policy positions, and yet all have functioned consistently and have advanced professionally in overwhelmingly masculine environments. Such women are likely to have been in a minority for much of their professional career, either the only (or one of few women) in any given professional room. Their tealeaf reading on the likely success of any foray into judicial appointment will be framed by a well-internalized historical perspective where 'it is clear that the gains made (*les acquis)* are always fragile and that there are many risks of regression'.[16] Thus, it seems appropriate not only to address the scripts of professional qualification on their own terms but rather to understand them as framed by gendered assumptions and 'dispositions'.[17] In a way, it would seem useful to think of these self-representations as indicating a form of bounded agency for women. In such contexts, by accessing elite judicial institutions, women exert agency by taking 'strategic, creative and intuitive action',[18] to generate individual opportunity as well as to enable dynamic entry to gendered institutional environments that have been, as a practical matter, closed to the female sex since their inception.

I take seriously the idea that the 'social stuff' of international institutions, and particularly of courts, matters for women.[19] Here, the insights from Chappell and Waylen's feminist analysis of political institutions, which engages the very challenging task of looking *within* institutions for 'formal and informal practices', codified rules and unwritten expectations is an important aspect of thinking about when, how, why and with what outcomes women engage in institutional processes. Their insights are highly relevant to the microclimate of judicial selection.[20] The 'social stuff' includes the performative entry points to closed masculine institutions, including form-filling, reference identification, engagement with national selection bodies and, perhaps most conspicuously, but not addressed in this study, the interview process for judicial candidates. One does not need to be an appointed judge to encounter the testing grounds of presentation, authentication within terms

[14] Chappell and Whaylen, 'Gender and the Hidden Life of Institutions', 91 *Public Administration* (2013) 599.

[15] The author does acknowledge that 'CV's constitute a peculiar corpus', *supra* note 1, at 210 (and that such purposes can serve both the interests of individuals and state).

[16] Tulkens, *supra note 5, at* 587.

[17] Annesley and Gains, 'The Core Executive: Gender, Power and Change', 58 *Political Studies* (2010) 909.

[18] Mackay, Kenny and Chappell, 'New Institutionalism Through a Gender Lens: Towards a Feminist Institutionalism', 31 *International Political Science Review* (2010) 573, at 583.

[19] Barnett and Finemore, *supra* note 8, at 701.

[20] Chappell and Whaylen, *supra* note 14, at 599.

acceptable to the institution and validation about fitting in. This corresponds to institutional analysis about the 'nestedness' of institutional cultures which project a 'logic of appropriateness' within institutional settings as well as the implicit understanding that *rule following* is a defining characteristic of the accepted institutional actor.[21] For the woman judge more than others, the testing may be particularly acute, given that presumptions about female care ethics in judging unlock profound questions about whether she will be suitable for 'internalization of accepted ways of doing things'.[22] Moreover, despite the formality of application, there are a host of informal institutional expectations and performance at play when any candidate, male or female, puts himself or herself forward for high judicial office. In a widely used definition coined by Helmke and Levitsky, informal institutions are understood as 'socially shared rules, usually unwritten, that are created, communicated, and enforced outside officially sanctioned channels'.[23] To fully understand the terrain upon which women make decisions (or not), to apply for high judicial office in the visible and high status arena of international courts, we must not only take the data we see presented by Hennette Vauchez, but also be curious about the requirements and expectations that are hidden. Despite their occlusion these elements exert enormous practical influence on the decision to expose oneself to the scrutiny that will follow domestically and internationally.

