Comment: Diversity and Legal Reasoning

Rosemary Hunter*

One of my current projects involves unearthing and highlighting examples of legal reasoning that acknowledge and incorporate excluded knowledges – and particularly feminist knowledge about women's lives. The feminist judgment projects have done this as a fictional exercise – imagining judgments that could have been written.[1] But I am now searching for real life examples. This involves close textual analysis of a judge's body of work, looking for ways in which they consistently articulate an understanding of the world that is different from the conventional understandings espoused (explicitly or implicitly) by their judicial colleagues. An unsystematic search has thus far identified a handful of these judges in Australia and the UK, and I am in the process, with various collaborators, of writing about them.[2] These judges introduce modes of reasoning not found in the judgments of their judicial colleagues, and sometimes their judicial colleagues object.[3] But other times

* Professor of Law and Socio-Legal Studies, School of Law, Queen Mary University of London. Email: rosemary.hunter@qmul.ac.uk.

[1] See Women's Court of Canada, 'Rewriting Equality' (2006) 18(1) *Canadian Journal of Women and the Law*; Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010); Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Oxford: Hart Publishing, 2014); Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds), *Feminist Judgements: Rewritten Opinions of the United States Supreme Court* (New York: Cambridge University Press, 2016); Máiréad Enright, Julie McCandless and Aoife O'Donoghue (eds), *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Oxford: Hart Publishing, 2017); Elisabeth McDonald, Rhonda Powell, Māmari Stephens and Rosemary Hunter (eds), *Feminist Judgments of Aotearoa New Zealand: Re Rino – A Two-Stranded Rope* (Oxford: Hart Publishing, forthcoming 2017). Other projects are under way in India, Scotland, and in international law.

[2] See Rosemary Hunter, 'Justice Marcia Neave: Case Study of a Feminist Judge' in Ulrike Schutz and Gisela Shaw (eds), *Gender and Judging* (Oxford: Hart Publishing, 2013) 399; Rosemary Hunter and Danielle Tyson, 'Justice Betty King: A Study of Feminist Judging in Action' (2017) 40 *UNSW Law Journal* 778. Another project with Erika Rackley focuses on Lady Hale on the UK Supreme Court. See also Elizabeth Sheehy (ed), *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé* (Toronto: Irwin Law, 2004).

[3] See, e.g., *R (on the application of McDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33, per Lord Brown at [27], Lord Walker at [32]; *R v RTM* [2006] VSCA 170, per Bongiorno JA at [39].

they go along with the novel reasoning because the perspective offered enriches their understanding, and so the law opens up a little.[4]

Thinking about this project in the light of Karin's paper prompted a couple of reflections. First, as I have argued elsewhere, it is clear that the legal culture to which Karin refers via Karl Klare – the generally shared notion of what it is proper and acceptable for a judge to do – operates as a real constraint, and possibly more of a constraint than the doctrine of precedent, on the possibilities for reasoning differently.[5] But even if one finds a judge who is willing to break out of these constraints, does the fact that she is still delivering a judgment which operates within the established legal system, mired as it is in hierarchy, patriarchy, colonialism, capitalism and other forms of exclusion, inevitably mean that she is merely engaging in 'diversity by adding'? Is it impossible sufficiently to destabilise current systems and norms from that speaking position? Would radical diversity necessarily entail disruption of the whole enterprise of judging?[6] Conversely, does judicial incorporation of feminist knowledge into law tend to reduce to an act of appropriation, which transforms feminist knowledge rather than law, which domesticates it and brings it within an economy of the same?

I think it is difficult to answer these questions when we have barely begun to explore the boundaries of what law can become. But I do think we need to be wary of accepting law's self-proclaimed limitations at face value. I do think many of the feminist judgments

[4] See, e.g., *Yemshaw v London Borough of Hounslow* [2011] UKSC 3; *R v Abela* [2007] VSCA 22, per Nettle JA at [6]-]9]; *Giller v Procopets* [2008] VSCA 236, per Maxwell P.
[5] See Rosemary Hunter, 'More Than Just a Different Face? Judicial Diversity and Decision-Making' (2015) 68 *Current Legal Problems* 119, 126-129.
[6] See also Margaret Davies, 'Critical Judging' in Gabrielle Appleby and Rosalind Dixon (eds), *The Critical Judgments Project: Re-reading Monis v The Queen* (Sydney: Federation Press, 2016) 218, 223.

