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## Feminist Judgments on the UK Supreme Court

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### Biographies:

Rosemary Hunter is Professor of Law and Socio-Legal Studies at the University of Kent. Her research interests are in feminist legal scholarship, family law and procedure, judging and the judiciary and access to justice. She is a founding editor of the online, open access journal *feminists@law* and was one of the organizers of the UK, Australian and New Zealand Feminist Judgment Projects. Her most recent book is *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times*, with Anne Barlow, Janet Smithson and Jan Ewing (Palgrave Macmillan, 2017).

Erika Rackley is Professor of Law at the University of Kent. Her research is on judicial diversity and the nature of judging, feminist legal history and image-based sexual abuse (including 'revenge porn'). She co-led the UK Feminist Judgments Project (with Rosemary Hunter and Clare McGlynn) and, more recently, the Women's Legal Landmarks Project (with Rosemary Auchmuty), which involved over 120 academics, lawyers, activists and judges writing about key legal landmarks – cases, statutes and events – for women from c.950-2018. The landmarks are published as *Women's Legal Landmarks: A Celebration of the History of Women and Law* (Hart/Bloomsbury, 2018).

### Abstract:

*Prompted by two of the premises of feminist judgment-writing projects – that feminist judgments are relatively rare in the 'real world', and that they make a valuable contribution to jurisprudence and to the quality of justice – this article explores feminist judgment writing on the UK Supreme Court. Drawing on a database of over 570 cases, the article investigates who writes feminist judgments on the UK Supreme Court, what kind of feminist judgments they write, and what the feminist judgments add to the Court's jurisprudence and the quality of justice it dispenses. It finds that among judges employing feminist reasoning, Lady Hale was by far the most active, but she was not alone, with Lords Kerr and Wilson also writing several feminist judgments. A range of different type of feminist reasoning was deployed and feminist judgments generally did constitute better judging, although their impact tended to be more discursive than substantive. The article concludes by considering the implications of these findings for both feminist debates and for the UK Supreme Court and the litigants appearing before it.*

## Feminist Judgments on the UK Supreme Court

Rosemary Hunter and Erika Rackley\*

### *Introduction*

It is fair to say that feminist judgment writing has taken the academic world by storm.

Scholars in Canada, the UK, Northern/Ireland, Australia, the USA, New Zealand, Scotland, India, Africa and in international law have re-written judgments in their jurisdictions from a feminist perspective.<sup>1</sup> The feminist judgments they have produced are informed by a feminist consciousness, feminist theory, feminist values and/or feminist methods, and aim to be inclusive of women's lives and experiences (and often the lives and experiences of others traditionally marginalized from the law) and to achieve gender justice.<sup>2</sup>

The feminist judgment projects as a whole aim to show how cases could – and should – have been decided differently. One of the foundational premises of these projects is that

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<sup>1</sup>: Women's Court of Canada, "Special Issue: Rewriting Equality" (2006) 18:1 *Canadian Journal of Women and the Law* 1; Rosemary Hunter, Claire McGlynn & Erika Rackley, eds, *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010); Heather Douglas et al, eds, *Australian Feminist Judgments: Righting and Re-Writing Law* (Oxford: Hart Publishing, 2014); Kathryn M Stanchi, Linda L Berger & Bridget J Crawford, eds, *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (New York: Cambridge University Press, 2016); Máiréad Enright, Julie McCandless & Aoife O'Donoghue, eds, *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Oxford: Hart Publishing, 2017); Elisabeth McDonald et al, eds, *Feminist Judgments of Aotearoa/New Zealand: Te Rino - A Two-Stranded Rope* (Oxford: Hart Publishing, 2017); Bridget J Crawford & Anthony C Infanti, eds, *Feminist Judgments: Rewritten Tax Opinions* (New York: Cambridge University Press, 2017); Women's Court of Canada, "Rewriting Equality II" (2018) 30:2 *Canadian Journal of Women and the Law* 197; Loveday Hodson & Troy Lavers, eds, *Feminist Judgments in International Law* (Oxford: Hart Publishing, 2019); Sharon Cowan, Chloë Kennedy & Vanessa E Munro, eds, *Scottish Feminist Judgments: (Re)Creating Law from the Outside In* (Oxford: Hart Publishing, 2019); Feminist Judgments Project: India: <https://fjpiindia.wixsite.com/fjpi>; African Feminist Judgments Project: <https://www.lawandglobaljustice.com/the-african-feminist-judgments-project/>.

