

**EXPERIENCED JUSTICE: GENDER, JUDGING AND
APPELLATE COURTS**

LAURA HILLY

MAGDALEN COLLEGE

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ABSTRACT

The under-representation of women in the senior appellate judiciary in common law jurisdictions remains an enduring problem. Much has been written about the lack of women's participation in the judiciary and what strategies, if any, should be undertaken in order to resolve this persistent problem. However, this thesis takes a step back to ask a broader question: what impact does gender diversity have upon judicial decision making in appellate courts? It seeks to answer this question by engaging feminist standpoint theory to assess the experiences of men and women judges from three common law jurisdictions: England, South Africa and Australia. Through a series of interviews conducted with members of the senior judiciary in these jurisdictions in 2012 and 2013, this thesis explores the extent that interviewees consider that gendered experiences impact upon their own judging, and judging within the dynamics of collegiate appellate courts. This thesis concludes that while it is not possible to pinpoint one particular 'contribution' or 'impact' that gendered experiences have upon judging, it is nonetheless generally considered by those interviewed to be an important part of the judicial decision making process in several subtle, yet important, ways. Because of the considerable role that diverse gendered experiences play in judicial decision making, appointments processes should be sensitised to the need for diversity of experience and alive to the danger of ostensibly neutral appointment criteria devaluing diverse experiences, particularly the experiences of women in the law.

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Alberta Law Review	AlbertaLRev
American Historical Review	AHistRev
American Journal of Political Science	AJPS
Australian Feminist Law Journal	AFLJ
Australian Law Journal	ALJ
Berkeley La Raza Law Journal	BLRLJ
Canadian Journal of Women and the Law	CJWL
Cambridge University Press	CUP
Convention for the Protection of Human Rights and Fundamental Freedoms	ECHR
Convention on the Elimination of All Forms of Discrimination Against Women	CEDAW
Constitutional Reform Act 2005 (UK)	CRA
Cornell UP	CornellUP
Dalhousie Law Journal	DalLJ
De Paul Law Review	DePaulLRev
Duke Journal of Comparative International Law	DukeJComp&IntL
European Court of Human Rights	ECtHR
European Law Review	ELRev
European Public Law	EPL
Federal Law Review	FLRev
Feminist Legal Studies	FemLS
Feminist Theory	FemT
Harvard Law Review	HarvLRev
Human Rights Law Review	HRLRev
Human Rights Quarterly	HRQ
Harvard University Press	HUP
International Covenant on Civil and Political Rights	ICCPR
International Journal of the Legal Profession	IntJLP
Journal of Law and Courts	JL&C
Journal of Law and Society	JL&Soc
Journal of Political Philosophy	JPP
Journal of Politics	JP
Judicial Appointments Commission	JAC
Judicial Service Commission	JSC
Law Quarterly Review	LQR
Legal Studies	LS
Manchester University Press	MUP
McGill Law Journal	McGillLJ
Michigan Law Review	MichLRev
Minnesota Law Review	MinnLRev
New York University Press	NYUP
Osgoode Hall Law Review	OHLR

Oxford University Press	OUP
Philosophy and Public Affairs	Phil&PubAff
Princeton University Press	PUP
Signs: Journal of Women in Culture and Society	Signs
Social and Legal Studies	S&LS
Social Science Journal	SSJ
Stanford Law Review	StanLRev
Stanford University Press	SUP
South African Law Journal	SALJ
Sydney Law Review	SydLRev
Texas Wesleyan Law Review	TexWesleyanLRev
The Constitution of the Republic of South Africa, 1996	SA Constitution
UCLA Law Review	UCLALRev
Universal Declaration of Human Rights	UDHR
University of Chicago Legal Forum	UChiLF
University of Pennsylvania Law Review	UPenLRev
University of Toledo Law Review	UToledoLRev
University of Toronto Press	UTP
William and Mary Law Review	WMLR
Yale French Studies	YFS
Yale Journal of International Affairs	YJIntAff
Yale University Press	YUP

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INTRODUCTION

Justice ... is not abstract, universal, or neutral. Instead, justice is the quality of human engagement with multiple perspectives framed by, but not limited to, the relationships of power in which they are formed.¹

Judicial diversity has become a problem of recent concern for domestic and international courts alike. After persistent patterns of homogeneity in common law judicial appointments, significant attention has been given to this topic by academics, legislatures and policy makers in the last few decades. While the problem of homogeneity remains, the focus of the attention appears to have shifted. In the 1980s in England and Wales, judicial diversity projects focused on achieving diversity through formal equality provisions. The Judicial Appointments Group issued its first published guidelines for appointments in 1986, emphasising that identifying group characteristics (commonly referred to as ‘status grounds’ or ‘protected characteristics’)² should *not* influence the appointment of a person to a judicial post. It set out a policy that the Lord Chancellor should ‘appoint to every judicial post the candidate who appears to him to be the best qualified to fill it and perform its duties, *regardless of party, sex, religion or ethnic origin.*’³ Formal equality measures have helped confront direct discrimination in the appointment process, although they have only had modest success in transforming the composition of the bench. By contrast, and as a result of legislative changes brought about by the Constitutional Reform Act 2005 (UK) (CRA), the Judicial Appointments Board is now required to have regard to

¹ Martha Minow, ‘The Supreme Court 1986 Term, Foreword: Justice Engendered’ (1987) 101 HarvLRev 10, 16.

² Equality Act 2010 (UK), s 4.

³ Lord Chancellor's Department, *Judicial Appointments: The Lord Chancellor's Policies and Procedures* (Central Office of Information, 1986).

the need to encourage diversity when performing its appointments function.⁴ A similar commitment can be seen in the text of the South African Constitution, which requires the ‘need for the judiciary to reflect broadly the racial and gender composition of South Africa’ to be considered when judicial officers are appointed.⁵ This is indicative of a broader trend as many jurisdictions around the world try to encourage greater judicial diversity.⁶

The shift is clear: in the past, to eliminate direct discrimination, those responsible for judicial appointments were enjoined to consider the gender of particular candidates as an irrelevant consideration in the appointments process. Today gender diversity is championed, not only as a relevant, but also a desirable, feature for appointment to the bench – but why?

The aim of this thesis is to understand why gender diversity in the judiciary matters. Specifically, it investigates what motivates this contemporary push to see more women elevated into the judicial role in common law countries: What is the impact of gender diverse benches? Would they strengthen the judiciary as an institution? Could they re-shape conceptions of power, and the expressive message courts send about women? Would they better recognise and make use of the talents of women lawyers? Will they enhance the quality of justice provided by the courts? This last question is of critical importance. This thesis will advance the argument that until the judiciary is gender-diverse, the quality of justice it can provide is impoverished. This argument has, until now, been devoid of a substantial empirical

⁴ CRA, s 64(1).

⁵ SA Constitution, s 172(2).

⁶ E.g. Justice (Northern Ireland) Act 2004, s 3; Montreal Universal Declaration of the Independence of Justice, Art 2.13.

base. As the House of Lords Select Committee on the Constitution accepted in its 2012 report on Judicial Appointments, '[a] more diverse judiciary can bring different perspectives to bear on the development of the law and to the concept of justice itself.'⁷ However, it pointed out that there was 'limited empirical evidence that diverse judges can improve the decision-making process'.⁸ This is not, as this thesis demonstrates, because such a finding cannot be supported by empirical research. Rather, it is because the research had not yet extensively been done. This is the primary contribution of this thesis – first, to investigate whether there is an empirical basis that supports the proposition that a gender-diverse judiciary, at least at the appellate level, enhances the quality of justice afforded by the courts. Second, having established that there is such a basis, to present it in as rigorous a way as possible.

The introduction to this thesis presents a snapshot of the global judicial landscape. This highlights that women continue to play a far lesser role, in numerical terms, when compared with their male counterparts. With this landscape in view, the final section of this introductory chapter provides an overview of this thesis.

A. WOMEN'S PARTICIPATION IN THE JUDICIARY

Homogeneity in judicial appointments, in terms of gender, race, religion, ethnicity, disability status, sexual orientation and social background persists throughout the common law world. The vast majority of judges are male, with a report released by UN Women in 2011 estimating that only 27% of the world's judges, across all levels of the judiciary, were women, with common law jurisdictions such as the United Kingdom (at 9%) and South Africa (at 25%) coming in well below the average.⁹

⁷ Constitutional Committee, *Judicial Appointments* (Twenty-Fifth Report, 7 March 2012) [70].

⁸ *Ibid.*

⁹ Laura Turquet, *In Pursuit of Justice: Progress of the World's Women* (UN Women, 2011) 59-61.

Even within common law jurisdictions with encouraging overall figures, the picture looks very different when looking at where women are placed in the judicial hierarchy. For example, 2014 statistics from the Australasian Institute of Judicial Administration¹⁰ show that women comprise 32% of all current Australian judges and magistrates. However, when this figure is broken down to include only superior courts,¹¹ women's participation falls to 26% of the judiciary. At the time of writing three women and four men currently serve on Australia's apex court, the High Court of Australia.¹² However, only nine women but 42 men judges currently sit on the New South Wales Supreme Court and Court of Appeal. Women therefore make up only 18% of these two courts which are the largest superior courts in Australia. They are frequently 'feeder' courts for appointees to the High Court of Australia.¹³ Women judges in Australia are more likely to sit on lower and less prestigious courts. For

¹⁰ Australasian Institute of Judicial Administration, 'Judicial Gender Statistics' (12 March 2014)

<<http://www.aija.org.au/index.php/judicial-gender-statistics>> accessed 13 December 2014.

¹¹ A 'superior court' includes the Supreme Court and Court of Appeal in each State and Territory, plus the Federal Court, the Family Court and the High Court of Australia.

¹² On 3 February 2015 Justice Susan Crennan will be replaced with Justice Geoffrey Nettle, leaving the composition of the court at two women and five men: Senator the Hon George Brandis QC,

'Appointment of the Honourable Geoffrey Nettle to the High Court of Australia' (*Attorney-General for Australia*, 4 December 2014)

<<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/4December2014-AppointmentOfTheHonourableGeoffreyNettleToTheHighCourtOfAustralia.aspx>> accessed 11 December 2014.

¹³ For example, of the 16 appointments made to the High Court of Australia since 1980, 9 of these appointees were members of the New South Wales Bar: Deane CJ, Gaudron, McHugh, Kirby, Gummow, Heydon, Crennan, Bell and Gagler JJ.

example, the New South Wales Magistrates Court has 56 female members out of a total of 132 members (equating to 42%).¹⁴

Women's equal representation across the court hierarchy is more likely to occur in jurisdictions where judicial service has been 'professionalised' and carries a lower status than it does in common law jurisdictions. For example, in France, a civil law jurisdiction, law graduates at the early stages of their careers can undertake a period of training at the École Nationale de la Magistrature to become eligible for appointment to a lower court. While there is the possibility for lateral recruitment into the judiciary from academia and the profession, this is not common. According to a publication released in 2012 by the Council of Europe based upon data collected in 2010,¹⁵ not only did women account for 64% of all professional judges in France, but they also maintained a majority across all levels of courts.¹⁶ However, the status of judicial office in France is not what it is in common law jurisdictions. As women entered the judiciary, there was a corresponding waning of interest from men. As Anne Boigelo notes, this is attributed to 'a loss of social prestige' as '[f]amilies with a legal tradition (judiciary, bar, notariat) that traditionally produced many future judges and public prosecutors, increasingly steered their sons towards other professions.'¹⁷ Young males 'preferred to turn to other legal fields, in particular that of the corporate lawyer' as the judiciary was perceived as a 'long and laborious career, where personal

¹⁴ Australasian Institute of Judicial Administration (n10).

¹⁵ European Commission for the Efficiency of Justice, *European Judicial Systems: Efficiency and Quality of Justice* (2012, Council of Europe Publishing, 2012) 261-88.

¹⁶ 67% at first instance; 55% at second instance and 54% at Supreme Court level.

¹⁷ Anne Boigeol, 'Male Strategies in the Face of the Feminisation of a Profession: The Case of the French Judiciary' in Ulrike Schultz and Gisela Shaw (eds), *Women in the World's Legal Professions* (Hart 2003) 406-7.

merit was rarely rewarded.¹⁸ The ‘feminisation’¹⁹ of judicial work in France and the correspondingly lower status accorded to it is reflected in a comparison of judicial salaries across the Channel. According to Council of Europe statistics²⁰ the average salary of a first instance judge in England and Wales in 2010 was 120,998€ compared with 40,660€ in France. This relative disparity continued to the highest appellate court levels, with senior judges in France earning on average 113,478€, less than half that of a UK Supreme Court Judge. UK Supreme Court Judges earn between seven or eight times that of the average UK salary. Senior judges in France earn three to four times that of the average French worker. The same Council of Europe statistics demonstrate a similar pattern in Central and Eastern Europe. Here many courts have achieved parity, if not a majority, in women’s overall judicial participation. In 2010 Czech women comprised 65% of first instance court judges, and earned 2.1 times that of the average national salary. However, in final instance Czech courts, where judicial posts carry substantially more prestige and earn 4.8 times the average national wage, women’s participation dropped to 39%.

This trend is also apparent in South Africa. The Magistracy is the lowest level in the South African court structure. In November 2013 women held 673 positions out of 1,711 (39.3%).²¹ This is markedly different from the situation at senior levels of the South African judiciary. For example, women currently hold only two of the 11 seats on the Constitutional Court, seven of 21 seats on the Supreme Court of Appeal and only two women hold the position of Judge-President across the thirteen

¹⁸ Ibid.

¹⁹ Ibid, 403.

²⁰ European Commission for the Efficiency of Justice (n15).

²¹ Catherine Albertyn, ‘Judicial Diversity’ in C Hoexter and M Olivier (eds), *The Judiciary in South Africa* (Juta 2014) 275.

provincial High Courts. There has never been a woman to hold the position of President of either the Constitutional Court or the Supreme Court of Appeal.

Some respond to this numerical disparity by encouraging patience – judicial gender equality will come; it is just a matter of time. In 1992 the sentiment was voiced by the Lord Chief Justice, Lord Taylor:

The present imbalance between male and female, White and Black in the judiciary is obvious... I have no doubt that the balance will be redressed in the next few years... Within five years I would expect to see a substantial number of appointments from both these groups.²²

The wishful thinking of this remark is clear. The Council of Europe ranks England and Wales as the fourth lowest employer of women in the judiciary out of 47 member states. Its overall figures were only marginally better than those of Armenia, Scotland and Azerbaijan.²³

There is now almost universal consensus among scholars who write in this area that the ‘trickle up’ theory – that with time women will climb to the highest legal ranks – is an unsatisfactory response to judicial gender inequality.²⁴ If nothing else the response is too slow – conservative estimates predict that at the current rate of progress it will take another 45 years to achieve gender parity in the senior judiciary in England and Wales.²⁵ Moreover, in addition to the slow pace of change in some jurisdictions where significant gains have been made, there is a fear of regression. Israel was one of the earliest common law jurisdictions to appoint a woman to its top

²² Lord Taylor, ‘The Judiciary in the Nineties’ (The Richard Dimbleby Lecture) 9.

²³ European Commission for the Efficiency of Justice (n15) 278.

²⁴ For example, for a concise summary of the development and demise of the ‘trickle up’ theory see: Erika Rackley, *Women, Judging and the Judiciary* (Routledge 2012) 32-6; and Kate Malleon, ‘Diversity in the Judiciary: The Case for Positive Action’ (2009) 36 *JL&Soc* 376.

²⁵ Equality and Human Rights Commission, *Sex and Power 2011* (August, 2011) 3.

court, with the appointment of Justice Miriam Ben Porat to the Israeli Supreme Court in 1977. Since then it has made impressive progress, with women accounting for more than half of Israel's 646 judges currently serving in secular courts in 2012.²⁶ However, despite this progress, the number of women represented on the Israeli Supreme Court has dropped, rather than risen in recent years, and in 2012 there were only seven women of the 21 new judges sworn in to the judiciary as a whole.²⁷ This raises concern and a prominent and senior Israeli academic attributes this to a public perception that the 'work has been done.' She fears that an increase in women's representation on the bench will not continue unless it is specifically kept on the agenda.²⁸ Similarly, in South Africa where the Constitution requires judicial appointments to the Constitutional Court to be made with due regard to the need for gender and racial balance,²⁹ only two women have ever sat concurrently over its almost two-decade history. Moreover, the number of women nominated and then interviewed for appointment to this court when vacancies arise has been dramatically decreasing – 18 men and four women were interviewed in 2009; in 2012 three men and one woman were interviewed; and in the 2013 round there were no women nominated, so five men were interviewed.³⁰

²⁶ Greer Fay Cashman, 'Beinisch Attends her Final Swearing-In Ceremony' *Jerusalem Post* (Jerusalem, 3 January 2012) <<http://www.jpost.com/NationalNews/Article.aspx?id=251946>>

²⁷ Ibid.

²⁸ Interview with senior Israeli female academic (Tel Aviv, 23 March 2012). Interview notes on file with the author.

²⁹ SA Constitution, s 174(2) 'The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.'

³⁰ Ernest Mabuza, 'Absence of Women on Constitutional Court Short List a Concern, Says Baqwa' *Business Day* (Johannesburg, 22 February 2013)

Women's low level of judicial participation is particularly problematic in common law jurisdictions such as England and Wales, Australia and South Africa. This will be the focus point for this thesis. While there have been gains in terms of gender transformation in other areas of governance and public life in these countries, the judiciary remains a persistent point of inequality. For example, in 2011 women in South Africa comprised 43% of Members of Parliament in the national legislature,³¹ but only 25% of the judiciary.³²

The numbers show persistent inequality, but why does it matter? What impact does it have on the law, upon society or upon justice as a whole if women judges are not sitting in equal numbers to men? There are many groups not represented in the judicial roles. Sometimes legitimately so. Exclusion may be legitimated in terms of the expertise required for judicial participation. Judicial appointment is justifiably contingent on prerequisites such as high educational achievement and significant legal knowledge.³³ Other forms of exclusion, such as the severe underrepresentation of people from Black and ethnic minorities communities in Australia, United Kingdom and previously in South Africa under the oppression of apartheid, are not legitimate. Clearly, the broader judicial diversity project has aims that extend beyond the increased participation of women. Diversity is advanced by a greater representation of people in judicial office who bring life experience from their participation in any

<<http://www.bdlive.co.za/national/law/2013/02/22/absence-of-women-on-constitutional-court-short-list-a-concern-says-baqwa>> accessed 13 December 2014.

³¹ 'Women's Parliament' (*Parliament of the Republic of South Africa*, 18 August 2011)

<http://www.parliament.gov.za/live/content.php?Item_ID=1617> accessed 25 January 2013

³² Turquet (n9) 59-61.

³³ Kate Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (2003) 11 FemLS 1, 19.

one or more currently excluded or under-represented groups. To date, judicial diversity programmes have paid the greatest attention to race, ethnicity, gender and, to a limited extent, socio-economic background. Clearly these target groups could be expanded to include specific and intersectional analyses of other protected characteristics such as disability, religious belief, sexual orientation and gender identity.³⁴ As important as this wider study is, it is beyond the scope of this thesis which focuses upon the participation of women in the judiciary.

B. THESIS OVERVIEW

The central research question for this thesis asks: why do we need more women judges? Why does it matter? It seeks to answer this question by engaging feminist standpoint theory to assess the experience of men and women judges from three common law jurisdictions: England, South Africa and Australia. Through a series of interviews conducted with members of the senior judiciary in these jurisdictions in 2012 and 2013, this thesis explores the extent to, and manner in which, interviewees consider gendered experiences to impact upon their own judging, and judging within the dynamics of collegiate appellate courts. This thesis concludes that while it is not possible to pinpoint one particular ‘contribution’ or ‘impact’ that gendered experiences make on judging, it is nonetheless generally considered by those interviewed to be an important and enriching part of the judicial decision-making process in several subtle, yet important ways.

Part I explores current arguments that are used to ‘make the case’ for more women judges. Chapter 1 demonstrates that many of these arguments rely upon the impact that women will make in the judicial role through their mere presence. These

³⁴ See Leslie Moran, ‘Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings’ (2006) 28 SydLR 565.

arguments depend upon ‘presence’ alone in the sense that women, just by being there, will have an impact on the judiciary. This impact will come from the expressive messages that are sent when judicial power is exercised by women and men equally; improvements in the legitimacy of courts as institutions; and a better reflection of equal opportunity for the progression of women in the legal profession. The impact of ‘presence’ does not depend upon ‘what women will bring’ to the judicial function and is not dependent on women judges changing the outcomes of judicial decisions. There are strong reasons to support such an approach, including the desire to move away from essentialising stereotypes of women that have historically served to justify women’s exclusion from law.

Nevertheless, Chapter 2 will question whether ‘presence’ as a justification for inclusion is enough. It will suggest that greater inclusion of women in judicial roles is linked to the quality of justice that gender diverse courts are able to deliver. This argument focuses on the value of experiential knowledge in judging, and particularly the way that experiential knowledge is gendered. This chapter will explore the concept of ‘gendered experiences.’ It will address a central question that troubles feminist research: is it possible to talk about women’s and men’s experiences without essentialising and homogenising what are, in truth, eclectic and disparate groups? This chapter draws upon a strand of feminist standpoint theory advanced by sociologist Patricia Hill Collins.³⁵ She highlights the dialogic relationship between received and experiential knowledge. When former ‘outsiders’ are ‘brought in’ their

³⁵ Patricia Hill Collins, ‘Defining Black Feminist Thought’ in Linda Nicholson (ed), *The Second Wave: A Reader in Feminist Theory* (Routledge 1997); Patricia Hill Collins, ‘Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought’ in Sandra Harding (ed), *The Feminist Standpoint Theory Reader: Intellectual & Political Controversies* (Routledge 2004).

experiential knowledge can serve to produce richer outcomes and, for law, a more socially appropriate interpretation of justice. In this way, a focus on experiential knowledge can assist in identifying gendered contributions to judging without pandering to essentialist stereotypes. Chapter 2 concludes by arguing that while the ‘mere presence’ versus ‘substantive’ categorisation of gender contribution is conceptually clear, in practice it is less so. This serves to reinforce the need to consider the substantive impact that gender diversity has upon the quality of justice courts are capable of delivering.

Chapter 3 will round out Part I by advancing the argument that not only does gendered experiential knowledge unavoidably impact upon judicial decision-making (and to date, this has been predominantly male gendered experiential knowledge), but a full consciousness of this impact will enhance the ability of the court to perform its function in an impartial way. Chapter 3 will draw a distinction between ‘neutrality’ and ‘impartiality’, arguing that the former is unachievable, but the latter is enhanced through greater judicial self-consciousness of gender situatedness, and a willingness to open up perspectives to challenge by those differently situated.

Part II asks how the impact of gender experiential knowledge upon judging is best explored. This chapter canvasses four possible methodological options, highlighting the strengths and limitations of each approach. Chapter 4 provides a brief overview of quantitative empirical research. This research is characterised by either an assessment of case outcome, or an individual judge’s voting record, and then looks at how this correlates with the sex demographic of the court. This chapter will argue that purely outcome-based enquires are insufficient to capture the subtle, yet important impacts of gendered experiential knowledge on judging.

Chapter 5 presents doctrinal analysis. The text of judgments are analysed to determine whether gendered experiential knowledge can be seen to overtly impact upon the written reasons. It offers a study of European Court of Human Rights case-law to test whether an increase in the number of women judges has produced an increase in judgments of references to and reflections upon women's gendered experiences. It demonstrates that while doctrinal analysis can be fruitful in uncovering flashes of reasoning based on gendered perspectives, the one-dimensional nature of written decisions render them a blunt tool with which to assess whether an increase in gender diversity on the bench is, in fact, responsible for these illuminations.

Chapter 6 considers recent projects such as the Women's Court of Canada and the English Feminist Judgments Project where court decisions are re-written by feminist scholars as fictional judgments. This project has been useful in exposing the impact of men's gendered experiential knowledge in decision-making in particular cases. It also serves to demonstrate the extent to which life experience and perspective can determine which 'fork of the path' a judge decides to take when writing reasons.

Chapter 7 will argue that more qualitative empirical research should be done in order to understand the extent to which judicial diversity has shaped judicial decision-making. While this approach is not without its limitations, it provides a sophisticated tool with which to capture the intricate and complex manner in which gendered experiences are brought to bear on judging. The chapter will conclude by setting out the methodology engaged in this thesis – qualitative semi-structured interviews with members of the senior judiciary.

Part III draws upon original empirical data collected by way of interviews with senior members of the South African, Australian and English judiciary. Chapter 8 analyses accounts of how these interviewees consider that ‘experience’ contributes to their decision-making capabilities. It will demonstrate that participants vary in their understanding of what experience is necessary in order to be a judge. It explores the link between professional experience and gendered experience, and what judges think should ‘count’ as experience necessary in order to become a judge and how this experience is obtained and valued or de-valued.

Chapter 9 moves from accounts of how experience affects an individual judge’s decision making to consider judicial perceptions of the impact of gendered experiences in the context of collegiate decision making. It will demonstrate that collegiate decision making can be strengthened if the court has a diverse pool of experience to draw from. In terms of gendered experiences, interview material reveals how sharing gendered perspectives serves as an important check on partiality and bias, with justices often being confronted by their own unconscious biases or stereotypical assumptions when challenged by a colleague with a different gendered experience and perspective.

Chapter 10 concludes by arguing that gendered experience is an important factor to consider when assessing candidates for judicial appointment. To date, gendered experiential knowledge has been undervalued in appointment processes. Chapter 10 will argue that collegiate appellate courts should be conceived of as a ‘team’. A holistic view of the current experiential range of the court should be taken into account when new members are appointed. Rather than relying upon the traditional ‘flat’ definitions of merit that tended to elevate technical excellence and advocacy experience over other qualities, appointment criteria should be capable of

giving serious weight to other experiences, such as gendered experiences, which are also essential tools for realising justice.

The main contribution of this thesis is its findings in respect of the substantive impact that gender diversity has in final appellate courts in common law jurisdictions. It offers a new empirical base to support the proposition that gender-diverse benches are able to draw upon a wider pool of experiences, and therefore enhance the quality of justice they provide. It highlights that up until now, men's gendered experiences have dominated judicial decision making, marginalising other gendered experiences, in particular, women's gendered experiences. While the policy implications of this finding are significant – for example, how then should appointment processes be designed in order to encourage the appointment of individuals with greater diversity in gendered experiences; is there a need for the written decisions of the court to be modified in order to reflect to a greater extent the impact that gendered experiences have upon the final decision – a detailed assessment of these questions is beyond the scope of this thesis, but are areas ripe for further research.

PART I: MAKING THE CASE FOR MORE WOMEN

JUDGES

A marked example of the shift in thinking away from a gender-blind assessment of judicial candidates came when the then Lord Chancellor, the Rt. Hon Jack Straw MP, established the Advisory Panel on Judicial Diversity, chaired by Baroness Julia Neuberger. The Advisory Panel's terms of reference were to 'identify barriers to progress on judicial diversity and to make recommendations to the Lord Chancellor on how to make speedier and sustained progress to a more diverse judiciary at every level and in all courts in England and Wales.' In 2011 the Neuberger Advisory Panel issued a report³⁶ that presented three arguments to 'make the case' for greater diversity: institutional legitimacy, fairness and perspective.³⁷ Other influential commentators have subsequently reflected this thematic categorisation for why diversity matters and, in particular, why gender diversity matters. For example, Lady Justice Arden, in her written submission to the House of Lords Select Committee on the Constitution considering the judicial appointments process in 2011, made eight points supporting the case for women judges: legitimacy; more perspectives are brought to bear in judicial deliberations; equality of opportunity and maximisation of talent; international standing; increasing self-awareness of the judiciary; and public confidence.³⁸

Each of these arguments, on their own and together, can be used to create a compelling case as to why the gender transformation of courts is important.

³⁶ Julia Neuberger and others, *The Report of the Advisory Panel on Judicial Diversity 2010* (2010).

³⁷ Ibid.

³⁸ Select Committee on the Constitution, *Judicial Appointments Process - Written Evidence* (House of Lords, 2011) 5.

However, they are not without controversy or contestation, particularly those that go towards ‘perspective’ arguments that contend that better decision making will result from a more diverse bench. The next two chapters will canvass four broad categories of argument. The first three, characterised as ‘presence arguments’ will be termed (1) expressive arguments; (2) institutional legitimacy arguments; and (3) employment equity arguments. These will be considered in this chapter. These three all appear to be generally accepted, with slight variations in reasoning, by most who work in this area. The fourth argument however, is much more contentious. It will be the focus of Chapter 2. While the Neuberger report termed this the ‘perspective’ argument, this thesis will argue that is more appropriately styled as (4) ‘the quality of justice argument’: that a gender diverse bench produces better justice. Argument four is a complex and nuanced area of inquiry and will be the driving question for the remainder of this thesis. Arguments and evidence supporting claims of (1) expressive arguments, (2) institutional legitimacy arguments and (3) employment equity arguments are relevant, overlapping and reinforce those supporting claim (4), ‘the quality of justice’ argument. However, claim (4), is a much more difficult case to make, but an essential one.

CHAPTER 1: MAKING THE CASE FOR MORE WOMEN

JUDGES – PRESENCE-BASED ARGUMENTS

The first three arguments – the ‘mere presence’ case – suggest that just by being there, women can make a difference on the bench. As Nussbaum writes, ‘[p]resence, though less important than the issues, still counts for a lot.’³⁹ It can promote public confidence in the courts and transform stereotypical conceptions of what it means to be a judge. Just by being there, women make an impact. The impact that the presence of women judges have will be broken down into three sub-categories: first, increasing the expressive gains that come with equal gender participation in the judiciary; second, arguments pertaining to institutional legitimacy of the judiciary; and finally, achieving greater employment equity through the re-distribution of positions of power. Increasing women’s numerical participation in the judiciary has significant value.

A. EXPRESSIVE ARGUMENTS

Courts in common law countries have a significant expressive function. They exercise significant amounts of power. A lack of women’s participation in the exercise of power sends a negative message about women and their acceptance as power bearers in society.

The ‘Court’ in this section has multiple meanings. First, ‘the Court’ refers to the institution itself, the body established, be it by convention, constitution or statute. It is the physical place, the third arm of government. However, ‘the Court’ is also

³⁹ Martha Nussbaum, ‘Women in Office Break Stereotypes’ *Philadelphia Enquirer* (Philadelphia, 24 November 2008) A10.

used to refer to the judges who constitute the bench – the people that make up the institution and exercise power under its name. This section will explore how ‘the Court’ in both senses has a fundamental expressive function in conceptions of the role of law, justice, power and citizenship. This expressive function is passive – its impact and the messages conveyed are not dependent upon the actual output of the court or the content of the decisions. Rather, it is an impact made through representations and perceptions of these representations. The section begins by looking at the expressive function of the Court as a physical institution. It then considers the expressive function of the composition of the judiciary from three different angles. The first draws upon the experience of regional representation to demonstrate that there is already a well-established consensus that judges in courts with a wide regional spread need to reflect that diversity, not because they are expected to represent their regions, but to give the court legitimacy among all its constituents. Secondly, this experience is contrasted with the paucity of women on the bench, to illustrate the significant absence of a consensus, particularly when viewed historically, that gender diversity is important in both correcting and conveying expressive messages about women and their role in institutions exercising power.

1. The ‘Court’ as an institution

There is no doubt that a court, in the first sense of the word, is a powerful symbolic institution. Its location, the scope of its powers, and even the physical structure that houses it and the iconography that adorns it, serve an important expressive function in the conceptualisation of justice for the particular jurisdiction.⁴⁰ The abolition of appeals to the Privy Council from Australia in 1986, making the High Court the final

⁴⁰ See: Judith Resnik and Dennis E Curtin, ‘Representing Justice: From Renaissance Iconography to Twenty-First Century Courthouses’ (2007) Paper 693 Faculty Scholarship Series.

arbitrator of law in the country, was an important moment for Australia, as a relatively young democracy gaining, for the first time, legal independence from its colonial master. The new Constitutional Court building in Braamfontein, Johannesburg, is built on the site of a former high-security prison. The symbolism of the building and the Court is overwhelmingly clear to whoever enters. Nelson Mandela explained the symbolic importance of the new court after the design of the court complex was chosen:

The Constitutional Court building, indeed the entire Constitutional Hill precinct, will also stand as a beacon of light, a symbol of hope and celebration. Transforming a notorious icon of repression into its opposite, it will ease the memories of suffering inflicted in the dark corners, cells and corridors of the Old Fort Prison. Rising from the ashes of that ghastly era, it will shine forth as a pledge for all time that South Africa will never return to that abyss. It will stand as an affirmation that South Africa is indeed a better place for all.⁴¹

In 2009, the Appellate Committee of the House of Lords transformed into the UK Supreme Court and moved from its former home within the House of Lords to its own building on the opposite side of Parliament Square in Westminster. This was seen as a moment of great significance, as the physical separation achieved ‘a complete separation between the United Kingdom’s senior Judges and the Upper House of Parliament, emphasizing the independence of the Law Lords and increasing the transparency between Parliament and the courts.’⁴²

⁴¹ Nelson Mandela, ‘Address by President Nelson Mandela on the Occasion of the Announcement of the Winner of the Architectural Competition for the Design of the New Constitutional Court Building’ (Johannesburg, 8 April 1998).

⁴² ‘The Supreme Court: Significance to the UK’ (*Judicial Committee of The Privy Council Website*, 2014) <<https://www.supremecourt.uk/about/significance-to-the-uk.html>> accessed 11 December 2014.

2. The expressive implications of judicial composition: regional spread

The symbolic importance of a judiciary that reflects the regional diversity of its constituency has been recognised in several jurisdictions. Regional representativeness in the composition of the judiciary can send a message of national or international unity, participation, inclusion and acceptance by the relevant actors. This is particularly so when a court is part of a project of legal harmonization which is politically sensitive. A judiciary that reflects the regional spread can assist in generating support and ‘buy-in’ not only from diverse, but often reluctant constituencies. The emphasis that several regional and all international courts place upon geographical representation demonstrates that diversity, at least regional diversity, is acknowledged as important both symbolically, and as an expression of shared participation and contribution to decision making with broad regional consequences.

There are many examples of domestic courts that have had to contend with the sensitive politics involved with such unifying projects. The Supreme Court of Canada, out of well-observed convention and explicit requirement, has a diverse representation of judges from each of the provinces. The Supreme Court Act requires that three of the nine justices appointed be from Québec, and by convention three appointments from Ontario, two from the Western provinces and one from Atlantic Canada.⁴³ Since the appointment of Chief Justice Duff in the 1930s, with one exception, a person has held the position of Chief Justice alternately from Québec and

⁴³ ‘Creation and Beginings of the Court’ (*Supreme Court of Canada*, 24 September 2011)

<<http://www.scc-csc.gc.ca/court-cour/creation/index-eng.asp>> accessed 11 December 2014.

from the rest of Canada.⁴⁴ This is done in part to ensure there is sufficient judicial knowledge on the bench of the various provincial laws, particularly the Québécoise civil code, but it also serves a greater political and symbolic purpose, including ‘Canada’s commitment to being inclusive of the French culture.’⁴⁵

There is a particular emphasis on regional diversity for international and supra-national courts.⁴⁶ For example, Article 20 of the ECHR requires that the ECtHR shall consist of a number of judges equal to that of each of the state parties. Article 27(2) requires that, for each case, the judge elected in respect of the state party concerned should sit as a member of the Chamber or Grand Chamber deciding their State’s case. Judges are not there to act as advocates for their country of origin or to ‘represent’ (in the strict definition of the word) their relative constituencies.⁴⁷ Rather, Article 27(2) is driven by an assumption that the State ‘representative’ will first be fully acquainted with the relevant domestic law of the respondent State and second will be fully acquainted with the context in which it is set. More will be said further on about the substantive impact that regional judges have in shaping the decision making of supra-national courts. However, the expressive impact that the inclusion of representative

⁴⁴ James Hopkins and Albert Peeling, ‘Aboriginal Judicial Appointments to the Supreme Court of Canada’ (Paper Prepared for the Indigenous Bar Association, April 6, 2004, Canada) 12.

⁴⁵ Richard Devlin, A. Wayne MacKay and Natasha Kim, ‘Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Towards a "Triple P" Judiciary’ (2000) 38 *AlbertaLRev* 797-8.

⁴⁶ Statute of the International Court of Justice, Arts 3 and 9; Statute of the International Tribunal of the Law of the Sea, Art 2(2); Rome Statute of the International Criminal Court, Art 36. See Ruth MacKenzie and others, *Selecting International Judges Principle, Process, and Politics* (OUP 2010) Ch 2.

⁴⁷ ECHR, Art 21(2).

judges from relevant constituencies has in supra-national courts is ‘complex and nuanced’, perhaps, as MacKenzie et al explain, more so than that in domestic courts.⁴⁸

Accession to the jurisdiction of international and supra-national courts is, for the large part, voluntary. As such, member states have an interest in seeing ‘one of their own’ at the table when decisions are made which will impact their country. In exchange for ceding a degree of sovereignty, the member states want to have a representative participate in the decision-making process. Judges on these courts might feel a degree of responsibility for ensuring that the best interests of their country are seen to be reflected in the jurisprudence of the court and that the values and principles of their domestic jurisdictions in some way impact upon the supra-national legal order. MacKenzie et al highlight the fine balance between judicial independence and vested interests in international courts:

... there is also recognition that judges cannot entirely leave their nationality at the door of the court and that the continuing commitment of states to international justice derives, to a significant degree, from the belief that having a national on the bench furthers the interests of the state in some way.⁴⁹

The principle is simple (to borrow a useful slogan): ‘no decisions about us without us’. Regardless of the *actual* impact of a particular judge on the outcome, there is greater acceptance of supra-national courts where there is at least the *impression* that there will be a domestic influence upon the decision-making process.

Problematic expressive consequences flow when ‘apex’ courts, charged with overseeing subordinate jurisdictions, are not jurisdictionally representative. Debates surrounding the composition of the High Court of Australia illustrate this point. The High Court of Australia sits at the apex of the Australian federal court structures and

⁴⁸ MacKenzie and others (n46) 25.

⁴⁹ Ibid.

is the final arbitrator of Constitutional matters that often pertain to inter-State disputes. Apart from an obligation for the Commonwealth Attorney-General to ‘consult’ with State Attorneys-General before making appointments to the High Court,⁵⁰ regional representation is not a formal or explicit consideration influencing High Court appointment. However, it is clear that pre-confederation tensions remain implicit in the process. There has been a creeping centralization of power in Australia which many attribute to the High Court of Australia’s expansionist interpretation of Commonwealth powers enumerated in the Constitution. This has been to the detriment of the States’ reserve powers which were fundamental to the delicate compact struck at Federation and, in particular, to the interests of smaller States. As Williams comments:

The Commonwealth has a monopoly on selecting High Court judges, and not surprisingly promotes its own interests. As a result, it is unusual for the High Court to have even a single judge who has professed sympathy for states’ rights. Instead, the High Court has been dominated by judges from the larger States. Of 49 appointments, 39 have come from NSW and Victoria alone. No judge has hailed from South Australia or Tasmania. Neither state has ever produced the “best person for the job”.⁵¹

So while the High Court of Australia has not been regionally representative, this is seen as a matter of concern.⁵² It is not uncommon when a vacancy arises for there to be noisy talk for the need to appoint a judge from one of the smaller States or the Territories and, by association, for the legal culture or regional interests of these

⁵⁰ High Court of Australia Act 1979 (Cth), s 6.

⁵¹ George Williams, ‘Here’s something even Gillard and Abbott might agree on’ *The Sydney Morning Herald* (Sydney, 28 August 2012) Opinion <<http://www.smh.com.au/opinion/politics/heres-something-even-gillard-and-abbott-might-agree-on-20120827-24wic.html>> accessed 28 February 2013.

⁵² For example, see: Gabriel Moens, ‘The Role of the States in High Court Appointments’ (Proceedings of the Eighth Conference of the Samuel Griffith Society, Canberra, 7 - 9 March, 1997).

jurisdictions to be seen to have a place at the judicial table when important decisions impacting upon the nation are made.

Similar debates arise in relation to the absence of indigenous judges. This has been an issue of contention in both Canada and Australia, where the absence of indigenous members, particularly in the ‘apex’ courts, signals exclusion and has paternalistic overtones. The following quotation demonstrates this negative expressive consequence in relation to the appointment of First Nations people to the Supreme Court of Canada:

Central to any Aboriginal justice appointment measures is a recognition that the country is comprised of distinct regions that collectively play a vital role in maintaining the democratic compact—that it is not simply enough to have equality before the law, but that the regions must be extended an equal opportunity to be represented in the exercise of its authority, its enforcement, and in defining its scope and content particularly when the issue concerns the application of laws particular to their own identity and system of governance.⁵³

The quest for ‘diversity’ at the domestic and international level has historically been seen as one in search of diverse representation of legal systems, geographical locations, citizenship, specific expertise and linguistic competence. As the quote above demonstrates, the scope of what is considered to be necessary diversity in order to convey messages of inclusion and participation is gradually expanding.

3. The expressive consequences of minimal gender diversity

According to MacKenzie et al, ‘[w]hereas the requirements for geographical, legal and linguistic diversity are widely accepted in principle, as necessary to ensure a competent, politically legitimate court, attitudes towards gender balance are generally much more ambivalent.’⁵⁴ This section examines the expressive implication for

⁵³ Hopkins and Peeling (n44) 14.

⁵⁴ MacKenzie and others (n46) 49.

courts that have inadequate levels of participation by women. Arguably, low levels of participation by women on the bench in common law countries signifies a continuation of historic prejudices about the competence of women and their right to participate equally in exercising power in public life.

In this regard, the composition of modern courts should play two important expressive functions. The first is to mark women's rightful legal status – as makers of law, holders of power and legitimate actors in the legal regulation of society. The second function is transformative – to continue to change any residual perceptions about the inferiority of women as holders of power. However, low levels of judicial participation give precisely the opposite message. Given the low regard given to women by law historically, these perceptions of inferiority run deep and have proven to operate, even if only at the subconscious level, to prevent women from equally participating in public life.

It is worthwhile sketching the root of these prejudices in order to unveil how historical assumptions perpetuate. There will be synergies with these historical observations and latter accounts given by women interviewees in Chapter 8 and 9 reflecting on persisting contemporary challenges. Historically, women were excluded from all forms of legal participation. The expressive implication was clear: women were not capable, as a matter of nature and of interest, of meeting the intellectual challenges required in the practice of law. Men (at least white, land-owning men) were the creators of law and their interests its subject. Women were the objects of law, nothing else, and seen by legal institutions and frameworks as chattels, the property of their male relatives or husbands, with no place in public life. Women's 'natural domain' was in the home.⁵⁵ While the women's suffrage movement in the

⁵⁵ Sandra Fredman, *Women and The Law* (Clarendon 1997) 2.

early 1900s marked significant progress in women's participation in public life, and some women, usually white, wealthy women who reflected their male counterparts in all but gender, were able to cross the private/public divide and start to venture into the practice of law, it has been a slow and difficult process.

The story of the first women lawyers was strikingly similar and an 'easy one to tell, even across widely disparate national and legal cultures.'⁵⁶ Initially, the formal barriers to women's participation in law were twofold. First, legal education was afforded exclusively to men, and second, admission to the legal profession was not open to women as they were legally considered 'non persons' and therefore not capable of holding public office.⁵⁷

The lack of access was justified by the male 'gate-keepers' through derogatory stereotypes about women's intellectual abilities, interests and temperament, as well as assumptions about the nature of law as a 'masculine' profession. Women were considered 'different' from men, and therefore not capable of participating in public life. In particular, the practice of law was assumed to be contrary to women's natural pre-disposition:

...the identity of the legal profession was defined through masculine characteristics of brashness, confidence and outspokenness, all presumed

⁵⁶ Carrie Menkel-Meadow, 'The Comparative Sociology of Women Lawyers: the "Feminization" of the Legal Profession' (1986) 24 OHLJ 897, 897. See also Mary Jane Mossman, *The First Women Lawyers: A Comparative Study of Gender, Law, and the Legal Professions* (Hart 2006); Barbara Babcock, *Woman Lawyer: The Trials of Clara Foltz* (SUP 2011) on the experience of Clara Foltz, one of the first women lawyers in the United States of America; and Suparna Gooptu, *Cornelia Sorabji: India's Pioneering Woman Lawyer* (OUP 2006) on the experience of Cornelia Sorabji, one of the first women barristers in India and the first woman to practice at the Calcutta Bar.

⁵⁷ See Clare McGlynn, 'The Status of Women Lawyers in the United Kingdom' in Ulrike Schultz and Gisela Shaw (eds), *Women in the World's Legal Professions* (1st edn, Hart 2003) 141.

unsuitable to, and inappropriate for, the members of the so-called “weaker sex”.⁵⁸

Men argued, and many in society accepted, that women’s biological make-up made them inherently unsuitable for the kind of logical and rational reasoning, assumed to be exclusive to men: ‘A woman does not, as a rule, arrive at a conclusion by logical reasoning, but rather by a species of instinct, which, no matter how unerring, cannot assist others to arrive at the same conclusion.’⁵⁹ Moreover, it was argued that to allow women access to practise would spell disaster for the profession as a whole.

Backhouse describes the hysteria of male opponents:

Catastrophic disruption had been predicted by those who opposed women in the profession. The litany was lengthy: nurseries attached to courtrooms, shrill demands to change laws perceived as discriminatory, woman litigators who would use their gender to unfair advantage with judges and juries, abandoned families in unkempt homes as mothers who should have been attending to domestic duties lingered in law offices.⁶⁰

When women first started to mobilize and challenge the ‘non person’ status that excluded them from practice, their efforts were met with contempt. As one Canadian journalist put it, the notion was ‘hilarious’:

The idea of women mingling in public affairs...and exercising professions which necessarily banish all maiden mawkishness, is so novel, so contrary

⁵⁸ Mossman (n56) 14.

⁵⁹ Arthur H O'Brien, ‘Legal Scrap Book’ (1892) 28 Canada LJ 202, 205, cited by Constance Backhouse, ‘Gender and Race in the Construction of ‘Legal Professionalism’: Historical Perspectives’ (First Colloquium on the Legal Profession, Ottawa, October 2003) 8.

⁶⁰ Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Women's Press 1991) 334.

to all notion of feminine sweetness, modesty, and delicacy, that we are apt to be hilarious over it, even when most gravely advocated.⁶¹

These barriers aside, some women lawyers did push through. Canadian Clara Brett Martin was the first woman in the British Empire to be admitted to practice in 1897.⁶² She was followed a few months later by Ethel Benjamin in New Zealand. In 1919, after much lobbying, the UK legislature adopted the Sex Discrimination (Removal) Act, which finally allowed women to practise as lawyers. Madge Easton Anderson was the first woman to benefit from this reform and was admitted in Scotland in 1920. She was followed in England shortly thereafter by Maud Crofts, Mary Pickup and Mary Sykes, being the first women admitted as solicitors in 1922.⁶³ Ivy Williams was the first woman to be called to the Bar in the UK. Women may have been gaining access to the profession, but they were far from welcomed. The law continued to be seen as a man's profession, and women who dared enter were to do so on men's terms.

While many of the formal barriers fell, women remained marginalized in the legal profession due to calcified attitudes about women's competence. Promotion for those who had made it to practice was slow and rare, and promotion to the bench almost unimaginable. Even where early appointments were made, such as the appointment of Emily Murphy and Alice Jamieson as the first two women police magistrates in Canada in the early twentieth century, male colleagues accepted their presence begrudgingly. Male counsel challenged this appointment, and the Supreme

⁶¹ 'Women's Rights' *Canadian Illustrated News* (Montreal, 21 November 1874) 323 cited by Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (n60) 294.

⁶² See Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (n60), Chapter 10.

⁶³ McGlynn (n57) 142-3.

Court of Alberta Judge who ultimately upheld their right to sit, did so with an additional remark that he “entertain[ed] serious doubts” whether a woman was “qualified to be appointed,” but the government of the day had apparently thought otherwise, and he could not find any legal impediment in the way.’⁶⁴

It is easy to reflect on this potted summary as a story of the past: attitudes that existed in a different time, in a different society. However, many of the sexist attitudes and doubts about women’s competency continue to permeate, although usually not so explicitly, through modern legal circles. The messages about women conveyed by courts of the past may not be as historic as many would hope. The long running ‘Judicial’ category in the Australian ‘Ernie Awards’ (a satirical award given for sexist behaviour) which has for 20 years now been highlighting a plethora of noxious judicial comments, is evidence of this sad fact.⁶⁵ While overt expressions of women’s inferiority or suggestions about women’s competency as decision makers and to ‘sit in the seat of power’ are few and far between and, one hopes, would be seen as unacceptable by many in the community, covert and unconscious biases arising from engrained social stereotyping still remain. Traditional stereotypes that portray women as submissive, passive and docile and therefore unsuitable for judicial service can still be identified in certain segments of society today. Anecdotal accounts by women judges of arriving as a visiting judge to another court and being asked by court staff, ‘where is the judge?’, continue to surface. More of these accounts will be provided in Chapter 9.

⁶⁴ Rex v. Cyr (1917) 12 AltaLR 321 cited by Backhouse, ‘Gender and Race in the Construction of ‘Legal Professionalism’: Historical Perspectives’ (n59) 13.

⁶⁵ Meredith Burgmann and Yvette Andrews, ‘The Ernie Awards for Sexist Behaviour’ (2012)

<<http://ernies.com.au/>> accessed 11 December 2014.

If modern courts fail to reflect the gender composition of the societies they serve, they send a message about power – who holds it, who deserves it, who is capable of holding it. The lack of women’s judicial participation reinforces, rather than transforms, negative stereotypes of women, power and their place in law and society.

B. LEGITIMISING THE EXERCISE OF POWER

The second ‘presence’-based argument supporting more women on the bench relates to the legitimacy of courts. Courts do not just hold symbolic importance: in common law systems they exercise real and significant power. For example, the UK Supreme Court describes itself as an institution whose influence ‘extends far beyond the parties involved in any given case, shaping our society, and directly affecting our everyday lives.’⁶⁶ As Malleon highlights, this power is not limited to superior courts, as ‘judges at all levels are exercising power and so are engaged in politics as widely defined.’⁶⁷ The ‘political’ influence of the judiciary is significantly different to that of the executive and the legislature. However, like the two other arms of governance exercising social power in a democracy, the judiciary must be viewed as legitimate. In a democratic society the exercise of power is justified through the legitimacy of the institution. This section considers what it means for a court to be ‘legitimate’ and why the inclusion or exclusion of women judges impacts upon this legitimacy.

Judicial legitimacy in common law systems is not usually maintained through electoral accountability.⁶⁸ Other mechanisms are required. The obligation upon courts to give reasons, the presumption that cases will be heard in public, the right of

⁶⁶ ‘The Supreme Court: Significance to the UK’ (n42).

⁶⁷ Malleon, ‘Justifying Gender Equality on the Bench: Why Difference Won’t Do’ (n33) 18.

⁶⁸ Although a number of state court judges in the US are elected.

appeal, the rule of law, the doctrine of precedent and the constraints that legal methods place upon the judiciary are all mechanisms of accountability which assist in legitimizing the courts' power.⁶⁹ But does accountability alone render an institution legitimate? Particularly when this accountability is so limited and individualized? A lower court may be held to account on appeal for a decision or conduct in respect of a particular case. However, ensuring the accountability of the institution in general or its members in particular, given the underlying concept of judicial independence, is somewhat more opaque and an unsatisfactory tool for determining institutional legitimacy.

But how do we know whether courts are legitimate or not? Weber defined institutional legitimacy in purely descriptive terms. According to Weber, power relations are legitimate where there is the 'belief in legitimacy',⁷⁰ or, as Beetham summarises, 'where those involved in them, subordinate as well as dominant, believe them to be so'.⁷¹ But how do we know what people think of the courts and how the gender make-up of the bench impacts their perceptions of legitimacy?

While social attitudes data is collected on a variety of justice-related issues such as the perceived legitimacy of the criminal justice system and trust in criminal courts,⁷² and has been collected in relation to race and the judiciary in South Africa,⁷³

⁶⁹ Issues surrounding judicial appointment procedures are also a central feature of debates surrounding institutional legitimacy. While Chapter 10 will look at conceptions of merit employed in appointments processes, a full enquiry into the mechanism of appointment is beyond the scope of this thesis.

⁷⁰ Max Weber, Guenther Roth and Claus Wittich, *Economy and Society: An Outline of Interpretive Sociology* (Bedminster Press 1968) 213.

⁷¹ David Beetham, *The Legitimation of Power* (Macmillan 1991) 6.

⁷² See: Jonathan Jackson and others, *Trust in Justice: Topline Results from Round 5* (European Social Survey, 2011).

to date there have not been any studies⁷⁴ linking public confidence in the court and its gender composition. This is not to say that such a correlation doesn't exist, and there are many anecdotal examples to support this thesis. For example, following the case of *R (Gentle & Anor) v The Prime Minister & Ors*⁷⁵ the applicant, the mother of a deceased Iraq war soldier, accused the male members of the UK Supreme Court of 'insensitivity'. At the same time, she praised the empathy Baroness Hale expressed 'as a mother.'⁷⁶ This is an example of a case where gender appears to have influenced a claimant's belief in the legitimacy of the institution. Another example can be found in an interview statement made by Justice Mandisa Maya of the South African Supreme Court of Appeal. She considers that her rural background helps to legitimize her and the court in the eyes of women from rural areas:

It's critical for the bench to have people who come from the places where the disputes come from. Having somebody like me here is what will make a woman from the rural areas, a woman from the township who has a legal dispute approach a court when they have a problem. They know that one of theirs is sitting there.⁷⁷

⁷³ Quantitative research was published in 2005 that pointed to a widespread public perception in South Africa that race does matter in the adjudication of cases. Out of 2,000 respondents, 51%, with no difference between racial groups, agreed with the proposition that the race of a judge does have an influence over how he or she decides a case. See Geoff Budlender, 'Transforming the Judiciary: The politics of the judiciary in a democratic South Africa' (2005) 122 SALJ 715, 717.

⁷⁴ That I am aware of.

⁷⁵ *R (Gentle & Anor) v The Prime Minister & Ors* [2008] UKHL 20; [2008] 1 AC 1356.

⁷⁶ Frances Gibb, 'Mothers Lose Bid for Iraq Public Inquiry' *The Times* (London, 10 April 2008) <<http://www.thetimes.co.uk/tto/law/article2210894.ece> > .

⁷⁷ Ruth Cowen, *Courting Justice* (Luna Films 2008).

Judge Masipa of the High Court of Johannesburg shared similar sentiments about judicial diversity fostering a greater belief in the legitimacy of the court on the part of its users:

In the past people, you know, would stay away from court. They would rather sort their problems out themselves. Now they see there are Black people and women on the bench and they say ‘well maybe, you know, if you want justice the High Court is where you go.’⁷⁸

As compelling as these accounts are, if legitimacy is understood as a purely empirical matter based upon people’s beliefs, there is no reliable data yet to support the claim that the more gender diverse a court is, the more legitimate it is in its exercise of power.

However, according to Beetham, institutional legitimacy is derived from more than just an empirical claim about society’s beliefs. He contends that there is also a normative aspect to consider when determining whether or not a power-wielding institution is legitimate. For Beetham, ‘[a] given power relationship is not legitimate because people believe in its legitimacy, but because it can be *justified in terms of* their beliefs.’⁷⁹ Moreover, this justification must be ‘in terms of the beliefs and values current in the given society.’⁸⁰ Accordingly, for Beetham, an important factor in legitimizing an institution is whether the power relationship is justifiable when assessed according to the current norms and values of the society in which the institution operates.

This is an important distinction to make when analyzing the legitimacy of modern courts. As discussed above, notions of ‘public confidence’ can be difficult to

⁷⁸ Ibid.

⁷⁹ Beetham (n71) 11.

⁸⁰ Ibid 12.

ascertain, and may be subject to manipulation, misinformation and popular sentiments that do not always amount to legitimacy. As Beetham highlights, equating legitimacy with ‘belief in legitimacy’ leaves the assessor ‘helpless in the critical task of analyzing an erosion of legitimacy in power relations, but proposing a report on people’s “belief in legitimacy” rather than identifying a developing discrepancy between rules of power and norms that provide their justification.’⁸¹

So can a judiciary that is unreflective of the general population be justifiable when assessed against current norms and values? The argument developed in the last section, about the negative expressive impact caused by having too few women on the bench, suggests that this is highly unlikely. In many jurisdictions, principles of equality are constitutionally entrenched or legislatively protected. Indeed, arguments of modernization are often accompanied by campaigns for equal participation by women and men.⁸² To argue otherwise leads to perceptions of ‘backwardness’. In South Africa the Constitution goes one step further, explicitly endorsing the ‘need for the judiciary to reflect broadly the racial and gender composition of South Africa.’⁸³ Legislation governing appointments to the Supreme Court of Ontario have similar requirements.⁸⁴

There is an increasing public focus on the relationship between judicial composition and legitimacy: ‘The question of who the judges are is increasingly

⁸¹ Ibid 23.

⁸² For example, see Sally Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (Routledge 2013) 88, highlighting how feminist movements in Britain have ‘sought to advance the case for more women on the bench by linking the issue to the Labour Party’s discourse on modernization.’

⁸³ SA Constitution, s 174(2).

⁸⁴ Courts of Justice Act (Ontario), s 43(3).

understood to be connected to their legitimacy'.⁸⁵ The Neuberger Advisory Panel took account of this connection:

In a democratic society it is unacceptable for an unelected institution that wields the power of the judiciary to be drawn from a narrow and homogenous group that reflects neither the diversity of society nor that of the legal profession as a whole. Failure to appoint well-qualified candidates from diverse backgrounds to judicial office represents exclusion from participation in power. A judiciary which is visibly more reflective of society will enhance public confidence.⁸⁶

The choice of the word 'reflective' rather than 'representative' here is significant. Political theorists have given a great deal of attention to what it means to be 'representative'. Phillips distinguishes between representation in terms of 'whom' (the politics of presence) and representation in terms of 'what' (the politics of ideas). She notes that:

... most political theorists have been happy to stand by the arguments Hanna Pitkin wielded nearly thirty years ago against mirror or descriptive representations...they have shared her perception that an over-emphasis on who is present in the legislative assemblies diverts attention from more urgent questions of what the representatives actually do.⁸⁷

Although not rejecting the importance of the 'what' – that representation in terms of policies, preferences and ideas matters – she argues that this is an 'inadequate vehicle for dealing with political exclusion'.⁸⁸ 'Representation' also needs to be considered in terms of 'whom' and that ideas cannot be 'treated as totally separate from the

⁸⁵ Malleon, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (n33) 18.

⁸⁶ Neuberger and others (n36) 15.

⁸⁷ Anne Phillips, *The Politics of Presence* (OUP 2003) 3.

⁸⁸ Ibid 24-5.

people who carry them'.⁸⁹ She argues that 'it is in the relationship between ideas and presence that we can best hope to find a fairer system of representation.'⁹⁰

The presence of excluded groups, including women, from decision making should be central to institutional legitimacy. Principles of equality are now, at least at a normative level, central to the three jurisdictions considered in this thesis. These principles, if not descriptively accepted, are at least normatively accepted through legislative, if not constitutional, entrenchment. If equality is not reflected and institutions continue to be stratified along the lines of archaic power structures, then institutional legitimacy is compromised.

C. EMPLOYMENT EQUITY ARGUMENTS

The third 'presence'-based argument making the case for more women judges is one of employment equity. Unequal participation by women in the judiciary is indicative of entrenched inequality within the profession. When juxtaposed with both the duration of time since women were 'let in',⁹¹ and the level of success they have achieved in legal education and in junior ranks of the profession since, inequality at the top suggests cultural or structural employment barriers below inhibiting progress.

Numerically speaking, women have made great gains in the junior levels of the legal professions throughout the common law world. Comprehensive statistics are available for the United Kingdom and track the clear gains in legal education and entrance to practice by women in the last two decades. However, in both the barrister and solicitors' professions, there is a significant rate of attrition for women, adversely impacting upon women's appointments to the bench.

⁸⁹ Ibid 25.

⁹⁰ Ibid.

⁹¹ Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (OUP 1996) 4.

Since at least 1995, women have outnumbered men graduating with law degrees from universities in England and Wales. For example, while in 1980 women amounted to 36.5% of the graduating class, by 1995 this proportion had risen to 52.4%.⁹² This number has continued to rise and, by 2012, women graduates amounted to 62.8% of the graduating cohort.⁹³ From this 2012 class, women were also more likely to receive either a first class or an upper-second class degree when compared to their male colleagues.⁹⁴ This, according to Erika Rackley, is an ongoing trend. She notes that ‘from the outset female law students have outperformed their male counterparts, achieving a higher proportion of first or upper-second class degrees.’⁹⁵

This high level of representation of women graduating from law school has been reflected in the numbers in which they enter the legal profession at the junior ranks. For example, since 1990 women have counted for more than 40% of all new barristers called to the Bar.⁹⁶ Indeed, between 2007 and 2010 women were the majority of all new calls.⁹⁷ In 2012 they amounted to 49.5% of new barristers.⁹⁸ However, it appears that women are finding it more difficult than their male colleagues to obtain tenancy. For example, in the 2010/11 intake, 49% of newly called barristers were women, but women made up only 43.6% of new tenants in 2011/12. A similar drop can be seen for those called in 2008/09, where women

⁹² See Table 2.6 in Rackley (n24) 46.

⁹³ The Law Society, *Trends in the Solicitors' Profession: Annual Statistics Report* (March, 2014) 35.

⁹⁴ *Ibid* 36.

⁹⁵ Rackley (n24) 33.

⁹⁶ *Ibid* 37.

⁹⁷ Bar Standards Board, *Bar Barometer: Trends in the Profile of the Bar* (June 2014) 55.

⁹⁸ *Ibid*.

amounted to 52% of all new calls, but in 2010/11 only succeeded to obtain 44.2% of all tenancies.

Looking at the Bar as a whole, there remain fewer female barristers than male barristers. Rackley notes that ‘though women have been joining the barrister’s profession in equal or slightly larger numbers than men since 2000, their overall presence has stabilized at around 35%.⁹⁹ In 2012, 34.7% of all practising barristers were women compared with 64.9% men.¹⁰⁰ Indeed, the percentage of women barristers has not risen significantly in the past two decades. For example, in 1995 women comprised 22.4% of the self-employed Bar, 26% in 2000 and 30% in 2005.¹⁰¹ In 2012 women were better represented at the employed Bar (45.5%) compared to the self-employed Bar (32.5%).¹⁰² As Rackley notes, the self-employed Bar is often considered more prestigious and is the pool from which the vast majority of Queen’s Counsel and High Court judges are appointed.¹⁰³

Women’s participation as senior members of the Bar is particularly low. In 2012 women accounted for only 12.4% of all practising QCs. While this number has continued to rise in the past two decades, the rate has not been fast, nor has it kept proportionate pace with the percentage of women entering the profession. For example, in 2012 the average recorded age bracket¹⁰⁴ for QCs was 45-54 years of age. Assuming that these QCs entered the profession at the same age as current barristers

⁹⁹ Rackley (n24) 36-7.

¹⁰⁰ Bar Standards Board (n97) 9.

¹⁰¹ Table 2.2 in Rackley (n24) 38.

¹⁰² Bar Standards Board (n97) 9.

¹⁰³ Rackley (n24) 38.

¹⁰⁴ Noting that 55.9% of QC’s did not disclose their age.

are entering the profession (76.1% of all new tenants are aged between 25 and 34¹⁰⁵) they would have started in a cohort of barristers in the early 1990s, at which stage women were already consisting of over 40% of new entrants. This demonstrates a significant attrition rate for this cohort of women.

Rackley highlights that one of the factors contributing to the low representation of women in senior ranks of the Bar is the continuingly low application rates from women for QC appointments. She notes that '[i]n the 2010-2011 QC appointment round, women made up just 16% of applicants (41 applications), despite 31% (746) of barristers between 15-20 years' call being women, with the result that the number of men appointed outnumbered women by 3:1.'¹⁰⁶ These figures did not change significantly in the latest completed competition. In the 2013/14 competition 18.7% of applicants were women, compared with 81.3% men. The result of this competition was that 18 women and 100 men were made QCs, the gap widening from the 2010-11 round with men outnumbering women by more than five to one.¹⁰⁷ In the 2014/15 competition, 19.2% of applicants were women, compared with 80.8% men.¹⁰⁸

Women's progress in the solicitors' profession closely mirrors the experience of the Bar. Women continue to account for the majority of trainees (61.5% in 2012-13)¹⁰⁹ and have done so since 1987-88.¹¹⁰ In 2013 women made up 47.7% of all

¹⁰⁵ Bar Standards Board (n97) 62.

¹⁰⁶ Rackley (n24) 40.

¹⁰⁷ See: Queens' Counsel Statistics from 2003 to present at <http://www.qcappointments.org/completed-competitions/>.

¹⁰⁸ Queen's Counsel *Applications Received 2014* <http://www.qcappointments.org/>.

¹⁰⁹ The Law Society (n93) 41.

