

The Rationale for More Women Judges in Canada, the United States and the Republic of South Africa

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The composition of the judiciary has been and continues to be a concern voiced in countries around the world by those striving to achieve gender equality. They are in accord in urging that there be more women judges. Their supporting arguments, however, differ. Presented here are the arguments and the supporting evidence advanced in Canada and the United States compared to the arguments advanced in the Republic of South Africa. The record of gender representation in the judiciary of the three countries is also compared, followed by speculation as to the function of arguments and of evidence in achieving greater gender judicial representation.

1. Canada and the United States

Beliefs upholding the ban against women as judges

In Canada and the United States, those favoring the appointment of women to the courts had to challenge two sets of beliefs. The first set maintains that women, *qua* women, are unqualified by emotion and intellect to practice law, let alone serve as judges. One of the many now classic statements of this was provided by the concurring judge in *Bradwell v Illinois*. The Court rejected Myra Bradwell's claim that Illinois' refusal to admit her to the bar on the grounds of sex violated the U.S. Constitution's 14th Amendment.¹ The concurring Justice asserted the prevailing view that

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life....The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.²

Such views were also prevalent in Canada. The laws of nature and of the Creator assigned women to the home -- and there were man-made laws to assure that women stayed where they belonged.

When President Harry Truman nominated Burnita Shelton Matthews in 1949 to be the first female federal judge in United States history³, Judge T. Alan Goldsborough, a member of the court to which she was to be confirmed, conceded that "Mrs. Matthews would be a good judge"—but, he pointed out, she had a fatal flaw; i.e. "She's a woman."⁴

Judge Goldsborough's belief in women's fatal flaw has been challenged and overcome, to the extent that it has been overcome, less by argument and evidence than by political pressure

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¹ 83 U.S. 130, 139 (1873).

² *Ibid.* at 141.

³ Reference is to judges appointed under Article III of the U.S. Constitution to the District Courts, Appellate Courts and the Supreme Court.

⁴ M.L. Clark, "One Man's Token is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges," 49 *Villanova Law Review* (2004) at 509-510.

applied by influential women and women's organizations in the context of one of the twentieth century's major social movements.

The second set of entrenched beliefs maintains that no social benefit could be gained from women's presence in court. Here it is held that women could add no value; that they could make no positive difference in the administration of justice.

These beliefs rest on two assumptions, the first of which is that the judges constituting an all-male judiciary are the best and the brightest society can produce. (President Richard M. Nixon's defense of a nominee – that mediocre people need representation, too – is endorsed, at least in public, by no one.) In the United States, once law schools began admitting women, their numbers in law classes grew rapidly until they accounted for more than half of all graduates. Reason might well dictate that once women were present in the pool of prepared lawyers, the claim of merit as the basis for appointment—a claim advanced when men were selected, might result in women candidates for judicial appointment. Justice Roslyn Atkinson of the Supreme Court of Queensland, Australia advanced this very conclusion more recently when she asserted that

A system purely based on merit would be likely to see men and women thriving equally. It is wrong to assume that a diverse judiciary is not an elite judiciary....In fact, widening the pool ensures that the best people are considered for appointment.⁵

Judge Florence Allen, who was the first woman to serve on an Article III appellate court in the United States advanced the same reasoning in 1921. "This entrance of women," she pointed out, "can but demonstrate that ... latent capabilities are unmined gold that the world cannot afford to be without."⁶ Even were women not to prove to be the "unmined gold" Allen anticipated would surface, their presence in the pool might help alchemize dross of some men into gold once they had to compete for positions they had previously considered entitlements.

The second of the two assumptions in support of the beliefs that women judges would add no value is that male-only courts left nothing to be desired since they administered justice according to the highest standards of impartiality, thereby assuring justice for all. It is here that advocates for greater judicial gender representation provided their most effective arguments. They argued this assumption did not reflect the reality of an unjustly biased jurisprudence and court administration. They argued, further, that women judges, approaching the issues of law and case management with a different perspective—and some argued with a different way of thinking—would help correct these biases. They provided evidence to back up their arguments.

There are rebuttals to these arguments and challenges to the evidence offered. Neither is considered here. This is an account of the case made and evidence presented by the advocates for more women judges. This account reports only the "side" for the plaintiffs.⁷

⁵ 18 *Advocate* (Dec.2005) quotation at 2 from report by Norman Arendse of session on gender and ethnicity at the IBA conference in Prague.

⁶ *Supra*, n 4 footnote 92.

⁷ Theresa M. Beiner, "Female Judging," (36) *Univ. of Toledo Law School Journal*, (Summer 2005) 821-829 provides a balanced summary of research.

Arguments and Evidence

-- The male-dominated judicial system is not impartial regarding women

In the United States, women who had somehow penetrated the barriers that had excluded them from the male-only courts, created state organizations of women judges. In 1979, a few women judges who had become aware of each other and of the similar patterns of discrimination they encountered in their courts convened to establish a nation-wide organization, the National Association of Women Judges (NAWJ). NAWJ's first president, Judge Joan Dempsey Klein, recalled:

We were all experiencing the same hostile work environment and demeaning treatment from some male judges. Attorneys appearing before us engaged in tactics to minimize us, to gain control over the courtroom, and were discourteous and disrespectful.⁸

Women judges took action to obtain non-anecdotal evidence supportive of their personally experienced accounts. They initiated a gender bias task force movement. State by state, women judges persuaded their chief justices to appoint task forces to study gender bias in their courts and to make correcting recommendations. Beginning in 1983, gender task forces in more than fifty state and federal judicial circuits exposed the gender-based discrimination in the courts. Lynne Hecht Schafran, "immensely effective and indefatigable,"⁹ provided technical assistance to these task forces.

The task forces held hearings, conducted surveys and collected data. Male members of the judicially appointed task forces saw what they and their male colleagues had believed did not exist. The New York and the New Jersey task force experiences are representative. Schafran observed that members of those task forces "who start out with no knowledge of gender bias in the courts, or even a conviction that the idea is nonsense, emerge from the data collection process convinced that the problem is real and has deeply serious implications for the administration of justice."¹⁰

The Report of the New York Task Force on Women in the Courts opened with an acknowledgment that "gender bias against women litigants, attorneys and court employees is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment and equal opportunity."¹¹ The New York report found that "[w]omen uniquely, disproportionately, and with unacceptable frequency must endure a climate of condescension, indifference, and hostility"¹² and the New Jersey Supreme Court Task Force on Women found "strong evidence that women are often treated differently in courtrooms, in judges'

⁸ "Remarks," *Supra*, n 7 at 917.

⁹ *Ibid.* at 918.

¹⁰ "The Success of the American Program" in S. Martyn and K. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell) 1987 at 412.

