

REVIEW ESSAY: COURTS AND TEAMWORK: WHAT IT MEANS FOR JUDICIAL DIVERSITY

ANDREW LYNCH*

I INTRODUCTION

The inner workings of appellate courts, but particularly final courts at the apex of a national judicature, are an enduring source of fascination for those who spend their professional lives interacting with or observing them – practising lawyers, academics, and sections of the media. The political arms of government also have good reason to be alert to the ways in which the senior tier of judges collectively determine the outcome of litigation in which government so often has a stake. Its sense as to the orientation and collegial practices of the top court must inevitably inform whatever decision the executive is empowered to make when a vacancy on the bench arises – be that the nomination or outright appointment of a new Justice.

As any of these different audiences know, courts are very human, and consequently highly dynamic, institutions. They change not only when the composition of the bench alters, but also as their individual members reposition themselves around each other or embark on new and distinctive paths in the law over time. Sometimes these developments are clearly signalled – explicitly or implicitly – in a court's decisions. Often they, or at least their catalysts, are opaque. Essentially, and despite the fact that they conduct public hearings and provide reasons which are far more detailed than those supplied by their political counterparts, there is a great deal that we still do not understand about how, behind the veil of the law, multi-member courts really work. Specifically, there have been only limited attempts to critically appraise the nexus between individual and institutional decision-making and examine what it is we hope to achieve by having judges sit together. In Australia, this issue has prompted a

* Co-Director, The Judiciary Project, Gilbert + Tobin Centre of Public Law and Professor, Faculty of Law, UNSW. I thank Dr Penny Crofts, Dr Ben Golder and Sir Anthony Mason AC KBE for comments on an earlier draft, though of course the usual caveat applies.

recent spate of judicial reflections on the necessary degree of independence from one's colleagues on the bench and the merits and limits of collaboration.¹

While undoubtedly stimulating contributions on an important topic, it is valuable to consider these local perspectives in light of the empirical evidence and more sustained arguments found in two recent scholarly works emanating from the United Kingdom. These are Professor Alan Paterson's *Final Judgment: The Last Law Lords and the Supreme Court*² and Professor Erika Rackley's *Women, Judging and the Judiciary: From Difference to Diversity*.³ Although both books are squarely focused on the contemporary British judiciary and debates about its role and composition, they are incredibly pertinent to the Australian scene and indeed discussion about the purpose and practices of multi-member courts generally.

At first blush, these are hardly companion titles. Paterson's work revisits the subject of his magisterial and groundbreaking study of 1982, *The Law Lords*.⁴ He charts the subsequent years in the Appellate Committee of the House of Lords, focusing particularly on its final era under Lord Bingham's leadership, before turning to the new age of the United Kingdom Supreme Court, which commenced sitting in 2009. He does so through the lens of the two institutions' internal and external dialogues, arguing that these provide the key to understanding judicial decision-making. Just as its forerunner did, *Final Judgment* draws on a wealth of interview material obtained by Paterson with over 100 subjects, including 40 past and present Law Lords. As Lord Hope says in his foreword to the book, Paterson's remarkable access reflects the integrity with which he utilised the original series of interviews conducted for his earlier study.⁵ Paterson relies on a great many other sources – not least being the judgments of the Court, speeches and media interviews by its judges and, especially useful and accessed here for the very first time, the judicial notebooks of two senior Law Lords, Reid and Bingham. Additionally, he presents data to illuminate relevant points on the practices and decision patterns of their Lordships – which is especially handy as a corrective to the judges' occasional tendency to make “guesstimates” ... considerably off the mark.⁶ Paterson's depth of experience with this diverse range of qualitative and quantitative empirical methods and his confidence with legal materials results in a study which will prove equally satisfying to both a legal and broader academic readership.

-
- 1 J D Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 *Law Quarterly Review* 205; Sir Anthony Mason, 'Reflections on the High Court: Its Judges and Judgments' (2013) 37 *Australian Bar Review* 102, 112; Justice Stephen Gageler, 'Why Write Judgments?' (2014) 36 *Sydney Law Review* 189; Justice Susan Kiefel, 'The Individual Judge' (2014) 88 *Australian Law Journal* 544. For discussion, see Andrew Lynch, 'Collective Decision-Making: The Current Australian Debate' (2015) 21(1) *European Journal of Current Legal Issues* <<http://webjcli.org/article/view/407/518>>.
 - 2 Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013) ('*Final Judgment*').
 - 3 Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013).
 - 4 Alan Paterson, *The Law Lords* (Macmillan, 1982).
 - 5 Lord Hope of Craighead, 'Foreword' in Paterson, *Final Judgment*, above n 2, vii.
 - 6 Paterson, *Final Judgment*, above n 2, 8.

Rackley's focus and methodology is different. As the title of her book makes plain, this is a contribution to the ever growing literature on the significance of gender in judging. Accordingly, she does not limit her attention to the Supreme Court but also reflects upon the experience of women in the legal profession generally and the challenges they face in appointment and service as judges. Rackley considers why it is that any departure from the traditional image of the 'default judge' – white, male, Oxbridge-educated, former barristers – has been seen as so unsettling and how this may explain the slow pace of increased gender representation in English courts. But as the starkest illustration of this problem is at the very top, inevitably Rackley does spend a great deal of time discussing the Supreme Court. It is startling that just one woman, Lady Brenda Hale, has sat amongst its 12 judges since establishment – with the result that the United Kingdom languishes near the bottom of the international leader board for female participation on final courts with a mere 8.3 per cent.⁷ By contrast, in 2012 only the national Supreme Courts of Greece, Rwanda, Croatia and Canada had a higher percentage of women judges than Australia's High Court. It has not been for lack of opportunity that Hale remains the lone woman on the Supreme Court – seven new appointments have been made to fill vacancies arising since creation, yet men have been selected each time. Rackley presses the case for judicial diversity as important not simply on public confidence and equality grounds but because a diverse bench is a *better* bench and judicial decision-making, the thing that courts exist to do, is enhanced by ensuring different perspectives are available in the resolution of complex legal problems.