¹¹⁰ John Jenkins, *Trends in Solicitors' Profession – Annual Statistical Report 1994*, London: Law Society, 1995, table 9.9 cited in Rackley (n24) 40.

those with practising certificates. Women are over-represented at the junior end of the profession, with around six in ten of all practising certificate holders being aged 35 or under, and only four in ten practising certificate holders being aged over 35. However, reports released by the UK Law Society reveal that ‘participation rates for women drop markedly from the 36-40 age group and decline steadily thereafter, whereas for men, participation rates decline modestly but remain high up to the age of 60.’¹¹¹

This decline in women’s participation by age was also borne out in professional seniority. Men were more likely than women to be partners or sole practitioners, with the gap between the proportion of men and women partners being 25.3% in favour of men. Of the total number of partners (29,863) amounting to 34.4% of all practicing certificate holders, only 8,115 were women compared to 21,748 men.¹¹² A similar pattern appears for sole practitioners. Of the 4,322 sole practitioners (amounting to 5% of the profession) only 1,348 (32%) are women and 2,974 (68%) are men.¹¹³ Even after adjusting for levels of experience, women achieve partnership at a slower rate than men. For example, in 1992, 79% of male solicitors with 10-19 years’ experience were partners, compared with 53% of women with the same experience. As Rackley notes, ten years later, though the number of women with 10-19 years’ experience who were either partners or sole practitioners has risen slightly overall, the gap between the percentage of men and women reaching these positions had widened.¹¹⁴ In 2013, men were still significantly more likely to become a partner

¹¹¹ The Law Society (n93) 12.

¹¹² Ibid 27.

¹¹³ Ibid.

¹¹⁴ Rackley (n24) 41-2.

than their female colleagues and to become a partner at an earlier point in their career.¹¹⁵

Significant attrition rates of women in the practising arms of the legal profession in England and Wales continue to impact adversely on judicial appointments. As at 1 April 2014¹¹⁶ women held only 25.5% of all judicial posts. Women are better represented in the lower echelons of the judiciary, but at no level do they comprise more than 38.3% of any particular post classification. Taking into account the senior judiciary (the Supreme Court, Court of Appeal and the High Court) of the 161 available posts, women hold only 27, amounting to 16.8%. Of the five ‘Heads of Division’ positions (Lord Chief Justice of England and Wales, the Master of the Rolls, President of the Queen’s Bench Division, the President of the Family Division and the Chancellor of the High Court) all are held, and have always been held, by men. Lady Hale is the first and only woman to have sat as part of the 12-member bench of the Supreme Court of England and Wales and she was the only woman to sit as a member of the House of Lords. Seven of the 38 judges in the Court of Appeal are women (18.4%) The forthcoming appointment of an eighth woman, Mrs Justice King, was announced on 31 July 2014 and this will bring women’s representation on the Court of Appeal to 20%. 21 of the 108 High Court judges are

¹¹⁵ See: Ibid 42; Law Society, *Trends in the Solicitors’ Profession Annual Statistics Reports*, 2010, 2011, 2013, and 2013.

¹¹⁶ ‘Courts Diversity Statistics 2013-14’ (*Courts and Tribunals Judiciary, Judicial Diversity Statistics 2014* 31 July 2014) <<http://www.judiciary.gov.uk/publications/judicial-diversity-statistics-2014/>> accessed 15 October 2014.

women (19.4%). Progress is slow. At the current rate it will take 45 years to achieve gender parity in the senior judiciary in England and Wales.¹¹⁷

South Africa also demonstrates inequity in women's progress in the legal profession, including the judiciary. By 2013, women in South Africa comprised a majority (at 56%) of all LLB graduates.¹¹⁸ However, from the statistics available, they appear to remain under-represented in the practising arms of the South African legal profession. In 2014, women accounted for approximately 50% of all candidates registered for articles (the training period year for an attorney), 53% of all newly admitted attorneys, but only 36% of all practising attorneys.¹¹⁹ The disparity in the overall gender balance of the attorney arm of the profession is particularly alarming in light of the fact that women have been entering the profession in almost equal numbers to men at least since 2001, and at higher numbers to men since 2006.¹²⁰

Since democracy, the South African judiciary has undergone a dramatic transformation. However, this transformation has been more pronounced in terms of race, rather than sex.¹²¹ For example, the number of Black, Coloured and Indian judges has increased from just under 2% in 1994 (where Black judges held three out of 166 posts),¹²² to 64% in 2014 (154 out of 241).¹²³ However, women's judicial

¹¹⁷ Equality and Human Rights Commission, 'Sex and Power 2011' (August 2011)

<<http://www.equalityhumanrights.com/about-us/our-work/key-projects/sex-and-power>> 3.

¹¹⁸ Dianne Angelopulo, *2013/2014 Statistics* (LSSA and LEAD, 2014) 21.

¹¹⁹ Drawing from statistics available on practising attorney's from the Cape Law Society, Kwa-Zulu Natal Law Society, Free State and Northern Provinces: Ibid 26, 29, 32.

¹²⁰ Ibid 34.

¹²¹ Franny Rabkin, 'Women Need a Foot in the Judiciary Door' *Business Day* (South Africa, 28 April 2010).

¹²² Albertyn (n21) 275.

participation has not seen the same advances. Women comprised 1% of the judiciary in 1994,¹²⁴ and by 2014, of the 241 permanent judges, only 78 are women (32%). Of these 78, 55 are Black, Coloured or Indian women (23% of the total number of permanent judges). By comparison, Black, Coloured or Indian men hold 99 of the permanent judicial positions, or 41%.¹²⁵ The lack of increase in women's participation in the South African judiciary is, again, most marked at the senior levels. In 1994 only two of the 11 members of the South African Constitutional Court were women. That fact remains true today. While the racial composition of all South African courts is moving towards a level that better reflects the South African community at large (whereby black South Africans make up almost 80% of the population),¹²⁶ the gender reflection, particularly for Black women, remains alarmingly low.

The statistics from Australia again show a similar trend – that women are entering the legal profession at equal or greater numbers to men, but are not progressing 'through the ranks' to senior positions, including judicial posts. While in the 1960s women accounted for only 11% of Australian law graduates, since the 1990s they have been graduating in either equal or higher numbers than men.¹²⁷ Indeed, the 2014 figures from Graduate Careers Australia show that women make up

¹²³ Angelopulo (n118) 46.

¹²⁴ Albertyn (n21) 275.

¹²⁵ Angelopulo (n118) 46.

¹²⁶ Albertyn (n21) 275.

¹²⁷ Karen Toohey, *Changing the Rules: The Experience of Female Lawyers in Victoria* (Victorian Equal Opportunity and Human Rights Commission, 2012) 6.

62.3% of all bachelor graduates in law.¹²⁸ A recent report by the Law Council of Australia highlighted that women are also entering the legal profession as solicitors, and have been for the last ten years (at an average of 58% over the last ten years), in higher numbers than their male peers.¹²⁹ Women account for 46% of all lawyers (both barristers and solicitors) in Australia, but hold only 19% of senior positions in law firms, account for 19% of the Australian Bar and only 6% of all Australian Queen's Counsel and Senior Counsel are women.¹³⁰ Like the UK statistics, these figures cannot be attributed to 'time lag', but rather are diagnostic of entrenched inequality and structural bias that prevents women from professional progress at the same rate as their male counterparts.

As the preceding figures demonstrate, rough gender parity at the junior levels of the profession, but enduring inequality at senior levels of practice and within the judiciary, is common across common law jurisdictions.¹³¹ This trend poses the question: what is happening to women lawyers? Concerted efforts have been made by various groups – public bodies and academics alike – to investigate where the

¹²⁸ 'Law - Bachelor Graduates (All)' (*Graduate Careers Australia*, 2014)

<<http://www.graduatecareers.com.au/Research/GradJobsDollars/BachelorAll/Law/index.htm>>

accessed 13 December 2014.

¹²⁹ Alison Wallace, *National Attrition and Re-engagement Study (NARS) Report* (Law Council of Australia, 2014) 9.

¹³⁰ Emma Hlubucek, 'Addressing Attrition and Encouraging Re-Engagement of Women Lawyers' (*Law Council of Australia*, 2014)

<<http://www.arkgroupaustralia.com.au/Presentations/E085WomeninProfessionalServices2014/08emmahlubucek.pdf>> accessed 13 December 2014.

¹³¹ Ulrike Schultz, 'Introduction: Women in the World's Legal Professions: Overview and Synthesis' in Ulrike Schultz and Gisela Shaw (eds), *Women in the World's Legal Professions* (Hart 2003).

‘missing women’ are.¹³² There is now almost universal consensus amongst scholars in the area that the ‘trickle up’ theory is an unsatisfactory response to gender inequality in the judiciary.¹³³ While the constraints of space do not allow for a deeper analysis of the causes of this deficit, it demonstrates that discriminatory practices, be they direct (eg, ‘old-boys networks’) or indirect (eg, the over participation by women in unpaid caring roles), still pervade the profession.

Secondly, unless the numerical imbalance is corrected, the judiciary faces an increasing risk of a legal ‘brain drain’. While judicial career prospects continue to statistically favour men, there is a good ‘business case’ for more women on the bench: to ensure that the judiciary is comprised of the best and the brightest legal minds. Mary Gaudron, the first woman to serve as a Justice on the High Court of Australia, is said to have remarked that ‘skills of lawyering and persuasion are not found on the Y chromosome.’¹³⁴ The success of women in law schools around the world and their entry *en masse* to the junior ranks of the profession are testament to this. As the statistics above demonstrated, in many jurisdictions female law students not only outnumber, but out-perform their male peers.¹³⁵ If more than half of the most gifted legal

¹³² Eg, Neuberger and others (n36); Turquet (9); Wallace (n129); Toohey (n127).

¹³³ For example see references cited above in n24.

¹³⁴ Michael Kirby, ‘Women in Law: Doldrums or Progress?’ (Women Lawyers of Western Australia, Perth, 22 October 2003). See also Neuberger and others (n36) 15.

¹³⁵ Eg, the 2012 figures in England and Wales show that more women graduate with first and upper seconds in law than men, 64.7% as opposed to 60.3%: The Law Society (n93). See also Margaret Thornton, ‘Otherness’ on the Bench: How Merit is Gendered’ (2007) 29 SydLRev 391, 401; Erika Rackley, ‘Representation of the (Woman) Judge- Hercules, the Little Mermaid, and the Vain and Naked Emperor’ (2002) 22 LS 602.

minds belong to women, unless women hold half of the judicial posts then the collective legal potential of the judiciary is not fulfilled.¹³⁶

Greater representation of women in the judiciary would be a fairer reflection of women's achievement, which in turn could give more women the confidence to achieve. Previously under-represented groups prove strong role models for the next generation, 'piercing stereotypes and giving them the self-confidence to move into non-traditional positions.'¹³⁷

The three arguments presented above – expressive harms, institutional illegitimacy and employment inequity – in and of themselves provide a solid case for advancing women's participation on the bench. These three exclusionary harms have been presented under the umbrella category of 'presence-based arguments' that support the case for more women judges. Chapter 2 will consider the fourth, and arguably the most problematic, argument that makes the case for more women judges – that an increase in gender diversity will provide for better judicial outcomes.

¹³⁶ Marilyn Warren, 'On the Tenth Anniversary of the Victorian Women Lawyers' (Melbourne, 24 August 2006).

¹³⁷ Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 268.

CHAPTER 2: MAKING THE CASE FOR MORE WOMEN JUDGES – GENDERED EXPERIENTIAL KNOWLEDGE

This chapter considers a fourth category of argument often used to ‘make the case’ for more women judges. Unlike the three categories of arguments considered in Chapter 1, this argument goes beyond arguments dependent only upon ‘presence’ – that ‘just by being there’ women make an important contribution to judging. Instead, this chapter argues that increasing gender equity on the bench will substantively enhance the quality of justice that courts are able to provide. This argument is termed the ‘substantive argument’ or the ‘quality of justice argument.’ This argument tends to be the most controversial in terms of ‘making the case’ for more women judges.

To argue that more women, and therefore gender diversity on the bench, will make a substantive impact on judging is not to deny that the ‘presence’ arguments for women’s increased participation in the judiciary are not important. However, presence-based arguments only form part of the reason why gender diversity in the judiciary is such an urgent and critical aim. The best way to advocate for greater women’s participation is not to do so relying upon arguments premised upon women’s presence alone. This is not to ignore the challenges and critiques of this approach.¹³⁸ As Kenney highlights, many who write in this area have become frustrated with the continuous search for the impact that women will have if represented in equal numbers on the bench.¹³⁹ She argues against what she takes as the underlying premise for a search for ‘difference’ or ‘impact’ by women judges: that women, and only women, have to prove that they will contribute something extra to

¹³⁸ cf Kenney (n82).

¹³⁹ Ibid 36.

judicial decision-making before it is accepted that they have a rightful place within it.¹⁴⁰

The aim of this thesis is not to prove that women have a rightful place in the judiciary. That this is so is a basic principle of equality, and one that this thesis takes as a normative given. Nor is the aim of this thesis to uncover essential differences between men and women judges. It will not seek to prove that women will come to a different conclusion to their male colleagues, or speak in a ‘different voice’ when sitting on the bench. Instead, this thesis will investigate how experiences of gender inform the judicial perception of justice, and that the process of judging is (and has been) impoverished by a lack of gender-diverse experience from which to draw. This thesis will argue that increasing gender diversity is an urgent project in order to remedy this deficit and to increase the perspectives, informed by a greater variety of gendered experiences, from which the courts can draw.

In order to investigate the impact of gendered experiences on judging, this thesis will employ a feminist methodology. Defining ‘feminist methodology’, just as defining ‘feminism,’ is far from uncontroversial.¹⁴¹ However, as a touchstone, feminist research strives to understand inequality between women and men by ‘asking the woman question’.¹⁴² That is, to put women at the centre of the intellectual

¹⁴⁰ Ibid 39.

¹⁴¹ For example, see Linda Alcoff, ‘Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory’ in Linda Nicholson (ed), *The Second Wave: A Reader in Feminist Theory* (Routledge 1997); Bronwyn Winter, ‘Who Counts (or Doesn't Count) What as Feminist Theory?: An Exercise in Dictionary Use’ (2000) 1 FemT 105; Liz Stanley and Sue Wise, ‘But The Empress Has no Clothes!’ (2000) 1 FemT 261; Elizabeth Ermarth, ‘What Counts as Feminist Theory?’ (2000) 1 FemT 113.

¹⁴² See Katharine Bartlett, ‘Feminist Legal Methods’ (1990) 103 HarvLRev 829.

inquiry, challenging presumptions of ‘neutrality’ and noticing the gender implications of apparently neutral rules and practices.¹⁴³ As Letherby highlights:

Many feminist writers have argued that knowledge, reason and science have been ‘man-made’. The general idea here is that western societies have been dominated by patriarchy and men have used their positions of power to define issues, structure language and develop theory. Thus, men have been able to promote their own interests and, as a result, all the dominant forms of discourse in western culture – art, media, literature, science, social science and so on – exhibit predominately male characteristics.¹⁴⁴

Before turning to the impact of gendered experiences upon judging, it is important to address some of the problematic assumptions that have led to many of the criticisms highlighted above by Kenney. For if the charge is that ‘the production of [legal] knowledge has been dominated by men throughout history’¹⁴⁵ for the benefit of men and to reflect men’s experience, to the exclusion of women and women’s experiential knowledge, a very careful definition of what exactly men’s experience and women’s experiences constitute or even who are ‘men’ and who are ‘women’ is necessary.

Examining theoretical debates that frame feminist discussions about gender and women can assist with this. These theoretical debates parallel many critical arguments against any assertion that women can make a substantive contribution to the quality of justice delivered by courts. Critiques of this assertion might contend that to look for a contribution that ‘women’ make re-creates prescriptive accounts of ‘women’s’ behaviour that may be just as dangerous as accounts about women’s ‘natural’ behaviour that has served to stereotype and exclude women from the practice of law in the past. Arguably, searching for ‘women’s voice’ in judging

¹⁴³ Ibid.

¹⁴⁴ Gayle Letherby, *Feminist Research in Theory and Practice* (Open University Press 2003) 20.

¹⁴⁵ Ibid 41.

essentialises women and ignores differences amongst women – differences determined by factors beyond gender such as race and class that may serve to distinguish women from each other more markedly than any distinction that may exist between women and men judges. Finally, it might be argued that a judge's individual personality and legal philosophy determines more about how they judge than any other 'external' background character. As such, the individualism of judges means that any substantive impact that a judge will make dependent upon their association with a particular identity group is both elusive and misleading.

The theoretical discussions presented in this chapter address these critiques. In order to investigate the impact of gendered experiences on judging, this chapter will begin by examining what is meant by the term 'gender' and how this differs from 'sex'. It then considers some important, but arguably not insurmountable, criticisms that are often encountered in a search for a unifying definition of the category of 'women'. These criticisms often arise in light of more dynamic and contextual understandings of the definition of 'woman'. Particular attention will be given to post-structural or anti-categorical criticisms of the attempts of cultural feminists to isolate a category of 'women'. However, it will then navigate through this critique by drawing on the work of anti-essentialist theorists such as Kimberlé Crenshaw and, particularly, feminist standpoint theory scholars such as Patricia Hill Collins. Their work demonstrates that conceptual categories of 'women' and 'women's gendered experiences' can be used in a constructive and strategic manner if they remain open to pluralised experiences. In this way, 'women' may be used in an analytical category way in order to assess the substantive contribution women's gendered experiences bring to the role of judging, but avoids deterministic accounts of women judges, and avoids homogenising the plurality in women's gendered experiences.

The final section of this chapter will acknowledge that while the distinction that has been drawn in Chapters 1 and 2 between ‘presence-based’ and ‘substantive’ arguments making the case for more women judges may be conceptually clear, in practice the distinction is less stark. ‘Presence-based’ arguments, such as legitimacy, may in fact be buttressed by assumptions or an understanding of the substantive impact that gender diversity has upon judging, and vice versa. As such, the close link between presence-based and substance-based arguments supports the need to continue to think about the substantive impact that gendered experience can have on the quality of justice provided by courts.

A. THINKING ABOUT GENDER

One is not born, but rather becomes, woman.¹⁴⁶

Simone de Beauvoir’s famous phrase is a common starting point for discussions about gender.¹⁴⁷ It draws a distinction between sex and gender, between being ‘female’ and a ‘woman’; between being ‘male’ and a ‘man’. Sex is associated with biological distinctions (between male and female)¹⁴⁸ whereas gender ‘captures the ascribed, social nature of distinctions between women and men – the excess cultural baggage

¹⁴⁶ Simone de Beauvoir, *The Second Sex* (Constance Borde and Sheila Malovany-Chevallier trs, New edn, Vintage 2010) 293.

¹⁴⁷ For example, see Elizabeth Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Women’s Press 1990), 66; Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (n60), 5; Judith Butler, ‘Sex and Gender in Simone de Beauvoir’s *Second Sex*’ (1986) 72 YFS 35, 35.

¹⁴⁸ Although this binary biological distinction has also been subject of much criticism: see Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (n60) Ch 4.

associated with biological sex.’¹⁴⁹ As Scott highlights, ‘gender’ ‘denotes a rejection of the biological determinism implicit in the use of such terms as “sex” or “sexual difference”’.¹⁵⁰ While sex differentiation may inform cultural practices, gender is a product of social construction, ‘as a societal category imposed upon a sexed body.’¹⁵¹

For feminist theory, engaging in discussions about ‘gender’, rather than sex, is a crucial political strategy. ‘Gender’ first emerged as a category of analysis in the late 1960s and early 1970s as second wave feminists ‘sought to explain why women’s situation was so different from men’s’.¹⁵² Gender as an analytical tool allows cultural arguments about the lives of men and women to be problematised, particularly assumptions, such as those highlighted in Chapter 1, that have been used to subordinate the position of women as the ‘fairer sex’. Arguments in support of this subordination relied heavily upon distinctions between men and women that were said to be ‘natural’ or ‘biological’. For example, Viscount Helmsley, in opposing the Conciliation Bill to enfranchise about a million women voters in England, debated on 28 March 1912, argued that ‘the mental equilibrium of the female sex is not as stable as the mental equilibrium of the male sex. The argument has very strong scientific backing...’.¹⁵³ Biological arguments premised upon purported differences between

¹⁴⁹ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (MUP 2000) 3.

¹⁵⁰ Joan Scott, ‘Gender: A Useful Category of Historical Analysis’ (1986) 91 *AHistRev* 1053.

¹⁵¹ *Ibid* 1056.

¹⁵² Ann Oakley and Juliet Mitchell, *Who's Afraid of Feminism?: Seeing Through The Backlash* (Hamish Hamilton 1997) 32.

¹⁵³ *Official Reports 5th Series Parliamentary Debates: Commons, Vol xxxvi* (Mar 25 – Apr 12, 1912) cols 615-732 <accessed http://www.johnclare.net/women_debate_1912.htm> accessed 23 December 2014.

the sexes were used to give an authoritative voice to what feminists saw as matters of social and cultural prescription. As Oakley describes, such a conflation was a way of ‘slipping cultural rhetoric under the heading of biological fact’.¹⁵⁴ For example, according to Oakley, it is a ‘cultural prescription – gender, not sex – which explains why women fail to have proper orgasms, are ill-fitted to be brain surgeons, suffer from depressive illness, cannot reach the heights of Shakespeare, and so on and so forth.’¹⁵⁵ By splitting the biological from the cultural, gender allows writers and activists across a wide variety of disciplines to prise apart cultural rhetoric and biological ‘fact’ previously fused in order to support the subordination of women by the patriarchy.

It is important to emphasise the historical and political context of ‘gender’: a term of art rooted in exposing the prescriptive impact that cultural practices have upon men and women in formulating their ‘gendered identities’. In this way, ‘[g]ender differences were/ are not “true” differences; they were/ are not “absolute abstract or irreducible”; no “essence” is involved.’¹⁵⁶ Rather, they are by-products of patterns of socialisation. MacKinnon has been a concerned critic of an un-nuanced engagement with ‘gender’ if the concept is used simply to re-create justifications for bi-polar distinctions between women and men:

One of the most deceptive antifeminisms in society, scholarship, politics and law is the persistent treatment of gender as if it truly is a question of difference, rather than treating the gender difference as a construct of the differences gender makes.¹⁵⁷

¹⁵⁴ Oakley and Mitchell (n152) 33.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid 48.

¹⁵⁷ Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (HUP 1987) 8-9.

If the word 'gender' merely replaces 'sex', without recognising the historical motivations behind the development of the category, the power of the concept is diffused: 'gender becomes as useless as sex'¹⁵⁸ as a tool for challenging the sexual status quo.

However, it is equally troubling to see 'gender' used merely as a synonym of 'women'. Phrases such as 'gendered experiences' conflate with 'women's experiences' in a manner that fails to appreciate that men too, are the subjects of gender inquiry. Men experience gender, just as women experience gender but, as Chinkin and Charlesworth note, this fact is not always made clear:

It is striking that a parallel problem with the use of the categories of 'men' or 'male' rarely prompts any question. Men and maleness are assumed to be the norm from which women and femaleness are to be differentiated. Women are constructed as the 'other', the deviant from the norm.¹⁵⁹

A lack of awareness of men's gendered experiences can be attributed to power structures and societal arrangements that assume that a man's experience of the world is a 'neutral' experience. Historically, the lives of women had meaning as a referential experience to the neutral yardstick of men. The second part of this chapter will elaborate on how this concept of 'neutrality' has influenced the development of legal knowledge. However, to focus upon women and women's gendered lives is not to deny that the same inquiry can and should be made about how gender impacts men's lives. In part, this thesis will attempt to advance this enquiry. While this thesis predominately focuses upon women judges' gendered experiences, men judges' gendered experiences, and men's level of awareness of gendered experience, is directly addressed in Chapters 8 and 9. This thesis, in focusing upon women judges'

¹⁵⁸ Oakley and Mitchell (n152) 52.

¹⁵⁹ Charlesworth and Chinkin (n149) 2.

gendered experiences and the impact that these experiences have on judging is part of a feminist awareness raising project that resists both the appropriateness and the desirability of viewing the world through the lens of gender neutrality. For so long, women's gendered experiences have been eliminated from the legal process under an assumption that law and judging is a gender-neutral endeavour. Lacey, in her critique of a gender-neutral 'original position' in Rawls's social contract account of justice¹⁶⁰ contends that:

... it is an enormous responsibility to put on the person in the original position to think himself beyond the gendered conditions of the society he is allowed to know about into the society beyond gender. This seems to me to stretch the limits of imagination, and possibly of logic, to breaking point.¹⁶¹

By placing women at the centre of the enquiry, and acknowledging that much of what is associated with 'being a woman' is a result of deeply set and gendered social patterns, this thesis rejects any assertion that it is possible to meaningfully engage with research of human subjects and human institutions in a way that goes beyond or 'post' gender. However, this rejection does not in any way avoid the challenges associated with taking such an approach.

Some of these challenges are usefully drawn out in the work of Connell. She contributes an important nuance to the definition of 'gender', providing a useful starting point for discussing some of these challenges. Connell highlights the fluidity of 'gender' – because gender is defined as a product of social relations, what is thought of as 'gender' or 'gendered' must also be conceptualised in a dynamic fashion to match these relations. 'Gender' is not fixed. A gendered experience will depend upon the interplay between social structures influenced by location and time.

¹⁶⁰ John Rawls, *A Theory of Justice* (Rev Ed edn, OUP 1999).

¹⁶¹ Nicola Lacey, 'Theories of Justice and the Welfare State' (1992) 1 S&LS 323, 338.

Gender, like other social structures, is multi-dimensional; it is not just about identity, or just about work, or just about power, or just about sexuality, but all of these things at once. Gender patterns may differ strikingly from one cultural context to another, but are still 'gender'. Gender arrangements are reproduced socially (not biologically) by the power of structures shaping individual action, so they often appear unchanging. Yet gender arrangements are in fact always changing, as human practice creates new situations and as structures develop crisis tendencies.¹⁶²

The next section engages with some critiques of attempts to create a unifying category of 'women' in light of the dynamic and contextual understanding of 'woman'.

B. THE 'CONCEPT OF WOMEN' PROBLEM

Are there even women?¹⁶³

Identity categories are difficult tools for academic research. Why? Because life does not fit well into strictly defined categories. It is now trite to say, as many feminist legal and political scholars have so persuasively highlighted with force over the past two decades, that every woman will fall within a number of particular 'identity categories'. Judges will all experience gender, but they will also have experiences shaped by sexual orientation, race, ethnic background, class, occupational status, age, disability status and so on. Is gender, but one of these 'identity factors,' really a useful category of analysis when determining a substantive impact on judging? Are there so many differences between women that 'women', and women judges, cannot be thought of as one social collective?

Alcoff has tracked the historical growth of what she terms 'the concept of women' problem. At the centre of this dilemma she places the very act of self-definition. She locates the need to define women in the patriarchal structure: 'Man

¹⁶² Raewyn Connell, *Gender* (Polity Press 2009) 11.

¹⁶³ Beauvoir (n146) 3.

has said that women can be defined, delineated, captured – understood, explained, and diagnosed – to a level of determination never accorded to man himself, who is conceived as a rational animal with free will.’¹⁶⁴ She then highlights the two dominant responses to this dilemma of definition, found in what has been termed ‘cultural feminism’ and ‘post-structural feminism’. Cultural feminists, according to Alcoff, attempted to re-claim the definition of woman and reform the connotations projected onto women by virtue of the male definition. As Fuss notes ‘Western philosophy always posited an essence for women – an essence based on biology and, as everyone knows, defined by the properties of weakness, passivity, receptivity, and emotion...’.¹⁶⁵ Men, who were the natural recipients of higher valued traits such as logic, knowledge and rationality, used these so-called ‘feminine traits’ as the basis for the subordination of women. Cultural feminism was an attempt to ‘revalidate undervalued female attributes’.¹⁶⁶ It sought to transform the pejorative loading placed on woman by holding in high esteem what they characterised as women’s ‘difference’: such as valuing women’s bodies, sexuality, motherhood, connectedness, nurture, emotions and peacefulness. For example, Rich emphasises the intimate connection between ‘female consciousness’ and the female body and the need for women to reconnect and value specific female attributes and their ‘bond with the natural order.’¹⁶⁷

¹⁶⁴ Alcoff (n141) 331.

¹⁶⁵ Diana Fuss, ‘“Essentially Speaking”: Luce Irigaray’s Language of Essence’ (1989) 3 *Hypatia* 62, 72-3.

¹⁶⁶ Alcoff (n141) 332.

¹⁶⁷ Adrienne Rich, *Of Women Born* (Bantam 1977) 21 cited by Alcoff (n141) 333.

Gilligan's work *In A Different Voice*¹⁶⁸ is also often cited in feminist legal theory as the 'watershed' for cultural feminism – a theoretical strand which both delineates and celebrates women's differences.¹⁶⁹ It has found particular traction in thinking about women judges.¹⁷⁰ It has also served as the theoretical base for many quantitative empirical projects that have sought to identify a difference in case outcomes when women judge.¹⁷¹ Gilligan's psychological study of the development of moral and ethical values in women questions the male normativity implicit in dominant theories of moral sense. She challenges the theory developed by Kohlberg¹⁷² (who drew upon Freud), which prioritised moral reasoning processes that were abstract and premised on rights, autonomy, and individualism. Gilligan criticised Kohlberg's scale and accused it of gender bias in that '[p]rominent among those who thus appear to be deficient in moral development when measured by Kohlberg's scale are women'.¹⁷³ On Kohlberg's scale, women only appeared to exemplify stage three of a six-stage sequence. At this stage, morality was conceived of in interpersonal terms, and 'goodness' was equated with helping and pleasing

¹⁶⁸ Carol Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (2nd edn, HUP 1993).

¹⁶⁹ For example, see Nancy Levit and Robert R M Verchick, *Feminist Legal Theory* (NYUP 2006) 18-22.

¹⁷⁰ Bertha Wilson, 'Will Women Judges Really Make a Difference?' (1990) 28 Osgood Hall LJ 507, 520.

¹⁷¹ See Chapter 4.

¹⁷² L Kohlberg and R Kramer, 'Continuities and Discontinuities in Child and Adult Moral Development' (1969) 12 Human Development 93; L Kohlberg, C Levine and A Hewer, *Moral Stages: A Current Formulation and A Response to Critics* (Karger 1983).

¹⁷³ Gilligan (n168) 18.

others.¹⁷⁴ Rather than interrogate the validity of such results, Gilligan accepts the differing conceptions of morality but challenges the meaning inferred from them.

To illustrate her point, she draws upon Shakespeare's character of Portia in *The Merchant of Venice*. She argues that the juxtaposition of Portia 'calling for mercy' and for 'that resolution in which no one is hurt' against Shylock's strict 'contractual conception of justice' is illustrative of the different moral voices uncovered in her psychological studies.¹⁷⁵ She emphasises:

[T]he centrality of the concepts of responsibility and care in women's constructions of the moral domain, the close tie in woman's thinking between conceptions of the self and of morality, and ultimately the need for an expanded developmental theory that includes, rather than rules out from consideration, the differences in the feminine voice.¹⁷⁶

In effect, Gilligan is arguing that an 'ethics of care' or the 'feminine model' of reasoning and justice is subverted by 'masculine models' that place higher value on the unemotional, impersonal and objective.

Cultural feminist theory has been the subject on an enduring critique by many, particularly in the context of judging where it has tended to assume that women will exhibit particular judicial behaviours. However, before turning to this critique, it is important to note that some of the theoretical shortcomings that may be identified

¹⁷⁴ Ibid.

¹⁷⁵ However, Carrie Menkel-Meadow provides an interesting critique of Gilligan's analysis of Portia, highlighting that when the play is read as a whole, Portia is a complex character who slips back and forth between her resort to non-rule based measures of morality and her resort to a literalist interpretation of law and rules: Carrie Menkel-Meadow, 'Portia Redux: Another Look at Gender, Feminism, and Legal Ethics' in Susan Carle (ed), *Lawyers' Ethics and the Pursuit of Social Justice* (NYUP 2005).

¹⁷⁶ Gilligan (n168) 105.

with such a theoretical approach 'should not imply that the political effects of cultural feminism have all been negative.'¹⁷⁷ Alcoff reminds us:

After a decade of hearing liberal feminists advising us to wear business suits and enter the male world, it is a helpful corrective to have cultural feminists argue instead that women's world is full of superior virtues and values, to be credited and learned from rather than despised. Herein lies the positive impact of cultural feminism. And surely much of their point is well taken, that it was our mothers who made our families survive, that women's handiwork is truly artistic, that women's care-giving really is superior in value to male competitiveness.¹⁷⁸

Another reading of Gilligan's 'ethics of care' thesis and similar cultural feminist theories, if conceived of in a gender-neutral manner, could be read as a broader understanding of moral reasoning and valuable human behaviour, and not necessarily attached to gendered behaviour. However, this distinction is ambiguous in Gilligan's work. Given that Gilligan's case studies focus upon female subjects to demonstrate the *feminine* mode, the conflation is understandable. However, Smart suggests that Gilligan is not intending to be descriptive of female and male behaviour. Rather, she sets up two theoretical constructions of masculinity and femininity. Her work does not suggest 'that either biological boys or girls may be inclined towards the feminine or masculine mode.' Rather it 'asserts that the feminine mode as expressed by women and girls has been repressed and undervalued.'¹⁷⁹ For Smart, the differences Gilligan bases on gender are not attributed 'to biological difference so much as to the psychosocial development of the female child.'¹⁸⁰

¹⁷⁷ Alcoff (n141) 336.

¹⁷⁸ Ibid 336.

¹⁷⁹ Carol Smart, *Feminism and the Power of Law* (Routledge 1989) 73.

¹⁸⁰ Ibid 73-4.

Others have been less forgiving of the work of cultural feminists. MacKinnon argues that we should not try to embrace the 'ethics of care' which society has ascribed to female development. Instead, the theory itself should be challenged. A failure to do so perpetuates unequal power structures that socialise women to speak in an 'ethics of care' voice in the first place, or set up societal frameworks, such as law, which never promoted, or even contemplated, a woman's voice.¹⁸¹ For MacKinnon, the 'difference' that cultural feminism focuses upon is indicative of a power hierarchy. 'Difference' is what is prescribed by those with power to those without. Difference theory does not challenge this power imbalance, but rather accepts the 'real as well as the fantasised differences, differences that are also inequalities.'¹⁸² In this way, the 'feminine' values of an 'ethics of care' are all that the powerful (men) allow for women. To try and re-value it is to accept the limitations prescribed to women.¹⁸³

Phillips also questions the wisdom in attempting to re-claim 'ethics of care' based upon so-called descriptive accounts of women's behaviour. She notes that gendered behaviour, such as a tendency towards relationships and care, 'is formed in relations of dependency and subordination, and what is positive in it is almost inextricably intertwined with aspects that are less attractive.'¹⁸⁴ Any attempt to rehabilitate stereotypes that devalue particular 'women's characteristics' threatens to

¹⁸¹ MacKinnon (n157) 38-9.

¹⁸² Ibid 37.

¹⁸³ Ibid 39. See also Joan Williams, 'Deconstructing Gender' (1989) 87 MichLRev 797, 802.

¹⁸⁴ Anne Phillips, 'Feminism and the Politics of Difference' in Susan James and Stephanie Palmer (eds), *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* (Hart 2002) 21.

resort to Victorian-era assumptions and ‘fails to come to terms with the extent to which the gender stereotypes were designed to marginalize women.’¹⁸⁵

The ‘concept of women’ problem has not been resolved though the cultural feminist response. However, the challenge of arriving at a coherent conceptualisation of ‘women’ becomes more problematic when viewed through a post-structuralist or anti-categorical lens. Post-structuralist feminists responded to what they saw as the essentialising nature of cultural feminism. They draw upon the work of influential post-structuralist French thinkers such as Derrida and Foucault who challenge the concept that a subject could have an essential identity and an authentic core that was not constructed solely by society or ‘totally imprinted by history’.¹⁸⁶ Feminist theorists, such as Butler, draw on this theory in order to inherently problematise not only the category of ‘women’, but identity categories in general: ‘I’m permanently troubled by identity categories, consider them to be invariable stumbling blocks, and understand them, even promote them, as sites of necessary trouble.’¹⁸⁷ For Butler, the shared conception of ‘woman’, be it commonality that pre-exists their oppression or is by virtue of their oppression,¹⁸⁸ presumes a false universality that serves to ‘reveal the coercive and regulatory consequences of that construction, even when the construction has been elaborated for emancipatory purposes’.¹⁸⁹ Rather than being emancipatory, feminism dependent upon the subject of ‘women’ performatively

¹⁸⁵ Williams, ‘Deconstructing Gender’ (n183) 806.

¹⁸⁶ Michel Foucault and Paul Rabinow, *The Foucault Reader* (1st edn, Pantheon Books 1984) 83 cited by Alcoff (n141) 349

¹⁸⁷ Judith Butler, ‘Imitation and Gender Insubordination’ in Linda Nicholson (ed), *The Second Wave: A Reader in Feminist Theory* (Routledge 1997) 301.

¹⁸⁸ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1989) 5.

¹⁸⁹ *Ibid* 6.

conceived through social forces, operates to exclude identities and behaviours not captured by the mainstream or dominant group. Butler concludes that ‘perhaps, paradoxically, “representation” will be shown to make sense for feminism only when the subject of ‘women’ is nowhere presumed.’¹⁹⁰

The problem with anti-categorical thinking is that it threatens to deconstruct ‘woman’ so far that we are no longer left with a workable category of ‘woman’ at all. As Alcoff highlights: ‘it limits feminism to the negative tactics of reaction and deconstruction and endangers the attack against classical liberalism by discrediting the notion of an epistemologically significant, specific subjectivity. What’s a feminist to do?’¹⁹¹ If there is no coherent or collectively united category of women upon which to unite and focus a feminist discourse, are we left back at a problematic and intractably individualised notion of human identity that does nothing to challenge social power structures that have historically subordinated one sex to the other? These structures have excluded women from the judiciary and pay no attention to women’s marginalisation. However, if we start from the premise that gender neutrality, and gender neutrality in law, is a false reflection of the lived experience, how do we challenge this without a conception of women?

In *Inessential Woman* Spelman draws attention to the abstractionist danger of thinking about one as only a ‘woman’:

Whatever else one does, or tries to do, when one is thinking of a woman “as a woman,” one is performing a feat of abstraction as sophisticated as the one Plato asks us to perform in thinking of a person not as her body but as her soul. What is it to think of a woman “as a woman”? Is it really possible for us to think of a woman’s “womanness” in abstraction from the fact that she is a particular woman, whether she is a middle-class

¹⁹⁰ Ibid 8.

¹⁹¹ Alcoff (n141) 341.

Black woman living in North America in the twentieth century or a poor white woman living in France in seventeenth century?¹⁹²

Spelman, like Butler, questions whether it was possible ‘to make a case about “women in general” that doesn’t in fact represent the situation of one group of women only?’.¹⁹³ Central to her critique is a concern that conceptualising ‘woman’ as a coherent category for the feminist subject potentially ‘excluded, devalued, or found deviant the lives and practices of many women’.¹⁹⁴ However, Spelman’s work should not be read as an attack on the possibility of imagining any unifying commonalities amongst women. Rather, hers was a project of sensitisation directed at women who had been privileged by the feminist movement (namely white, middle class, able-bodied, heterosexual women), perhaps unconsciously, by their position of privilege society afforded them by virtue of their other ‘identity’ indicators. Hers was not, as Spelman makes clear in her introduction, a work intended for ‘those who would be happy to find any fault they can with feminism [and who] will relish yet another opportunity to see some of its shortcomings exposed.’¹⁹⁵ Rather, her project questions whether it was possible to ‘give the things women have in common their full significance without thereby implying that the differences among us are less important’ and how to ‘describe those things that differentiate women without eclipsing what we share in common’.¹⁹⁶ This challenge – of valuing both the shared and the unique in women’s experience – is of vital concern in achieving gender

¹⁹² Spelman (n147) 13.

¹⁹³ Ibid 79.

¹⁹⁴ Resnik and Curtin (n40) 717.

¹⁹⁵ Spelman (n147) 5.

¹⁹⁶ Ibid 3.

diversity in the judiciary. Chapter 10 will speak to this further. However, the theoretical material provides an important framework for thinking beyond this hurdle.

Anti-essentialist theories, unlike post-structuralists, do not entirely reject the possibility, strategically and politically, of conceptualising a category of ‘women’. Their contribution is to use the critique in order to include a broader plurality of women and women’s experience than that which had been promoted by cultural feminism. Raising awareness of the manner in which gender, as both a biological and a social construct, intersects with other aspects of identity is key to this contribution. Conaghan neatly summarises the contribution that the development of theories of intersectionality has brought in terms of mapping a more pragmatic way forward, taking into account post-structuralist critiques:

In some ways, intersectionality continued a response to the concerns to which anti-essentialism [or post-structuralism] gave expression. In other ways, it was a restatement of those concerns but one perceived to have the potential to move debate beyond the theoretical and political stalemate to which anti-essentialism seemed inexorably to lead. ...the point was, as intersectionality theorists reminded, that anti-essentialism for its own purpose was a weak insight...To have any political value, the critique had to be combined with a strategy of anti-subordination. Intersectional theory attempts to do just that.¹⁹⁷

In this way, Conaghan highlights that it was not enough to rely upon the deconstructive critique of anti-essentialism alone. Intersectionality goes beyond a pure critique of the subject of feminism, by offering an alternative model that takes account of a greater number of experiences and sensitised the dominant voices within the feminist movement to the previously ignored experience of ‘the other’.

¹⁹⁷ Joanne Conaghan, ‘Intersectionality and the Feminist Project in Law’ in Emily Grabham; and others (eds), *Intersectionality and Beyond* (Routledge 2008) 23.

Crenshaw defined this project of sensitisation with her work, offering a pioneering critique from the viewpoint of Black women.¹⁹⁸ Crenshaw does not reject the category of women altogether. However, she highlights the ‘problematic consequence of the tendency to treat race and gender as mutually exclusive categories of experience and analysis.’¹⁹⁹ She asserts that the construction of a universal ‘woman’s voice’ gives greater weight to the experiences of privileged women over those less privileged. To think about subordination and disadvantage along a ‘single axis’ framework, where experience is segregated into categories along lines such as gender, race, religion, disability, sexuality, class and age, disregards the intersecting and compound nature of these experiences. The disadvantage may be compounding – occurring as a result of membership of two or more axes of disadvantage – or it may be intersectional. For example, the disadvantage experienced by a Black woman is not simply the sum of the gendered and racialised experience. Rather, it presents a unique and deeper manifestation of disadvantage:

Black women sometimes experience discrimination in ways similar to white women’s experiences; sometimes they share very similar experiences with Black men. Yet often they experience double-discrimination – the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience

¹⁹⁸ Kimberlé Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Theory and Antiracist Politics’ [1989] UChiLF 139; Kimberlé Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1991) 43 StanLR 1214; Kimberlé Crenshaw, ‘From Private Violence to Mass Incarceration: Thinking Intersectionally about Women, Race, and Social Control’ (2012) 59 UCLALRev 1418.

¹⁹⁹ Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Theory and Antiracist Politics’ (n198) 139.

discrimination as Black women – not the sum of race and sex discrimination, but as Black women.²⁰⁰

Crenshaw criticises feminist theories that try to construct a universal paradigm of ‘woman’. This, in effect, ‘erases Black women in the conceptualization, identification and remediation ... by limiting inquiry to the experiences of otherwise-privileged members of the group.’²⁰¹ She is critical both of the focus and assumptions made by first and second wave feminist movements that placed white middle-class problems at the centre to the detriment of Black women’s concerns.²⁰² She responds to movements that try to reclaim stereotypes that justified the disparate societal roles assigned to men and women by highlighting how this ‘attempt to debunk ideological justifications for *women’s* subordination offers little insight into the domination of *Black* women.’²⁰³ She argues that cultural feminist assumptions such as the location of an ‘ethics of care’ in women are ‘over generalized at best, and often wrong.’²⁰⁴

Statements such as ‘men and women are taught to see women as dependent, limited in abilities, and passive’ are common within this literature. But this ‘observation’ overlooks the anomalies created by crosscurrents of racism and sexism. Black men and women live in a society that creates sex-based norms and expectations which racism operates simultaneously to deny; Black men are not viewed as powerful, Black women are not seen as passive.²⁰⁵

For example, Black women have traditionally worked outside the home in numbers far exceeding the labour participation rate of White women. Accordingly, narratives

²⁰⁰ Ibid 149.

²⁰¹ Ibid 140.

²⁰² Ibid fn 38.

²⁰³ Ibid 155.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

that focus on the women's historical exclusion from the workplace fall short of a full depiction of 'women's experience'.²⁰⁶

Crenshaw's work was the springboard for what has grown into a complex and important field of inquiry into the intersectional relationships between gender and other 'status grounds'.²⁰⁷ Crenshaw's contribution spotlights a major concern with any attempt to speak universally for women or to use gender as a single analytical category that is not sensitised to the plurality of 'women's' experiences within it. However, it does not respond to the 'concept of women' problem by retreating from the category of women entirely. It should not be that 'middle class women could not speak to or represent the interests of working class women, White women in the interests of Black women, or first world women in the interests of women from the third world'²⁰⁸ and therefore requiring a refrain from any kind of unified discourse. Rather, the challenge, as Spelman puts it, is to ask: 'Have we thought enough about what kinds of knowledge and skills are necessary in order for one woman to speak about another? In order to speak on behalf of another?'²⁰⁹

C. MOVING BEYOND ESSENTIALISM AND POST-STRUCTURALISM

The 'concept of women' problem is difficult. However, this final section will elaborate on two complementary methodologies that help transcend some of the

²⁰⁶ Ibid 156.

²⁰⁷ See for example Yvette Taylor, Sally Hines and Mark E. Casey, *Theorizing Intersectionality and Sexuality* (Palgrave Macmillan 2011); Emily Grabham, *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge-Cavendish 2009); Margaret L. Andersen and Patricia Hill Collins, *Race, Class, and Gender: An Anthology* (5th edn, Wadsworth 2004); Leslie McCall, 'The Complexity of Intersectionality' (2005) 30 Signs 1771.

²⁰⁸ Phillips, 'Feminism and the Politics of Difference' (n184) 18.

²⁰⁹ Spelman (n147) 9.

difficulties highlighted above. The first is to think about the employment of ‘strategic essentialism’ in order to talk about women as a political category, rather than a descriptive category. The second is to engage ‘standpoint theory’ or a theory of positionality when thinking about the content of ‘women’ as an analytical category, particularly women in the judiciary.

1. Strategic essentialism

McCall has developed a useful typology to analyse various approaches to exploring the complexity of intersectionality in social life.²¹⁰ She calls the first approach ‘anticategorical complexity’. This is based upon a methodology that deconstructs and ultimately rejects analytical categories, such as gender. Life experiences are considered to be ‘too irreducibly complex...to make fixed categories anything but simplifying social fictions that produce inequalities in the process of producing difference.’²¹¹ All forms of categorisation are suspect. This classification owes its origin to postmodernist and poststructuralist critiques of Western philosophy, history and language.²¹² The work of deconstructionist feminists such as Butler, explored above, adopt an anticategorical approach, contesting that even the most pluralised attempt would not result in a meaningful category of ‘woman’.²¹³ Butler asserts that ‘female’ and ‘woman’ are not stable, untroubled or fixed notions. Rather, they are

²¹⁰ McCall (n207).

²¹¹ Ibid 1773.

²¹² Ibid citing Michel Foucault, *The Archaeology of Knowledge and Discourse on Language* (Random House 1972) and Jacques Derrida, *Of Grammatology* (Gayatri Charavorty Spivak tr, John Hopkins University Press 1974).

²¹³ Butler, *Gender Trouble: Feminism and the Subversion of Identity* (n188).

only understandable in relational terms (ie within a ‘heterosexual matrix’)²¹⁴ and that to search for a common identity for feminism precludes ‘a radical inquiry into the political construction and regulation of identity itself.’²¹⁵

The first way out of this impasse, as suggested by McCall, is to take an ‘intracategorical approach’ to complex intersectionality. This methodology is reflected in Crenshaw’s work. It does not reject existing categories, but is ‘critical of broad sweeping acts of categorization rather than [being] critical of categorization *per se*’.²¹⁶ Intracategorical approaches focus on the site of intersection, using finer intersections of categories. Phillips highlights the motivation for this intracategorical approach. She points to the complex nature of individual identity and how, as social beings, our identity is constructed through a relationship with many, overlapping, and at times contradictory, sub-groups:

[I]f no-one regards herself simply as ‘woman’, it is also the case that no-one regards herself simply as a working class woman, or simply as a Black woman. It is not so much that there are many identity groups, but that each person lives in a complex of identities, some elements of which may become more important than others depending on political context.²¹⁷

This does not diminish the importance of association with any particular sub-group, however, the importance of this association to individual identity at any particular time will be largely dependent on the political context, or in judging, the judicial context presented by the case at hand. Intracategorical approaches place a premium on personal narratives and qualitative methods that ‘aspire to situate the subjects within the full network of relationships that define their social locations’. Complexity

²¹⁴ Ibid 5.

²¹⁵ Ibid ix.

²¹⁶ McCall (n207) 1779.

²¹⁷ Phillips, ‘Feminism and the Politics of Difference’ (n184) 18.

is managed by focusing on the social location at the intersection of ‘single dimensions of multiple categories, rather than at the full range of dimensions of a full range of categories.’²¹⁸ While ‘[t]raditional categories are used initially to name previously unstudied groups at various points of intersection ... researchers are equally interested in revealing – and indeed cannot avoid – the range of diversity and difference *within* the group.’²¹⁹

The final method of exploring intersectional complexities is the ‘intercategorical approach’. This approach, adopted by McCall in her own work, uses categories in a strategic way. Categories, as imperfect and changing as they are, serve as anchor points for analysis, and then the focus falls on relationships amongst social groups.²²⁰ The approach is comparative and looks at each group in a systematic way as part of a larger project.²²¹

2. Standpoint theory and positionality

An intercategorical approach to ‘the concept of women’ problem is usefully illuminated by standpoint or positionality theory. This theoretical school, derived from traditional Marxist theory, focuses upon the epistemological value of perspectives shaped by life experiences. Standpoint theory is a useful theory for interrogating the impact that gender has upon judicial decision making. First, it highlights the epistemological value of perspectives enriched by gendered

²¹⁸ McCall (n207) 1781.

²¹⁹ Ibid 1782.

²²⁰ Ibid 1785.

²²¹ Ibid 1787. See also Gayatri Spivak on the need to accept the ‘risk of essence’ in Gayatri Spivak and Ellen Rooney, “‘In a Word’: Interview” in Linda Nicholson (ed), *The Second Wave: A Reader in Feminist Theory* (Routledge 1997).

experiences. It does not place firm categorical boundaries around what a ‘woman’s’ experience is. It is capable of encompassing the diverse, but without doing away with the shared, experiences of women living in a gender-structured society. In this way it also brings in elements of the intracategorical approach – with a full consciousness of the network of different relationships that women have by virtue of their membership of other identity groups, such as race and class. Second, Patricia Hill Collins’ concept of the ‘outsider-inside’ highlights the valuable dialogic relationship between the new ‘experiential knowledge’ and the traditional or ‘received’ body of knowledge that, in law, has been limited in the scope of perspectives that have shaped it. Finally, this theory proposes that these ‘new’ or previously excluded perspectives will allow a richer body of jurisprudence to develop. Similar to the work of a comparativist, the new perspective gives a lens to view the ‘strange in the familiar’; to critically challenge ‘received knowledge’; to correct misassumption of stereotypes that arise from an over-reliance on inferential knowledge; and to facilitate greater levels of impartiality in judicial decision making.

3. The epistemological value of experience

Feminist standpoint theory is an inter-disciplinary ‘feminist critical theory about the relations between the production of knowledge and the practices of power’.²²² Emerging from the works of sociologists and political theorists,²²³ early standpoint theorists drew upon an interpretation of Marxism concerned with the impact of class relations on the production of knowledge. Jaggar’s work interpreting the synergies

²²² Sandra Harding, *The Feminist Standpoint Theory Reader: Intellectual and Political Controversies* (Routledge 2004) 1.

²²³ For a comprehensive account of the development of standpoint theory, and the vast array of positions taken by standpoint theorists see: Ibid.

with traditional Marxism is important in this respect. She considers that, like Marxists, standpoint feminists 'view knowledge as a social and practical construct and they believe that conceptual frameworks are shaped and limited by their social origins.'²²⁴ Moreover, in rejecting the possibility of a liberal epistemology based upon a 'neutral observer', both Marxism and standpoint feminism consider that 'in any historical period, the prevailing world view will reflect the interests and values of the dominant class.'²²⁵ For traditional Marxism it was social class, in particular the view of the world from the view point or perspective of the bourgeoisie, that dominated the construction of what is falsely thought of as 'universal knowledge'. The oppressed class (the proletariat) not only has a different knowledge of the world when compared to the ruling class, but Marxism, as interpreted by Jaggar, saw this as an epistemological advantage:

It provides the basis for a view of reality that is more impartial than that of the ruling class and also more comprehensive. ... whereas the condition of the oppressed groups is visible only dimly to the ruling class, the oppressed are able to see more clearly the ruled as well as the rulers and the relation between them.²²⁶

Feminist standpoint theory differs from traditional Marxism 'in its assertion that the special social or class position of women gives them a special epistemological standpoint.'²²⁷ In relation to the construction of knowledge, it is argued that from this standpoint 'it is possible to gain a less biased and more comprehensive view of reality than that provided either by established bourgeois science or by the male-dominated

²²⁴ Alison M. Jaggar, *Feminist Politics and Human Nature* (Rowman & Allanheld Harvester 1983) 369-70.

²²⁵ Ibid 370.

²²⁶ Ibid 370-1.

²²⁷ Ibid 370.

leftist alternatives to it. An adequate understanding of reality must be undertaken from the standpoint of women.’²²⁸ By reconstructing women’s standpoint as one that is epistemologically advantageous, feminist standpoint theorists seek to expose biases that lead to sexist and androgynous knowledge claims.²²⁹

Much of the standpoint theory literature centres on the creation of new perspectives as a result of power imbalances and oppression. Before going further, it is important to de-construct what is meant by ‘oppression.’ In colloquial terms, many would be surprised to think of any member of the judiciary as ‘oppressed’. Members of the judiciary in common law jurisdictions hold positions of prestige, relative wealth, independence and the benefit of high levels of education. However, when oppression is given a richer definition, such as the one formulated by Young in her thesis of the ‘five faces of oppression’²³⁰ then the term becomes less jarring in its application to the judicial context. Young asks us to think of oppression not only in the sense of disadvantage and injustice suffered at the hand of some identifiable force, such as tyrannical coercive power. Rather, it must be understood as disadvantage and injustice that also arises from ‘the everyday practices of a well-intentioned liberal society.... Oppression in this sense is structural, rather than the result of a few people’s choices.’²³¹ Because of this systematic nature of oppression, the oppressed group need not have a correlative group.²³² Group oppression, she argues, manifests itself in one or more of five faces: exploitation, marginalization, powerlessness, cultural imperialism and violence. Not all groups will be subject to each face of

²²⁸ Ibid 371.

²²⁹ Harding (n222) 18.

²³⁰ Iris Marion Young, *Justice and the Politics of Difference* (PUP 1990) Ch 2.

²³¹ Ibid 41.

²³² Ibid 41.

oppression, and not all members of each group (which are often large, complex, differentiated and fluid) will feel the oppressive forces in the same manner. Young argues that women, as a group, are subject to gender-based exploitation, powerlessness, cultural imperialism and violence. Arguably, women in law have also suffered institutionalized marginalisation – a system that initially explicitly excluded them from participating, but even after the correlative oppressing force (in this case, explicit legal and cultural prohibition) was removed, structural oppression remains, with the relatively low participation rate of women in the judiciary, highlighted above, being indicative of this. In this way, women's exclusion from the practice and making of law amounts to an oppressive force, leaving them either as outsiders or, because of their marginalised numbers, 'outsiders within'. This in itself is a useful standpoint for the creation of new legal knowledge.

While early attempts at feminist standpoint theory have been accused of not lending themselves to 'de-centered' and 'intersectional' analyses,²³³ later work by Hill Collins demonstrates how standpoint theory is particularly adaptable to incorporating these critical nuances in an intracategorical way, as well as creating dialogue amongst various groups who might be considered 'outsiders'.²³⁴ For the judiciary, outsiders would include women, Black and ethnic minorities, as well as those from particular socio-economic backgrounds. Hill Collins deflects essentialist critiques by emphasizing that any conception of the standpoint of Black women must not be confused with any attempt to articulate *the* standpoint of *a* Black woman.²³⁵

²³³ Harding (n222) 18. See also Jaggar (n224) 386.

²³⁴ Hill Collins, 'Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought' (n35) 121.

²³⁵ Hill Collins, 'Defining Black Feminist Thought' (n35) 245.

However, she identifies a ‘core theme’ that informs Black women’s standpoint in the United States of America:

All African-American women share the common experience of being Black women in a society that denigrates women of African descent. ...In spite of the differences created by historical era, age, social class, sexual orientation, or ethnicity, the legacy of struggle against racism and sexism is a common thread binding African-American women.²³⁶

Central to Hill Collins’ thesis is that for a self-defined standpoint to exist, experience alone is not enough. Rather, it is the interconnectedness of thought, self-reflection and experience that allows a distinctive standpoint to develop. It is not enough to have simply lived a woman’s life in order to achieve any epistemological benefit that might be associated with this. Kenney demonstrated this need for self-reflection in the comments Justice Sonia Sotomayor made when she spoke of being a wise Latina woman²³⁷:

She did not say a Latina woman would come to a better decision than someone without those experiences, but a *wise* Latina woman, presumably one who has reflected on how her gender, race, and class have shaped her experiences.²³⁸

Moreover, experience must be reflected upon and placed within the context of social relationships – juxtaposed both with those that have shared the experience and those who have not. The wisdom acquired from standpoint theory is not only the ability to draw upon the epistemological benefits of one’s own experiences, but also to be aware that this standpoint or perspective is not universal, and that those who are differently positioned may bring equally valuable perspectives.

²³⁶ Ibid 244.

²³⁷ Sonia Sotomayor, ‘A Latina Judge’s Voice’ (2002) 13 BLRLJ 87.

²³⁸ Kenney (n82) 14-5.

This self-consciousness and self-reflection is not necessarily an easy task. It may be obscured both by false consciousness and the inherent professional dangers associated with questioning received ‘truths’. Hill Collins observes that ‘[a]n oppressed group’s experiences may put its members in a position to see things differently, but their lack of control over the ideological apparatuses of society makes expressing a self-defined standpoint more difficult.’²³⁹ Moreover, the struggle for self-definition ‘involves tapping sources of everyday, unarticulated consciousness that have traditionally been denigrated in White, male-controlled institutions.’²⁴⁰ The validation of new epistemologies must struggle against ‘truths’ that have been embedded in the social consciousness, both of the insiders and the outsiders.

Finally, acknowledging the value of experiential knowledge does not devalue or eliminate the need for inferential or vicarious knowledge. This is particularly important in the context of judging. No one judge, nor panel of judges, will be able to collectively represent all of life’s experiences. Rather, a court will be required to draw on the accounts of others, predominantly accounts submitted by the parties before the court, when tasked with the job of understanding the lived experiences to which they must apply the law. However, the experiential knowledge of the judge may be valuable to act as a ‘circuit breaker’ for prevailing stereotypes of biases (conscious or not) or as a steward where the lived experience in question might otherwise not be properly or fully received. This does not turn the courts into a

²³⁹ Hill Collins, ‘Defining Black Feminist Thought’ (n35) 253.

²⁴⁰ Ibid.

‘congress of ambassadors from different interest groups’,²⁴¹ but rather an interpreter for experiences that might otherwise be misunderstood.

4. The dialogic relationship between received and experiential knowledge

Legal knowledge and judicial decisions cannot be based on experience alone. Judges in common law jurisdictions are constrained by a large body of external positive law, both precedent and statute, when deciding a case. This positive body of law, along with well-established interpretive techniques, will be termed ‘conventional’ or ‘received’ knowledge. Writing as a Black, female sociologist holding a Professorial position within an elite US university, Hill Collins highlights the possibility of a dialogic relationship between received and experiential knowledge which is useful when thinking about the application of standpoint theory to the work of judges. She frames this around an idea of the power of being an ‘outsider within’.²⁴² Hill Collins considers that the normative bias in sociology advantages those who are ‘insiders’. For example:

...the transition from student status to that of a practitioner engaged in finding significant facts that sociological paradigms deem important, matching facts with existing theories, and furthering paradigmatic development itself may proceed more smoothly for White middle-class males than for working-class Black females. The latter group is much more inclined to be struck by the mismatch of its own experiences and the paradigms of sociology itself.²⁴³

However, Hill Collins sees the experience of the ‘outsider within’ as advantageous. She contends that the special place occupied by outsiders ‘and their differences

²⁴¹ Cf, Jonathan Sumption, ‘Home Truths about Judicial Diversity’ (Bar Council Law Reform Lecture, London, 15 November 2012) 21.

²⁴² Hill Collins, ‘Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought’ (n35) 103.

²⁴³ Ibid 119.

sensitizes them to patterns that may be more difficult for established sociological insiders to see.’²⁴⁴ The combination of both the learned professional expertise, and the ‘significant source of knowledge’ from ‘their own personal and cultural biographies’ allows the ‘outsider within’ to simultaneously re-examine their own personal and cultural experiences and ‘these same experiences paradoxically help to illuminate sociology’s anomalies’.²⁴⁵ Hill Collins concludes that this helps the outsider within to move both themselves and their discipline closer to ‘the humanist vision implicit in their work – namely, the freedom both to be different and part of the solidarity of humanity.’²⁴⁶

5. Contributions from excluded perspectives

Women judges may be in a position to take advantage of this ‘outsider within’ position and facilitate a richer body of legal thinking that is receptive to previously excluded perspectives. Yancey Martin, Reynolds and Keith have used standpoint theory in order to develop the case for more women judges.²⁴⁷ They start from the position of MacKinnon and others that since the legal system ‘was created by men, based on a concept of citizen as man, with laws written from the man’s standpoint, the ability to take women’s standpoint fully into account is undermined.’²⁴⁸ They assert that ‘the gender composition of the legal institution is consequential because individuals’ social location in the sex-gender system affects their experiences,

²⁴⁴ Ibid 121.

²⁴⁵ Ibid.

²⁴⁶ Ibid 122.

²⁴⁷ Patricia Yancey; Martin, John; Reynolds and Shelley Keith, ‘Gender Bias and Feminist Consciousness among Judges and Attorneys: A Standpoint Theory Analysis’ (2002) 27 Signs 665.

²⁴⁸ Ibid 667.

interpretations, and, ultimately, consciousness within and beyond legal contexts.’²⁴⁹

The approach focuses upon the sensitizing impact that diverse experience brings. It allows the epistemologies of gendered experience to be engaged and opens up the possibilities for new awareness, and a more critical analysis to ‘received knowledge’, which only ever reflected the standpoint of a few.

D. PRESENCE-BASED VS SUBSTANTIVE : A FALSE DICHOTOMY?

While this distinction between ‘presence-based’ and ‘substantive’ arguments making the case for more women judges may be conceptually clear, in practice the distinction is less stark. This section will first argue that many of the ‘presence-based’ arguments used to make the case for more women judges in fact have a logical connection with an assumed substantive impact derived from diversity. Second, it notes that disregarding the substantive impact of gender diversity on the quality of justice produced by courts may have unintended negative consequences. It may lead to appointments based on ‘tokenism’ or a greater tendency to appoint women willing to preserve the ‘status quo’. Finally, this section acknowledges that substantive impacts are a difficult area to research. There is a fine line between searching for the ‘impact’, ‘contribution’ or ‘difference’ women judges bring to decision making and descending into gender essentialism, stereotyping and re-creating sex dichotomies that, as highlighted above, have been so harmful to women in the past. However, this thesis considers that investigating the manner in which gender-diverse courts can enhance the quality of justice is a critical area of research. Accordingly, it forms the central focus of this thesis.

²⁴⁹ Ibid.

1. Presence-based versus substantive

Two of the examples given in Chapter 1 as ‘presence-based’ reasons for judicial diversity logically imply that diversity brings a substantive contribution to judging. These two examples are that of regional diversity and public confidence.

As has been mentioned above, regional courts, such as the ECtHR, draw judges from each of the member states over which they exercise jurisdiction. This justification was previously framed in terms of its symbolic and participative significance. It is argued here that this justification goes beyond simply the appearance of collective participation. In an Advisory Opinion²⁵⁰ concerning a rule requiring member states to include both women and men on the shortlists of candidates presented to the Assembly for election to the ECtHR, the Grand Chamber of the ECtHR elaborated on the current appointment criteria. It considered Article 20 of the ECHR (that the ECtHR shall consist of a number of judges equal to that of each of the state parties) and Article 27(2) (that for each case the judge elected in respect of the state party concerned should sit as a member of the Chamber or Grand Chamber deciding their state’s case). The Grand Chamber noted that these provisions assume special knowledge on behalf of the judge representative of each state. He or she will bring knowledge of ‘the legal system, language or indeed cultural and other traditions of the country concerned as a candidate from that country.’²⁵¹ In other words, the representative judge will have a unique jurisdictional perspective to bring based upon his or her experience in their home state. This experience goes beyond technical knowledge of domestic law and includes ‘cultural’ knowledge. The same argument

²⁵⁰ *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, Strasbourg, 12 February 2008.*

²⁵¹ *Ibid* [52].

could be used to support the need to include women: it could be said that having women on the bench furthers the court's knowledge and understanding of the context of women's experiences. This is particularly so in light of the expanding geographical reach of the Council of Europe into regions where the experiences of women are likely to diverge in increasing ways and a particular contextual understanding of women's experience becomes critical. The same can be said for domestic courts. In this way, the presence-based argument for representation concerned with the need for courts to be seen as inclusive of, and participatory by, those whose interests are at stake, logically implies that judges' particular experiences will contribute to the substantive competencies of the court.