While Hennette Vauchez's article addresses the 'getting there' portion of judicial selection process for women, we should not forget that there is an organic link between the means of access and one's subsequent experience on the bench.[24] The growth of international legal institutions has spawned a number of particular challenges for women and transnational feminist activism. Over a decade ago, Cynthia Enloe called on scholars to employ 'feminist curiosity' and address the institutional political cultures of international war crimes tribunals.[25] The same curiosity is now usefully being diverted to the established international human rights courts. The encounter with institutions has increasingly incited feminist interest as scholars and practitioners become more attuned to the fact that getting there may now be less fraught than what happens once you have arrived. Thus, the routine practices and 'ways of doing things' are central to the ways of doing and experiencing institutions.[26] This chimes with Judge Tulkens' observation that we should not underestimate 'the difficulties

[21] Olsen, 'Change and Continuity: An Institutional Approach to Institutions of Democratic Government', 1 *European Political Science Review* (2009) 3, at 13 (emphasis added).

[22] *Ibid.*, at 13.

[23] Kelmke and Levitsky, 'Informal Institutions and Comparative Politics: A Research Agenda', 2 *Perspectives on Politics* (2004) 725, at 727.

[24] In the British context, the views of Baroness Hale underscore the relationship, see www.independent.co.uk/news/uk/home-news/more-women-judges-will-improve-law-britains-only-female-supreme-court-judge-calls-for-more-diversity-9630884.html (last visited 10 Feb. 2015).

[25] C. Enloe, *The Curious Feminist: Searching for Women in a New Age of Empire* (2004) 241, who writes 'we need to launch explicitly feminist investigations of institutional political cultures. Let's have a feminist analysis of the two International War Crimes Tribunals at the Hague and in Arusha ….'

[26] Koomen, 'Language Work at International Criminal Courts', 16 *International Feminist Journal of Politics* (2014) 581, at 583.

encountered by women judges in the Court'.[27] Those experiences not only test the willingness to stay past their first term of appointment but may also have downstream effects on the willingness of women to apply, given better data points on the experience of being there overall.

2 The Feminist Judge

Gender operates as a process within institutions. This means that institutional gender norms are not necessarily fixed and can be upended or nudged along to a different equilibrium. Thus, if the process of gendering institutions is bi-directional, it makes the matter of female judicial appointment to predominantly masculine spaces a rather more radical proposition, even more than theories of cosmopolitan citizenship envisage. If institutions can be gendered, then as Beckwith notes, 'activist feminists ... can work to instate practices and rules that recast the gendered nature of the [institution]'.[28]

Thus, one interesting feature of the analysis is the brief reference to the identification of a number of CVs that reveal a 'large proportion of women candidates for which distinctly feminist features were put forth.'[29] While candidates appear not to formally or affirmatively identify as feminist, close inspection reveals membership of female professional networks, organizations associated with women's equality and feminist scholarship. Arguably, if we are to go beyond a politics of presence in international judicial settings, a key element may be the commitment of judicial appointees to transformative politics, as well as to changing the institutional culture of the entity in which the judging takes place.[30] The challenge is enormous. As feminist theoretical and empirical work on gender and institutions shows, 'gender relations are cross-cutting ... they play out in different types of institutions, as well as at different institutional levels, ranging from the symbolic level to the 'seemingly trivial' level of interpersonal day-to-day interaction, where the continuous performance of gender takes place'.[31] Hence, the work of the female judges involves not only holding judicial space in the formalized rituals of judicial interaction but also addressing the hidden norms, practices and interactions that shape the value, meaning and status at the European Court of Human Rights.

[27] Tulkens, *supra* note 5, at 594.

[28] Beckwith, 'A Common Language of Gender?' 1 *Politics and Gender* (2005) 128, at 132–133.

[29] Hennette Vauchez, *supra* note 1, at 214. I note that the list of feminist attributes elides somewhat into organizations and occupations that have a connection with women and gender equality but this should not necessarily be understood as feminist in orientation.

[30] I do not provide an all-encompassing definition of a feminist approach to judging but would stress two essential components: first, a commitment to a political agenda (the agenda itself may be disputed or open to different interpretations); second, a commitment as a feminist would seem to necessarily involve a commitment to other women.

[31] Kenny and Mackay, 'Already Doin' It for Ourselves? Skeptical Notes on Feminism and Institutionalism', 5 *Politics and Gender* (2009) 271, at 272.

