

## **Norfolk Law Lecture 2012**

### **It's a Man's World: Redressing the Balance**

**University of East Anglia, Norwich, 16 February 2012**

#### **Lady Hale, Justice of the Supreme Court**

It would be good to think that you had invited me here because I am the wisest, most learned, but yet most approachable and entertaining judge you can think of. But I know that that is not true. You have invited me here because of my scarcity value: I am the only woman judge in the highest court of the United Kingdom and indeed the only woman judge there has ever been at that level in this country. This is a truly lamentable state of affairs and we now compare unfavourably with all our nearest relations in the common law world – Canada (four out of nine), Australia (three out of seven), USA (three out of nine), New Zealand (one out of four) and Ireland (two out of nine). In three of these countries, the Chief Justice is a woman.

And it is not much better lower down the judiciary. The statisticians have got the figure up to 22.3% of the judiciary in the ordinary courts – what we call the uniform branch because they often wear robes – but only by including all the fee-paid part-timers where the percentage of women is much higher. And it would be higher still if – as the pretty pie chart in the Northern Ireland statistics does – they included all the tribunal judges and the lay magistrates who are such an important part of our judicial system. But among the full-timers in the ordinary courts, only those on the lowest rung of the ladder – the district judges and their equivalents – get above a quarter. Circuit judges are 15.9%, High Court judges 15.6% and Court of Appeal judges

10.8%. Still, it's a great deal better than it was ten years ago, when the total was 14.1%, Circuit judges were 7.9%, High Court judges 8.1%, and Court of Appeal judges 6.1% (mind you, that meant two women – Lady Justice Arden and I).

The figures do, I think, demonstrate that some-body cares and is trying to do something about it. But why should any-one care? We are told that our judiciary and our judicial system are universally admired (although I am not sure of the empirical evidence for that) and they certainly score highly on what I call the four essential IQs for judges – industry, intelligence, independence and integrity. There are, I think, also at least four reasons why one should care. The first is popular perception and democratic legitimacy – people coming to court in whatever capacity should be able to feel that the court is their court, that it reflects the communities it serves, and not some narrow elite. The second is that the courts should embody two of the law's most important values, which are fairness and equality. How can the courts be seen as fair to all sections of society if the appointment of judges is not seen as fair to all sections of society? The third is the waste of talent which goes on at present. Women have been studying law and entering the legal profession in equal if not greater numbers than men for at least twenty years now, and of course that does mean that there are now more of them to choose from. But they are not there in equal numbers among the people from whom the top judges are traditionally chosen. So perhaps we should start fishing in some different ponds.

But the really controversial reason is the fourth – that having more women on the bench, especially in our higher, law-making, courts, might actually make a difference. We can of course make a difference by looking different (if they will let us), sounding

different, and smiling more. But what about making a difference in decision-making? This raises at least three questions (1) do women in fact decide cases differently from men; (2) if so, why might that be; and (3) is that a good or a bad thing?

### **Do women decide cases differently from men?**

There are a few studies from the United States, but they do not tell us a great deal. One tells us that white female Justices on the US Courts of Appeals in 1979 to 1981 were more liberal than their male counterparts in race and sex discrimination claims, but no different in criminal and prisoners' rights cases.<sup>1</sup> Later studies have also told us that women judges are more favourable to claimants in discrimination cases,<sup>2</sup> in family law cases, and in cases raising feminist issues.<sup>3</sup> But these are relatively small-scale studies of the voting patterns of judges on federal or state appellate courts. More interesting is a large study of the first instance decision-making of asylum judges in the US.<sup>4</sup> The researchers found a wide gap between the asylum grant rates of men and women judges – 37.3% for men, 53% for women (and regardless of whether these people had previously been employed in helping asylum-seekers or in the immigration service).

Professor Carrie Menkel-Meadow suggests that “to the extent that immigration cases combine intensive fact determinations with a relatively vague and broad statutory standard, they are precisely the kind of case in which appeals to need, emotional and

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<sup>1</sup> Gottshall, J, “Carter’s judicial appointments: the influence of affirmative action and merit selection on voting on the U.S. Courts of Appeals” (1983-84) 67 *Judicature* 165.