A second example of the overlapping categorisation of presence-based and substantive arguments can be found in the arguments proposing that greater public confidence will be found in institutions that are broadly representative of the constituencies they serve. Two examples given above demonstrate this point. The first, comments by the mother of a deceased Iraq war soldier,²⁵² accusing all the male members of the UK Supreme Court of insensitivity (albeit possibly unfairly);²⁵³ and praising Baroness Hale's compassion 'as a mother'.²⁵⁴ The second was the perception of greater trust of the court process by rural South African women litigants when they could see rural South African women on the bench. These examples imply that there was something more than the appearance of the judge that gave these particular litigants confidence. They perceived that the court, with women as well as men, may

²⁵² *R (Gentle & Anor) v The Prime Minister & Ors* [2008] UKHL 20; [2008] 1 AC 1356.

²⁵³ Indeed, when the decisions of the other male members of the Court are considered the level of empathy appears to be 'on a par' with that expressed by Baroness Hale.

²⁵⁴ Gibb (n76).

know ‘more about them’ and have a greater capacity to understand their story because of a shared (albeit probably shared to a limited extent) gendered life experience. As Albertyn has noted, ‘questions of legitimacy [and public confidence] inevitably morph into questions about outcomes and the quality of justice’.²⁵⁵ People will have greater confidence in diverse courts not merely because they look diverse, but rather because there will be an expectation that it will make a difference to the outcome of a case.

To rely upon presence-based arguments alone to make the case for more women judges, and to avoid arguments that suggest the quality of decision making will change with a gender diverse bench, is logically flawed.

2. Dangers in relying upon ‘presence-based’ arguments alone

Moreover, to rely upon presence-based arguments to make the case for more women judges – that it only matters that women are seen to be there, no matter what they do when they are there – opens up the space for ‘tokenistic’ appointments. If the candidate’s potential to contribute and enrich the collective experience of the court is ignored or discounted, then the result may be that only women who are thought to be likely to preserve the current ‘status quo’ will be selected for appointment. The court may look different, but will not be transformed in any meaningful way. This is obviously a delicate argument to make and it is not inconceivable that those who accuse an appointee of being a ‘token’ may have a more malicious agenda. Nonetheless, it is an important concern, particularly in jurisdictions where the power to appoint is centralised and non-reviewable.

²⁵⁵ Albertyn (n21), 263.

An interesting piece of research has been done in relation to women appointed to the South African legislature under the ANC's quota policy.²⁵⁶ The South African legislature has made great gains in terms of women's participation in parliament. Before the 1994 democratic transition, only one woman, Helen Suzman, held a place in the then all-White parliament. When the ANC came into power it implemented a 30% (raised to 50% by President Mbeki in 2009) voluntary party quota for women. Given the ANC's electoral dominance in South Africa, this translated into a phenomenal increase in the number of women holding seats in the National Assembly. In 2009 women made up 44.5% of parliament.²⁵⁷ Walsh argues that in the first democratic parliament the 'quota brought a talented number of ANC women into parliament' and '[c]apitalizing on this opportunity, female MP's established a number of counterpublics that helped them pry open debate conditions, and they exercised substantive representation and advanced women's rights.'²⁵⁸ However, she argues that by the second parliament under President Mbeki, and continuing under President Zuma, the Executive had used quotas as a way of allowing leaders to 'handpick women who would toe the party line, allowing leaders to centralize their power while reinforcing the perception that the ANC was committed to women's equality.'²⁵⁹

If women are appointed on purely descriptive terms – just because they are women – with no concern or interest in their substantive impact on the functions they perform, then there is a concern that there will be no growth to the experiential pool that the court can draw from by virtue of these appointments. This is because there is

²⁵⁶ Denise Walsh, 'Party Centralization and Debate Conditions in South Africa' in Susan Franceschet, Mona Lena Krook and Jennifer M Piscopo (eds), *The Impact of Gender Quotas* (OUP 2012).

²⁵⁷ Ibid 119.

²⁵⁸ Ibid 130.

²⁵⁹ Ibid 119.

a danger that those who most reflect the status quo in all but sex will be the only appointments made.

This thesis starts from the assumption that the judicial system, as it currently stands in the three focus jurisdictions, is impoverished. It is impoverished because the perspectives brought to bear on issues of justice draw predominantly on male gendered perspectives. The central argument of this thesis is that a greater pool of gendered experiences will in turn improve the quality of justice capable of being delivered by the court. To eliminate considerations of the substantive contribution that gender diversity brings in favour of presence-based reasoning alone fails to recognise the ongoing harm to the quality of justice our courts can do if they continue to be so unrepresentative. While examining the substantive contribution of gender diversity is a delicate and tricky area of research, littered with traps of essentialism and stereotypes, it remains an important area of academic enquiry.

Based on the understanding of standpoint theory developed in this chapter, Chapter 3 will consider how it might inform our understanding of how judges, as part of independent and impartial tribunals, can legitimately combine knowledge and experience in order to enhance impartiality and the performance of their judicial functions.

CHAPTER 3: EXPERIENTIAL KNOWLEDGE AND THE JUDICIAL FUNCTION

The possible other factors (call them “personal”) [that impact upon judicial decision-making] include personality traits, or temperament (and thus emotionality at one end of the spectrum and emotional detachment at the other end), which are more or less *innate* personal characteristics. They include personal *background* characteristics, such as race and sex, and also personal and professional *experience*. ...The political and personal factors create *preconceptions*, often unconscious, that a judge brings to a case. This can explain how judges can think their decisions uninflected by political considerations but neutral observations find otherwise.²⁶⁰

The quote above, by United States Court of Appeal Judge Richard Posner, is a somewhat uncontroversial statement in modern judicial studies. A great deal of work has been done to debunk the historically convenient fiction that judges are all neutral arbitrators, unaffected by their own personality or experiences when deciding cases. This work owes its origins to the American realist schools of thought, critical legal studies, and over a century of feminist legal theory. As highlighted in the chapters above, feminist legal scholars expose the way in which false assumptions of neutrality and the lack of women’s participation have infected law and impeded the development of legal knowledge.

However, an ‘independent and impartial tribunal’ is central to the right to a fair trial and is explicitly stated as such in various international and domestic instruments²⁶¹ and long recognised by the common law. For example, the International Bar Association Minimum Standards of Judicial Independence link the concept of impartiality with bias by requiring that ‘[a] judge shall not sit in a case

²⁶⁰ Devlin, MacKay and Kim (n45) 10-11.

²⁶¹ See for example UDHR, Art 10; ICCPR, Art 14(1); ECHR, Art 6(1); SA Constitution, s 32.

where there is a reasonable suspicion of bias or potential bias’ and that ‘[a] judge shall avoid any course of conduct which might give rise to an appearance of partiality.’²⁶² However, what does it mean to be impartial? Is it the same as being neutral? Where does the threshold for bias lie? And how does this reconcile with the standpoint theory presented above?

This chapter will flesh out these concepts and use the tools provided by standpoint theory, outlined above, to shed light on the role of the judge. In rejecting both the possibility and desirability of judicial neutrality in favour of judicial impartiality, it will demonstrate how a non-neutral but impartial judge is still able to perform her judicial function ‘without fear or favour, affection or ill will’ or ‘reasonable suspicion of bias or potential bias’. At the heart of the enquiry lies the extent to which the ‘human’ or ‘non-technical’ skills of the judicial decision maker, and the technical knowledge combined with ‘personal and cultural biographies’²⁶³ are all required in the exercise of the judicial function.

A. JUDICIAL NEUTRALITY OR IMPARTIALITY?

The concept of judicial neutrality demands that the judge not allow any externally formed sympathies, antipathy or attitudes to impact upon the particular case at hand. It stems from the principle that a judge should not come to the case with a preconceived position which might give one party an unfair advantage. The judge should be a blank screen upon which arguments from opposing camps can be projected and then weighed by the judge according to law, free of any pre-disposition

²⁶² International Bar Association Minimum Standards of Judicial Independence, cls 44-5.

²⁶³ Hill Collins, ‘Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought’ (n35) 121.

or extra-judicial perspective. However this is an over-simplified and sterile view of the judicial function. As an Australian judge notes:

It is men and women enjoying judicial independence who administer justice, not automata or computers. In many areas judges are given broad discretion for a variety of reasons. If legislators wish to guide, inform or limit those discretions they are generally free to do so, but much room for movement is left – often deliberately.²⁶⁴

This observation questions both the *ability* of a judge to be truly neutral and the *desirability* of judicial neutrality.

1. Away from Neutrality

Benjamin Cardozo, with striking correlation to standpoint theories discussed above, observed: '[w]e may try to see things as objectively as we please. None the less we can never see them with any eyes except our own.'²⁶⁵ In this observation he implicates the judge in every step of the judicial decision-making process: the interpretation of legislation, the selection and interpretation of precedent, the assessment of witnesses, the exercise of discretion, the weighing of competing arguments, the formulation of reasons and the final judgment. This is not to say that this process is unprincipled. The common law requirement that judges give reasons is but one safeguard against this.²⁶⁶ However, except for the most straightforward cases (the kind least likely to reach superior courts) the external positive body of law, or the 'received knowledge' will not be sufficient to decide a case. Some kind of vicarious or experiential knowledge reserve will need to be drawn upon, and any claim to

²⁶⁴ Keith Mason, 'Unconscious Judicial Prejudice' (2001) 75 ALJ 676, 676.

²⁶⁵ Benjamin Cardozo, *The Nature of the Judicial Process* (YUP 1957) 13.

²⁶⁶ HLA Hart, *The Concept of Law* (2nd edn, OUP 1997) 273.

neutrality may, in effect, serve to obfuscate the partiality inherent in the judicial function.

The judge who proceeds under the banner of ‘neutrality’ may actually be succumbing to unconscious, un-contemplated or un-recognised bias²⁶⁷ – either within the judge him or herself, or within the status quo. Minow highlights the extent to which we are all implicated in the decisions that we make, particularly when they relate to complex social questions that go to the heart of human experience: ‘that men as well as women have a sex, and Whites as well as Blacks have a race. These categories implicate us all. If being implicated means bias, then everyone is biased, and perhaps then no one can judge.’²⁶⁸ Or, to put it more simply, we each have a ‘point of view,’ a positionality that is inescapable, no matter how hard we try. To deny this serves only to reinforce the blinkers of assumed neutrality. This denial also compromises the exercise of the judicial function. However, to stop at this point is rather unhelpful, particularly if ‘judicial neutrality is the central tenet of the rule of law.’²⁶⁹

²⁶⁷ The related issue of ‘subconscious discrimination’ whereby the alleged discriminator is found to be acting on un-admitted discriminatory reasons is an emerging concept in discrimination law. See Sarah Wilkinson, ‘On the Judge's Couch: Should Employment Tribunals Make Findings of Subconscious Discrimination?’ (Oxford Faculty of Law Labour Law Discussion Group, Oxford, 24 January 2011). See also Binna Kandola, *The Value of Difference: Eliminating Bias in Organisations* (Pearn Kandola 2009).

²⁶⁸ Martha Minow, ‘Stripped Down Like a Runner or Enriched by Experience’ (1991) 33 WMLR 1201, 1208.

²⁶⁹ Mason (n264) 676.

The problem is not inherent within the adjudicative system, but rather with how we conceptualise the role of the judge.²⁷⁰ To view the judge as impartial, rather than neutral, allows for the ‘human condition’ to enhance the judicial function. This will not erode the right to a fair trial before an independent and impartial tribunal.

2. Towards Impartiality

The Supreme Court of Canada in *R v RDS* carefully considered this distinction between neutrality and impartiality.²⁷¹ In this case the court was divided on the question of whether Nova Scotia trial judge, Judge Corrine Sparks, made remarks in her *ex tempore* reasons which exhibited bias. The case concerned a charge against a Black 15-year-old for unlawfully assaulting a White police officer while the police officer was arresting the 15-year-old’s cousin. The accused allegedly tried to intervene in this arrest. The accused and the police officers were the only witnesses and their accounts differed in material respects. The defence argued that the accused had been over-charged for the incident in question, and that the police officers used excessive force (placing the accused and his cousin – who was already handcuffed – in ‘choke grips’). The trial judge acquitted the 15-year old, and at the centre of the controversy, remarked that police officers had been known to mislead the court in the past and to overreact, particularly with Black groups, and that this could indicate a questionable mind. The contentious point was whether the trial judge was able to take ‘judicial notice’ of a culture of racism and untruthfulness within the police-force, or whether such an observation, drawn from her own personal experiences interacting

²⁷⁰ See Erika Rackley, ‘When Hercules Met the Happy Prince: Re-Imagining the Judge’ (2005) 213 *TexWesleyanLRev* 213.

²⁷¹ *R v RDS* [1997] 3 SCR 484.

with those in the community, rather than tendered evidence, amounted to bias. At the time of the trial Judge Sparks was the only Black judge in Nova Scotia.²⁷²

A majority of Justices of the Supreme Court²⁷³ dismissed the appeal, holding that there was no actual or reasonable apprehension of bias attributable to the trial judge. There was consensus within the court on the legal test for actual or apprehended bias, and, significantly for the purpose of this section, all of the justices agreed that judicial neutrality was not a pre-requisite for the performance of the judicial function. The dissenting judges highlighted that ‘the life experience of this trial judge, as with all trial judges, is an important ingredient in the ability to understand human behaviour, to weigh the evidence, and to determine credibility. It helps in a myriad of decisions arising during the course of most trials.’²⁷⁴ The joint judgment of L’Heureux Dubé and McLachlin JJ, with whom La Forest and Gonthier JJ agreed, went further. Not only is a certain degree of subjectivity ‘helpful’ or ‘important’, it is unavoidable:

In our view, the test for reasonable apprehension of bias established in the jurisprudence is reflective of the reality that while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality. It therefore recognizes as inevitable and appropriate that the differing experience of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the case based on the facts in evidence.²⁷⁵

²⁷² Richard Devlin, ‘We Can’t Go On Together With Suspicious Minds: Judicial Bias and Radicalized Perspectives in *R v RDS*’ (1995) 18 Dal LJ 408, 410.

²⁷³ La Forest, L’Heureux-Dubé, Gonthier, Cory, McLachlin and Iacobucci JJ with Lamer CJ and Sopinka and Major JJ dissenting.

²⁷⁴ *R v RDS* [13].

²⁷⁵ *Ibid* [29].

These sentiments confirm the inevitability of a certain degree of subjectivity in the judicial process. L’Heureux Dubé and McLachlin JJ distinguished their reasons, although not their findings, from that of Cory J who considered the comments of the trial judge to be ‘worrisome and come close to the line.’²⁷⁶ Rather, L’Heureux Dubé and McLachlin JJ found the comments to ‘reflect an entirely appropriate recognition of the facts in evidence in this case and of the context within which this case arose – a context known to Judge Sparks and to any well-informed member of the community.’²⁷⁷

The desirability of judges being informed by their life-experiences when performing the judicial function was central to L’Heureux Dubé and McLachlin JJ’s reasons. They emphasised that not only is neutrality unachievable, but undesirable as it denies the strategic importance that ‘human elements’ – such as empathy and connection²⁷⁸ – play in the administration of justice:

[J]udges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of diversity of backgrounds in the judiciary.²⁷⁹

There is also a great danger when judges do not realise that a lack of personalised knowledge, may, in fact compromise the impartiality of the bench. If a judge is too far removed from a particular life experience, this too, may create an

²⁷⁶ Ibid [152].

²⁷⁷ Ibid [30].

²⁷⁸ Rackley, ‘When Hercules Met the Happy Prince: Re-Imagining the Judge’ (n270) 217.

²⁷⁹ *R v RDS* [38].

unconscious bias or a ‘blind spot’ in the court’s ability to fully understand the case at hand, along with the way that it is embedded in broader social relations. Former Judge of the South African Constitutional Court, Laurie Ackermann, articulated how these ‘blind spots’ arise:

Judges who believe that they are wholly free of prejudice delude themselves. It behoves us all to seek out rigorously, painfully as that might be, our own particular prejudices, of whatever nature. We need to keep these constantly in mind and to endeavour actively and persistently to counteract them. Furthermore, we all need to understand the insidious influence of institutional culture and to appreciate the powerful effects of the class, social and political environment in which we live and work, and the potential that this has for making us insensitive to the context and views of others.²⁸⁰

The final question that remains is if it is inevitable and desirable, where possible, for judges to incorporate a personal ‘standpoint’ into the judicial function, how can this be done so as to preserve impartiality?

3. Self-consciousness, Participation and the ‘Enlargement of Mind’

The first point to note is that the choices made by the judge, even in hard cases, are still structured choices, made within the constraints provided for by the current legal framework. Unlike a legislature, the judge’s influence is limited to resolving questions necessary in order to dispose of the particular case before her. Moreover, this function cannot be exercised in an arbitrary manner. As discussed above in Chapter 2 in relation to Hill Collin’s work, this is the relationship that any ‘experiential knowledge’ must have with the current body of ‘received knowledge’ in common law jurisdictions.

²⁸⁰ LWH Ackermann, ‘Submission to the Truth and Reconciliation Commission re: The role of the judiciary’ (1998) 115 SALJ 51, 54.

Hunter distinguishes between decision being *based upon*, and *informed by*, a personal belief or standard.²⁸¹ While the latter is, in many cases unavoidable, the former should not be encouraged. This kind of personalised outcome driven decision-making strays too far beyond the scope of the proper judicial function. Even though point of view is brought to bear on a judgment, the decision maker must remain alive to the danger of basing their decision on this point of view, rather than informing it. One way to scrutinise this is through the requirement to give reasons.

In *R v RDS*, L'Heureux Dubé and McLachlin JJ offer two further criteria for achieving impartiality. The first is a conscious, contextual enquiry on behalf of the decision-maker to identify where their partiality may lie.²⁸² Minow highlights the importance of self-consciousness, arguing that '[j]ustice can be impartial only if judges acknowledge their own partiality.'²⁸³

The second part of this equation set out by L'Heureux Dubé and McLachlin JJ is 'enlargement of mind'. This requires the judge, once acknowledging her own dispositions, to be open to challenge and movement from her original position. L'Heureux Dubé and McLachlin JJ describe this as an expectation that the judge will arrive at a final decision after 'being equally open to, and considering the views of, all parties before them.'²⁸⁴ Through this dynamic and reflexive process the judge, rather than removing the 'humanizing' parts of themselves from the decision-making process, allow their decisions to be enriched by this, all the while remaining conscious

²⁸¹ Rosemary Hunter, Clare McGlynn and Erika Rackley, *Feminist Judgments: From Theory to Practice* (Hart 2010) 31.

²⁸² *R v RDS* [42] citing Jennifer Nedelsky, 'Embodies Diversity and the Challenges to Law' (1997) 42 McGillLJ 91, 107.

²⁸³ Minow, 'Stripped Down Like a Runner or Enriched by Experience' (n268) 74.

²⁸⁴ *R v RDS* [40].

of their utmost duty of impartiality to afford a fair trial and the administration of justice. Hannah Arendt has developed this concept in her theory of ‘enlarged mentality’. In contrast to the liberal tradition that views individuals as autonomous and separate beings, Arendt builds on the concept of community. In order to judge, you must be able to situate yourself within the context of the community and have ‘the ability to see things not only from one’s own point of view but in the perspectives of all those who happen to be present.’²⁸⁵ This argument has been posited in political theory. Amartya Sen links this with legitimisation, arguing in short that the more voices or perspectives are injected into a market-place of ideas, the closer decision-makers will come to reaching an appropriate conclusion. He reasons that:

Partisanship is avoided not so much by taking either a conjunction, or an intersection, of the views respectively held by dominant voices in different societies...but through an *interactive* process, in particular by examining what would survive public discussion, given a reasonable free flow of information and uncurbed opportunity to discuss differing points of view.²⁸⁶

In the judicial context, particularly when judges are dealing with open-textured laws concerning complex social questions, the greater the spread of perspectives on the bench, arguably, the better equipped the judiciary will be to interact with and be susceptible to differing points of view. This chapter has sought to demonstrate that the incorporation of experiential knowledge, and indeed gendered experiential knowledge, is not antithetical to the ‘proper’ role of a judge. Rather, it is both unavoidable and desirable. The next part of this thesis will now consider how the impact of this experiential knowledge can best be investigated.

²⁸⁵ Hannah Arendt, *Between Past and Future* (1961) 221.

²⁸⁶ Amartya Sen, ‘Elements of a Theory of Human Rights’ (2004) 32 *Phil&PubAff* 315.

PART II: HOW TO INVESTIGATE THE IMPACT OF EXPERIENTIAL KNOWLEDGE?

Part I has argued that gendered experiential knowledge has the potential to impact upon judging. The next question is: how should this impact be investigated? Methodological choice has been crucial to this project. There is now a large volume of research considering the impact that women judges might have upon the quality of justice.²⁸⁷ To date this area has been approached using four main methodological techniques: (1) quantitative outcomes based research; (2) doctrinal analysis; (3) alternative judgment writing; and (4) qualitative interview based research. This Part will argue that method (1) – quantitative outcomes based research – is, at best, a limited tool of enquiry because problematic assumptions, such as an essentialising man/ woman binary, pervade results. Methods (2), doctrinal analysis and (3) alternative judgment writing, show more promise. They have been undertaken in several forms, most recently by analysing the texts of judgments from a feminist standpoint. While methods (2) and (3) are able to produce some insight into the impact that women judges or feminist judges (two distinct projects) make on judicial decision-making, the two-dimensional or ‘flat’ nature of doctrinal research does not allow firm conclusions to be drawn and relies heavily upon inferential reasoning and assumptions in order to ascertain the impact of gender diversity. This method is not without value. Chapter 5 of this thesis will use decisions of the ECtHR as a case study to demonstrate some of the strengths and weaknesses of this methodological

²⁸⁷ For a summary see Kenney (n82) 28-40. See also Christina Boyd, Lee Epstein and Andrew D Martin, ‘Untangling the Causal Effects of Sex on Judging’ (2010) 54 *AJPS* 389, appendix 1 which lists 34 quantitative empirical studies in this area.

approach. Chapter 6 will explore alternative judgment writing – demonstrating that feminist judgment writing projects have been useful in unmasking the dominance of male gendered experiential knowledge in judgment writing. The final methodology – (4) qualitative based interviews – will be considered in Chapter 7. Because of the inherent difficulties in undertaking qualitative empirical work in judicial settings, this has been an under-used methodological approach. This thesis breaks new ground by drawing upon empirical data collected in a series of interviews with men and women judges from superior courts in the three focus jurisdictions. These interviews have provided greater insights into how judges perceive the impact that gender diversity has upon the judicial function. Arguably, this offers a deeper and more nuanced understanding than that which is available through the other three methodologies considered. The interview, or narrative, method of research allows for complexities and contradictions in judging to be explored, including the intersection of gendered experiences with other life experiences (in an intracategorical manner, discussed in Chapter 2) and the country-specific contextual location of each of the interviewees, providing a fuller picture of the ways in which it matters for courts to have an equal number of men and women judges.

CHAPTER 4: QUANTITATIVE OUTCOMES BASED RESEARCH

The first methodological approach attempts to quantify or predict case outcomes or voting patterns according to the composition of the bench. Sex is used as a variable in order to study whether the outcome of a case, or a specific set of cases, is altered by the sex-composition of the bench. This type of research was pioneered by North American social scientists. One of the earliest studies carried out in the United States and published in 1977 questioned whether the sex of the judge was an important variable in criminal trials, including rape trials. The research concluded that the sex of the judge had virtually no significant effect.²⁸⁸ Since then, a number of studies have been undertaken across a vast array of courts and legal questions in order to determine whether women judges and men judges come to different outcomes when faced with the same legal problem.²⁸⁹ These studies have sought to investigate difference across a variety of legal subjects including: sexual harassment or sex-discrimination cases,²⁹⁰ divorce cases,²⁹¹ immigration asylum cases,²⁹² rights of

²⁸⁸ Herbert Kritzer and Thomas Uhlman, 'Sisterhood in the Courtroom: Sex of Judge and Defendant as Factors in Criminal Case Disposition' (1977) 14 SSJ 77.

²⁸⁹ See Kenney (n82) 28-40. See also Boyd, Epstein and Martin (n287) appendix 1 which lists 34 quantitative empirical studies in this area.

²⁹⁰ Beverly Blair Cook, 'Will Women Judges Make a Difference in Women's Legal Rights? A Prediction from Attitudes and Simulated Behaviour' in Margherita Rendel (ed), *Women, Power, and Political Systems* (St Martin's Press 1981); Donald Songer, Sue Davis and Susan Haire, 'A Reappraisal of Diversification in the Federal Courts: Gender Effect in the Courts of Appeal' (1994) 56 JP 425; Jennifer Peresie, 'Female Judges Matter: Gender and Collegiate Decisionmaking in the Federal Appellate Courts' (2005) 114 YLJ 1759; Boyd, Epstein and Martin (n287);

accused and prisoners;²⁹³ deference towards government;²⁹⁴ criminal procedure; obscenity cases; abortion cases;²⁹⁵ affirmative action cases;²⁹⁶ capital punishment;²⁹⁷ campaign finance;²⁹⁸ contract clauses;²⁹⁹ federal challenges;³⁰⁰ race cases;³⁰¹ and the list goes on and on. Several of these studies do point to sex delineated voting trends. For example, Boyd et al found that in their case sample a judge deciding in favour of a party alleging sex discrimination decreased by ten percentage points where the judge is a man.³⁰² Ramji-Nogales et al, in their study of asylum cases in US courts of appeal from different circuits, demonstrated that women judges were 44% more likely

²⁹¹ Elaine Martin and Barry Pyle, 'State High Courts and Divorce: The Impact of Judicial Gender' (2005) 36 *UToledoLRev* 923.

²⁹² Jaya Ramji-Nogales, Andrew Ian Schoenholtz and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (NYUP 2009) Ch 3; Carrie Menkel-Meadow, 'Asylum in a Different Voice: Judging Immigration Claims and Gender' in Jaya Ramji-Nogales, Andrew Schoenholz and Phillip Schrag (eds), *Refugee Routeet: Disparities in Asylum Adjudication and Proposals for Reform* (NYUP 2009).

²⁹³ Jon Gottschall, 'Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the US Courts of Appeals' (1983) 67 *Judicature* 156.

²⁹⁴ Thomas Walker and Deborah Barrow, 'The Diversification of the Federal Bench: Policy and Process Ramifications' (1985) 47 *JP* 596.

²⁹⁵ Boyd, Epstein and Martin (n287).

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² *Ibid.*

to grant a claim for asylum when compared with their male counterparts.³⁰³ However, many other studies have failed to demonstrate any demarcation along sex lines in voting patterns. For example, Boyd et al tested 13 areas of law in order to ascertain sex based voting patterns, including areas that might be thought of as particularly ‘gendered’ such as abortion and sexual harassment cases. However only one of their sample sets – sex discrimination cases – yielded results indicating any significant differentiation in voting patterns between women and men.³⁰⁴ The results of empirical ‘outcomes’ based studies have been equivocal, at best.³⁰⁵ Boyd et al conclude that ‘the presence of women judges on federal courts *rarely* has an appreciable effect on judicial outcomes.’³⁰⁶ Sally Kenney is more emphatic in her rejection of this methodology, and suggests a number of its inherent limitations:

Only occasionally has the evidence supported any of these assumptions [that women will decide cases differently from men]. And even when it does support the idea that women are somehow essentially different, the studies tend to be constrained by sample size, limited time periods, or an absence of controls. Other explanatory variables, such as party ideology (or simply feminism), may predict differences between men and women judges more reliably than sex. Strangely, findings of no difference never seem to challenge the fundamental assumption of difference, or deter the search for it.³⁰⁷

She contends that even where ‘differences’ in outcomes may be detected, they are idiosyncratic to the particular court or group of judges studied and are susceptible to influence by an array of factors not related to sex. She questions the value of results

³⁰³ Ramji-Nogales, Schoenholtz and Schrag (n292).

³⁰⁴ Boyd, Epstein and Martin (n287).

³⁰⁵ Menkel-Meadow, ‘Asylum in a Different Voice: Judging Immigration Claims and Gender’ (n292) 207.

³⁰⁶ Boyd, Epstein and Martin (n287) 406.

³⁰⁷ Kenney (n82) 41.

‘when studies do find a difference but can only speculate as to its cause because nothing in the evidence would allow you to determine whether the alleged cause produced the reported difference.’³⁰⁸

Another quantitative approach has been to ascertain whether women judges are more likely to write a dissenting or concurring opinion, or alternatively, whether women will vote together in particular types of cases. In 2008 Marie-Claire Belleau and Rebecca Johnson published a study considering the voting patterns of men and women on the Supreme Court of Canada. This research sought to illuminate a higher tendency among the first three women on the Supreme Court of Canada (Justices Wilson, L’Heureux-Dubé and McLaughlin) to write dissenting or concurring judgments when compared to their male colleagues.³⁰⁹ Justices Wilson and L’Heureux-Dubé had the largest percentage of dissenting and concurring judgments by a notable margin: Justice Wilson concurred in 31.5% of cases and dissented in 28.1% of cases, Justice L’Heureux-Dubé concurred in 32.4% of cases and dissented in 23.2% of cases, with the average rate of concurrence on the court being 25.7% and dissent 15%. However, Justice McLaughlin’s figures were less notable – concurring in 23.6% of cases and dissenting in 19.6% of cases. Moreover, when Belleau and Johnson extended the scope of their survey to take into account the voting patterns of the next four women judges to sit on the court, Justices Dechamps, Abella, Arbour and Charron, the figures became less conclusive. Justices Abella, Arbour and Charron dissented or concurred at a lower rate than the court average, and Justice Deschamps, while a significant dissenter (23.9% of cases) still voted with the

³⁰⁸ Ibid 38.

³⁰⁹ Marie-Claire Belleau and Rebecca Johnson, ‘Judging Gender: Difference and Dissent at the Supreme Court of Canada’ (2008) 15 *IntJLP* 57.

majority 60.6% of the time – at the same rate as the court average. While a number of explanations might be offered to account for why the new women judges were more likely to agree with their colleagues than their predecessors – for example, hesitation in dissenting when new in the job; a relational shift in the court over time; the impact of regional considerations dominating over sex or gender based influences – it does raise the question whether the first three women on the court were disagreeing because they were women or just because they disagreed.

Similar dangers occur in attempts to identify gendered voting blocks. Kenney presents the 2011 Supreme Court decision in *Wal-Mart v Dukes*³¹⁰ as a good example of this danger. She notes that because this was a sex-discrimination case, commentators immediately focused upon the fact that all three of the court's women judges, Justice Ginsberg, Sotomeyer and Kagan (with Justice Breyer) dissented from the majority who found against the complainants. However, she notes that 'all justices appointed by a Republican president were in the majority and all justices appointed by a Democratic president, including one man, Justice Breyer, dissented.'³¹¹ In a recent decision of the High Court of Australia concerning the implied protection of freedom of political communication, the six-member court was also split along gender lines.³¹² All three women justices were in the minority (Justices Crennan, Kiefel and Bell). A colleague was quick to contact me to ask me whether I had seen the decision and what did this mean? Nothing on the facts gave any indication that there was a particularly 'gendered' issue at stake. It was just the

³¹⁰ *Wal-Mart v Dukes* 564 US__ (2011) US Supreme Court.

³¹¹ Kenney (n82) 42.

³¹² *Monis v The Queen* [2013] HCA 3. This was an unusual case as only six of the Court's seven judges were able to sit given that the latest appointee – Justice Gagler – was conflicted out of the case. The Court was split 3-3. Since the Court was evenly split, the Court below was affirmed.

case that three judges decided a case in the same way, and they happened to be women judges. However, the fact that this judgment caught my colleague's eye and immediately prompted the search for some underlying sex-based synergy between the justices on the split court, is telling.

Perhaps the greatest worry about quantitative empirical research is the essentializing impact that it has upon men and women judges. The search for difference in this context is a binary one: women will find this way, men will find that way, women will agree with each other in these cases, they will disagree with men in those cases. It allows little space for the particularities of the judge, the court and, most importantly, the case at hand to be taken into account. Moreover, it draws inferences from the outcomes of cases – providing information at the meta level of how men and women judge, but does not look at the process that is undertaken in coming to a particular result. This approach also assumes that all cases in a chosen category will be the same. If we are looking to see whether women judges are more likely to find in favour of rape complainants, this also assumes that all rape complainants who come before the court will have an equally strong case. If we are looking to see if men judges are more likely to find in favour of respondents in sexual harassment cases, this assumes that all sexual harassment cases are the same. Not only does this type of research essentialise the judges who hear them, but also the cases that come before them. It is a blunt tool with which to research women in the judiciary, and at best, can only give insight into the particular tendencies of a particular court at a particular time. Outcome based research is therefore an inadequate tool with which to analyse the impact that gendered experiential knowledge has upon the quality of justice provided by the court.

CHAPTER 5: DOCTRINAL ANALYSIS

[T]here is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman.³¹³

This chapter examines the second methodological approach flagged in the introduction to Part II, namely, using doctrinal analysis in order to examine the impact of gendered experiential knowledge on judging. It will be argued that this is a more subtle method of researching women and their impact on the judiciary, when compared to quantitative analytical methods outlined in Chapter 4. In common law jurisdictions and many supra-national courts judges are required to put into written form the reasons that led them to the outcome in the case. Furthermore, each member of the court has the option of either joining a majority judgment, writing concurring reasons, or writing a dissent. The judge is not only required to announce his or her final decision in a case, but must also articulate, usually in written form, the intellectual process that led him or her to that outcome. This can prove fertile ground for investigating the influences that led the judge to decide the way he or she did.

There are a number of very prominent decisions where this gendered experiential knowledge is explicitly highlighted by the judge, usually in a concurring or dissenting opinion. The quote at the outset comes from Baroness Hale's dissent in *Radmacher*. It has become famous amongst certain legal circles, not only for Hale's particular interpretation of pre-nuptial agreements, but for this bold statement she included in her dissent. Sometimes the impact of gendered experiential knowledge in the reasoning is more subtle. A good example of this comes from Lady Justice Arden's concurring opinion in *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727, [2004] Fam Law 647. Ms Evans sought the use of a frozen embryo created

³¹³ *Granatino v Radmacher (formerly Granatino)* [2010] UKSC 42; [2011] AC 534 [137].

using her eggs and her former partner's sperm. UK law required the consent of Ms Evan's former partner, something he was not willing to give, before she could have access to the sperm. She claimed that this was an infringement of her right to private life, provided for under the Human Rights Act 1998 (UK). Her former partner argued that for Ms Evans to be given access to the embryo in the absence of his consent was an infringement of his right to private life. The court was required to balance two competing claims – her right to be a mother against his right not to be a father. While Arden LJ concurred with her male colleagues that the outcome should be in favour of the potential father, she wrote concurring reasons that emphasised the unique experience of pregnancy:

Infertility can cause the woman or the man affected great personal distress. In the case of a woman, the ability to give birth to a child gives many women a supreme sense of fulfilment and purpose in life. It goes to their sense of identity and to their dignity.³¹⁴

It is not the fact that Arden LJ wrote a separate concurring opinion that is of significance, but rather, in her concurring reason she made a space for a different narrative and insight to infuse the judgment. Erica Rackley, writing about a different decision of Arden LJ, highlights that:

“...her ‘difference’ lies in the fact that she hears and tells a different story (rather than simply the fact that it has a different ending) and, more specifically, in the potential of her counter-narrative to open up new avenues for exploration and alternative understandings of the judge and judging.”³¹⁵

The strength of using doctrinal analysis to investigate the impact of gendered experiences upon judging lies in the fact that this type of analysis is that it is not

³¹⁴ *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727, [2004] Fam Law 647, [80]-[81].

³¹⁵ Erika Rackley, ‘What a difference difference makes: gendered harms and judicial diversity’ in Ulrike Schultz and Gisela Shaw (ed), *Women in the Judiciary* (Routledge 2012) 46.

solely ‘outcomes’ based. It accepts that a richer perspective on human experience may be brought to bear upon the reasoning of a case, even if it does not alter the outcome.

This chapter will explore the strengths and also the limitations inherent in doctrinal research as a way of investigating the impact of gender on judging through a case study of recent decisions of the European Court of Human Rights (ECtHR).

A. SEARCHING FOR GENDERED EXPERIENTIAL KNOWLEDGE IN THE ECtHR

The ECtHR provides a unique case study for elucidating possible contributions that women’s gendered experiences have made to the judicial process. Positive steps have been taken to redress the judicial gender imbalance since the creation of the new Court in 1998. The gender composition of the bench has been the subject of recent consideration by the Parliamentary Assembly of the Council of Europe (‘Assembly’),³¹⁶ and given specific attention in an advisory opinion of the Grand Chamber.³¹⁷

The modern manifestation of the ECtHR is the result of more than half a century of evolving institutional design. The Treaty of London established the Council of Europe in on 5 May 1949. One year later it completed its first major project: the drafting of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

³¹⁶ Notably Resolution 1366 (2004); Resolution 1246 (2005) and Resolution 1627 (2008).

³¹⁷ *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, Strasbourg, 12 February 2008*, (2009) 49 EHRR 825.

The ECtHR's role was initially limited and narrowly circumscribed. It lacked compulsory jurisdiction over State Parties,³¹⁸ standing was heavily restricted,³¹⁹ and, as a result, its workload was minimal. However, the jurisdiction and powers of the Court were gradually expanded through the ratification of additional protocols to the ECHR, the most important being Protocol 11, coming into effect on 1 November 1998. The ECtHR is now a permanent, full time court with compulsory jurisdiction over all member states. It may receive applications from 'any person, non-governmental organization or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties of the rights set forth in the [ECHR] and the protocols thereto.'³²⁰

1. Women's Representation on the ECtHR

Protocol 11 endeavoured to modernise the ECtHR structure to allow it to keep up with ever-growing demands. These reforms also gave the Assembly an opportunity 'to improve its own procedure for the selection of candidates'³²¹ for appointment to the Court. Part of this review focused on the election of a greater number of women. Before 1998, only three women had ever been elected as permanent judges to the ECtHR, and at no time in its history, had more than two women served

³¹⁸ Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

³¹⁹ Only the Commission or a Member State could refer matters to the Court, and then, only if the state in question had accepted its jurisdiction. See Dinah Shelton, 'The Boundaries of Human Rights Jurisdiction in Europe' (2003) 13 *DukeJCompInt L* 95, 100.

³²⁰ ECHR, Art 34.

³²¹ Resolution 1082 (1996) [3].

concurrently.³²² One of the main factors contributing to the paucity of female representation was the lack of female candidates being put forward by states. In the lead up to the creation of the new Court, the Assembly actively encouraged states to put forward the name of at least one woman per national list.³²³ Although this request went unheeded by most member states, at the first sitting of the new Court a visible change in composition was apparent – for the first time eight women (24%) sat alongside 33 male colleagues.³²⁴ Since 1998 there has been a rapid acceleration in terms of women’s representation on the ECtHR bench: there are 18 women on a Court of 47 (38%). In a little over a decade the ECtHR has almost doubled the female representation on the bench, bringing women’s judicial representation tantalisingly close to overcoming the 40% benchmark – this is the threshold that the Council of Europe has deemed necessary for the exclusion of possible gender bias in decision-making processes, and the point at which a group will no longer be considered to be ‘under-represented’.³²⁵

This achievement may be attributed to a variety of factors,³²⁶ but particular attention should be paid to the institutional steps taken by the Council of Europe targeted at increasing women’s representation on the Court. In 2004, in light of

³²² Marie-Bénédicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (CUP 2006) 191.

³²³ Order no. 519(1996) 1 on the Procedure for examining candidatures for the election of judges to the European Court of Human Rights; see also Report of the Committee on Legal Affairs and Human Rights, *National Procedures for Nominating Candidates for Election to the European Court of Human Rights* (Doc 8505, 8 September 1999) at [26] noting that this request was largely not complied with.

³²⁴ Dembour (n322) 191.

³²⁵ Art 22(2) of the Council of Europe’s Regulations on Appointments.

³²⁶ E.g. the increasing participation of women in the legal profession in Member States.

lingering gender disparity, the Assembly introduced soft-quotas in the hope of increasing women's judicial participation. Resolution 1366 (2004) provided:³²⁷

3. The Assembly decides not to consider lists of candidates where:

...

ii. the list does not include at least one candidate of each sex;

The accompanying Recommendation 1649 (2004) announced that the amendments were not only directed towards improving the legitimacy of or public confidence in the institution, but were 'in the interest of impartiality and of the Court's effectiveness'.³²⁸ It was quickly noted that the wording of paragraph 3.ii of Resolution 1366 (2004) could potentially impede the pursuit of a more balanced gender representation as it effectively excluded any consideration of an all-female list of candidates. Accordingly, Resolution 1426 (2005) amended paragraph 3.ii of Resolution 1366 (2004) to read:

3. The Assembly decides not to consider lists of candidates where:

...

ii. the list does not include at least one candidate of each sex, except when the candidates belong to the sex which is under-represented in the Court, that is the sex to which under 40% of the total number of judges belong.

The measures introduced by the amended Resolutions were met with scepticism and controversy, but success.³²⁹ The mandatory gender soft-quota attracted particular attention from the Maltese Government, which consecutively failed to produce a candidate short-list that included a woman. A referral was made to the Grand Chamber for an advisory opinion on the validity of the resolution and whether

³²⁷ Resolution 1366 (2004).

³²⁸ Recommendation 1649 (2004) [18].

³²⁹ Mrs Bemelmans-Videc, Rapporteur and Chairperson for the Sub-Committee on the Election of Judges, 31st Sitting of the Ordinary Session of the Parliamentary Assembly (20 September 2008)

candidate lists could be refused on the basis of gender-related issues.³³⁰ Although accepting the principle behind the resolutions, the Court unanimously held that candidate lists could not be refused solely on the basis of gender-related issues and that the resolutions went beyond the scope of the Assembly's responsibilities under Article 21. The Court considered that the only mandatory requirements for short-lists were those provided for in Article 21. Member states could specify extra criteria for themselves when selecting candidates, however the Assembly could not impose extra criteria without a modification of the ECHR by the usual means.

Following the Advisory Opinion, the blanket ban on single-sex lists was amended, to allow for a member state to put forward a single-sex list in 'exceptional circumstances'.³³¹ The substance of these resolutions remains in force,³³² and women's judicial participation on the ECtHR has continued to rise.

B. A DISTINCT WOMAN'S CONTRIBUTION HARDLY EMERGES?

Despite strong support from the highest echelons of the Council of Europe for an increased presence of women on the ECtHR a clear and consistent justification of *why* such gender diversity is important is yet to emerge.³³³ As discussed in Chapter 2, there remains a great deal of valid disagreement about the substantive contribution an increase in women judges might bring to ECtHR jurisprudence. This is particularly so in the context of the ECtHR given the potential for institutional factors, particularly the application of the doctrine of margin of appreciation (discussed

³³⁰ See Alastair Mowbray, 'The Consideration of Gender in the Process of Appointing Judges to the European Court of Human Rights' (2008) 8 HRLRev 549.

³³¹ Resolution 1627 (2008) [4].

³³² Although Resolution 1822 (2011) clarified some of the language used in the original resolutions.

³³³ See Chapters 1 and 2 for an overview of the various arguments used to 'make the case' for more women judges.

below) to influence judicial activity. However, despite this, it remains possible that gender parity is ‘in the interests of impartiality and of the Court’s effectiveness’.³³⁴

This suggestion that women judges will make a substantive contribution is interesting when juxtaposed with Marie-Bénédicte Dembour’s observation in 2006 that, despite the increase in women’s judicial presence, ‘it is clear that a female voice hardly emerges from the midst of the Strasbourg Court.’³³⁵ Defining ‘feminist’ as ‘asking the woman question’ and as ‘a way of looking at the world, seeing it as organized along gendered lines which benefit men, and trying to change it so that women are empowered’,³³⁶ she draws attention to the lack of any ‘feminist’ influence on the court, despite the increase in women’s participation on the bench. She offers a number of possible explanations for this:

Perhaps women judges are careful, consciously or not, not to display their female, all-too-female, view of the law, making it impossible for an external observer like me to discern their *f* (female/ feminine/ feminist) voice in the bench. Perhaps they are waiting for the Court to be ready to hear them before they speak out. Or perhaps they have simply internalized the hegemonic male norms. What will not do is to say that the absence of an overtly feminist agenda (by female *or* by male judges) is due to feminism having become so mainstream that it is now unnecessary for a distinctive *f* voice to be raised.³³⁷

Another possible explanation for this perceived lack of obvious women’s contribution may lie in the subject matter of complaints before the Court. As Stephanie Palmer, writing in 2002 noted ‘there are only a few occasions when the [Court] has addressed women’s human rights’. She attributes this principally to the structure of the ECHR, which is primarily concerned with civil and political rights.

³³⁴ Recommendation 1649 (2004) [18].

³³⁵ Dembour (n322) 196.

³³⁶ Ibid 189.

³³⁷ Ibid 197.

While noting that ‘civil and political rights, in the traditional sense, are important for all people, economic, social and cultural rights may offer even more to women’s everyday lives.’³³⁸ In this way, it could be suggested that the subject matter in dispute in cases before the Court has focused largely on violations of rights in the public sphere, rather than the non-political private sphere where, it has been argued, the greatest harms against women occur.³³⁹ Conversely, it might be also argued that the historical reluctance of the State to interfere in the private sphere means that the gendered perspectives of apparently gender-neutral cases are not brought to the attention of the Court. It follows from this line of reasoning that ‘gender-neutral’ disputes, or disputes which have less of a direct impact on the lived experience of women, and whose resolution requires less of an understanding of women’s experience, are less likely to provide a space into which divergent gendered experiential knowledge can infiltrate.

C. WOMEN IN THE GRAND CHAMBER

MacKenzie et al note that the gender diversity in, and by implication its impact on, international courts is an area that has received relatively little attention when compared to the breadth of literature on national courts.³⁴⁰ This final section analyses recent decisions of the Grand Chamber of the ECtHR to ascertain whether a particular gendered contribution is apparent. Three decisions – *A,B,C v Ireland*,³⁴¹ *Evans*³⁴² and

³³⁸ Stephanie Palmer, ‘Feminism and the Promise of Human Rights: Possibilities and Paradoxes’ in Susan James and Stephanie Palmer (eds), *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* (Hart 2002) 104-5.

³³⁹ Ibid 105, citing Charlesworth and Chinkin (n149) 233.

³⁴⁰ MacKenzie and others (n46) 47.

³⁴¹ *A, B, C v Ireland* (2010) ECHR 2032. (*A,B,C*)

*Sahin*³⁴³ have been particularly striking in this regard. They serve as a useful illustration of some of the contributions, and the limitations of doctrinal research as a tool for evaluating the impact of gendered experiential knowledge on judging.

1. Framework for Case Study

This case study focuses on decisions of the Grand Chamber between 1 January 2005 and 21 August 2011³⁴⁴ considering arguments on Articles 8, 9, 10 and 11 of the ECHR where a particularly gendered pattern is ascertainable in the reasons. Before analysing the outcome of this study, it is necessary to explain how and why the parameters were selected.

a. The Grand Chamber

The Grand Chamber of the ECtHR plays a politically significant role in ECHR jurisprudence. The 47 judges of the ECtHR sits in three different configurations: as a Committee of three members; a Chamber of seven; or as a Grand Chamber of 17. Committees and Chambers hear matters of ‘lower level importance’ whereas matters of high level political importance and controversy are afforded the benefit of the greatest number of adjudicators.³⁴⁵ The Grand Chamber sits both as an appellate court and as a court of first instance on matters concerning a ‘serious question affecting the interpretation of the Convention or the protocols thereto, or a serious question of general importance.’³⁴⁶ Given the contentious nature of the cases before

³⁴² *Evans v United Kingdom* (2008) 28 EHRR 34. (*Evans*)

³⁴³ *Sahin v Turkey* (2007) 44 EHRR 5. (*Sahin*)

³⁴⁴ This timeframe is selected for analysis as the court had more than 30% female judicial participation during this period.

³⁴⁵ Art 27(1) ECHR.

³⁴⁶ Art 43(2).

it, there has been a high rate of non-unanimous³⁴⁷ judgments. This is unsurprising given the socially complex subject matter of its work.

During the time period in question the Grand Chamber delivered 119 decisions.³⁴⁸ Of these, 97 resulted in divided reasons: both dissents and concurrences.³⁴⁹ These results reinforce the argument made in Chapter II that empirical ‘outcomes’ based research is a limited method to interrogate particular judicial contributions.

b. Qualified Rights – Articles 8, 9, 10 and 11

This case study investigates Grand Chamber decisions in matters involving ‘qualified rights’. Of the 119 decisions, 33 consider either separately or in combination arguments pertaining to Articles 8-11 (right to respect for family and private life; freedom of thought, conscience and religion; freedom of expression; freedom of assembly and association), with Article 8 being the most frequently relied upon ground.³⁵⁰

Articles 8-11 are drafted according to a similar structure. They are ‘qualified’ in that they contain internal conditions that must be satisfied before any interference with the enjoyment of a particular right is permissible. An interference may be permissible if it is ‘in accordance with law’ or ‘prescribed by law’; in order to pursue

³⁴⁷ Robin C. A. White and Iris Boussiakou, ‘Seperate Opinions in the European Court of Human Rights’ (2009) HRLRev 37, 50. See also Robin C. A. White, Clare Ovey and Francis Geoffrey Jacobs, *Jacobs, White and Ovey: the European Convention on Human Rights* (5th edn, OUP 2010) 578-9.

³⁴⁸ HUDOC search <<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>> selecting Judgments: Grand Chamber; Importance: levels 1 – 3; Language: English.

³⁴⁹ Ibid, selecting Judgments: Grand Chamber; Importance: levels 1 – 3; Language: English; Text: “concurring opinion” or “dissenting opinion”.

³⁵⁰ 23 out of 33 cases analysed.

a 'legitimate aim'; and that interference was 'necessary in a democratic society' in order to achieve the identified legitimate aim.³⁵¹

The third element of this test, 'necessary in a democratic society,' is the most vague. ECtHR jurisprudence has developed two doctrines or interpretive principles to assist with the determination of what is 'necessary in a democratic society'. The first is the doctrine of proportionality. 'Necessary' 'implies that an interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.'³⁵² Factors considered when determining whether the proportionality test is satisfied include: the nature of the right in question; the extent of the particular interference; the strength of the public interest goal being pursued; the significance of local knowledge; the difficulty of weighing competing policy goals; and whether the measure adopted was the least restrictive of the right.³⁵³

Closely related to the proportionality test, is the principle of 'margin of appreciation'. This recognises that States have the primary responsibility for securing Convention rights, and should therefore enjoy a certain degree of deference, or 'margin of appreciation'. This margin is not unlimited and remains subject to the supervision of the Court.³⁵⁴ Despite being one of the most contemplated aspects of ECtHR jurisprudence, Greer concedes that '[a]ll commentators agree that no simple formula can describe how it works and that, in spite of the mountain of jurisprudence

³⁵¹ D J Harris, M O'Boyle and Colin Warbrick, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 344.

³⁵² *Olsson v Sweden* (1989) 11 EHRR 259 PC [67].

³⁵³ Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP 2006) 217.

³⁵⁴ Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 3.

and analysis, its most striking characteristic remains its casuistic, uneven, and largely unpredictable nature.³⁵⁵ Some of the most important features are summarised by Greer as follows:³⁵⁶

- Margin of appreciation has had a ‘high profile’ in respect of interpreting particular articles, including Articles 8 – 11.
- Drawing a line between reconciling rights and legitimate public interest limitations will involve weighing difficult and controversial political, rather than judicial, questions.
- There may be a range of equally defensible places where such lines could be drawn.
- National authorities are better placed to obtain and assess local knowledge, which the Court may either not have, or the significance of which it may misjudge.
- The width of the margin of appreciation will vary according to the nature of the right in issue, the importance of the right for the individual, the nature of the activity involved, the extent of the interference, and the nature of the state’s justification.
- Intensity of review will vary from extreme deference on issues such as social and economic policy and national security, to a more intense review in cases involving criminal procedure, intimate aspects of private life, or political debate on matters of public interest.
- The extent of pan-European consensus on the relationship between a particular Convention right and public interest governs the scope accorded the margin of

³⁵⁵ Greer (n353) 223.

³⁵⁶ Ibid 224.

appreciation. Where there is no common consensus it would be more appropriate to grant a wider margin of appreciation.

While margin of appreciation and proportionality are central to ECtHR jurisprudence, neither of these principles are easily applied, nor do they necessarily lead to clear and consistent outcomes. They can only be expressed in terms of ‘the factors a decision-maker should take into account without being able to provide much guidance on the relative weight of each of them.’³⁵⁷ This uncertainty is useful for the project at hand. Given the vague nature of qualified rights, combined with the tendency for the Grand Chamber to ‘split’ in its reasons, one would expect that cases considering these articles would allow the greatest scope for the individual personalities, including any ‘gendered perspective’ to come to the fore.

c. ‘Gendered’ Cases

A series of filters were adopted in this case study to select cases that were particularly ‘gendered’. A case was sufficiently gendered for the purpose of this study where it (a) was a matter decided on the merits with a female primary applicant;³⁵⁸ and (b) where a point of view that could be said to result from a female gendered experience was evident in the reasoning. The second part of this filter draws on the concepts developed in Chapter 2.

³⁵⁷ Harris, O’Boyle and Warbrick (n351) 360.

³⁵⁸ Primary applicant means the first applicant, and excludes cases where the female applicant is part of a group claim (*Lindon, Otchakovsky-Laurens and July v France* (2007) ECHR 21279/02 concerning freedom of expression in the context of defamation); or where the application was made on behalf of parents.

2. Results

The first filter narrowed the pool from 33 cases to seven. Little, in terms of women's contribution, can be learned from the numerical gender split in these cases (see Table 1). In the two cases where all of the women voted in the same way, there was a high degree of consensus amongst the Grand Chamber as a whole. The largest dissenting split in terms of gender was in *A,B,C* (60%). However, given that there were only five women out of 17 sitting on the panel, it is difficult to ascertain any trend from this. These results are not surprising. As Chapter 4 highlighted, quantitative, 'outcomes' focused studies tend to tell us very little about the impact that gendered experiential knowledge has on the court.

Table 1.

	<i>Women Judges : Men Judges (% of Women Judges)</i>
<i>A, B, C v Ireland</i>	
Majority	1:8 (20%)
Concurring	1:3 (20%)
Dissenting	3:1 (60%)
<i>Şerife Yigit v Turkey</i> ³⁵⁹	
Majority	4:11 (100%)
Concurring	0:2 (0%)
<i>Neulinger and Shuruk v Switzerland</i> ³⁶⁰	
Majority	5:4 (62.5%)
Concurring	3:4 (37.5%)
Dissenting	0:1 (0%)
<i>E.B. v France</i> ³⁶¹	
Majority	4:6 (66%)
Dissenting	2:5 (33%)
<i>Evans v UK</i>	

³⁵⁹ *Şerife Yigit v Turkey*, Application No 3976/05 (ECtHR 2 November 2010)

³⁶⁰ *Neulinger and Shuruk v Switzerland* (2009) ECHR 41615/07

³⁶¹ *E.B. v France* (2008) 47 EHRR 21

Majority	3:10 (60%)
Dissenting	2:2 (40%)
<i>Sahin v Turkey</i>	
Majority	4:11 (80%)
Dissenting	1:0 (20%)
<i>Draon v France</i> ³⁶²	
Majority ³⁶³	2:15 (100%)

However, when the second filter is applied, and the reasons are qualitatively assessed for indications for a point of view that could be attributed to a female gender experience, three cases stood out: *A, B & C*; *Evans* and *Sahin*. In each of these cases the Grand Chamber considered deeply gendered social problems – abortion laws; reproductive technology; and the headscarf. What follows is not an in-depth analysis of all points raised in these cases. Rather, this analysis focuses on areas of disagreement in these judgments where it is possible to detect reasoning that draws upon women's gendered experiential knowledge.

a. *A, B, C v Ireland*

This matter is situated right at the heart of feminist legal concern: the legal regulation of abortion. Irish law only allows the termination of pregnancy where there is a risk to the life of the mother and not for reasons of health or wellbeing. The first two applicants sought to terminate their pregnancies on the basis of health and wellbeing. Given the Irish prohibition they were required to travel to the UK in order to undergo the procedure. At the time of the abortion the first applicant was a single mother of four, unemployed and living in poverty. Her youngest child was disabled and all her children were in foster care as a result of problems she experienced with alcohol. She travelled to England alone and in secrecy, borrowing from a moneylender for

³⁶² *Draon v France* (2006) 42 EHRR 40

³⁶³ Unanimous decision in respect of Art 8 issue.

treatment in a private clinic and travel. She experienced profuse bleeding on her journey back to Ireland and was subsequently hospitalised. The second applicant became unintentionally pregnant. She had taken the ‘morning after pill’ and was advised by doctors that she was at high risk of an ectopic pregnancy. She also borrowed money to cover the procedure and travelled to England alone. She was advised to tell her doctors upon return that she had a miscarriage. The applicants claimed that the expense and trauma experienced because the prohibition and the requirement to travel was a violation of their Article 8 right to private life.

A,B,C is a complex case raising questions about the relationship between European consensus and the margin of appreciation.³⁶⁴ For the purposes of this study these issues will largely be set aside, with the focus remaining upon diverging reasons. Five out of the 17 judges in this case were women and it provided the most significant numerical gender split of the case study.

The point of disagreement between members of the Court was in respect of the first and second applicants. The Grand Chamber unanimously held that the prohibition was an interference with their Article 8 rights. Disagreement turned upon whether the prohibition was for ‘a legitimate aim’, ‘necessary in a democratic society’ and what was the appropriate margin of appreciation to be afforded to Ireland.

The majority characterised the aim of Ireland’s interference with the applicants’ right to private life as being to ‘protect morals of which the protection in Ireland of the right to life was one aspect.’³⁶⁵ They noted the 1983 referenda in favour of the prohibitions and said that evidence produced by the applicants of opinion polls to the

³⁶⁴ See: Elizabeth Wicks, ‘A, B, C v Ireland: Abortion Law Under the European Convention on Human Rights’ 11 HRLRev 556.

³⁶⁵ *A,B,C* [224].

contrary were not significantly indicative of a change in the views of the Irish people. As such, the prohibition on the abortion was held to serve a legitimate aim to protect a specific Irish conception of morality.

The next step was to ascertain whether there was ‘a fair balance between, on the one hand, the first and second applicant’s right to respect for their private lives under art 8 and, on the other, profound moral values of the Irish people as to the nature of life and consequently as to the need to protect the life of the unborn.’³⁶⁶ The Court’s assessment of whether a ‘fair balance’ had been struck was inextricably linked to the appropriate margin of appreciation to be given to Ireland in this case. The ‘acute sensitivity of the moral and ethical issues raised by the question of abortion’ led the majority, *prima facie*, to a broad margin of appreciation for Ireland to determine the protection required by the public interest in protection of ‘the right to life of the unborn’ and the conflicting rights to the applicants to respect for their private lives.³⁶⁷

The identification of the relevant consensus was a vital step in the majority’s reasoning. It agreed with the applicants’ submission that there was consensus amongst a substantial majority of contracting states towards allowing abortion on broader grounds than that afforded under Irish law. It highlighted that Ireland was the only state that allows abortion solely where there is a risk to the life of the mother, and only three other states have more restrictive access to abortion services than Ireland.³⁶⁸ However, for the majority, this was not the appropriate consensus to look to in order to ascertain the appropriate margin of appreciation. They reasoned that since the rights claimed on behalf of the foetus and the mother are inextricably

³⁶⁶ Ibid [230].

³⁶⁷ Ibid.

³⁶⁸ Ibid [235].

interconnected, it is the margin of appreciation accorded to a state's protection of the unborn and how it balanced those with the rights of the mother that are in question. The majority held that the lack of European consensus on the scientific and legal definition of the beginning of life gave states a broad margin of appreciation on this question, and this necessarily translated into a broad margin on the level of protection to be given to the unborn. It was therefore open to Ireland to make a choice on how the two competing rights in question were to be balanced, and Ireland had chosen to achieve this balance by restricting abortions to circumstances where there is a risk to the life of the mother, and establishing measures to provide women with information and counselling to facilitate their travel abroad for an abortion. The majority held that although the applicants took issue with this choice, it was one within the scope of what was 'necessary in a democratic society'.³⁶⁹

In coming to this conclusion, the majority reasoning characterised pregnancy as something that 'touches upon the sphere of the private life of the woman'. As Wicks highlights, rather than accepting pregnancy as part of a woman's private life and then balancing it with the other competing rights, as is done in other cases of competing claims, the majority sought to erode the scope of private life for pregnant women.³⁷⁰ While the case did not turn upon this characterisation, Wicks notes that this raises a broader problem concerning the disjunction between what is private and what is public:

The state can be justified in regulating our private lives but it needs strong justification in doing so ... The value of an aspect of our life being private is all too readily overlooked in today's society and the Court should recognise Article 8's protection for a right to respect for private life as a fundamental pillar for securing the diminishing aspects of our lives that

³⁶⁹ Ibid [240].

³⁷⁰ Wicks (n364) 560.

are private in nature. There can hardly be a better example than a biological change in a woman's body such as pregnancy.³⁷¹

The dissenting judgment took issue with a number of points in the majority's reasoning. It opened by clarifying that 'the Court was not called upon in this case to answer the difficult question of "when life begins"'.³⁷² Rather, the issue before the court was 'regardless of when life begins – before birth or not – the right to life of the foetus can be balanced against the right to life of the mother, or her right to personal autonomy and development, and possibly found to weigh less than the latter rights or interests.' By separating the issue of 'where does life begin' from the analysis the dissenting judgment afforded a narrow margin of appreciation to Ireland given that 'the right to life of the mother, and, in most countries' legislation, her well-being and health, are considered more valuable than the right to life of the foetus.'³⁷³ It was critical of the majority, arguing that 'it is the first time that the Court has disregarded the existence of a European consensus on the basis of "profound moral views"'.³⁷⁴

Three female judges, representing 60% of the female composition of the Court, and one male judge gave the dissenting reasons. The subject matter is highly controversial: however, only the dissenting judgment acknowledged that it was also highly gendered. The majority noted that '[t]here can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake.'³⁷⁵ The majority phrased the case in terms of the interests of the community as a whole, and the universal morality of the

³⁷¹ Ibid.

³⁷² A,B,C, [2].

³⁷³ Ibid [2].

³⁷⁴ Ibid [9].

³⁷⁵ Ibid [233].

Irish people evidence by the referendum held almost three decades ago. In contrast, the minority brought the women – as participating members of the community with independent rights – to the fore.

First, they highlighted the ‘real issue of unjustified interference’ for the applicants: namely, the requirement that they travel abroad in order to have an abortion. The cost and difficulties involved in this, being required to leave their country to have their right to private life respected, was for the minority, the real interference with the right to private life. This interference is compounded by the severity of the penalty under Irish law (life imprisonment) for procuring an illegal abortion. The minority described this penalty as ‘archaic’ and one that should be taken into account when applying the proportionality test.

Second, the minority was sceptical of the ‘profound moral views’ that underlay the majority reasons, suggesting that they may not still be ‘embedded in the conscience of the majority of Irish people’.³⁷⁶ Furthermore, to allow ‘moral beliefs’ to override European consensus was, in the minority opinion ‘a real and dangerous new departure in the Court’s case-law’.³⁷⁷ In line with the scepticism described in Chapter II from many feminists towards ‘grand theories’ or overarching ‘truths’ that extend from societies that are already fundamentally compromised by a patriarchal history, the minority saw the emphasis placed on such purported consensus to be ‘disputable’.³⁷⁸ The referendum relied upon was one conducted in 1983 – almost

³⁷⁶ Ibid [9].

³⁷⁷ Ibid.

³⁷⁸ Ibid [7].

three decades ago, and even then only 53.67% of the electorate voted, with 841,233 votes in favour and 416,136 against restrictive abortion laws.³⁷⁹

Third, the minority judgment gives primacy to the right of the mother, and secondary, or associated rights to the foetus. They note that:

The rights of the foetus and the rights of a living person – are, by their nature, unequal: on the one hand there are the rights of a person already participating, in an active manner, in social interaction, and on the other hand there are the rights of a foetus within the mother's body, whose life has not been definitively determined as long as the process of leading to the birth is not yet complete, and whose participation in social interaction has not even started.³⁸⁰

In this way the independent identity of the mother and her life experience do not become submerged in the debate about the anticipated life of the foetus, nor the opaque assertion of moral consensus.