¹¹ *Loc. Cit.* (1986) reprinted in 15 *Fordham Urban Law Journal* 11 (1986-7).

¹² *Supra* n 10 at 419.

chambers, and at professional gatherings.”¹³ All task forces found and documented gender bias.¹⁴

- The judicial process and jurisprudence of the male-dominated judicial system are biased against women

The documentation about the women who work in the courts, on and off the bench, or who enter the courts as defendants, plaintiffs and attorneys did not reveal the whole of judicial gender bias. The gathered evidence grew to include gender bias in judicial processes and jurisprudence.

Women judges again provided experiential evidence. Their accounts were enlarged and verified by legal scholarship.

Madame Justice Bertha Wilson, former Justice of the Supreme Court of Canada, is one of the women judges who spoke up. She reported having observed evidence of jurisprudential bias during her fourteen years as a judge, “working closely with...male colleagues.”

There are probably whole areas of the law on which there is no uniquely feminine perspective. This is not to say that the development of the law in these areas has not been influenced by the fact that lawyers and judges have all been men. Rather, the principles and the underlying premises are so firmly entrenched and so fundamentally sound that no good would be achieved by attempting to re-invent the wheel, even if the revised version did have a few more spokes in it. I have in mind areas such as the law of contract, the law of real property, and the law applicable to corporations. In some other areas of the law, however, a distinctly male perspective is clearly discernible. It has resulted in legal principles that are not fundamentally sound and that should be revisited when the opportunity presents itself. Canadian feminist scholarship has done an excellent job of identifying those areas and making suggestions for reform. Some aspects of the criminal law in particular cry out for change; they are based on presuppositions about the nature of women and women’s sexuality that, in this day and age, are little short of ludicrous.¹⁵

Madame Justice Wilson in her often-referenced presentation at Osgoode Hall Law School in 1990, cites examples of the supportive academic research. She refers to a study that related the attitudes of United States judges to their decisions. The researchers, John Johnston and Charles Knapp, two law professors at New York University Law School, concluded, she reports, that United States judges have succeeded in freeing themselves of stereotypical thinking with regard to racial discrimination but were unable to free themselves of stereotypical thinking regarding sex discrimination.¹⁶ She also refers to what Norma Wikler, a social scientist at the University of California, found when she reviewed the studies regarding judicial attitudes. “These studies confirm,” Madame Justice Wilson points out, that male judges tend to adhere to traditional values and beliefs about the natures of men and women and their proper roles in society. The studies show overwhelming evidence that gender-based myths, biases, and stereotypes are deeply embedded in the attitudes of many judges, as well as in the law itself. Researchers have concluded that gender difference has been a significant factor in judicial decision-making, particularly in the area of tort law, criminal law, and family law. Further, many have concluded that sexism is the unarticulated underlying premise of many judgments in these areas, and that this is not really surprising [given] the nature of the society in which the judges themselves have

¹³ *Ibid.* at 415

¹⁴ E. Martin and B. Pyle, “State High Courts and Divorce: The Impact of Judicial Gender,” *Supra*, note 7 _ at 929.

¹⁵ ”Will Women Judges Really Make a Difference?” 28 *Osgoode Hall Law Journal* (1990) at 515.

¹⁶ *Ibid.* at 511.

been socialized.¹⁷

The Osgoode Hall presentation also references the first national, interdisciplinary conference on the relationship between judicial neutrality and gender equality. After examining judicial behavior in matters of equality, the participants found judicial acceptance of traditional stereotypes regarding women and noted the impact on important areas of constitutional litigation, family law, criminal law and human rights law.¹⁸

American judges had failed to bring to sex discrimination the judicial virtues of detachment, reflection, and critical analysis which served them so well with respect to other areas of discrimination. They state “sexism”—the making of unjustified (or at least unsupported) assumptions about individual capabilities, interests, goals and social roles on the bases of sex differences—is as easily discernible in contemporary judicial opinions as racism ever was.¹⁹

The entire judicial process, including legal reasoning and the role of judging, is gendered—masculinist and patriarchal, according to feminist legal scholarship.²⁰ They remind those who maintain that judges apply “the law,” that “the search for ‘the law’ is necessarily subjective...; the law and the judicial process are gendered; the law falsely assumes that a dichotomy exists between public and private spheres of existence; and notions of legal reasoning, rights, subjectivity and sovereignty are masculinist and patriarchal.”²¹

--Women judges will help eradicate the bias against women

Women bring a different perspective and a different way of thinking

An important argument advanced by advocates for a greater presence of women on the bench is that women bring a different and needed perspective. William O. Douglas, Associate Justice of the United States Supreme Court, stated the obvious when he wrote for the court: “The truth is that the two sexes are not fungible.”²² One basis for this truth is that women and men are embedded in a society characterized by pervasive and generalized gender differentiation. Their experiences in that society differ in significant ways. Even women sheltered by an institution, such as a feminist family, that does not reinforce the gender distinctions outside its realm have to venture beyond the boundaries. When they do, they confront a gendered world.

For women lawyers and judges these differences are reinforced and augmented in their chosen profession. As Madame Justice Claire L’Heureux-Dube, a former Justice of Canada’s Supreme Court, points out, women were outsiders — and she adds, still are.²³ They were either excluded from consideration for judicial appointments or were evaluated by different

¹⁷ *Ibid.* at 512, reference is to N.J. Wikler, “On the Judicial Agenda for the 80s: Equal Treatment for Men and Women in the Courts” (1980) 64 *Jud.* at 202.

¹⁸ *Ibid.*, at 516 reference is to Martin & Mahoney, *supra*, n 10 at preface, iii-iv.

¹⁹ *Ibid.* at 511-512 reference is to J.D. Johnston and C.L. Knapp, “Sex Discrimination by Law: A Study in Judicial Perspective” (1976) 46 *N.Y.U. Review* at 675-676.

²⁰ Judith Resnik and Regina Graycar are prominent proponents of this argument. See J. Resnik. “On the Bias: Feminist Reconsiderations of the Aspirations of Our Judges” (1988) 61 *S. California Law Review* 1877. and R. Graycar, -“The Gender of Judgments: An Introduction” in M. Thornton, ed., *Public and Private Feminist Legal Debates* 1995 (Melbourne: Oxford University Press).

²¹ Summary of feminist scholar positions in D.O’Sullivan, “Gender and Judicial Appointment” (1996) 19 *University of Queensland Law Journal* 107-114 .

²² *Ballard v. United States*, 329 U.S. 193, 195 (1946).

²³ Conversation with author, 19 Sept. 2005

standards. Often incorporated in this argument is the reminder that the two women serving on the United States Supreme Court were refused employment in the legal profession, even though one graduated first in her class and the other third. The shared recollections of women justices abound with their own experiences as they found that the doors to the legal profession were iron-barred to keep them out.

