Law, Women Judges and the Gender Order: Lessons from the High Court of Australia

Kcasey McLoughlin

Routledge, 2021, pp. 262, ISBN: 9781000475487

Exclusively the domain of men for over 80 years, in recent times the High Court of Australia has experienced near gender parity. In *Law, Women Judges and the Gender Order: Lessons from the High Court of Australia*,[1] Kcasey McLoughlin questions whether the presence of women on the High Court has disrupted the embedded masculinist gender regime, primarily through the lens of feminist legal theory. Analysing both the institution of the High Court and individuals within it, McLoughlin provides novel insights into how the Court's historical evolution, rituals, and practices continue to reproduce the prevailing gender order. This work is timely, given recent scrutiny over women's presence, authority, and safety within Australia's democratic institutions.[2] It also preceded the announcement in late 2022 that women would for the first time comprise the majority justices of the High Court of Australia.[3]

McLoughlin persuasively argues that women's exclusion from the creation of Australia's constitutional framework and its subsequent interpretation has ingrained a masculinist legal regime. This regime is still 'sticky' today, evincing a historical and entrenched fiction: the paradigmatic neutral and

[1] Kcasey McLoughlin, *Law, Women Judges and the Gender Order: Lessons from the High Court of Australia* (Routledge, 2021).

[2] See ibid 189–91. This work emerged during the political and social context of specific sexual harassment allegations against former Justice Dyson Heydon and the broader #MeToo movement. It was published around the time when Brittany Higgins' Parliament House rape allegations emerged: see Paul Osborne, 'Timeline of Higgins Incident and Response', *The Canberra Times* (online, 18 February 2021) <https://www.canberratimes.com.au/story/7133304/timeline-of-higgins-incident-and-response/>.

[3] Kcasey McLoughlin, 'The High Court of Australia has a majority of women justices for the first time. Here's why that matters', *The Conversation* (Web Page, 4 October 2022) <https://theconversation.com/the-high-court-of-australia-has-a-majority-of-women-justices-for-the-first-time-heres-why-that-matters-191675>.

rational legal man.[4, 5] The appointment of more 'women judges'[6] was once viewed by some feminist legal theorists as a 'panacea to law's gender blindness'.[7] However, this notion of women judges bringing 'a different voice' has fallen out of favour.[8] McLoughlin's thesis therefore focuses on women judges' potential to disrupt the status quo. She acknowledges some progress beyond women as 'mere fringe-dwellers' in judicial circles.[9] Yet although her analysis reveals how women judges are more than 'just men in skirts', their collective effect on the law's substance and scope appears subtle, rather than transformative.[10] More successful is McLoughlin's consideration of critical themes. These have significant political aspects which expand the work's applicability beyond the gender debate. Such themes include: the deployment of the nebulous concept of merit, the benefits of diversity, and the increase in collegial judgment writing.

McLoughlin explores how merit and diversity are often posited as dichotomous concepts yet are not mutually exclusive.[11] Merit as a judicial selection criterion has been invariably invoked during discussions of women's appointments. However, it is scarcely mentioned in executive appointments of men.[12] McLoughlin re-invigorates the long-standing debate over reforms to presently opaque, cleverly crafted, and often politically self-serving judicial appointment practices.[13] Reforms include the development of publicly available selection criteria, founded on a broad yet defined concept of 'merit', essential personal qualities, and open acknowledgment of the value of diversity in judicial selection processes.[14]

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[4] McLoughlin (n 1) 18, 222.

[5] See ibid 61, 94, 166, 219.

[6] McLoughlin makes deliberate linguistic choices to expound her ideas, preferring the social construct of 'women/men' judges to the biological 'female/male' frames of reference. She also prefers 'masculinist' over 'patriarchal', to describe the social order situating men above women as legal knowers within the context of the High Court: ibid 20–1.

[7] Ibid 5, 218.

[8] Ibid 5–6, 218–9. See, eg, Dermot Feenan, 'Women Judges: Gendering Judging, Justifying Diversity' (2008) 35(4) *Journal of Law and Society* 490.

[9] McLoughlin (n 1) 224.

[10] Ibid 218.

[11] Ibid 64–5.

[12] Ibid 61, 192.

[13] See ibid 62–4.

[14] Ibid 220.