<sup>2</sup>: See further Rosemary Hunter, "Can Feminist Judges Make a Difference?" (2008) 15 *International Journal of the Legal Profession* 7; Rosemary Hunter, "Feminist Judging in the 'Real World'" (2018) 8:9 *Onati Socio-Legal Series* 1275.

feminist judging does not occur sufficiently often in the ‘real world’<sup>3</sup> – hence, there are many decided cases calling out for feminist rewriting, and the projects aim to model feminist judgment-writing for the benefit and future reference of ‘real world’ judges.<sup>4</sup> The other foundational premise is that feminist judging is valuable. Judgments taking a feminist approach are likely to be more informed about what is at stake and more inclusive of the breadth of human experience than those not adopting such an approach.<sup>5</sup> Feminist judging is not a form of bias but a method of correcting existing biases and blind spots in adjudication.<sup>6</sup> It involves judging ethically, with care and responsibility, and improves the quality of justice by delivering judgments which do not simply reinforce existing configurations of power, privilege and domination.

Yet while the production of fictional feminist judgments has blossomed, there has been little systematic investigation of the extent to which and the ways in which recognizably feminist judgments are being written in the ‘real world’. There is a small but growing literature exploring the feminism – and feminist judgment writing – of ‘real world’ judges,<sup>7</sup> but this literature has focused on individual judges rather than courts. This article

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<sup>3</sup> The scare quotes around ‘real world’ indicate that the term refers to only one (conventional) understanding of reality. There is a sense in which the feminist judges and judgments of the feminist judgment projects are equally ‘real’. See also Hunter, “Feminist Judging in the ‘Real World’”, *supra* n 2.

<sup>4</sup> See Diana Majury, “Introducing the Women’s Court of Canada” (2006) 18:1 *Canadian Journal of Women and the Law* 1 at 2.

<sup>5</sup> Brenda Hale, “A Minority Opinion?” (2008) 154 *Proceedings of the British Academy* 319; Hunter, “Can Feminist Judges Make a Difference?”, *supra* n 2.

<sup>6</sup> Rosemary Hunter, “Can Feminist Judges Make a Difference?”, *supra* n 2 at 15-27; Rosemary Hunter, “An Account of Feminist Judging” in Hunter, McGlynn & Rackley, eds, *Feminist Judgments*, *supra* n 1, 30 at 30-35.

<sup>7</sup> E.g. Susanna Sherry, “Civic Virtue and the Feminine Voice in Constitutional Adjudication” (1986) 72 *Virginia Law Review* 543; Judith O Brown, Wendy E Parmet & Mary E O’Connell, “The Rugged Feminism of Sandra Day O’Connor” (1999) 32 *Indiana Law Review* 1219; Elizabeth Sheehy, ed, *Adding Feminism to Law: The Contributions of Justice Claire L’Heureux-Dubé* (Toronto: Irwin Law, 2004); Beverley Baines, “But Was She a Feminist Judge?” in Kim Brooks, ed, *Justice Bertha Wilson: One Woman’s Difference* (Vancouver: UBC Press, 2010) 211; Rosemary Hunter, “Justice Marcia Neave: Case Study of a Feminist Judge” in Ulrike Schultz & Gisela Shaw, eds, *Gender and Judging* (Oxford: Hart Publishing, 2013) 399; Heather Douglas & Francesca Bartlett, “Practice and Persuasion: Women, Feminism and Judicial Diversity” in Rebecca Ananian-Welsh & Jonathan Crowe, eds, *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Sydney: Federation Press, 2016) 76; Rosemary Hunter & Danielle Tyson, “Justice Betty King: A Study of Feminist Judging in Action” (2017) 40 *UNSW Law Journal* 778; Hunter, “Feminist Judging in the ‘Real World’”, *supra* n 2.