<sup>2</sup> Haire, SB et al, “The Voting Behavior of Clinton’s Courts of Appeals Appointees” (2000-2001) 84 *Judicature* 274.

<sup>3</sup> Martin, E and Pyle, B, “Gender, Race, and Partisanship on the Michigan Supreme Court” (1999-2000) 63 *Albany Law Review* 1205.

<sup>4</sup> Ramji-Nogales, J, Schoenholtz, AI, and Schrag, PG, “Refugee Roulette: Disparities in Asylum Adjudication” (2008) 60 *Stanford Law Review* and (2009) NYU Press.

non-legal factors may be particularly salient”.<sup>5</sup> She suggests that women may bring different *values* as well as different *experiences* to the business of judging, values such as empathy and compassion, connection with rather than disengagement from the litigants, and “a deeper sense of context”. She also suggests that, as women judges have themselves suffered disproportionately from discrimination,<sup>6</sup> they may be better able to “hear” the “different” voices in their courtrooms.

### **Gender in the United Kingdom courts**

There are, so far as I know, no comparable studies in the United Kingdom. So what can we learn from the way in which the few senior female judges in this country have approached certain kinds of issue where the gender element looms large? I could, of course, talk about reproductive issues, or sex discrimination, or family law and pre-nuptial agreements in particular. It was a female judge who pointed out (in graphic detail) that having a child that she had negligently been made to have was an invasion of her bodily integrity and personal autonomy which had lasting effects upon her and was not just a financial burden.<sup>7</sup> It was a female judge in the Employment Appeal Tribunal who recognised the improper pressure put on school dinner ladies when they were told that pushing on with their equal pay claim would jeopardise the school meals service for the children who needed it as well as the jobs of their colleagues.<sup>8</sup> It was the two female judges out of the eleven who considered the case of *Radmacher v Granatino*<sup>9</sup> who recognised that pre-nuptial agreements are always designed to

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<sup>5</sup> Menkel-Meadow, C, “Asylum in a different voice? Judging Immigration Claims and Gender”, in *Refugee Roulette* (2009, NYU Press), p 17.

<sup>6</sup> She cites Martin, E, “Men and Women on the Bench: Vive la difference?” (1990) 73 *Judicature* 204, but Chief Justice Sian Elias of New Zealand makes the same point.

<sup>7</sup> *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2002] QB 266.

<sup>8</sup> *Derbyshire v St Helens Metropolitan Borough Council* [2007] UKHL 16, [2007] ICR 841.

<sup>9</sup> *Radmacher v Granatino* [20120] UKSC 42, [2011] 1 AC 534.

damage the interests of the person who is in the weaker bargaining position at a vulnerable time their life and might therefore require special scrutiny before it was fair to enforce them.

But these are relatively rare cases. The abuse and ill-treatment of women is regrettably not at all rare. Do female judges see it any differently from men? I do not know, but I can give two examples at least where they might have done. The first is very extreme, and may seem far removed from the lives you lead in this peaceful part of the world.

Zainab Fornah was aged 15, a member of a tribe in Sierra Leone where female genital mutilation was routinely enforced upon young girls by older women in order that they could become fully grown up members of female society. Everyone agreed that this was sufficiently severe ill-treatment to qualify as persecution within the meaning of the Geneva Convention on the Status of Refugees. But to qualify for refugee status, it is not enough that you have a well-founded fear of being persecuted if you return to your home country. Your persecutor has to be going to persecute you for a “Convention reason”: that is your race, religion, nationality, membership of a particular social group or political opinion. Sex is not on the list. So was it because of her membership of a particular social group? The group has to share common characteristics independently of the feared persecution. It cannot be defined simply by the persecution it fears. So, it was argued, the group is young, uncut girls in Sierra Leone, because once they have been cut they no longer fear the persecution; and if the group is limited to the uncut, then they are defined by the very persecution they fear.

The majority in the English Court of Appeal accepted that argument.<sup>10</sup> Furthermore, FGM would result in a girl's integration into the society of adult Sierra Leonean women. It was an accepted practice in that society "however repulsive we might think it to be". So it was not discriminatory in such a way as to set her apart from society. This is cultural relativism taken to unusual lengths, given that it was common ground that she would face "torture or inhuman or degrading treatment" contrary to article 3 of the European Convention on Human Rights if she were returned.