Both books succeed admirably on their own terms. Paterson illuminates a profound period of institutional change and broader constitutional reform affecting the three arms of government in the United Kingdom. He provides fascinating detail about the House of Lords and the Supreme Court's engagement with counsel appearing before it, the recent arrival and growing importance of judicial assistants (in local parlance, associates), the development of the relationship with Strasbourg as the Court progresses its own jurisprudence under the *Human Rights Act 1998* (UK), and much besides. For her part, Rackley details the highly gendered perception of what it is to be a 'neutral' judge, grapples with the complexities and problematic essentialism of claims that women judges will 'make a difference' and neatly harnesses the concept of 'merit' – typically used to trump diversity arguments – to mount a very convincing case for an appointments model that capitalises on, rather than denies, difference.

However, both books transcend these distinctive contributions and, especially when considered together, offer a rich reflection on the judicial function of multi-member courts, which is of importance not simply to our appreciation of how these institutions make decisions, but what we might strive for in selecting individuals for appointment to them. It is this aspect of both books that I wish to focus upon in this essay.

7 Rackley, above n 3, 21 (Table 1.5).

II COURTS AND TEAM-WORKING

Paterson states that over the last 40 years before the demise of the House of Lords most of the Law Lords seemed to take ‘the view that group membership was at least a relevant attribute in their decision-making role’.⁸ This awareness has deepened in the new Supreme Court, with a number of the Justices in the new court self-identifying as members of a team. Care should be taken not to confuse this with seeing the court, in the caution once sounded by Sir Anthony Mason in respect of our own High Court, as a ‘monolithic institution’.⁹ As Lord Reed acknowledged to Paterson, ‘[i]t is a curious team because the value of the team depends on everybody using their own individual intelligence and their own experience and so forth and bringing all that to the party, but our working method is very collaborative’.¹⁰

There are a number of ways in which this is so, but the most striking has been the deliberate adoption, in response to the opportunity afforded by the establishment of an entirely new court, of ‘team-working practices’.¹¹ Many of these were not a feature of decision-making in the House of Lords, despite their familiarity to the majority of the Law Lords from their earlier service in the Court of Appeal. But in the Supreme Court there are far more frequent sittings of large panels, a pre-hearing meeting before each case, more debate at post-hearing conferences, a greater use of occasional second conferences, and, most significantly, ‘more sustained collective engagement’ at the stage of the circulation of draft judgments in response to a new cultural norm towards single judgments of the Court.¹²

This has most firmly taken hold since Lord Neuberger assumed the presidency of the Court and, within a month of doing so, said of dissenting opinions that ‘we could have fewer of them, and they could be shorter’,¹³ while also emphasising the desirability of keeping concurring opinions to a minimum. On the evidence presented by Paterson, Neuberger’s colleagues have responded positively to this gentle, yet unambiguous, signal – by mid-2013 55 per cent of cases were decided by a single judgment.¹⁴ But this prompts a question: are the new institutional practices of the Supreme Court going to hold or will they prove

8 Paterson, *Final Judgment*, above n 2, 132.

9 Sir Anthony Mason, ‘Foreword’ in Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000) viii.

10 Lord Reed, quoted in Paterson, *Final Judgment*, above n 2, 141.

11 Paterson, *Final Judgment*, above n 2, 141.

12 Ibid 313–14. Single judgments of the Court need not be, and in fact only rarely are, what in Australia would be called unanimous opinions, appearing under the names of each Justice, but still tend to be published under the name of the Justice assigned the task of writing the ‘lead opinion’ at the first conference.

13 Lord Neuberger, ‘No Judgment – No Justice’ (Speech delivered at the First Annual BAILII Lecture, Freshfields Bruckhaus Deringer LLP, 20 November 2012) [28] <<http://www.bailii.org/bailii/lecture/01.html>>.

14 Paterson, *Final Judgment*, above n 2, 106 (Table 3.5). This has diminished somewhat since publication of the book; for an update on this statistic and others, see Alan Paterson, ‘*Final Judgment Revisited*’ (2015) 21(1) *European Journal of Current Legal Issues* <<http://webjcli.org/article/view/418/531>>.

merely ephemeral, leading to a decline in consensus and a fresh bout of separate concurrences and dissents? Paterson notes that in the late 1970s and early 1980s, under Lord Diplock's influence (described by Lord Wilberforce as having 'the quality of persuading his colleagues to the extreme. It almost got to the stage of a mesmeric quality'),¹⁵ the House of Lords moved towards a very high proportion of cases decided by a single opinion. This subsided a little in the immediate aftermath of Lord Diplock's death but surged again to 70 per cent in 1993. But from the late 1990s the trend went really the only way it could go, which was down. In the Bingham era, the House of Lords was far more accepting of multiple judgments and not once over these eight years were there more than 20 per cent of cases decided by a single judgment. Paterson's interviews over the years further demonstrate the judicial oscillation between the attractions of unanimity and multiple opinions.¹⁶

However, in *Final Judgment* it is suggested that what is occurring in the Supreme Court is not simply another swing of the pendulum towards unity over individualism due to prevailing judicial attitudes. The latter are, to be clear, important, but the difference is that on this occasion they are being brought to bear on the establishment of institutional practices in a relatively nascent body. Anyone tempted to think that the transition from the Appellate Committee to the Supreme Court has been largely formal or symbolic will struggle to maintain that view after reading this study. While undoubtedly linked to its past, most obviously through the appointment of serving Law Lords as its first Justices, the Supreme Court is a new body, strikingly distinct from its predecessor. The most obvious example of this is the far greater transparency of its workings and efforts of outreach and public engagement. But nor has the opportunity to rethink internal decision-making practices been squandered. It may still be too early to tell, but it is entirely possible that the Court's speaking with one voice will wax and wane less in future, being no longer simply responsive to the views of certain dominant individuals on the court, but determined instead by the steady application of institutional practices of teamwork.