contributes to and extends that literature by presenting a systematic analysis of feminist judgment writing on the UK Supreme Court (UKSC). Our aim has not been to quantify the exact proportion of UKSC cases which include feminist judgments. Rather, we set out to answer three questions: firstly, who writes feminist judgments on the UKSC? Lady Hale, the Court's current President, is well known as a feminist judge and author of feminist judgments, but is she the only member of the Court writing feminist judgments? Secondly, what does feminist judging on the UKSC look like? What strands of feminism or different feminist approaches are evident in the Court's feminist judgments? Thirdly, what (if any) value do the feminist judgments identified add to the UKSC's decision-making? While we have asked these questions of the UKSC, the methodology we adopted to answer them could clearly be applied to other courts, as well as individual judges.

The article begins with a description of our methodology which involved first identifying a sub-set of cases for analysis which were most likely to give rise to instances of feminist judging, and then engaging in close textual analysis of all the judgments in those cases to identify any feminist reasoning. We go on to detail our findings in terms of which judges employed feminist reasoning in those cases, the types of feminist reasoning discovered, and the extent to which feminist reasoning might be said to have 'added value' to the Court's jurisprudence and the quality of justice dispensed. We conclude by considering the implications of our findings, and further questions that arise, in relation to both debates within feminist legal scholarship, and the future of feminist judgment-writing on the UK Supreme Court.

### ***The UK Supreme Court***

The UKSC was established in 2009 at the apex of the court system of the United Kingdom. It is the final court of appeal for civil cases in the UK and for criminal cases in England, Wales and Northern Ireland.<sup>8</sup> Prior to its establishment, final appellate jurisdiction in the UK was exercised by the Appellate Committee of the House of Lords. However as a Committee of the House of Lords, its members were also part of the legislature, entitled to sit in the House of Lords in its legislative capacity. The advent of the Supreme Court was designed to effect full constitutional separation between the legislature and the judiciary.

The Court has twelve members, but unlike many other apex courts it does not sit en banc. Cases are usually heard by a panel of five Justices, although in certain cases raising issues of high legal, constitutional or public importance, the size of the panel is increased to seven, nine or exceptionally eleven Justices.<sup>9</sup> Panels for individual cases are constituted on the basis of a combination of expertise, workload/availability, and any perceived need for balance among Justices who might take different views on an issue.<sup>10</sup> Draft panels are drawn up by the Court's Registrar and approved by the President and Deputy President. The smaller size of panels and differing combinations of Justices mean that judicial conversations and opportunities for persuasion vary between cases. Nevertheless, the court has tended to

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<sup>8</sup>. Under the terms of Scottish devolution, criminal cases are finally decided in the Scottish courts rather than by the UK Supreme Court.

<sup>9</sup>. See the panel numbers criteria at <https://www.supremecourt.uk/procedures/panel-numbers-criteria.html>. To date the court has sat as a panel of eleven Justices only twice, in the two Brexit cases: *R (on the application of Miller and another) v Secretary of State for Exiting the European Union*, [2017] UKSC 5; *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41. Note that members of the Supreme Court also sit on the Privy Council, which is the final court of appeal for a number of British Commonwealth countries. Our analysis relates only to UK Supreme Court decisions and not to Privy Council decisions.

<sup>10</sup>. Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Oxford: Hart Publishing, 2013) at 72. See also Graham Gee et al., *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge: Cambridge University Press, 2015) at 199; Rosemary Hunter & Erika Rackley, "Judicial Leadership on the UK Supreme Court" (2018) 38 *Legal Studies* 191 at 209-213.

exhibit high levels of agreement, with seventy-seven percent of cases in 2009-15, for example, being decided unanimously.<sup>11</sup>

Until very recently only one woman – Lady Hale – had ever sat on the Court.<sup>12</sup> She was joined in 2017 by Lady Black, and in 2018 by Lady Arden. Hale was appointed Deputy President of the Court in 2013 and became its President in September 2017. She will leave the Court when she reaches the statutory retirement age of seventy-five in January 2020. At that point, the Court will revert to only two woman Justices as Hale will be replaced by a man.<sup>13</sup>