One of the few women judges in the Court of Appeal, Lady Justice Arden, dissented. If the cut women become members of the particular social group into which they are initiated, why cannot the uncut ones also be members of a social group? To say that they lose their common characteristic of intactness as a result of persecution was like saying that left-handed people could not be a particular social group because after being persecuted by having their left hands cut off they would no longer be left-handed.

The House of Lords were unanimous in overturning the Court of Appeal decision. I rudely announced that the answer was "so blindingly obvious that it must be a mystery to some why" the case had had to reach us at all.<sup>11</sup> I was equally blunt about what FGM involved and its "underlying purpose in serving and preserving the inferior position of women in the society".<sup>12</sup> My definition of the particular social group was Sierra Leonean women belonging to those ethnic groups where FGM is practised: they obviously shared common ethnic characteristics quite independent of the

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<sup>10</sup> *Fornah v Secretary of State for the Home Department* [2005] EWCA Civ 680, [2005] 1 WLR 3773.

<sup>11</sup> [2006] UKHL 46, [2007] 1 AC 412, [2007] 1 All ER 671, para 83.

<sup>12</sup> Para 93.

persecution. The senior Law Lord, Lord Bingham, took a similar view of the group but emphasised something else they had in common: “women in Sierra Leone are a group of persons sharing a common characteristic which, without a fundamental change in social mores is unchangeable, namely a position of social inferiority as compared with men.” They would share this even if FGM were not practised. Nor did it matter that FGM was widely practised and accepted. It might ensure a young women’s acceptance into society “but she is accepted on the basis of institutionalised inferiority”.<sup>13</sup> The other three Law Lords more cautiously defined the group in the same way that Lady Justice Arden had defined it.

Some commentators have seen this story as a demonstration of “what a difference difference makes”.<sup>14</sup> This is not to say that Lady Justice Arden and I speak “in a different voice,” for we use the same kinds of reasoning and sources as do the men. Rather it is that our experience of leading women’s lives allows us to see things that the men cannot always see, including the institutionalised inferiority involved in many socially accepted practices, as much in our own countries as elsewhere. Because our view eventually prevailed in that case, it was possible for that same commentator also to speak of the “transformative potential of judicial diversity”.<sup>15</sup> I would not make such a large claim, because it was an all male House of Lords<sup>16</sup> which had earlier and very boldly recognised that Pakistani women who feared domestic abuse if they were returned to Pakistan were “members of a particular social group”, defined either as all women in Pakistan or those women who had offended or were accused of offending

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<sup>13</sup> Pare 31.

<sup>14</sup> Eg Rackley, E, “What a difference difference makes: gendered harms and judicial diversity” (2008) 15 International Journal of the Legal Profession 37-56.

<sup>15</sup> At p 39.

<sup>16</sup> *R v Immigration Appeal Tribunal, ex p Shah, Islam v Secretary of State for the Home Department* [1999] 2 AC 629.

against the social mores there. But I think that our presence can help our colleagues to see things in a different light – and may make it harder for them to voice unacceptable views.

Turning then to domestic abuse, there is the case of *Yemshaw v Hounslow London Borough Council*.<sup>17</sup> The issue was what was meant by the words “domestic violence” in Part VII of the Housing Act 1996, which deals with housing the homeless. The Act provides that it is not reasonable to expect a person to continue living somewhere where it is probable that doing so will lead to domestic or other violence against her or a member of her family or household.<sup>18</sup> The Court of Appeal had twice held that “violence” meant only physical contact, so that other sorts of violent conduct and abuse were not covered. Yet in 1993 the General Assembly of the United Nations had adopted a Declaration on the Elimination of Violence against Women, which it defined as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women”. And the House of Commons Home Affairs Committee that same year had used the definition “any form of physical, sexual or emotional abuse which takes place within the context of a close relationship”.

So there was reason to think that the word had borne a wider meaning when the Act was passed. But even if that were not true, it certainly bore a wider meaning now. As the local authority’s own leaflet on *Domestic Violence* explained,

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<sup>17</sup> [2011] UKSC 3, [2011] 1 WLR 433.  
<sup>18</sup> Housing Act 1996, s 177(1).