The different experiences equip women with a different lens. New York's Chief Judge Judith S. Kaye, in asserting "I take my gender with me wherever I go," is stating what is true for all women, including women judges.²⁴

It is "unlikely," Sean Cooney asserts in representing this view, that the unconscious assumptions in current legal reasoning... will be corrected unless there is a significant proportion of women judges on the bench. Male judges, in general, do not have the background [and] experience necessary to recognize the male-centeredness of law....²⁵

The proponents do not argue that all women think alike. They argue that "by virtue of their gender they undeniably do have a shared life experience that is different from a male experience—a shared experience that can result in a different perspective."²⁶

Some go further than asserting that women have different perspectives to asserting that women have a different way of thinking. Those who advance this argument often reference Carol Gilligan's *In A Different Voice*.²⁷ Gilligan's conclusions, based on her study of children, are that girls and boys differ in their way of viewing the world. Girls perceive the world through an "ethic of care," while men see the world through an "ethic of justice." They differ in that the ethic of care is more concerned with relationships than with autonomy and more bent toward compromise than toward outright victory. Women's different ethic, Gilligan's thesis proceeds, informs their way of reasoning. It is a small step then to argue that women judges, programmed as women to think differently, would decide cases differently. They would modify the confrontational, adversarial character of litigation; contextualize the rules of evidence; and amend the principle of *stare decisis*. Introducing women's way of thinking into case consideration is of special timeliness, they argue, since the ethic of care is more appropriate to the kinds of issues they anticipate will be coming before courts in increasing numbers—issues, for example, as those dealing with human rights.²⁸

Among those advancing this argument are legal scholars and social scientists who amend "women's" way of thinking to a "feminist" way of thinking. Its opposite is the "masculinist"

²⁴ "Women Chiefs: Shaping the Third Branch," in *supra*, n.8 at 837,

²⁵ "Gender and Judicial Selection: Should There be More Women on the Courts?" (1993) *Melbourne University Law Review* at 29.

²⁶ K. M. Werdegar, Justice of the Supreme Court of California "Why a Woman on the Bench" (2001) *16 Wisconsin Women's Law Journal* 31.

²⁷ *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1982).

²⁸ Dominic O Sullivan summarizes these arguments in "Gender and Judicial Appointment (1996) 19 (*University of Queensland Law Journal* 107] at 115.

and patriarchal way of thinking, the foundation for the long established and unquestioned standard. It is conceded that not all women judges think as feminists. However, feminist thinking is applicable, according to those who are associated with this position, to all substantive and procedural components of the administration of justice. The *Feminist Perspective in Law* series of books, for example, includes separate volumes on child law, criminal law, equity and trusts, and other substantive legal concerns as well as on evidence and legal reasoning.²⁹ They offer a construct for feminist legal reasoning and jurisprudential processes that is neither masculinist nor patriarchal.³⁰

The arguments about the different perspective or ways of thinking that women judges bring to the bench lead to the proposition that women judges can make a difference-- even given deference to legislative jurisdiction and precedent, there is still significant room for discretion. As Wilson points out, "There is no reason why the judiciary cannot exercise some modest degree of creativity in areas where modern insights and life's experience have indicated that the law has gone awry."³¹ With vision unblurred by sexism and patriarchy, they can see where the law has gone awry and will act to challenge or overcome the otherwise unquestioned entrenched biases.³²

The reasoning leading to the predictions that women judges would influence case outcomes was also applied to predictions that they would alter the administration of the courts so as to reduce gender bias there. Elaine Martin asserts this view:

Women might influence such things as decisional output, ...conduct of courtroom business, especially as regards sexist behavior by litigators; influence on sex-role attitudes held by their colleagues, especially on appellate courts where decisions are collegial; administrative behavior, for example, in hiring women law clerks; and... collective action, through formal organizations, undertaken to heighten the judicial system's response to gender bias in both law and process.³³

Evidence that women's judicial decisions are different and that women can affect court administration

Many women judges have provided experiential evidence to support the charge of gender biased adjudication by their male colleagues and to support the claim that women "bring gender specific experiences and perspectives to the bench [and] tend to assess legal and moral issues in a different but no less valid way."³⁴ The different and no less valid way is one without gender bias.

Empirical support for their observations had to wait until there was a number of women judges sufficient for valid statistical analysis. Until President Jimmy Carter at the end of the 1970s appointed forty women to the federal courts in the United States, there had only been eight women in the country's entire history who had served on federal district or appellate

²⁹ Mary Childs & Louise Ellison, eds London, Sydney: Cavendish Publishing.

³⁰ For presentations of the discussion regarding feminist legal theory see. M Thornton, ed. *Public and Private: Feminist Legal Debates* (1995 Melbourne:Oxford University Press.

³¹ *Supra* n 15 at 516.

³² Some feminist legal scholars concede that change requires more than including women in the judiciary. change

³³ "Men and Women on the Bench: Viva La Difference?," (1990) 73 *Judicature* at 204, 208.

³⁴ D. O'Sullivan summarizes this evidence, *supra* n 28 at 120.

courts. No women had served on the United States Supreme Court.³⁵ With more women judges, legal scholars, political scientists and other social scientists undertook to provide case-outcome comparisons by gender. They considered decisions of both state courts and federal courts.

Their research shows a significant statistical relationship between the gender of the judges and their decisions on some—not on all -- matters.³⁶ Some of the areas where the judge's gender matters in federal courts are employment discrimination and discrimination cases involving race and sex. These findings hold even when controlling for other variables, such as the political party of the appointing President.³⁷

Studies of state court decisions also show a significant relationship between the gender of the judge and the case outcome. The issues decided differently include discrimination, sexual abuse, medical malpractice, property settlements and parent-child relations.³⁸ One study shows that women judges maintained a supportive position regarding women's rights even when that position was in opposition to the court's majority.³⁹

A study of divided decisions in divorce cases before state high courts shows with sharp clarity the relevance of the judge's gender. The researchers, Elaine Martin and Barrie Pyle, selected divorce law as "fertile ground for discovering the impact of judicial gender [since it] is hard to imagine any other area of the law in which men and women go toe-to-toe as they do during divorce litigation."⁴⁰ Their initial research considered decisions over more than thirteen years in the Michigan State Supreme Court. They found that women judges, regardless of party identification, crossed party lines to uphold the position of the female litigant in about 60% of the cases, and the male judges crossed party lines to uphold the position of the male litigant in about 55% of the cases. When they extended their study of divided decisions, ultimately to thirty-seven states, they found that the judge's gender was "the primary predictor" of his or her vote. "We think," they summarize, "we consistently found results suggesting that a judge's gender does impact a judicial decision."⁴¹ 41

There have been fewer efforts to test the feminist jurisprudence argument. One effort examined the decisions of Associate Supreme Court Justice Sandra Day O'Connor. The study claims that her decisions reveal concern with connection, substantive fairness, context and communitarian values as consistent with Gilligan's ethic of care.⁴²

³⁵ Federal Judicial Center, Federal Judges Biographical Database at <http://www.fjc.gov>.