The distance between the majority and the dissenting approaches allows for an inference to be made about the manner in which gender may inform varying perspectives. An alternative characterisation of the same set of facts and law was offered by the female-dominated judgment. However, as noted in Chapter 2, this cannot be said to indicate a particular woman's approach, for three reasons. First, a woman, even a sole woman, participated in the majority decision, and second, a man joined the minority decision. Third, the concurring reasons of Judge Lopez Guerra, joined by Judge Casadevall, a male pairing, closely reflects one of the 'contributions' made by the minority opinion. They also stress the need to focus on the real experiences of the women applicants in this particular case, critiquing the majority for not making 'reference to the real or perceived dangers to the applicant's health or well-being in their individual cases, and in their particular and specific

³⁷⁹ Ibid [36].

³⁸⁰ Ibid [2].

circumstances.’³⁸¹ While they considered that the dangers apparent in this particular case did not place the prohibition beyond the margin of appreciation, they left open the space for greater protection of the personal autonomy as well as physical and psychological integrity to be afforded under different circumstances. This reinforces the argument that contributions sensitive to women’s experience are not exclusively, or necessarily the domain of women.

b. *Evans v United Kingdom*

The next case also demonstrates the potential contribution that women’s life experiences may bring to the judicial process. The Court was required to resolve competing individual claims to the right to respect for private life in the context of both the decisions to become and not to become a parent.

The applicant, Ms Evans, was required to have both her ovaries removed following the detection of serious pre-cancerous tumours. Before undergoing the surgery, she and her then partner ‘J’, underwent procedures to develop *in vitro* six embryos from her eggs and his sperm. The embryos were frozen and stored for use at a later date by Ms Evans and J. Ms Evans was deterred from freezing her eggs, an alternative way to preserve her ability to become a biological mother, due to the lower chances of success with this procedure and following J’s reassurance that there was no need, they were not going to split up, and that he wanted to be the father of her child.

Six months later the couple separated. J withdrew his consent for Ms Evans to use the embryos and made an application for them to be destroyed.

³⁸¹ Ibid [5].

Ms Evans's appeal to the Grand Chamber was based on the argument that UK domestic legislation preventing her from using the embryos without J's consent was infringing of her right to respect for private life. Conversely, J asserted that to allow Ms Evans to use the embryos without his consent constituted an infringement of his right to respect for private life. The Article 8 protection cut both ways – it 'incorporates the right to respect for both the decisions to become and not to become a parent.'³⁸² Consequently, the majority characterised the interests to be balanced as 'entirely irreconcilable' because 'if the applicant is permitted to use the embryos, J will be forced to become a father, whereas if J's refusal or withdrawn consent is upheld, the applicant will be denied the opportunity of becoming a genetic parent.'³⁸³

The majority's decision turned upon the margin of appreciation to be afforded to the UK to decide where the balance between the competing rights should be struck. The majority noted that where an important facet of an individual's existence or identity is at stake, the margin is generally restricted. However, in light of the lack of European consensus as to the stage in IVF treatment when a providers' consent becomes irrevocable, and since the use of IVF treatment gives rise to sensitive moral and ethical considerations in the context of fast-moving medical and scientific developments, the majority considered that a wide margin of appreciation was appropriate in this case.³⁸⁴

The question then became whether a fair balance had been struck between the competing interests so as to bring it within the scope of that which is 'necessary in a democratic society'. This task of balance was the critical point of departure in the

³⁸² *Evans* [71].

³⁸³ *Ibid* [73].

³⁸⁴ *Ibid* [79]-[82].

dissenting judgment from that of the majority and demonstrates an acutely different interpretation of the weight to be afforded to each of the competing claims. Ten men judges and three women judges gave the majority decision, with the dissenting judgment comprising two men and two women.

The majority considered the balance struck by the UK following an extensive period of consultation was one within the accepted margin. It characterised this case as one where all things were equal and that ‘it does not consider that the applicant’s right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J’s right to respect for his decision not to have a genetically-related child with her.’³⁸⁵ The majority emphasised that the mere fact that ‘different rules might have been adopted by the legislature’³⁸⁶ in relation to the requirements for both parties’ ongoing consent, would not necessarily lead to a finding by the Court that Parliament had exceeded the margin of appreciation afforded to it under Article 8 when making the legislative choice it did.

The dissenting judges disagreed. First, they did not consider this to be a case of positive obligation – the State providing a service to Ms Evans – but rather one where the legislation interfered with Ms Evans’ right to respect for the decision to become a genetically related parent.³⁸⁷ Moreover, the interference was disproportionate as the minority considered that Ms Evans’ right to become a genetically related parent weighed heavier than J’s decision not to become a parent in this case. This was due to the nature of the interference. For Ms Evans’, her decision to have a genetically related child was thwarted in order to accommodate J’s converse right, it was ‘the

³⁸⁵ Ibid [90].

³⁸⁶ Ibid [91].

³⁸⁷ Ibid [5]-[6].

effective eradication of any possibility of having a genetically related child, thus rendering any such decision now or at a later time meaningless'.³⁸⁸ They considered that rendering 'empty or meaningless a decision of one of the two parties cannot be considered as balancing the interests'.³⁸⁹

While the majority reasons were heavily influenced by the fact that the UK legislation served a number of wider public interests, upholding the principle of the primacy of consent and promoting legal clarity and certainty, the minority disagreed with this positivist approach. They considered that 'a sensitive case like this cannot be decided on a simplistic, mechanical basis'.³⁹⁰ Moreover, and resonating with the minority in *A,B,C*, the minority noted '*Evans* is not a case about general policy only; it is a case about important individual interest. In our view the majority has placed excessive weight on such general policy issues forming merely the background to this case'.³⁹¹

Focusing on the individual interests at stake led the minority to consider that Ms Evans was not in the same position as J. Drawing on the Convention on the Elimination of Discrimination Against Women (CEDAW), they emphasised that a 'woman is in a different situation as concerns the birth of a child'.³⁹²

This deeper regard for what it can mean for a woman to be pregnant, not just to be a biological parent, was a gendered contribution that resonates through the dissenting and concurrent reasons of women who sat on courts at intermediate stages in the *Evans* dispute. As mentioned above, Lady Justice Arden in the Court of Appeal

³⁸⁸ Ibid [6].

³⁸⁹ Ibid [7].

³⁹⁰ Ibid [12].

³⁹¹ Ibid fn 2.

³⁹² Ibid [14].

was the sole woman to sit on the case at the domestic level.³⁹³ Judge Mijovic was the only woman to sit on this matter when it came before the Chamber, and she too, in dissent with male Judge Traja, emphasised the importance of looking at the case in an individualistic, rather than public policy context and noted that the interference with Ms Evans' right was not equal to that J's.³⁹⁴

What can be taken from the reasoning in *Evans* is that there is a degree of variation in women's understanding of pregnancy and motherhood. As Chapter 2 highlighted, gendered experiences are plural, and just because women may provide perspective of 'outsider's' gendered experiences, namely women's gendered experiences, this does not mean that *all* women, or even *most* women will come to the same conclusion or interpretation. Indeed, three women sat with the majority and only two dissented in the Grand Chamber. However, the alternative understanding of motherhood that provided an alternative consideration of the weight attributable to Ms Evan's rights is significant. This account enriched the collective knowledge of the court and although it did not sway the final outcome, it expanded the possible ways in which women's experience is publicly understood. While it is not certain that an all male panel would not have contributed the same understanding, given the depth of empathy it is hard to deny that this contribution was facilitated by the presence of women.

c. *Sahin v Turkey*

The final case is the most difficult to analyse in terms of women's contribution. It demonstrates how simply being a woman, any woman, may not be enough in cases where a woman's experience is highly dependent on contextual and intersecting

³⁹³ *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727, [2004] Fam Law 647, [80]-[81].

³⁹⁴ *Evans v United Kingdom* (2006) 43 EHRR 21.

factors. While this does not detract from the increased plurality of ideas that women might bring to a case, it demonstrates that issues of diversity are complex, and that focusing on gender alone may not take into account the complex interaction between experiences and its impact upon point of view.

Sahin struck at the heart of one of the most politically contentious and divisive modern human rights debates – wearing an Islamic headscarf. What is remarkable about this judgment is the lone dissenting opinion of Judge Françoise Tulkens. Her opinion brought to the fore argument that had not otherwise resonated with the majority. While some praise this decision for its efforts to understand the viewpoint from the women applicant's perspective,³⁹⁵ this in itself may be a particularly prescribed understanding of what that perspective actually entails. It also demonstrates the complexity of intersectional impacts upon point of view.

Leila Sahin was a medical student in Istanbul when she became the subject of disciplinary proceedings by the University after she failed to comply with the rules on dress. Ms Sahin is a practising Muslim and considers it her religious duty to wear the Islamic headscarf.

In February 1998 the Vice-Chancellor of Istanbul University issued a circular banning, *inter alia*, the headscarf on University grounds.³⁹⁶ Ms Sahin continued to wear her headscarf and consequently she was denied the right to sit two written examinations, to attend a lecture and to enrol in a course by reason of her dress. Following disciplinary proceedings Ms Sahin was issued with a warning and advised 'that her attitude and failure to comply with the rules on dress were not befitting of a

³⁹⁵ Dembour (n322) 213.

³⁹⁶ *Sahin*, I, A.

student.’³⁹⁷ A year later Ms Sahin joined student protests against the rules on dress and was subsequently suspended from the University.

Before the Grand Chamber, Ms Sahin submitted, *inter alia*, a claim of violation on the basis of Article 9 and Protocol No 1, Article 2. Tulkens dissented from the majority who held there had not been a violation of either of these provisions.

Tulkens’ approach is striking in two respects. First, she was more interrogative of the meaning of secularism and equality by casting them in a pluralistic light. Second, she required a high degree of evidential proof before accepting certain ‘facts’ about gender equality and religion. In turn, this illuminated some questionably stereotypical assumptions that arose in the majority judgment.

The majority considered that a wide margin of appreciation would be afforded to Turkey in this case because it was not possible to discern a uniform pan-European conception of the significance of religion in society.³⁹⁸ Tulkens considered a wide margin inappropriate in this case given it was in the context of university education. She considered that:

The comparative law materials do not allow for such a conclusion, as in none of the Member States has the ban on wearing religious symbols extended to university education, which is intended for young adults, who are less amenable to pressure.³⁹⁹

She considered the majority’s deference to Turkey on the basis of its specific historical background inappropriate for this issue which ‘is not merely a “local” issue, but one of importance to all the Member States,’⁴⁰⁰ and therefore the ECtHR’s

³⁹⁷ Ibid [22].

³⁹⁸ Ibid [109].

³⁹⁹ Ibid O-II [3].

⁴⁰⁰ Ibid O-II [3].

scrutiny was required in order to determine whether Turkey's interference with Ms Sahin's right to freedom of religion was 'necessary in a democratic society'.

The majority accepted that two main interests sought protection: secularism and equality.⁴⁰¹ Conversely, Tulkens saw these terms as highly subjective, malleable and open to differing interpretations. While all members of the Grand Chamber accepted secularism as a foundational principle of the Turkish Republic and necessary for the protection of democracy in Turkey, difference emerged as to the precise definition of secularism. Tulkens criticised the majority, saying that merely stating the principle of secularism 'did not release it from its obligation to establish that the ban on wearing the Islamic headscarf to which the applicant was subject was necessary to secure compliance with that principle and, therefore, met a "pressing social need."'⁴⁰² Moreover, she considered that by concluding that wearing the headscarf contravenes the principle of secularism the majority 'take up a position on an issue that has been the subject of much debate.'⁴⁰³

For Tulkens, this position is problematic on three counts. First, it did not address Ms Sahin's argument that she had no intention of calling the principle of secularism into doubt. Second, there was no evidence to show that Ms Sahin, through her attitude or conduct or acts, contravened that principle. Finally, the judgment's reliance on an earlier case considering bans on primary schoolteachers wearing the headscarf was an inappropriate comparison because 'while it has to be compulsory for

⁴⁰¹ Ibid [112]; O-II [4].

⁴⁰² Ibid O-II [5]

⁴⁰³ Ibid O-II [7].

teachers and all public servants, as they have voluntarily taken up posts in a neutral environment, the position of pupils and students seems to me to be different.’⁴⁰⁴

Tulkens was concerned about the lack of evidence to support a pressing social need to ban the headscarf in order to protect secularism. She asserted that ‘[o]nly indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention.’⁴⁰⁵ Tulkens’ call for probative evidence challenged stereotypical assumptions. It also served to attribute agency to Ms Sahin, treating her as an individual capable of rational choice that must be respected unless strong evidence of a greater need for protection is established:

Merely wearing the headscarf cannot be associated with fundamentalism ... Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views. She is a young adult woman and a university student and might reasonably be expected to have a heightened capacity to resist pressure, it being noted in this connection that the judgment fails to provide any concrete examples of the type of pressure concerned. The applicant’s personal interest in exercising the right to freedom of religion and to manifest her religion by an external symbol cannot be wholly absorbed by the public interest in fighting extremism.⁴⁰⁶

Tulkens, drawing upon her experiences as a Belgian woman, was able to provide a remarkably different interpretation of Ms Sahin’s experience than the majority. In the liberal feminist tradition, she attributed agency to Ms Sahin and challenged what she saw as stereotypical assumptions that were being made by the majority in respect of secularism, Islam and women who wear headscarves. Moreover, she highlighted the ironic result of the majority judgment – in the pursuit of gender equality Ms Sahin

⁴⁰⁴ Ibid O-II [7].

⁴⁰⁵ Ibid O-II [5].

⁴⁰⁶ Ibid [O-II11].

was being excluded from her University, rendering her right to education ineffective. Given the importance of education in the transformation of unequal societies, '[a]dvocating freedom and equality for women cannot mean depriving them of the chance to decide on their future.'⁴⁰⁷

Although Tulkens' voice is the most easily identifiable as the 'woman's' voice as she speaks alone in dissent, care should be taken not to discount the voice of the other four women judges who participated in the majority decision. Equally valid 'women's' arguments could be made in support of curtailing the individual's right to wear a headscarf. Arguably, cultural practices that are based in unequal and patriarchal traditions should not be accommodated.⁴⁰⁸ CEDAW is explicit in this regard.⁴⁰⁹ It is difficult in a joint judgment to ascertain what contribution came from women, however, the majority judgment can also be seen as one acutely sensitive to the experience of Turkish women, recognising that the social pressures to cover may be so overwhelming that individual choice to cover or not to cover is illusory. In this way, State intervention may be the only real way of promoting gender equality.

D. STRENGTHS AND WEAKNESSES OF DOCTRINAL ANALYSIS

Three major points can be taken away from this case analysis. First, all three cases reinforce the point that there is not one, unifying, women's contribution to cases involving complex social questions. This outcome supports the argument made in Chapter 4 – that work attempting to locate 'the way' in which women decide cases, treating women as a monolithic entity, are doomed to fail. However, this does not mean, as Dembour suggested, that no specific contribution can be identified in the

⁴⁰⁷ Ibid [O-II19].

⁴⁰⁸ Dembour (n322) 163.

⁴⁰⁹ CEDAW, Art 5.

jurisprudence of the ECtHR as a result of the increased numbers of women serving on the court. Each woman potentially brings a unique, but still a gendered, perspective to the matter at hand. This opens up the possible range of interpretations available to the Court. As gender parity increases in the ECtHR, we can expect a fuller range of women's perspectives to be incorporated, and a richer jurisprudential body to emerge. The divergence of 'women's voices' expressed in *Sahin* provides a good example of this range.

Second, this analysis demonstrates some of the inherent limitations in doctrinal analysis. With the exception of Judge Tulken's dissent in *Sahin*, both women and men joined all of the reasons that could be said to be illustrative of women's gendered experiential knowledge. From the readers point of view, assumptions can be made about who was responsible for a particular contribution – but these remain assumptions, open to stereotypical presumptions of men and women's gendered knowledge. It is not beyond the realm of possibility that the male judges who joined the dissent in *Evans* were the ones who contributed the deep insight on the differences between parenthood and motherhood. They may not have been, but the limits of doctrinal analysis – confined to the words on the page that may project a false impression of unanimity – provide little scope to go beyond deductive reasoning based upon assumptions.

Finally, and closely related to the point above, written judgments provide little insight into the impact of peer-to-peer interactions on judgment writing. Arguably, this influence is critical to understanding the dynamic of appellate decision-making. As Paterson has warned: 'scholars of the court neglect at their peril the significance of

judicial advocacy...’⁴¹⁰ Written decisions of collegiate courts are the product of dialogue and intellectual exchange. The influence that gendered experiential knowledge has upon this exchange cannot be ascertained from doctrinal analysis alone.

This chapter has demonstrate that doctrinal analysis is a useful, yet limited tool to investigate the impact of experiential knowledge upon judging. The next chapter turns to a related methodology – alternative judgment writing.

⁴¹⁰ Alan Paterson, ‘Does Advocacy Matter in the Lords?’ in James Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart 2011) 255.

CHAPTER 6: ALTERNATIVE FEMINIST JUDGMENT WRITING

The one duty we owe to history is to rewrite it.⁴¹¹

Alternative judgment writing, as an academic enquiry and pedagogical technique,⁴¹² has experienced a renaissance in the last few years by virtue of the rise of alternative feminist judgment writing projects. Broadly speaking, these projects have been collaborations between academics and practitioners where fictional judgments are written in order to account for the ‘missing’ feminist voice in key cases. Fictional feminist judging, at its core, seeks substantive equality for women *through law*, by asking: ‘Could we put theory into practice, in judgment form? What would these judgments look like? What impact would they have?’⁴¹³ They are an innovative method of investigating the impact of gendered experiential knowledge in law, and have been particularly useful in demonstrating the way in which an increased diversity may colour judgments, as well as highlighting the extent to which male gendered experiential knowledge has dominated judicial reasoning.

This chapter gives an account of major fictional feminist writing projects to date. It then considers the gendered experiential insights generated by these projects. However, as a result of their ‘fictional’ nature they are confined by certain limitations

⁴¹¹ Oscar Wilde, ‘The Critic as Artist’ (1891) Pt 1.

⁴¹² A strong focus of the English Feminist Judgments Project has been developing materials to incorporate feminist judging into classrooms. See: Rosemary Hunter, Clare McGlynn and Erika Rackley, ‘Teaching Resources’ (*Feminist Judgments Project*) <http://www.kent.ac.uk/law/fjp/resources/teaching_resources.html> accessed 25 July 2012.

⁴¹³ Hunter, McGlynn and Rackley, *Feminist Judgments* (n281) 4.

and are supplementary, rather than primary tools for investigating the impact that gendered experiential knowledge has upon actual judging.

A. A SHORT HISTORY OF FEMINIST JUDGING PROJECTS

Why don't we show them how it could have been done?⁴¹⁴

Alternative feminist judgment writing originated with a project conducted by the Women's Court of Canada in 2006.⁴¹⁵ The energy and ideas of this endeavour inspired a similar project to be undertaken in England and Wales, culminating in the publication of *Feminist Judgments: From Theory to Practice* in 2010.⁴¹⁶ Feminist judgment writing projects are now underway focusing on decisions from several other jurisdictions, including Australia;⁴¹⁷ the Republic of Ireland and Northern Ireland;⁴¹⁸ and India.⁴¹⁹

The 'Women's Court of Canada' brought lawyers, academics and human rights activists together to form an imagined 'virtual court' in order to rewrite equality cases decided under the Canadian Charter of Rights and Freedoms. This project focused entirely on cases dealing with substantive equality rights under the Canadian Charter. It began with ten feminist equality activists, lawyers, and academics feeling

⁴¹⁴ Diana Majury, 'Introducing the Women's Court of Canada' (2006) 18 CJWL 1, 2.

⁴¹⁵ Of course, there are several celebrated 'real life' examples of feminists judges before this.

⁴¹⁶ Hunter, McGlynn and Rackley, *Feminist Judgments* (n281).

⁴¹⁷ Heather Douglas and others (eds), *Australian Feminist Judgments* (Hart 2014).

⁴¹⁸ Led by Mairead Enright, University of Kent and Aoife O'Donoghue, University of Durham and Julie McCandless, London School of Economics. See 'Northern/Irish Feminist Judgments Project' (2014) <<http://www.feministjudging.ie/>> accessed 12 December 2014.

⁴¹⁹ Madhumanti Mukherjee, 'Judging in the Presence of Women as Legal Persons - Feminist Alternatives to the Indian Supreme Court Judgment in *Sakshi v Union of India*' (2011) 1 feminism@law <<http://journals.kent.ac.uk/index.php/feministsatlaw/index>>.

frustrated by their observation that ‘politicians and Supreme Court of Canada judges alike seem to think that women have largely attained equality and that other issues (balanced budgets and national security) should take priority over equality.’⁴²⁰ In response to that frustration, they sought to create a project that would find ‘alternative routes to enable us to raise our voices when we come up against judicial interpretation that fails to accord women the full and equal rights of personhood.’⁴²¹ The aim was clear: to articulate ‘fresh conceptions of substantive equality’.⁴²² Six ‘shadow’ judgments were produced ‘to build a vision of an equal society in which such inequalities are unimaginable.’⁴²³ They were published in a special edition of the *Canadian Journal of Women and Law* and a dedicated website to the ongoing development of the project was established.⁴²⁴

The England Feminist Judgments Project took its lead from the Women’s Court of Canada. It began in 2008 to re-write significant decisions from English and Welsh law traversing a broad range of subject areas. In addition to substantive equality cases, the English project sought to tackle cases across the areas of parenting, property and markets, criminal law and evidence and public law. The fictitious judgments were written subject to the same constraints as the original judgments, but employed a specific feminist reasoning method. The editors of the project, following extensive workshops with contributors, identified seven ‘theoretical clusters’ as a methodological framework for a feminist judgment. These include:

⁴²⁰ Majury (n414) 1.

⁴²¹ Ibid 4.

⁴²² Melina Buckley and others, ‘The Women's Court of Canada’ <<http://womenscourt.ca/home/>> accessed 19 September 2011

⁴²³ Majury (n414) 5.

⁴²⁴ Buckley and others (n422).

1. 'asking the women question';
2. 'including women', both in terms of writing women's experiences into legal discourse and in the construction of legal rules;
3. challenging gender bias in legal doctrine and judicial reasoning;
4. contextualisation and particularity;
5. seeking to remedy injustices and to improve the conditions of women's lives;
6. promoting substantive equality; and
7. drawing on feminist legal scholarship to inform decisions.⁴²⁵

B. FEMINIST JUDGING AS PERFORMATIVE FEMINISM

What these projects have done, and done well, is to not just talk about feminism, but also, *do* feminism. By re-writing judgments in a feminist voice, they contribute to the important project of transforming law from a vehicle of, for and by men, into one that includes the voices, interests and concerns of women. Women's interests are moved from the periphery, to the centre. Catharine MacKinnon illuminates the importance of feminism evolving from something that is said, thought and written about, into something that is done:

...feminism has become something to be done more than a flag to be flown. Fortunate, as feminism as a flag can become a way to confine work by gender, saluted so that it can be ignored, a means to cede the rest of the world to everyone who is not labelled, so they can continue doing what they imagine is everything else, unchallenged and unchanged.⁴²⁶

This approach has many appealing features. It focuses on women as the subjects and beneficiaries of justice, not only as the agents of justice. It is about more than getting

⁴²⁵ Hunter, McGlynn and Rackley, *Feminist Judgments* (n281) 35.

⁴²⁶ Catherine MacKinnon, 'Forward' in Beverley Baines, Daphne Barak-Erez and Tsvi Kahana (eds), *Feminist Constitutionalism: Global Perspectives* (CUP 2011) xi.

a job for one woman; it is about achieving justice for all women. Feminist judges are women and men who adopt particular reasoning methodologies in order to advance the interests of women. This shares the responsibility for the advancement of women on all members of the judiciary, instead of placing the burden on the shoulders of women. It can move beyond the essentialist critiques of ‘different voice’ theories, and does not pre-suppose or project a universal assumption of ‘woman’. It also transcends problems that arise when men and women are pitted against each other using investigatory techniques, such as those which affect quantitative analysis, that implicitly or explicitly employ a dangerous same/different binary.

C. CONTRIBUTIONS TO INVESTIGATING GENDERED IMPACT

Feminist judgments projects have made two major contributions to investigating the gendered impact upon judging. First, they provide concrete examples of how diverse perspectives can inform a decision and the impact that this has upon the reasons produced by a judge. Second, they proved an important tool for unmasking the dominance to date of male gendered experiential knowledge, at the exclusion or oversight of other perspectives.

1. Demonstrating the impact of perspective on judgment writing

Fictional feminist judgments demonstrate how an ‘outsider within’ could impact judicial reasoning working within the traditional constraints that face real life judges when writing judgments. As Rackley highlights, unlike conventional scholarly writing, fictional judgment writing requires the author to apply critical scholarship and theoretical insights to an actual case.⁴²⁷ Réaume emphasises that this entails

⁴²⁷ Erika Rackley, ‘Why Feminist Legal Scholars Should Write Judgments: Reflections on the Feminist Judgments Project in England and Wales’ (2012) 24 CJWL 389, 397.

‘really testing abstract theories and political commitments against the realities of actual cases.’⁴²⁸

Not only are actual cases, rather than hypothetical debates at stake in this process, but a key marker of these projects is to be faithful to established adjudicative practices and style. The Women’s Court of Canada re-wrote decisions ‘within the existing parameters of the law, applying traditional legal language and principles...following the same rules and law as the Court but applying different equality analysis and coming to different conclusions.’⁴²⁹ The English Feminist Judgments Project also adopted this methodology, writing ‘subject to the same constraints as the original judges’.⁴³⁰ It took ‘judgment writing as a “given”, and [did] not attempt to re-think it as a practice in any significant way.’ As such, the fictional judgments are constrained aspects of common-law adjudication such as absence of opportunity to re-try the facts of the case, addressing only the issues raised by the parties in the appeal, confined to applying legal authorities raised by the parties in the appeal or by the court in the course of oral argument and established conventions on statutory interpretation and the application of precedent.⁴³¹ While there is a great deal of scope to question whether the adjudicative process as it currently operates is a satisfactory forum through which to truly incorporate the gendered experiences of both those whom decide cases, and those whom appear

⁴²⁸ Denise Réaume, ‘The Women's Court of Canada: The Virtues of Blending Theory and Practice’

(*Feminist Judgements Project*) <<http://www.kent.ac.uk/law/fjp/links.html>> accessed 25 April 2013, 2.

⁴²⁹ Majury (n414) 6.

⁴³⁰ Hunter, McGlynn and Rackley, *Feminist Judgments* (n281) 13.

⁴³¹ Ibid 13-7.

before the court,⁴³² remaining faithful, as far as possible, to the current common law courts' practice demonstrates that there is scope within the current legal structure for more diverse experiential knowledge to impact judicial decision-making.

A clear example of this in the English Feminist Judgments Project comes from Rosie Harding's fictional re-write of the decision in *Wilkinson v Kitzinger* [2006] EWCH 22 (Fam), [2007] 1 FLR 295. In this case the applicants contested that the failure of UK law to recognise a same-sex marriage that they entered into overseas as a marriage, rather than as a civil partnership, contravened their rights under Article 8 (respect for private and family life) and Article 12 (right to marry) of the ECHR. In Harding's fictional re-write she based the claim on Article 8 in conjunction with a violation of the Article 14 prohibition on discrimination. She emphasised in her decision how civil partnerships affected an individual's everyday life in a way that a marriage did not. For instance for the applicant 'having to describe her relationship as a "civil partnership", rather than a "marriage" in official interactions forces her to "come out" as a lesbian whenever asked about her marital status, whether or not she feels comfortable doing so in the situation.'⁴³³ In correspondence with Rackley, Harding explains how although she was aiming in this observation to 'deploy anti-discrimination training approaches to explain how discrimination is experienced'; she has also included the example:

because it's my own story to an extent because I have [had] to come out in that way and interactions in daily life because I am in a civil partnership and sometimes I don't want to do that. This was a place where I had the

⁴³² See Reg Graycar, 'A Feminist Adjudication Process: Is There Such A Thing?' in Ulrike Schulz and Gisela Shaw (eds), *Gender and Judging* (Hart 2013); Thornton, *Dissonance and Distrust* (n91) 28; Catharine A. MacKinnon, 'Reflections on Sex Equality Under Law' (1991) 100 YLJ 1281.

⁴³³ Hunter, McGlynn and Rackley, *Feminist Judgments* (n281) 45.

ability to tell that story in print, you know coming from a different vantage point allows these issues to come to the fore a bit more.⁴³⁴

This is a powerful example of how Harding's unique gendered experience gave her a different insight into the claim of the applicant that was available to the real-life judge. Because of the fictional nature of the project, Harding was also in a better position than an actual judge would be to candidly reflect upon the factors that led her to write the judgment in the way that she did.

2. Unmasking the dominance of male gendered experiential knowledge

The second benefit of feminist judging projects, predominantly participated in and written by women, is that they demonstrate the extent to which judicial decisions have been dominated by male gendered experiential knowledge, and how this has been previously thought of as the 'neutral' position, or one unaffected by the personal experience of the decision maker. Rackley describes the power of academic judgments in the following terms:

The power of the academic judgment therefore lies...in its revelation of the constraints and choices behind the process of judicial decision-making – to use Baroness Hale's words, in its exposure of the process of judicial reasoning as 'not the straightforward, predetermined march from A to B of popular belief, but something altogether more complicated and uncertain.'⁴³⁵

By re-writing judgments subject, as close as possible, to the disciplinary constraints of judgment writing, fictional writing projects demonstrate 'not only the extent to which the original decision is often just one way of deciding the case and writing the

⁴³⁴ Rackley, 'Why Feminist Legal Scholars Should Write Judgments: Reflections on the Feminist Judgments Project in England and Wales' (n427) 406.

⁴³⁵ Ibid 408.

judgment, but also of the importance of the personality and the perspective of the judge.’⁴³⁶

Despite these strengths, this methodology has particular limitations when attempting to investigate the impact gendered experiences have upon modern day judges.

D. LIMITATIONS OF FICTIONAL JUDGMENT WRITING

1. Fictional Accounts

The first point to note is that fictional judgments are just that – fictional. While the academic ‘judges’ try to put themselves in the position of the decision maker, the pressures of ‘real life’ judging are unable to be replicated through these projects. The fictional judge does not have the parties before her. While she must come to a decision, in order to be true to the style of judicial writing, the academic judge, as Rackley concedes, ‘will never be able to appropriate fully the authority and power of those they imitate’.⁴³⁷ Rackley cites Robert Cover’s expression that judgments operate in the field of ‘pain and death...a judge articulated her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.’⁴³⁸ While fictional judgments may attempt to put themselves in the emotional field that the original judge would have occupied, it is difficult to replicate the ‘real life’ impact of the courtroom in the academic office.

Moreover, many of the decisions re-written by the Women’s Court of Canada and the Feminist Judgments Project were done a considerable period after the actual case occurred. Some of the fictional judgment writers had the benefit of decades of

⁴³⁶ Ibid 403.

⁴³⁷ Ibid 408.

⁴³⁸ Ibid 407.

social change to inform the context of their re-write. Real judges do not have the luxury of hindsight. They must do their best with the knowledge, including social knowledge, available at the time.

Finally, fictional judges were charged with re-writing a single judgment. The writing stage of Feminist Judgments Project spanned several years. The authors had the opportunity to receive feedback from other participants on their re-writes, and also adopted a process whereby each fictional judge would be paired with a ‘writing friend’ to assist them in developing their judgment. Most real-world judges do not have the luxury of this kind of writing support, nor the time.

2. Collegiate judgments

Closely associated with the limitations highlighted above, the fictional feminist judgment writing projects to date have been limited in assessing the impact of gendered experiential knowledge on judgment writing in collegiate environments. The point was emphasised in the introduction to the English Feminist Judgments Project, and subsequently by its editors, that a number of different feminist judgments could be written in respect of each re-visited case. For instance, several of the decisions of Baroness Hale, a self-acclaimed feminist, were, in her words, given the mark of ‘could do better’ to what she describes as ‘some of my own best efforts’.⁴³⁹ The English Feminist Judgments project tried to simulate decisional collegiality through a series of workshops where contributors would come together to discuss draft judgments.⁴⁴⁰ However, only one judgment was produced for each re-visited case. Six of the judgments were co-authored, however the results in each of these

⁴³⁹ Brenda Hale, ‘Forward’ in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments* (Hart 2010) v.

⁴⁴⁰ Hunter, McGlynn and Rackley, *Feminist Judgments* (n281) 4.

cases were produced as if only one judge was writing. For example, Linda Mulchay and Cathy Andrews re-wrote *Baird Textile Holding v Marks & Spencer Plc* [2001] EWCA Civ 274, 1 All ER (Comm) 737 under the name of 'Baroness Mulandrew' (an amalgamation of both of their surnames). The Women's Court of Canada adopted a similar process of co-authorship.

In the introduction to the Women's Court of Canada, Diana Majury made note of two other projects that applied a critical, although not a feminist, methodology to discussing the decisions of the Supreme Court of the United States in *Brown v Board of Education*⁴⁴¹ and *Roe v Wade*.⁴⁴² Jack Balkin was editor of both of these projects. For the first project, he asked a group of constitutional scholars to re-write the opinion in *Brown*, by posing to each author the same question:

How would you have written the *Brown* opinion in 1954, if you knew then what you know now about the subsequent history of the country and the progress of race relations in the past half century?⁴⁴³

The methodological instructions for producing the collection of re-writes to *Roe v Wade* were virtually identical.⁴⁴⁴ The contributors results were written in judgment form, with each fictional judge writing in judicial style, offering either a concurring or dissenting judgment to that written by the fictional Chief Justice of the Court (Jack Balkin). Fictional judges were required to use only the material that was available at

⁴⁴¹ Jack Balkin (ed) *What Brown v Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* (NYUP 2001).

⁴⁴² Jack Balkin (ed) *What Roe v Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decisions* (NYUP 2005)

⁴⁴³ Balkin, *What Brown v Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* (n441) ix.

⁴⁴⁴ Balkin, *What Roe v Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decisions* (n442) x.

the time of the original decisions (such as case law and journal articles), however were testing how those materials could be manipulated to write a decision that reflects the subsequent progress of civil rights. Majury has noted the strength of this approach, drawing out the potential plurality in reasoning outcomes when a group of people are presented with the same facts and legal history:

This approach in which a single case is rewritten by a number of different authors is another interesting way to explore the same issues and questions that sparked our project and all the decisions that the Women's Court has produced. A number, if not all, of the decisions included in this round would lend themselves to multiple alternative rewrites.⁴⁴⁵

While the results of *Brown* were 'staged at a session of the American Association of Law Schools in January 2000, where the nine...assumed the roles of a mock Supreme Court'⁴⁴⁶ and *Roe* at a similar symposium at Yale Law School in 2003,⁴⁴⁷ there is no indication that the judges in either of these projects in any way engaged in any form of decisional collegiality throughout the judgment writing process. In short, they wrote as academic silos, cut off from the influences of one another and then juxtaposed the fruits of their labour.

No feminist judgment project to date has attempted to set up a mock panel of feminist judges and have them interact with each other in the manner that judges on appellate courts do despite the fact most of the fictional judgments were re-writing opinions given by a plenary bench. This limits the opportunity to test the impact of

⁴⁴⁵ Majury (n414) 8.

⁴⁴⁶ Balkin, *What Brown v Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* (n441) ix.

⁴⁴⁷ Balkin, *What Roe v Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decisions* (n442) x.

peer-to-peer influence on judgment writing. As will be highlighted in Chapter 9, this influence is critical to understanding the dynamic of appellate decision-making.

3. Women's equality *in law*

Fictional feminist judgment writing, at its core, seeks substantive equality for women *through law*, and distinguishes itself from other projects that advocate for the greater representation of women in the judiciary in order to realise substantive equality for women *in law*. The latter project does not automatically result in the first, nor the first necessarily secure the second. They *can* be mutually reinforcing pursuits, however a careful distinction of the two projects is needed in order to safeguard against drawing generalities too broadly and essentialising both feminists and women. This form of analysis is complementary to supporting increased representation of women on the bench. Two of the key methodological indicators for the feminist judgments project are achieved when more women sit in judgment: “‘including women”, both in terms of writing women’s experiences into legal discourse ... and in the construction of legal rules’; and ‘contextualisation and particularity: reasoning from the context and the reality of women’s lived experience...’”⁴⁴⁸

However, although the feminist judgments approach does not diminish the pursuit of greater gender representation on the basis of institutional legitimacy and fairness (it is explicitly supportive of this aspiration), it does not necessarily add to it. It would be conceivable to have a bench of feminist judges and still not have a woman in the room. As such, it should always be seen as a complementary project to others that focus upon greater participation of women in the judiciary, rather than one to supplement them.

⁴⁴⁸ Hunter, McGlynn and Rackley, *Feminist Judgments* (n281) 35.

Fictional judgment writing has become an important tool in critical legal theory. It presents an innovative way in which academics demonstrate how the law could be, not just how they think it should be. However, this thesis will not engage with this methodology, although acknowledging its complementary nature to the project at hand. Rather, the next chapter will argue that greater attention should be paid to qualitative empirical research, as a tool that allows the researcher to investigate many of the unseen, yet highly influential, dynamics that impact upon judicial decision-making.

CHAPTER 7: QUALITATIVE INTERVIEW BASED ANALYSIS

Clearly, more empirical work is required. ...Simple interview studies could also at least let the judges speak for themselves about what they think they do in judging claims so that at least at the self-reporting level we could see if there are gender differences in beliefs about or conceptions of what judges are doing.⁴⁴⁹

As Carrie Menkel-Meadow makes clear in the quotation above, qualitative interview based analysis has been the least used methodological approach to investigating the question of gendered impact upon judicial decision-making. Hazel Genn has made similar observations,⁴⁵⁰ and Lizzie Barmes sees great urgency in redressing this deficit by complementing legal methodology highlighted in the chapters above with qualitative empirical research:

An urgent specific question in democratic terms is the effect on decision-making of the demographic homogeneity of many judges, especially at the higher levels. ... We can only begin to work out how legitimately to achieve this, however, if we have a better sense of the extent to which current adjudicative processes marginalize certain voices and prioritize others. ...there must be scope for devising effective means, for example combining ethnography and systematic qualitative and quantitative analysis of case law, with which to trace how judicial discourse and substantive decision-making are structured by dominant practices, pre-conceptions and beliefs related to group identity.⁴⁵¹

This is not to say that no work has been done with judicial participants using various qualitative analytical methodological approaches. There are some notable

⁴⁴⁹ Menkel-Meadow, 'Asylum in a Different Voice: Judging Immigration Claims and Gender' (n292) 206.

⁴⁵⁰ Hazel Genn, *Judging Civil Justice* (CUP 2009) 137.

⁴⁵¹ Lizzie Barmes, 'The Courts and the Common Law' (Oxford Labour Law: Past, Present, Future, St John's College, Oxford, 25-6 July 2013). Paper on file with author and cited with permission.

exceptions. For example, Australian-based researchers Kathy Mack and Sharyn Roach Anleu have undertaken a comprehensive questionnaire-based socio-legal study of the entire Australian judiciary in order to undertake a comparison of the experiences and attitudes of women and men at different levels of the judicial hierarchy.⁴⁵² There have been fewer examples of projects that engage members of the judiciary in semi-structured interviews in order to investigate the nature of judging. But again, this is not completely unbroken ground, and is an area of research that, ‘has taken on a new lease of life in the last few years.’⁴⁵³

In 2011 Penny Darbyshire published an ethnographical account of the working lives of judges across all levels of the judicial hierarchy in England and Wales. Her work was largely observation based. She spent the better part of a decade shadowing 40 judges and magistrates for at least four days, and complemented these observational studies with interviews of 37 participants (and, as she notes, informal encounters with hundreds of others judges and magistrates).⁴⁵⁴ As noted by Darbyshire, for those using qualitative empirical research to understand the internal workings of the judiciary in the United Kingdom, Alan Patterson’s work remains a

⁴⁵² Kathy Mack and Sharyn Roach Anleu, ‘Skills for Judicial Work: Comparing Women Judges and Women Magistrates’ in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart 2013).

⁴⁵³ Alan Paterson, *Final Judgment* (Hart 2013), 1. For example, Hilary Sommerlad, ‘Let History Judge? Gender, Race, Class and Performative Identity: A Study of Women Judges in England and Wales’ in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart 2013) draws on empirical interviews with 16 women judges from the tribunal service in England and Wales in order to reflect on the antinomy between women and judicial office; see also, Majda Halilović and Heather Huhtanen, *Gender and the Judiciary: Selected findings and recommendations on the implications of gender within the judiciary of Bosnia and Herzegovina* (DCAF/ Atlantic Initiative, 2014).

⁴⁵⁴ Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Hart 2011) 1.

‘socio-legal masterpiece’.⁴⁵⁵ In his first major publication in 1982 *The Law Lords*,⁴⁵⁶ and then the ‘sequel’ in 2013, *Final Judgment: The Last Law Lords and the Supreme Court*,⁴⁵⁷ Paterson had unprecedented access to the Law Lords and then Justices of the UK Supreme Court. These two publications are the culmination of over 40 years of elite interviews conducted between Paterson and leading members of the legal profession. In *The Law Lords* he interviews 15 current of former Law Lords and 46 counsel. For *Final Judgment* he interviewed 27 Law Lords of Justices of the Supreme Court, six members of the Court of Appeal, nine leading counsel, six judicial assistants, two Principal Clerks of the Judicial Office and one Registrar of the Supreme Court.⁴⁵⁸ What is striking about Darbyshire and Paterson’s work is the limited attention that both of these studies gave to subject of judicial diversity, and in particular, gender diversity in courts in England and Wales. Given the amount of attention that this subject has received in recent times in the United Kingdom by successive government initiated taskforces and enquiries in the last two decades (as discussed in Chapter 1), it is surprising that greater attention was not paid to the subject given the wider-reaching nature of both of these projects.⁴⁵⁹ There has also

⁴⁵⁵ Ibid 13.

⁴⁵⁶ Alan Paterson, *The Law Lords* (Macmillan 1982).

⁴⁵⁷ Paterson, *Final Judgment* (n453).

⁴⁵⁸ Ibid 5.

⁴⁵⁹ Darbyshire (n454) highlights the lack of women at the court when analysing the social patterns of the judges, noting at 423 that ‘[a]t 30 of the courts with dining rooms, I was the only woman. At 10 others, the only other female was the research subject. At five, there were two female judges’, and includes ‘Women’ as a sub-heading in a section titled ‘Experiences of Minorities in the Legal Profession’. However, of the 456 pages of her ethnography, only two pages in total are dedicated to explicitly taking about gendered experiences of judging. Paterson does not give any specific attention to women in the House of Lords and the Supreme Court. However, this may be attributed to the fact

been limited qualitative empirical work done with judges from South Africa and Australia exploring gender and judicial decision-making.⁴⁶⁰

This project seeks to address the current gap in qualitative research into interactions between gender and judicial decision-making, and has specifically sought to gather anew data in an area that has not yet been examined using qualitative interview methods. That is: how do judges see gender impacting upon the way they perform their judicial functions? Taking in its stride the wisdom of Carrie Menkel-Meadow, quoted above, the final part of this thesis (specifically Chapters 8 and 9) will ‘let the judges speak for themselves about what they think they do in judging claims’. However, before going there, this chapter will lay the foundations for the methodological framework adopted. The first section of this chapter outlines the methodological design of this study. The second considers the strengths, along with the limitations inherent in using qualitative research as a method for investigating the

that there is, and has only even been, one women Law Lord or Justice for the Supreme Court (Lady Hale). He has, elsewhere, written on the concerns of judicial diversity as they relate to judicial appointments processes. See: Alan Paterson, *Lawyers and the Public Good: Democracy in Action?* (CUP 2012) 141-6 and Alan Paterson and Chris Paterson, *Guarding the Guardians? Towards and Independent, Accountable and Diverse Senior Judiciary* (CentreForum, 2012).

⁴⁶⁰ A remarkable exception to this is a documentary created by Ruth Cowan interviewing seven women from the South African Judiciary: Ruth Cowan, *Courting Justice* (2008). For a review of the film see: Hannah Brenner, ‘Courting Justice (Film Review)’ [2011] YJIntAff 118. Moreover, Professor Kim Rubenstein and others from the Australian National University are currently conducting an oral history project *Trailblazing Women and the Law* in Australia that sets out to create 100 oral histories with trailblazing lawyers across the country, including interviews with women from the Australian Judiciary. See: H Kerwin and K Rubenstein, ‘Reading the Life Narrative of Valerie French, the First Woman to Sign the Western Australian Bar Roll’ *Founders, Firsts and Feminists* <<http://www.womenaustralia.info/leaders/fff/>> accessed 14 April 2014.

impact that gendered experiential knowledge has upon judicial decision-making. The third section demonstrates how this thesis uses an explicit feminist methodology. This includes an explanation of the approach used to present the interview material collected in this study – and why long form quotations was chosen over other literary devices such as paraphrasing or vignettes.

A. METHODOLOGY

The aim of this study was to investigate how judges thought experiential knowledge, in particular, gendered experiential knowledge, impacted upon decision-making in senior appellate courts. The empirical research for this project was conducted in 2012 and 2013. It comprised a series of interviews with senior members of the Australian, English and South African Judiciary. This project received ethics approval from the Univeristy of Oxford Central University Ethics Committee in 2012.⁴⁶¹

1. Choice of Courts and Jurisdictions

The decision to investigate judicial gendered experiential knowledge in more than one jurisdiction was motivated by both pragmatic and theoretical considerations. At a pragmatic level, it allowed for the experiences of a greater number of women to be considered. At the time of the empirical stage of research, the senior judiciary in England and Wales was in a critical state in terms of gender diversity – with only five women of its 53 members. However, to study the impact of gender diversity with such a small sample of possible participants of one gender would lead to problematic results. By expanding the research to look at senior judiciaries in South Africa and Australia, the number of women ‘subjects’ in the potential participant pool was greater.

⁴⁶¹ SSD/CUREC1A/12-281.

From a theoretical perspective, comparing the experience of three jurisdictions with a shared common law tradition and similar struggles to increase the representation of women on the bench affords an opportunity to take a comparative approach to this research. Looking outwards to the experiences of others can illuminate the ‘strange in the familiar’ of the home jurisdiction. The role played by the judiciary in each of these common-law countries has a number of significant common features. First, the judiciary, as an institution sits at the apex of the justice system and appointment to it is a mark of professional excellence and prestige. Second, each jurisdiction employs an adversarial approach to litigation where the judge plays an important determinative function. Third, each jurisdiction has a ‘senior judiciary’ which uses multi-member panels of judges to determine appellate cases from decisions of lower courts and issues of constitutional importance. Because the senior judiciary exercises constitutional or quasi-constitutional power it plays an important ‘small ‘p’ political role in the governance of the country. While each jurisdiction has a different system for appointing judges, the executive arms of governments closely, and in the case of Australia exclusively, control the appointment process. Finally, in each jurisdiction, as highlighted above, there is an enduring problem of the under-representation of women (among others) in the higher echelons of the judiciary.

Despite these important similarities that make a collective study of these three jurisdictions insightful, there are significant and distinguishing cultural, historical and structural differences. The contrasting historical conditions and the impact that this has had upon judicial and legal culture, particularly when the experiences of post-colonial Australia, and post-apartheid South Africa are juxtaposed with that of England – from where the former derive much of their legal traditions – has been

useful to draw out in a starker contrast some of the implications of a diverse, or un-diverse bench. In the chapters that follow it will be important to note where these traditions and cultures are shared or similar and where they substantially differ, in order to place this research into its rightful context.

2. Selecting Participants

Interviews were conducted with men and women judges from the UK Supreme Court, the Court of Appeal of England and Wales, the Constitutional Court of South Africa, the South African Supreme Court of Appeal, the High Court of Australia, the Federal Court of Australia and the Victorian Supreme Court of Appeal.

I set out to interview ten judges in each of the three jurisdictions – an equal number of men and women, but also, importantly, I sought out judges whose biographical information suggested that they might be capable of being characterized as ‘an outsider within’. For example, I approached those who had previously spoken about their own ‘difference’ in terms of disability status, sexual orientation, socio-economic background or racial, ethnic or national origin. Because of the role that racialised divides have played in South African history I was particularly careful to approach both men and women judges from different racial groups. It was harder to achieve racial diversity in Australia and the United Kingdom for the concerning fact that none of the members sitting in superior courts identified as anything other than White. One interviewee from Australia identified as ‘first generation’ Australian. One interviewee from the United Kingdom had migrated to the United Kingdom mid-way through their professional career. Two of my interviewees were openly gay. One spoke to me about living with a physical disability.

In addition to my ‘outsider within’ candidates, I also sought to speak to those who had not yet publically commented upon the matter of judicial diversity

extensively and would not identify themselves as being ‘an outsider’ in terms of the usual identity categories. This study sought the views both of those who perceived themselves as being different and the impact this had on judicial decision-making, but also the impact it might have upon those who could be said to be ‘the same’. The contribution of those who might be seen as ‘insiders’ in terms of identity was therefore important.

Interviewees were invited to participate in three separate methods. The first, and most commonly used method, was to ‘cold call’ potential participants. This was done by writing to the judge in question via their chambers assistant. The initial letter set out my research question and general background on the study. If the judge required further information, or on the rare occasion, asked for a copy of the draft interview questionnaire, this was sent to the judge to consider before obtaining consent. The second method of approach was to ask a judge to participate through personal introductions – often by other judges participating in my study, through academics who had personal ties to the judges I sought to interview and often, through former or current law clerks (in South Africa), judicial assistants (in the United Kingdom) or associates (in Australia).

In two courts – the South African Supreme Court of Appeal and the Victorian Supreme Court, I was fortunate to have the active support of the Judge President for this research project. On both of these occasions they offered to send a general introduction email to judges of their court, encouraging them to participate in my research. At the Victorian Supreme Court I was invited to present my research at a private judges’ seminar. This provided an opportunity for several judges who were not able to participate in my research due to time constraints, but who were nonetheless interested in my project, to discuss with me in an informal way some of

the themes that arose in the interview questionnaire. I have also spoken to a number of other judges, both from the jurisdictions of explicit focus, and from abroad, informally about my research. These informal conversations have also shaped my thinking about the ultimate findings of this work.

Generally, I only sought to interview current sitting judges. South Africa was an exception. Here, in addition to seeking out sitting judges of the Constitutional Court and Supreme Court of Appeal, I sought to interview retired judges of the Constitutional Court. South Africa was the only jurisdiction where I sought to interview retired judges as well as sitting judges. This was a conscious choice, motivated by two pragmatic factors. Initially my research was only going to focus on interviews with members of the Constitutional Court to ensure that the experiences reported were as contemporary as possible. However, there have only ever been four women sitting as justices of this court. In order to maximise the representative sample, the pool was extended to invite former justices to interview. Secondly, the South African Constitutional Court is unique amongst the three jurisdictions by setting the mandatory retirement date based upon time served (currently, a Justice of the Constitutional Court may not sit for longer than 15 years), rather than by age (both Australia and the United Kingdom set this at 70 – when, as one interviewee opined, he would reach the ‘statutory age of senility’!). This means that justices of the Constitutional Court serve comparatively short terms, and would be drawing upon experiences that currently span no longer than 20 years – providing sufficient contemporariness of experience to be valuable to this study.

The following tables present a breakdown by gender, court and jurisdiction of the interviewees approached for this study, and the interviewees who accepted and then did participate in this study.

Table 2: South Africa

	# judges on Ct	# women judges on Ct	Approached for interview		Agreed to interview	
			Men	Women	Men	Women
Constitutional Court (Current)	10	2	4	2	2	0
Constitutional Court (Former) ⁴⁶²	8	2	3	2	2	1
Supreme Court of Appeal	22	7	3	5	2	4
Total number of interviewees:					6	5

Table 3: Australia

	# judges on Ct	# women judges on Ct	Approached for interview		Agreed to interview	
			Men	Women	Men	Women
High Court of Australia	7	3	2	3	1	2
Court of Appeal of the Supreme Court of Victoria ⁴⁶³	14	4	5	4	4	2
Federal Court of Australia, Victorian Registry	11	2	0	2	0	1
Total number of interviewees:					5	5

Table 4: United Kingdom

	# judges	# women judges	Approached for interview	Agreed to interview
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⁴⁶² The former President of the Constitutional Court of South Africa, Arthur Chaskalson, sadly passed away during the course of this research. He has not been included in the count of available judges.

⁴⁶³ Including the Chief Justice of the Victorian Supreme Court and an ordinary judge of the Victorian Supreme Court who frequently acted as a Judge of Appeal of the Victorian Court of Appeal.

	on Ct	on Ct				
			Men	Women	Men	Women
Supreme Court of the United Kingdom	12	1	4	1	3	1
Court of Appeal of England and Wales	31	4	2	4	2	2
<i>Total number of interviewees:</i>					5	3

3. Interviews

Through a series of semi-structured interviews conducted in person with my interview participants, I sought to gather insights into how these judges consider that gender impacts upon judicial decision-making. How conscious are they of their own ‘gendered-standpoint’ and what ways, if any, do they and their colleagues perceive this as having an impact upon their decision-making? Interviews usually lasted between one and two hours. They were generally conducted in the judge’s chambers, however, on occasion the judge preferred to meet at a café, garden or their own home. Interviews were digitally recorded and professionally transcribed. All of my participants elected to remain anonymous, identified only by their gender and national jurisdiction. I consider that this was an important methodological choice, giving the participant a greater sense of freedom to answer candidly.

Participants were asked a series of questions about the impact, if any, that a judge’s background has upon either his or her own decision-making, or the decision-making of his or her colleagues. Each interview was guided by a set list of questions, modified, as appropriate, to take into account the specific nature of the background of each participant. But we often went ‘off script’. I had the benefit of dealing with highly articulate interviewees, skilled in the art of oral discourse. I found my

participants eager to engage, and eager to talk. On very few occasions did I feel that the participant was guarded or nervous about speaking openly on this topic. On very few occasions participants asked to speak 'off the record' or asked to stop the tape.

Following the interviews participants were offered the opportunity to review a copy of the interview transcript following the completion of the interview, and were afforded the opportunity to amend the transcript as they felt necessary. Most took advantage of this opportunity, however amendments were done either to correct grammar or language, de-personalise an observation when they had referred to a colleague by name, or add extra adjectives to enhance an idea expressed. None of my interview participants asked for a transcript to be redacted in any way that compromised the integrity of the process. None of my interviewees subsequently withdrew their consent to participate after reading the transcript.

B. STRENGTHS AND LIMITATIONS OF QUALITATIVE RESEARCH

Chapters 4, 5 and 6 considered some of the methodological limitations associated with quantitative outcomes based research; doctrinal textual analysis; and alternative judgment writing techniques. Qualitative research involving elite participants also has limitations. These are most commonly associated problems of access to the subjects and a degree of self-selection when participants are invited to participate; problems associated with memory and self-reflection by the participants in the interviews; and the difficulty of 'measuring' the impact of diversity by relying upon the perception of the judge. These limitations are real, however they do not diminish the value of this type of research, which allows greater space for the complexity of the subject matter to be fully explored and some of the nuances of the diversity debate to come to the fore. The next section will highlight some of these methodological limitations, and the strategies that were taken in this project to confront them.

1. Access to research subjects

It was noted at the outset of this chapter that relatively little qualitative empirical research has been done on the topic of gender and judging. Given the difficulties associated with undertaking this type of empirical work this comes as no surprise. Judges, like all elite interview subjects, have limited time. The nature of their work, in particular what happens in ‘closed chambers’, is subject to strict confidentiality. Judges, particularly sitting judges, are not permitted to provide extra-judicial comment on the substance of cases that come before them – it is through their final published reasons that judges communicate their opinions on the merit of cases to the world. Judges might also be wary of the academic researcher for various reasons, many of them valid. There have been notable occasions of somewhat ‘sensationalised’ accounts of courts and the judicial process resulting from empirical academic work. Not all of it paints the judicial officers as individuals, or the court as a public institution, in a particularly flattering light. For some, the obligation to respect the duty of impartiality and confidentiality attached to the office may provide reason enough to not want to engage with extra-judicial interviews seeking to uncover the motives and inspirations behind their written and published reasons. Others may feel that although they hold a public office, their personal experiences and reflections on judging have little to do with the public debate. They prefer not to court the spotlight by indulging curious researchers.⁴⁶⁴ Thankfully for this research project, not

⁴⁶⁴ A notable example of this is Mary Gaudron, former Justice of the Australian High Court and the first woman to hold this office. Gaudron is notoriously unavailable for any interview focusing on her time as a Judge. In the forward to her unauthorised biography, Michael Kirby, former High Court of Australia judicial colleague of Gaudron wrote ‘We have it on the authority of this book that Mary Gaudron has a horror of biographies, believing that some events in life belong in the past and should be

all judges consider that the duties of impartiality and confidentiality are incompatible with volunteering themselves as interview subjects for academic researchers. Indeed, one of the South African participants in this study noted that there was an unwritten agreement amongst the members of the first Constitutional Court of South Africa to make themselves available, where possible, to academics. According to this interviewee, they were conscious of both the novelty and pioneering features of this new court, and saw potential relationships with academic researchers as a mutually beneficial exchange – for the Court to both share its experiences with the world and for it to have an independent and critical academic eye cast over it in the hope of strengthening this pioneering project. This comfortable relationship between the first Constitutional Court and the academy may be credited to the fact that most of its founding members had themselves, at some time or another in their careers, held academic positions or themselves undertaken extensive academic research. But regardless, this research project was greatly facilitated by those members of the judiciary who see value in extra-judicial collaboration with academia. Others working in the area have not been so fortunate⁴⁶⁵ and the difficulties associated with accessing the ‘Judge as interviewee’ should not be disregarded.

I was fortunate in the positive response that I received from potential participants. Generally, chambers staff was gracious and helpful in putting my requests before the judge in question. On the rare occasion I did encounter chambers staff who were perhaps overzealous in their ‘gate-keeping’ role. This lack of direct

left there, undisturbed by prying eyes.’ Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (UWA Publishing 2010) ix.

⁴⁶⁵ For example, Kate Malleson describes significant hurdles in accessing judicial subjects in Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Dartmouth 1999).

access to the judge to consider the interview request was usually remedied by adopting one of the two alternative methods of approach outlined above. Disappointingly, on one occasion I was advised by chambers staff that the judge was unable to participate in my study, only in subsequent informal conversations with the judge in question to discover that she had not received my request and would have, had the information been received, been a willing participant. These kinds of barriers perhaps reflect a different conception of the ‘appropriate role of a judge’ and cultural barriers that may not fully embrace the potential for mutually beneficial gains that can arise when members of the judiciary make themselves available to participate in academic research.

Another potential limitation associated with questions of access arises from the fact that judges volunteered to be interviewed. Herein lies a danger that participants would self-select and only those who might be ‘sympathetic to the cause’ would agree to participate, thus skewing results. Happily, this was not my experience. As will be apparent from the chapters that follow, the material obtained in the interview series represented a broad spectrum of opinion on the benefits of a gender diverse judiciary, the manifestation of its impact upon judicial decision-making, and what participants saw as the best way to remedy the lack of diversity in their own institution. I specifically sought to include interview candidates who had not previously spoken publicly on the subject of judicial diversity. For some, so they told me at the outset of the interview, it was not a topic that they had previously had the opportunity to consider in-depth. In this way, the possible danger that would have been posed if only ‘sympathetic subjects’ were included was somewhat mitigated.

2. Problems with memory and self-reflection

Qualitative empirical research, in contrast to other methodologies identified above, allows those who are actually ‘doing’ the judging to speak of the impact that they perceive gender to have on decision-making. Of course, this too, can be problematic. Judges are only offering their ‘perception’ of events. This is a very different thing from a steadfast fact. Judges may labour under a sense of false consciousness, they may be eager to ‘please’ the interviewer and provide responses that cast them in a positive ‘feminist’ light.

Gendered experiences may also have an unconscious or unexplored impact upon the judge. As one interviewee told me – when it comes to judging ‘I just do it!’ Justice Albie Sachs, writing extra-judicially, has commented upon the difficulties inherent when asking judges to examine and articulate on an internal processes that lead to decision-making:

...I readily acknowledge that many of the processes that affect our decisions do so in mysterious ways that though not unfathomable in principle, in practice are rather difficult to define. The way like experiences enter into judicial pronouncements, or at least, into my judicial pronouncements, falls into this category.⁴⁶⁶

He goes as far as to state that ‘Every judgment I write is a lie’. Not because of any falsehood that lies in the content of a judgment, but rather, as he puts it:

in the discrepancy between the calm and apparently ordered way in which it is read, and the intense and troubled jumping backwards and forwards that had actually taken place when it was being written. I felt a need to dispel the notion, induced by the magisterial tone we judges conventionally adopt, that judgments somehow arrive at their destination purely on rational autopilot.⁴⁶⁷

⁴⁶⁶ Albie Sachs, *The Strange Alchemy of Life and Law* (OUP 2009) 8.

⁴⁶⁷ Ibid 7.

This demonstrates the complicated and nuanced considerations that are at play in judicial decision-making. This is particularly enhanced when judges are asked to reflect upon the impact that they perceive they have upon their colleagues – arguably asking them the impossible – to sit in the mind of their colleagues. However, despite these challenges, arguably the intrinsic complexity in judicial decision-making processes is best captured by qualitative research methods where the judge can expand upon the multiple sources of influence that impact upon a reasoned decision – where as other methods, most notably quantitative outcomes based research – tends to distil this process in search of only one influencing factor, such as the sex of the judge.

3. ‘Measurement’ and qualitative research involving human subjects

Finally, and closely related to some of the hurdles posed by memory and self-reflection, is a common criticism that qualitative empirical evidence is so subjective and imprecise that it holds no empirical value. Darbyshire clearly articulates this charge when reflecting upon her work, and the work of Paterson:

... I call Paterson’s book a socio-legal masterpiece, yet Harlow, a lawyer, called it ‘anecdotal’ and ‘impressionistic’, in 1986. Nevertheless, by 2010, Paterson’s work was widely regarded as unsurpassed, in providing in-depth insight into the Law Lords. Harlow’s remains a singular view. This book may similarly be regarded as anecdotal. It does, however, provide very wide, rich and frank insight into judges’ everyday work, from a researcher privileged to have unprecedented access to a very wide sample of judges, their workplaces and the material to which only they have access. In getting so close to the judges, there is a necessary loss of objectivity but that is well-recognised in this field of phenomenological research and indeed in all anthropological research. This type of work cannot and does not pretend to be impeccably objective, scientifically pure and quantitatively rigorous, as if it were chemistry.⁴⁶⁸

⁴⁶⁸ Darbyshire (n454) 13-4.

She correctly points out that to require absolute objectivity and mathematical precision from qualitative research is to miss the point of qualitative research entirely. The purpose of the research in this thesis is not to establish an ultimate ‘truth’ or to ‘prove a theory’ about the impact of gender on judging. Rather, it is to explore the experiences of those who are best placed to decide whether gendered experiential knowledge can and does, at times, impact upon judicial decision-making.

C. FEMINIST METHODOLOGY

The qualitative research undertaken in this thesis adopts an explicitly feminist methodology. As discussed in Chapter 2, what constitutes ‘feminist methodology’, in the same way as formulating a coherent definition of ‘feminism,’ is far from uncontroversial.⁴⁶⁹ However, one of the foundational methods is to approach research by ‘asking the woman question’⁴⁷⁰ and placing women and women’s experiences (whatever these may be) at the centre of the enquiry. This methodological approach recognises that women have, and in many ways continue to be, ‘outsiders within’⁴⁷¹ the judiciary. Because of the low participation by women in the judiciary, women’s experiences have not had the opportunity to influence the development of law through the judicial process in the same way that men’s experiences have. But ‘placing women at the centre’ did not mean that the interview participants were only women. As the descriptive methodology above clearly demonstrates, they were not. Nor is this necessary in order to characterise this methodology as feminist. However, the interviews with both women and men consciously focused upon the gendered nature

⁴⁶⁹ For example, see Alcoff (n141); Winter (n141); Stanley and Wise (n141); Ermarth (n141).

⁴⁷⁰ See Bartlett (n142).

⁴⁷¹ See Chapter 2 and Hill Collins, ‘Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought’ (n35).

of judging, and the influence that was perceived by the judges to be attributable to gender diversity. Given that women maintain a minority status within three judicial systems with long histories of exclusive influence from men's gendered experiential knowledge, judicial perceptions of gendered influences did tend to correlate with contributions brought by women's gendered experiential knowledge, as this was most likely to disrupt the 'status quo' and therefore be recognisable to participants. In this way the thesis maintains an explicitly feminist methodology.