“It is rarely a one off incident and it is not only about being physically or sexually abused, you may be subject to more subtle attacks, such as constant breaking of trust, isolation, psychological games and harassment. Emotional abuse is just as serious and damaging: many survivors will carry the emotional scars long after the physical injuries have healed.”<sup>19</sup>

So the term “domestic violence” (and indeed “other violence”) could move with the times, consistently with the statutory purpose. This was and is:

“. . . to ensure that a person is not obliged to remain living in a home where she, her children or other members of her household are at risk of harm. A further purpose is that the victim of domestic violence has a real choice between remaining in her home and seeking protection from the criminal or civil law and leaving to begin a new life elsewhere.”<sup>20</sup>

My (male) judicial assistant,<sup>21</sup> to whom I owe a great deal in the preparation of this lecture, no doubt in a spirit of encouragement and support for his boss, has commented that this recognition of what the Act was for, and the vulnerable people it was designed to protect, was “notably absent from the decision of the Court of Appeal, whose members were content to settle for the narrow and what they perceived to be the natural and ordinary meaning of the word violence”. But in this case, the male members of the Supreme Court agreed with the more purposeful analysis.

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<sup>19</sup> Quoted in *Yemshaw*, para 24.

<sup>20</sup> Para 27.

<sup>21</sup> Rowan Pennington-Benton, LL.B, BCL, Barrister.

## **Gender in the European Court of Human Rights**

It is interesting to look at how this issue of protecting vulnerable people from abuse has developed in the European Court of Human Rights in Strasbourg. Strasbourg has a much better gender balance than we do. This has been the product of a conscious effort on the part of the Parliamentary Assembly, which refused to consider male-only shortlists of nominees. As a result of a dispute with Malta, which found itself unable to field a female candidate in its shortlist of three, the legality of this was referred to the Grand Chamber of the Court for an Advisory Opinion.<sup>22</sup> The Court held that the Assembly could take into account factors such as the need to redress the imbalance between the sexes on the Court; but where a State had done all it could to ensure that there was a candidate of the under-represented sex, but without success, the Assembly could not reject the list.<sup>23</sup> Can we hypothesise, however, that the better gender balance on the Strasbourg Court, and the consciousness of the importance of gender, have influenced the recent developments in the use of the Convention to protect women and children from abuse?

A long time ago, the Court decided that there were positive obligations entailed in what look like the purely negative requirements of the Convention. This is controversial, because it turns a Convention designed to limit the state's interference in the lives of its people into a Convention designed in some circumstances to ensure that it does intervene. But feminists would welcome this, because they too realised a long time ago that doing nothing is not a neutral action: it legitimates the power of the more mighty to do as he pleases.

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<sup>22</sup> *Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, 12 February 2008. Available from HUDOC at <http://www.echr.coe.int>.

<sup>23</sup> See further, Mowbray, A, "The Consideration of Gender in the Process of Appointing Judges to the European Court of Human Rights" (2008) *Human Rights Law Review* 1.

Thus, Article 3 says that no-one shall be subjected to torture or other inhuman or degrading treatment or punishment. But it is not enough for the state itself to refrain from torture or inhuman or degrading treatment. It also has a positive duty to protect people from being so treated by others. So the United Kingdom had violated the article 3 rights of a family of children who had suffered years of abuse and neglect from which the local authority had failed to protect them even though it knew enough about what was going on to be able to do so.<sup>24</sup>

Similarly, article 8 says that everyone has the right to respect for their private and family lives and limits the circumstances in which the state can interfere in these. It was long ago recognised that the state also had a positive obligation to protect a person's physical and psychological integrity from serious abuse by others, and in particular to protect children and vulnerable adults from sexual abuse.<sup>25</sup>

The court put article 3 and 8 together in the important case of *MC v Bulgaria*,<sup>26</sup> where the Bulgarian authorities had not pursued the alleged rape of a 14 year old girl by two men, because it had not been shown that force or threats had been used or that she had had to resist. The Court noted that throughout Europe, states had progressively abandoned requirements of force, threats or deceit from the aggressor and had focussed on the lack of consent of the victim. The Council of Europe had "agreed that penalising non-consensual sexual acts '[including] in cases where the victim does not show sign of resistance', is necessary for the effective protection of women against violence".<sup>27</sup> There was "a universal trend towards regarding lack of consent as the

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<sup>24</sup> *Z v United Kingdom* (2002) 34 EHRR 97.