³⁶ T. M. Beiner identifies and summarizes a number of important studies in *supra*, n 7 at 1-847.

³⁷ Donald R. Songer et al, *A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals*, (1994) *56JPo1* at 434.

³⁸ David W. Allen and Diane E. Wall, "The Behavior of Women State Supreme Court Justices: Are they Tokens or Outsiders?," (1987) *12 Just. Sys.J* at 232,239

³⁹ *Ibid.* at 161.

⁴⁰ *Supra*, n 14 at 923.

⁴¹ *Ibid.*

⁴² S. Sherry, "Civic Virtue and the Feminine Voice in Constitutional Adjudication," (1986) at 543,592 -616. Among those challenging these assertions and conclusions is Justice S.D. O'Connor.

The evidence regarding the promise that women on the bench would result in less sexist court administration is unsystematic and limited to random anecdotes. Betty Weinberg Ellerin provides one example. She reported that during her tenure as Administrative Judge for the New York City Courts, in which 425 judges and more than 4700 nonjudicial employees served, she considered her position to be an opportunity and used her authority in that position “to ensure that talented and qualified women received the recognition they deserved by assigning them to positions in which they could shine.”⁴³

New York’s Chief Judge Judith S. Kaye provides another example. She established child care rooms in the family courts. On the surface this might seem to be a minor service. But, having this facility brought order out of the previous out-of-control chaos created by restless, vocal and active children who accompanied their parents into the court rooms. Still another example is provided by the legal education programs developed and offered by women’s organizations to counter jurisprudential sexism.⁴⁴

--Women judges will encourage perception of judiciary’s impartiality and enhance its legitimacy

The legitimacy of the judiciary rests on public trust, confidence and perception that the courts are properly constituted and acting on behalf of the society whose interests the courts claim to represent and protect. Legitimacy is tied to a belief that the administration of justice is fair, that it is impartial—i.e., that it is just. Judicial scholars, social scientists and members of the judiciary argue that the appointment of women assists in legitimizing the judiciary-- it promotes public trust and confidence that justice will be done. Judge Gladys Kessler, former President of NAWJ, sees this as the “ultimate justification” for the appointment of women to the bench.⁴⁵

Even some vocal critics of the arguments that women judges will decide cases more fairly regarding women, are won over because of the relevance of women’s judicial inclusion to the judiciary’s legitimacy. Michael Solamine and Susan Wheatley, critical of the evidence presented to support the case for more women judges, endorse the goal because of the importance of legitimacy.

[I]n the final analysis, the notion that there should be more women on the bench is based on an intuitive sense of fairness. . . . [T]he debate over whether men and women are different, and whether those differences have some role to play on the bench, seems unresolvable. This justifies to some extent the call for placing, and electing, more women to the bench. If there is a cognitive or psychological difference in how men and women perceive the world, those differing perceptions should be present on the courts. The process of managing and deciding a case rests heavily on perception, language, stereotypes and first impressions. The conscious and unconscious strictures of judicial thinking, which might to some degree be gender-based, should be as diverse as possible. . . . [A] broad mix of perceptions, assumptions and stereotypes which judges necessarily use in handling all the matters in their cases. . . . will lead more often to decisions that are legally defensible or in some sense “right.”⁴⁶

John W. Kennedy, former Dean of the California Judicial College, frames the importance of legitimacy.

The judicial system requires public trust and confidence [T]herefore, we all have a stake in seeing

⁴³ “*Building a Justice System Committed to Fairness and Equality for Women: A Personal Account of New York’s Progress*.” *supra* n 7 at 890.

⁴⁴ The International Association of Women Judges offers such educational programs around the world.

⁴⁵ J.E.Scott. “Women on the Illinois State Court Bench”(1986) 74 *Illinois Bar Journal*, at 438.

⁴⁶ “Rethinking Feminist Judging,” (1994-1995) 70 *Indiana Law Journal* pp 891-920 quote: p 918-919

to it that we address not only bias in fact, but anything that produces the appearance of unfairness. This is not a woman's issues; it is a justice issue, and all of us in the justice system, including women, minorities, and white males, have a big stake in justice issues.⁴⁷

Given the political context of Canada and the United States, this "ultimate justification" is the least significant of the argument to be made. Court decisions may be criticized and judges' thinking attacked, but the legitimacy of the courts is not in danger.

2. The Republic of South Africa

Sexism pervades the legal history of South Africa, as it does the histories of Canada and the United States. Patriarchy and the resultant gender discrimination relegated women to motherhood, home and male dominance, as they did in Canada and the United States. The legal profession, far from motherhood and home, was not open to women.⁴⁸ A decision written by a Judge Solomon and Melius de Villeurs' comment about that decision are often quoted expressions of this. Judge Solomon concluded that women should not be admitted to the practice of law because of "the immemorial practice of centuries" emanating from the law of nature—a higher law than the law of men.⁴⁹ De Villeurs, once Chief Justice of the Orange Free State, justified the decision. Writing in *The South African Law Journal* he explained that

[a] revolt against nature is involved in any proposal to allow women to enter into the legal profession. This idea of women as lawyers is incompatible with the idea and duties of Motherhood [*sic*]. Only when a woman is incapable of exercising the functions of Motherhood [*sic*] should she be allowed to practice law.⁵⁰

R.P.B. Davis, who was to become an acting appellate judge, elaborated further. "The law of nature destines and qualifies the female sex for the bearing and nurture of the children." This is "a radical and sacred duty," and were women to practice law they would be violating this duty, departing from "the order of nature; and when voluntary, treason against it."⁵¹ These views, embedded in conventional wisdom, were also incorporated into legislation and common law, as well as into judicial opinions and commentary.

For the African and Muslim women in South Africa -- the overwhelming majority of the female population, there was the additional authority of customary law and religious law. Both, far less significant in Canada and the United States, are comprehensive in subordinating women to male authority, in consigning women to their proper place at home and in establishing motherhood as their primary role. Thandabantu Nhlapo, one of South Africa's authorities on customary law, states it simply and clearly. "What is it about custom that is inimical to women's rights?" he asks. "It is," he answers, "everything that emanates from an attitude to women in marriage and in the family which sees them solely as adjuncts to the group, means to the anachronistic end of clan survival, rather than as valuable in themselves."⁵² Religious law mirrors customary law in its patriarchal values and

⁴⁷ *Supra* n 8 at 909.