Moreover, qualitative empirical research that employs the use of semi-structured interviews is considered by some to have 'become the principal means by which feminists have sought to achieve the active involvement of their respondents in the construction of data about their lives.'⁴⁷² One of the most advantageous aspects of this methodology, when contrasted with the quantitative empirical research discussed in Chapter 4, is that it allows non-standardised information to be collected that can illuminate differences amongst the perceptions and experiences of different people. It does not seek out a single 'women' or 'men' perspective. Rather, it searches for alternative and diverse narratives of judging. As Hilary Sommerlad discovered in her work that considered women judges, narrative is 'the best way of eliciting what I anticipated would be the processual, fragmented experience of women judges.'⁴⁷³ Semi-structured interviews also allow the interview participant to take an active role in the construction of data, and as a result, the 'knowledge' that the data then becomes. Given that much of this research is focused upon challenging received

⁴⁷² Hilary Graham, 'Surveying Through Stories' in Colin Bell and Helen Roberts (eds), *Social Researching: Politics, Problems, Practice* (Routledge & Kegan Paul 1984) 112 cited by Shulamit Reinharz and Lynn Davidman, *Feminist Methods in Social Research* (OUP 1992) 18.

⁴⁷³ Sommerlad (n452) 359.

notions of what ‘counts’ as epistemologically valuable in judging, this participative and reflexive methodology is apt.

The choice of writing style adopted in Chapters 8, 9 and 10 also engages an explicitly feminist approach. There were several choices that could have been made when presenting the interview material. For example, the interview material could have been presented by using writing techniques such as setting out long form versions of the interviews with very little editing; using ‘vignettes’ where large segments of the interviews are presented and then commented upon by the author; or paraphrasing whereby the author uses her own words to give a summary and overview of the interview material obtained. I have chosen to use long quotations from the interview material, thematically grouped and accompanied by analysis.⁴⁷⁴ This writing style was a conscious choice. Clearly, I have been selective in which material to reproduce in these chapters and a certain degree of paraphrasing and ‘sculpting’ has influenced the writing process. However, I have chosen to use long quotations in order to allow the material, to a certain degree, to ‘speak for itself’. As opposed to paraphrasing, this method has two major advantages. First, it gives greater opportunity for the complexities and nuances of the interview material to be reflected. As Caroline Ramazanoglu describes, this embrace of complexity, or ‘the acceptance that the sort of truths that feminist seek ... never simply black or white but “complex, grey and almost always disputable”’⁴⁷⁵ is an explicitly feminist inspired approach to research concerned with complex human interactions. The chapters that follow are not trying to reconcile these complexities, but rather highlight them in

⁴⁷⁴ This is similar to the approach taken in Kerwin and Rubenstein (n460) and Darbyshire (n454).

⁴⁷⁵ Caroline Ramazanoglu and Janet Holland, *Feminist Methodology: Challenges and Choices* (Sage Publications 2002) 41.

order to advance the understanding of the possible impacts of gender diversity on the bench. The use of long quotes facilitates this aim.

Secondly, the decision to use long quotes from the interview transcripts is done with a conscious view of future researchers in this area. Elite interview material is, by nature, difficult to obtain. Much of the interview material obtained as part of this research project will be difficult to collect again. While some of my interview participants have spoken publicly on the subject of gender diversity in the bench and therefore have views on the topic that are readily accessible, others have not. Judicial perceptions on this topic are valuable and as Kerwin and Rubenstein highlight, interviews give the ‘chance to ... capture people’s “ideas, thoughts and memories in their own words” [and] offers an apt method of uncovering and representing these previously silenced events’.⁴⁷⁶ According to Reinharz, this is particularly important to feminist methodology and where women are involved in interview sets because ‘in this way learning from women is an antidote to centuries of ignoring women’s ideas altogether or having men speak for women.’⁴⁷⁷ Long quotations allow successive researches in this field to draw on the original testimony of my interview participants and to see first-hand account of the judge’s own perceptions on what influences his or her decision-making.

This chapter provides an account of the qualitative research method underpinning the material presented in the following chapters. It acknowledges that while, like all methodologies, there may be limitations with this approach, its benefits outweigh the dangers. This is particularly so when it is used to compliment other forms of research on gender and judging. The chapters that follow will present the

⁴⁷⁶ Kerwin and Rubenstein (n460) citing Reinharz and Davidman (n475) 126.

⁴⁷⁷ Reinharz and Davidman (n475) 19.

material obtained in the interview series described above, first by looking at the impact that gendered experiential knowledge has upon the individual judge's decision-making, and then by exploring its effect on collegiate judging.

PART III: PERSPECTIVES ON THE IMPACT OF GENDERED EXPERIENCES

Part I of this thesis set up the theoretical case for the proposition that gendered experiential knowledge has the potential to impact upon judging. Part II explored the different methodological approaches to exploring this question. It argued for more qualitative interview based research in order to allow a fuller picture of the complexities, contradictions and often the ‘hidden’ influences of gendered experiences to come to the fore. Chapter 7 concluded by providing the methodological roadmap for the empirical research that underpins these final chapters.

Chapter 8 now explores the impact that life experiences, particularly gendered life experiences, have upon an individual judge’s perspectives when judging. It begins by examining judicial perspectives on professional experiences – how these might shape perspective and approach, and how professional trajectories, even for those who rise to the top of the legal profession, can be profoundly influenced by gender. It then turns to the question of judicial subjectivity – how much of judicial decision-making is affected by a judge’s perception of ‘common sense’ or his or her own ‘social awareness’. Closely related to this enquiry, is the question that finds focus in the final part of Chapter 8 – how do personal identities, and in particular, experiences shaped by gender identity, colour the subjectivity of the judge? This final section will explore a spectrum of opinions offered by interviewees – highlighting some of the dangers, such as identity determinism, that result if too much importance is placed upon gender identity in judging. It concludes by looking at interview responses that felt that gendered experiences could helpfully inform judicial decision-

making. This was particularly so when the perspective brought by the gendered experience was one that had been previously marginalised or excluded from the dominant perspectives that have hitherto informed judicial decision-making.

Chapter 9 takes a step back and looks at appellate courts as a whole. In recognising these courts as collegiate institutions, it argues that it is important to consider the interactions amongst judges, and the impact that diverse gendered experiences have upon these interactions. When diverse perspectives are held amongst the collective, better judicial reasoning may result. This is because when courts are operating in a ‘good collegiate’ fashion, the interaction between the different perspectives held by its members has the potential to challenge normative biases, unearth subconscious bias, and hold to account the positionality (a judge’s standpoint) of each member of the court. Through these interactions, the court as a whole has a greater opportunity to move close to impartiality, as the partiality of each member is exposed and challenged. Chapter 9 recognises that ‘good collegiality’ may not always occur in multi-member courts. Good collegiality depends upon the judges’ willingness to participate in collective deliberations; their ability and willingness to expend equal amounts of intellectual input into the decision-making process; and mutual respect amongst judicial members so that when they interact with each other they see their colleagues as equals, with perspectives that are well informed and valuable.

Part III concludes with some preliminary thoughts on the application of the findings of this thesis – that gendered experiences matter – to judicial appointments processes. While it will not prescribe a particular process, nor will it fully critique any of the approaches currently used in the focus jurisdictions, it does provide three considerations that must be born in mind when assessing whether an appointments

process can enhance the gendered experience of a court. The first condition is that diversity is a collective consideration, relative to the existing composition of the bench, so that in order to promote true judicial diversity an appointments process must look to the court as a whole when appointing new judges. It should consider the existing scope of experience and give weight to those experiences that are currently marginalised or excluded from the current bench. The second consideration is to interrogate the concept of ‘merit’ and recognise it as a socially subjective assessment. Due to this subjectivity, careful attention needs to be given to the criteria used to assess merit and to consider how these criteria encourage or discourage diversity in appointments. Finally, Chapter 10 concludes by urging the ongoing recognition of gendered experience as pluralistic. In order to have a diversity of gendered experiences, we need to have a range of women on a court. Care needs to be taken to ensure that the experiences of women who have been most marginalised from judicial appointment processes are not overlooked by focusing solely on gender as a single-axis identity marker. The intersection of gender and other identity markers, such as race and socio-economic status, may result in a much richer spectrum of gendered perspectives, but will not be fully captured by appointment processes if the focus is just to appoint ‘women’, without looking at whether these women truly have diverse gendered experiences to offer the court.

CHAPTER 8: EXPERIENCE SHAPING INDIVIDUAL PERSPECTIVES

The life of law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.⁴⁷⁸

What does it take to be a judge? What experience is necessary or desirable for a person to have in order to fulfil the judicial function? This chapter tests some of the theoretical challenges presented in previous chapters about what the role of the judge is – what characteristics should they demonstrate, or not demonstrate – when performing their role? In light of the theoretical base established in Chapter 3, this chapter, informed by qualitative empirical research, takes a deeper look at the question of what it means to be impartial: is this the same as being neutral? To what extent do judges feel that their personal experiences impact the way that they decide cases? How does the experience of being an ‘outsider within’ impact upon the way that judging is done?

This chapter explores the extent to which senior appellate court judges consider that ‘experience’ impacts upon their decision-making. Relevant judicial experience can take many forms, as the responses set out in this chapter will demonstrate. However, it is clear from the interviews that there has traditionally been a preference for, and prioritization of, particular types of experience, namely: time spent practising

⁴⁷⁸ Oliver Wendel Holmes, *The Common Law* (Macmillan 1887) 3.

as a barrister or an advocate. When interrogated, these ‘preferred’ experiences reveal deep-set gender bias.

The first part of this chapter explores the variety of judicial responses to questions about the impact that professional experience has upon decision-making. Practical legal experience, usually gained by spending time working as a barrister, solicitor or as a judge in a lower court or as an ‘acting judge’, has long been one of the criteria for appointment to the senior appellate courts in South Africa, the United Kingdom and Australia. However, can other forms of legal experience, such as a prior career in academia or working in the ‘third sector’ be seen as sufficient preparation for life on the bench? As this chapter will demonstrate, there has been significant stratification of legal work along gender lines. This is true not only in relation to the legal sectors men and women practise in, but also to areas of legal specialization. How do patterns of gender-stratification within the legal profession impact upon how the notion of what is the most ‘relevant’ legal experience prior to appointment? The consequence of ‘career breaks’, particularly ‘career breaks’ taken in order to fulfil caring responsibilities, also has, according to many interviewees, a marked impact upon the type of professional experience lawyers have.

The quotation above from Holmes suggests that ‘professional experience’ is not the only form of experience necessary for judicial decision-making. The second part of this chapter will explore how a large proportion of interviewees consider ‘extra-legal’ factors, namely common sense and social awareness, play a critical role in their decision-making processes. When asked ‘*How much of a role do you think ‘social awareness’ or perhaps ‘common sense’ plays in the work you do as a judge?*’ all participants accepted that it played some part, while many considered that it mattered a great deal. This section also breaks down the concepts of ‘social awareness’ and

‘common sense’, as many participants during the interviews did, revealing the inescapable subjectivity of these concepts.

After opening up discussions in light of Holmes’ proposition that judicial enquiries into legal problems at an appellate level ‘cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics,’ interviewees were invited to reflect upon what ‘extra-legal’ experiences or ‘non-technical’ factors inform their decision-making. The third part of this chapter considers this in greater depth. It is informed by participants’ responses to questions such as *‘Have you noticed that any other factors influence how judges approach legal problems? Ie, age, training, religion, gender, sexual orientation or family status?’* and *‘Have you ever felt that an ‘extra-legal’ factor in your own background (for example, a personal experience) has been brought to bear on your perspective in a case?’* It will particularly focus upon the extent to which interviewees considered ‘gendered experiences’ to impact upon their decision-making.

Two additional themes are explored throughout this chapter. The first will look at the continuity or discontinuity in the personal narratives exposed by the interviews. As the chapter will demonstrate, the value placed by certain participants on particular forms of ‘experience’ was not uniform. For example, while some interviewees expressed the important impact that their own personal story played upon their approach to decision-making, this did not always translate to an acknowledgement that ‘gendered experiences’ were important. Indeed, some of the men interviewees did not consider that they had ‘gendered experiences’, which provides a telling insight into the pervasiveness of male-normativity in some of the interviewees’ understanding of judicial experience.

Second, Holmes' observation that 'law embodies the story of a nation's development' was starkly reflected in many responses. In particular, the South African judicial experience, which has been explicitly focused upon 'transformation' since democracy, appears to have led to a greater understanding amongst the South African participants of the impact of one's life story and background on their interpretation of what 'law' is. The fluency with which South African participants spoke of the importance of diversity was markedly different from that of many of their Australian and English counterparts.

1. Professional Experiences

Practical legal experience, usually gained by spending time working as a barrister/advocate, solicitor/attorney, or as a judge on a lower court, has long been a criterion for appointment to the senior appellate courts in South Africa, the United Kingdom and Australia. In Australia, legislation limits appointment to the High Court of Australia to those who have either served as a judge on another Australian court, or have been enrolled as a barrister or solicitor for at least 5 years.⁴⁷⁹ Justices of the Supreme Court of the United Kingdom must have either held high judicial office for a period of two years, or have been a qualified practitioner and gained experience in law for the past 15 years.⁴⁸⁰ The terminology used for eligibility for appointment to

⁴⁷⁹ High Court of Australia Act 1979 (Cth), s 7.

⁴⁸⁰ CRA, s 25. Section 25 was amended by the Tribunals and Enforcement Act 2007, ss 50-52 to include the second pathway to appointment. Namely that an applicant 'must satisfy the judicial-appointment eligibility condition on a 15-year basis, or have been a qualifying practitioner for at least 15 years. A person satisfies the judicial-appointment eligibility condition on a 15-year basis if he [or she] has been a solicitor of the senior courts of England and Wales, or barrister in England and Wales, for at least 15 years; and has been gaining experience in law during the post-qualification period. ... The meaning "gaining experience in law" is set out in section 52(2) to (5) of the Tribunals and

the Constitutional Court of South Africa is much broader. It states that '[a]ny appropriately qualified man or woman who is a fit and proper person'⁴⁸¹ may be appointed. While the historical reasons for the use of broader language will be explored later in this chapter, suffice to say that 'appropriately qualified' has tended to elevate those with professional legal experience.

The two questions were posited to interviewees in order to investigate the impact of professional experience respect:

Do you think your professional experiences before coming to the bench have had an impact upon the way in which you perform your role as a judge? If so, in what way?

In your experience to date, do you find that judges from other professional backgrounds tend to approach legal problems in different ways?

The responses from these two questions provoke a range of insights into what types of professional experience constituted beneficial training for a judicial appointment, and the manner in which different types of professional experiences subsequently mark a judge's work style. This chapter demonstrates that some judges prioritise certain forms of professional legal experience, such as time spent working as an advocate appearing before courts, over other experiences as necessary training for a judicial career. Others disagreed, and felt that particular professional experiences, such as that gained working as an academic lawyer, was currently undervalued by both appointment committees and the judicial culture in general. They also felt that the prioritization of certain forms of legal training – such as a career at the Bar or judicial experience in a lower court – had profound gender implications. Many interviewees

Enforcement Act 2007 and relates to a period engaged in law related activities.' See: The Supreme Court, 'Appointments of Justices' (*Judicial Committee of the Privy Council*, 2014)

<<https://www.supremecourt.uk/about/appointments-of-justices.html>> accessed 15 December 2014.

⁴⁸¹ SA Constitution, 174(1).

pointed towards the need for professional legal experience in diverse areas of law. Some perceived that their lack of experience in certain areas was in fact an asset on the bench: for example those who had been commercial barristers engaging as a judge with criminal law problems. They felt their inexperience sharpened their ability to interrogate the law and its underlying principles – coming to the problem as an ‘outsider’ rather than a seasoned player.

a. Professional Background of the Judiciary

Statistically the senior appellate judiciary in the UK, South Africa and Australia come from a relatively homogenous professional legal background – namely, the Bar. As of 1 April 2014, all 38 members of the Court of Appeal of England and Wales nominated ‘barrister’ as their pre-appointment profession.⁴⁸² The online biographies of ten of the eleven current sitting members of the UK Supreme Court of Appeal note that their primary career before judicial appointment was as a barrister.⁴⁸³ While not as uniform as the UK experience, senior judges in Australia and South Africa also tend to have spent the bulk of their pre-judicial career working as a barrister or an advocate.

The participants in this study, compared to the averages noted above, were more diverse in terms of their professional background. Of the 30 judges interviewed, 20 had been elevated to their current judicial post from a lower judicial post. Six had previously practised as barristers before their current judicial appointment, one came directly to the bench from practice as a solicitor, and three had been working full time in academia and law reform immediately prior to appointment (Table 5).

⁴⁸² ‘Courts Diversity Statistics 2013-14’ (n116).

⁴⁸³ The Supreme Court, ‘Biographies of the Justices’ (*Judicial Committee of the Privy Council*, 2014) <<https://www.supremecourt.uk/about/biographies-of-the-justices.html>> accessed 15 December 2014.

Table 5:

	Judicial Post	Barrister/ Advocate	Solicitor/ Attorney	Academic/ Law Reform/ Bureaucratic
Australia				
Men	3	1	1	
Women	2	2		2
United Kingdom				
Men	4	1		
Women	3			
South Africa				
Men	4	2		
Women	4			1

More insight is gained by taking an extended look into the interviewees' backgrounds. Judges, like many other professionals, will not necessarily spend their entire careers prior to appointment doing the one job. Career changes are frequent, and many of the interviewees noted that they had also held a variety of positions, both in and out of the legal profession, before their appointment. For example, in the UK, Supreme Court Justice, Jonathan Sumption was a Fellow in History at Magdalen College for four years before re-training as a barrister. In Australia, High Court Justice Susan Kiefel chose not to go to university after completing her secondary schooling, but rather trained as a legal secretary and worked in this role for a number of years before taking the extraordinary step of reading for a Masters in Law at Cambridge University, despite never having obtained an undergraduate degree in any field. Following this she was then called to the Bar.⁴⁸⁴ Many of the interviewees spoke of an eclectic career path, particularly those who, in their time, faced explicit or implicit barriers to their participation in traditional fields of legal practice. This was most marked in the professional experiences of Black South African Judges who were actively excluded

⁴⁸⁴ See Susan Purdon and Aladin Rahemtulla (eds), *A Woman's Place: 100 Years of Queensland Women Lawyers* (Supreme Court of Queensland Library 2005).

from the educational and professional opportunities open to their White colleagues. Another notable trend in South Africa and Australia was the tendency of lawyers to have spent parts of their professional careers working as a solicitor or attorney before moving on to become a barrister or advocate.

b. Impact of diverse professional experiences

So what did those interviewees who had pluralistic careers, and those who had not, think about the impact of diversity of professional legal experience? When reflecting upon their own experiences, most felt that a variety of professional backgrounds in law was beneficial to the court as a whole.

One Australian judge noted that she had spent a significant amount of time working as a commercial solicitor before going to the Bar. She felt that this gave her a greater understanding of the impact that any orders she made would have upon those responsible for the conduct of the case.⁴⁸⁵ Several of the women interviewed had spent significant time in academia before their appointment to the bench. One South African woman judge considered that there had been a marked effort in the 1990s, following South Africa's democratic transition, to draw in women from the academy both to increase the number of women judges and to 'draw in more progressive people who hadn't been at the Bar' during the apartheid years.⁴⁸⁶ Generally, judges with an academic background felt that this gave them an important skill set that complemented those of their colleagues who had exclusively worked in practice prior to appointment. Another female interviewee considered that her time as an academic impacted positively upon both her technical approach to cases, as well as the inter-personal skills she brought to the role:

⁴⁸⁵ AUST026, 65-77.

⁴⁸⁶ SA020, 59-63.

I may be slightly less pompous and self-important in my presentation. That doesn't mean to say that I'm not just as egotistical and conceited as anybody else might be, but I probably come over slightly differently. People tell me that, and it may be because I spent 18 years teaching 18 to 21 years old and others, and there is no point in pomposity and self-importance when you're dealing with students. Also, of course, it does teach you an awful lot about certain sorts of people, because you're leading a very different life from a court-based life. And it probably makes me want to go and read around some topics more than others necessarily would and to introduce contextual material into my judgments (which I think is probably something women do anyway) more than some people would.⁴⁸⁷

Another Australian interviewee felt that her time in academia helped her to think more broadly about law, the development of law, and how the case before her fits into, what she described as, the 'bigger picture'.⁴⁸⁸

Most of the judges who did not have an academic background spoke favorably of the contribution that their academic colleagues (both women and men) brought to the court. They considered these colleagues to have a distinctive judging style, and that this was a positive contribution. One Australian judge, who did not have an academic background, spoke of the mutually reinforcing relationship between academic and practice experiences:

There is no doubt that they initially approach it differently, especially those who have come from academia or principally from a non-advocacy background. That's not to say it's wrong. It's just different, but I think over time there is a merger of approaches. That is not to say I haven't learnt from *them*. I mean there is one judge who's recently retired from this court who came from academia...sometimes he had an advantage, he didn't have the baggage that others had ...[He was] all the more likely to give you better...more direct advice too. ...I think it's just that they are not shackled by that 'on one hand and the other hand the better view is x', they are not scared about expressing a view.⁴⁸⁹

⁴⁸⁷ UK004, 155-66.

⁴⁸⁸ AUST010, 50-5.

⁴⁸⁹ AUST026, 102-22.

Another Australian judge considered that his colleague's academic experience gave a broader frame of reference, and arguably more contextual awareness, from which to consider the legal questions before the court:

[My colleague] brings a very different perspective...having been an academic and a law reformer...that's just a different view of the world...there's a certain framework within which you have to operate as a judge and you can't write policy obviously, but I just think that's a very different background from a person who was only ever a barrister all their lives. ...if you've only ever been 'this is my advice and this is my argument', ...that is a different frame of reference.⁴⁹⁰

Interviewees were not uniformly supportive of the idea that all legal experiences were necessarily equal. One South African Judge who had a long career in academia before appointment to the bench felt that while time in academia gave some advantages, it was also a handicap:

I think that as an academic one is not equipped to practice in the law and a judge needs a great deal of familiarity with legal practice. I didn't have that. ... On the other hand I am certainly better equipped to do research on the law on my own. I'm much better equipped to write than most practitioners would be. I think I have a greater knowledge of societal needs than the average barrister would do but the disadvantages actually I think far outweigh the advantages!⁴⁹¹

This same interviewee expressed deep concerns that a shift too far away from the traditional channels of recruitment posed a danger to the quality of candidates selected for appointment. She spoke strongly of the need for transformation of the South African bench, but warned of what she saw as 'a rush to change' too fast.⁴⁹² She felt it was a difficult issue in South Africa, particularly in terms of racial transformation:

⁴⁹⁰ AUST010, 223-37.

⁴⁹¹ SA020, 37-49.

⁴⁹² SA020, 304.

...you couldn't in 1994 or 1995 not immediately have Black lawyers on the Bench. There were of course very competent able Black lawyers who were brought on immediately. In the late 90s a number of experienced very good Black judges were appointed. More recently the pool of people with that sort of experience has dwindled, it hasn't grown. And so we are left with the dilemma. Of course you want to right the balance but there has not been sufficient notice taken of actual ability to resolve a dispute between the litigating parties or to come to a fair conviction and impose a fair sentence. ...And so I think that the public has been largely harmed. It's the people who come before the courts who are harmed.⁴⁹³

This interviewee highlighted a concern that ran throughout a number of responses – the desire for the bench to have a broad range of experiential knowledge to draw upon, but also the need for the bench to remain technically skillful. The two competencies are far from incompatible and arguably appointments have traditionally prioritized the technical skills of a candidate with little regard for the experiential knowledge that a given candidate might bring to the bench. This was the view of one of the South African interviewees. She believed fundamentally that 'law is a craft' and that one of the important abilities of this 'craft-person-ship' was 'to do the task of law, to be able to be a good technician, to understand legal rules, to work with the law and have a great knowledge of it.' However, she was concerned that too great a focus upon technical excellence 'flattens the range of qualities that you would require in a judge'. She believed that the qualities of excellence that were required in a judge were sometime 'qualified by other characteristics' such as 'an ability to understand and grasp social context, to be able to have a grasp for what the proper role of the court is in a modern constitutional democracy, to be wise in a way that crafting excellence is used.'⁴⁹⁴ The two interviewees above highlight the very fine line to be drawn in assessing relevant experience for judges – the fine line between focusing too much on

⁴⁹³ SA020, 307-22.

⁴⁹⁴ SA014, 121-38.

technical excellence at the expense of other skills, but also dangers associated with appointing candidates who do not possess the requisite technical skills to judge.

As highlighted above, numerically speaking, in all three jurisdictions studied, barristers make up the majority of the bench, although there is a rising trend for the appointments of attorneys in South Africa (the racial implications of this will be discussed further below). Are barristers or advocates prioritized in the appointments process? One judge, speaking of the English experience noted, ‘you have the Bar which is a very self-contained, rather priestly caste which has been fixated on judicial appointments as the ultimate crown of one’s career for very, very many years.’⁴⁹⁵

None of the interviewees were adamant that in order to be a good judge a candidate had to have previous experience at the Bar. However, several interviewees saw a great advantage in advocacy experience prior to judicial appointment. Two judges, who had both had long and distinguished careers at the Bar, highlighted the benefit of having spent time working in independent practice as a barrister. The ‘independence’ of barristers – who work in ‘sets’ or ‘chambers’, without an employer, and bound by the cab-rank rule (whereby they must take each suitable brief as it comes to them) was seen by many as one of the cultural advantages of being at the Bar prior to judicial appointment. However, they also recognized that this independent mindset was not limited exclusively to barristers or advocates. Other legal professionals, for example, legal academics, might feel a strong sense of intellectual independence. More so perhaps than that of a practitioner who must argue on the side of their client in a particular case. A South African interviewee noted this:

⁴⁹⁵ UK007, 133-7.

The notion that only barristers or only advocates can be competent judges is a bad one. Although what is truthful within it is that one of the precepts of being a barrister and an advocate is independence. ... I would say that provided the academic and the attorney or solicitor has that commitment and that understanding of institutional independence, then that is necessary too.⁴⁹⁶

Another related benefit acquired through training at the Bar, according to one interviewee, was the familiarity of working alone under pressure:

There is, I think, still a considerable advantage if the appointee comes to the Bench from a background that is an active independent practice under a degree of pressure, because the fact is you can't be a judge these days without recognizing that there is a lot of pressure to get through work. ... I do not think that no solicitor, no academic, will make a good judge. You can't make those absolute assertions.⁴⁹⁷

On a technical level, interviewees also highlighted that often barristers will have superior knowledge about technical rules of evidence, which particularly assist appellate court judges tasked with reviewing decisions taken by trial judges. For example, one Australian judge noted that there were unique skills that solicitors and academics brought to the Bench. However barristers and advocates tended to have an advantage when it came to the understanding and application of technical rules of evidence and procedure:

I don't think most solicitors hit the ground running. This isn't actually about elitism as barristers, it's about the fact that barristers have to acquire a specific skill set, and to become senior counsel you've got to have acquired that skill set which a degree of expertise, as well as an understanding of technical rules of evidence and procedure that you can administer like that [*clicks fingers*].⁴⁹⁸

⁴⁹⁶ SA005, 308-15.

⁴⁹⁷ AUST005, 67-78.

⁴⁹⁸ AUST025, 173-219.

Another argument often used to support a claim that training as a barrister was superior experience, was that barristers, at least traditionally, have been able to resist the pressure to specialize in a particular area of law, more so than other areas of the profession. While this may be true in smaller jurisdictions, it is questionable whether this holds true for most, if not all barristers practising today. However, even if it were, and even if it were possible, are judges better placed when they are experts in a particular area of law? One interviewee felt that it was not the particular area of individual specialty that mattered, but rather that there was a range of specialism on a court, particularly at the senior appellate levels. She thought that it:

...is good for the judiciary [to have] a diversity of professional background in the law and specialism. ...it's a good idea if we have people who have some experience in the less prestigious and money-making areas of the law, rather than in the more commercial areas. Particularly, we do a lot of public law, so that is probably, I'd say, almost as important a dimension of diversity as gender.⁴⁹⁹

A few interviewees highlighted what they saw as the advantage of coming to a particular area of law 'fresh'. They felt that their inexperience in the particular subject matter allowed them to 'ask good questions because he (or she) is new to it and has the intellectual capacity to test the question and so on.'⁵⁰⁰ The 'fresh' judge was able to deeply interrogate the questions at play, and open up some of the idiosyncrasies and inconsistencies in the area that may be taken for granted by those who were seasoned practitioners. In this way, some interviewees saw the judge who was an 'outsider,' in terms of subject specialization, as in a position to apply a sharper analytical lens than the experienced 'insider'.

⁴⁹⁹ UK004, 284-9.

⁵⁰⁰ AUST010, 152-5.

The discussion above highlights that there are varying opinions on what the ‘best’ form of legal experience prior to judicial appointment is. Clearly, most of the interviewees felt that there were strengths and weaknesses in each prior professional path, and many were willing to admit that judging involved such a unique skill set that ‘judges very much learn on the job.’⁵⁰¹ As one Australian judge put it:

I think that whatever your background when you are first appointed as a judge you’ve got to learn to be a judge. You’ve got to recognize that it is not a continuation of your previous professional experience.⁵⁰²

However, what is also apparent from the interviews is that not every professional path has been equally available, or is equally participated in, by all judicial candidates. This next section will consider this in light of what can be described as the ‘feminisation’ (ie, the ‘clumping’ of women) in various forms of legal professional experience; as well as the structural barriers which have historically limited (and in some cases continue to limit) the participation of certain groups in certain fields. Are these areas of paid and unpaid work, where ‘outsiders’ tend to congregate, devalued in the eyes of those who assess what experience is necessary in order to be a good judge?

c. Equal Access to Professional Experience?

In each of the focus jurisdictions – South Africa, Australia and the UK – there are marked gender patterns in the professional career paths of lawyers. Chapter 1(c) highlighted these gendered patterns in statistical terms. In addition, general statistics

⁵⁰¹ AUST010, 116-7.

⁵⁰² AUST005, 59-67.

in each of these jurisdictions demonstrate that women tend to have ‘interruptions’ to their paid working lives in order to undertake unpaid caring responsibilities.⁵⁰³

The 12 women interviewed in this study reflect these trends. Six had spent significant periods of their careers working as full-time academics. Only two female interviewees had spent the majority of their professional lives pre-appointment working as barristers or advocates. In addition, 10 of the 12 women interviewed had children, and most of these women undertook ‘career breaks’ (of varying durations) in order to care for children.

A number of the women interviewed spoke about the impact that the ‘double burden’ – juggling both professional and family responsibilities – had upon women’s professional career progression. One South African woman spoke of the lack of structural support in ‘traditional’ areas of practice, namely the Bar, for women with children:

Part-time work, taking time out, is not smiled upon by the traditional notion of what a career path should look like. ... It is quite difficult to do at the Bar. Maternity leave doesn’t exist at the Bar. ... So there’s just the sheer physical difficulty of dealing with both sides of it and then there’s also the personal choice, which I absolutely endorse for women, they don’t want to spend the early years of their children’s lives working 14 hour days. ... and so if you do want to take more time not to work but to parent, it damages you in this career trajectory which people see as the model career trajectory, so I think that needs to be unpacked.⁵⁰⁴

Another South African woman felt that these structural barriers and inequities at the practice level were more telling of judicial gender inequality than any explicit bias or discrimination at the appointments process level. She considered that this was the

⁵⁰³ See: Wallace (n129); Kirsten Whitworth and others, *Transformation of the Legal Profession* (Centre for Applied Legal Studies, 2014); Karon Monaghan and Geoffrey Bindman, *Judicial Diversity: Accelerating Change* (Report for Sadiq Khan, Shadow Secretary of State for Justice, 2014).

⁵⁰⁴ SA014, 563-79.

critical point of enquiry in order to ensure that projects of transformation worked towards the appointment of strong women candidates:

...there is a strong belief that women are, even today in South Africa, discriminated against.... I actually think that there is a problem with women making it to the top echelons of the profession – I think there is a glass ceiling in place – but I believe that the answer to that lies in finding out why it's happening.⁵⁰⁵

She spoke of the high attrition rates of talented women in law, and attributed it to larger societal patterns that serve to undermine women's professional advancement:

For a long time I [held a senior academic post at a prestigious university] and there were more women graduates than there were men and they were always in the top ranks. You would find that a majority of the outstanding students were women, but find out where they are five and ten years hence and it's very hard to see them. And it's not a phenomenon I could explain: it's a societal thing. I think that South Africa is still a very conservative society and that many women, despite the networks of domestic help here, simply once they have children give up work and feel that they *have* to give up work. And then find it very hard to get back in. And economic circumstances haven't really changed that. With far more women from rural backgrounds or impoverished backgrounds graduating you should see that they would need to continue working and yet they haven't broken the barriers. They aren't there in numbers, they are not in the attorney's profession, though more so. I think it's easier than being a barrister and they are not at the Bar, and they are certainly not the leading lights at the Bar.⁵⁰⁶

An English woman judge also considered that the lack of work-life balance, coupled with gendered domestic patterns, served to disadvantage women when compared to their male colleagues:

... it doesn't matter what steps you take, you won't get greater diversity in the profession and you won't get greater diversity at the senior levels of the profession and you won't get greater diversity in the judiciary until you address the quality of life, and that means the whole of society has to address it: politicians, business people. ... I think we all have to work together to get quality of life. It is the women who in this building are the

⁵⁰⁵ SA020, 138-49.

⁵⁰⁶ SA020, 155-70.

ones that protest about the ridiculous hours that we work. The ridiculous hours that we work will put off top people, top women from staying in the profession and applying to become judges and it's only when we get our critical mass that we'll be able to address the quality of work because the men have this macho, you know... well it's alright for them. I mean they've got a wife to cook the turkey or you know or a partner or something but if I'm not home to cook the turkey it doesn't get cooked. If I'm not there to make sure the Christmas decorations are all sorted, they don't get put up. The men have the luxury... most of the men have the luxury of knowing that they can work all hours in this building and when they get home their dinner will be on the table and there will be loo paper in the bathroom.⁵⁰⁷

These interviewees highlighted the difficulties that they felt many women with children experienced in practice and considered that this has negative implications upon judicial appointments processes. In particular, several interviewees felt that appointments processes did not adequately reflect women's professional life patterns, but rather, was tailored to a male hegemonic conception:

I think that a lot of this is this hegemonic concept of merit that if you have not been a practitioner for a long period of time at the Bar etc...you can't be excellent. The problem about women is the double shift. There's the problem of getting in, in the first place, there are all sorts of challenges for women to actually have been there and for many women they follow a less traditional career pattern. So then if your excellence is unexamined and is seen in these terms of, you know – many years of experience coupled with this traditional background – women are not going to rise to the top.⁵⁰⁸

Contrastingly, one woman interviewee had little sympathy for this hurdle. She felt that 'it's a choice women must make. They either push themselves and get there or they don't.'⁵⁰⁹ Chapter 10 of this thesis will further interrogate the impact that gender-bias norms might have upon appointment processes. However, for present purposes this point is raised in order to highlight the gender-patterns of professional experience.

⁵⁰⁷ UK026, 500-26.

⁵⁰⁸ SA014, 441-9.

⁵⁰⁹ SA020, 180-2.

Often, ‘professional experience’ is conceptualized in ostensibly neutral terms that are, in fact, deeply loaded with historical and cultural bias. For example, the quotation below is from a senior male member of the English judiciary. He considers that career breaks, of whatever kind, are detrimental for legal professional development. In his terms, they serve to interrupt the ‘indefinable process of osmosis, by which you understand current developments in law’ and that from the career breaks he had seen colleagues take ‘they just didn’t work’.

Judge: ...I think it is true that if you take several years off it is almost impossible to get back into the swing. This happens to men too actually. There have been a number of very well recognized cases in which extremely successful male barristers late in their career instead of going to the Bench decide to go into industry. ...after that, they sought to come back to the Bar after a break, and it was a break doing something the experience of which one would have thought was valuable and yet when they came back that sort of indefinable process of osmosis, by which you understand current developments in the law, somehow had stopped working. And it just didn’t work. Now I would think that something like that must happen to a woman who takes, say, five years off.

LH: ...so you think it has an impact on their technical ability?

Judge: Yes, I think it does. I mean so much of legal practice is a matter of accumulating experience and a sort of instinct for things that are not learnt but felt.

...

LH: So you think it’s the type of thing that people do during their career break that matters?

Judge: Yes, I mean, I think that child rearing or running banks is a very different activity and it seems to block the process by which you absorb this, you know, this instinct for how judges are seeing things now, which isn’t necessarily the same as they saw if five years ago, even if they are applying the same rules of law.⁵¹⁰

⁵¹⁰ UK007, 510-651.

This insight was put to subsequent interviewees and attracted a great deal of concern and comment, particularly from women interviewees. An Australian judge who was also a mother felt that a period ‘off work’ in order to raise children had the potential to improve a judge’s mediation skills. She felt that overly combative advocacy styles were unhelpfully characteristic of practice in common law jurisdictions, and parenting experience trained a person in more productive mediation techniques:

...one possible difference about having greater representation of women in our highly combative profession is that they introduce an alternative paradigm for solving conflicts which is more mediatory. Women are used to sorting out a fight at home between the kids...if you were just treating them as in a combat that would just be oxygen on the fire!⁵¹¹

For a senior female South African judge, the assessment by the male judge, quoted above, of what ‘counts’ towards professional experience was, as she saw it, the key contributing factor towards women’s low numerical representation on the Bench:

Judge: ...you’re not asking the double shift question which I do think is quite a material factor in women not making this pool of excellence and because...you may find lots of it...the process of getting to the Bench is a social process. We are at the point where women were graduating in sufficient numbers to be at the moment of appointment and where one would expect seeing them, and of course in some jurisdictions like Canada and the US you are seeing it, but in others like Australia and the UK and here, you are not. ... in Australia and the UK, you’re *well* through that. I do think a factor there is the ‘second shift’. This unexamined assumption about merit and which requires, frankly, a traditional career trajectory which genuinely doesn’t fit with any kind of double shift responsibilities. It is interesting in South Africa how many of the senior women do not have children. Some of us do but there are still a significant number who don’t.

LH: ...Why does the ‘double shift’ impact upon careers?

⁵¹¹ AUST006, 298-305.

Judge: Because it's very difficult to work flat out when you've got a six-month old squalling all night long!⁵¹²

The same judge also raised an important point about the intersectional nature of barriers facing women in practice. She highlighted the extra layer of disadvantage experienced by Black women in South Africa:

Now maybe with regard to African women, we haven't reached that moment in relation to the social process production of the pool ...I was at the end of women being a very small number and a couple of years following my graduation, in fact I think early 80s, that's 30 years ago, women started graduating in large numbers. And 30 years is a reasonable...that is about the timeframe I was talking about for the Bench to change. Whereas African women, when I was teaching in the early 90s were still a minority. It's a different minority for them, so they're at a 20-year social process phase.⁵¹³

The intersection between race and gender in South Africa, and its impact upon the type of professional experience a judicial candidate may or may not have, takes on an extra dimension of complexity in light of the historical barriers traditionally faced by Black practitioners, and also new affirmative action initiatives that draw talented Black lawyers to the attorney's profession, rather than the Bar. Under the Black Economic Empowerment ('BEE') Programme,⁵¹⁴ South African companies employing more than 50 people are legally required to design and implement plans to improve their workplace demographics. In the legal profession, this legal requirement applies only to attorneys' firms, and not advocates (who, like in Australia and the UK, are generally 'self employed'). One interviewee noted the impact that this has upon the racial stratification of the legal profession, creating an incentive for attorney firms subject to BEE laws to 'headhunt' young Black lawyers – both men and women:

⁵¹² SA014, 530-559.

⁵¹³ SA014, 542-50.

⁵¹⁴ See: Broad Based Black Economic Empowerment Act 2003 (South Africa).

...let me give you an example: at UCT [the University of Cape Town], lets say you have a class at UCT that's 50:50 or 40:60 and then let's say in your top ten students you've got five who are Black or three who are Black. Those three will have been headhunted before they've even reached their final year.⁵¹⁵

When combined with the historic disadvantage that Black practitioners faced, making it far more difficult for them to enter the advocate's profession rather than the attorney's profession (where, even during apartheid there were opportunities for Black attorneys to practice in 'Black' firms), this leads to a higher proportion of Black practitioners continuing to practise as attorneys rather than advocates in South Africa. As another interviewee noted, any system that prefers advocates' experience over other forms of professional legal experience discriminates heavily against Black appointees. She considered that at this stage of South Africa's transformation, drawing from the attorney's profession is 'the only way that Black lawyers get on to the bench.'⁵¹⁶ Interviewees from Australia and the UK did not make this explicit link between professional experience and intersectional disadvantage. However, with the low level of Black and ethnic minority representation at the senior levels of the Bar in at least the UK,⁵¹⁷ the same hurdle remains if the experience of a barrister is seen as preferential experience for judicial appointment.

The figures in Table 5 also highlight that it is commonplace for appointees to senior appellate courts to be elevated to that position from a judicial post at a lower

⁵¹⁵ SA021, 295-306.

⁵¹⁶ SA020, 53-4.

⁵¹⁷ For example, in 2012 Black and Ethnic Minority (BME) candidates comprised 11% of the Bar of England and Wales, but only 5.5% of Queens Council: Bar Standards Board (n97), 44. No official statistical data is collected in Australia on the racial or ethnic composition of the Bar in Australia, however, from anecdotal accounts it suffers from similar rates of under-inclusion of BME barristers.

level court. This in itself poses significant problems for the transformation of the senior appellate judiciary. For one, the lower ranks of the judiciary are only marginally more diverse than the senior ranks. Moreover, one interviewee highlighted the high degree of chance and circumstance at play for judges attempting to ‘stand out’ among their judicial peers.

It’s sometimes entirely a matter of chance. At High Court level you get the cases that are allocated and sometimes you are lucky, you get given cases that will then go on to the Constitutional Court. I was very lucky: as an acting judge I had two cases that went up to the Constitutional Court. That’s unusual but I was very fortunate to have that exposure. But other times you can work with people who are really competent, you can work really hard but you just don’t get the cases that are reportable because, by some toss of the dice those are not cases that come your way.⁵¹⁸

Do certain people get ‘luckier’ than others on the bench because of personal connections, particularly when it came to securing highly sought-after ‘acting positions’ on higher courts? One senior South African judge explained how ‘acting appointments’ are made upon recommendation of Judge Presidents of the various provincial courts. Currently all, save two, of the High Court Judge Presidents are men.

...[the difficulty for the] Head of the Appeal Court is that [he looks] to the High Courts for people to come and act here and you find that it is difficult to get people there to come here. [He will talk] to the head of a particular High Court and say ‘you’ve got so and so there; how is he or she’, ‘I’m considering an acting appointment here’, and the Judge President would for instance say ‘no no no just wait for that one you know he or she must get a little bit more experience and so forth’, so that is [his] dilemma in this court to do as much as [he] would love to do is because the Judges President tell [him] ‘no no no wait a bit, wait a bit’.⁵¹⁹

⁵¹⁸ SA021, 794-803.

⁵¹⁹ SA023, 294-307.

Interestingly, he also noted a reluctance of lower courts to ‘let go’ of good women judges. These courts also face gender imbalances, and in this interviewee’s opinion, this impacts upon who gets recommended for acting appointments:

In the High Courts we have still a huge imbalance. I mean, you go to Gauteng and if I take out a law report and I check judges and I say ‘oh my goodness, there are few female judges’... and what you must also remember is that the Judges President also wouldn’t want their female numbers to come down! But because they also have a difficulty in filling positions, they are actually the ones who should be bringing up more and more females to act in the High Courts and I think they are trying their best to do so. Insofar as getting candidates from the Bar, they are having a real difficulty because there aren’t many females practising as advocates. There are quite a number of them practising as attorneys. I suppose the difficulty might be the ten-year practice requirement to get as many as they *would* like. On the other hand a female may be practising in an area where there isn’t a broad practice in the sense of getting a variety of work in virtually all branches of the law. You will probably find they are doing mostly divorce matters, mostly criminal cases and so forth because of the area where they practise, and so Judges President might then think that they are not sufficiently qualified in a sense that they are not doing a broad range of work for them to be given to the Bench but they do; I think Judges President are doing their best.⁵²⁰

The first part of this chapter demonstrated that there were diverging opinions amongst the interviewees on what professional experience was necessary in order to be a good judge. Most interviewees were prepared to accept that there was not one ‘right’ way to obtain the professional experience necessary in order to judge. Indeed, many interviewees felt that a diverse array of professional experiences made for a stronger court. However, what was also clear from these interview responses was that professional pathways in law are not gender or race blind. Women, and particularly BEM women, experience the legal profession in markedly different ways to their male colleagues. This finding will be analysed again in Chapter 10 when this thesis turns to consider the intersection between diversity and merit in judicial appointments

⁵²⁰ SA023, 315-35.

processes. The next part of this chapter moves beyond professional legal experience to explore the impact that other life experiences had, in the opinion of the interviewees, on the judicial role.

2. Judging as a neutral or subjective exercise?

By now it is hopefully uncontroversial to say that judging in common law jurisdictions is more than a mere mechanical process. This is because law is both unavoidably and necessarily ‘open-textured’: unavoidably because ‘there is a limit, inherent in the nature of language, to the guidance which general language can provide’;⁵²¹ and necessarily because of the (human) fallibility of the legislature in its inability to accurately anticipate, and therefore precisely regulate, for every event that may arise in the future.⁵²² The common law method intensifies this imprecision through the application of the doctrine of precedent, which although it guides judicial choice through principle and incremental development of what has come before, nonetheless relies upon judicial choice. Lord Bingham spoke of the unavoidable human influence of the judge on the development of case law: ‘the inescapable fact is that [judges] do have to make choices, and unless superseded by Act of Parliament their choices determine what the law shall be.’⁵²³ The choices judges make in coming to a decision take many forms. A judge must draw inferences, interpret statutes, apply or distinguish precedents, give weight to certain facts and issues, and disregard others. All of these activities involve choice, or *judgment* on behalf of the judge.

⁵²¹ Hart (n266) 126.

⁵²² Ibid 128.

⁵²³ Tom Bingham, ‘The Judges: Active or Passive?’ (2005 Maccabean Lecture in Jurisprudence, Cardiff Law School, 27 October 2005) 15.

All of the judges interviewed accepted, to varying degrees that judging involves subjective assessments. This question was explored with participants by asking how they saw ‘common sense’ or ‘social awareness’ impacting upon their work. The proposition was intentionally put to interviewees in gender-neutral terms at this stage. While participants were later questioned on the impact of gendered experiences on judicial decision-making, this part of the interview series intended to explore the role of judicial subjectivity from a basis that was broader than gendered influences alone. It also served to open up a space for judges who may have been sceptical of any gendered impact on judging, to reflect on the subjectivity of judging without veering into what they may have perceived to be ‘dangerous’ identity politics.

One interviewee was particularly dismissive of the idea that judging was, could or should be a neutral exercise and that the individual judge was personally removed from the process of judging. He thought that social awareness or common sense was ‘elemental; it’s the start of everything else. It’s possibly the first post and possibly even the last post.’ When it was put to him that judging was not subjective, but simply applying the law in a technical fashion he replied:

That’s such nonsense. Complete nonsense. No, the law is there and you have both an institutional and a principled normative commitment to it. Your role is distinct from someone offering parliamentary advice or political policy-based decision-making; it’s very distinct. And it’s distinct because of legal precepts. But you start and end with common sense and social awareness. It’s absolutely pivotal.⁵²⁴

Another judge emphasized that by rejecting the notion of ‘neutrality’ and accepting the inevitable subjectivity that creeps into decision-making, courts come closer to being impartial adjudicative bodies:

⁵²⁴ SA005, 6-22.

I think [social awareness is] very important. ...it's the awareness of the 'other' which I think is so important to judicial impartiality: to really try and put oneself in the position of the other. None of us come to adjudication with a totally clean slate. I think the better the judge, the more aware he or she will be of the fact that we don't have a clean slate, and so is prepared for counteracting pre-conceptions or pre-formed ideas.⁵²⁵

When answering this question, most interviewees highlighted the delicate balance of adhering to the internal boundaries of legal decision-making, whilst also ensuring that their decisions were situated and appropriate to the broader social context in which they arose. In this way, the interviewees reflect the dialogic relationship between internal legal rules, and external subjective experiences. Decision-making by judges is very much grounded in received legal 'truths' – from legislation and case law. It is not purely a subjective exercise, but also far from a mechanical one:

...social awareness is intrinsic to the very nature of the judicial project, and you can't rule simply by grammar, by technical analysis, by abstract reasoning. Judging isn't simply applying social awareness to problems. Social awareness feeds into it. It's one of the central elements of the judging process but it doesn't occupy the whole space and so it's neither an add-on to a purely technical thing ...nor is it the basic canvass in itself on which you trace a few judicial lines.⁵²⁶

One Australian participant saw social awareness as a particularly important tool when applying precedent – whereby the common law should develop in an incremental fashion to ensure that it keeps pace with the community it serves. This comment also reinforces the element of 'choice', highlighted above:

The common law proceeds in a way sometimes described as 'dynamic', involving continuity and change so, as a judge, you look back at precedents then we look at the present to check whether they remain relevant or whether in fact there needs to be some departure from them.

⁵²⁵ SA015, 12-7.

⁵²⁶ SA011, 17-25.

Those sorts of decisions are all informed by ...that phrase ‘social awareness’.⁵²⁷

Another participant went as far as to suggest that the common law was flexible to allow for common sense to shape legal outcomes:

...common sense is important in all cases. Because you are applying the law but you are not applying the law in a vacuum...it’s no use having a result that is almost impractical – it might be the result that the law dictates but sometimes you can, through common sense, you can work around it.⁵²⁸

A judge from South Africa highlighted the impact of context in determining the extent to which values and principles external to ‘formal law’ would impact upon a judicial decision. This participant placed particular emphasis on decisions that are part of, what they described as ‘a transformatory project’:

...to the extent that values occupy a central and often commanding place in the judicial function, social awareness becomes imperative. ... In a case [where] the very nature of the constitutional project is transformatory and without social awareness transformation becomes rather meaningless and then you are just juggling with abstract concepts and ideas. Having said all that it’s not to downgrade the importance of principle and coherence and logic or the importance of text, but simply to say that social awareness is a core element in the nature of the judicial process.⁵²⁹

From this snapshot we can do away with any assumption that judging is a purely objective exercise. It is far from being unrestrained subjectivity – interviewees demonstrated an acute awareness of what one described as ‘that anxious edge between the application of rules and understanding of context’.⁵³⁰ They all felt that social awareness and common sense played an important role in judging. However,

⁵²⁷ AUST006, 19-24.

⁵²⁸ SA024, 9-19.

⁵²⁹ SA011, 26-44.

⁵³⁰ SA014, 114-5.

how does a judge become socially aware? And how ‘common’ is ‘common sense’? Interestingly, many of the female participants picked up on this second point. One opined that:

Where you might think X is common sense and you find that [a colleague has] grown up in a different environment or a different life experience, it is not common sense, it might be an outright lie or certainly not be accepted as the norm.⁵³¹

This then leads to the question: will a judge’s ‘identity’ impact upon the way they decide a case? From what has come before we see support for Holmes’ assertion that judging has ‘a good deal more to do than the syllogism in determining the rules’. The next section explores how judges perceive their life experiences impacting upon the way they judge. This final part will pay particular regard to the interviewees’ perception of the impact of gendered experiences that have been gained outside of formal professional experiences.

3. The impact of a judge’s background experiences

Upon losing leadership of the Australian Labour party, and therefore the office of Prime Minister in 2013, Julia Gillard reflected upon the role that her gender had played during her time in office. She stated: ‘It doesn’t explain everything, it doesn’t explain nothing – it explains some things’.⁵³² This reflection is an apt summary of the responses received from both men and women interviewees when pressed on how gendered experiences impacted upon judging.

⁵³¹ SA014, 21-5.

⁵³² Julia Gillard, ‘The Concession Speech’ (The Blue Room, Parliament of Australia, Canberra, 26 June 2013) reproduced in Samantha Trenoweth (ed) *Bewitched & Bedevilled: Women Write the Gillard Years* (Hardie Grant Books 2013), 238.

It is important at this stage to elaborate on what is meant by ‘impact’. First, it can mean the impact upon the outcome of the case – the way a judge decides. The second meaning of impact is subtler. It concerns what goes into the judgment, how the issues are considered by the judge, and how gender might impact upon how he or she interacts with the facts, the law and his or her colleagues in coming to a conclusion. Clearly, these two types of impact are related – what ‘goes into’ a judgment and the process of deliberation may have consequences for the outcome of the case. But this may not always be the case. As Albertyn describes, assessing impact may be more about ‘process over outcomes’.⁵³³ Process may change outcomes, but caution needs to be taken against always assuming that it will.

a. The dangers of identity determinism

As considered in Chapter 4, many academics have criticized what are at best equivocal findings on the link between a judge’s gender and the *outcome* of a case.⁵³⁴ This ties into concerns, highlighted in the theoretical literature in Chapter 2, that gender will be determinative of judicial behaviour and tie women and men into essentialised frameworks. In line with these academic perspectives, most of the interviewees were sceptical of assertions that gender would determine the outcome of a case or could predict what opinion a particular judge would have on a specific matter.

It’s mischaracterized when it’s assumed that a woman will decide a case differently to a man. ... And that is as dangerous to women as it is to men, quite frankly, because it assumes that you will decide based on your gender. The whole point of law is the law is meant to be blind from all these things and you ought to be able to get the same result from a male

⁵³³ Albertyn (n21) 267.

⁵³⁴ See, for example Menkel-Meadow, ‘Asylum in a Different Voice: Judging Immigration Claims and Gender’ (n292) 207; Kenney (n82) 41.

judge or a female judge. So in as far as it's assumed that you will get a different result or a different treatment from a man or a woman I think that's problematic and it's partly what scares the horses.⁵³⁵

Underlying this scepticism was often a concern about essentialism, or as one interviewee phrased it, 'identity determinism':

Our gender does not necessarily determine what our attitudes are. I really do believe that very fundamentally, so we have to be careful. I always call it the 'siren of identity determinism'. ... We do not want gender diversity because women will represent women, or women's views, we want it because the different life experience that being a woman has probably means that you are likely to make a contribution to improving the impartiality and open mindedness of the bench. The siren of identity determinism suggests you can never be different, and indeed, you should never be different from some preconception of what your gender or racial identity implies. That we must avoid.⁵³⁶

The quote above acknowledges that while gender, as a social experience, can impact the way the judge has experienced life, and therefore shape perspective, it is not prescriptive of *how* the perspective will be shaped, or what resulting world-view will be formed. It is a delicate path to steer between rejecting harmful stereotypes and valuing appropriate experiential knowledge. One male participant reflected upon the manner in which various 'identities' intersected to inform, but not determine, his perspective:

I don't think that a person's complexity as a human is concluded by their race or sexual orientation or gender or class or anything else. But I think that those are partly constitutive of what makes a person – but only partly, so I don't think there is a problem. I mean, I'm a gay man, I'm living with HIV, I'm White: but I think in most of our debates my colleagues don't hear those things about me, they hear the persuasiveness of the view that I propound.⁵³⁷

⁵³⁵ AUST025, 847-51.

⁵³⁶ SA014, 295-320.

⁵³⁷ SA005, 141-7.

Some examples of determinism cautioned in the earlier quotation on ‘identity determinism’ were evident in the responses of certain interviewees, particularly in the context of judging cases involving sexual violence. A small number of interviewees thought that it was particularly important to have women sit on cases concerning, what they saw to be, ‘women’s issues’.

One male judge commented that it was important to have women sit on cases involving rape and sexual violence. He considered that women judges were less lenient on the accused than their male colleagues. When asked why he thought this, he gave the following reason: ‘I think it’s just human nature. The females ... are able to record the feeling and the trauma that the rape victim would have gone through better than we as males do.’⁵³⁸ When the judge was asked if he could think of a parallel example – where men would be ‘naturally’ better at empathizing with a particular claimant – he was unable to give an example.⁵³⁹ Another male judge remarked that women judges would have a greater ‘natural’ capacity to empathize with rape victims and therefore judge differently than he would.

Judge: I think I approach it from a different perspective altogether and my female counterpart has got, I would call natural empathy. She can understand what the victim wants. I can begin to understand what the woman wants too but I can never feel the pain.

LH: Ok and why is that? Why do women understand this more than men, if it’s not necessarily direct experience or is it, that they will be practising in that particular area of law before they came to the Bench?

⁵³⁸ SA023, 173-80.

⁵³⁹ SA023, 180-206.

Judge: I don't think so. ... I believe a woman is a woman. I think women understand the indignities. The privacy issues; the invasion of your private space.⁵⁴⁰

Other judges were alarmed by this line of reasoning – that women, simply because they were women – would take a different approach in cases concerning sexual violence. A female colleague of the two male judges quoted above was forthright in her rejection of this theory – that women judges were more empathetic to victims of sexual violence. She spoke about the difficult implications that these assumptions have, leaving women judges open to focused criticism:

I've been vilified by lawyers' groups, particularly women's groups, because I haven't taken the kind of stand on sentencing for rape that many people believe is warranted. ... I've been the butt of criticism. 'Women should feel more strongly that rapists should spend their entire lives in jail' and so on and there is [*name deleted*] who has reduced a sentence several times.⁵⁴¹

In this way, identity determinism, as opposed to experiential knowledge informed by gender, perpetuates stereotypes that have historically marginalized women in law. Identity determinism has nothing to do with the actual experience of the judge in question, but rather assumptions made by virtue of his or her gender. The burden of this assumption more frequently falls upon women judges. As was demonstrated by the interviewee above who could not identify an area of law where men were 'naturally' more equipped to judge, seldom is this pressure placed upon men judges. Identity determinism can also dangerously stereotype men. One Australian judge noted what she believed to be a generational change in men's sensitivity to so called 'women's issues' such as sexual harassment:

⁵⁴⁰ SA022, 209-18.

⁵⁴¹ SA020, 187-198.

Look, anyone who has worked in an office knows about sexual harassment. I went to the Bar in '75, I worked in offices before that. Sure, they shape your experiences and you get older and you're in a position to discuss them. ...The level of understanding and empathy now of male judges is just not comparable with 20, 25, 30 years ago. You are not in the same ballpark. So you just don't need to remind them as much.⁵⁴²

A South African judge also commented that she had been lucky to sit with 'some of the most feminist male judges ... of any court anywhere' she had ever encountered.⁵⁴³

It is interesting to question the extent to which this awareness by male judges of highly gendered experiences – for example, sexual harassment in the workplace – and the embrace of a pro-feminist stance has been the result of consciousness-raising exercises by the women's movement in previous decades. It took women to bring these issues into public consciousness, illustrating the impact of women's experiential knowledge on the public space, including the bench. However, the point remains that the dangers of determinism clearly cuts both ways – to assume that women, because they are women will be *more* gender aware simply because they are women, or that men will be *less* gender aware simply because they are men is a dangerous assumption.

Another danger identified by some interview participants arises where the judge sees their identity bringing with it a responsibility to decide cases in a particular way. This is particularly acute if a judge sees themselves as 'representing' a particular group or having superior expertise or authority in a matter because of their own personal experience. One interviewee demonstrated this in his assessment of his ability to apply customary law in South Africa:

⁵⁴² AUST007, 520-29.

⁵⁴³ SA014, 391-2.

...when I sit in court as a Black judge there are instances where there is African law and I am in a much better position than my White counterpart. I can understand the nuances. ... I believe that perspective of living African law. I didn't read it, I am living through it; I know what it means.⁵⁴⁴

Another interviewee considered that such a claim of authority, derived from identity and experience – that the judge in the quote above thought that he was in a ‘much *better* position’ than his White counterpart to understand customary law – had the potential, if taken without nuance, to pose a threat to impartiality. She considered that a feeling of ‘authority’ over a particular form of knowledge might leave the judge less amenable to the alternative perspectives offered by his or her colleagues.

There is a fine line between recognising the value of experience and assuming that a judge will ‘know it all’ by virtue of this experience. The quote above could be read in both ways. A more favourable reading is that the judge was not expressing a superiority in knowledge about customary law given his Black identity, but rather that his experiences living as a Black South African according to customary law provided a unique and valuable perspective that may not have been easily accessible to those judges who had not had this same life experience. This interpretation of the quotation highlights that identity and experience are valuable in informing judicial decision-making, particularly in collegiate courts where a plurality of experiences combine. However this is distinct from a problematic claim to authority, determined by identity. This is because the judge is not there to ‘represent’ a particular segment of society and a judge who has lived a particularly gendered or racialised experience may still have ‘blind spots’ that can be pointed out by colleagues, even those who might not have the same lived experiences. Language of representation labours under false assumptions of identity determinism and universalism – that all women judges will be empathetic

⁵⁴⁴ SA022 168-73.

to rape victims, that all Black judges will have a superior understanding of customary law: ‘Gender or race doesn’t determine views entirely, we remain capable of thinking and deciding for ourselves and that means women can have different views, and people of the same race can have different views, and in a democracy based on human dignity that is good.’⁵⁴⁵

b. When have gendered experiences mattered?

A judge’s background will not determine the outcome of a case, nor will it necessarily determine the weight they will place on various factors in coming to a decision. So what does it do? Does this mean that gender has no impact upon judicial decision-making? This was not the case, according to many of the interviewees. They were asked to reflect upon how they felt a ‘gendered’ experience had impacted upon their decision-making. The term ‘gendered’ was not defined, but rather left to the interviewees to interpret. This led to a range of responses from both male and female interviewees.

One common response was that a bench that can draw upon a diversity of gendered experiences could enhance its impartiality by offering a broader base from which it considers what is ‘normal’ or ‘right’. In this sense, diversity of gendered experiences serves as a de-stabilizer of hidden or subconscious bias, allowing established ‘truths’ to be interrogated, to see if they actually are, so to speak, ‘common sense’ when compared with the various ways that women judges have experienced the world.

It could be used, particularly in a collegiate context (explored further in the next chapter), as a tool to interrogate personal subjectivity – to unearth preconceived

⁵⁴⁵ SA014, 334-7.

notions and personal biases that may not be immediately apparent, even to the most conscientious of judges:

...you learn your blind spots, you learn what your prejudices are, and you learn different ways of being in the world. You understand the limits that your own life experiences imposed upon you. That is hugely valuable. At times it can be quite painful to be told that your worldview is in fact a completely erroneous worldview and it can be quite painful but it's really important and that's why; that's the real value.⁵⁴⁶

One senior male judge, who had sat on an all-male court for a significant period of his career, felt that women judges asked subtly different questions to Counsel, illuminating elements of the case that he had previously not considered to be important. In this way, a different background experience allowed the judge to come at the problem from a different angle:

I think that men can be as empathetic in their way as a woman can, but there is a point at which the empathy of the one becomes different to the empathy of the other. It's hard to define that point but I think it's certainly there and when sitting with female colleagues one can see that the questions that are asked of Counsel and the general approach to the problem can subtly vary....⁵⁴⁷

Other interviewees considered that diversity helped to bring to light contradictions or oddities in the law that have previously gone unnoticed. In particular, interviewees considered that an 'outsider's' experience would give greater contextualization to previously marginalized experiences. One female South African judge spoke of this in relation to her experiences growing up in rural South Africa:

...people for instance who have not lived in rural areas don't know how hard it is just to have a bucket of water in your home and if you come from that background and you sometimes go home and experience it first-hand it's very difficult for you to explain to a person who does not have that advantage; how difficult these things are and I know because

⁵⁴⁶ SA014, 370-6.

⁵⁴⁷ AUST018, 149-58.

sometimes when I am in my house in the suburb I tend to take certain things for granted until I go back home where I grew up and I realize how important it is to have a toilet that can flush!⁵⁴⁸

The same judge also reflected upon how her personal experiences with sexual violence had helped her have a deeper understanding of the issues that often played out in these cases. This is a similar example to the one given above by the judge who felt he had something deeper to bring to customary law cases by virtue of his life experiences. The woman judge in the quotation above did not attribute her understanding to simply being a woman, but rather, her situatedness as a woman had given her access to conversations and experiences that she felt her male colleagues would not have had:

...you grow up with girls, you are a woman yourself, and you listen to your friends, how they relate to things that have happened to them. You know how scared you are sometimes of being hijacked for instance. I am a woman. People would lock their houses because they don't want their possessions taken. I would lock my house because I am scared of being raped, so because I am a woman I would think that! I am so scared of being raped more than I am scared of a person breaking into my house and stealing my possessions. I would rather they would take my possession but leave me alone.⁵⁴⁹

She felt that this experiential knowledge – of being a woman who grew up in rural South Africa – had an impact on the way that she saw issues concerning poor women who came before her in court. She recounted how her position as an ‘outsider’ in one particular case, concerning the declaration of a universal partnership (a status in South African law that would allow the female applicant access to communal assets of the now-defunct relationship), allowed her to offer a unique perspective to her judicial colleagues in this case:

⁵⁴⁸ SA025, 61-5.

⁵⁴⁹ SA025, 155-64.