<sup>25</sup> *X and Y v The Netherlands* (1986) 8 EHRR 235.

<sup>26</sup> (2005) 40 EHRR 259. Chamber decision of four men and three women.

<sup>27</sup> Para 162.

essential element of rape and sexual abuse”.<sup>28</sup> I am tempted to comment that this too is a statement of the blindingly obvious, at least once the focus is shifted from the perpetrator to the victim. If women are to have the same right to agree or not to agree to have sex on a particular occasion, it must be rape to have sex with a woman who is asleep or too drunk or drugged to know what is going on or too intimidated by the perpetrator to resist.

But the Court went further in commenting that this development “reflects the evolutions of societies towards effective equality and respect for each individual’s sexual autonomy.”<sup>29</sup> It has been suggested that the Court’s concern for the protection of people who for a variety of reasons are vulnerable to violations of their fundamental rights by others could be developing into a concept of “effective equality” quite separate from the principle of non-discrimination in article 14.<sup>30</sup>

So it was held that the Member States’ positive obligations under article 3 and 8 “must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim”.<sup>31</sup> The Court recognised that in practice it might be difficult to prove lack of consent in the absence of evidence such as traces of violence or direct witnesses, but the authorities had to explore all the facts and surrounding circumstances in order to assess whether or not there was consent. This they had not done, nor had they paid much attention to the “particular vulnerability of young persons and the special

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<sup>28</sup> Para 163.

<sup>29</sup> Para 165.

<sup>30</sup> Rudolf, B, and Eriksson, A, “Women’s Rights under international human rights treaties: issues of rape, domestic slavery, abortion and domestic violence” [2007] *International Journal of Constitutional Law* 507.

<sup>31</sup> Para 166.

psychological harm” involved in the rape of minors.<sup>32</sup> So the Court was able to find a violation of the positive obligation without deciding whether or not the alleged perpetrators were guilty.

In similar vein was the case of *Siliadin v France*,<sup>33</sup> the first case in which there was held to be a violation of article 4 of the Convention, which prohibits slavery or servitude, and forced or compulsory labour, in. A Togolese girl had been sent to France by her parents at the age of 15 to work for a Mrs D who “lent” her to Mr and Mrs B. She worked 15 hours a day, seven days a week, for no pay. She slept on a mattress in the baby’s room. She eventually escaped after three years, but a prosecution for, among other things, obtaining services without payment and subjecting her to working in conditions incompatible with human dignity, by taking advantage of her vulnerability or dependence failed. The French court found that she was not in a state of vulnerability or dependence because she was able to leave the house unsupervised and to contact her family (though it was her family who had sent her there in the first place and consented to the loan of her services).

The Strasbourg Court held that, like article 3 and 8, article 4 imposed positive obligations to protect people from invasions of such fundamental rights by private individuals. They also held that, though not a slave, she had been held in a condition of servitude within the meaning of article 4, where “the obligation to provide one’s services is imposed by the use of coercion”. The applicant had been delivered by her parents with a view to exploiting her labour, she was vulnerable and isolated because she was living illegally in France (and the “employers” had played upon this in order

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<sup>32</sup> Para 183.

<sup>33</sup> (2006) 43 EHRR 287. Chamber decision of five men and two women.

to keep her in their power) and she was without financial resources. Civil sanctions were not enough to fulfil the state's positive obligation – there had to be the deterrent of a criminal sanction. Although the Court did not refer to the concept of “effective equality”, it is a women's rights issue because United Nations statistics show that nearly 80% of the victims of domestic slavery are women.