None of this is to deny the enduring continuities of individual judicial behaviour. Paterson identifies essentially three dispositions. First, there remains a small minority of individualists who tend 'largely to plough their own furrow',¹⁷ and appear relatively sanguine about whether their views attract majority support

15 Interview with Lord Wilberforce, quoted in Paterson, *Final Judgment*, above n 2, 133.

16 This is hardly an unfamiliar concern in the Australian jurisdiction. See Michael Coper et al, 'Multiple Opinions Project' (Report, ANU College of Law and National Judicial College of Australia, 30 June 2010). For longitudinal statistics on the High Court, see Matthew Groves and Russell Smyth, 'A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903–2001' (2004) 32 *Federal Law Review* 255, 266–73.

17 Paterson, *Final Judgment*, above n 2, 134.

or are out on their own.¹⁸ But these aside, the bulk of judges respond to their place as individuals in a collective decision-making exercise through one of two distinct approaches:

there was a difference between those collectively minded (group-oriented) Law Lords, whose primary aim was to engage with their colleagues for elucidation as to how they might together best resolve the problems posed by the current appeal, and those more tactically minded Law Lords (tacticians), who were seeking to promote their own point of view as providing the best solution to the appeal.¹⁹

This difference manifests itself in all sorts of interesting ways – including the approach taken to dialogue with counsel in oral hearings and with colleagues in the post-hearing conference, as well as the speed with which draft judgments are circulated. Beyond those stages, judges of either type may continue to engage with their colleagues through discussion and memoranda – but the group-oriented judges are seeking, particularly when a majority ratio is proving elusive, to construct an agreed set of reasons while the tactician is, to be blunt, simply lobbying.

Even when there are clear lines of disagreement across the Court as to the resolution of a case, collective decision-making is on display. Paterson describes the traditional reluctance of the Law Lords to write judgments that engage with the reasons given by their colleagues. With a few notable exceptions – for example, Lord Atkin in *Liversidge v Anderson*²⁰ – their own view of the matter was stated without feeling the need to point out the weakness perceived in the views of the majority. But in the Supreme Court such engagement is ‘an everyday event’, occurring ‘in every case where there is a significant disagreement’.²¹ Engagement in written reasons presents the institutional result as the outcome of a dialogue between the Court’s individual members, allowing the litigants and the community to see that, far from being mere happenstance as to how a certain number of individuals favoured resolution of the matter, the majority view has held firm in the face of internal critique.

The extent to which individuals are willing to compromise and accommodate the views of others in order to reach a shared position obviously impacts on the achievement of a single judgment as opposed to fragmented opinions delivered separately. That may seem trite, but Paterson’s analysis leads him to conclude that these differences of role conception and work practice are just as significant in determining how the Court will decide as any differences in values or ideology between the justices on any particular panel.

18 Lord Rodger appears to have most personified this attitude on the Supreme Court to date: see Lord Brown, ‘Dissenting Judgments’ in Andrew Burrows, David Johnston and Reinhard Zimmerman (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press, 2013) 29. Australia has its own examples, and I have elsewhere considered Stephen J in this regard: Andrew Lynch ‘Taking Delight in Being Contrary, Worried About Being a Loner or Simply Indifferent? How Judges Really Feel About Dissent’ (2004) 32 *Federal Law Review* 311, 327–8.

19 Paterson, *Final Judgment*, above n 2, 132–3.

20 [1942] AC 206, 246 (Lord Atkin).

21 Paterson, *Final Judgment*, above n 2, 137. Paterson reports that thankfully this practice remains ‘a long way from the acerbic exchanges’ familiar in the United States Supreme Court: at 140.

III DIFFERENCE AND JUDICIAL CHOICE

Difference is also, unsurprisingly, at the heart of Rackley's study. As noted, she devotes considerable time to tackling the powerful myth of the 'default judge' as a reassuring mask of value-free sameness. Just at an impressionistic level, Rackley argues that female judges' simple physical differences inevitably pose a challenge to the idea of a depersonalised and interchangeable judiciary.²² But more deeply, it is the potential for women judges to 'make a difference' on the bench that is viewed as not merely unsettling, but dangerously antithetical to core legal values of objectivity and predictability. If that seems exaggerated, how else are we to understand the familiar refrain that according weight to diversity considerations in appointing judges is not just irrelevant but in fact a diminishment of 'merit'?²³