...there was a case about whether we should declare that kind of union or partnership as a universal partnership, and the Bench was split into three to two...it was me and a female colleague and one male colleague, and two male colleagues on the other side. On reflection I think it is because me and my other colleague know that sometimes as a woman you let things go, you tend to let things go because you don't want to rock the boat, so even though you could criticize that woman and say 'why couldn't she have insisted that this man marry her and why couldn't she have insisted that she play an active role in the relationship', as a woman you appreciate that probably this woman trusted this man, loved this man, and thought that they would eventually get married and that at the most he would appreciate her role as an equal partner if she behaved in a certain way, because personally, I know that taking care of the children, taking children to school and supervising their homework and running the household and so on is probably more strenuous than dressing up and going to work. I don't know if men appreciate that it's more difficult to run the household than run the family business. I just thought that if this woman had not relieved that man of the responsibility of being pregnant for nine months, taking care of the children, taking the children to school and raising those children and making sure that the household is run properly, he probably would not have been that successful. So in a way although he wanted to suggest that she never played any part in the business, I know that means he is undermining her contribution, her human contribution to the partnership. ...I think that one judge was also as passionate as we were. The other one appreciated where we were coming from but for different reasons, didn't, but the one male judge felt that we were wrong.⁵⁵⁰

This also highlights the importance of intersectional experiences in creating the valuable epistemological vantage point. The experiential knowledge that informed the observation above was not simply arrived at as a result of living as a woman. It was also an empathetic understanding of the intersectional challenges that face women who are mothers and who are economically dependent. This example of the value of experiential knowledge is distinct from identity determinism. The female judge did not hold these views by virtue of being a woman, nor did she feel an expectation to have these views. Rather, they were informed by her own actual experiences, that happen to be particular to some (but not all) women, and therefore

⁵⁵⁰ SA025, 179-209.

she was able to bring these forward in judicial deliberations to enrich the perspectives available to the court.

An Australian judge provided a similar example of a time when her intersecting experiences, this time as a single woman who lives alone, gave her a different perspective from that of her colleagues on a case:

I am a woman living alone. It means I have a different sense of personal safety to a big male possibly living with others etc. So what seems like normal, rational behaviour for someone to do, say a witness or an accused or something in a trial or even what's reasonable to do as between colleagues about personal safety might seem very, very different from a different gender perspective or a different physical size. I have had such discussions with colleagues on occasions where they've said something like 'you know, and then she did such and such and that was an overreaction'. My response is 'yes, but she's a woman living alone, this guy has come up to the house and done such and such, she would be freaking out. That's actually a perfectly reasonable response...you think she's acted irrationally? What she's done is perfectly rational to me.' Once again, some of my male colleagues would be alert to such issues, and not all my female colleagues would agree with my view, but there are certain areas where your own experience can matter.'⁵⁵¹

Again, the interviewee is not saying that her experience is universal to all women, or exclusive of all men, but rather that it is one that is framed by her particular situation as a woman, and has proven to differ from those of her colleagues.

c. Vicarious Experiences?

The discussion above drew out concerns of 'identity determinism' and the possibility of problematic outcomes when judges consider themselves as, or are considered by others to be, 'representing' a particular group as a result of any particular identity association. A related, pragmatic point, also arose in a number of the interviews: a judge must be able to decide whichever case comes before her or him, regardless of the extent to which he or she may or may not have commonality with the experiences

⁵⁵¹ AUST025, 532-50.

of the litigant before the court. It would be impractical to expect a judge to have personal experiential knowledge of the matters in each and every case. In the opinion of one interviewee: ‘You don’t have to have lived through a rape to understand what rape means; you don’t have to have grown up poor to understand what living in poverty means.’⁵⁵²

Some judges felt that ‘vicarious experience’ acquired through generally being aware of the world around them was sufficient to provide them with all of the experiential knowledge needed to be a judge. In a lecture given in 2012, Lord Sumption feared that arguments for a bench with diverse experiences ‘overstate the importance of personal as opposed to vicarious experience’. He argued that:

No judge, from whatever background he or she may come, can ever claim personal experience of more than a tiny proportion of the situations which he or she is called upon to consider. Most judicial experience is necessarily vicarious and always will be. It is derived from intelligent social observation, and a sensitive empathy with those who find themselves in situations that the judge is unlikely to have experienced himself. I do not doubt that men and women have experiences of life that differ in some respects. But I deny that because a particular kind of experience is specific to one gender, judges of a different gender cannot comprehend it equally well.⁵⁵³

This comment is at odds with arguments made above, both in the theoretical literature and by interviewees, of the need for self-consciousness on the part of judges. The statement that a judge of a different gender can comprehend, equally well, the experience of another assumes an extraordinary level of all-knowingness on the part of the judge. Rather than accepting, as another interviewee urged, that judges should ‘know their blind spots’ it presumes that there will never be such blind spots. This is a cause for concern and can lead to assumptions of universality that tend to prefer

⁵⁵² SA020, 97-101.

⁵⁵³ Sumption (n241).

dominant, socially privileged narratives of life, and leave marginalised experiences as just that – marginalised. As a South African interviewee highlighted, the benefit of multiple perspectives, informed by the pluralities of broad life experiences ‘gives you an insight that you didn’t have before, that you didn’t even realise you needed!’⁵⁵⁴ This level of interrogation, and willingness to be open to surprise, is suppressed by the assumption that we can all comprehend, equally well, the experiences of the other based on our own ‘intelligent social observation’.

Lord Sumption’s lecture raised a compelling argument though about the degree of stereotyping that judges were often subject to. He felt that arguments for broad experiential knowledge drew upon the ‘image of the inward-looking, out of touch judge’ which ‘is a journalistic cliché, and it is no doubt true of a few judges. But as a generalisation it is manifestly false.’⁵⁵⁵ Other interviewees also spoke about what they saw as an unfairly stereotyped image of judges as removed, sheltered individuals, disengaged with the realities of contemporary life. A South African judge commented that whatever truth this image may have held in the past, it was now an outdated one:

The old notion of judges as being out of touch I think is completely outdated. I think it was to do with the very narrow elite sources of appointments of English judges in the 1950s and 60s. All the classic instances of judges who don’t know what television is and so. England was in many ways the archetype of judges for many people in the Anglophone world and perhaps outside the United States, even in Canada. Because of the Etonian, public school, Oxbridge background of many of the judges there it might have been possible for them to lead very narrow lives. They were lives that were connected to the social elite in London and the Home Counties and Edinburgh in which those judges moved. So

⁵⁵⁴ SA006, 73-5.

⁵⁵⁵ Sumption (n241).

I think the particularly ludicrous examples of judges being wrapped in cotton wool in this tower, judicial tower, has never really applied.⁵⁵⁶

An Australian interviewee also made a similar reflection:

...it is sometimes thought that a judge is a one dimensional person only interested in the law, but all judges have got interests outside the law ...and have got lives and so ...it's a sort of monochromatic, one dimensional mistake to imagine that all judges do is sit on cases and then sit in their Chambers thinking about the law.⁵⁵⁷

Another Australian judge noted that, particularly in the Australian context where judges are rarely a *cause célèbre*, many would be surprised by the extent to which the biographical histories of the members of the court did not reflect the stereotypical image of the privileged elite:

...for much of my time on the court we have been able to say that there has been no member of the court that had a parent who went to university so that, contrary to what is a common misconception, the High Court of Australia is not the province of the legal dynasty, the silver-tail, I don't care what term you use.⁵⁵⁸

Another Australian judge made the same point, noting that a period of State funded university education in Australia post-war created broad socio-economic access to the legal profession, and therefore the judiciary.⁵⁵⁹ Rather than being an isolated elite, a third Australian interviewee felt that judges were perhaps more aware of the diversity of social experiences. This is because their work exposes them to parts of society that many 'mainstream' citizens would never see:

...I just don't see how judges cannot be socially aware. I mean it's an intrinsic part of the work that they do. They are constantly faced with some of the worst aspects of mankind, for instance...all the sexual offences against children, the grossest crimes, so they get to know there's an underworld. They're aware of social issues...it's very difficult to

⁵⁵⁶ SA005, 30-42.

⁵⁵⁷ AUST007, 38-44.

⁵⁵⁸ AUST005, 110-4.

⁵⁵⁹ AUST006, 116-27.

understand how any intelligent, educated person could not be socially aware, unless they were wilfully ignorant, but I wonder whether there's a different...aspect of that in Australia from England...I think Australian society is more cohesive than English society. Judges don't differentiate themselves so much, I suspect, from the average person in the street. The sort of elitism that judges might unconsciously have would be because of their role and the way in which they have to stand back, to be seen to be objective and because they are part of an institution. But I don't think they disregard the viewpoint of society. It's probably better informed and shaped by a lot more information than most people have...I think they are perfectly capable of understanding how people view things and they often discuss what the view out there is going to be and how things are impacting, how they would impact on the average person in the street or the not so average person in the street; always trying to think it through.⁵⁶⁰

An English judge who had spent the majority of her pre-appointment professional life working as a criminal barrister demonstrated the exposure that her professional training had given her to the darker side of human nature:

I think that, for example, when you're sitting in crime if you have, as a barrister as I did, been down the steps to the cells to talk to the man who has been convicted and sentenced to life imprisonment; or on the other side of it, had to explain to the family of a young girl who was raped why those who were responsible for what was a gang-bang have been acquitted, I think when you have had hands-on experience of that kind, it does I think help with your empathy. I think you do really appreciate the impact of what you do and I think that makes you pause. Either way. It could be (pause): 'have we considered the rights of the victim sufficiently'. It could make you pause: 'are we really going over the top and sentencing this chap too severely or not ensuring that his trial was conducted in the way it should have been,' so I think you just need to pause.⁵⁶¹

While this point was strongly made by several interviewees, others were sceptical about the 'vicarious experience' argument. They thought that it served to maintain and justify the status quo. In addition, they thought when experiential knowledge is being acquired 'vicariously' there is the danger of misunderstanding and the impact or

⁵⁶⁰ AUST007, 62-89.

⁵⁶¹ UK026, 127-39.

importance of an issue being ‘lost in translation’. As one male South African judge put it, assuming to ‘know’ the other’s experience can be dangerous, because what is there to challenge this vicarious understanding? ‘But what challenges one’s vicarious perception? I think so much depends on the individual.’⁵⁶²

What is important is how willing the individual is to accept that their view is not universal. From the interviews it became apparent that those who had seen themselves as somehow ‘different’ were more easily able to identify that there are various standpoints, or perspectives shaped by experience, that influence a judicial view. They may not have all shared the same sense of being ‘different’ however they did share a commonality: the experience of being an outsider or a ‘minority.’ As one male Australian judge put it, being different allowed you to value difference, and to challenge assumptions of universality:

You don’t necessarily have to have experienced it yourself, but in that case, you might through learning or through sensitivity to others’ experience, have developed an awareness that’s more than just your own way of looking at the world.⁵⁶³

This chapter has used empirical evidence to explore how individual experience can shape judicial perspectives. It started by looking at professional experiences – the strong sense of support amongst interviewees for a plurality of professional experiences within a court, but a remaining concern that certain areas of practice, namely the Bar, tended to be prioritised in common conceptions of what makes a ‘good judge’. This was seen by some as particularly damaging to women – whose professional career trajectories often differed to those of their male colleagues. It then highlighted how many interviewees saw a significant degree of subjectivity involved

⁵⁶² SA015, 76-84.

⁵⁶³ AUST025, 248-68.

in appellate judging, and that personal experiences, particularly those informed by gender, shaped this subjectivity. It considered the link between subjectivity, and judicial impartiality. For some, impartiality was best arrived at by confronting personal subjectivity and resisting assumptions of universal knowledge. The next chapter of this thesis will explore how diverse experiences, in collegiate courts, can be used to challenge assumptions of universality and enhance impartiality.

CHAPTER 9: EXPERIENCES SHAPING COLLEGIATE DECISION-MAKING

...out of the attrition of diverse minds there is beaten something which has a consistency and uniformity and average value greater than its component elements.⁵⁶⁴

Chapter 8 explored the impact that experiences, and in particular gendered experiences, have on judges' individual decision-making processes. However, as reflected in the Cardozo quotation above, in order to understand the dynamics of multi-panel courts, researchers must not just look at judges as individuals, but also the impact that they have upon each other.⁵⁶⁵ Chapter 8 demonstrated that gendered experiences could shape an individual judge's decision-making. This chapter now looks at the impact of gendered experiences upon the court as a whole in the context of collegiate decision-making.

Inter-judicial influences are an important aspect of judging in the context of final appellate courts in common law jurisdictions. This is because they operate, to a greater or lesser extent, depending upon the court, as collegiate spaces. Most of the work done by common law appellate courts is done as multi-member panels rather than as a single judge sitting alone.⁵⁶⁶ For example, the UK Supreme Court sits in panels of five, seven, or in cases of 'great public importance', nine.⁵⁶⁷ Quorum for

⁵⁶⁴ Cardozo (n265) 177.

⁵⁶⁵ See: Harry T Edwards, 'The Effects of Collegiality on Judicial Decision Making' [2003] 151 UPenLRev 1639; and Paterson, *Final Judgment* (n453) 66 ff.

⁵⁶⁶ Although there are notable exceptions to this. For example, applications for leave to appeal to the High Court of Australia, or 'call-over' is usually done by a single justice sitting alone.

⁵⁶⁷ There is an increasing number of 9-members panel configurations by the Supreme Court of the United Kingdom. Paterson notes that 'in the Bingham era there were 12 enlarged courts (eight with

the South African Constitutional Court is eight, while the High Court of Australia regularly sits as a full bench of five or seven. The Supreme Court of Appeal in South Africa usually sits in panels of three or five, and the Court of Appeal of England and Wales in panels of three. In each of these courts, as a general rule, the more ‘important’ the case being heard, the greater the number of judges allocated to the panel. This ‘three-heads are better than one’ approach to judging is far from controversial. Given this opportunity for ‘team work’, this chapter will consider the extent to which judges actually do work ‘together’ in multi-member panel cases when coming to their decisions. How much intellectual interaction occurs? What impact do the justices have upon each other? In the context of these interactions, how do diverse experiences, particularly diverse gendered experiences feed into and shape these collegiate processes?

The purpose of this chapter is to demonstrate that when diversely composed appellate courts engage in ‘good collegiate practices’ they become, as the quote above from Cardozo suggests, more than just the ‘sum of their parts’. However, unlike Cardozo’s quote, this chapter will not suggest that ‘attrition’ or the wearing down of one’s peers is what creates greater value in collegiate processes. Rather, the interaction amongst multiple perspectives can provide better judicial reasoning. This is because normative biases are challenged, subconscious bias is un-earthed, positionality (a judge’s standpoint) is illuminated and the court has a greater opportunity to become impartial through the exposure of and challenge to each

seven Law Lords and four with nine Law Lords). In the Supreme Court up to August 2013 there had been 57 enlarged courts (43 with seven Justices and 14 with nine Justices). See Paterson, *Final Judgment* (n453) 195, fn 121. See also Andrew Burrows, ‘Numbers sitting in the Supreme Court’ (2013) 129 LQR 305, for a critique of this trend towards enlargement.

members' partiality. Interviews have revealed that the presence of both men and women from diverse backgrounds is important to achieving this. This is because it is the enlargement of the pool of ideas from which to draw, not the competitive wearing away of ideas, that serves as the greatest contribution diversity brings to a court. However, this positive product of collegiality is not a given. It will depend upon the collective and individual commitment to fostering an environment for collegiate decision-making, as well as the ability of judges to be open to challenge and movement from their original standpoint, all the while remaining decisionally independent.

Interviews demonstrate that when both men and women judges share accounts of gendered experiences this can play an important role in deliberative processes. An individual's experiential knowledge generally, and gendered experiential knowledge in particular, serves as an important source of knowledge from which the whole court can draw. Increasing the pool of experiential knowledge available to appellate courts engaged in collegiate decision-making enhances its ability to comprehend cases that come before it, and enhances the quality of its output.

This chapter will begin by briefly explore the meaning of 'collegiality' in the judicial context. While the familiar meaning of the term suggests friendship and camaraderie, this chapter will understand 'collegiality' in the judicial context in a more nuanced way. Collegiality refers to the extent to which multi-member panels consider themselves as participating with their judicial peers in a collective enterprise when deciding cases. Part B of this chapter examines how collegiality manifests itself in modern appellate courts. In practice, how often are judges engaging in decisionally collegiate practices? Part C is concerned with the conditions necessary for 'good collegiality.' It identifies these conditions for good collegiality by highlighting three

potential blockages. Part D draws upon interview material to illuminate the ways in which gendered experiential knowledge shapes and positively informs this process. It also highlights that potential blockages to collegiality may be highly gendered, and inhibit the court from capitalizing on the rich experiential knowledge that women have to offer these male-dominated spaces.

A. WHAT DOES IT MEAN TO BE COLLEGIATE?

In this chapter ‘collegiality’ is used as a term of art. It refers to decisional collegiality, or intellectual collegiality. This is distinct from social collegiality. While social collegiality – the extent to which judges have good social interactions with each other – may significantly impact the manner and form of decisional collegiate interactions,⁵⁶⁸ decisional collegiality is not dependent upon social collegiality, nor can social collegiality fully explain the extent and impact of decisional collegiality. As Paterson puts it:

The term does not refer to how well the Court’s members get on with each other, but to how much they work together as a team pursuing a common enterprise (the pursuit of the ‘right answer in law’ in the case) ...⁵⁶⁹

In other words, to what extent do judges intellectually collaborate in the production of judgments? To what extent is the production of judgments in appellate courts a collective enterprise, rather than the accumulation of multiple individual enterprises?

Edwards⁵⁷⁰ supports a definition of collegiality that views judging as a collective rather than an individual endeavour. He defines collegiality in the negative:

⁵⁶⁸ For example, Lady Justice Arden notes that the personality of the judge will impact upon the extent to which they will be prepared to intellectually engage with their colleagues: Mary Arden, ‘A Matter of Style? The Form of Judgments in Common Law Jurisdictions: A Comparison’ (Conference in Honour of Lord Bingham, Oxford, 20 June 2008).

⁵⁶⁹ Paterson, *Final Judgment* (n453) 142.

‘When I speak of a collegial court, I do not mean that all judges are friends. And I do not mean that the members of the court never disagree on substantive issues. That would not be collegiality, but homogeneity or conformity, which would make for a decidedly unhealthy judiciary.’⁵⁷¹ Rather, for Edwards, collegiality means that:

...judges have a common interest, as members of the judiciary, in getting the law right, and that, as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect. Collegiality is a *process* that helps to create the conditions for *principled* agreement, by allowing all points of view to be aired and considered. Specifically, it is my contention that collegiality plays an important part in *mitigating* the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another in constructive and law-abiding ways.⁵⁷²

This definition of collegiality resonates with the concept of ‘enlargement of mind’ – the process of opening oneself up to competing perspectives in order to challenge personal partiality, or subconscious bias, and move towards impartiality – as was established in Chapter 3 of this thesis.

Paterson prefers the term ‘team-work’, rather than collegiality, to describe this process.⁵⁷³ He distinguishes his definition of ‘team work’ from that of ‘collegiality’ adopted by Edwards. Paterson gives two reasons for his scepticism about the use of the term ‘collegiality’ in this context:

I doubt the utility of focusing on the concept of ‘Collegiality’: first, because the technical meaning ascribed to it by Edwards and others is not sufficiently different from the ordinary language meaning of the concept (which contains overtones of comradeship or friendship), to cause confusion in the mind of the reader; and secondly, because Edwards uses the concept as an ‘ideal type’ both in the Weberian sense of an abstract

⁵⁷⁰ Edwards (n565).

⁵⁷¹ Ibid 1644-5.

⁵⁷² Ibid.

⁵⁷³ Paterson, *Final Judgment* (n453) 142.

descriptive model and in the sense of a moral idea. For Edwards ‘Collegiality’ is an imperative which it is the duty of all appeal judges to strive towards. In practice, as we have seen, the Law Lords and Justices vary in their commitment to collective decision-making and for many the obligation of ‘Collegiality’ in Edwards’ sense is not one that they endorsed.⁵⁷⁴

Paterson’s first objection to ‘collegiality’ – that its technical meaning is easily mistaken for its ordinary meaning – is one to take note of and this chapter has been explicit in its use of ‘collegiality’ as a term of art. However, his second concern – that Edwards uses ‘collegiality’ as an ideal type, and that this mitigates the utility of the concept – might also be a criticism made of defining the inter-judicial process as ‘team-work’. The interviews below demonstrate that Paterson is correct in his assessment that not all judges will subscribe to the idea that there is an imperative duty for judges to act collegially or as a team. Indeed, some, such as Dyson Heydon, former Justice of the High Court of Australia, explicitly rejects both ideas.⁵⁷⁵ However, as Paterson’s own work demonstrates, there has been a rise, at least in the UK Supreme Court, of behaviour demonstrating collective rather than individual enterprise in the production of judgments. He notes that ‘the most striking development in the Supreme Court, which has accelerated under the Presidency of Lord Neuberger, is the frequency of team-working in the Court...the majority of Justices now favour having more single majority judgments and fewer concurrences.’ So whether judges embarking upon this collectivity out of a ‘duty’ (which is contestable) or for any other reason, the fact remains that there is, at least a significant degree, of ‘collegiality’ or ‘team work’ occurring in practice, regardless of whether it is a conscious decision that this is the ‘right’ way to judge. For this reason, it appears

⁵⁷⁴ Ibid 143.

⁵⁷⁵ JD Heydon, ‘Threats to judicial independence: the enemy within’ (2013) 129 LQR 205.

that there is little to distinguish between the terms ‘team work’ or ‘collegiality’ in that both are markers of collectivism that can be identified as a practice that is undertaken by members of multi-member courts. The two words are getting at the same concept. The purpose of this chapter is not to explore in any great length whether judges should partake in this collectivism, but rather, to take as a starting point the fact that they do. If judges share ideas, perspectives and opinions on cases with their colleagues, to what extent do they, either explicitly, or implicitly, through this sharing of knowledge impact each other? How then, does a judge’s personal history, in particular his or her gendered life experiences, impact upon this sharing process?

B. DECISION-MAKING ‘BEHIND THE SCENES’

Moving on from the definitional debate of collegiality above, this section describes the procedures by which decisions are arrived at in appellate courts and demonstrates where ‘collegiate practices’ are in fact occurring, and therefore opening up a space for shared gendered experiential knowledge. It will focus upon inter-judicial discussions that happen away from the public view, both at pre- and post-hearing stages. These interactions are both formal and informal in nature, and take a number of forms: organized plenary conferences, informal discussions between one or more of the judges, email exchange and the circulation and re-circulation of draft judgments. While the focus on inter-judicial dialogue does not diminish the importance that other interactions, most notably the public exchange between counsel and the bench during oral hearings, have upon the shape of the final decision, it is both an important and often under-studied aspect of the decision-making process. In modern common law courts the average time allocated to oral hearings has been markedly reduced.⁵⁷⁶ So

⁵⁷⁶ Paterson has noted that today oral hearing in the UK Supreme Court last just over half as long as 40 years ago, with the average hearing time of cases in the Supreme Court between October 2009 and July

this ‘private’ period of deliberation is an important site for inter-judicial exchange that shapes judicial decisions.

Each of the courts studied in this interview series adopts a different pre- and post-hearing procedure. It is important to note that the word ‘court’ is used here in two different senses. First, ‘the court’ refers to the institutional body in each of the jurisdictions. For example, due to institutional requirements the pre- and post-hearing procedures adopted in the Court of Appeal of England and Wales have distinguishing characteristics from those conducted in the Supreme Court of the United Kingdom. But even within the same institution, approaches to pre- and post-hearing interactions may vary according to who ‘the court’ is in a personal sense. This is the personal or membership definition of ‘the court’. For example, the post-hearing procedure adopted by the House of Lords under the leadership of Lord Justice Bingham was less structured when compared to those subsequently adopted by Presidents Phillips and Neuberger.⁵⁷⁷ Moreover, the observations below demonstrate that even within a particular court at a particular time the willingness of individual members to engage in collegiate practices can vary. It is often a matter of personal style and preference.

Finally, the purpose of this section is to understand both the frequency and the form of ‘private’ judicial dialogue in modern courts. As mentioned above, although there may be differing opinions on when, where and how judges *should* engage with each other or collaborate once a decision is reserved,⁵⁷⁸ it is not the aim of this section to explore these questions. This chapter takes the descriptive, rather than the

2012 being 2.18 days compared with an average of four days in the 1970s, and between 1952 and 1968 25% of English appeals to the Lords lasted more than five days, 10% of them took seven days or more: Paterson, *Final Judgment* (n453) 81-2 (fn 72 and 79).

⁵⁷⁷ Ibid 141.

⁵⁷⁸ See Heydon (n575).

normative position as its starting point: that judges *do* discuss reserved cases in private. The first section of this chapter will therefore provide an overview of the extent and form of these interactions.

1. United Kingdom

Of each of the three jurisdictions studied, there is the largest amount of contemporary academic literature on the working practices of courts in the UK. This is largely due to Darbyshire's extensive ethnographic account of the working lives of judges across all levels of the judiciary in the UK,⁵⁷⁹ and Paterson's work on the inner workings of the House of Lords, and now the Supreme Court, spanning more than 40 years.⁵⁸⁰ Together with the interview material gathered, it is possible to paint a relatively clear picture of the internal working patterns of these two courts.

Paterson has identified a change in the 'management culture' at the Supreme Court under the leadership of both Lord Phillips and Lord Neuberger. He notes that teamwork practices have been established and are participated in by the Court's members 'to a far greater extent than was ever the case in the House of Lords.'⁵⁸¹ The Supreme Court currently has procedures designed to facilitate inter-judicial dialogue on cases. Indeed, the internal working-space of the court's new home in Parliament Square was deliberately renovated to facilitate collaborative encounters with purpose-

⁵⁷⁹ Darbyshire (n454).

⁵⁸⁰ See Paterson, *The Law Lords* (n456); Paterson, 'Does Advocacy Matter in the Lords?' (n410); Paterson, *Lawyers and the Public Good: Democracy in Action?*, Ch 4; Paterson, *Final Judgment* (n453).

⁵⁸¹ Paterson, *Final Judgment* (n453) 141.

built meeting rooms and common social spaces for the judges.⁵⁸² The usual practice after each hearing is that judges will privately convene and, in reverse order of seniority (presumable to avoid any undue pressure on junior judges to agree with their seniors), take it in turns to speak about the matter before a decision is made on how the judgment may be ‘divided up’. Where possible one judge will be responsible for writing the first draft, which is then built upon by their colleagues. Another judge may be given the task of writing an account of the facts and so on.⁵⁸³ Darbyshire’s ethnography includes an observation from one of the current members of the Supreme Court on the collegiate procedures after the end of an oral hearing:

At the end of each oral hearing we...have an immediate debate and we decide that either someone will write a judgment with which it is likely everyone else will concur. That is one extreme. The other is that the [presiding judge] will say ‘obviously we are all going to want to write on this’ and all manner of intermediate positions. We reach a sort of provisional consensus. The one thing that is clear is that practice requires that there should be one speech which covers all the relevant veins and all the relevant issues, whereas others can chip in on particular issues if they want and ideally the leading judgment should be one in the majority... [but is regrettably sometimes a dissent]. But there is a pattern of different possibilities ranging from where we all agree, and all think it would be best just to dispose of it in just one judgment, to all manner of differences of opinion and uncertainties, and people saying that they don’t really know where they stand and they will reconsider it after they have seen someone else’s draft...Sometimes we go round the room and realize that we cannot reach a consensus and that’s unsatisfactory. It’s an unhappy feeling. We stay for 10 seconds and say, ‘Well that’s it then.’⁵⁸⁴

One of the interviewees from the Supreme Court sees a great value in this structured process and considers it ‘extremely important to discuss cases with [his] judicial

⁵⁸² Hugh Feilden, ‘The Design of the Supreme Court of the United Kingdom’ in Chris Miele (ed), *The Supreme Court of the United Kingdom: History, Art, Architecture* (Merrell 2010) 153.

⁵⁸³ Darbyshire (n454) 384-5.

⁵⁸⁴ Ibid 385.

colleagues’.⁵⁸⁵ He saw strong intellectual benefits in this formalized pattern of inter-judicial dialogue, something that he was initially sceptical of, but now fully supports. His support is motivated by both the intellectual discipline that the process encourages, and the opportunity it provides to gain the benefit of other judicial perspectives on the matter at hand.⁵⁸⁶

While the process is less formulaic in the Court of Appeal, this court has a strong reputation for its members willingness to conceptualize themselves as a ‘team’ and to work together to produce decisions. Paterson describes this collaborative environment:

The English Court of Appeal is highly collegial ... Its members regularly sit on the same panel for several weeks, they meet before cases to discuss points on which they wish to hear argument, to allocate who will write and to express preliminary views on the case. There may be subsequent meetings where the opinion has been circulated, especially if it is a composite judgment. The sheer pressure of business couples with the need to play to the specialist strengths within each panel only emphasizes their inter-dependence and the necessity for team-playing.⁵⁸⁷

An English judge interviewed considered that by nature and demand, most Courts of Appeal in common law jurisdictions adopt very collegiate approaches in order to meet their workload. He confirmed this reflection of the collegiate practices of the Court of Appeal of England and Wales:

I think the Court of Appeal can genuinely be considered to be teamwork because in most Courts of Appeal, and certainly in the English Court of Appeal ... it is normal to assign in advance somebody who is going to take the lead on any particular case. Well that doesn’t rule out dissent; it undoubtedly increases very considerably the likelihood that person will be the dominant voice, and what normally happens is that the other two judges will feed in thoughts to him and only in extreme cases will they

⁵⁸⁵ UK006, 308-9.

⁵⁸⁶ UK006, 315-40.

⁵⁸⁷ Paterson, *Final Judgment* (n453) 142.

end up disagreeing with him, sometimes two to one; that's rather humiliating but it happens. Now that can be described as teamwork, but there is nothing inevitable about it.⁵⁸⁸

2. Australia

In contrast to the UK, there is a striking lack of publicly available information on the internal working practices, including post-hearing procedures, adopted by Australian appellate courts, including the apex court, the High Court of Australia.⁵⁸⁹ Moreover, the Australian judicial landscape, as a result of its federal structure, is the most complicated of the three focus jurisdictions and therefore the most difficult to draw generalized assertions about 'court practices'. Members of three different Australian courts were interviewed for this study: the High Court of Australia, the Court of Appeal of the Supreme Court of Victoria and the Federal Court of Australia. The High Court of Australia, sitting as the apex court and final court of appeal has seven permanent members. It sits in panels of three, five or seven in order to hear appeals.⁵⁹⁰ The Court of Appeal of the Supreme Court of Victoria has eleven permanent members (including the Chief Justice of the Supreme Court of Victoria and the President of the Court of Appeal)⁵⁹¹ plus any additional Judges of Appeal appointed or 'acting' in order to assist the court in meeting its caseload.⁵⁹² The Court

⁵⁸⁸ UK007, 198-208.

⁵⁸⁹ A notable exception to this is Heydon (n575). See also Enid Campbell and HP Lee, *The Australian Judiciary* (2nd edn, CUP 2012); Mack and Anleu (n452).

⁵⁹⁰ Other work of the High Court of Australia includes special leave applications, which are usually heard by a single member. The High Court of Australia also exercises original jurisdiction in certain areas and these matters, particularly those concerning immigration, tend to be heard by a single justice.

⁵⁹¹ See Constitution (Court of Appeal) Act 1994 (Victoria).

⁵⁹² Constitution Act 1975 (Victoria), s 80B.

of Appeal of the Supreme Court of Victoria usually sits in panels of three,⁵⁹³ and is the final court of appeal in the State of Victoria (although matters may then be appealed from this Court to the High Court of Australia). The Federal Court of Australia is the primary court responsible for the adjudication of disputes arising from federal law. It currently has 47 members, all of whom sit alone as trial judges, and on appeal cases in panels of three or five to form the Full Court of the Federal Court. Appeals from the Full Court of the Federal Court are heard by the High Court of Australia.

Interviewees from the High Court of Australia were consistent in their descriptions of the pre- and post-hearing conferences. Although there is no ‘set’ and ‘uniform’ procedure, all of the interviewees agreed that the Court would generally meet before and after the oral hearing in order to discuss the case. A member of the High Court describes the process as follows:

...the current system is that most of us will meet before the sittings ... and we’ll just generally chat about the cases coming up. Now most of us won’t be on top of all of them to the degree that we will be when we go into court so these are very preliminary discussions and they are mostly with a view to discovering whether or not there’s a particular problem or something ... that the parties need to address so we can give them advance notice, but they’re not in-depth discussions. But then after we conclude each appeal we sit down in meetings, those of us who wish to – usually most of us but not always – and then we discuss it ... it might be obvious from the discussion in court whether there is a clear consensus, a clear majority, we might all be *ad idem* and if there is, we’re *ad idem*, or there is a clear majority then one of us either volunteers, or the person obviously most interested is asked to volunteer to write a first draft which is then circulated and people can either agree or not. In some cases, mostly constitutional law, most judges like to write on their own [opinion] so there is not really a talk, a discussion about who’s going to circulate.⁵⁹⁴

⁵⁹³ Although this may be enlarged or reduced to at least two members by the President of the Court of Appeal: see Constitution (Court of Appeal) Act 1994 (Victoria), s 20.

⁵⁹⁴ AUST007, 140-59.

This interviewee gave two important riders to her response. First, and importantly, she noted that the system ‘alters with different High Courts’.⁵⁹⁵ Furthermore, not every member within the same court would avail him or herself of this private deliberative process. The account above was of the ‘usual’ post-hearing conference, with the caveat:

Judge: Well it’s not mandatory. It’s a matter of discretion for the judges. But we have a meeting and I don’t think we’re secretive about this. ...

LH: You said that ‘mostly’ but not always you will sit together [after the hearing]. What are the circumstances that determine if someone will decide not to sit in on that discussion?

Judge: Yes, if they are going to write on their own anyway. ...So it’s not going to be of assistance to them.⁵⁹⁶

This response gives weight to the observation above that courts will have a ‘personality’ that impacts upon their operating procedures, and that this personality is highly dependent upon their members. It also highlights one of the potential blockages to good collegial practices, namely participation. This concern will be considered further in the next section.

Another member of the High Court of Australia gave two rationales in favour of promoting this type of pre- and post-hearing collective deliberation: first, and pragmatically, to avoid unnecessary duplication in the final judgment. Second, and of significance to this chapter, as a mechanism for developing individual perspectives on a case:

Judge: ... if you didn’t discuss cases, you might unwittingly not realise that you’ve got quite a common position about a case. One of the things

⁵⁹⁵ AUST007, 131.

⁵⁹⁶ AUST007, 132 -65.

you want is for the process of judging to be an efficient one, so if you never spoke to anyone about your case or the facts or whatever, that would seem to me to lead to unnecessary duplication.

LH: Do you ever feel that discussion creates more differentiation in decision-making between you and your colleagues, or has it ever made you re-think your initial approach to a case?

Judge: Well I am always happy to re-think my initial reaction to a case, which will be based on reading. During the course of oral submissions you might re-think a case so I am always open to re-thinking about a case whether that arises out of discussion or submissions. Discussion, as in ordinary life, is just a way of ventilating your thoughts about something.⁵⁹⁷

Interviewees from the Court of Appeal of the Victorian Supreme Court also described habitual pre- and post-hearing group deliberations. Again, there was no set formula, and given the larger membership of the Victorian Supreme Court and Court of Appeal combined (and that often judges from the Supreme Court will take up ‘acting’ post in the Court of Appeal), and the multiple configurations that can occur when setting panels, this is unsurprising. However all of the interviewees indicated that they spent time discussing cases with colleagues. The discussions however, appeared to be briefer than those taking place in the High Court of Australia, and usually more ad-hoc. For example, one interviewee gave the following description of the process usually adopted when hearing appeals:

...you meet ten minutes or 15 minutes before in the ante-room and people often express a preliminary view on the basis of having read the submissions. Now often that preliminary view changes. Often when we come out, let’s say it’s an appeal against conviction, we’ll look at each other and say well, you know, this doesn’t add up, you won’t have a kind of detailed discussion, usually, about the reasoning unless it’s something like a five member bench or a complicated issue of principle, or

⁵⁹⁷ AUST006, 365-78.

something like that. ...If it's more complex then you have that interactive process a bit more.⁵⁹⁸

This interviewee lamented the brief nature of these discussions, expressing the opinion that although the level of inter-judicial interaction outside of court was not ideal, it was a pragmatic necessity for this busy court:

Judge: ...if I was starting with scratch and we didn't have so much to do, I probably would get everyone sitting down and actually work out the path of reasoning under each category. At some point someone's got to go away and read it... write it and you've got to react to the draft, but I don't think we can do it.

LH: Because the workload doesn't allow for it?

Judge: Yeah because in a way it's more efficient to have somebody go off and do the thinking and, you know, chasing all the authorities down and all of that sort of stuff. ... And, you know, Counsel doesn't always do very well on that, even at this level. And then giving it to your colleagues and some people will just agree or just agree for it to be a judgment of the Court. And, you know, it looks right sort of thing, and you agree with the conclusion. If it's more complex then you have that interactive process a bit more.⁵⁹⁹

Another interviewee also emphasized the point made in the quotation above that the nature and complexity of the case would certainly impact upon the amount of time spent by the judges outside of court discussing the case:

My perception is that it would be an extraordinarily rare case where they wouldn't have sat down, often just for five or ten minutes beforehand, to discuss what they are thinking about the case. In a complex case they will have often sat down long before. But in a typical case, because the vast majority of the work the Court of Appeal does is pretty routine appeals, County Court sentencing appeals and not very difficult appeals in terms of the facts, you probably wouldn't sit down for more than five or ten minutes beforehand just to discuss some preliminary views about where it's going but also to discuss do we want to spend a lot of time asking 'is this an area I really want to explore, can we make sure we clarify with

⁵⁹⁸ AUST013, 404-29.

⁵⁹⁹ AUST013, 398-422.

defence this, that and the other' or whatever. ... The real discussion, if there is going to be debate, often happens when the draft is circulated, because usually it's only in the process of writing or reading someone else's draft that you really work through the reasoning process. Sometimes people change the ultimate decision but more often than not the debate and the discussion goes into the articulation of the reasons rather than the decision, because with the decision at the end of the day you can always agree or disagree, but how you are going to explain why you agree or disagree is where the bulk of the time goes in.⁶⁰⁰

The Full Court of the Federal Court of Australia had similar pre- and post-conference tendencies as the Court of Appeal of the Supreme Court of Victoria. Again, appeal benches in this court are pulled from a pool of judges (indeed, a much larger pool than that available in the Court of Appeal of the Supreme Court of Victoria) so the individual preferences of the particular combination of judges play heavily on the processes adopted in each particular case. However, in general, judicial discussions surrounding Full Court appeals tended to include a degree of discussion among the judges about the case, away from the public eye. The appeal cases in the Federal Court of Australia are held during 'full court periods' four times each year. The interviewee below described how they engage in a significant degree of pre-trial preparation and judicial discussion:

Judge: I prepare well in advance and so I probably irritate the others a bit because I ask...for my allocation early and I substantially prepare that case including a draft up front if I can so I know where I'm going and I prepare the other cases and then I will often distribute my draft beforehand for discussion purposes. If there are particular issues that are either not clear then I will often email my colleagues and say to them... so that's sort of the two weeks before the hearing, and then we confer, as you know, in the period leading up to it. It depends who's presiding; sometimes we do it by telephone two or three days but desperately without failure on the morning or the afternoon before and then we confer all that day and then again afterwards.

LH: And so would it be fair to say that you talk a lot to your colleagues about Full Court decisions before the decisions is made?

⁶⁰⁰ AUST025, 614-47.

Judge: Correct, yes. So at the end there is a consensus as to whether we are on the one page or not. It's much easier if you've at least a shell of a draft because you've got something to shoot at and then we either agree that one will write or if there are differing views then one will say, 'well you write and I'll see what it is', and they'll write a dissent if they want to.⁶⁰¹

3. South Africa

The Constitutional Court of South Africa is explicit about its collegiate approach to judging, describing collegiality as 'one of the central features of the Court'.⁶⁰² The South African Constitutional Court is striking in this respect – collegiality is central to its procedure not by reason of evolving tradition or habitual practice, but out of explicit and deliberate design. Upon its establishment under the Interim Constitution⁶⁰³ in 1994, the Constitutional Court was seen as the symbolic legal embodiment of South Africa's new democracy. The new court purposefully embraced concepts of collegiality and inclusivity or 'unity in diversity',⁶⁰⁴ particularly in terms of gender and racial inclusiveness. This was done out of a desire to create a new court that would lead the democratic constitutional transformation for South Africa and conscientiously distance itself from the divisive and exclusive legal structures that marked the previous apartheid era. Judges on the newly formed Court were active participants in both the physical design of the new court, built on the site of a former notorious apartheid prison, and also in shaping new internal operating

⁶⁰¹ AUST026, 418-37.

⁶⁰² 'The Role of The Constitutional Court: How it decides cases' (*Constitutional Court of South Africa*) <<http://www.constitutionalcourt.org.za/site/thecourt/role.htm>> accessed 3 March 2014.

⁶⁰³ Interim Constitution, Act 200 of 1993 (South Africa).

⁶⁰⁴ G A Bremner, 'Supreme and High Court Architecture in the Common-Law Tradition: An International Perspective' in Chris Miele (ed), *The Supreme Court of the United Kingdom: History, Art, Architecture* (Merrell 2010) 193.

procedures. The Court was purposefully designed to ‘celebrate the ideals of a progressive Constitution, commemorate the suffering and struggles of the country’s past without slavishly doing obeisance to history and give visible form to the belief that all are equal before the law’.⁶⁰⁵ The role that collegiality would play amongst the judges, who were to ‘reflect broadly the racial and gender composition of South Africa’,⁶⁰⁶ was clear from the outset. One of the lead designers of the new Constitutional Court building reflected upon the central role that a particularly nuanced conception of ‘collegiality’ – combining both the individual responsibility and the group participation – played in the design of the new building:

As individuals we are part of broader communities: families, neighbourhoods, tribes, religious groups, countries. We dance and sing as individuals, but contribute to the impact of the whole. We have our own voices, our own beliefs and our own personalities, and in a democracy, every person has value and rights. But we are ‘one in many’, part of a greater whole, and we embrace that collective spirit in our Court.

In the Constitutional Court, there are eleven judges, representatives of the nation’s diversity. Together they debate the matters of the Constitution and then they respond and deliver judgment to the people.

In a similar fashion, the Court building is made up of distinct parts. The parts themselves are made up of groups. The Judges’ Chambers are a collection of free-standing buildings, separated from the spine of the Gallery, in pods of water and planted gardens. They are private places for retreat and study. But the collection of these buildings underneath the common sun-shading roof is symbolic of the judges’ working together for a common response to matters of the Constitution.

The South African democracy is an accomplishment of unity in diversity. As in dance and song, the individual remains always an individual, but is

⁶⁰⁵ Bronwyn Law-Viljoen (ed) *Light on a Hill: Building the Constitutional Court of South Africa* (David Krut Publishing 2006) 7.

⁶⁰⁶ SA Constitution, s 174(2).

made stronger by the group. This is the hope embodied in the South African Constitution.⁶⁰⁷

So how is this vision – the individual remaining the individual but being made stronger by the group – encapsulated in the working practices of the Constitutional Court? The South African Constitution requires that all cases before the Court be heard by a minimum of eight judges, with the usual practice being that all eleven will sit. Prior to the oral hearing, but after written submissions have been received, the Chief Justice will ask a particular judge to ‘do special preparation and possibly write the judgment’.⁶⁰⁸ Once the oral hearing has concluded (but not before to prevent the justices from being ‘unduly influenced by the views of colleagues’⁶⁰⁹) the judges will meet as a group to discuss the case. The Court is transparent in its collegiate practices and unique in its description of the process on the Court’s website. Justice Albie Sachs, one of the first eleven judges appointed to the Constitutional Court in 1994, described the process as follows:

... judges act collegially and meet often to discuss important and controversial aspects of a case. A few days later, the writing judge will submit a memo to all the others, indicating where he or she stands. If there are disagreements about the decision or the route taken in reaching it, the judge who disagrees with the main writer will prepare to write a concurrence or dissent. Writing a judgment is a long process. The judge prepares a first draft and circulates it. The judges then meet and submit comments or changes. If a dissenting judgment has been written, the justices will begin to indicate which judgment they will follow and why. Sometimes lengthy discussions take place. Once consensus is reached, the judgments are thoroughly checked. The judgment is then handed down - released at a public sitting of the Court.⁶¹⁰

⁶⁰⁷ Janina Masojada, in Bronwyn Law-Wiljoen (ed), *Light on a Hill: Building the Constitutional Court of South Africa* (David Krut Publishing 2006) 117.

⁶⁰⁸ (n602).

⁶⁰⁹ Sachs (n466) 49.

⁶¹⁰ Ibid.

He has reflected in detail upon the intensity of this process:

We meet round the conference table once, twice, three times and more, seated where we wish, and engaging with each other in the intense and distinctly earnest deliberative tones that only jurists (and some clerics) use. You can almost hear our brains whirring as one by one we motivate our different standpoints. After the meetings, we send each other courteous but sharp e-mails. In a setting of rigorous intellectual interchange, any initial naked preferences that we might have started with will at least have to be artfully dressed up in the garb of plausible legal argument.⁶¹¹

The South African Supreme Court of Appeal has less publically available material describing its pre and post hearing deliberative processes. The Supreme Court of Appeal is the final appeal court on all matters in South Africa, save for constitutional cases. The Court is situated in Bloemfontein and it sits regularly in panels of five or three judges. The composition of these panels differ for each case, and will be configured from any of the 22 members of the court. In many respects, the deliberative processes of the Supreme Court of Appeal appear similar to those adopted by the Court of Appeal of England and Wales and the Victorian Supreme Court and Court of Appeal. Collegial deliberation is frequent, but unlike the Constitutional Court, is not specifically regulated by either formal procedure or convention. One interviewee described the process as follows:

In petitions for instance, when they arrive you read it and you phone your colleague and you discuss it and then if you are not in agreement you go and look at it again and if you still don't agree another colleague is roped in and you discuss it. When we do appeals, after court we sit and we have what we call conferences and we debate issues and we share views and sometimes you find that you were wrong and sometimes colleagues find that they were wrong and so on. Then in judgment writing, if you are appointed as a scribe then you circulate that judgment. Colleagues look at

⁶¹¹ Ibid 50-1.

it and then they give input and then you look at their inputs and then it's a joint effort.⁶¹²

Another colleague gave a similar account, noting the benefit of peer engagement and the powerful impact that it had on the final shape of the decision produced:

...immediately after the case has been heard we have a case conference... it's a tradition that in descending order of seniority that the judges will give their view as to what should be the case. That's a way of crystallising... you realise that unambiguously you are going to have a unanimous Bench or you might realise that, 'look there is a problem here in a sense that we're going to have a majority and a minority, we don't know which is it going to be', because somebody is saying, 'well I'm not prepared to actually pin my colours to either mast; I want to see what so and so writes and whether he can persuade me to his point of view in writing'. So the discussions between colleagues - and it's not just formal discussions, it's also popping into somebody's office and having a chat with them or someone who has been on the Bench with you popping in and saying, 'now I am writing this particular judgment and I am grappling with this particular area, what do you think?' Then you have a debate and your input might then be reflected in what is an ultimate judgment but that interaction between colleagues is very important. I think it's more important in some ways than ... well I can't say it's more important than the heads of argument or the arguments in court but it's very influential. It certainly does have a great impact on what the judgment looks like, whether there's a split Bench, so how is it split etc.⁶¹³

This quotation also demonstrate how relatively informal procedures can generate collegial engagement in appellate courts. This was common to all of the courts studies. Informal avenues that encourage collegiality include the design of a court building that provides for common spaces for judges to meet and discuss cases before and after hearing, and during the deliberation period; the English tradition of 'dining in',⁶¹⁴ or other forms of spontaneous engagement between judges such as

⁶¹² SA025, 226-35.

⁶¹³ SA021, 543-62.

⁶¹⁴ However, note Darbyshire's observation that certain 'minority' groups within the judiciary may be less inclined, depending upon the court environment, to spend their lunch hour engaging in such an activity: see Darbyshire (n454) 423.

conversations via telephone, or in small snatches of time before and after court.⁶¹⁵

For example, several justices of the High Court of Australia, located in Canberra and therefore remote from all of the current serving judges' home bases, have taken to habitual walks around Lake Burleigh Griffin with their colleagues and use the occasion to discuss reserved judgments. Informal interactions were often identified by interview participants as sites of intellectual exchange that were important in the judges' formation of decisions.

This section has demonstrated that while the degree to which judges interact with each other in the decision-making process will vary according to both the institutional setting and the personal preferences of the judges involved, there is, at least, a significant *opportunity* for judges to interact with each other away from the public eye, and to collaborate in the decision-making process. The question now becomes whether collegiate practices necessarily mean that the court will become 'more than the sum of its parts' by drawing upon the diverse experiences and perspectives of each and every member of the court, or are there blockages that inhibit this process? If so, how can they be overcome?

C. WHEN DOES COLLEGIALLY ENHANCE 'ENLARGEMENT OF MIND'?

The sections above demonstrate the extent to which modern courts do, in fact, engage in collegiate practices. Collegiality presents an opportunity for judges to share experiences, use the collective plurality to challenge their own assumptions of 'normal' in order to test the objectivity of their own standpoint, and generally foster an environment where the process of 'enlargement of mind' can flourish. This definition will be referred to as 'good collegiality' for the purposes of this chapter. However, despite the potential for collegial interactions to enhance decision-making,

⁶¹⁵ Arden (n568) 8.

many of the interviewees highlighted that the conditions in collegiate courts will not *necessarily* enhance the collective consciousness and enrich the deliberative process. In some circumstances, collective decision-making might, in fact, serve to diminish the range of perspectives available to the court.

This section will consider what conditions are necessary in order to encourage ‘enlargement of mind’ in a court, and what can inhibit this process. It will highlight some of the dangers that are present in collegiate courts. It will conclude that these dangers are not insurmountable, and more importantly, are not an automatic by-product of gender-diverse courts. Indeed, being conscious of these potential blockages is a necessary first step towards achieving good collegiality.

1. What is ‘good’ collegiality?

Chapter 3 of this thesis explored the concept of ‘enlargement of mind’.⁶¹⁶ This is the process through which a judge strives for impartiality by first, acknowledging her own partiality, and then opening herself up to challenge and movement from her original position by engaging with the ‘truths’ of others that may be different from or challenge her own. The process was elegantly articulated by one of the South African interviewees. In his opinion, the court on which he sat was particularly diverse. While he lamented the fact that women remained a significant minority on the court, the interviewee noted that in terms of race, linguistics, class, rural versus urban, sexual orientation, culturally and ethnically it was a diverse court. From this diversity, he said ‘we are constantly confronted in this court by someone who says ‘*why* doesn’t that make sense?’⁶¹⁷ He said that often ‘something seems so obviously nonsensical – and then you have a colleague who says to you “but *why* is that

⁶¹⁶ See also Nedelsky (n282).

⁶¹⁷ SA005, 82-4.

nonsensical?”⁶¹⁸ He continued, ‘this has a profound impact on your own thinking because then you’ve got to reach further back into your own social premise to justify your stand. That is in itself illustrative of how this nonsense that you rely only on “the law” is simply absurd because you are reaching back into your own social, economic, [and] political pre-suppositions all the time.’⁶¹⁹ The trigger for this deep personal interrogation is the confrontation offered by a colleague differently situated in the world. The challenge to explain ‘why’ something is or should be so to a colleague with a differing opinion offers an opportunity for critical self-reflection, and consequently intellectual growth. Later in the interview, the same participant noted the benefit that this brought to judicial decision-making: ‘I think that through judicial conversations, you actually strengthen and enhance your insights...and through contestation of judicial ideas after arguments, you do the same.’⁶²⁰

The collegiate environment can clearly be facilitative of an ‘enlargement of mind’ process. However, this is not a given and will depend upon the existence of particular conditions and the absence of certain blockages. To start with, a necessary prior condition is that there are, in fact, points of challenge around the deliberative table. As Minow highlights, ‘[t]he value of consultation is enhanced not merely by the presence of more than one mind but also by the presence of more than one vantage point.’⁶²¹ This reinforces the idea that diverse gendered experiences, rather than just gender identity itself, is the touchstone for better decision-making in collegiate courts. Collective deliberation that occurs in the absence of contestation

⁶¹⁸ SA005, 71-2.

⁶¹⁹ SA005, 84-8.

⁶²⁰ SA005, 353-6.

⁶²¹ Minow, ‘Stripped Down Like a Runner or Enriched by Experience’ (n268) 1209.

may serve only to reinforce the original vantage point, rather than produce an environment where that starting point can be tested, countered and ultimately, strengthened through the didactic process of exchange. The limitations of homogenous deliberative groups have been well documented, as Sunstein's work in this area highlights.⁶²² Sunstein has surveyed the literature that analyses the impact of 'group polarization' on deliberating bodies. Group polarization is where members of a deliberating group move towards a more extreme point in the direction indicated by the members' pre-deliberative tendencies. The research suggests that during group deliberations, 'when people are hearing echoes of their own voices, the consequences may be more than support and re-enforcement'.⁶²³ Rather, these echoes will lead the group as a whole to move further towards the dominant direction of the group than any one member would have moved had they had been deliberating on their own. The research contained in Sunstein's work indicates that the impact of this phenomenon is particularly acute when people are participating in iterated polarizing events – that is, 'when they meet regularly without sustained exposure to competing views extreme movements are all the more likely'.⁶²⁴ Courts with homogenous membership are particularly susceptible to this type of iterated polarization. Depolarization is possible within these groups, but, in a similar way to 'enlargement of mind,' is dependent of several factors: first, a diversity of positionality within the members of the groups; and second, members within the deliberating group having a degree of flexibility in their positions. As Sunstein sees it:

⁶²² See: Cass Sunstein, 'The Law of Group Polarization' (2002) 10 JPP 175; Cass Sunstein, *Going to Extremes: How Like Minds Unite and Divide* (OUP 2009).

⁶²³ Sunstein, 'The Law of Group Polarization' 'The Law of Group Polarization' (n622) 6.

⁶²⁴ Ibid 2.

The central problem is that widespread error and social fragmentation are likely to result when like-minded people, insulated from others, move in extreme directions simply because of limited argument pools and parochial influences. ...In terms of institutional design, the most natural response is to ensure that members of deliberating groups, whether small or large, will not isolate themselves from competing views. ...Here, then, is a plea for ensuring that deliberation occurs within a large and heterogeneous public sphere and for guarding against a situation in which like-minded people are walling themselves off from alternative perspectives.⁶²⁵

The extent to which judicial deliberation can be done within a ‘large and heterogeneous public sphere’ is limited – judicial deliberations occur in private, and in appellate courts are done within relatively small panels of judges. However, this thesis has advanced the case for increasing heterogeneity, and therefore the breath of argument pools, from which these small judicial groups can draw upon. However, is heterogeneity enough to ensure that ‘good collegiality’ occurs? The next section highlights some of the potential ‘blockages’ to good collegiality that may arise even within diverse judicial groups. These blockages are not insurmountable. But they do highlight that good collegiality will not automatically follow from placing groups of experientially diverse people around the same deliberative table. Conscious effort must always be taken on the part of those deliberating to ensure that each member is both open, and equipped, to undertake the process of good collaboration in order to capitalize on the benefits of this process.

2. What threatens ‘good’ collegiality?

This section will explore three conditions that obstruct ‘good collegiality.’ They can undermine the ability of the bench to effectively collaborate during the decision-making process. These factors are (i) a lack of physical participation in collective deliberation; (ii) an inability or unwillingness to fully contribute intellectually to

⁶²⁵ Ibid 12.

collaborative deliberations; and (iii) a lack of mutual respect amongst deliberative participants. The presence of one or more of these factors might cause a blockage in the development of the pool of ideas available to the deliberative group and weaken the potential of collaborative decision-making. These blockages mean that even if members of the court hold diverse perspectives, these will not be placed upon the deliberating table, and will not benefit the deliberating group.

a. Deliberative Participation

The first, and most obvious impediment to good collegiality is the resistance of individuals to participate in this process. As the initial part of this chapter has highlighted, all of the courts studied have either formal, or informal mechanisms designed to facilitate interaction between judges during the deliberation process. However, these processes are often voluntary, and rely upon the ‘buy-in’ of individual judges in order to have any impact. A quotation in the first section of this chapter from an Australian judge notes the non-mandatory nature of post-hearing conferences in that particular court. Indeed, former Justice of the High Court of Australia, Dyson Heydon, has described close collective deliberation between appellate judges as a potential threat to judicial independence from ‘the enemy within’.⁶²⁶ He reasons: ‘[t]he function of independent judges is to concentrate on their personal views of what constitutes a just outcome according to law after full argument from counsel. Post-hearing conferences weaken that concentration.’⁶²⁷ He has resisted the idea that courts should operate in a decisionally collegiate manner and considers participating in post-conference discussions with other members of the court as a fraught exercise – both because it potentially opens the individual up to inappropriate pressure from

⁶²⁶ Heydon (n575).

⁶²⁷ Ibid 219.

colleagues attempting to influence the particular judge's opinion, and it also gives an opportunity for less conscientious of members to defer the intellectual task of thinking through the case at hand to their colleagues. These points will be considered further under the next heading of 'intellectual contribution'. For Heydon, this equates to a lack of independence, and the only way to safeguard against this undue influence is for judges to deliberate alone. Paterson notes that a 'small minority of individualists' in the House of Lord and the new Supreme Court have shared this position over the last 40 years.⁶²⁸ While the decision to isolate oneself from all collegiate influences may be an effective way of resisting undue inappropriate pressures from colleagues, it also shuts the judge off from the positive deliberative effects of discussion. An isolated judge will have fewer opportunities to be challenged – the self-reflection that comes from a colleague enquiring 'why' is extremely difficult, if not impossible, to self-generate. It becomes easier to think that a view is universal if it is not open to challenge and sustained challenge after oral argument can only occur through discussions with judicial colleagues. To remove oneself from this process in order to preserve judicial independence may, in fact, weaken impartiality as a judge. A new 'threat from within' arises – that of the individual's own sub-conscious partiality, left unchecked without contestation.

A reluctance to engage colleagues in dialogue about reserved judgments is one obvious obstacle to the positive benefits that may be derived from collegiate deliberation. Another is when judges are selective in which colleagues they are willing to discuss cases with. This participatory defect is not a complete withdrawal from collegiate discussions, but rather selective participation in discussions. In some ways this may even be more noxious practice – it creates the potential for internal

⁶²⁸ Paterson, *Final Judgment* (n453) 131.

factions to form and for judges to only deliberate with those who reinforce, rather than challenge, their own initial perspective on a case. On Sunstein's account of group deliberation, this would be more likely to push insulated sub-groups within the court to more extreme positions, rather than provide a foil to challenge received normative assumptions and sub-conscious biases. This is most likely to occur in courts that, unlike the South African Constitutional Court, do not have formal process for post-hearing judicial dialogue, but rather rely on informal processes. However, even within formal group deliberative processes factions may occur if judges are not open to receiving in-put from particular members of the deliberating group.

Selective deliberation might occur for a number of reasons. Those that have been identified in my interviews and the research to date include i) friendship or intellectual bonds between certain judges; ii) feelings of exclusion iii) strategic behaviour on the part of members of the court to create a 'voting block'.

Friendship may be a strong motivating factor when a judge decides whom to deliberate with. As Paterson's research demonstrated, judges 'were more likely to visit colleagues whom they were friends with or whom they knew well from the past.'⁶²⁹ Intellectual respect or mentorship may also tend to make judges selective when consulting with colleagues. For example, an Australian judge reported her relationship with a more senior member of the court and her preference to approach certain people 'for advice' over others as follows:

...of all the people in this court that I would ring when he was on the Bench to ask for advice he would be one of them. Because sometimes he had an advantage, he didn't have the baggage that the others had, does

⁶²⁹ Ibid fn 154.

that make sense? And so for me he would be one of the one or two [people] I would ring.⁶³⁰

Selective engagement, particularly when the selection is being made from a relatively small pool of judicial colleagues, could lead to issues of group polarization. Particularly if judges are inclined to ‘select’ those whom they see as intellectual allies. Basing deliberative partnership selection upon friendship or intellectual bond may serve to reinforce a judge’s own initial position, and mutual reinforcement that may serve to push the group further towards a pre-conceived assessment of the case, rather than providing any challenge for the initial standpoint. This is a potential threat to good collegiality, but not a necessary outcome. There have been many well-documented judicial friendships which could in no way be accused of fostering group polarization. The friendship between US Supreme Court Democratic appointee Justice Ruth Bader Ginsberg and Republican appointee Justice Antonin Scalia is a well-known example. This famous friendship has not discouraged rigorous debate or, evidently, dissents between the two judges. Ginsberg, speaking extra-judicially on the subject, highlighted the long tradition of disagreeing friends, at least on the US Supreme Court:

Are there lasting rifts sparked by sharply worded dissent? Justice Scalia spoke to that question nicely. He said: “I doubt whether any two [J]ustices have dissented from one another’s opinions any more regularly or any more sharply than did my former colleague Justice William Brennan and I. I always considered him, however, one of my best friends on the Court, and I think that feeling was reciprocated.” The same might be said today about my friendship with Justice Scalia.⁶³¹

⁶³⁰ AUST026, 111-5.

⁶³¹ Hon Ruth Bader Ginsberg, ‘The Role of Dissenting Opinions’ (2010) 95 MinnLRev 1, 4 citing Antonin Scalia, ‘Dissents’ (22) 13 Organisation of American History Magazine of History 22.

It is clear that although friendship and self-selection does not necessarily mean that rigorous debate will not occur between judges, it might inhibit full debate. This is because, in the absence of formal conferencing opportunities, judges may not be getting the benefit of the full market-place of ideas on offer to the court if selecting which colleagues to interact with and which ones not to interact with. Conversely, any lack of social cohesiveness or comfortable relations amongst different members of the court might raise the potential for exclusion. This is particularly so for members who have been historically, or are even continuing to be, excluded and marginalized or seen as ‘outsiders’ by their colleagues. A South African interviewee spoke of her perceptions of the experience of the first Black judges appointed to South African courts post-apartheid. She thought that in this context, race would have been a decisive factor on who collaborated with who. She said:

I think it would have been difficult for them coming into this environment with lots of White judges and I think it does make a difference when you come into an environment who you are going to approach first. ... But as the years go, that becomes less of an issue because now you have children going to school together. In our times we didn’t go to school together so if I was appointed as a judge and I knew a judge there, you know, the first person I want to go to is a Black colleague to ask ‘can you help me with this’?⁶³²

Without formalized post-hearing deliberative structures there is a danger, as the quote above demonstrates, that historical or social segregations will infiltrate the collegiate decision-making space. This is particularly concerning where those who have been socially or historically segregated – the ‘other’ or the ‘outsider’ – are more likely, such as the South African experience, to have had vastly different world experiences and may have the most to offer in terms of perspectives to the other, socially dominant group.

⁶³² SA024, 272-81.

The final issue to consider in respect of participation is the phenomenon of ‘strategic’ engagement. A great deal has been written in the US context about strategic alliances formed between judges in order to generate voting blocks.⁶³³ This theory, as described by Posner, posits that ‘judges do not always vote as they would if they did not have to worry about the reactions to their votes of other judges (whether their colleagues or the judges of a higher or lower court), legislators, and the public.’⁶³⁴ Rather, judges take a strategic approach to cases – perhaps conceding a point and joining a majority decision on one case in order to have more ‘leverage’ against their colleagues in a future case. Paterson has identified this as an outcome-oriented approach to judicial behaviour. Drawing on the work of Danelski,⁶³⁵ applying small group analysis to the decision-making process in the US Supreme Court, Paterson drew upon a characterisation of judicial strategists as ‘task leaders’. He described a task-leader as a judges who can ‘exercise effective leadership concerning decisional outcomes,’ and ‘leadership which is affected by “personality”, esteem within the Court, intelligence, technical competence, and persuasive ability.’⁶³⁶ He included a number of eminent senior Law Lords and Justices in his list of ‘task leaders’ – people who could use the collective decision-making context of the court as a forum within which to lobby or tactically manoeuvre colleagues.⁶³⁷

⁶³³ See Richard Posner, *How Judges Think* (HUP 2008) 29-30 and the references cited therein.

⁶³⁴ Ibid 29.

⁶³⁵ David Danelski, ‘The Influence of the Chief Justice in the Decisional Process’ in Walter F Murphy and C Herman Pritchett (eds), *Courts, Judges and Politics: An Introduction to the Judicial Process* (Random House 1961).

⁶³⁶ Paterson, *Final Judgment* (n453) 146.

⁶³⁷ Paterson includes Lords Reid, Wilberforce, Diplock, Bingham and Dyson as examples of judges who exercise task leadership effectively: ibid 146.