Lady Hale is a prominent and self-identified feminist judge.<sup>14</sup> Her feminist ‘set pieces’ – often, though not always, in cases involving ‘women’s issues’ – are well known and widely discussed.<sup>15</sup> But this does not necessarily mean there is, or has been, only one writer

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<sup>11</sup> Authors’ data. For some periods within this timeframe the level of unanimity was even higher – under the leadership of Lord Neuberger as President and Lord Hope as Deputy President it was eighty-two percent. See also Paterson, *Final Judgment*, *supra* n 10 at 113, who notes that the UK Supreme Court was more likely to be unanimous than the Canadian Supreme Court, the High Court of Australia or the US Supreme Court. Tom Poole & Sangeeta Shah, “The Law Lords and Human Rights” (2011) 74 *Modern Law Review* 79 at 87 show a similar level of unanimity on the House of Lords.

<sup>12</sup> Lady Hale sat alone on the House of Lords and subsequently the UK Supreme Court for almost fourteen years.

<sup>13</sup> Three Supreme Court Justices will retire in 2020: Lady Hale, Lord Wilson and Lord Carnwath. In July 2019 the Ministry of Justice announced their replacements as (in order): Lord Justice Nicholas Hamblen, Lord Justice George Leggatt (both from the Court of Appeal for England and Wales) and Professor Andrew Burrows (Oxford University).

<sup>14</sup> See, e.g., Hale, “A Minority Opinion?”, *supra* n 5. In her earlier academic career, Hale co-authored the first English textbook on women and law: Susan Atkins & Brenda Hoggett, *Women and the Law* (Oxford: Basil Blackwell, 1984; reissued London: Institute of Advanced Legal Studies, 2018, available at [https://humanities-digital-library.org/index.php/hdl/catalog/book/atkins\\_hoggett](https://humanities-digital-library.org/index.php/hdl/catalog/book/atkins_hoggett)).

<sup>15</sup> A ‘set piece’ is a judgment in which the judge makes a deliberate statement comprehensively setting out her or his (different) approach to the issue in dispute. (The term is derived from the sporting arena where it refers to situations in which tactics and routines are worked out in training in advance of matches and played out on the field according to the set plan.) For examples of Hale’s feminist ‘set piece’ judgments, see, e.g., *Parkinson v St James and Seacroft Hospital NHS Trust*, [2001] EWCA Civ 560; *K v Secretary of State for the Home Department*; *Fornah v Secretary of State for the Home Department*, [2006] UKHL 46; *Radmacher v Granatino*, [2010] UKSC 42; *Yemshaw v London Borough of Hounslow*, [2011] UKSC 3; *R (on the application of McDonald) v Royal Borough of Kensington and Chelsea*, [2011] UKSC 33; *Montgomery v Lanarkshire Health Board*, [2015] UKSC 11. See discussion in Erika Rackley, “Difference in the House of Lords” (2006) 15 *Social and Legal Studies* 163; Nicolette Priaulx, *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice* (London: Routledge-Cavendish, 2007); Erika Rackley, “What a Difference Difference Makes: Gendered Harms and Judicial Diversity” (2008) 15 *International Journal of the Legal Profession* 37; Brigitte Clark, “Ante-Nuptial Contracts after *Radmacher*: An Impermissible Gloss?” (2011) 33 *Journal of Social Welfare and Family Law* 15; Robert

of feminist judgments on the UKSC bench. Not all feminist judgments are written by self-declared feminists. Indeed, one of the dangers of looking for feminist decision-making in the judgments of someone who is avowedly feminist is the risk of confirmation bias: you find (only) what you are looking for. Nor are feminist judgments necessarily written by women, just as not all women judges will write feminist judgments. Hence, in order to answer our first question about who writes feminist judgments on the UKSC, this article does not focus only on Lady Hale's high profile feminist judgments, but rather draws on a systematic analysis of all UKSC cases decided from the Court's inception in 2009 to the end of Lord Neuberger's Presidency in 2017.<sup>16</sup> Taking this approach, we find that half of the Justices authored or co-authored a judgment that included feminist reasoning. As expected, Lady Hale is exceptional, making the largest contribution to feminist judgment writing during the period. However, two other Justices, Lords Kerr and Wilson, also wrote feminist judgments with some frequency.