⁴⁸ Felicity Kaganas and Christina Murray, "Law and Women's Rights in South Africa: An Overview," *Acta Juridica* 1(1994)1-38.

⁴⁹ *Incorporated Law Society v Wookey* 1912 AD 623.

⁵⁰ "Women and the legal profession" 35 *South African Law Journal* (1918) at 290.

⁵¹ 31 *South African Law Journal* (1914) at 384.

⁵² "The African family and women's rights: friends or foes?" *Acta Juridica* (1991) at 135.

discriminatory effect on women.

Arguments against patriarchy made in negotiations for the new Constitution

It was views such as these that the case for women's judicial representation in Canada and the United States was directed at challenging. It was decades after the movement for change began in Canada and the United States that the women in South Africa made their case against patriarchy and gender discrimination. They did this most effectively during the years immediately preceding and during the negotiations in 1994 for the Constitution of the New Democracy.

The women in the national liberation struggle, led by the women in the African National Congress (ANC), were determined to prevent the classic post struggle invisibility of women that they had observed up close in other African countries. The ANC Women's League launched a women's rights movement which succeeded in mobilizing women throughout the country into the Women's National Coalition (WNC); the WNC included ninety- two national organizations and thirteen regional coalitions.⁵³ It also produced the Women's Charter for Effective Equality. The Charter was comprehensive and represented the demands made by the women throughout the country.⁵⁴

The women, organized with an impressive show of numbers, fought for the inclusion of a commitment to gender equality and women's rights in the new constitution. They succeeded in gaining entry into the constitutional negotiation process. Determined and firm about what women wanted, the women's lobby pressed its agenda. Regarding customary law and religious law, "South African feminists have made it clear," Felicity Kaganas and Christina Murray wrote of the feeling at that time, "that they are not prepared to offer up women's rights to the cause of protecting an institution distorted by colonialism, apartheid, and the opportunism of powerful men"⁵⁵

The women delegates were not able to overcome the power of the traditionalist lobby, but they did succeed, as Nhlapo described, in preventing "an outright victory of the traditionalists."⁵⁶ They achieved a compromise which gave constitutional recognition to customary and religious law while barring these laws from violating the rights extended to women.⁵⁷

Success was also partial regarding other concerns pressed by the women's lobby. "Women were not able to place their concerns centre-stage," was the assessment of Catherine Albertyn, a prominent feminist scholar in South Africa. "[B]ut it is undeniable," she added, "that they made significant gains."⁵⁸

The significant gains are indeed significant. The Constitution establishes nonsexism as a

⁵³ C. Albertyn, "Women. and the Transition to Democracy," *Acta Juridica* (1994) at 51.

⁵⁴ *Supra* n48 at 37.

⁵⁵ *Ibid* at 19-20.

⁵⁶ "African customary law in the interim constitution," chapter 12 of unidentified book given the author by Nhlapo at 1.

⁵⁷ Act 108 of I 996, *The Constitution of the Republic of South Africa, 1996*, S 31.

⁵⁸ Quoted in Kaganas & Murray, *supra*, n 48 at 37.

founding value,⁵⁹ prohibits the state from discriminating unfairly against women on seventeen specified grounds that include gender, sex, pregnancy, marital status, sexual orientation, and *birth*⁶⁰ and prohibits private discriminatory action and indirect discrimination as well as direct discrimination—an acknowledgment that unwritten, institutionalized sexism restricts and imposes hardships on women.⁶¹ The Bill of Rights appends to the enumerated rights additional rights embodied in international instruments and even in foreign laws.⁶² Compared to rights guaranteed women in other constitutional democracies, the “significant gains” are way out in front and would seem to have delivered a major blow to patriarchy and discrimination based on gender.

Judiciary intended to be agent of transformation

The society envisioned in 1994 was to be based on “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms.”⁶³ The Constitution elaborates this vision and designs a government to honor and realize it. In the estimation of the noted constitutional scholar, Cass Sunstein, it is “the most admirable constitution in the history of the world.”⁶⁴

The envisioned society bore no resemblance to the reality South Africa when the constitution was being drafted. “In 1994 when the interim Constitution came into force, and in 1996 when the elected Constitutional Assembly adopted our present Constitution,” as former Chief Justice of South Africa Arthur Chaskalson pointed out,

We were one of the most unequal societies in the world. The past hung over us, profoundly affecting the environment... [T]he great majority of the people... had been the victims of a system of racial discrimination and repression which had affected them deeply. . . in almost all aspects of their lives.⁶⁵

The challenge confronting the new government was to transform what was into what was envisioned. The Constitution, identified by Sunstein as “the world’s leading example of a transformative constitution”⁶⁶ imposes on government the obligation to face this challenge. It mandates the state to “respect, protect, promote and fulfill the rights in the Bill of rights.”⁶⁷

The judiciary, though not exclusive in its transformative obligation, was intended to be an important agent of change. The Constitution empowers the judiciary so that it can fulfill its obligation. The Constitution reconstitutes the judicial system from one which was subordinate to parliament and bound to uphold executive and legislative actions without regard to their egregious human rights violations, to an independent judiciary “subject only to the Constitution and the law”; and mandates that the courts apply the Constitution and the law “impartially and without fear, favor or prejudice.”⁶⁸ The Constitution gives the judiciary

⁵⁹ *Supra*, n 57, S 1 (b).

⁶⁰ *Ibid.*, S 9 (3) & (4).

⁶¹ *Ibid.*, S 8 (2), and S 9 (3) & (4).

⁶² *Ibid.*, S39 (b) & (c).

⁶³ *Ibid.* S 1 (a).

⁶⁴ *Designing Democracy: What Constitutions Do* (2001) at 262.

⁶⁵ “National Judges Symposium,” (120) *The South African Law Journal* (2003) at 659.

⁶⁶ *Supra*, n 64 at 68.

⁶⁷ *Supra* n 57 at S 7(2).

⁶⁸ *Ibid.* S 165 (2).

important powers, including the power of judicial review;⁶⁹ it establishes a new court, the Constitutional Court, to be the final arbiter in matters involving the Constitution ; empowers this new court to determine whether Acts of Parliament and the conduct of the President are consistent with the Constitution; further empowers it to confirm or reject lower court decisions that raise constitutional issues; and declares that its decisions will be binding on all persons and on all courts.⁷⁰ “[T]o ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts,” the Constitution orders “organs of state” to “assist and protect the courts.”⁷¹

It was predictable that the courts would be active agents of change for at least two reasons. The first is that the rights embodied in the Constitution are justiciable rights and the second is that South African human rights advocates were tuned into “cause lawyering.”—that is, the use of courts to advance human rights. Law schools taught courses on cause lawyering and the Legal Resources Centre, co-founded by Arthur Chaskalson, had trained a generation of lawyers in using the courts to advance human rights.