However, some of my interviewees were more sceptical about the extent to which ‘lobbying’ actually occurred. One interviewee from the UK put it this way:

...this business about peer to peer influence can be easily overestimated. I mean it’s one of these tantalizing subjects that academics love to speculate about: what’s the dynamics of the court and who’s the strongest character and will that person prevail upon the less set of what dominant character...that’s not really the way life works, quite obviously! We are all people of pretty firm opinions and I think that while we strive to be open to influence from colleagues, I’ve never – I can say this with complete confidence – I’ve *never* had the experience of being influenced to a result that I was less than totally comfortable with because of the views of others. I hope I haven’t! I’m pretty certain that I’ve never sought to persuade someone to a course that he or she didn’t wish to follow, and I think it would be pretty futile for people to try to influence me to a course that I didn’t think was the right one. In as much as this peer influence topic suggests that there is this subterranean current running where the more forthright and the more dominant personalities have their way: I think it is a myth.⁶³⁸

Whatever the actual rate of occurrence of strategic behaviours by judges, it could be seen as another inhibitor to good collegiality. A judge who is trying only to convince colleague, or to ‘win them around’ to his or her initial position is not sufficiently opening themselves up to the possibility of error in their own initial viewpoint, nor would they be overly receptive to challenge. Their participation, or commitment to participation, in good collegial practices is limited due to the strategic targeting of the exercise. In this way, strategic engagement may limit good collegiality in a manner similar to selective engagement or disengagement.

b. Intellectual contribution

The first requirement for good collegiality was participation in collective deliberation. The second requirement is that each member of the court needs to be able and willing to expend equal amounts of intellectual input into the decision-making process. Good

⁶³⁸ UK006, 357-75.

collegiality may break down in this respect in two ways. First, if a judge is unwilling to expend this energy, either overtly or inadvertently as a result of a collegiate-decision-making process that may allow him or her to ‘ride on the coat-tails’ of others’ industry. Second, good collegiality will break down if a judge is unable to intellectually contribute to a collegiate decision-making process. This second concern is an often-cited fear by those who are opposed to, or critical of, incorporating ‘diversity’ into appointments process. They fear that even the most well intentioned efforts at transformation may inadvertently lead to what is pejoratively referred to as ‘token’ appointments – that the individual is appointed on their gender, race, ethnicity etc alone, rather than their intellectual capacity to perform the duties of the judge.

The first aspect of intellectual contribution is concerned with expenditure of equal intellectual energy into the final decision produced by the court. If collegiate practices become a mechanism for judges to ‘opt-out’ of this duty of industry and over-rely on the energy expended by their colleagues then decisional collegiality does nothing to enhance the pool of ideas available to the court. On the contrary, it reduces the perspectives on offer.

An interesting debate that often accompanies this line of reasoning is whether judges sitting in panels should each give separate reasons for their decisions – clearly demonstrating to the public that full intellectual consideration was given by each and every judge to the matters at play in the decisions – or whether composite or joint decisions are a more appropriate reflection of the result of collegiate engagement. While a full and detailed examination of this debate is beyond the scope of this chapter,⁶³⁹ a few points are salient to the question at hand. All of the courts studies in this thesis allow for judges on appellate courts to either ‘join’, or ‘concur’ or dissent

⁶³⁹ See: Heydon (n575), Paterson, *Final Judgment* (n453) and Burrows (n567).

(in whole or in part) from the majority decisions. Judges join a decision when they agree with both the reasoning and outcome of another judge's written opinion. A judge may agree with the outcome, but not the reasoning, and in this case they may elect to write a concurring opinion. Finally, a dissenting opinion is written when the judge disagrees with both the reasoning and outcome of the decisions written by her or his colleagues. There is no requirement, unlike other jurisdictions such as the Court of Justice of the European Union, for the court speak in one 'voice' – as 'the Court'. Indeed, 'good collegiality' may, in practice, increase the number of concurring or dissenting judgments produced by a court in a particular case – as the process of engagement with judicial colleagues serve to highlight nuances and diversions in opinion in a manner not previously anticipated. Lord Neuberger, citing a former Federal Court of Australian judge Russell Fox, highlights how multiple opinions are one of the 'glories of the common law system',⁶⁴⁰ not only for their contribution towards the incremental development of the common law, but as a safeguard of judicial independence and 'decisional independence and accountability'.⁶⁴¹ That is, making sure that the written decision is an accurate reflection of what each panel member considered on the merits of the case. This decisional independence extends not only to the outcome of the case (for example, in the freedom to dissent), but also provides for independent expression of the reasoning. Justice Mary Arden, referring to her concurring reasons for decision in the case of

⁶⁴⁰ Lord Neuberger, 'Developing Equity - A View from the Court of Appeal' (Chancery Bar Association Conference, London, 20 January 2012) [20] citing Russel Fox, *Justice in the Twenty-First Century* (Cavendish Publishing 2000) 107.

⁶⁴¹ Neuberger, 'Developing Equity - A View from the Court of Appeal' (n640) [21] citing Arden (n568).

Evans v Amicus Healthcare Ltd,⁶⁴² a case concerning a woman's ability to have fertility treatment, explains her reasons for providing a concurring opinion as follows:

...I decided that it would not be right for my judgment to form part of the judgment of the court. I had written it in part from a woman's perspective and wanted it to be seen as such, especially as the decision was to reject the woman's case.⁶⁴³

Concurring or dissenting decisions are not problematic in terms of intellectual industry. What can be problematic, however, is when apparent, but not actual collegiate agreement leads to composite judgments. Heydon expressed the problem as such:

Composite judgments raise questions. Who did the work? Did every judge understand the judgment? Did every judge closely examine it? Did a confident "specialist" assume dominance over nervous "generalists"? What, if any, compromises were made? It is sometimes said that all members of the court contributed "equally" to a composite judgment. The intellectual activity involved cannot be measured to that degree of precision. This is an extreme illustration of a fundamental difficulty in composite judgments. The same difficulty exists where a judge delivers a full judgment and the remaining judges say "I agree". No doubt the judges do sincerely agree on something, but on what? On a sufficient selection of the main steps in the reasoning? Or on every word, including split infinitives and floating participles? Or on an intermediate position? The late F. A. Mann was bold enough to say just before his death, in his habitual blunt style:

"Law Lords who agree with an opinion may not necessarily analyse and scrutinize it to the same extent as would be required if they had to write their own opinions. Probably they read it through, agree with the result and the broad line of reasoning, perhaps make suggestions, but are less than precise and careful in so far as specific formulations, sentences or dicta are concerned. Perhaps it would not even be regarded as polite to argue about individual phrases or incidental arguments".⁶⁴⁴

⁶⁴² *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727, [2004] Fam Law 647.

⁶⁴³ Arden (n568) 6.

⁶⁴⁴ Heydon (n575) 212.

Situations of inequitable industry alluded to in the quotation above do not demonstrate good-collegiality. But is the production of separate reasons by each judge on the bench necessary to ensure that all members of the panel share equally in the intellectual exercise? One of my interviewees saw this as wholly impractical for a busy and modern court. She put it this way:

...it is meant to be three individual decisions. That's the theory! The practicality is that you end up making a lot of accommodation on matters that don't at the end of the day matter to your decision, for pragmatic reasons to do with time and the fact that there just aren't enough hours in the day to all write your own judgments. And it's probably not a good thing for the development of the law that you all write your own slightly different, slightly nuanced things. So it shouldn't be team work in terms of coming to one decision, but in the process of delivering your reasons or explaining how you get the decision you often end up reaching accommodations to make it pragmatic and to ...be able to turn the judgments out in time.⁶⁴⁵

Another judge from the UK considered it detrimental to the development of law and weakened the guidance on offer for courts below if judges were to each write separate opinions without at least attempting to delineate the lines of consensus between them. He felt that 'courts like ours [a final appellate court] should be trying to arrive at a clear guidance for the courts in the future and you can only achieve that by some kind of team work and discussion. If you simply allow everybody to go off into their own corner and write their own judgment without any communication with the others, the whole thing would be a shambles in ten minutes!'⁶⁴⁶

While there may be 'team work' in the production of a composite judgment – be it through judges dividing up the sections that they each write after a discussion of the case as a whole, or by one member of the court offering to write as the 'scribe' of the court, and drawing up a draft that reflects the collective consensus arrived at during

⁶⁴⁵ AUST025, 581-92.

⁶⁴⁶ UK008, 204-10.

the post-hearing conference, such division should not, as one interviewee put it be a process by which ‘the individual abdicates responsibility’.⁶⁴⁷ This does not mean that each judge must, or necessarily should, write his or her own separate opinion in every case. Rather, there is an expectation that each member of the court will expend an equal level of intellectual energy on the issues that arise in case at hand, and contribute this intellectual energy to the final decision delivered by the court.

Good collegiality is also inhibited when members of the court, try as they may, cannot intellectually contribute in a meaningful way, or at least in an equal way, to collective discussions. This is always a sensitive, and often a loaded topic of debate and is often intermingled with definitions of what constitutes ‘merit’ for the purposes of appointment. The definition of ‘merit’ will be considered fully in Chapter 10, however, at the least, as was discussed above, the threshold for appointment to a final appellate court is high. It often comes after many years of legal training and experience. Often, an appellate court judge will have significant experience on a lower court. Sometime they will not, but will have professional experience of another kind that was sufficient to demonstrate that they are fit for appointment to the post. But there have been moments, whether real or perceived, in each of the jurisdictions studied, where members have been appointed to the court who do not, in the eyes of their colleagues or the profession, have the necessary technical skills to perform the task at hand. Often inadequate appointees are termed ‘political appointees’ – political because it is felt that they were not appointed because they were not the ‘best person’ and greatly resented by colleagues, as the following quotation demonstrates:

Other judges have to carry some political appointments to courts who simply cannot do the job that they are appointed to do. They embarrass the courts, their decisions embarrass the courts, they sometimes do not

⁶⁴⁷ AUST005, 296.

understand the role correctly because they do not have sufficient training.⁶⁴⁸

Another interviewee spoke of the strain that it puts on other members of the court having to ‘carry’ weaker members and how this is detrimental to ‘team work’ and collegiate practices. I asked her to what extent she considered appellate work to be ‘team work’. She replied:

I think it largely depends upon the quality of your team. I think that there is no doubt that that’s right and if your team’s fabulous then it’s wonderful, if your team’s not, it’s not wonderful! So there’s no doubt that’s right and some of the happiest times are times when it’s entirely collaborative and the product comes out and it’s beautiful; someone will write a bit and then you will re-write whatever you need to do and it’s all done, so, you know, I agree it’s team work but it depends on the strength of your team, like anything.⁶⁴⁹

A South African interviewee was explicit in her concerns about the appointment of those to the bench who were not technically competent. She spoke of what she perceived to have been a ‘rush’ to appoint Black judges to the bench in order to effect racial transformation post-democracy:

I think that there has been a rush to change the colour of the Bench too fast. ... [It is a] difficult issue because you couldn’t in 1994 or 1995 not immediately have Black lawyers on the Bench. There were of course very competent, able Black lawyers who were brought on immediately. In the late 90s a number of experienced very good black judges were appointed. More recently the pool of people with that sort of experience has dwindled; it hasn’t grown. And so one is left with the dilemma. Of course you want the right the balance, but there has not been sufficient notice taken of actual ability to resolve a dispute between the litigating parties or to come to a fair conviction and impose a fair sentence.⁶⁵⁰

⁶⁴⁸ AUST007, 277-81.

⁶⁴⁹ AUST026, 399-409.

⁶⁵⁰ SA020, 304-16.

This interviewee identified four important factors that the appointment of under-qualified judges could bring. First, she noted the erosive effect that it has on cordial relationships and cohesiveness within the court. Speaking of the relationships within her court, she said:

There is a very clear racial divide now. There wasn't when I got there. There *were* Black judges but there was a very easy mixing. There isn't any more. ...I think there is a lot of resentment. You know there is a resentment of the old order more senior judges and judges who have come in with virtually no background experience. There is a feeling of resentment on the part of those people who are appointed. A resentment that they are resented and great anger that they are not regarded as having been appointed on merit instead of being appointed on the basis of gender or skin colour and so there is a constant sort of simmering tension. And while I have formed friendships all my life across the colour line and still have some in [this Court], there is very much a sort of a non-socialisation.⁶⁵¹

She felt that this inter-personal tension made it difficult to be able to fully engage in a robust way with all of her colleagues.

I think it is prejudicial to the interaction between the judges and I think that if you sit as one of five people with whom you don't feel comfortable and with whom you are not going to agree on absolutely everything, it makes it uncomfortable. You know it's very easy to have disagreements, people have disagreements, violent disagreements with people with whom you feel comfortable and who aren't terribly self-conscious about their inadequacies. Or are unaware of their inadequacies. It's very hard, if you don't have great faith in your colleagues, to be entirely open.⁶⁵²

This has a chilling effect on the exchange of ideas in a similar way that feelings of exclusion, identified above, did. Third, the interviewee described the increase in workload that less capable judges generated for their colleagues on appellate courts:

There are judges and acting judges in the Supreme Court of Appeal who actually cannot write a judgment. They cannot string together a series of inter-connected ideas, or put a sentence together, which means that they

⁶⁵¹ SA020, 244-59.

⁶⁵² SA020, 263-9.

might as well not be there. And somebody has to do the work. One allocates judgments as the presiding judge in a matter to members of the panel. If you know that you are going to have to re-write the whole judgment you think twice before allocating it, and then because you want to be tactful and not to be abrasive and hostile you allocate it to somebody who just isn't equipped to do the job and land up writing and feeling resentful and there is resentment all around, so it's actually a very destructive thing and I think no-one is done any favours if appointed other than on merit.⁶⁵³

Finally, she spoke about the public impact of judges who are perceived to be incompetent. She particularly spoke about the phenomenon in South Africa for well resourced private parties to turn towards private arbitration as a means of settling disputes in order to avoid coming to courts where they may be faced with a judge lacking the competence to decide the matter at hand:

It's the people who come before the courts who are harmed. One of the things that our current Minister of Justice, and previous ones as well, have been very unsettled by is the fact that commercial disputes are not taken to the courts anymore; they go to arbitration. Because the big commercial parties don't have confidence in the courts and so the way that the government has reacted is by trying to preclude retired judges from undertaking arbitration. It hasn't succeeded yet but it's trying very hard and arbitration has become a dirty word in this country. It's perceived to be very elitist. It's regarded as undermining and demeaning the courts and yet the parties walk. They won't come to the courts if they can avoid it.⁶⁵⁴

At this stage it is important to note that under qualified judges are not simply a product of efforts to transform the racial or gender constitution of the bench. Ill-suited appointments might be motivated by a number of factors – such as political ideology or nepotism that have nothing to do with the gender or race of a potential candidate. However, there has, at least in the popular discourse, been a concern that efforts towards transformation will lead to an increase in the appointment of under-qualified judges. This will be considered more fully in Chapter 10. While the

⁶⁵³ SA020, 281-93.

⁶⁵⁴ SA020, 318-33.

extracts above from the South African judge took a particularly racialised view of under-qualified appointees, what they do serve to illustrate are the difficulties that appointments – of any gender or race – create if the candidate is unable to intellectually contribute to judicial life. This is perhaps, one of the most concerning impediments to good-collegiality. A judge cannot make a meaningful contribution to the collective ideas pool if they are not intellectually capable of doing so. As an Australian interviewee remarked: ‘If you’re not up to it, no-one will respect you. You cannot be influential if the rest of the court is carrying you.’⁶⁵⁵

c. Mutual respect

So far we have seen how the levels of participation and intellectual contribution impact upon collegiality – and the absence of either in any of its different manifestations might stand as a blockage to ‘good collegiality’. The third and final point is closely related to the second category of blockages – intellectual contribution. The third potential hurdle to good collegiality is a lack of mutual respect. Not only must each member feel confident in expressing their own opinion, but it is equally important that each member of the court sees their colleagues as equals, with a perspective that is well informed and valuable. As the examples extracted above demonstrate, if there is a lack of mutual respect amongst members of the court, less weight will be put on certain perspectives, and therefore the contribution of those who may be viewed as ‘weaker’ will have a limited impact on the argument pool. It is important to recognize that perceptions of judicial ‘weakens’ may not always have firm foundations. They may be coloured by pre-existing prejudices, or unconscious biases. This is particularly so when ‘outsiders’ join the court, whose experience may

⁶⁵⁵ AUST007, 337-8.

be different from that held by the majority of the members of the court. There is the potential for stigmatizing, or minimization, of those whose contributions may be different. Judges who may be perceived, rightly or wrongly, as ‘token’ or ‘political’ appointments might be unjustifiably de-valued and have a higher hurdle to cross before they can ‘prove’ their worth to colleagues. This lack of respect from colleagues, particularly if unjustified, will make it difficult for the ideas and perceptions of the ‘outsider’ to penetrate the status quo, therefore impeding good collegiality. This final idea will be explored further below in the stigma felt by a number of the female interviewees upon appointment to the bench – they reported a need to ‘prove’ themselves in order to be fully accepted by their brethren.

D. GENDERED EXPERIENCES AND COLLEGIATE DECISION-MAKING

Section B of this chapter demonstrated that senior appellate courts in the jurisdictions investigated do, in fact, engage regularly in decisional collegiate processes. While Section C has demonstrated that there may be hurdles to ‘good collegiality’, these hurdles are not insurmountable. Collegiate processes, when engaged in by independent minded judges who are willing to confront, explore and challenge their own personal standpoint and presuppositions, open up a valuable space for ‘enlargement of mind’ – they can allow the court to tap into a wider reserve of epistemologically valuable experiential knowledge. This enhances the quality of justice the court is able to provide. The process allows the court, acting collegially, to become more than the sum of its individual parts.

The final section of this chapter investigates the extent to which the judges interviewed could identify moments of ‘enlargement’ in their own judicial experiences. Particular focus is placed on experiences that the judges themselves identified as gendered. This is not to say that the experience was entirely attributable

to gender (in fact, rarely was this the case). Often the experience was one that lay at the intersections of multiple experiences – for example, by virtue of being a single woman, or from being a woman with a rural background, or from being a mother. This chapter also includes observations that are not gendered at all, but were shared by the interview participant as an example of associating with ‘otherness’ and how the collegiate sharing of this ‘otherness’ was a powerful tool from which judges could interrogate their own understandings of the world. It is important to reiterate that this section is concerned with the interviewees’ own perceptions of the impact that gender has. Some interviewees referred to certain cases where they considered the sharing of gendered experiences to be important. However, this chapter does not re-visit the text of these decisions (although, as Chapter 5 demonstrates that this too can be a useful methodology in uncovering gendered impact). Rather, it draws solely upon the insights shared during the interview.

This analysis is separated into three sub-parts. The first looks at situations where a participant identified a gendered experience as having an explicit influence on the collegiate decision-making– either an explicit influence they felt they made on a colleague, or one that a colleague made on them. These responses were elicited by asking the interviewee to respond to the questions: ‘has a colleague ever shared a gendered experience that made you change your perspective?’, ‘have you ever shared a gendered experience with a colleague that has made them change their perspective?’

The second sub-part will consider remarks that relate to the implicit influence that gender had on collegial decision-making. For example, comments that the tone of a conversation altered when the judicial decision-making spaces became gender inclusive.

The third section looks at gender in terms of collegiality, and identifies ways in which gendered stereotypes can serve to inhibit collegiality on gender-diverse courts.

The material in this section is organized by themes. These themes are generated solely by reference to the examples given by my interviewees. They are not exhaustive, nor could they be, of all of the areas where gendered experiences might be important. What becomes relevant and important for the interviewee is largely dependent on context, the particular experiences of the judges, what they were willing to share with that particular colleague at that particular time etc. But what is interesting is that they track along many of the traditional sites of law where feminist theory has been concerned with normative male-bias: notably gender based violence; children and mothering; and power dynamics in personal relationships between men and women.

It is important to note at the outset that not all of my interviewees could recall a time where they shared, or were impacted by the sharing of, a gendered experience. Indeed, as the previous chapter highlighted, on one occasion an interviewee did not consider himself as having a gendered perspective. However many did. These snapshots provide an illuminating account of the way that gendered experiences inform collegiate decision-making.

1. Explicit Influences

Even if they could not provide a concrete example, many of the interviewees were prepared to accept, in a general way, that there had been moments in their judicial career when a colleague had shared a life experience that was so different to their own that they had to recalibrate their own initial reaction to the case at hand. The following quotations demonstrate the general acceptance that this process of ‘enlargement of mind’ occurs when the bench shares their own reflections upon a

case. They show a common understanding on this question, despite the jurisdictional spread:

Well they certainly exist the – the ‘light bulb’ moments. ...I am certainly prepared to accept that occasionally someone would have said something to me and it has involved me recognising that there was a dimension to the case I hadn’t thought about, and I think vice versa has happened so it’s just part of the normal human process of increasing your knowledge by having something pointed out to you that you haven’t necessarily worked out yourself.⁶⁵⁶

I think that we learn from each other. We learn because if we have a particular worldview and we’ve got blinkers on then that’s how our judgments are going to be, and I think our judgments need to be all embracing. We need to be more open to the reality of the situation and that’s what diversity brings to the table and to the discussions you have.⁶⁵⁷

...in a collegiate court you get points of view being offered which you might not think of yourself. ...So one must guard against what I call ‘walking down a windowless corridor of reasoning.’ I think collegiality opens a lot of windows.⁶⁵⁸

I think there have been innumerable insights I’ve gained from sitting on very diverse benches. ...and of course I do think that diversity goes far deeper than race and gender: abilities, language, class, age – all of these things are human markers, which are often indicative of different life experiences. Innumerable moments when somebody will have said something which will be in a half moment to me when I think, ‘ah, I never thought of that experience or have never known about that sort of experience. That’s very meaningful. It’s not normally when you are saying ‘well what does this statute mean.’ It’s more about ‘what are the implications’, ‘what are the points of justice here’, what are the principles that underplay this’.⁶⁵⁹

This sharing may not have always led to a change of mind. This is an important point – that the purpose of diversity is not to posit one perspective as more important than

⁶⁵⁶ AUST006, 400-8.

⁶⁵⁷ SA024, 140-4.

⁶⁵⁸ SA015, 111-8.

⁶⁵⁹ SA014, 52-65.

another, but rather for as many perspectives as possible to be shared, for the marketplace of ideas to be enlarged, and for this to then inform each judge's personal reflection on what the strongest argument or legal interpretation should be. Sometimes hearing an alternative perspective may actually confirm one's original position. Sometimes it may not. The important point is the process of engagement. This was reflected in a comment from a White male South African interviewee who felt that it was important for all judges to open their minds to the perspectives of their colleagues, differently situated:

I think it's necessary, in any event, not only for White people but also for Black people, to try and put yourself in the position of the other and it's a debate here sometimes that Whites can never do it because they can never realize it. But I think that's wrong. Unless you try and then discuss it and see whether you are right or wrong. So I think it's necessary to do it yourself, it's a benefit to discuss it then with somebody who is a woman, or Black, or whatever, so 'this is how I think or how I see it from your perspective' and often I think they consider me wrong but they can also gain some perspective.⁶⁶⁰

Moments of enlightenment, as one interviewee explained, are often left unarticulated in the final decision and remain hidden from the public view. They may not be insights that ultimately persuade colleagues to decide a case differently from their original position, but they nonetheless, form an important part of the deliberative process. A woman judge from the UK recalled such an instance in a case concerning duress:

I can remember a moment when I did say something and they all said 'oh yes I see what you mean', but it didn't actually appear in the judgment! It was in the duress case. ... This was about where you join a group of people and you can foresee that you will be coerced into doing illegal acts, then you can't claim duress if you do them. I asked, what about the woman who marries a gangster? She might foresee being coerced into some things, but she wouldn't necessarily foresee that she would be coerced into actually joining the gang as opposed to, you know, blacking

⁶⁶⁰ SA006, 199-207.

his boots. I mentioned battered wives and the others did say ‘oh yes I see what you mean’, and it sounded as if they agreed with it. But that distinction didn’t get into the majority judgment, so I put it into mine. And the ones I remember are the ones where I didn’t succeed, as opposed to the ones where I did. There are probably lots where I *did* but they do not stick in the mind in the same way.⁶⁶¹

Having set out general statements that show a high level of acceptance amongst interviewees of the impact that inter-judicial sharing has in shaping decision-making, this section now turns to look at specific categories of experience, identified by interviewees, where they felt that sharing gendered experiences impacted upon the collegiate decision-making process.

a. Gender Based Violence

One of the most common areas where interviewees felt that gendered experiences, once shared, impacted upon the collegiate discussion was in the area of gender-based violence. The female judge above, who was unsuccessful in her attempts to influence the majority reasoning with her analogy between criminal duress and ‘battered wives syndrome’ was also able to recall an instance where her perspective on a case did impact upon the outcome of the case. In this particular example she drew on her expertise in gender-based violence and found her colleagues to be receptive to her intervention:

Obviously the expanded definition of what violence means ... was something where I suspect that I had an impact on my colleagues, but with one exception they were very ready to have that impact made upon them.⁶⁶²

An Australian interviewee provided a similar example of a time where she felt that she was able to emphasize the experiences of a female victim of gender-based

⁶⁶¹ UK004, 499-512.

⁶⁶² UK004, 831-904.

violence to her male colleagues in a manner that brought it to the fore. As she saw it, this women-centric approach would have otherwise taken lesser prominence in the ultimate decision of the court had she not been there to make an intervention:

I don't think you get a diverse judiciary just by appointing proportionally from different backgrounds. But, I do think appointing from different backgrounds helps increase the likelihood that there is a broader discussion. For instance, there was a case when I was sitting on the Court of Appeal ...where it involved the sentence for an indigenous man who had alcohol problems who had a long violent history. I was sitting with two male judges, one of whom in particular aware of indigenous issues and had spent many years of his early career working for virtually nothing for one of the Northern Territory Aboriginal Legal Services. He was a hugely wise and sensible and fair judge with this extraordinary background. He was all in favour of reducing the sentence that had been imposed below and he had all these arguments, based on the authorities, about the need to take into account indigenous experience, the different background and that this would be a mitigating factor in sentencing. And I said 'that's all well and good; but the problem is that the victims of most indigenous male violence, including in this case, are indigenous women. And I'm not happy about greatly reducing this sentence, because it sends a message to indigenous women that if they are beaten up, their attacker is not going to get as much as if they were a White woman who was beaten up by a man.' So there are actually two sides to this. Now it's just a simple illustration and my colleague got it and I think we found some accommodation in the middle in terms of what we did with the sentence. But I had that particular perspective as a woman.⁶⁶³

The two examples above are given by female interviewees, reflecting on what they saw as an impact that they made upon male colleagues. The next example comes from a male interviewee from South Africa. He identified an instance where his own perspective was enlarged after a female colleague shared her own personal experience of perceptions of security in public spaces. In this case, his colleague's personal anecdote changed the way he understood the pervading sense of threat that some women feel when going about their every-day activities. He described the discussion as follows:

⁶⁶³ AUST025, 272-96.

LH: Do you think that gender plays any role in a diverse perspective?

Judge: Yes, it certainly does. From, once again, different ways of seeing things. For instance, one of my colleagues in the Eastern Cape...does criminal cases. ...she just mentioned that if she walks in a shopping mall in Port Elizabeth ...she looks at young people and she feels more insecure, while I walk out and I don't care about it, you see.⁶⁶⁴

This observation was remarkable for him, and differed greatly from his own experiences. The interaction demonstrates how sharing gendered experiences can expose assumptions of universal experiences as incorrect, and can give judges reason to pause before assuming that their experience of the world necessarily translates across gender lines.

b. Domestic power (im)balance

Domestic relationship and the power imbalance that may exist in this context is a theme closely related to gender-based violence. Not surprisingly it was also identified by interviewees as a site where gendered experiences colour perspectives. A South African female interviewee gave an example of a case where her interpretation of the gendered elements of personal relationships differed from some of her male colleagues in the case (but not, as she saw it, from the other woman sitting in the case). The matter at issue before the court was whether a subsequently dissolved relationship between an unmarried man and woman should be characterized as a universal partnership and whether the woman should be able to make a claim to the profits of a business owned by her former partner. In this matter the bench split 3:2 in favour of the woman's claim. There was a gender split in the court – the two women judges joined with one of the male judges, the two judges in dissent were both men.

⁶⁶⁴ SA006, 118-26.

The interviewee thought that gender understandings of relationships were central to judicial discussions:

On reflection I think it is because me and my other colleague know that sometimes as a woman you let things go, you tend to let things go because you don't want to rock the boat, so even though you could criticize that woman and say 'why couldn't she have insisted that this man marry her?' and 'why couldn't she have insisted that she plays an active role in the relationship', as a woman you appreciate that probably this woman trusted this man, loved this man, and thought that they would eventually get married. And that at the most, he would appreciate her role as an equal partner if she behaved in a certain way. Because personally, I know that taking care of the children, taking children to school and supervising their homework and running the household and so on is probably more strenuous than dressing up and going to work! I don't know if men appreciate that it's more difficult to run the household than run the family business. I just thought that if this woman had not relieved that man of the responsibility of being pregnant for nine months, taking care of the children, taking the children to school and raising those children and making sure that the household is run properly, he probably would not have been that successful. So in a way although he wanted to suggest that she never played any part in the business, I thought that he was undermining her contribution, her human contribution to the partnership.⁶⁶⁵

This reflection was cited above as an example of impact of background and experience on the individual judge. However, it also highlights the impact that the background and experience of one member of the court can have (but will not always have) on the other members of the court. I asked the interviewee if she felt that there was a moment in the deliberation where she felt that she had been able to impress upon her colleagues a different perspective of the case that may have influenced their own understanding of it. She said 'I think there was one judge who was also as passionate as we were. The other one appreciated where we were coming from but for different reasons didn't, but one of the male judges felt that we were wrong.'⁶⁶⁶

⁶⁶⁵ SA025, 179-203.

⁶⁶⁶ SA025, 207-203.

c. Mothering and children

The next category focuses upon the subjects of mothering and children. Two of my female interviewees, the first from Australia and the second from the UK, gave interesting examples of times where they felt that their experiences of mothering, and particularly their understanding and knowledge about female children – derived both from their own experiences and from that of being a mother – made unique contributions to the collective knowledge of the court.

The first example related to a criminal case involving a girl child victim and the reliability of evidence given by that girl to the court. The woman judge recalled that she made a remark to her male colleagues ‘about little girls’ lack of knowledge of their own anatomy ...you know, just not knowing that they had a vagina as well as...all of that!’⁶⁶⁷ While she did not want to characterize this as an ‘elevated example’ of the strong impact that gendered experiences could have upon collegiate judging, she considered it a useful example of a situation where her male colleagues did say that it was something that they wouldn’t have appreciated unless she had brought it up. As the female judge observed: ‘you wouldn’t appreciate that if you had been a little boy.’⁶⁶⁸ While she did note that her male colleague might have if they had girl children and had been actively involved in their upbringing, she considered this to be a particularly gendered contribution, derived from her own personal experiences – of once being a girl and also of being a mother to girls – that impacted upon the thinking of the court.

A female judge from the UK provided the second example. The appeal point in question turned on whether the first instance judge had made proper provision in

⁶⁶⁷ AUST013, 516-20.

⁶⁶⁸ AUST13, 522-3.

favour of an unmarried woman for child maintenance when she had separated from her partner. Before the split the couple were wealthy and therefore the child had grown up in a wealthy London suburb, Belgravia, attending, as the interviewee put it ‘terribly smart schools’. She noted that ‘It was so different from my upbringing ...but it was absolutely obvious that that’s what this child had become and when the couple split, the father was responsible for making proper provision for this child.’ However, at first instance ‘the judge had decided that instead of being a Belgravia child the provision the father had to make was simply that she would become a Fulham child’, Fulham being a less affluent London suburb. The interviewee described the difference of opinion on what provision should be made as follows:

Now, my male colleagues though well, whatever, Fulham or Belgravia...it’s not very far from each other, and anyway, it’s quite a lot of money just to live in Fulham, so that’s ok. I said you’re talking about moving a child from its school, from its surroundings. At the moment the child can walk to their friends...and all the different events and I said that was a huge impact. I know you are only moving a relatively short distance in London, but I don’t think they appreciated [the disruption to the child]. Why did I come up with that and they didn’t? Because I remembered what it was like to move schools myself, and how important the schools were to my children. I moved schools a lot and I hated it.⁶⁶⁹

I asked the interviewee whether other male members of the court had children, giving them this insight into juvenile experiences. She said that they did have children but that it was ‘a long time since their children were at school.’⁶⁷⁰

A male judge from South Africa also agreed with the observations given above. He felt that women had different experiences to men when it came to children. He felt that women ‘let men see something about the general background’ that men do not always see. He was keen to emphasise that he was not ‘being patronizing or

⁶⁶⁹ UK026, 421-32.

⁶⁷⁰ UK026, 438-40.

anything' (obviously highly sensitive to the potential for an essentialising critique to claim that women have a superior claim over parenting to men). Rather, he was reflecting on a specific case where he thought that his female colleague 'gave something that the men didn't realize' and even though 'they should be aware of it' they were 'made more aware of it' by having their female colleagues raise the point.⁶⁷¹ The inference from this comment was that the interviewee felt that an important point in the case might have been overlooked had the women judges not brought this to the fore. The same interviewee made similar observations about the impact that female colleagues made in criminal cases involving children and how sentencing should be approached when children were involved. He said that:

The traditional male perspective might be that these are criminals and deserve tough punishment without giving in depth attention to the fact that they are children. The women made us think a bit more deeply about what being a child means and how this affects sentencing.⁶⁷²

This same interviewee made a powerful observation about the way that his female colleagues often challenged what, in hindsight proved to be essentialised assumptions, about how women would view a particular situation.

The examples given in this section so far are valuable, however somewhat predictable examples of women's insights on topics such as gender based violence and children that have long been the concern of gender and feminist analysis. However, the next example demonstrates a situation where a White South African male judge was confronted with an unpredictable account by a Black female colleague. The interviewee above spoke about the influence that one of his female colleagues had on him in a case that concerned women's

⁶⁷¹ SA006, 128-36.

⁶⁷² SA006, 144.

rights in traditional customary law situations. This colleague had close connections with customary law. The interviewee felt that this perspective impacted her approach a lot more than her gender. He said that this was an example 'where the woman didn't give me the sort of thing that I expected in relation to women's rights'.⁶⁷³ This interaction between this judge and his female colleague is important. The 'lesson' imparted from the woman judge to her colleague in this situation was not only that a women's gendered perspective of a case might differ from a man's gendered perspective of a case. It went further to show the danger in trying to presuppose exactly what a 'women's gendered perspective' will actually be. In this case the woman judge's approach to women's customary law rights was not only influenced by her gendered experiences, but also her gendered experiences as a woman who lived in a particular community. It was this intersection that coloured her perspective, and the intersection that challenged not only what the male judge might have thought himself, but also what he assumed that she would have thought on account only of her gender. It is a reminder that women cannot be essentialised. A judge being a woman will not mean that she is guaranteed to hold a particular standpoint, nor should she be expected to.

d. Mutual sharing of gendered experiences

Most of the interviewees who were able to give an example of a gendered experience contributing to collegiate discussions focused upon a moment where they considered that their contribution had impacted upon their colleagues. However, some of the judges were able to reflect upon moments when a colleague shared an experience that

⁶⁷³ SA006, 160-62.

made them re-assess their own initial standpoint. A female judge from South Africa shared a striking example. She recounted an experience a male colleague, Justice Pius Langa, has shared with her both personally, and on the public record during South African Truth and Reconciliation Commission (TRC). He reflected upon his experiences as a young black man living under apartheid and having to report to officials to receive a ‘pass’ in order to be allowed to enter ‘White areas’.⁶⁷⁴ Justice Langa’s account to the TRC went as follows:

The whole process at the influx-control offices was painful and degrading, and particular aspects of it inflicted deep humiliation on the tens of thousands who were on the receiving end of these regulations. For example, we had to stand in a queue in a large hall for medical examination. As a 17-year-old, I remember having to avert my eyes from the nakedness of grown men in a futile attempt to salvage some dignity for them in those queues where we had to expose ourselves to facilitate the degrading examination.⁶⁷⁵

The interviewee reflected upon how deeply this sharing of experience touched her. She said:

...what I hadn’t realized...well certainly if I had known about it, it would have passed over at some fairly superficial level of consciousness, was that he had to strip naked with all the other people and his deep sense of shame. Not on his own behalf as a young man, but on behalf of the older men who were there. Because his cultural belief system was that older people were worthy of great respect and this was a hugely embarrassing and demeaning moment for them to be shown in this vulnerable position vis à vis him. Two things came out of that: one was this deep respect for older people but the other was just really a dramatic example of the demeaning effect of apartheid on Black South Africans.⁶⁷⁶

⁶⁷⁴ Justice Edwin Cameron has also commented upon what he describes as ‘humble, direct and powerful’ submissions by Justice Langa to the TRC: see Edwin Cameron, *Justice: A Personal Account* (NB Publishers 2014) 59-60.

⁶⁷⁵ Justice P N Langa, ‘Submission to the Truth and Reconciliation Commission on the Role of the Judiciary’ (1998) 115 SALJ 36, 38.

⁶⁷⁶ SA014, 71-82.

For the interviewee this shared personal insight into meanings of masculinity and dignity went on to inform her perspective on the highly charged debate that flared in South Africa in early 2011 concerning Cape Town based artist Brett Murray's painting titled 'The Spear.' The painting appeared as part of a public exhibition showing at the Goodman Gallery in Johannesburg and depicted President Jacob Zuma fully clothed but with his genitals exposed. The ANC filed proceedings in the South Gauteng High Court in Johannesburg for the painting to be removed. They claimed, among other things, that the painting violated the President's right to dignity under the Constitution. While never actually having to sit in judgment on this matter (she was not a member of the court in which proceedings were initiated, and in any case the action was withdrawn after the artwork was vandalized and subsequently removed from the gallery), the interviewee felt that the previous perspective shared by Justice Langa had a serious impact upon how she understood the case. She said that whenever she speaks on the controversy surrounding 'The Spear' she always starts by recounting the TRC testimony described above 'because I don't think ordinary White South Africans, or Black South Africans who didn't live through that, have the immediate sense of pain that any representation that brings that recollection of indignity to mind. How deep it is.'⁶⁷⁷

This example is powerful. Not only because it illustrates a moment of personal re-calibration in light of a shared experience, but it also demonstrates that gender is not just about women's experiences. The experience here was very much an intersectional experience – where (men's) gender and race combined in the context of oppression to create a counter-narrative to the dominant perspective. That men may

⁶⁷⁷ SA014, 85-8.

experience the world as the ‘other’ and hold otherwise marginalized perspectives is an important point highlighted by this female judge’s observation.

However, discourse about men’s gendered experiences, and particularly men’s gendered experiences that might contribute a new perspective to judicial decision-making were somewhat absent from my interviewees’ responses. Indeed, in Chapter 8 above I highlighted the moment when a male interviewee was confused when asked how his gendered experiences impacted his decision-making. He was not aware that he had gender. It is important to restate here what should be obvious: that men do have gender; that men’s gendered experiences will be just as diverse as women’s gendered experiences; and consequently that dominant judicial culture may be encouraging only one particular form of expression of maleness and masculinity, while silencing other less dominant understandings. A full exploration of this complicated idea – particularly the ideas of masculinity that are created and reinforced by judicial institutions – is beyond the scope of this thesis, but an area ripe for further research.

However, setting this debate aside, one of the Australian female interviewee did not think that her male colleagues had ever shared a gendered perspective that she would not have been able to arrive at, but for their input. She gave an interesting explanation for this response. As she saw it, having practiced in a male-dominated industry her entire career she felt that the ‘men’s perspectives’ were so apparent in normative discourse and accepted practice that they needed no further articulation. Rather, it was the experiences that were under-articulated in public life – for her, women’s experiences of the world – that were the ones that had the greater impact:

I probably can’t immediately [think of an influential men’s perspective that has been shared with me], but it’s probably because on any of these issues where there’s a gender type thing I have spent my entire professional life in a male profession. So, I’m probably far more aware of

what the blokes think of something than they are about how a woman would think about the situation; that's because their point of reference is generally what their wife would do or think. So there wouldn't be a lot of instances where I wouldn't know what they are thinking already. I don't mean that to sound arrogant but you know what I mean, having been acculturated in a very male dominated culture. So I can't immediately think of something where someone has said 'well a bloke would see it like this' and I have gone 'really?!' because the whole point is I'm acutely aware most of the time how a bloke would see it and I am trying to say 'but that's not necessarily how the woman would have seen it', so I can't think of an instance on a gender issue where that has happened.⁶⁷⁸

The examples given above have concentrated men and women's reactions to both sharing with colleagues and receiving from colleagues experiences that were informed by their gendered experience of the world. What is very apparent about these examples is that none can be reduced to an experience *purely* informed by gender. This clearly demonstrates the manner in which gendered experiences interact with other life experiences in order to produce important epistemological standpoints. While gender *may* be a proxy for a particular type of life experience, it will always intersect with other contextual factors which colour and inform the experience. For example, observations about gendered perceptions on children were also informed by the experience of being a parent. A view on domestic relationships was equally informed by an understanding of class and socio-economic experiences and the way that this can place unique pressures on women.

e. Sharing beyond gender

While this chapter focuses upon the impact that gendered experiential knowledge has upon collegiate decision-making, clearly there are many other life experiences that make equally important contributions to collegiate judging. The examples given above demonstrate how other points of 'situation' such as socio-economic

⁶⁷⁸ AUSTO, 792-806.

background, race, culture and ethnicity will interact with gender to shape an individual's experience, and therefore perspective. These characteristics on their own, or in intersection with each other but not gender may also shape experience and perspective. Interviewees often drew on these types of examples, that were experience forming, but not explicitly related to gender, to illustrate how life experience impact upon judicial decision-making. This was particularly true of the South African participants. For example, one White South African male judge spoke candidly about the impact that stories from Black judges who grew up with socio-economic disadvantage had upon the White members of the court:

One of the earliest Black judges was a local, so I knew him as an attorney and so on. But for the first time when he came to the Bench... you would know that eviction cases were one of the things that the Constitution has had an impact on ...and then we were sitting in the tea room and he was saying, 'well you must remember I come from a house with one room – that was our family. ... One room. And when we experienced evictions under apartheid era, it had a huge emotional impact.' I think for myself and the older conservative White judges that was an eye opener. We are used to living in nice, comfortable houses and suddenly this is a colleague of ours who now tells us his house was one bedroom.⁶⁷⁹

I asked the interviewee why it was important for the judges to hear this story from one of their colleagues, as opposed to counsel in submission. He replied that 'if you are drinking tea with a colleague it just hits you a bit more.'⁶⁸⁰

Another South African interviewee gave an interesting example of the way that experiences of regional location and language inform perspective. The example is interesting, as the influence did not come from a colleague, but from the Judge's law clerk. It demonstrates that in modern court structures where judges work closely with law clerks (in South Africa), judicial assistants (in the United Kingdom), associates

⁶⁷⁹ SA006, 59-71.

⁶⁸⁰ SA006, 91.

(in Australia), or support staff in producing decision, that non-judicial colleagues also play a role in informing to the collegiate space in chambers. For this interviewee, his law clerk's personal knowledge of the hurdles placed by language and location in the practical application of a law concerning personal injury claims proved useful contextual background for one case:

one of [the Court's] most important aspects is the function of the law clerks. ...for example, one case was about the time cut-off for the lodging of personal injuries claims under the motor accident legislation. I had a law clerk who came from the most remote Venda speaking region of the country which is very ruralised in the northeast corner of the country. He told me about a cousin who hadn't known of these cut-offs and we factored it in to the debate. So within Chambers these observations, the practical impact of decision-making are factored in *right* at the beginning.⁶⁸¹

These examples reinforce the meta-argument of this thesis: that diverse experiential knowledge has important epistemological value in judging, particularly in collegiate courts where it can serve to de-stabilize dominant understandings of the world in order to make space for previously marginalized perspectives. While gender is an acute area where there has been a lack of diversity and an over-representation of male-gendered experiences feeding into judicial deliberative processes, the thesis does not deny that the inclusion of other forms of diversity are important for increasing the judicial capabilities of the bench.

2. Implicit Influences

The section above focused upon moments where an explicit sharing of a gendered experience amongst colleagues had an impact upon the decision-making process. This section considers a second strand of influence that was illuminated by the interviews. This was the implicit impact that gender diverse environments had on

⁶⁸¹ SA005, 99-109.

decision-making. Implicit influences are those that do not come as a result of an explicit statement made by one judge to another about a particular case, but rather, an impact that arises out of a perceived environmental change resulting from gender-inclusive courts. In other words, what impact could the presence of women in male dominated courts have upon the collegiate environment? These influences are less easy to detect and may well operate on a sub-conscious level.⁶⁸² Nonetheless, several interviewees remarked on how gender-diverse spaces made an important impact on the collegiate decision-making environment.

At the very general level, having the presence of women and men may change the social environment at a court. One of my male interviewees from Australia had served as a judge during a time when there were no women members of the court. I asked him whether he felt the workplace dynamics had changed as the court became more gender diverse. He felt that it had:

The feeling of collegiality now is very different to what it was when I arrived. We have a glass of wine or something equivalent to that after our Counsel of Judges meetings. The talk is now about a much wider variety of subjects than it used to be and that's good, that improves the quality of the collegiality I think.⁶⁸³

For this interviewee, at the very least, the presence of women judges enhanced the social collegiality of the court by broadening the topics of conversation in social situations. A similar observation was made by a British judge – who noted that gender diversity had served to open up a space for other types of ‘difference’ at the court. In his opinion, diversity in one arena paved the way for acceptance in other ways – that everyone was not expected to be and act in the same way.

⁶⁸² For example, there is now a well-developed body of literature looking at the impact of sub-conscious gender bias. See n267.

⁶⁸³ AUST018, 162-70.

However, beyond enriching the social-scene, how does gender diversity impact upon decisional collegiality?

Again, there was not uniform acceptance that gender diversity did change the collegiate environment, even in an implicit way. For example, one male interviewee from Australia categorically rejected the idea that gender played a role in how the groups deliberated.

I think that what impacts on the environment of a collective group is much more to do with one's openness to other people's ideas, of one's force of personality and so on and I don't discern any noticeable difference between these factors as possessed by men and as possessed by women. There is a view, not fashionable to express and probably largely untrue now, that women are more easily put upon by dominant men. If that's true of any group it certainly isn't true of lawyers. As a barrister I frequently had to work with generally rather successful women barristers and I never knew one of them who wasn't perfectly capable of expressing a different view and one listened.⁶⁸⁴

It was not surprising that this interviewee rejected the idea that gender diversity alters collective decision-making environments: he had also strongly rejected that gender impact the individual's approach to decision-making (explored in Chapter 8). However, one of the key points to note about this quotation is that the comment resonates strongly with the anti-essentialist concerns highlighted in Chapter 2 of this thesis – that there are 'women's traits' and 'men's' traits: that women will be 'more easily put upon by dominant men'.

This comment also highlights the important impact that professional background might have on the deliberative demeanour of judges – particularly at the current moment where the majority of judges in all three of the jurisdictions studied have had former careers as barristers or advocates, and are highly experienced and adept at dealing with adversarial encounters. It brings into question whether other

⁶⁸⁴ UK007, 459-68.

experiences – notably professional background – might be more dominant and determinative of individual behaviour than anything to do with the identity of the judge.

A point related to this and borne out in the literature⁶⁸⁵ is that those who are different might try to ‘cover’ this difference, or have actively worked at covering whatever makes them different in order to progress in public and professional life. Some, like the interviewee in Chapter 8 who purposefully wore colourful clothing and prominent jewellery in court to assert her difference, actively take action against assimilation. But it is often argued that for many, particularly women in the judiciary, assimilation has been a necessary survival tactic. Any mark of ‘difference’ from the status quo can be professionally dangerous. The question then becomes: how much does the system changes women rather than women changing the system? One of my Australian female interviewees noted that ‘by the time you get on to this Court you have spent your professional life in a group of men playing by the boys’ rules, so you’ve usually had to adapt.’⁶⁸⁶ Unsurprisingly then, male colleagues would be unlikely to find these women any different from their male colleagues.

Another interviewee felt that it depended *which* woman he sat with, so the impact of gender diversity related much more to the personality of the judge in question, rather than some uniform experience marked only by gender. He said that when he sat with one particular female colleague ‘that the atmosphere is markedly different when she sits’. However, this was not the case when he sat with other female colleagues. On the question of whether gender diverse panels changed the

⁶⁸⁵ See Kenji Yoshino, *Covering: The Hidden Assault on our Civil Rights* (Random House 2006).

⁶⁸⁶ AUST025, 916-9.

environment of the court he said that ‘my honest answer has to be, “well I don’t know”’,⁶⁸⁷

However, many interviewees, both men and women, did point to discernable environmental differences with gender-diverse environments. One interviewee who himself identified as ‘different’ due to his sexuality was strongly supportive of the proposition that there was positive environmental change when women were in the room, as opposed to when they were not.⁶⁸⁸ Some interviewees put this down to a different courtroom style. For example, one male interviewee saw a difference in the way his female colleagues questioned counsel:

I think men can be as empathetic in their way as women can, but there is a point at which the empathy of one becomes different to the empathy of the other. It’s hard to define that point but I think it’s certainly there and when sitting with female colleagues one can see that the questions that are asked of Counsel and the general approach to the problem can subtly vary because the feminine view is somewhat different to the male view. It is hard to give particular examples but I’ve no doubt that the influence of the feminine side of things has benefitted the Court very greatly.⁶⁸⁹

This observation may be troubling for the way that it establishes an essentialist dichotomy between what the judge sees as a ‘feminine’ view and a ‘male’ (or ‘masculine’) view. However, the next quotation by a female Australian interviewee provides an interesting base on which to interrogate this statement. She agreed that, generally, she had noticed gendered patterns of behaviour in-court: ‘I think women probably are not quite as pushy to get that question out there and feel the need to do it.’ She was very careful to caveat this statement with an explicit acknowledgement that it was a generalization but nonetheless went on to say that:

⁶⁸⁷ UK006, 542-51.

⁶⁸⁸ UK032, 231.

⁶⁸⁹ AUST018, 149-58.

If you look across the band of women judges and identify how many of them are badly behaved in court, they're in the distinct minority. I'd guess that if you did a statistical survey you would find that women probably have determined, as women do, that they are going to have a more subtle way of controlling court and be able to manage it better if they just tone things down a little bit and keep everyone calm and be polite. They can be as firm as they like while they do it, they are quite good at doing it. I think that they probably think about it a lot more than men do. They think those issues through a bit more. ...Most men would try to be polite I think, but it might be a bit more of the 'I' in men, so they might want to take over a little more. But I don't think that leads them to impoliteness, it's just...it might be a little more competitive.⁶⁹⁰

This extract reveals a double standard in expectations for judicial style. In order to control court, the woman judge, on this account, had to 'tone things down' and 'keep everyone calm and be polite' in order to be effective. The interviewee noted that this same pressure did not exist for men, who were able to exhibit more aggressive or competitive behaviour and still be effective. A third interviewee did not think that there was anything discernibly different in how women and men judges behaved in court due to the strong cultural pressures which constrain the behaviour of all judges. For this interviewee the entrenched tradition of how judges 'should' behave served to temper individual characteristics, including gendered behaviours. He said that:

We are more homogenous in Court; we tend to behave according to certain norms of behaviour which I don't think are particularly male, I just think there is a certain way of going about it....⁶⁹¹

While this interviewee did not feel there was anything particularly gendered about the expected judicial demeanour, feminist critiques of the judiciary, which identify the judiciary itself as a symbol of hegemonic masculinity, beg to differ.⁶⁹² Moreover, it is interesting to juxtapose this with the quotation above where the women judge felt it

⁶⁹⁰ AUST007, 618-632.

⁶⁹¹ AUST010, 315-5.

⁶⁹² See Thornton, *Dissonance and Distrust* (n91) 201-209; Sommerlad (n453).

necessary to adopt a particular style as a woman in order to be effective. In her opinion, women *had* to be different in court in order to be effective.

Finally, many of my interviewees spoke about the important expressive message that a gender diverse bench had for litigants, practitioners and society as a whole. They reinforced much of the theoretical argument presented in Chapter 2 on the enhanced institutional legitimacy and confidence that a court could command when people saw both women and men sit in judicial positions, particularly those of the highest order. This chapter will not focus on the external expressive impact of a gender-diverse bench. Rather, it concentrates on the impact that gender has upon the internal collegiate environment so as to shape the discussions amongst judges, and the final decisions made by the court. However, these two questions are not easily separated. Interviews support the suggestion made in Chapter 1 that the questions of institutional legitimacy, and the expressive function of diversity – what it says about power and who should hold positions of power – also, in practice, impact upon the actual experiences of women who sit on the bench, and ultimately the functioning of a court. For example, the comment above from the female judge who said that women ‘have determined, as women do, that they are going to have a more subtle way of controlling court and be able to manage it better if they just tone things down a little bit’ indicates that women still need to think about common *perceptions* of women in power, and then adjust the *manner* in which they exercise power to do so in a way that will not affront social conventions – that there is an acceptable and unacceptable way for women to exercise power. The expressive message sent both to the public at large, as well as male colleagues, when women remain a minority also has a potential to impact upon both their claims to authority and their ability to obtain respect as equals on the court. One Australian male interviewee put it clearly: ‘as long as

[women] remain a minority, the blokes look as if they run the show, and in some cases assume that they run the show. I think the numbers really matter. [This Court] would feel different if we were six men and six women instead of ten men and two women.’⁶⁹³ For this interviewee, the symbolic significance had a practical implication – if it looks as though women do not ‘belong’ on the bench then they are open to being treated as if they do not belong on the bench. Numerical marginalization easily gives way to substantive marginalization – reinforcing attitudes and environments that are hostile to women. The Australian interviewee quoted above also spoke about the positive impact that a ‘critical mass’ of women can have on the court environment. This was an interesting insight for two reasons. First, for the important point that it makes on critical mass, but second, that this insight was coming from a male judge following a conversation that he had with a female judge and her experiences on the bench. The interviewee spoke of a conversation that he had with a female colleague who was sitting as a Judge on one of the County Courts in Australia. The court in question had experienced a large increase in women over a relatively short period of time – five or six years. The interviewee wanted to know what impact this increase in women’s participation had made. His colleague told him that ‘it just makes a difference; we now have a critical mass when we meet as a group of judges. Instead of there being four or five of us as there were a decade ago, there are now 35 of us out of 55.’⁶⁹⁴ I asked my male interviewee what he thought ‘critical mass’ did. He said that critical mass lets women say ‘we are not an oddity, not just a bit of curiosity – “what does Miss So and So think?” – we are an authentic equal voice. It’s a legitimacy thing too. If there are more of us we must be taken to count

⁶⁹³ AUST010, 778-83.

⁶⁹⁴ AUST010, 778-83.

for more and we can't be out-voted so easily, we can't be out-talked so easily.'⁶⁹⁵

Critical mass confirms that women belonged on the bench, both in the eyes of the general public, and also in the eyes of doubting colleagues. As the next section of this chapter will demonstrate, the presence of the later – doubting colleagues – remains real, and poses significant challenges to good collegiate practice.

E. CHALLENGES IN COLLEGIALLY FOR WOMEN AS 'OUTSIDERS'

Part C of this chapter explored general barriers that may inhibit collegiality. The challenges that were explored in Part C were general to all members of multi-member courts. However, interview material revealed that these challenges also have particularly gendered manifestations. Some interviewees spoke about specific challenges facing women judges, largely based on assumptions rooted in social stereotypes. According to my interviewees, this created barriers to collegiate interactions in court environments where women remained a distinct and visible minority.

Many of these barriers were based upon assumptions that women interviewees felt that some of their male colleagues projected onto them. For example, an Australian interviewee felt that her gender 'difference' proved a barrier at times to easy collegial relations. She felt that on occasion, colleagues would approach her with unnecessary caution:

I think possibly sometimes my colleagues may feel a bit defensive when they deal with me because they might think I would think that they were gender biased in some way and so they sort of feel like they have to lean over backwards to prove that they are not. ...I think this always goes away when people have got to know me, but when new people have come to the Court who haven't known me very well – and they know I'm a feminist – they sort of get scared that I might think that something they say will be offensive. And so they try quite hard and after a little while

⁶⁹⁵ AUST010, 795-800.

they realize that I quite like an argument and I'm not going to run crying from the room or anything like that!⁶⁹⁶

This 'defensiveness' or the perceived need by certain colleagues to 'prove' their feminist credentials or their lack of gender bias would clearly inhibit full and robust inter-judicial dialogue. In a similar light, but on the flip side of this experience, another Australian female interviewee spoke about feeling the need to 'prove' herself to her male colleague. There was a particular intersection between her age and her gender in how she felt older male colleagues treated her:

Judge: ...there is no doubt that at times it's been abundantly clear to me that I'm viewed as the young female judge but that doesn't change my approach [to judging] it just means that's their view.

LH: Do you think that it happens to others?

Judge: I don't know, I think the other women who are on this court are older than me by a long way and so... I mean one of the things that was a *great* concern to me before I took the appointment was that I was too young and perceived to be too young and I was told by many who I respected that I wasn't and I should put that to one side. But I think that there's an older generation to whom I had to prove myself. I had to sit on the first few appeal courts and make them realise that a) I worked extraordinarily hard, b) I prepared and c) I had half a brain. ...and therefore I wasn't someone who was there just to fill the numbers. I never felt that ever when I was at the Bar. Never. Not once.⁶⁹⁷

I asked the interviewee if she thought that there was a stigma attached to her as a result of her gender or age. She said it wasn't so much a stigma, but a question mark: 'Is she up to it?' She also was not able to conclude whether the question mark hovered over her as a result of her age, or her gender, or as a combination of both:

I don't know whether it was age or it was gender. I mean, for example, I think that it might have just been as a new judge and maybe I'm overly-

⁶⁹⁶ AUST013, 612-635.

⁶⁹⁷ AUST026, 216-38.

sensitive, but I suspect it was probably a combination. And as you say there are not many female judges on this Court.⁶⁹⁸

As the final sentence of the quotation illustrates, because the interviewee was ‘different’ from the typical judge on the court at the time, her colleagues approached her with suspicion. She was set a higher benchmark than would have otherwise been set for a colleague who was older or male. The assumption that some of her male colleagues had made was that she was not ‘up to the job’. The burden was on her to prove that she was. This is a powerful example of a lack of ‘mutual respect’ inhibiting collegiality. The judge in question was not, by mere fact of her appointment, accepted by her colleagues as being ‘up to the job’. As a result, whatever impact she might be able to make on the court, or whatever perspectives she might bring to judicial table were first contingent upon winning the respect of her older male colleagues. This is a similar story to that told by a senior male judge from South Africa. He was also acutely aware of the double standard that had been applied to women appointees but not to their male counter-parts. He also spoke about the important expressive and re-educative impact that women on the bench made to challenge and reform these prejudices. The interviewee spoke about the appointment of Justice Kate O’Regan, one of the first two women to be appointed to the South African Constitutional Court, in the following way:

I think of the whole attitude to women in the law and it’s changed significantly because of Justice O’Regan’s contribution, and particularly in the higher echelons of law and the judiciary. I’ll never forget early on in the history of the Constitutional Court, a deceased colleague of mine, whose name I won’t mention, but who was known on the Bench as a very liberal man and that opposed apartheid very courageously, but had gone the traditional route of the Bar, the Bench and then was appointed to the Constitutional Court. I think he was sceptical about these young women being appointed to it and I remember him bursting into my Chambers one

⁶⁹⁸ AUST026, 252-6.

afternoon and in his high-pitched powerful voice: ‘you know, ... she is bloody marvellous! She is bloody marvellous!’⁶⁹⁹

Justice O’Regan is regarded by many today as one of the leading jurists in the common law world. Yet she too, because some of her colleagues saw her as ‘different’ from the archetypical judge due to her age and her gender, was initially treated with suspicion. Undoubtedly, this cautious approach to ‘difference’ impacts upon the collegiate environment. As was explored in the section above, the degree to which a court can benefit from collegiate diversity depends a great deal on the extent to which they see each other as equals, the extent to which they are prepared to not only persuade their colleagues, but to be persuaded by their colleagues. These examples also reinforce the need for a critical mass of women in collegiate environments – so that they won’t be seen as anomalies or ‘experimental appointments’, but rather as legitimate holders of judicial office, not only by the public at large, but also by their colleagues.

A related point is the extent to which this environment erodes the confidence and the energy of the ‘different’ judge. If women appointees enter an environment where they are treated with suspicion, or have to ‘prove themselves’ to colleagues, to what extent will they be free to fully and robustly contribute to deliberative debates? One of my interviewees made an interesting observation, drawn from her time as a barrister appearing before the High Court of Australia, about Justice Mary Gaudron, Australia’s first female High Court Justice, and her courtroom demeanour. She said that ‘whenever she asked a question she would always look for support from the others. I could never understand it. Here was this women who had the most amazing

⁶⁹⁹ SA015, 438-48.

intellect and power; she always did it.’⁷⁰⁰ Was this an example of insecurity? Or perhaps consensus building? My interviewee was unsure.⁷⁰¹

If women, or anyone who is ‘different’, expend so much extra energy in order to ‘prove’ themselves to their colleagues, how limiting will this be to what they can contribute to the collegiate process? Will any contribution or perspective be, as Cardozo suggests, lost in the ‘attrition of diverse minds’? Or will it endure to contribute to a collegiate process where the product of respectful exchange can be ‘of average value greater than its component elements’?

This chapter has explored the substantive impact that diverse gendered-experiences have upon collegiate spaces. Just as gendered-experiences help shape individual perspectives in judging, the interview material presented demonstrates that gendered-experiential knowledge also impacts upon collegiate decision-making. This chapter has demonstrated that final appellate courts in Australia, South Africa and the UK *do* operate as collegiate spaces. In all of these courts there is scope for inter-judicial dialogue. Judges discuss cases with each other, and are open to persuasion by their colleagues. This chapter also demonstrates that, at times, the persuasiveness of an argument may be very much rooted in a new perspective or observation based upon a gendered understanding of the world. When judges share these gendered perspectives, they have the power to sharpen debate between deliberating judges, and may even transform the ultimate decision reached by the court. Gender diversity also has an implicit role to play in the collegiate process. Most importantly, interviewees demonstrated that women judges are still seen as ‘exceptional’ in some courts. This

⁷⁰⁰ AUST026, 330-3.

⁷⁰¹ AUST026, 341-8.

exceptionality may lead them to be treated with suspicion, requiring them to ‘prove’ themselves before any true benefits of collegiality may follow.

However, despite these blockages, it is clear from the interview material – gendered experiential knowledge can influence and transform collegiate judicial spaces. The final chapter of this thesis will now take the findings from Chapters 8 and 9 and ask – so what now? If gendered experiential knowledge is a valuable and important epistemology in judging, but to date there has been an over-inclusion of male gendered experiential knowledge, how can appointment processes be transformed to re-calibrate the judiciary in order to enhance the range of gendered experiential knowledge to the greatest degree possible?

CHAPTER 10: PROMOTING EXPERIENCED JUDGES

Gendered experience matters in judging. As the preceding chapters demonstrate, most of the interview participants placed a high epistemological value on experiential knowledge, and particularly gendered experiential knowledge. However, all of the courts studied still have dramatic homogeneity in their composition, particularly in terms of gender. This limits the pool of gendered experiential knowledge from which these courts can draw during the deliberative processes. The question now becomes, what can be done both to increase the range of experiential knowledge available to the court, and also to highlight its important epistemological impact? Is the answer as simple as ‘add more women (and mix)’?⁷⁰²

The final chapter of this thesis argues that there are three conditions that must be kept in mind when designing processes that will ‘promote’ experienced judges and enhance the level of diverse gendered experiential knowledge available to courts.

The first step is to recognize that diversity is a relative quality. Diversity only exists in relation to others. As such, when appointment processes consider who the strongest candidate for appointment will be, courts should be considered as a whole. Who ‘the best candidate’ is will be influenced by the pre-existing composition of the court at the particular time that an appointment is made (and the historical participation or marginalisation of particular groups), and can only be considered when an honest assessment is made of the experiences reflected by the current serving members of the court.

⁷⁰² See Judith Gardam and Hilary Charlesworth, ‘Protection of Women in Armed Conflict’ (2000) 22 HRQ 148, 165 who use the phrase ‘add women and mix’ to criticise gender mainstreaming efforts in international institutions where the addition of women has not been accompanied by structural transformation.

The second, crucial step is to reframe how ‘merit’ is understood in the context of appointments. Again, ‘merit’ should be considered as a contextual concept and the merit of a particular candidate cannot be fully assessed in isolation from both the needs of the court, and of the community, as a whole. Merit also needs to be understood as a largely subjective notion. Even in circumstances where set ‘criteria’ are used to ‘establish’ merit, caution must be taken to formulate these criteria in a way that is responsive to all valuable experiences. The responsiveness of this criterion will also depend upon the responsiveness of those who are charged with applying them. Who gets to decide who is meritorious and who is not (or who is less meritorious)? What yardstick is experience measured against? For if the yardstick remains those qualities that have served to promote men ahead of women in the past, will they truly be responsive in validating women’s gendered experiences in law?

The third step is to recognize that gendered experiences are pluralistic. Chapter 2 highlighted the dangers in approaching women as if they were a homogenous group. Not all women (or all men) will experience the world in the same way. While there may be experiences resulting from gender that are broadly shared, this should not obscure the unique in women’s experiences. Achieving diversity in gendered experiences cannot be wholly determined by sex. It may be possible to have a bench with an even number of women and men, but still have very little differentiation in gendered experience. This final step requires that intersectional experiences, particularly the experiences of women who have been most marginalized from judicial participation, should be sought out in appointments processes in order to strive for the greatest possible breadth of gendered experiential knowledge.