### ***Methodology: Identifying Feminist Judgments***

Our primary database consisted of all decisions issued by the Supreme Court over an almost eight-year period from its inception in October 2009 to the end of Lord Neuberger's Presidency. Lord Neuberger retired in August 2017, and the last decision by the Court under his Presidency (*Commissioner of Police of the Metropolis v DSD and another*, [2018] UKSC 11) was issued in February 2018. This amounted to a total of 571 decisions.<sup>17</sup>

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George, "In Defence of Dissent: *R (McDonald) v Royal Borough of Kensington and Chelsea*" [2011] *Family Law* 1097; Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (London: Routledge, 2013) 36; Robert Heywood & Jose Miola, "The Changing Face of Pre-Operative Medical Disclosure: Placing the Patient at the Heart of the Matter" (2017) 133 *Law Quarterly Review* 296.

<sup>16</sup> The article thus does not consider the possible effect on the Court of having a feminist President, although we intend to investigate this question in future work.

<sup>17</sup> For a quantitative analysis of these cases, see Hunter and Rackley, *supra* n 10.



Our previous theoretical analysis of and empirical research on ‘real world’ feminist judgments suggested that, while feminist legal scholarship has developed analyses of just about every area of law, this does not mean that feminist judgments are likely to be encountered in every area of law.<sup>18</sup> Rather, practical opportunities for feminist judging are most likely to arise in cases that at least potentially raise feminist or gender issues (defined below). Although feminist judgments may be written in cases not raising such issues, previous experience suggested that finding such judgments was akin to searching for a needle in a haystack. The time-consuming and intensive work involved in closely reading every judgment issued by the Court would yield little benefit in terms of the identification of feminist judgments. We therefore focused our in-depth qualitative analysis on the subset of cases we identified as raising feminist/gender issues. In so doing, we may have missed some feminist reasoning in other cases, but we are likely to have captured the bulk of feminist reasoning adopted by members of the Court, in terms of both its occurrence and range.

From our dataset of 571 cases we identified 114 cases raising (potentially) feminist or gender issues, as described below. We undertook close readings of these cases, making a note of the specific factual issues and legal questions raised, the result, the Justices on the case and their role in the decision, whether any feminist reasoning was used, and if so, whether this was in a leading, concurring or dissenting judgment, and the type of reasoning adopted. We recorded the reasoning adopted by each Justice in detail and produced a summary table of the cases to allow for category counts, cross-referencing, and comparison.

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<sup>18</sup> For specific discussion of this point, see Hunter, ‘Justice Marcia Neave’, *supra* n 7. And see further Hunter, ‘Feminist Judging in the ‘Real World’’, *supra* n 2.

### *Feminist/Gender Issues*

The aim of creating our subset of ‘feminist/gender’ cases was essentially pragmatic – to enable us to focus our in-depth analysis of judgments in an informed and productive way. Consequently, we did not aim to reify the feminist/gender category, to draw hard and fast boundaries around it, or to make strong claims about the proportion of UKSC cases which fell within it. We took a deliberately expansive approach to the identification of cases which raised actual or potential feminist or gender issues, and in cases of doubt, erred on the side of inclusion. The fact that others might disagree with our choices around the margins does not affect the validity of our analysis.

We included cases in our subset if they fell within one (or more) of four possible groups: ‘feminist’, ‘gender’, ‘potentially feminist’ and ‘potentially gender’ cases. Cases raised a ‘feminist’ issue when they involved the situation of women collectively (as a class),<sup>19</sup> or a subject central to feminist theory. This group included cases relating to mothering and family relationships,<sup>20</sup> gender-based and sexual violence,<sup>21</sup> sexually transmitted debt,<sup>22</sup> sex or pregnancy discrimination and equal pay,<sup>23</sup> family property,<sup>24</sup> autonomy and women’s

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<sup>19</sup> As opposed to simply involving individual women. Thus, the fact that one or both of the parties were women did not necessarily make a case ‘feminist’.