One way women lawyers have sought to avoid this trap – in which, ironically, the potential for difference is used as the strongest argument *against* judicial diversity – has been to give very little acknowledgment to how it is they might, on occasion, make a distinctive contribution to judicial decision-making. They have 'adopt[ed] the guise of the default judge, presenting themselves as *exactly the same* as their male counterparts: a lawyer first *and* second, neither man nor woman'.²⁴ This has, though, started to change. Canada's Chief Justice Beverley McLachlin and America's Justices Ruth Bader Ginsburg and Sonia Sotomayor are just three prominent figures who have explicitly moved the discussion on from the different perspective that women *might* bring in some cases to an unambiguous affirmation that, inevitably, they do so.²⁵ Closer to home, it was Justice Michael McHugh who made this claim on behalf of Justice Mary Gaudron, the High Court's only female up to that time, and he extolled the importance of appointing more women to the bench.²⁶ But no judicial figure has so consistently or powerfully advocated greater gender representation and diversity as to other attributes than the Supreme Court's Lady Hale. In 2013 she explained that 'the lived experience of being a judge for 19 years now and a Law Lord for nine' had dissolved her earlier scepticism of the claim that women judges were 'bound to make a difference'.²⁷ In 2008, she told Paterson that 'there

22 Rackley, above n 3, 127.

23 See Lord Chief Justice Igor Judge, quoted in Rackley, above n 3, 27; Lord Sumption, 'Home Truths about Judicial Diversity' (Speech delivered at the Bar Council Law Reform Lecture, 15 November 2012) 4 <http://www.barcouncil.org.uk/media/178069/2012_lrc_lecture_home_truths_about_judicial_diversity.pdf>.

24 Rackley, above n 3, 137 (emphasis in original).

25 Ibid 149–50, 167–8.

26 See Justice Michael McHugh, 'Working as a High Court Justice' (Speech delivered at the Women Lawyers Association of New South Wales and the Law Society of Newcastle, 17 August 2005); Justice Michael McHugh, 'Women Justices for the High Court' (Speech delivered at the High Court Dinner, Western Australian Law Society, 27 October 2004) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/mchughj/mchughj_27oct04.html>.

27 Lady Hale, 'Equality in the Judiciary' (Speech delivered at the Kuttan Menon Memorial Lecture, 21 February 2013) 19 <<https://www.supremecourt.uk/docs/speech-130221.pdf>>.

are issues on which I am quite likely to take a different line from my colleagues for a variety of reasons, and it's one of the reasons I'm here'.²⁸

Rackley's book essentially takes its cue from this growing candour about the value of women's different perspectives on the bench but she says we should hardly be surprised to hear that, at least sometimes, '*who the judge is matters*'.²⁹ For quite a while now judges have been perfectly frank with us about the legitimate scope for choice and discretion in the work that they do. While the American Realist movement struck a very early blow against formalistic accounts of the law,³⁰ it has now been well over a generation in both the United Kingdom and Australia since emphatic judicial acknowledgment of the indeterminacy of legal materials and the active role of the individual decision-maker. Lord Reid famously dismissed the declaratory theory of common law as 'fairy tales'³¹ over 40 years ago, while Sir Anthony Mason firmly rejected Australia's entrenched judicial philosophy of legalism as 'a cloak for undisclosed and unidentified policy values' in 1986.³² Those pronouncements did not signal a sudden unshackling of judges from the numerous doctrinal, institutional, cultural and individual factors which constrain their decision-making. Instead, they merely recognised the fact that, even so circumscribed, a judge is inevitably confronted with the necessity of choice.³³

How he or she resolves that choice, through the weighing of considerations that lead to one result over another, differs between individuals.³⁴ Traditionally, judges have not tended to identify an expansive array of what are sometimes referred to as the 'extra-legal' factors they may call upon, even just subconsciously, in order to decide a case. For example, while former Australian Chief Justice, Gerard Brennan, admitted that a 'judge is not a juridical robot', he explained the consequence of this not much differently from Lord Reid 35 years earlier as a need to 'make value judgments in which common sense and an

28 Paterson, *Final Judgment*, above n 2, 135.

29 Rackley, above n 3, 132 (emphasis in original).

30 Tamanaha has convincingly argued that in fact the Realists were boxing at shadows and that a long line of judicial descriptions of the adjudicative role quite incompatible with any purely formalist account predates their emergence: see Brian Z Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press, 2009).

31 Lord Reid, 'The Judge as Law Maker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 22. See also Lord Bingham, 'The Judges: Active or Passive?' (Speech delivered at the Maccabaean Lecture in Jurisprudence, British Academy, 27 October 2005) 14 <<http://www.law.cf.ac.uk/newsandevents/transcripts/271005.pdf>>.

32 Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the United States and Australian Experience' (1986) 16 *Federal Law Review* 1, 5. For a succinct account, with reference to key judicial speeches, of the subsequent waxing and waning of judicial support for legalism in Australia, see George Williams, Sean Brennan and Andrew Lynch, *Australian Constitutional Law & Theory: Commentary and Materials* (Federation Press, 6th ed, 2014) 177–81.

33 Lord Bingham, above n 31.

34 Terence Etherton, 'Liberty, the Archetype and Diversity: A Philosophy of Judging' [2010] *Public Law* 727, 736, 740.

appreciation of community standards play a part'.³⁵ Contrast that with Justice Richard Posner's more exhaustive description of judicial decision-making as a complex interplay between 'legal doctrine, institutional constraints, policy preferences, strategic considerations, and the equities of the case, all mixed together and all mediated by temperament, experience, ambition, and other personal factors'.³⁶ While some inclusions in Justice Posner's list may be ones from which other judges might demur, or express differently, most would agree that a fair number of them are likely to be relevant, though their relative importance will vary for each judge depending on the nature of the matter at hand, the submissions made, and the opportunities for choice that are presented by the relevant legal arguments and materials. As Justice Posner himself recognises, 'in making a judgment ... one is conscious of both freedom and constraint'.³⁷ Law's malleability, arising from its frequent indeterminacy, does not liberate the judge to decide in a way which is simply free of it.³⁸