The expectation that the activists would turn to the courts is illustrated by the efforts of a group of feminist lawyers. They recognized that the women’s rights provided by the Constitution would not be self implementing. As soon as the constitutional negotiations were under way, they determined to establish an organization dedicated to using litigation to advance women’s rights. They persisted in their determination and succeeded, after almost five years, in getting the necessary funding. With the funds, they established the Women’s Legal Centre. Its mission was to use constitutional litigation to advance women’s rights.⁷²

Apartheid’s legacy of judicial illegitimacy

If the judiciary were to be effective as a transformative agent, it had to undergo its own transformation. The courts had been instruments of apartheid’s brutality and repression. Edwin Cameron, Judge of the Transvaal High Court, in his submission to the Truth and Reconciliation Commission elaborated.

[During apartheid, the judiciary incontestably played a role in the enforcement of a pernicious system. But its very special role must be adequately understood. The distinguishing feature of apartheid... was that it was defined and enforced through an elaborate and sophisticated legal system. At the apex of that system were the judges [A]partheid was... sustained and distinguished by legal regulations and by enforcement through a highly sophisticated legal system. The complicity of all judges who held office under apartheid is therefore incontestable... [The legal system I accentuated the crudity and barbarity of the purposes apartheid sought to achieve. It [enforced] an evil and unjust Courts [were] used as instruments of apartheid—judges administered the [unjust I laws rather than

⁶⁹ *Ibid* S 165 (5) & S 167 (3), (4) & (5).

⁷⁰ *Ibid*, S 167 (3), (4) & (5) See for description of courts South African Government Information, “Courts” at www.gov.za (courts) last referred to, March 10, 2006

⁷¹ *Ibid*. S 165 (4).

⁷² For an account of the Women’s Legal Centre see R.B. Cowan, “The Women’s Legal Centre During its First Five Years,” in Christina Murray and Michelle O’Sullivan, eds, *Advancing Women’s Rights, Acta Juridica*, December 2005 273-307.

administer justice.⁷³

“[J]udicial officers merely applied the law without any concern for basic principles of justice and human rights,” Deputy Judge President Jeanette Traverso later, in 2005, reminded an audience convened to consider racism and sexism in the courts.⁷⁴

Diana Gordon more recently reiterated these views.

The government’s interest in strict enforcement of apartheid laws by ... judges yielded the desired results most of the time, with particularly brutal outcomes in periods of crisis....[J]udgments that buttressed the apartheid regime were the norm. The courts’ failure to recognize either the role of individual rights in the rule of law or the needs of South Africa’s mostly black population was justified by the positivist notion that the judicial role was merely to apply neutral principles of existing law without regard to its political significance. Yet most judicial officers applied principles that were anything but neutral.⁷⁵

The judiciary’s complicity in maintaining what the United Nations declared a crime against humanity and the consequent widespread disrespect for the courts, was in part related to the exclusionary portrait of those sitting on the bench. One hundred and sixty-six judges were serving when the constitutional democracy replaced apartheid . Of the 166, 161 were white men. There were three black male judges and two white female judges.⁷⁶ By negotiated agreement they were to remain in their positions. Many, as a Department of Justice study reported in 1996, continued to hold onto “the values and attitudes that aided and abetted a system of injustice.... Unfortunately, when provided the opportunity to redeem itself during the [Truth and Reconciliation Commission] Legal hearings, the judiciary, under ‘new’ leadership, abstained from participating in the proceedings.”⁷⁷

The Deputy President of the Supreme Court of Appeal, the Honorable L. Mptai, in an address titled “Transformation of the Judiciary—A Constitutional Imperative,” asserted what all who were committed to the New Democracy endorsed—i.e., that “measures [needed to] be introduced to improve the image of the courts and ... ultimately [to] make them acceptable to the majority who had for decades viewed them as illegitimate.”⁷⁸

What were the measures that needed to be introduced? The Department of Justice, early in the life of the new government, prepared a ten-point strategic plan of action.⁷⁹ It was based on extensive consultative processes during 1994 and 1995 . It pointed to, among other changes, greater representation on the bench of blacks and women.

⁷³ Memorandum sent to Truth & Reconciliation Commission 23 Sept 1997 “Submission on the Role of the Judiciary Under Apartheid” cited in David Dyzenhaus, Oxford Hart (1998) *Judging the Judges, Judging Ourselves, Truth, Reconciliation and the Apartheid Legal Order* at 13-14.

⁷⁴ JTraverso, Deputy Judge President of the High Court of good Hope Provincial Division. At Roundtable discussion hosted by the Institute for Democracy and the University of Cape Town’s Democratic Governance and Rights Unit, II & 12 October 2005, pp 9-10

⁷⁵ *Transformation and Trouble: Crime, Justice and Participation in Democratic South Africa* 2006 at 239 of draft copy.

⁷⁶ *Supra*, n 65 at 650.

⁷⁷ Dept. of Justice, “Judicial Vision 2000:draft strategic plan for the transformation and rationalization of the Administration of Justice (1996) at 16 & 23.

⁷⁸ “Inaugural Lecture,” Univ. of the Free State, 6 Oct 2004.

⁷⁹ *Supra*, n 77.

The exclusionary portrait of those sitting on the bench had to change. Pius Langa, now Chief Justice of South Africa, made explicit the significance of a judiciary characterized by

a white unwelcoming face with black victims at the receiving end of unjust laws administered by courts alien and generally hostile to them. The language of the courts was not that of the majority. Nor was the culture and social practices of the judicial officers that of the racial majority. The white face of justice was not only overwhelming and part of an oppressive discriminating system; it also failed to recognize the humanity of the victims of the apartheid system.⁸⁰

Advocate Dumisa Buhle Ntsebeza “remembered the ladies” as well as the blacks. “No judicial system,” he pointed out,

which is majority white is going to pretend that it can, with legitimacy, deliver justice to a majority black population. No judicial system that holds sacrosanct values of equality between the sexes is going to remain white and black male without having white and black women sufficiently swelling the ranks of the judiciary. We need to appoint to the bench men and women of integrity, who will hand down judgments which will be respected by the society they serve⁸¹

The judiciary could not consist of 97 per cent white male judges and expect legitimacy. Justice had to be seen to be believed. The Constitution addresses this: it asserts the “need for the judiciary to reflect broadly the racial and gender composition of South Africa.”⁸² and then mandates that this need “be considered when judicial officers are appointed.”⁸³

In addition to mandating consideration of race and gender in appointing judges, the Constitution provides a new, open, broadly representative system for appointing judges to the superior courts. Under apartheid, the “system” was a closed one with the president and Minister of Justice somehow determining whom to advance to the bench. It was this procedure, violative of the New Democracy’s values of transparency and accountability that produced the almost all white, almost all male judiciary.