Her analysis reinforces the need to fetter executive discretion by increasing transparency and accountability in judicial appointments more broadly.[15]

'Collegiality is not compromise' is another recurring theme.[16] This is examined through a range of primary sources, with mixed success. McLoughlin argues that consensus constitutes a different form of disruption.[17] This argument appears strongest in her appraisal of Justice Crennan's departing speeches in defence of collegiality.[18] However, the author's examination of maiden judgments[19] was inconclusive on the point of disruption.[20] Using contemporaneous men's first High Court judgments may have strengthened this argument by providing a gendered comparison. Moreover, absent further analysis of authorship practices or influences on consensus judgments (such as efficiency), proving causality between greater collegiality and women's presence on the bench remains a challenge.[21]

McLoughlin's choice of research methodology thus represents both a weakness and a strength. Such difficulties with substantiation are evident throughout the text and may have been alleviated by embracing some quantitative inquiries. However, using a purposefully qualitative case study approach, McLoughlin aims to break new ground by examining previously understudied sources. For example, her innovative examination of judges' farewell addresses allows for a 'before and after' contrast with the discourse surrounding swearing-in speeches.[22] Additionally, McLoughlin takes a novel analytical approach to the High Court's decision in *PGA v The Queen*.[23] Here, the author juxtaposes the various judges' reasoning

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[15] See George Williams, 'High Court Appointments: The Need for Reform' (2008) 30(1) *Sydney Law Review* 163. See also Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report No 138, December 2021).

[16] McLoughlin (n 1) 110, 168–9, 177, 185.

[17] Ibid 184.

[18] Ibid 7, 176, 184–6.

[19] Ibid 109, 113–4.

[20] Nonetheless, McLoughlin recognised the limitations of this source: ibid 111.

[21] Ibid 112, 180.

[22] Ibid 169.

[23] (2012) 245 CLR 355. This case examined spousal immunity for rape, historically available at common law. This signifies a carefully selected example for analysis of a gender-sensitive subject matter.

with a fictitious judgment stemming from the Australian Feminist Judgments Project.[24] However, given the differences between the juridical texts are imagined and merely aspirational, this appears more a lesson *for* the High Court, than from it.

More compelling is the chapter on *Monis v The Queen*,[25] the Court's first split along gender lines.[26] McLoughlin proceeds quickly to a well-developed conceptual argument, addressing the visible gender divide, whilst skilfully interweaving earlier threads on the historical entrenchment of masculinism. Critically, the substance of the women's joint judgment is contrasted with its form, revealing how women judges' potential to disrupt continues to be constrained by the institutional context in which they operate.[27]

Ultimately, the author finds some support for gendered disruption, or at least its possibility. However, some inherent methodological difficulties limit the articulation of a distinct contribution from the Court's women judges.[28] Seemingly, a more conscious and deliberate effort will be required to disturb the institution's embedded masculinity. Yet the appointment of not just (more) women, but *feminist* judges remains a significant challenge.[29] In response to this improbability, McLoughlin highlights Susan Kiefel's elevation to Chief Justice, and her response to sexual harassment allegations, as a counterpoint and symbol of the potential for change.[30] It remains to be seen whether the High Court will continue to bear the hallmarks of masculinity, with a majority of women judges now presiding.

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[24] See McLoughlin (n 1) 116–7, 135–6, 140–1. See also University of Queensland, *Australian Feminist Judgments Project* (Web Page) <https://law.uq.edu.au/the-australian-feminist-judgments-project>.

[25] (2013) 249 CLR 92. This case involved the implied freedom of political communication, legal conceptions of the public/private dichotomy, and the men and women judges' divergent views on the appropriateness of the law's reach into the home.

[26] McLoughlin (n 1) 142.

[27] Ibid 143, 160–2.

[28] Ibid 223.

[29] Ibid 8, 218. The women of the High Court to date have typically shunned feminist identities: ibid 10, 145.

[30] Ibid 224–5.

Law, Women Judges and the Gender Order carves out a niche position in the literature as an analysis of the gender regime operating in Australia's highest court at a particular point in time. McLoughlin's work will appeal to scholars, practitioners, and researchers interested in how gender diversity impacts the judiciary, legal profession, and politics. This important contribution from the Australian context adds original insights to a growing field of literature on gender dynamics and constitutional and international courts worldwide.[31]

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[31] See, eg, Maria C Escobar-Lemmon et al, *Reimagining the Judiciary: Women's Representation on High Courts Worldwide* (Oxford University Press, 2021); Loveday Hodson, 'Gender and the International Judge: Towards a Transformative Equality Approach' (2022) 35(4) *Leiden Journal of International Law* 913.

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