Lady Hale neatly captured this dichotomy when she said that judges often face 'a choice between different conclusions, any of which it may be possible to reach by *respectable legal reasoning*'.³⁹ It is implicit in this statement that 'legal reasoning' is not, in fact, reasoning limited to legal *materials* but can – indeed, in final courts must quite frequently – involve reliance on other considerations in order to guide the judge to a conclusion using those same materials but which they do not themselves dictate.⁴⁰ This is quite distinct from, and is perfectly reconcilable with, criticism of judges who are 'motivated not by legal but by extraneous considerations, as by the prejudice or predilection of the judge or, worse, by any personal agenda'.⁴¹ For as Lady Hale said, 'a point of view is not the same as an agenda'.⁴²

In seeking a more explicit conversation about the importance of having judges with a range of different attributes and experiences, Rackley is all too aware of the dangerous assumption of essentialism – that all persons of the same sex will decide in like ways, and also to the exclusion of other factors (race,

35 Sir Gerard Brennan, 'The Selection of Judges for Commonwealth Courts' (Papers on Parliament No 48, Parliament of Australia, 2008) 2. The value-laden nature of the judicial recourse to 'common sense' is discussed by Etherton, above n 34, 730–1; Reg Graycar, 'Gender, Race, Bias and Perspective: OR, How Otherness Colours Your Judgment' (2008) 15 *International Journal of the Legal Profession* 73, 82; Justice Michael McHugh, 'The Law-Making Function of the Judicial Process – Part 1' (1988) 62 *Australian Law Journal* 15, 17.

36 Richard A Posner, *How Judges Think* (Harvard University Press, 2010) 85.

37 Ibid.

38 Etherton, above n 34, 736. Judging (consciously or otherwise) from any particular perspective is neither illegitimate nor evidence of bias since the 'approach must always be subordinated to judicial norms': Rosemary Hunter, 'An Account of Feminist Judging' in Rosemary Hunter, Claire McGlynn and Erika Rackley (eds), *Feminist Judgments – From Theory to Practice* (Hart Publishing, 2010) 30, 31–32.

39 Baroness Hale, 'A Minority Opinion?' (2008) 154 *Proceedings of the British Academy* 319, 320 (emphasis in original).

40 'There can be no doubt, even among the most committed legalists, that judges have a considerable degree of discretion and that in reaching their decisions they are not always and only applying legal rules': Hazel Genn, *Judges and Civil Justice: The Hamlyn Lectures 2008* (Cambridge University Press, 2010) 166.

41 Lord Bingham, above n 31, 28.

42 Hale, above n 39, 336; see also Etherton, above n 34, 743.

education, class, professional experience and so on) which might differentiate them from each other or provide a greater commonality of outlook despite differences of gender.⁴³ Judges are rightly discomforted by ‘the notion that the mere fact that one is a man or a woman necessarily means that one will ascribe to a particular world-view’.⁴⁴ Misguided attempts to *measure* (as opposed to simply recognise or identify) the impact of gender or race are inevitably captured by such essentialism.⁴⁵ Not only does that exercise require us to accept that the selected attribute *alone* will explain the female judge’s decision if they differ from their colleagues; it also suggests that gender is irrelevant when they agree. Left unconsidered in the latter case is the influence of judicial recruitment processes or subsequent ‘judicial socialization’.⁴⁶ And of course Paterson’s work amply illustrates the importance of another explanation – the judge’s role conception on a multi-member court and his or her approach to collective decision-making.

IV THE RELEVANCE OF GENDER

Yet being alive to these various dangers of essentialism and overstatement does not require acceptance of Lord Judge’s assertion that ‘background, ethnicity, religion, sexuality and gender are utterly irrelevant to the ability of an individual to be a good judge, and therefore they are utterly irrelevant to the selection and appointment of any judge’.⁴⁷ I return to the question of what makes a ‘good judge’ in a multi-member court below, but for now let us admit that personal attributes cannot be simply irrelevant *per se* to the activity of judicial decision-making – given the impossibility of their complete exclusion and everything we have heard about the inescapable choices that regularly confront judges. Thus it seems only obvious that Rackley is right when she modestly asserts that ‘[w]hat we can say ... is that gender is one of the things that influences women *and men* judges’ decision-making and so may be *one* reason why judges sometimes differ’.⁴⁸

Further, when room for judicial choice arises, surely this benefits from the availability of different perspectives? A rather surprising answer to that query was provided by the Supreme Court’s Lord Sumption in a speech given after

43 Respectively, ‘false universalism and gender imperialism’: Rackley, above n 3, 144.

44 McHugh, ‘Women Justices’, above n 26. See also Genn, above n 40, 152; Sally J Kenney, ‘Critical Perspectives on Gender and Judging’ (2010) 6 *Politics & Gender* 433, 436–7; Rackley, above n 3, 146–9.

45 Aside from this complaint, such studies are generally viewed as inconclusive and unconvincing: see McHugh, ‘Women Justices’, above n 26; Rackley, above n 3, 142–6; Sumption, above n 23, 17.

46 Cassia Spohn, ‘The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities’ (1990) 24 *Law and Society Review* 1197, 1212; see also Genn, above n 40, 160–61.

47 Quoted in Rackley, above n 3, 27. Lady Hale has rejected simplistic and essentialist arguments about the impact of the ‘woman’s point of view’, but at the same time argued ‘that does not mean that we do not make a difference’: Brenda Hale and Rosemary Hunter, ‘A Conversation with Baroness Hale’ (2008) 16 *Feminist Legal Studies* 237, 245.