As a replacement for the behind-closed-doors process, the Constitution establishes the Judicial Service Commission (JSC).⁸⁴ The JSC is chaired by the Chief Justice of South Africa who also heads the Constitutional Court. Its members include the President of the Supreme Court of Appeal; a Judge President of a High Court selected by his Judge President peers— the masculine pronoun is accurate since the Judge Presidents are all male; and , when there are matters before the JSC regarding a specific High Court, the Judge President of that court and the Premier of that province.⁸⁵ The membership also includes the Minister of Justice and Constitutional Development or her/his designee; presidential appointees ; members of Parliament’s National Assembly—some of whom must be from the Assembly’s opposition parties ; members of Parliament’s National Council of Provinces, who must have the support of at least six of the provinces; practicing advocates nominated by their peers; practicing attorneys nominated by their peers; and a university law professor selected by

⁸⁰ “ Judging in a Democracy: the challenge of Change “delivered in Johannesburg on 20 March 2004 quoted by Hon L Mptai, Deputy Pres, Supreme Court of Appeal, Inaugural Lecture, Univ of Free State, 6 Oct 2004 “ Transformation in the Judiciary—A Constitutional Imperative,” at 21-22.

⁸¹ “Why majority black bench is inevitable,” *Sunday Times*, 25 July 2004.

⁸² *Supra*, n 57, S 174(2)

⁸³ *Ibid.*, S 174(b).

⁸⁴ *Ibid.*, S 178.

⁸⁵ *Ibid.* S 178 (j) & (k).

her/his peers.⁸⁶

Unlike the situation in Canada and the United States, in South Africa the appointment of women to the courts is an important manifestation of the transformation of the judiciary and is publicly embraced as a high priority commitment by everyone significant to the appointment process. The President, the Chief Justice, the Minister of Justice and Constitutional Development, members of the JSC, the court leaders consisting of Judge Presidents and Deputy Judge Presidents, leaders of the organizations representing the legal profession —i.e., every person in every office and institution involved in the judicial appointment process— often speak of the need for increased representation of blacks and women in the courts.

The JSC gave this necessity prominence in its first annual report, asserting that “[t]he Commission pays particular attention to this requirement when it considers applications for judicial appointment.”⁸⁷ In its guidelines to Commissioners when questioning candidates for judicial appointments, JSC directs the commissioners’ attention to the importance of diversity—

[i]t is a quality without which the Court is unlikely to be able to do justice to all the citizens of the country. It is a component of competence. The court will not be competent to do justice unless, as a collegial whole, it can relate fully to the experience of all who seek its protection.⁸⁸

The JSC devoted an entire meeting in October 1999 to the transformation of the judiciary, as did the Heads of Court in April 2005. There are numerous conferences and round table discussions and symposia about the importance of the transformation of the judiciary by race and gender. The statements of all who have considered the topic endorse the necessity of appointing more blacks and women and their statements are well reported in the press. Greater representation of blacks and women is a prominent component of the prominent topic of the transformation of the judiciary by race and gender.

Incorporated into the speeches and reports and deliberations from time to time is a justification for the constitutionally mandated appointment of more blacks and women. V. Ntsebeza offered as a justification that blacks and women will bring “an understanding of the South African society and an appreciation of its immediate past.”⁸⁹ Others have expanded on this.⁹⁰ Sir Sydney Kentridge in a lecture given in 2002, offered the rationale that “a generally more diverse bench with a wider range of backgrounds, experience and perspectives on life, might well be expected to bring about some collective change in empathy and understanding for the diverse backgrounds, experience and perspectives of those whose cases come before them.”⁹¹

⁸⁶ *Ibid.*, S 178 (I) (d), S 178 (1) (j), S 178 (1) (h), S 178 (1) (i), s 178 (1) (e), S 178 (1) (f), S 178 (1) (g).

⁸⁷ “Annual report for year ending 30 June 1994.”

⁸⁸ Quoted by C. Rickard, “The Transformation of the Judiciary,” n.d., at 5.

⁸⁹ Quoted *Supra*, n 80.

⁹⁰ See, for example, MTK Moerane, SC Advocate member of JSC since its inception “The Meaning of Transformation of the Judiciary in the New South African Context,” *supra*, n 65 at 712.

⁹¹ “The Highest Court: Selecting the Judges,” “The Second Sir David Williams Lecture, Cambridge, 10 May 2002.

These justifications are, however, superfluous. In a conversation with Chief Justice Pius Langa regarding the representation of women in the judiciary, he dismissed these justifications as “given.”⁹² The South Africa Constitution condenses all such arguments in its unequivocal assertion of the need for broader racial and gender representation. In South Africa the only justification needed is provided by the country’s highest authority. “The transformation of South Africa’s judiciary is constitutionally prescribed, necessary and inevitable.”⁹³

In South Africa, therefore, advocates for the appointment of women to the bench, unlike their counterparts in Canada and the United States, have not needed to provide arguments and evidence to support what they advocate. They needed only to refer to the constitutional mandate.

Symbolic importance of women in the courts

In South Africa, women’s representation on the bench is important for the legitimacy it brings to the judiciary. But, women’s judicial presence has a symbolic importance that it does not have in Canada and the United States. Those who were in “the struggle” and who contributed to the vision of a society based on non-racialism and non-sexism, made a gender balanced judiciary part of the social contract. Success in moving toward a judiciary that broadly reflects the gender composition of South Africa symbolizes that the government has the will and capability to keep that part of the social contract. In addition, it symbolizes that it has the will and capability to move toward keeping the other social contract promises. Conversely, insufficient advancement toward a gender balanced judiciary weakens confidence in the will and capability to consolidate democracy. The presence of women on the bench in South Africa tells a story of promises kept or promises broken. President Thabo Mbeki acknowledged this, as have others, when stating that “[f]ailure to move forward towards gender equality can only mean that we are not advancing significantly toward the creation of a new South Africa.”⁹⁴

3. The Record

Canada

Women’s representation on the courts of Canada is significantly higher than women’s representation in the courts of the United States or the Republic of South Africa. In Canada as of March 2006, women constituted 31% of the total section 96 judicial positions—i.e. those appointed by the federal government to the Supreme Court of Canada, the Appeal Courts and the Superior Courts. Of the 882 section 96 judges, 276 were women.⁹⁵

Women’s representation is greater when one looks at individual courts, in two of which women constituted a majority. Most significant is women’s presence on the country’s Supreme Court. Though women constituted one short of a majority there (four of the nine

⁹² Conversation, 8 December 2005

⁹³ S.Seedat, et al. Political Information and Monitoring Service, Institute for Democracy in South Africa (IDASA), “Debating the Transformation of the Judiciary: Rhetoric and Substance,” 13 May 2005 at 1.