offer examples of the kinds of shifts Karin calls for, and some of the real judgments do too – examples of re-centering, of moving from knowledge to acknowledgement, and of moving from observational and logical truth to experiential and dialogic truth. For example, I concluded that Victorian Court of Appeal judge Marcia Neave 'brought previously excluded social experiences into legal discourse…to expand and transform law's "common knowledge" of the world',[7] particularly in cases concerning sexual offences and domestic violence. She also insisted that jurors' life experiences – including experiences of being victims of crime – were what qualified them for jury service and enabled a variety of perspectives and experiences to be brought to the task of fact-finding, rather than constituting grounds for disqualification.[8] Both Justice Neave and Victorian Supreme Court Justice Betty King were particularly attentive to the experiences of victims and were concerned in their judgments to 'tell the victim's story'.[9] In addition, Justice King re-centred the discourse of provocation, which blamed (usually women) victims of violence for bringing that violence upon themselves, to focus on the need for men to take responsibility for and to control their anger and rage, and the rights of women to exercise their autonomy and make their own decisions about personal relationships without being met with a lethal response.[10] She also acknowledged the lived realities of Indigenous women offenders who had been subjected to multiple forms of abuse, within a community and professional systems which failed to take care of them or take responsibility for their welfare.[11]

[7] Hunter (2013) above n 2, 405-406.
[8] *R v Goodall* [2007] VSCA 63 [3]-[4].
[9] Hunter (2013) above n 2, 408-409, 415-416; Hunter and Tyson, above n 2, 783-785.
[10] Hunter and Tyson, ibid, 796-804.
[11] Ibid, 790-791, 794.

We should also remember that appellate decision-making in common law systems is capable of generating plural knowledge and versions of the truth through the medium of concurring and dissenting judgments. These appellate courts are not compelled, like many of their civil law counterparts, to speak with only one voice. Karin is right to insist that judicial dialogue is necessarily limited by the people who are permitted to engage in the conversation, but the practice of delivering individual opinions does allow for epistemic diversity to emerge, as is well illustrated in a number of Lady Hale's concurring and dissenting judgments on the Court of Appeal for England and Wales and the UK House of Lords and Supreme Court.[12] Again, there must be much more scope for this to occur than has been explored to date.

To illustrate my point further I want to refer to the Australian Feminist Judgments Project, and the positions taken by Indigenous women in that project. The three Indigenous women who participated in the project each took a different approach to the relationship between Australian law and Indigenous women's knowledge. One wrote a fairly conventional judgment, but instead of relying on an anthropological 'expert's account of the Indigenous plaintiffs, she allowed the voices of the Indigenous women themselves to be directly represented and attended to within her judgment.[13] One maintained that she could not assume the persona of a judge in an Australian court, but could only speak authentically from a position of Indigenous sovereignty, and wrote an essay explaining why this was so.[14] The third similarly felt she could only speak from a position of sovereignty, but she imagined

[12] See, e.g. *Parkinson v St James and Seacroft University Hospital NHS Trust*, per Hale LJ (as she then was); *R (Gentle and another) v Prime Minister and others* [2008] UKHL 20, per Baroness Hale of Richmond at [53]; *R (McDonald)* above n 3, per Lady Hale; *Radmacher v Granatino* [2010] UKSC 42.
[13] Heron Loban, '*ACCC v Keshow*' in Douglas et al. (eds) above n 1, 180.
[14] Irene Watson, 'First Nation Stories, Grandmother's Law: Too Many Stories to Tell' in Douglas et al. (eds) above n 1, 46.

a future in which a treaty has been concluded between Indigenous and settler Australians and pursuant to that treaty, an Indigenous tribunal has been established with the task of revisiting and redressing past legal wrongs. Her judgment is written as a judgment of that tribunal.[15] I take the first two as instances of Karin's notions of possible but limited incorporation of difference on the one hand (although I'd contend that this approach in itself could be seen as transformative), and of having to abandon law altogether to achieve the desired result on the other hand. But the third is for me the most interesting and promising option, and also the approach that is most unexplored. The forthcoming collection of *Feminist Judgments of Aotearoa New Zealand*[16] includes a set of mana wahine[17] (as opposed to feminist) judgments in which Māori (together with some Pākehā) contributors have devised and implemented an intersectional Māori women's jurisprudence. These judgments fall somewhere on the spectrum between the first and third of the Indigenous Australian approaches, but both individually and collectively they provide a radically norm-shifting response to the ethical demand for cohabitation which Karin highlights.

So before we decide that what's possible is not enough, we need to know a lot more about what might be possible. And exploring what might be possible means (among other things) finding – and appointing – judges who are prepared to bring to their role imagination and idealism and the desire for justice *in* law. And while I go looking for these judges, I

[15] Nicole Watson, '*In the matter of Djappari (Re Tuckiar)*' in Douglas et al. (eds) above n 1, 442.
[16] McDonald et al., above n 1.
[17] Mana wahine translates as the prestige and authority of women. The concept of mana wahine and its distinction from and co-existence with feminism in the context of judgment re-writing is explained by Māmari Stephens in Rosemary Hunter, Māmari Stephens, Elisabeth McDonald and Rhonda Powell, 'Introducing the Feminist and Mana Wahine Judgments', in McDonald et al. (eds) above n 1, ch 3. As is also the case in the book, I have not italicised words in te reo Māori here in order to avoid the symbolisation of otherness.

remain hopeful that the full extent of what's possible will not be discovered, or exhausted, any time soon.