48 Rackley, above n 3, 145–6 (emphasis in original).

Rackley's manuscript went to press, in which he took issue with Chief Justice McLachlin's claim that women are 'capable of infusing the law with the unique reality of their life'.⁴⁹ Lord Sumption, agreeing with Lord Judge that personal attributes are 'not relevant',⁵⁰ said it was mistaken to assume that just 'because a particular kind of experience is specific to one gender, judges of a different gender cannot comprehend it equally well'.⁵¹ Citing earlier decisions of English courts in which exclusively male benches had recognised and responded to the legal vulnerability of women, Lord Sumption did not deny that law is never open to choice but said the 'different perspectives' argument 'overstates the importance of personal as opposed to vicarious experience'.⁵² That seems a provocatively confident assumption from a judge whose personal background corresponds so closely to the dominant profile of the judiciary. We hardly need wonder at the likely response of Rackley and female Justices such as Lady Hale to this suggestion that those with different life experiences should be content to trust in the imaginative powers of white men when making decisions which affect their legal rights.

Put plainly, the argument for judicial diversity is most compelling in the context of appellate decision-making by a multi-member court. Posner has asserted that 'the greater the judiciary's diversity, the more disagreement, dissent',⁵³ and although this is not the picture that Rackley emphasises in *Women, Judging and the Judiciary*, she certainly acknowledges the capacity for gendered perspectives to result in division. A clear example of this is the case of *Granatino v Radmacher (formerly Granatino)* concerning the weight to be given to a prenuptial agreement.⁵⁴ Both the female judge at first instance and Lady Hale on final appeal took a view of the case not shared by any of the male judges in the Court of Appeal or the Supreme Court. In her dissent, Lady Hale observed 'there 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'.⁵⁵ Given that, Rackley is hardly out on a limb when she suggests that disagreement as to the outcome was 'at least in part attributable to the different experiences, and hence the different insights and perspectives men and women have on the role and effect of such agreements, and indeed of marriage more generally'.⁵⁶ In addition to *Radmacher* and other actual examples adduced by Rackley, we might also consider the fruits of the innovative Feminist Judgments Writing project – with both an English and Australian collection of judicial opinions penned by academics as ones which

49 This is attributed to Chief Justice McLachlin in Mary-Ann Hedlund and Susan Glazebrook, 'Foreword' in Mary-Ann Hedlund et al (eds), *The IAWJ: Twenty Years of Judging for Equality* (2010) 4.

50 Sumption, above n 23, 4.

51 Ibid 19.

52 Ibid.

53 Posner, above n 36, 256.

54 [2011] 1 AC 534.

55 Ibid 577 [137] (Lady Hale) ('*Radmacher*').

56 Rackley, above n 3, 157.

might have been delivered in real cases and reflecting a feminist perspective.⁵⁷ These volumes provide the perfect riposte to Lord Sumption's assertion of the sufficiency of 'vicarious experience'. The exercise suffers, however, from an inevitable deficiency in that there is no way of knowing what role such opinions might have had in judicial deliberation as the relevant court was deciding the particular case.⁵⁸

But it is that benefit, the influence of the female judge's perspective (and indeed also that of other 'identity characteristics')⁵⁹ in truly *collective* decision-making, which Rackley champions most strongly. Downplaying Posner's prediction about diversity and disagreement, she instead offers that:

the promise of a diverse judiciary is not the promise of a multiplicity of approaches and values each fighting for recognition, but of a judiciary enriched by its openness to viewpoints previously marginalised and of decision-making which is better for being better-informed.⁶⁰

The example Rackley seizes on as best demonstrating this is the House of Lords unanimous upholding of appeals from two women claiming refugee status on the basis of fear of persecution relating to family membership or as a woman threatened with female genital mutilation.⁶¹ The only woman in the Court of Appeal, Lady Justice Arden, had dissented from that body's refusal to see either claim as a fear derived from the women's membership of a 'particular social group' under the meaning of the 1951 Geneva Convention Relating to the Status of Refugees.⁶² Lady Hale's judgment in the Supreme Court is an expressly gender-sensitive response to the legal issues – but Rackley argues that it is 'difficult to distinguish' her reasoning from that of the other Justices and that the case shows 'how the presence of women judges and the distinctive perspectives and arguments they might bring need not exist in parallel and in contrast to the arguments and reasoning of their male counterparts'.⁶³ A similar point has been made in respect of race by Professors Johnson and Fuentes-Rohwer who argue, perfectly reasonably, that the 'mere presence of a minority in the deliberations over a case can dramatically change the dynamics of the discussion ... by challenging stereotypes, limiting improper discussion, and adding important

57 Hunter, above n 38; Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014).

58 Hunter, above n 38, 3, 10–11.

59 Rackley, above n 3, 148.

60 Ibid 177.

61 *K v Secretary of State for the Home Department* [2007] 1 AC 412.