These three requirements should be reflected in any process dedicated to judicial transformation and committed to ensuring a broad spectrum of gendered

experiential knowledge is present in the judiciary. They represent the overarching findings of the empirical work undertaken in this research project. This thesis found that the answer to the initial investigated question – why do we want more women judges – was to provide for a greater breath of gendered experiential knowledge to be infused into the judicial process. This final chapter takes the first step, but only the first step, in the practical application of this finding. It will elaborate on what these three requirements mean, and what they might look like in an appointments process. It does not propose to set out a complete vision for what an appointments process that is capable of promoting diverse gendered experiential knowledge would look like. Unfortunately, the breadth of that project is beyond the scope of this thesis. However, the requirements set out in this chapter provide a foundational base that could be used to assess current and future appointment models.

A. DIVERSITY IS RELATIVE

This thesis argues that appointing more women to senior appellate courts provides a substantial gain for the court as a whole, as it enhances the breadth of experiential knowledge upon which the court can draw. Chapter 9 demonstrated that judging is about more than the individual competencies of each judge. It encompasses the relationships and interactions amongst the members of the court as a whole. The interview material demonstrated that these interactions are enriched when there are a variety of experiential standpoints interacting with each other. While the arguments in this thesis for diversity have been made by reference to gender diversity, they are clearly not limited to this one ‘identity’ marker. Diversity across a range of identity markers which can impact upon ‘standpoint’ – for example, race, ethnicity, culture, sexuality, class, disability, professional background, or regional location – will also enhance the overall pool of experiential knowledge available to the court. Albertyn

captures this complex relationship-based conception of diversity in her definition of that concept. She distinguishes ‘diversity’ from ‘representivity’ in general which refers to ‘the demographic requirement that the judiciary should be made up of members of different social groups’⁷⁰³ and representation which ‘signifies the idea that members of different groups represent, in some way, the interests of their constituency’. In contrast, ‘[d]iversity is used to express a more complex idea of multiple judicial differences that go beyond facial, group-based difference to differences in norms, values, judicial attitudes and philosophies.’⁷⁰⁴ Furthermore, this definition explicitly acknowledges the relationship between multiple intersections of identity with judicial attitudes and ‘the effects that these might have on the very nature of the institution and its norms, values and modes of adjudication.’⁷⁰⁵ From diversity, new deliberative interactions, including valuable deliberative tensions are created, that require deeper reflection by every member of the court.

Diversity is both a comparative, and context specific notion. In terms of diversity as a comparative notion, Minow highlights that like difference, diversity is not something which is intrinsic in the person, ‘but rather the product of comparison.’⁷⁰⁶ Diversity cannot be found by looking at an individual in isolation, but can only be seen when compared to the range of qualities already existing in the group. As Rackley highlights:

[T]here is no such thing as a ‘diverse individual’ understood in isolation from others. Thus, the diversity credentials of particular institutions are

⁷⁰³ Albertyn (n21) 247.

⁷⁰⁴ Ibid 247.

⁷⁰⁵ Ibid 247.

⁷⁰⁶ Martha Minow, ‘Making all the Difference: Three Lessons in Equality, Neutrality and Tolerance’ (1989) 39 DePaulLRev 1, 3.

established through a comparative assessment of whether its members are sufficiently different from, or relatively distinct from, each other.⁷⁰⁷

In order to promote diversity of experience appointment processes must be acutely aware of the current composition of the court to which the appointment is being made. The process must ask: what experiences are missing and whose voices have been marginalised in the composition of this institution to date? How will the next appointment to this court enlarge the pool of experiential knowledge available to this court? The individual candidate cannot be fully assessed for the extent to which they will diversify the court if each appointment is looked at in isolation from the next.

This may be a confronting idea for some candidates. The strength of their judicial candidature is not only subject to *who they* are, but also *who came before* them. As will be discussed in the section below, this will have an impact on how we conceive of merit – with merit becoming also contingent upon external factors beyond the applicant’s control, in addition to those which are a product of their own inherent talents and industry.

One Australian interviewee highlighted the difficulty in conceptualizing appointments in light of the current composition of the court. For this interviewee, such an approach would be ‘merging into a single undifferentiated whole a series of very differentiated singular decisions; it’s just illegitimate.’⁷⁰⁸ Because on this view of the legitimate way appointments should be made – a series of singular decisions, happening at different points in time amongst different candidate pools, and measuring candidates solely by reference to their own qualities in comparison to the

⁷⁰⁷ Erika Rackley, ‘Rethinking Judicial Diversity’ in Ulrike Schultz and Giselle Shaw (eds), *Gender and Judging* (Hart 2013) 505.

⁷⁰⁸ AUST005, 493-4.

others in the pool – this interviewee felt that you couldn't assume that judicial appointments were the same as 'picking a footie team...'.⁷⁰⁹ Therefore, his opinion was that we should not look to the current composition of the court in order to shed light on the suitability of the next candidate. However, another interviewee from South Africa was very supportive of the conceptualization of courts as a 'team'. He thought that 'legitimate' selections should be made looking at the court as a whole. He spoke of his own story of being 'passed up' for appointment, not on the basis of his own individual talents (clearly, because he was later appointed), but rather because the needs of the court as a whole required a different candidate at that particular time:

I was (in a sense) the 'victim'. I use victim in expressly quotation marks because I was recommended for appointment to this Court in 1999 when there were only ... three Black judges and one Indian judge on it. President Mandela was about to appoint me and Deputy President Mbeki said, 'no, the court needs another Black judge': I think completely rightly.... It seemed obvious to me and even nearly 14 years later I still think it was the right thing to do in 1999 to appoint a fifth Black judge, because of the legitimacy issue. How can you have a court that isn't going to be questioned in its viewpoint, its elite conception of social justice issues because it is preponderantly white, so there's what I call the legitimacy point. ... The second point is this point which I think is also true, which is that people really do bring alternative perspectives.⁷¹⁰

This interviewee recognized the importance of looking beyond the individual candidate during appointment processes, and the desirability of looking to the needs of the court as a whole. While he emphasizes in this remark the important 'legitimacy' enhancing factors that diversity brought – and that at that particular stage a Black candidate was going to bring 'more' to the court in terms of diversity than he

⁷⁰⁹ AUST005, 497-8.

⁷¹⁰ SA005, 199-212

could comparatively offer, he also ends his remarks with an endorsement of the idea that diversity of perspectives is closely linked with identity.

This thesis demonstrates the destabilising, yet enriching, impact that perspectives framed by diverging life experiences can have on judicial deliberation. In order to enhance the collective pool of experiential knowledge, the existing pool must be considered in order to determine which new candidate will have the most to offer in terms of experiential knowledge. The strength of a particular candidate and the contribution that they can make to the diversity of the court will be a relative assessment that must be made by looking at the existing court as a whole.

B. DIVERSITY IN ‘MERIT’

The second step in promoting experiential diversity through judicial appointment processes is to challenge and reframe conventional understandings of ‘merit’ by understanding diversity as an internal component of merit, rather than an external (or irrelevant) factor.

The United Kingdom, South Africa and Australia each employ different judicial appointment systems (and even within each jurisdiction, a different model depending upon which court the appointment is being made to). However, within each of these processes, the concept of ‘merit’ is central in evaluating candidates. What has proved difficult about using merit as the underlying determinate for judicial appointment is the vagueness and subjectivity of the term. This vagueness arises even when appointing bodies set out detailed criteria in an attempt to articulate the content of merit. What amounts to ‘merit’, and how the criteria used to measure merit are identified and applied is highly contested. In addition, without due attention to the extent that cultural and social hierarchies influence assessments of merit, ‘merit’ based assessments can obscure underlying normative preferences that disadvantage

marginalized groups. While this chapter does not intend to give a comprehensive critique of the benefits or limitations of each appointment model,⁷¹¹ it will investigate how ‘merit’ can be enriched by diversity to give greater weight to gendered experiences. This enrichment depends upon a conception of merit that sees it not as an antithetical, or even distinct, consideration from diversity. Rather, when merit and diversity are viewed as mutually reinforcing and ‘fused’ concepts, greater space is open for valuing diverse gender experiences.⁷¹²

This section begins by examining how different understandings of merit have been applied in appointments processes in the focus jurisdictions, and the varying relationships with diversity. In particular, it examines the extent to which appointing bodies have sought, and often failed, to interpret merit in order to encompass

⁷¹¹ This has been done extensively elsewhere. For example, in the context of Australia see Elizabeth Handsley, ‘The Judicial Whisper Goes Around’: Appointment of Judicial Officers in Australia’ in Kate Malleson and Peter Russell (eds), *Appointing Judges in an Age of Judicial Power* (UTP 2006); and Elizabeth Handsley and Andrew Lynch, ‘Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments in 2008-13’ [forthcoming] (copy on file with the author and cited with permission); Simon Evans and John Williams, ‘Appointing Australian Judges: A New Model’ (2008) 30 *SydLRev* 295. In the context of the United Kingdom see: Kate Malleson, ‘The New Judicial Appointments Commission in England and Wales: New Wine in New Bottles?’ in Kate Malleson and Peter Russell (eds), *Appointing Judges in an Age of Judicial Power* (TUP 2006). In the context of South Africa see: François du Bois, ‘Judicial Selection in Post-Apartheid South Africa’ in Kate Malleson and Peter Russell (eds), *Appointing Judges in an Age of Judicial Power* (UTP 2006); Hugh Corder, ‘Appointment, Discipline and Removal of Judges in South Africa’ in HP Lee (ed), *Judiciaries in Comparative Perspectives* (CUP 2011).

⁷¹² This approach, of seeing merit and diversity as fused and interrelated concepts, was recently endorsed in a report commissioned by the British Labour Party considering judicial diversity. See: Monaghan and Bindman (n503) 20-2.

women's gendered experiences, and how the concept can be reframed in order to provide a mechanism for greater promotion of the important epistemologies derived from gendered experiences.

1. The relationship between merit and diversity

a. Pure merit; merit plus diversity; or merit in diversity?

The relationship between 'merit' and 'diversity' is fraught. Not the least, because of the conceptual vagueness of what we mean when we speak of 'merit'. The definition of 'merit' and its value as an evaluative principle has long been the site of controversy,⁷¹³ yet so much weight is placed upon this imprecise term in the context of judicial appointments, perhaps because, at first blush, there is an authoritative and value-neutral implication associated with the term.

So what is merit? This section will set out three common models of merit and their relationship to diversity. The first is 'strict merit' or the 'maximalist' model. The second is 'threshold merit' or the 'minimalist' model. The third is what will be termed the 'fusion model' where diversity is seen as a component of merit and inherently colours any criteria or assessment of it.

b. Pure Merit

Pure merit, or the maximalist model starts from the idea that judges should be appointed on 'merit' alone: 'that positions should be awarded to the most qualified individuals, that is, to those who have the greatest aptitude and skill for performing

⁷¹³ For example, see John Rawls, 'Justice as Fairness: Political not Metaphysical' (1985) 14 *Phil& PubAff* 223 where he argues that a citizen should not be seen as more deserving or more 'meritorious' simply because she was born with gifts that are in great demand.

the tasks those positions require.’⁷¹⁴ In this model merit is isolated from any other contextualizing factors, including diversity. Central to this model is the idea that the aptitude and skill of individuals can be neutrally isolated and then compared and evaluated in order to provide a clear ranking of potential candidates. As Malleson explains, pure merit requires that ‘if 100 candidates apply for 10 judicial posts a ranking-based merit system would list the candidates in order of merit from 1 to 100 and the first 10 would be selected’.⁷¹⁵ There is no space to consider diversity in the model. Young highlights that ‘the merit principle asserts that this [process] is just when no group receives a privileged position by birth or right, or by virtue of arbitrary characteristics such as race, ethnicity, or sex. The unjust hierarchy of caste is to be replaced by a “natural” hierarchy of intellect and skill.’⁷¹⁶ In this way, a pure conception of merit might work as a mechanism for equal opportunity on a formal understanding of equality – that everyone should be treated alike. The idea that judicial appointments should be made on ‘merit alone’ was aimed at eliminating systems of patronage and the ‘old boys network’ that served to elevate particular candidates above others on factors irrelevant to their ability to actually perform the judicial functions. The quotation in the introduction to this thesis from the Lord Chancellor in 1986 stating that the ‘best candidate’ should be appointed to any vacant judicial post ‘regardless of party, sex, religion or ethnicity’ is a classic example of this approach.⁷¹⁷ Ironically however, by removing any consideration of factors such as race, ethnicity and sex, and by failing to pay due attention to the social structures that

⁷¹⁴ Young (n230) 200.

⁷¹⁵ Kate Malleson, ‘Gender Quotas for the Judiciary in England and Wales’ in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart 2013) 489.

⁷¹⁶ Young (n230) 200.

⁷¹⁷ Lord Chancellor’s Department (n3).

serve to disadvantage particular groups on account of these characteristics, this formal equality approach has, in practice, reinforced traditional networks, rather than risen above them. This is attributable to the difficulty, if not impossibility, of both defining and assessing merit in neutral terms. As Young observes, in order to be a valid assessment of ‘pure merit’ the criteria used to assess candidates in a strict merit model assume a number of conditions. First, qualifications must be defined in terms of technical skills and competence, independently of and neutral with respect to values and culture. Second, to justify differential job privilege, these technical skills and competences must be ‘job related’ and operate as predictors for excellence in performance in the position. Third, for criteria to be justly applied, performances and competence must be judged individually and finally, individuals must be compared and ranked according to measures which are independent of and neutral with respect to values and culture.⁷¹⁸

Malleson gives an example of a ranking model of merit as ‘one in which a relatively technical set of skills is required and/or where selection is based primarily on examination results or some other form of formal assessment.’⁷¹⁹ She points to systems of judicial selection that are employed in some European civil law jurisdictions as an example of such processes. In France entrance to the judicial training college (École Nationale de la Magistrature) is done by way of a competitive examination taken by law graduates, usually immediately after university. This examination consists of an anonymous written component and an oral examination. With respect to the anonymous, written component, Boigeol notes that ‘personality

⁷¹⁸ Young (n230) 201-2.

⁷¹⁹ Malleson, ‘Gender Quotas for the Judiciary in England and Wales’ (n715) 489.

plays no part'⁷²⁰ and success rates are comparable for both men and women who sit this part of the examination (noting that women far out-number male candidates for this examination, and subsequently the number of new female entrants to the École Nationale de la Magistrature was 80% in 2012).⁷²¹ However, with respect to the oral component of the exam, where candidates are examined not only on law, but a discussion on a topic of general culture 'to assess a candidate's personality', Boigeol notes that 'experience has shown that male candidates have consistently, with very few exceptions, scored better than women'.⁷²²

The French experience demonstrates two important factors in terms of diversity. First, it might be inferred that the anonymous written examination demonstrates that a 'pure merit' system that accords with the four conditions of neutrality outlined by Young may be possible to implement. At least as a critical first step, if the initial pool of candidates is already diverse, it removes the opportunity for blatant discrimination on the grounds of race, sex, ethnicity etc. However, the nature of such an examination will only be capable of assessing purely technical legal skills. As this thesis demonstrates, the qualities required for judicial office go beyond those of a mere technician. This gives force to Young's observation that valid criteria to assess 'normatively and culturally neutral measures of individual performance do not exist for most jobs'. She says that this is particularly so for complex and multifaceted jobs,

⁷²⁰ Anne Boigeol, 'Feminisation of the French 'Magistrature': Gender and Judging in A Feminised Context' in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart 2013) 128.

⁷²¹ Adélaïde Remiche, 'Women on the Bench in France and the United States: Understanding the Presence of Women on the Bench Through the Prism of the 'Imagined Judge'' [forthcoming] JL&C. Copy on file with the author and cited with permission.

⁷²² Boigeol, 'Feminisation of the French 'Magistrature': Gender and Judging in A Feminised Context' (n720) 128. See also pp 18-9 above for an explanation of the high number of new female entrants.

particularly those requiring verbal skills, imagination and judgment.⁷²³ The oral component of the French examination is evidence of the illusory nature of neutral assessment criteria. Boigeol highlights that the superior performance of men in this part of the examination may be a result of a political desire of the examiners to rectify the judicial feminization of the process,⁷²⁴ but also could be attributed to socio-cultural features in schools and families which ‘prepare boys better for competitive situations’.⁷²⁵ Whatever the reason may be, it underscores the elusiveness of normatively and culturally neutral measures of individual performance. Without normatively and culturally neutral measures, it becomes impossible to accurately rank candidates as ‘candidates do not come with comparable and quantifiable skills, experiences and knowledge which can easily be ranked.’⁷²⁶

c. Merit plus diversity

A second approach to conceptualizing merit is to see criterion based merit systems as the merit threshold or, as Malleson describes, a ‘minimalist model’. This model applies a ‘predetermined quality level which all candidates must meet in order to be appointed. Once this threshold has been reached, diversity factors can be taken into account in selecting between well-qualified candidates.’⁷²⁷ This model, which Handsley and Lynch term ‘merit-plus’⁷²⁸ eschews the notion that candidates can be

⁷²³ Young (n230) 202.

⁷²⁴ ‘Feminisation’ refers to the high representation of women in the French judiciary, and accordingly a falling level of prestige accorded to the judicial role. See: Boigeol, ‘Feminisation of the French ‘Magistrature’: Gender and Judging in A Feminised Context’(n720).

⁷²⁵ Ibid (n720) 128.

⁷²⁶ Malleson, ‘Gender Quotas for the Judiciary in England and Wales’ (n715), 490.

⁷²⁷ Ibid 489.

⁷²⁸ Handsley and Lynch (n711).

neatly ranked. It opens up the possibility that first, there may be equally meritorious candidates or a 'tie' in a linear ranking scale. Or second, there may be a pool of highly qualified candidates who are all above the set threshold of 'merit', but are indistinguishable on any objective criteria because they are meritorious but in *different ways*.

The use of 'tie breaker' rules to distinguish between equally meritorious candidates is still very closely aligned with the 'pure merit' model described above. It again, assumes that a ranking system of candidates is possible and that neutral measures of performance can be applied to candidates in a methodologically scrupulous way. It allows for the possibility that there might be two or more 'best' candidates competing for only one position. This is the model of judicial selection currently adopted in the UK. While section 63(2) of the CRA takes a 'strict merit' approach by requiring appointments to the courts and tribunals of England and Wales to be made 'solely on merit', provision is made for the possibility that there may, in some circumstances, be a 'tie'.⁷²⁹ The use of a tiebreaker provisions is a familiar mechanism to UK equality lawyers,⁷³⁰ and recently legislation was passed confirming its application to the UK appointment processes.⁷³¹ Under this system, considerations

⁷²⁹ An exception lies in appointments to the UK Supreme Court where selection on 'merit' alone is subject to the caveat that the selection commission must 'ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom': CRA, s 27(8).

⁷³⁰ For example, see: C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* ECR [1995] I-03015; C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* ECR [1997] I-06363; C-158/97 *Georg Badeck and Others* ECR [2000] I-01875; and more recently, Equality Act 2010 (UK), s 149.

⁷³¹ See Crime and Court Act 2013, Sch 13, inserting CRA, s 63(4).

of judicial diversity may be taken into account *after* a strict merit ranking has taken place. Where there are ‘two or more candidates of equal merit’, a candidate may be selected for a post by the JAC ‘for the purpose of increasing diversity’ in the judiciary.⁷³² The JAC has made it clear that the ‘tie break’ position will only be applied at the final decision-making stage and made only in respect of the characteristics of gender and race.⁷³³ To date, no official information is available on how often the ‘tie breaker’ provision has been used, but critics argue that it will have little impact.⁷³⁴ It is also important to note that the JAC makes only one nomination to the Lord Chancellor for every vacant appointment space, reflecting a commitment to the idea that ‘merit’ is ultimately determinative and nothing in the political process should influence judicial selection.⁷³⁵

An alternative version of ‘merit plus’ does away with the concept of ranking, and instead, sees criteria as a minimum threshold for the competencies required for judging. It replaces the metaphor of a ladder, where each candidate can be placed on a rung with the candidate at the top the only feasible choice, with a hurdle – that all candidates who can jump the hurdle are feasible, and that the ultimate selection

⁷³² CRA, s 63(4).

⁷³³ See Judicial Appointments Commission, ‘Equal Merit Provision Policy’ (2014)

<<http://jac.judiciary.gov.uk/about-jac/2767.htm>> accessed 15 December 2014. This approach has been criticised in a recent report commissioned by the British Labour Party: Monaghan and Bindman (n503) 24.

⁷³⁴ Graham Gee and Kate Malleson, ‘Judicial Appointments, Diversity and the Equal Merit Provision’ (*UK Constitutional Law Blog*, 6 May 2014) <<http://ukconstitutionallaw.org/2014/05/06/graham-gee-and-kate-malleson-judicial-appointments-diversity-and-the-equal-merit-provision/>> accessed 22 November 2014.

⁷³⁵ See Handsley and Lynch (n711) 18.

amongst approximate equals is determined by something external to the selection criteria. As one of the UK interviewees commented, this approach is more adept at highlighting the imprecise nature of candidate ‘ranking’. She said that after sitting on appointments panels, ‘I came to the firm conclusion that there are *many* times when we discovered candidates of equal merit [but] in different ways’.⁷³⁶ Because of the numerous ways that candidates could demonstrate the imprecise criteria that were used to establish ‘merit’ a strict comparison of one with the other was near impossible. It was much more appropriate to identify a qualified ‘pool’ of candidates, rather than a rank of candidates. The public statements of the Australian High Court Justice, Stephen Gagler, prior to his appointment, reinforce this comment. He considers that ‘at any one time there would be fifty people in Australia quite capable of performing the role of High Court justice.’⁷³⁷ He also advocates for a ‘merit plus’ approach to appointment, whereby ‘the first stage would be solely concerned with identifying persons having ... the essential judicial attributes [technical competence; practical judgment; courtesy; and industry]. At the second stage, [Gagler] would be happy to see the broader considerations [geography, gender and ethnicity] brought to the fore and debated’.⁷³⁸

Handsley and Lynch⁷³⁹ argue that the ‘merit plus’ model of appointments closely resembles the arrangements in place for federal appointments in Australia between 2008 and 2013. Prior to 2008, federal appointments were the ‘unfettered discretion’ of the Executive – the traditional method of ‘secret soundings’ by the

⁷³⁶ UK026, 542-4.

⁷³⁷ Stephen Gagler, ‘Judicial Appointment’ (2008) 30 SydLRev 159, 160.

⁷³⁸ Ibid 161.

⁷³⁹ Handsley and Lynch (n711).

Attorney General, who then recommended new appointments to be made by the Executive.⁷⁴⁰ In 2008 the Commonwealth Attorney-General Robert McClelland made significant changes to the process: articulating publicly available appointment criteria; advertising vacancies and calling for nominations; and establishing an Advisory Panel to make recommendations to the Attorney-General.⁷⁴¹ As Handsley and Lynch describe, in 2013, '[w]ith neither fanfare nor warning',⁷⁴² this new process was abandoned by the current Attorney-General, Senator George Brandis QC, and the appointments process reverted to the traditional approach. However, for the purpose of this section, the 2008-2013 model presents a useful illustration of the 'merit plus diversity' approach to judicial appointments. Under the McClelland model, for all judicial vacancies save for those on the High Court or as head of the three federal courts, an Advisory Panel was convened. The Advisory Panel was typically constituted by 'the Chief Justice of either the Federal Court or Family Court or Chief Judge of the Federal Circuit Court, or their nominee; a retired judge or senior member of the Federal or State judiciary; and a senior member of the Attorney General's Department.'⁷⁴³ After a public call for nominations, the panel would consult with relevant professional body representatives and in some cases, interview potential candidates. During this process, the Advisory Panel assessed nominated individuals against a set of published criteria deemed by the Attorney-General to be 'requisite qualities for appointment'.⁷⁴⁴ Upon conclusion of this process the Advisory Panel

⁷⁴⁰ Ibid; George Williams, 'High Court Appointments: The Need for Reform' (2008) 30 SydLRev 163.

⁷⁴¹ Handsley and Lynch (n711) 9.

⁷⁴² Ibid 1.

⁷⁴³ Ibid 8-9.

⁷⁴⁴ Legal expertise; Conceptual, analytic and organizational skills; Decision-making skills; The ability (or the capacity to quickly develop the ability) to deliver clear and concise judgments; The capacity to

would provide the Attorney-General with a list of those recommended as ‘highly suitable for appointment.’ From this list, Cabinet, upon advice of the Attorney-General, would forward a single name to the Governor-General in Executive Council for formal appointment under the power conferred under the Constitution.⁷⁴⁵

As Handsley and Lynch note, while not explicit in the guidelines governing the McClelland process,⁷⁴⁶ the second step – when the Attorney-General considered the short-list of candidates recommended by the panel as ‘highly suitable for appointment’ – provided a space for diversity considerations. This model differs from the UK’s approach of the JAC recommending a single candidate after a ‘ranking’ based on merit, as the short list demonstrates that there is a pool of candidates who may be equally qualified, but in different ways, to perform the duties required by the vacant judicial post. However, caution must be exercised to ensure that this discretionary space does not re-create systems of patronage or politicization that were sought to be countered by ‘merit’ systems of appointment. Handsley and Lynch argue that the lack of transparency in the McClelland model – with no clear guiding statement as to how this discretion would be exercised – has the potential to do just that.⁷⁴⁷ This has also been a persistent criticism levelled against the South African Judicial Service Commission (JSC) where it has been argued that Presidential discretion has, in some cases, been used to illegitimately elevate less qualified candidates, under the guise of racial diversity, in order to appoint judges who were

work effectively under pressure; A commitment to professional development; Interpersonal and communication skills; Integrity, impartiality, tact and courtesy; and Capacity to inspire respect and confidence.

⁷⁴⁵ Handsley and Lynch (n711) 9.

⁷⁴⁶ Ibid 20-3.

⁷⁴⁷ Ibid.

‘believed to be more deferent to government policies’ or ‘beholden to those who appoint them’.⁷⁴⁸

d. Merit in diversity: the ‘fusion’ model

The third conception of merit sees diversity as a component of merit and something that enhances the candidacy of an applicant. The fusion model differs from the ‘merit-plus’ approach in its explicit understanding that there is inherent value in diversity and that the experiential knowledge of a particular candidate may in fact contribute to the general aims being pursued in appointment processes. In a similar way that Dworkin highlighted that seeing race as a ‘qualification’ may enhance a college applicant’s ability to contribute to particular university goals (such as making collective life more just and harmonious),⁷⁴⁹ the identity traits of a particular judicial candidate may contribute to explicit goals of judicial appointment.

The March 2012 Report of the House of Lords Select Committee on the Constitution Inquiry into Judicial Appointments explicitly rejected the ‘fusion model’ of merit and diversity for the UK, stating that ‘diversity and merit are distinct qualities’⁷⁵⁰ and that ‘merit should continue to remain the sole criterion for appointments’.⁷⁵¹ By contrast, the constitutionally prescribed appointments process in

⁷⁴⁸ Albertyn (n21), 280. See also Amy Gordon and David Bruce, *Transformation and the Independence of the Judiciary in South Africa* (2007) 47.

⁷⁴⁹ Ronald Dworkin, ‘Affirming Affirmative Action’ *New York Review of Books* (New York, 22 October 1998) 91, 100.

⁷⁵⁰ House of Lords Select Committee on the Constitution, *Judicial Appointments* (25th Report of Session 2010-12, HL Paper 212, 2012) [94].

⁷⁵¹ *Ibid* [97].

South Africa has the potential to be interpreted in order to give effect to this fused understanding of diversity and merit.

The JSC is a body comprised of judges, lawyers and politicians, established under section 178 of the South African Constitution, responsible for making recommendations to the government in respect of judicial appointments. The appointment procedure for all superior courts except the Constitutional Court, for judicial transfers between courts and for the appointment of administrative heads of courts is the same. The JSC calls for nominations and applications for anticipated vacancies. Candidates submit answers to a detailed questionnaire in relation to both personal and professional qualifications, and the JSC prepares a short-list of candidates for interview. Interviews are conducted in open, public sessions. While pre-interview screening and post-interview deliberation is held in closed sessions, the JSC has made available a transcript of its discussions concerning the general approach and priorities to be pursued in making selections.⁷⁵² Following the conclusion of the interview process the JSC sends its list of recommendations to the President who must appoint those recommended ‘on the advice of’ the JSC. The process is similar for appointments to the Constitutional Court, save that the JSC will forward a list of recommendations to the President which is greater by three than the number of vacancies to be filled on the court. The President may select any nominee from the list after consulting with the Chief Justice and the leaders of all the parties represented in the National Assembly.

The selection criteria for appointments, specified in section 174 of the Constitution, are underpinned by principles of non-sexism and non-racism. Section 174 provides that:

⁷⁵² See du Bois (n711) 288.

(1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.

(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

Albertyn suggests three possible interpretations of the relationship between sections 174(1) and (2).⁷⁵³ First, she argues that section 174(2) may be regarded as a screening or filtering criterion that trumps the merit of other candidates otherwise qualified under section 174 (1) as ‘fit and proper persons’. This approach may be seen as an inversion of the second model established in this chapter – rather than taking a ‘merit plus diversity’ approach, this takes a ‘diversity plus merit’ understanding of qualifications for appointments. The second conception, according to Albertyn, is the classic ‘merit plus diversity approach’. This will insist that ‘competence always limits positive action to diversify the judiciary’.⁷⁵⁴ A third conception, and the one which arguably has the most potential for transformation in appointments, is to locate what Albertyn terms ‘race and gender representivity’ within ‘a wider understanding of difference, including class background, ethnicity, culture, sexual orientation and religion.’ On this third model, the requirements in sections 174(1) and (2) are read cumulatively and, as Albertyn highlights ‘with emphasis placed on redefining “merit” and the qualities of a judge.’⁷⁵⁵ This third understanding is what I will term the ‘fused’ understanding of merit and diversity. On this understanding, diversity is not a quality that is looked to after a ‘merit’ assessment is made in order to reach some political or otherwise transformative goal but rather, diversity is seen to shape what it

⁷⁵³ Albertyn (n21) 276-7.

⁷⁵⁴ Albertyn (n21) 277.

⁷⁵⁵ Ibid.

means to be a meritorious candidate. It is both a component of merit in and of itself, and an influential factor on how ‘merit’ is assessed. It rejects the assumption made by ‘pure merit’ structures that truly ‘normatively and culturally neutral’ evaluative criteria for judicial appointments can be developed. But it goes further than this. It rejects both the possibility, *and the desirability* of such ‘neutrality’. Rather, criteria for assessing judicial candidates should be sensitive to diversity – seeking it out in candidates where possible. As Albertyn puts it:

the ideas of representivity and diversity inform the qualities necessary in an individual judge, thus the institutional aspiration expressed in s 174(2) influences the meaning of s 174(1). As a result, the content of ‘appropriately qualified’ and ‘fit and proper’ (or merit) includes qualities such as empathy, awareness, diversity and social context and a deep sense of constitutional values, including “a...commitment to transform South African society, which affirms and promotes substantive equality and the values of dignity, freedom and equality. Diversity also implies differences in judicial approach and philosophy, which encourage debate and deliberation amongst judges and may inspire well-reasoned, value-based judgments.”⁷⁵⁶

An example of this interpretation of the fused conception of diversity and merit can be seen in the JSC’s interpretation of the forerunner of section 174 in section 99(5)(d) of the Interim Constitution. This section governed the appointment of the first set of judges to the newly created Constitutional Court and mandated the JSC when submitting recommendations for appointment to ‘have regard to the need to constitute a court which is independent and competent and representative of race and gender’. The JSC interpreted this provision not as one of affirmative action or allowing ‘special treatment’ for particular candidates, but rather considered the qualities described in section 99(5)(d) to be necessary for the institutional competence of the court as a whole. Thus, interpretive guidance on the section stated:

⁷⁵⁶ Ibid 282.

This is not a question of affirmative action in the sense in which the term is most commonly used. Affirmative action usually means varying the traditional criteria of qualification – the criteria which govern entrance or appointment or promotion – in order to undo the effects of the exclusionary policies of the past. ...But the Constitution-maker is not here concerned with the interests of individuals who, by appointment to the Court, might benefit from its instructions. Its concern is with the effectiveness of the Court as an instrument of justice. The constitutional instruction is based on the conviction that the Court must be constituted from a wide enough spectrum of South African society to be able to understand the experience of all South Africans and empathise with their needs.⁷⁵⁷

This statement reinforces the point made in the first section of this chapter – that diversity is a relative concept and that a candidate's appropriateness for appointment requires consideration of the court as a whole.

The argument made above must be carefully distinguished from correlating diversity alone with merit. There is danger in this approach. Albertyn's second interpretation of the relationship between sections 174(1) and (2), whereby section 174(2) is taken as a sifting mechanism gives rise to this danger. In Chapters 2 and 3 of this thesis, standpoint theory was used to underpin the argument that diverse gendered experiences could help transform the judiciary and improve the quality of decisions reached. Standpoint theory⁷⁵⁸ is not about experience alone, but rather the value of the dialogic relationship between experiential knowledge and received (or technical) professional knowledge. It is the new understandings, meanings and interpretations of the 'received knowledge' when this 'received knowledge' is scrutinised from a perspective that had previously been excluded. Concerns of 'under-qualified' appointees and charges of 'tokenism', highlighted in Chapter 9,

⁷⁵⁷ Judicial Service Commission, *Guidelines for questioning candidates for nomination to the Constitutional Court* (JSC Handbook 2010) 67 and 69, cited by Albertyn (n21) 277-8.

⁷⁵⁸ Hill Collins, 'Defining Black Feminist Thought' (n35); Hill Collins, 'Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought' (n35).

arise when this dialogic relationship is not carefully balanced. Du Bois, quoting a reflection made by Sir Sidney Kentridge QC in 2003, highlights that this has been a criticism of the JSC's approach to appointments under section 174:

while the JSC represented a 'huge advance on the old system,' and had succeeded in eliminating some poorly qualified candidates who might otherwise have hoped for political favour, it had not been rigorous enough 'in ensuring that legal knowledge and experience accompany the other qualities needed for the transformation of the judiciary.'⁷⁵⁹

This criticism has endured,⁷⁶⁰ and was voiced by several interviewees, as highlighted in Part C(2)(b) of Chapter 9. Therefore it is the interlinking between technical competency and experiential diversity that informs the fused conception of merit.

The final part of this section will examine the use of 'criteria' in the three focus jurisdictions, and ask how these criteria may serve to value or devalue gendered experiential knowledge, in the process of assessing the merit of candidates for appointment. Importantly, it will ask what a fused approach to merit and diversity would look like when applied to some of the current criteria employed when determining who is the 'best' person for judicial appointment.

2. Envisioning a 'fused' approach

As stated at the outset of this section, 'merit' is a vague and contested term. In an attempt to counter this opaqueness, those responsible for appointing judges on 'merit' have often sought to flesh out criteria by which particular candidates will be evaluated. These criteria, set by the executive or the relevant appointment body, act as a supplement to the broad terms for appointment set down by statute or constitutional prescription. For example, under the McClelland model in Australia

⁷⁵⁹ du Bois (n711).

⁷⁶⁰ See Albertyn (n21) 280, ff 172 and 173.

the following criteria were used to assess potential candidates for appointment to federal courts:

- Legal expertise;
- Conceptual, analytical and organisational skills;
- Decision-making skills;
- The ability (or capacity quickly to develop the ability) to deliver clear and concise judgments;
- The capacity to work effectively under pressure;
- A commitment to professional development;
- Interpersonal and communication skills;
- Integrity, impartiality, tact and courtesy; and
- Capacity to inspire respect and confidence.⁷⁶¹

In South Africa the JSC gave content to the Constitutional requirements of section 174 in the following terms:

1. Is the proposed appointee a person of integrity?
2. Is the proposed appointee a person with the necessary energy and motivation?
3. Is the proposed appointee a competent person?
 - (a) Technically competent
 - (b) Capacity to give expression to the values of the Constitution
4. Is the proposed appointee an experienced person?
 - (a) Technically experienced
 - (b) Experienced in regard to values and needs of the community
5. Does the proposed appointee possess appropriate potential?
6. Symbolism. What message is given to the community at large by a particular appointment?⁷⁶²

The JAC in the UK uses the following five criteria, to elaborate (somewhat more substantially than Australia and South Africa) upon the statutory criteria set out in the CRA in order to assess potential candidates:

⁷⁶¹ See Handsley and Lynch (n711) 13.

⁷⁶² Judicial Service Commission, 'Summary of the Criteria Used by the Judicial Service Commission When Considering Candidates for Judicial Appointments' (2010)

<<http://www.justice.gov.za/saiawj/saiawj-jsc-criteria.pdf>> accessed 25 November 2014.

1. *Intellectual Capacity*: Expertise in your chosen area of profession; Ability to quickly absorb and analyse information; Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary;
2. *Personal Qualities*: Integrity and independence of mind; Sound judgment; Decisiveness; Objectivity; Ability and willingness to learn and develop professionally.
3. *An Ability to Understand and Deal Fairly*: An awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs; Commitment to justice, independence, public service and fair treatment; Willingness to listen with patience and courtesy.
4. *Authority and Communication Skills*: Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved; Ability to inspire respect and confidence; Ability to maintain authority when challenged.
5. *Efficiency*: Ability to work at speed and under pressure; Ability to organise time effectively and produce clear reasoned judgments expeditiously; Ability to work constructively with others.
6. *Leadership and Management Skills*: Ability to form strategic objectives and to provide leadership to implement them effectively; Ability to motivate, support and encourage the professional development of those for whom you are responsible; Ability to engage constructively with judicial colleagues and the administration, and to manage change effectively; Ability to organise own and others' time and manage available resources.⁷⁶³

These criteria establishing 'merit' present as authoritative statements of what constitute characteristics necessary for a candidate to be a suitable appointment. They are often driven by certain perceptions of what constitutes the necessary levels of 'excellence'. However, they are still expressed in broad and subjective terms. In addition, they are assumptions of what constitutes a 'good judge.' As Handsley notes, they often revert to historically informed images of the judiciary 'but rarely show any evidence of having properly reflected on whether the traditional assumed content of merit really describes what makes a good judge'.⁷⁶⁴

⁷⁶³ Judicial Appointments Commission, 'Qualities and Abilities'

<<http://jac.judiciary.gov.uk/application-process/qualities-and-abilities.htm>> accessed 25 November 2014.

⁷⁶⁴ Handsley and Lynch (n711) 138.

The central problem in knowing ‘what makes a good judge’ is that our perceptions of the judiciary are often informed by the image of judges who have come before – and as has been made out in the introduction to this thesis, this group has been remarkably homogenous – usually an older, white, able-bodied, heterosexual man who has had a career in advocacy. Appointment criteria, and those who apply it, must be sensitive to this, and the normative impact that it has upon the application of selection criteria at either a conscious or subconscious level. If this sensitisation does not occur, appointment criteria will be unable to value experiential knowledge that has been accumulated from experiences that diverge from this historical archetypal image of a judge. The selection criteria, and those who apply it, must be innovative both in their ability to identify new candidates for judicial appointment who have both the requisite technical skills, and rich life experiences that will extend the pool of judicial perspectives. As this thesis has demonstrated, both technical skills and life experiences impact profoundly upon decision-making done by collegiate courts. Attempting transformation by strict reference to a yardstick of the judge informed by the past is a project bound to fail. When formulating criteria to flesh out the content of ‘merit’ in a way that sees diversity as an important part of a merit assessment the criteria must do more than just integrate women (or other historically excluded groups) into the existing paradigm. This paradigm must be challenged to ensure that the criteria themselves do not simply re-create or reinforce exclusionary structures that have served to marginalize under-represented groups and prioritize experiences and career trajectories that predominantly reflect the dominant group. As Fredman highlights, ‘[w]here a “merit”-based process systematically excludes black people or women, it is necessary to reconsider the criteria themselves.’⁷⁶⁵ The statistics set out

⁷⁶⁵ Sandra Fredman, ‘Reversing Discrimination’ (1997) 113 LQR 575, 578.

in the introduction to this thesis are testament to the fact that in all three jurisdictions women continue to be systematically marginalized in appointments processes. While it is beyond the scope of this thesis to thoroughly investigate the impact of each of the current appointment criteria applied in each of the three jurisdictions, interview material did shed light on some particular areas where greater attention must be paid to in order to validate diverse gendered experiences.

A fused conception of diversity and merit is useful in assessing relevant professional experience. In all three jurisdictions, professional experience is used to assess a candidate's competency. As noted in Chapter 8, Australian legislation limits appointment to the High Court of Australia to those who have either served as a judge on another Australian court, or have been enrolled as a barrister or solicitor for at least 5 years.⁷⁶⁶ Justices of the Supreme Court of the UK must have either held high judicial office for a period of two years, or have been a qualified practitioner and gained experience in law for the past 15 years.⁷⁶⁷ The terminology used for eligibility for appointment to the South African Constitutional Court is much broader. It states that '[a]ny appropriately qualified man or woman who is a fit and proper person'⁷⁶⁸ may be appointed. However, this broader language of 'appropriately qualified' has tended to elevate those with professional legal experience.

Judicial appointments in common law jurisdictions come at the latter end of illustrious careers. However, how do we determine who has and who has not had this illustrious career? Part I of Chapter 8 highlighted the gendered patterns of lawyer's

⁷⁶⁶ High Court of Australia Act (Australia), s 7.

⁷⁶⁷ CRA, s 25. Section 25 was amended by the Tribunals and Enforcement Act 2007, ss 50-52 to include the second pathway to appointment. See n480.

⁷⁶⁸ SA Constitution, 174(1).

professional lives. Many of the women interviewed commented upon the difficulties they experienced in combining a ‘traditional’ legal career with caring responsibilities. Others felt that time spent ‘out of work’ was often discounted or dismissed by those assessing relevant experience necessary for judicial appointment. A female English judge commented on how she saw another member of an appointing body interpret relevant experience:

He, I suspect, thinks of merit as the glittering prizes, which men have traditionally won. Now to take me as an example ...when my colleagues were writing articles for the textbooks and winning this and doing that I was giving birth, I was travelling miles to see my children, to give them a bath, to put them to bed. I didn’t write the articles, so it’s a bit rich to say, if you look at my CV and theirs, that I’m not equally appointable on merit because I haven’t got the spliffing prizes.⁷⁶⁹

This interviewee then gave a good account of how a ‘fused’ approach to merit and diversity might be employed when assessing relevant career experience:

What they should be doing is saying ‘well wait a minute, let’s look at what she *has* done, let’s look at her potential and say whether or not she is appointable on merit, but in a different way.’⁷⁷⁰

This approach moves beyond a formal equality approach to assessing merit. It pays attention to structural differences that impact women and men’s careers in law. The statistics presented in Chapter 1 highlighting the structural impediments to women reaching higher echelons of legal practice in numbers equal to their male counterparts should not be overlooked in appointment processes. That women and men experience life in law in remarkably different ways is well-documented.

It is not only in levels of seniority that women’s experiences deviate from those of their male counterparts. Areas of practice also continue to be shaped by gender.

⁷⁶⁹ UK026, 546-553.

⁷⁷⁰ UK026, 553-556.

For example, a 2010 report highlighted gendered patterns of practice area in the solicitor's profession in the UK. Women were more likely to work for smaller firms and specialise in 'community oriented and lower paid fields such as family, employment and benefits.'⁷⁷¹ This type of gender stratification in legal practice may mean that women's experience in law might be in forums that deviate from the traditional archetype of a successful judicial candidate. They may have less opportunity in their work to perform advocacy in the higher courts,⁷⁷² or may have an over-representation in work that is commercially low-value, and therefore attracts less 'prestige'. Rather than these experiences being viewed by appointments panels as inferior, they should be seen as opportunities to inject rich and pluralistic perspectives onto the bench. This would see a true valuing of 'diversity' when assessing the 'merit' of a candidate's professional experience.

Another area of concern for professional diversity comes when those with prior judicial experience are given preference for senior posts over those without. This has often been the case for appointments made in South Africa with its system of 'Acting Judges'. As Hugh Corder notes, there is an:

...apparent requirement of the JSC in its approach in practice that anyone seeking appointment to judicial office must have served some time as an Acting Judge. The practice of appointing senior advocates (barristers) to the bench for a period of one to three months, typically to replace a judge on long leave or to help reduce a backlog of pending trials, has now been part of the administration of judges in South Africa for decades. As well as serving the direct purpose of allowing the court concerned to keep pace

⁷⁷¹ Rosaline Sullivan, *Barriers to the Legal Profession* (Report for the Legal Services Board, 2010) 12.

⁷⁷² For example, between 1994 and 2011 at least one woman barrister had a 'speaking part' in oral advocacy before the High Court of Australia in only 48 of the 766 argued cases (a rate of only 6.3% of all cases); Vinod Mishra and Russell Smith, *Barrister Gender and Litigant Success on the High Court of Australia* (Monash University, Department of Economics, ISSN 141-5429, Discussion Paper 15/13, 2013), Table 2 'Table 2: Female Barristers Appearing Before the High Court (1994-2011)' 40.

with the demands for its services, it has allowed those who are likely at some stage to be considered for judicial appointment a limited opportunity to experience judicial work, thus better informing any subsequent decision as to the person's suitability for judicial office, both from a personal as well as a collegial point of view.⁷⁷³

Acting appointments to the Constitutional Court are made by the President on the recommendation of the Minister of Justice, who must act 'with the concurrence of the Chief Justice and the President of the South African Supreme Court of Appeal'.⁷⁷⁴ The Minister of Justice makes all other acting appointments, 'after consulting the senior judge of the court on which the acting judge will serve'.⁷⁷⁵

Several South African judges interviewed expressed concerns about the ways in which acting appointments serve to marginalise women judges from future promotion. They noted that there is currently a lack of transparency in the system of appointment for acting posts, and that certain candidates – those who were well known to the people in power – are prioritised over other less-well known candidates. They considered that this process serves to marginalise women for two reasons. First, women are often excluded from the networks that inform these 'secret soundings'. Second, as admitted by one of the Judge Presidents interviewed for this project, lower courts are often reluctant to 'let go' of their women judges for the purposes of 'acting up' for fear that this would negatively impact upon the gender ratio of the current court. Cowan has expressed an opinion that 'the process for becoming an Acting Judge is unfriendly to women.' She again highlights that the process depends heavily upon the recommendation of the particular Judge President, most of whom are

⁷⁷³ Corder (n711) 105. See also du Bois (n711) 289-90.

⁷⁷⁴ SA Constitution, s 175.

⁷⁷⁵ Ibid.

currently men.⁷⁷⁶ In this way, to privilege judicial experience is, at this stage, introducing a gender-bias to apparently neutral appointment criteria. A ‘fused’ approach would recognise that affording preference to those with prior judicial experience might at this stage, until the apparent structural defects have been corrected, limit the experiential pool of candidates deemed suitable for judicial appointment.

Other common criteria used to determine the ‘merit’ of a candidate are whether or not the candidate can ‘inspire respect and confidence’, ‘maintain authority when challenged’, or ‘provide leadership’. These are extremely socially-subjective concepts and arguably, due to socio-cultural biases, serve to disadvantage women. Interview material presented in Chapter 9 explored some of the collegial challenges for women judges who were viewed by their peers as ‘outsiders’. The testimony of one of the female interviewees that she felt that she needed to ‘prove herself’ to her male colleagues is an example of how gendered stereotypes and biases negatively impact upon perceptions of ‘authority’, ‘confidence’ or a woman’s ability to ‘command respect’. The type of experience often has very little, if nothing at all, to do with the abilities of the woman, and everything to do with the bias (conscious or not) of the audience. To rely on such measures as if they are culturally or normatively neutral⁷⁷⁷ can be hazardous for efforts to increase experiential knowledge. They are hazardous because they have the potential to exclude women (and men) who deviate the most from the traditional archetype of the judge. In this way, the transformative power of appointments processes is limited – giving preference to those who most

⁷⁷⁶ Ruth B Cowan, ‘Do Women on South Africa’s Courts Make a Difference?’ in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart 2013) 320.

⁷⁷⁷ See Young (n230) 202.

closely conform to the pre-existing judicial norm. This might well include women – but only those who can ‘cover’⁷⁷⁸ or assimilate to traditional prototypes of what power, authority and leadership look like. This does little to broaden the experiential pool available to the court. In order to take a ‘fused’ approach to assessing criteria that are normatively and socially charged – like notions of ‘confidence’ and ‘authority’ – appointments bodies need to look carefully at how these qualities are assessed and what is used to evidence them (for example, research demonstrates that there are often gendered patterns in models of ‘leadership’, affected by socio-cultural influences upon women⁷⁷⁹), and also ensure that those who sit on appointments bodies are made aware of the potential scope of bias – both conscious and unconscious – to affect their decision-making and assessment. A fused approach to ‘merit’ and ‘diversity’ in this area would be mindful of the different ways in which qualities such as authority are exhibited, and the socio-cultural context which impact upon both the demonstration and assessment of these criteria.

C. DIVERSITY AMONGST WOMEN

As demonstrated above, conceptions of ‘merit’ that fail to pay sufficient attention to the relationship between merit and diversity can marginalise candidates whose life experiences deviate the most from the traditional archetype of the judge. This is concerning because these candidates may have the most to offer a court in terms of unique perspectives framed by broad life experiences. When considering diversity in

⁷⁷⁸ See Yoshino (n685).

⁷⁷⁹ For example, Professor Nannerl O. Keohane’s research highlights that women are often associated with subtle, ‘low-key’ leadership behind the scenes that is markedly different from the ‘out front’ qualities usually associated with (men’s) leadership styles: Nannerl O Keohane, *Thinking About Leadership* (PUP 2012).

terms of ‘merit’ and appointment processes, it is of vital importance to resist the temptation to look at candidates along a ‘single identity axis’ alone. For example, viewing all women as simply ‘women’ can serve to obfuscate the important life variances *amongst* women. When embarking upon the project to increase the breadth of gendered experiential knowledge available to the court, it is critical to look at how gendered experiences amongst women (and men) are heavily coloured by the intersection that their gender has with other ‘axes of identity’, particularly race, socio-economic background, and geographical background.

As demonstrated in the introduction to this thesis, the composition of the courts studied have been characterised by the homogeneity of the judges who serve. This homogeneity has been particularly striking in terms of gender. None of these jurisdictions have achieved parity (let alone a majority) of participation by women judges. Therefore, on the axis of gender, women remain one important focal point for inclusion in order to achieve greater diversity. But this final section will highlight that it is not enough to consider the question of judicial diversity by using single-axis identity markers alone.

Efforts seeking to promote gender diversity in the judiciary need to pay serious attention to maximising the experiential spread amongst the women (and men) themselves. We need to have not just more women, but more women who may have shared certain experiences as a result of their gender, but also have unique experiences to offer. Albertyn cites the late South African Chief Justice Pius Langa, who suggests that ‘[j]udicial diversity implies, not that there is an appropriate racial or gender mix, but that a wide range of views and life experiences are represented.’ Albertyn goes on to reflect that ‘[a]lthough Langa believed that in contemporary South Africa diversity would often coincide with representivity, diversity can be a

much more complex and multi-faceted idea of difference, referring to race, religion, gender, sexual orientation, class and culture and to the diversity of ideas, norms, values and experiences that any combination of these creates.’⁷⁸⁰ In addition, the focus of this thesis on women’s increased participation does not discount the value of the various gendered perspectives to judging that marginalised men’s experiences will bring. As Minow articulates, the search is not simply for the women’s perspective, nor the man’s, but rather a perspective that will take both into account. ‘Although we are still left with a perspective, it is one which implies neither a norm nor a deviant position, but instead a third point of view from which to see relationships between diverse human beings.’⁷⁸¹ Every judicial candidate should broaden the diversity of the bench. Every member of the court should add to the enriching impact that pluralistic perspectives create when placed in relation to one another and required to decide upon the same legal problems.

Interview material in Chapters 8 and 9 demonstrates that it was often the intersection between gendered experiences and other experiences that served as the ‘trigger-point’ for new perspectives to enrich discussions in collegiate courts. For example, it is worth recalling here the quotations in Chapter 8 from the Black female South African judge who spoke of her experiences growing up in rural South Africa and trying to explain to people from the city the importance of running water; or her understanding, derived from deep personal experience, of the omnipresent threat of sexual violence for many South African women. It was the intersections of her experiences: of being a woman, of growing up poor, and of growing up in a rural South African environment – that marked her perspectives in a way that was different

⁷⁸⁰ Albertyn (n21) 270.

⁷⁸¹ Minow, ‘Making all the Difference: Three Lessons in Equality, Neutrality and Tolerance’ (n706) 6.

both from those of White women and men in South Africa, and also from Black men in South Africa. Other examples were given in Chapters 8 and 9 where the intersections of identity stood out as important influences on experience, and therefore perspective: the female Australian judge who was single and her perceptions on personal security; the several female judges who spoke of the impact that mothering had upon their world-view; the relatively wealthy White South-African male judge who had an ‘eye-opening’ encounter when his colleague spoke candidly about housing rights in the context of his own experience growing up in poverty in a single-room house. These examples demonstrate that a single-axis approach to identity is insufficient in order to truly encompass a broad-spectrum of life-experiences on the bench.

However, the recognition of the importance of women’s intersectional identity has been slow to impact upon conversations on judicial appointment. South Africa’s recent experience has been the most telling. While section 174 of the Constitution mandates transformation in terms of both race and gender, greater progress has been made in terms of race at the expense of gender. Since 1994 the Constitutional Court has transformed from an institution with seven White judges and four Black judges, to the current bench where the majority of judges are Black and two are White. However, as was the case in 1994, only two women currently serve on this court. As a recent report by the Centre for Applied Legal Studies notes, there has been a focus on race, not gender, and in the South African context this has served to leave behind Black and Coloured women as the rightful beneficiaries of transformation.⁷⁸² Despite the constitutional guarantees, these are the voices that remain marginalised in the judicial context. Black women are the most marginalised in terms of South African’s

⁷⁸² Whitworth and others (n503).

demographic when it comes to judicial appointments in South Africa. Recent statistics demonstrate that while Black judges occupy 107 (44%) of the current 241 judicial posts, only 35 of these posts are held by Black women, meaning that Black male judges outnumber Black female judges at a rate of over 2:1.⁷⁸³ While Black women in South Africa comprise approximately 40% of the entire population,⁷⁸⁴ they comprise only 14.5% of the judiciary. Coloured women are also under-represented when compared to their male counterparts and with the population at large – with 15 Coloured men and 8 White women holding judicial posts.⁷⁸⁵ This means that while Coloured women comprise approximately 4.5% of the population,⁷⁸⁶ they make up only 3% of the judiciary. White women are also dramatically out-numbered by their White male counterparts, more so than any other racialised group, with 64 White men currently serving and only 23 White women.⁷⁸⁷ However when compared to the overall White population of South Africa (8.9% in total⁷⁸⁸), this demonstrates a dramatic over-participation demographically speaking by White men (who comprise 26.5% of the judiciary, but 4.5% of the population as a whole), and, to a lesser extent, by White women (comprising 9.5% of the judiciary and 4.5% of the population). The only racialised group with equal numbers of representation by women and men were

⁷⁸³ As at 30 April 2014: Angelopulo (n118), 46.

⁷⁸⁴ In 2011 79.2% of South Africans were black and 51% of South Africans women: see Pail Lehohla, *Census 2011: Census in Brief* (Statistics South Africa, 2012) Figure 2.1 and Table 2.4, 20-1.

⁷⁸⁵ Angelopulo (n118) 46.

⁷⁸⁶ Lehohla (n784) 21.

⁷⁸⁷ Angelopulo (n118) 46.

⁷⁸⁸ Lehohla (n784) 21.

Indian judges – with 12 men and 12 women currently serving.⁷⁸⁹ Indian or Asian people currently comprise 2.5% of the population⁷⁹⁰ but almost 10% of the judiciary.

What these statistics illustrate is that the experience of all women in South Africa has not been the same – some continue to be marginalised from judicial participation at a higher rate than others. This marginalisation also holds true for the United Kingdom – however the homogeneity in the judiciary is far more extreme. Diversity statistics published by the Court and Tribunal Judiciary service present a breakdown according to the ethnicity (‘Black, Asian, or Ethnic Minority’ (BAEM)) of post holders, but not by gender and ethnicity. However, this lack of disaggregated information does not prevent a clear picture of the BAEM women’s representation on the senior judiciary being obtained for the simple reason – that there are no BAEM women judges in the superior courts of United Kingdom. Currently there are no members of the Supreme Court of the United Kingdom or the Court of Appeal of England and Wales who identified as BAEM and only one member of the High Court of England and Wales – Mr Justice Rabiner Singh – who identified as BAEM. While BAEM judges are better represented at lower levels of the judiciary – comprising 5.8% of the judiciary as a whole, and 9.3% of legal post holders in the Tribunal system, little else is known about the demographic composition of this group. A lack of attention by monitoring bodies to intersectional representation in the judiciary serves to highlight the marginalisation of those who differ to the greatest extent from the historical judicial ‘norm’. Without visibility, the lack of participation of these groups goes unnoticed and therefore unaddressed. This need for greater attention to multiple and intersecting identities was highlighted in a recent report

⁷⁸⁹ Angelopulo (n118) 46.

⁷⁹⁰ Lehohla (n784) 21.

commissioned by the British Labour Party. The authors strongly recommend improvement in the collection of reliable data on the ethnicity of current judicial post-holders, as well as a broadening of focus to include data on ‘disability status, sexual orientation, religion and belief and the social and educational background of judges and tribunal (legal) members.’⁷⁹¹ This information should also be analysed along multiple-identity axes, for example, breaking down information on ethnicity *and* gender, in order to fully capture patterns of exclusion and marginalisation. Australia is the most concerning jurisdiction in terms of information about the intersectional identity of its judges. There are currently no statistics available⁷⁹² on the race or ethnicity of the judiciary. This is alarming given the ‘multi-cultural’ face of modern Australia.⁷⁹³ However, in the most visible place, the Australian judiciary remains White: all seven of the justices of the High Court of Australia are of White-Anglo background.

Just as gender will not be determinative of a judge’s life experiences or perspectives, the intersections between gender and other identity factors cannot be used to ‘essentialise’ the judge. However, as the interview material presented in Chapters 8 and 9 have illustrated, intersectionality may be a fertile source to inform

⁷⁹¹ Monaghan and Bindman (n503) 33.

⁷⁹² To the best of my knowledge.

⁷⁹³ According to 2011 census data, over a quarter (26%) of Australia’s population were born overseas, one-fifth had an overseas born parent (20%) and 53% had a grandparent born overseas. The top five countries of birth for the overseas born population are the United Kingdom, New Zealand, China, India and Italy: see Australian Bureau of Statistics, ‘Reflecting A Nation: Stories from the 2011 Census, 2012-2013’ (21 June 2012)

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013>> accessed 28 November 2014.

perspective and challenge pre-conceived notions of ‘normal’, ‘natural’ and ‘common-sense’ that consciously or sub-consciously pervade judicial dialogue. To fail to give due attention to the differences between women, but rather focus on simply appointing any women, may limit the scope of experiential knowledge available to the bench. It may serve to elevate those who by privilege or by other facets of their identity – namely their race, ethnicity and social class – have lived a life that resonates most closely to that which has been prioritised and privileged in judicial appointments. In order to truly expand the scope of valuable experiential knowledge on offer in a court, it is critical to focus on the intersections of identities, and the voices of women who have been most excluded in judicial transformation projects.

CONCLUSION

The central research question for this thesis asked: why do we need more women judges? This thesis has presented a new empirical base to support a much-contested theory – that the inclusion of more women judges has the potential to improve the quality of justice provided by courts. As the quotation from Minow, set out in the introduction to this thesis provides: ‘Justice...is not abstract, universal or neutral. Instead, justice is the quality of human engagement with multiple perspectives...’⁷⁹⁴ Justice is enhanced by the inclusion of women because courts that are inclusive of a broad range of life experiences, and a variety of perspectives informed by these experiences, have a greater ability to interpret and apply the law in a fashion inclusive of a fuller spectrum of human experience. Multiple perspectives provide senior appellate courts with a powerful adjudicative tool. When judges bring perspectives, formed by life experiences, that have previously been excluded or marginalised in these forums they are able to offer more inclusive interpretations of the law that resonate more closely with the experiences of the communities which they serve. Additionally, when judges are presented by their colleagues in collegiate decision-making forums with accounts of the world that challenge and destabilize their own perspectives, they are required to check their own subjectivity and interrogate their own partiality. They must ask – is my view really universal, or are there other ways of interpreting this problem? Is the law, and this interpretation of the law, truly reflective of the genuine experience of society? This in turn serves to enhance the impartiality of the judiciary, and makes for stronger, more receptive courts.

⁷⁹⁴ Minow, ‘The Supreme Court 1986 Term, Foreword: Justice Engendered’ (n1) 16.

Chapter 1 began by acknowledging that there are a number of ways to ‘make the case’ for more women judges. Three of these arguments, accepted by this thesis as strong and valid, are premised on the greater presence alone of women in the judiciary. They are: the expressive messages that are sent when judicial power is exercised by women and men equally; improvements in the legitimacy of the court as an institution; and a better reflection of equal opportunity for professional progress by women in the legal profession. As Chapter 1 discussed, these arguments have gained a great deal of support both in academic and political arenas. Simply having women represented equally on the bench is important for strong, legitimate courts and represents a more equitable gender distribution of power in society at large. However, this thesis sought to go further, to explore a fourth argument, less universally accepted, to make the case for more women judges: that gender diverse courts will be better courts. It also exposed the extent to which this argument underpins and is related to the first three discussed. That gender diversity improves the substantive quality of justice afforded by these institutions. But how do we establish this substantive impact?

Part II of this thesis canvassed the methodological options for researching the impact that gendered experiential knowledge has upon judging. It noted that four main methodological approaches have been taken to date. The first, quantitative outcomes-based research has proved ambiguous in supporting the assertion that women judges will make a substantive impact on the law. Doctrinal analysis, whereby the text of judgments are studied in order to ascertain if gendered voices make a difference show more promise. Chapter 5 demonstrated the usefulness, but also the limitations of this methodology by analysing decisions of the European Court of Human Rights in order to uncover examples of gendered experiential knowledge

being explicitly incorporated into judgment writing and the judicial reasoning process. Alternative feminist judgement writing projects have become popular in recent years, and are an effective tool in unmasking points of male-normative bias that affects judicial decision-making. However, Chapter 7 argues that qualitative interview based analysis is a much needed site for further interrogation in order to investigate gendered impacts on judging. This is because often, the impact that gendered experiences have on the judicial process is complicated, subtle and hidden from the outside world. Qualitative interviews allow these complexities to come to the fore, and provide a unique opportunity to hear from the ones who are in the best position to know – the judges – how they perceive gendered experiences – their own, and those of their colleagues – to impact upon decision making.

In this light, Part III (particularly Chapters 8 and 9) has drawn upon qualitative empirical accounts that demonstrated the important substantive gains received by courts that were able to draw upon the benefit of both women's and men's gendered experiences when deliberating. Chapter 5 demonstrated that at times, judges do draw upon gendered experiential knowledge and include these accounts in their written reasons. Chapters 8 and 9 demonstrate that even if these experiences are not explicitly included in written decisions, judges nonetheless often consider that their own gendered experiences are important influences, shaping the way they approach cases as an individual, and having significant impact as they deliberate on cases as a collective group. These experiences may have been indirectly informed by gender – for example, variations in career structures resulting from gender-determined caregiving arrangements; career breaks resulting from childbirth; or variations in professional experiences due to gendered 'channelling' of women into particular areas of law or modes of legal practice. These chapters were also careful to highlight that

gendered experiential knowledge is most powerful when brought to the court by a judge who is able to use it as an overlay in the application of strong, technical legal knowledge. It is the dialogic relationship between gendered experience and ‘received’ technical expertise that allows the greatest scope for judicial transformation.

Despite the value that many of my interview participants placed upon gendered experiential knowledge as an important epistemology in judging, all of the courts studied in this thesis still have a dramatic gender imbalance in their composition. This final chapter of this thesis sought to make an initial contribution towards re-imagining appointments processes so that they can become more equipped at promoting diversely experienced judges. This chapter offered three guiding principles: that each individual appointment should be informed by the background experiences of the existing court with a view to expanding the experiential pool; that merit and diversity are fused concepts and the relationship between the two must be taken into account– the diverse ways that one can exhibit ‘merit’ and that diversity may in some contexts enhance ‘merit’; and that a search for diverse gendered experiences should also be conscious of the diversity amongst women (and men). Those who have been the most marginalised from judicial office, due to the way in which gender intersects with other identity markers, may have the most to offer in terms of new perspectives, informed by experience.

In common law countries, judicial appointment is usually a marker of the accumulation of years of experience. This thesis encourages a broader view of what experience should ‘count’. Technical experience is important, but so too is life experience. And life experience is gendered. If women, and women’s life experiences, continue to be marginalised in the judiciary, then the institution remains

impoverished. Women's experiences are valuable to law, and by including them we improve the quality of justice by opening it up to the enrichment that can be produced within the context of diversity. By drawing on diverse experiences in this way, courts are better equipped to provide justice.

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