As much as the women judges may face challenges, the self-identified feminist judge may be particularly tested.[32] As Justice L'Hereaux-Dubé of the Canadian Supreme Court has noted, 'The idea of a woman on the bench may have gained acceptance … but the proper role for female jurists once they get there is still a work in progress.'[33] Feminist judges remain a rare breed domestically, and few self-identified feminist judges have been appointed to international courts of any hue.[34] The barriers to female judicial appointment, much less the appointment of a self-identified feminist judge, are underscored by the logic of appropriateness outlined above as well as the unstated assumptions that a feminist judge will bring uncertainty and unpredictability to an established institutional order.

Conclusion

The current percentage of women judges at the European Court of Human Rights is 15 out of 47 judges (32 per cent). For a variety of reasons, at the end of 2014 and the beginning of 2015, a number of women judges will leave the Court. It bears reminding that gendering and regendering legal institutions are 'active processes with palpable effects'.[35] The footholds gained by a certain tipping point of judicial female presence are not always distinctly marked in the jurisprudence of the Court. Nonetheless, when the four dissenting judges in a case addressing the prohibition on the use of ova and sperm from donors for *in vitro* fertilization are women, it marks a gendered, if not feminist, space.[36] As Françoise Tulkens, retiring Belgian judge on the European Court of Human Rights, affirms in addressing the matter of female judicial difference:

> [Female judges] do, however, sometimes and even often, bring 'something different'. Simply because they occupy a very different space because of their gender and other elements that form part of their own history.[37]

The appointment process at the European Court of Human Rights does not safeguard a consistent or substantial presence of female judges on the bench. As a result, the influence of those women who are appointed may be barely visible, and, more problematically, legal institutions (like others) may learn to adjust and 'accommodate changes in membership while simultaneously disadvantaging the newcomers'.[38]

[32] Hunter, 'Can Feminist Judges Make a Difference?', 15 *International Journal of the Legal Profession* (2008) 7; E. Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (2014).

[33] L'Heureux-Dubé, 'Outsiders on the Bench: The Continuing Struggle for Equality, 16 *Wisconsin Women's Law Journal* (2001) 15, at 30.

[34] Chappell, '"New," "Old," and "Nested" Institutions and Gender Justice Outcomes: The View from the International Criminal Court', 10 *Politics and Gender* (2014) 572, at 574–576.

[35] Hawkesworth, 'Congressional Enactments of Race-Gender: Toward a Theory of Raced-Gendered Institutions', 97 *American Political Science Review* (2003) 529, at 531.

[36] ECtHR, *Case of S. H. and Others v. Austria*, Appl. no. 57813/00, Judgment of 3 November 2011. Decision available online at http://hudoc.echr.coe.int/.

[37] Tulkens, *supra* note 5, at 593.

[38] Kenny, 'New Research on Gendered Political Institutions', 49 *Political Research Quarterly* (1996) 445, at 462.

These forms of disadvantage have been meticulously documented in political institutions, showing how male elites shift the institutional locus of power from formal to informal mechanisms, and counteracting women's access by changing the spaces and places in which small 'p' power is exercised within institutions.[39] So, the challenges are manifold. It is evident that a multi-layered approach to ensure the continued and consistent presence of a significant (if not equal) number of women on the Court mandates an ongoing attention to the broader institutional environment in which women will function if appointed as judges. Recognizing that the point of entry is as much an aspect of that structure as the day-to-day taken-for-granted rules and norms within the Court requires thinking in institutional terms and seeing institutionalism as an important dimension to advancing or limiting gender equality.

[39] This may be in part what Judge Tulkens references as '[t]he difficulties encountered by women judges in the Court, and the petty annoyances, which sometimes are great discriminations they can be implicitly faced with, should not be underestimated. For example, during the deliberations, it is not always that easy to be not "heard" but "listened to".' Tulkens *supra* note 5, at 594.