62 Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

63 Rackley, above n 3, 176–7. This prompts acknowledgment of the recent remark by McMurdo J, President of the Queensland Court of Appeal, that to be 'true to their oaths and affirmations of office, arguably context may require all judicial officers, women and men, to be feminists': Justice Margaret McMurdo, 'Address at the Launch of the Book "Australian Feminist Judgments – Righting and Rewriting Law"' (Speech delivered at the book launch of *Australian Feminist Judgments: Righting and Rewriting Law*, Supreme Court of Queensland, 2 December 2014) <<http://www.law.uq.edu.au/documents/afjp/Justice-McMurdo-Launch-speech-021214.pdf>>.

information ... This, in turn, might well influence the ultimate outcomes of cases'.⁶⁴

These arguments converge neatly with what Paterson has revealed about the Supreme Court's internal dialogue. In particular, disagreement amongst the judges on a multi-member court is frequently fluid and can be integral to the process by which that institution eventually determines the controversies before it. During both the hearing stage and after circulation of draft opinions, '[v]ote changes occur and with some regularity', reports Paterson.⁶⁵ After presenting nine judicial reflections on the topic, Paterson goes on to show that the perception that changes of mind are rare and tend to be mainly at the hearing rather than the judgment circulation stage is not really borne out by the evidence provided by published reasons, judicial notebooks and revelations of judges in interviews. He provides an extremely detailed account of cases across the Bingham era of the House of Lords and the early years of the Supreme Court to demonstrate the way in which members of both bodies influenced their colleagues and led some to alter their initial thoughts on the disposition of a case. Further, it seems only reasonable to assume that changes of mind as to the reasoning by which an agreed outcome is justified are likely to be more frequent.⁶⁶

That formal and informal processes geared towards the 'social aspects of decision-making' which promote 'reflection and engagement between the Justices is healthy for the Court and for democracy'⁶⁷ is confirmed by judges' admissions about how they initially approach legal problems. Lord Neuberger told Paterson:

I almost always have an idea of what I want to find either because it instinctively feels right or it seems to go with the merits or my feeling is that it is in line with the principles as I think they are.⁶⁸

Lord Sumption agreed:

Yes, I do have an instinctive feeling [for the outcome of cases]. I think everybody does. ... If you start with the answer and work backwards it is very important to know when to recognise defeat ... when you find you can't in any intellectually honest way get to where you thought you should be going, you change your mind.⁶⁹

If exposing those 'instinctive feelings' about how a case should be resolved to the critical scrutiny of peers is not the purpose of having multi-member appellate courts then it is hard to know what is. And surely that internal dialogue occurs most optimally when its participants are able to bring a diverse range of

64 Kevin R Johnson and Luis Fuentes-Rohwer, 'A Principled Approach to the Quest for Racial Diversity on the Judiciary' (2004) 10 *Michigan Journal of Race & Law* 5, 26–7.

65 Paterson, *Final Judgment*, above n 2, 207. See also, in the setting of the United States judiciary, Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behaviour* (Princeton University Press, 2006) 51–2.

66 Paterson, above n 2, 181–2.

67 Ibid 207.

68 Ibid 196.

69 Ibid 197.

perspectives and experience to the collective process? Professor Blackshield has pointed to the sheer size of final appellate courts as making it clear that, at the very least, judicial *homogeneity* cannot be an objective when appointing persons to them.⁷⁰ This is already tacitly acknowledged in the practice of appointing judges to such courts on account of their particular area of legal expertise, so why does the possession of different attributes and the life experiences which follow from them not similarly factor in appointments decisions? Lord Sumption's assertion that the former is 'perfectly legitimate' while the latter is irrelevant does not hold up in the face of repeated judicial admissions and evidence that, on occasion, those broader characteristics relevantly inform judicial deliberation and even possibly affect outcomes.⁷¹

V DIVERSITY AND MERIT

Paterson and Rackley both throw down a challenge to the traditionally narrow way in which 'merit' is applied as the 'sole criterion' in appointing judges. While Rackley's objections are systemic, Paterson overlaps to the extent that discussion concerns appointment to the Supreme Court, and possibly other courts in which judges sit as a panel. But in highlighting the challenges and potential of collective decision-making, they both suggest that diversity is central to a court's institutional operation and the quality of its work. That is not to dispute the legitimacy and equality grounds for a more diverse judiciary. But it does challenge the focus upon individual accomplishment at the expense of institutional composition and need.

If anything, Paterson's stance appears the more radical in this regard. His portrayal of the Supreme Court is akin to a team that 'requires a different skill set in the participants than was once required of Law Lords'; these include an 'ability to negotiate, to compromise, to persuade whilst robustly defending a position of principle'.⁷² Paterson notes the downsides of taking teamwork too far – but arguably does not ever fully engage with the core concern about the impact of collective decision-making upon judicial independence, as most forcefully expressed by Justice Dyson Heydon prior to his departure from the High Court.⁷³ It takes no effort to imagine that consensus-seeking abilities or an aptitude for group work as relevant considerations in making judicial appointments would likely meet with opposition from many barristers, whose professional disposition generally requires them to possess rather different qualities. Such an approach would obviously not amount to the disqualification of luminaries from the bar for

70 A R Blackshield, 'The Appointment and Removal of Federal Judges' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 429–30.

71 Sumption, above n 23, 4. On deliberate geographical diversity across a number of final courts, see Harry Hobbs, 'Finding a Fair Reflection on the High Court of Australia' (2015) 40 *Alternative Law Journal* 13, 15.