The domestic case of *O v Commissioner of Police for the Metropolis*<sup>34</sup> concerned women who had been made to work for no pay in households in and around London and subjected to physical and emotional abuse by the householders. It was not in dispute that they had been subjected to treatment within the scope of article 3 and 4 and that the state had a duty to investigate. But the women had sometimes been reluctant to assist in the investigation and the police had concluded that there was no real foundation for their complaints. But the judge drew inspiration from another Strasbourg decision in *Rantsev v Cyprus*,<sup>35</sup> where a Russian young woman had been brought to Cyprus on an “artiste's” visa to work in a bar, had been taken to a police station but sent back to her employer without any investigation and found dead soon afterwards in mysterious circumstances. The Court held that trafficking came within article 4, which contained the full range of positive obligations. Most significantly, the requirement to investigate potential trafficking does not depend upon a complaint from the victim: once the matter comes to the attention of the authorities they must act of their own motion.<sup>36</sup> Thus the Metropolitan Police had a duty to investigate and take action whether or not they were prompted or actively assisted by the potential victims. Understanding the pressures which keep victims silent, or make them reluctant to take action, is vital. The duty to protect them has to arise whether or not they have asked

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<sup>34</sup> [2011] EWHC 1246, [2011] HRLR 29

<sup>35</sup> (2010) 51 EHRR 1.

<sup>36</sup> Para 288.

for it. That is why the development of positive obligations is so important and why we may have something to learn from Strasbourg in our own system. We think that we have a full panoply of remedies, civil and criminal, against domestic violence and other forms of abuse, but these will not fulfil our positive obligations if their implementation is not effective.<sup>37</sup>

Positive obligations under article 8 came up again in *KU v Finland*.<sup>38</sup> The applicant was a 12 year old boy. An unknown person had placed an advertisement on an internet dating website in the applicant's name, giving a detailed description of him and claiming that he was "looking for a man to show him the way". Privacy laws in Finland prevented the web provider from revealing the unknown person's identity. The Court held a violation of the positive obligation in article 8:

"States have a positive obligation inherent in article 8 to criminalise offences against the person . . . Where the physical and moral welfare of a child is threatened such injunction assumes even greater importance. . . . sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects upon its victims. Children and other vulnerable individuals are entitled to state protection, in the form of effective deterrence, from such grave interference with essential aspects of their private lives."<sup>39</sup>

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<sup>37</sup> District Judges, for example, are concerned that making the breach of their domestic violence orders a criminal offence, far from improving their enforcement, has in practice made it more difficult.

<sup>38</sup> (2009) 48 EHRR 1237.

<sup>39</sup> Para 46.

So I was relieved, but not necessarily surprised, to be upheld in Strasbourg in the follow-up to *R v G*.<sup>40</sup> This was a case where a 15 year old boy had been prosecuted for having sex with a 12 year old girl and complained of a disproportionate interference with *his* private life, in particular because what used to be colloquially known as “statutory rape” – having sex with under-age girls or boys irrespective of whether they have agreed - can now be prosecuted as the offence of “rape” under the Sexual Offences Act 2003. Not surprisingly, I had focussed on the harm done to young girls by premature sexual intercourse and prioritised the need to protect them over the need to respect the desires of their boyfriends or anyone else. Once again, I was rude enough to declare that every male has a choice about where he puts his penis. Strasbourg upheld my analysis when finding the complaint inadmissible.<sup>41</sup>

Interestingly, that was by a majority, as it had been in the House of Lords, where two of their Lordships held it a disproportionate interference with this boy’s private life to convict him of an offence called rape. One of them, however, referred to my “unique insight into these issues” – quite what he meant by that I do not know. I am sure that he meant it as a compliment. I hope that he meant that I was unique in bringing the perspective of a woman, who had been a girl, and had spent most of my life working in areas of law relating to women and children. But of course I am by no means unique in any of that. So perhaps he meant that I was unique in bringing that perspective to bear as a judge. Quite so.

In *Hajduova v Slovakia*,<sup>42</sup> the Court developed further its recognition of the fear and anguish suffered by victims of abuse. The applicant’s husband had assaulted and

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<sup>40</sup> [2008] UKHL 37, [2009] 1 AC 92.

<sup>41</sup> *G v United Kingdom* (2011) 53 EHRR 237.