⁹⁴ “Letter from the President,” *ANC Today*, 8 August 2002.

⁹⁵ The data regarding the number of women judges in Canada come from an internet search done by Ms. Catrin Coe, Legal Counsel, Court of Appeal of Alberta. The data are as of March 15, 2006. Also referenced I www.scc-csc-gc.ca.

judges are women), one of the four women, Rt. Hon. C.J. Beverley McLachlin, P.C., is chief Justice. As Chief Justice, she also served as a member of the Privy Council of Canada.

On the Appeal Courts women held 37% of the total positions—but in three of the provinces, i they held half or more of the judgeships and in Alberta where 54% of the judges were women, one was Chief Justice. On the Superior Courts 30% were women, ranging in the provinces from 0% to 43%. On the Prince Edward Island Superior Court, where there was but one woman, she served as the Chief Justice.

The United States

In the United States as of July 2005, 221 of the 868 judges on the federal Supreme Court, Court of Appeals and District Courts were women — 22% (reduced to 11% with the retirement of Sandra Day O'Connor), 19% and 17.6% respectively. In the state courts as of July 2004, there were 97 women on State Supreme Courts and state courts of last resort — 28.2% of the total number of judges . A higher percentage, 34.6 %, of the State Chief Justices were women.⁹⁶

South Africa

At the end of 2004, there were 210 judges in the Higher Courts of South Africa—which include the Constitutional Court, the Supreme Court of Appeal and the High Courts. Of the 210 only 28 were women—13.3%. Among the Heads of Court, there was no female Judge President. There was only one female Deputy Judge President.⁹⁷

In the Constitutional Court, as of May 2005, two of the eleven justices were women (a third has since been appointed) and on the Supreme Court of Appeal, two of the 20 judicial officers were women. But, of thirteen regional High Courts, there were four with no women, and four with but one woman. In one of the latter four the lone woman served with fifty-four men.⁹⁸

Complementing the agreement as to the necessity for women judges, is agreement that despite the affirmative action mandate of the Constitution and the establishment of an institution charged with following this mandate, the record, more than a decade after the inauguration of the New Democracy, is woeful. The record in South Africa compares badly with the record in Canada or the United States where there is no constitutional imperative to appoint women. More than a decade after apartheid and after the constitutional commitment to the transformation of the judiciary by gender, men continue to constitute the large majority of the judges.

Concluding Comments

The comparative consideration of women on the bench in Canada, United States and the Republic of

⁹⁶ L.H. Schafran "Not From Central Casting: The amazing Rise of Women in the American Judiciary," *supra*, n 8 at 973.

⁹⁷ Address by Hon. Brigitte Mabandla, Minister of Justice and Constitutional Development, at the conference of the International Association of Women Judges/ South Africa Chapter, 7 August 2004. at 4. The identified source of these numbers was Dept of Justice & Constitutional Development. Numbers provided by the same source, however, are inconsistent.

⁹⁸ *Supra*, n 93 at 3.

South Africa reveals that more than reason is necessary for achieving equitable gender representation in the judiciary. The three different political contexts in which the same goal is sought show different results. The record in Canada is superior to that in the United States, though the arguments put forward in both countries have been similar. The least advance has been made in the country with the strongest argument for appointing women to the courts. In none of the countries does the number of women judges reflect what could be predicted from demographic data of law school graduates-- all other things being equal.

Of course, all other things are not equal. The advance of women to the bench in Canada and the United States, to the extent that it has occurred, has been a result of women's organized political efforts. The first woman to serve on the United States Supreme Court was appointed as a consequence of a pledge Ronald Reagan made during his 1980 presidential campaign when poll numbers indicated the need to attract the "women's vote." Pressed by the National Association of Women Judges, he pledged to appoint a woman should he be elected and should a vacancy occur. When elected and when a vacancy occurred, he honored that pledge, though against the advice of close associates.⁹⁹

The record and history of women's judicial appointments suggests that there is a disconnect between the reasons and evidence advanced by advocates for gender representation and results. Reasons and evidence, no matter how persuasive intellectually, are not the determining factors in getting women appointed.

This is not to say arguments and evidence are without value. They serve to provide appointment decisions a higher moral cover, thus helping to maintain a belief that an independent judiciary is untainted by back-room political deals. At the same time and in somewhat of a paradox, they serve to clear the appointment process of the specious justifications for not appointing women thereby allowing the political pressures and counterpressures to confront each other in the political arenas. .

Recent developments in South Africa suggest it would now be of use to introduce into the appointment process some of the arguments and evidence used in Canada and the United States. Women judges and women lawyers are organizing, as their counterparts had in Canada and the United States, to press their claims for professional recognition. Women judges organized an association of women judges in August 2004. The organization, the South Africa chapter of the International Association of Women Judges (IAWJ) has advocated the appointment of women to the bench. It is now moving to the next step of preparing a directory of women qualified for appointment. In May 2006 a broader representation of women in the legal profession inaugurated the South African Women in Law Association.[SAWLA]. SAWLA committed itself to "play an effective role in the transformation of the legal profession, judiciary and the justice system to promote the legitimacy of the justice system."¹⁰⁰ The Minister of Justice and Constitutional Development, the Hon. Brigette Mabandla., in the opening address at SAWLA's inauguration, appeared to advise that organization to abandon that mission. "One of the factors that will determine the association's relevance," she advised, "will be its ability to make a difference in the lives of ordinary people,

⁹⁹M. L. Clark, "Changing the Face of the Law: How Women's Advocacy Groups Put Women on the Federal Judicial Appointments Agenda," 14 *Yale Journal of Law and Feminism* (2002) at 250.

¹⁰⁰ Draft of The Constitution of the South African Women in Law Association, Preamble (v).

particularly women.” To do this she urged the association “to find ways... to make its impact felt in national and global policy dialogues... Making a difference,” she continued, means standing for something bigger than you... Something that would give me immense personal joy would be to see the association play an important role in existing efforts aimed at improving access to justice for all, particularly to historically disadvantaged groups such as women, children, persons with disabilities and rural communities.¹⁰¹

These comments have to be puzzling to those committed to the transformation of the judiciary by gender. Since those who claim to honor this commitment have failed during the dozen years of South Africa’s New Democracy to effect the mandated change, one might expect the Minister of Justice and Constitutional Development, one of the key participants in the judicial appointment process, to applaud the women for organizing in order to effect the often called-for change. At the historic moment when women came together to do that, the Minister sought to redirect their attention. Pointing out to her the connection between a more representative judiciary and women’s improved access to justice could help clear the appointment process to allow the pressures applied for the first time by women organized to transform the judiciary to have a chance. if not on an even playing field, at least on a field. where the political judicial appointment process can be played out..

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¹⁰¹ *Loc.cit.* pp 3 & 4.