72 Paterson, *Final Judgment*, above n 2, 314.

73 Heydon, above n 1.

judicial appointment – but it would acknowledge that a successful transition requires capacities that should not simply be assumed. As an example, it is sometimes mused that the personality traits which fuelled Sir Garfield Barwick's ascent to the heights of the private bar explained his later shortcomings as Australia's Chief Justice.⁷⁴

To be very clear, Paterson is emphatically *not* suggesting that collective decision-making requires the appointment of judges with similar professional or life experiences, or ideological outlook. Indeed, to do so would undercut his main thesis about the effectiveness of institutional processes which thrive on the capture and exchange of different viewpoints. But he is saying that the developing features of the Supreme Court will be better served by appointing those who will engage constructively in its internal dialogues rather than run their own race from beginning to end.⁷⁵

Rackley appears content to assume that judges will have the necessary disposition to engage in deliberation. Her message is that there is not much gained however if they do not have anything particularly different to bring to the table. In her appearance before a House of Lords Committee inquiry on appointments Lady Hale agreed that:

in disputed points you need a variety of perspectives and life experiences to get the best possible results. You will not get the best possible results if everybody comes at the same problem from exactly the same point of view. You need a variety of dimensions of diversity. I am talking not only about gender and ethnicity but about professional background, areas of expertise and every dimension that adds to the richer collective mix and makes it easier to have genuine debates.⁷⁶

This sentiment was recently repeated by the President of the Supreme Court, Lord Neuberger, who said 'it is highly desirable to have a genuinely diverse judiciary, because it would result in a greater spectrum of judicial experiences and perspectives, which will enrich the law'.⁷⁷ While some, like Lord Sumption, reject this rationale (but not others) for increasing diversity, it appears that Rackley's core argument is hardly one outside mainstream opinion amongst senior judges in the United Kingdom.

The more challenging thing then is to consider how diversity is to be actually achieved. While some have argued that it 'needs to be considered an integral part of what is meant by merit (ie, the qualities needed to deliver justice) for

74 George Winterton, 'Barwick, Garfield Edward John' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 56, 58.

75 One very good reason for preferring the former over the latter is the danger of 'collective irrationality' when the decisions of individual members of an appellate court fail to come together with coherence: for recent Australian discussion, see Justice Stephen Gageler and Brendan Lim, 'Collective Irrationality and the Doctrine of Precedent' (2014) 38 *Melbourne University Law Review* 525, 528–32.

76 Baroness Hale, quoted in Select Committee on the Constitution, 'Judicial Appointments' (Report No 25, House of Lords, 2010–12) 31–2.

77 Lord Neuberger, "'Judge Not, That Ye Be Not Judged': Judging Judicial Decision-Making' (Speech delivered at the 38th FA Mann Lecture, Lincoln's Inn, London, 29 January 2015) [23] <<https://www.supremecourt.uk/docs/speech-150129.pdf>>.

appointment’,⁷⁸ Rackley claims to have a different approach. This is borne of her observing strong resistance to the suggestion that ‘merit’ might be redefined to accommodate ‘diversity’ or that the former can operate as a threshold after which judges are selected on the basis of some additional, diversity-based, consideration.⁷⁹ There is distrust of either approach as amounting to a dilution of merit.⁸⁰ Rackley attempts to avoid this by stressing that ‘diversity is essential to the *quality* of judicial decision-making ... to the ability of judges to do their job’.⁸¹ Despite her saying that this fosters ‘no need to rethink or redefine “merit”’,⁸² as the orthodox basis for appointments, it is not really clear that is so. If diversity is to be more than an add-on to merit, then some reconceptualisation of the latter seems inescapable. Nevertheless, this is not to challenge Rackley’s main argument that the overall and court-specific composition of the bench and what an individual will bring to it should be addressed in the appointments system. Even though some judges have signalled support for this approach,⁸³ to suggest that merit is, in part, a relational concept influenced by institutional needs and existing strengths, remains controversial – and has been strongly resisted by committees of inquiry in both the United Kingdom and Australian parliaments.⁸⁴

VI CONCLUSION

These two books do much more than offer Australian readers an armchair exposure to recent – and hugely significant – developments and debates concerning the United Kingdom judiciary. That is, of course, an excellent reason for reading them given that jurisdiction’s historical and continuing interest and importance to the Australian legal system. But additionally, they provide perspectives which have been lacking, at least in a comparable form and depth, from our own appreciation of multi-member courts, and particularly the High Court.

78 Cheryl Thomas, ‘Judicial Diversity in the United Kingdom and Other Jurisdictions’ (Report, Commission for Judicial Appointments (UK), November 2005) 30.

79 Rackley, above n 3, 190.

80 For example, the House of Lords Select Committee on the Constitution was emphatic both that ‘diversity and merit are distinct concepts’ and that ‘merit should continue to remain the sole criterion for appointments’: above n 76, 32–3. See also Sumption, who talks of diversity ‘qualifying the principle of selection “solely on merit”’: above n 23, 22.

81 Rackley, above n 3, 195 (emphasis in original).

82 Ibid.

83 In addition to Lady Hale in the United Kingdom, see also Tom Bingham, ‘The Law Lords: Who Has Served’ in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds) *The Judicial House of Lords 1876–2009* (Oxford University Press, 2009) 122, 125–6; Etherton, above n 34, 746. In Australia, see Stephen Gageler, ‘Judicial appointment’ (2008) 30 *Sydney Law Review* 159. Cf Lords Phillips and Carswell quoted in Select Committee on the Constitution, above n 76, 32; Sumption, above n 23, 22.

84 Select Committee on the Constitution, above n 76, 32–3; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia’s Judicial System and the Role of Judges* (2009) 23.

There are certainly a number of real differences between the latter and the United Kingdom's new Supreme Court – just as there were between the High Court and the Appellate Committee of the House of Lords. Not the least of these, which may explain variations between the two jurisdictions as to the intensity or specific contours of the debate on judicial diversity and collective decision-making practices, is the human rights jurisdiction which the final court of the United Kingdom has enjoyed since 2000. But, on a more day-to-day level, Paterson's book makes distinctions between institutional practices and culture very apparent – and some will probably astonish those who have not examined the institutional developments in the United Kingdom closely in recent years. But the fundamental issues across both books are directly accessible and relevant to contemporary Australian thought about senior courts, but most especially to the topic of judicial appointments – which still awaits lasting and meaningful reform.