<sup>42</sup> (2011) 53 EHRR 8.



threatened her on a number of occasions. He was convicted of offences and it was suspected that he was suffering from a psychiatric disorder. He was sent for assessment but released. He then made further threats. The state had failed to provide her with effective protection. The Strasbourg Court noted that “the particular vulnerability of the victims of domestic violence and the need for active state involvement in their protection has been emphasised in a number of international instruments”.<sup>43</sup> Given the past history, the applicant’s fear of further violence was enough to engage the state’s positive obligations. The failure to put in place proper safeguards breached her article 8 rights.

So although the Convention is mostly a Charter for leaving people alone, the Court has clearly recognised that this is not always enough to secure the fundamental rights of women, as well as children and other vulnerable people. Whether this is because of the better gender balance on the Court, we cannot know.

### **Why might women (or courts with women on them) decide things differently?**

There are two main competing theories about why women might decide cases differently. One is that women actually think differently from men. They “speak in a different voice” because they think and behave in different ways. While men favour the battle - adversarial disputes between binary positions where one is right and one is wrong – women favour consensus, collaboration and context – seeking the middle ground through friendly co-operation rather than fighting it out in accordance with the rules. By and large, the Americans do not favour this theory. Their Constitutional guarantee of equal treatment is based on treating like cases alike and so they want to

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<sup>43</sup> Para 46.

say that women are the same as men. It is no accident that Sandra Day O'Connor, first woman on the Supreme Court of the United States and a girl of the golden west, criticized the idea that women brought a sensitive, empathetic and gentle perspective to the law for "so nearly echo[ing] the Victorian myth of the 'True Woman;' that kept women out of law for so long".<sup>44</sup> The Canadians, who do not believe that people have to be the same in order to be treated equally, may take a different view.

The other view is that women think in the same way that men do but have had very different life experiences about which to think. Women have experienced pregnancy and childbirth. Women have experienced, if not actual violence, the fear of such violence from people far stronger than they are. Women have experienced, if not actual sexual assault, the fear of sexual assault from people who are not only far stronger than they are, but also seem to think that it is someone's else's job to control their sexual desires. Women have experienced, if not overt discrimination and unequal pay, the petty humiliations and exclusions of not being one of the boys. Women have experienced, or contemplated the prospect of, having no money, and no freedom, except that which the man they are living with is prepared to let them have.

Of course, not all women have those experiences and some men have experiences which are very similar. Not all women can think or feel themselves into other people's lives, and many men can. Women would never have got anywhere in the world outside the home if there had not been wonderful men who were prepared to let them fly.

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<sup>44</sup> "Portia's Progress" (1991) 66 New York University Law Review 1546.

My preference, as must be obvious, is not for the first theory but for the second. I think that we can play the game as well as and in the same way as any man, but that we bring a different set of life experiences to the game which in a particular sort of case can colour what we think about it. This is not the same as having an “agenda” about what the outcome of any given case should be. No judge should start from the outcome they wish to achieve. Unlike the advocates, we should not “reason from a given conclusion”. We should all start with the evidence and the law and reason from them to the conclusion which they dictate. This is where I agree with the great Lord Bingham,<sup>45</sup> who always hoped that his decisions on difficult points would not be too predictable. Where we might disagree is over the influence of our respective experiences of life in shaping the points of view from which we started, rather than finished, the case.

### **Is it a good or a bad thing?**

You can only think that it is a bad thing to bring different experiences and perspectives to the business of judging if you think that the only valid experience which can shape the law is the experience of one half of the human race – that that is the only real experience, and it results in a neutral, unbiased view of the law, whereas anything else is unreal and results in a partial, biased view of the law.

The experience of domestic violence and abuse has taught us that doing nothing is not a neutral option. Refusing to intervene or provide a solution legitimises and sustains the power of the abuser. That is why the recent decisions of the European Court of Human Rights are so valuable. It is also why we in this country should never be

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<sup>45</sup> Bingham, T, “The Judges – Active or Passive?” (2006) 139 Proceedings of the British Academy 55.

complacent. We think that we have had the remedies to cater for domestic abuse for a long time. But are they always as “practical and effective” as they should be? Would they be more effective if we were able to focus both on the victim and on the perpetrator? And would we do that more effectively if they were more people in positions of power who can empathise with people in positions of no power at all?