<sup>20</sup> E.g. *In the matter of E (Children)*, [2011] UKSC 27; *R (on the application of Quila and another) v Secretary of State for the Home Department*, [2011] UKSC 45; *In the Matter of S (a Child)*, [2012] UKSC 10; *BH and another v The Lord Advocate and another (Scotland)*, [2012] UKSC 24; *HH v Deputy Prosecutor of the Italian Republic, Genoa*, [2012] UKSC 25; *ANS and another v ML (Scotland)*, [2012] UKSC 30; *In the matter of J (Children)*, [2013] UKSC 9; *R (on the application of Agyarko) v Secretary of State for the Home Department*, [2017] UKSC 11.

<sup>21</sup> E.g. *Yemshaw v London Borough of Hounslow*, [2011] UKSC 3; *R v Brown (Northern Ireland)*, [2013] UKSC 43; *Michael and others v Chief Constable of South Wales Police and another*, [2015] UKSC 2.

<sup>22</sup> *Royal Bank of Scotland v John Patrick McCormack Wilson and another (Scotland)*, [2010] UKSC 50; *AB v Her Majesty’s Advocate (Scotland)*, [2017] UKSC 25.

<sup>23</sup> *Jessy Saint-Prix v Secretary of State for Work and Pensions*, [2012] UKSC 49; *North and others v Dumfries and Galloway Council (Scotland)*, [2013] UKSC 45; *South Lanarkshire Council v The Scottish Information Commissioner*, [2013] UKSC 55; *Mirga v Secretary of State for Work and Pensions*, [2016] UKSC 1; *Samin v Westminster City Council*, [2016] UKSC 1.

<sup>24</sup> E.g. *Jones v Kernott*, [2011] UKSC 53; *Gow v Grant (Scotland)*, [2012] UKSC 29; *Prest v Petrodel Resources Ltd*, [2013] UKSC 34; *Sharland v Sharland*, [2015] UKSC 60; *McDonald v Newton or McDonald*, [2017] UKSC 52.

bodies,<sup>25</sup> trafficking and labour exploitation of women,<sup>26</sup> and access to reproductive services.<sup>27</sup> It also included cases which addressed areas of feminist concern such as marriage, care, and dependency.<sup>28</sup> In *R (on the application of Johnson) v Secretary of State for the Home Department*, [2016] UKSC 56, for example, while the substantive issue concerned whether the Secretary of State was able to deport a Jamaican citizen following his release from prison, the fact that this was an issue at all was the result of the valorization of marriage.<sup>29</sup> Johnson was born in Jamaica to an unmarried Jamaican mother and British father in the mid-1980s. Under the law at the time of his birth he was a Jamaican citizen. He had moved to the UK with his father when he was four, but neither he, nor his father on his behalf, had applied for British citizenship. Had Johnson's parents been married when he was born, or had married later, or had his mother been the parent with British citizenship, he would not have needed to do so. He would have been a British citizen not liable to deportation, whatever his criminal activity. His purported removal was therefore "based solely on the accident of [his] birth outside wedlock", and as such, the Court held, was unlawfully discriminatory under Article 14 of the European Convention on Human Rights.<sup>30</sup>

Cases raised gender issues when they concerned men collectively (as a class) and/or differences between men and women, such as the assumed roles of mothers and fathers in

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<sup>25</sup> *R (on the application of McDonald) v Royal Borough of Kensington and Chelsea*, [2011] UKSC 33; *Montgomery v Lanarkshire Health Board*, [2015] UKSC 11; *Amoena (UK) Limited v Commissioners for Her Majesty's Revenue and Customs*, [2016] UKSC 41.

<sup>26</sup> *Hounga v Allen and another*, [2014] UKSC 47; *Taiwo v Olaigbe and another*, [2016] UKSC 31.

<sup>27</sup> *Greater Glasgow Health Board v Doogan*, [2014] 68; *R (on the application of A and B) v Secretary of State for Health*, [2017] UKSC 41.

<sup>28</sup> E.g. *R (on the application of McDonald) v Royal Borough of Kensington and Chelsea*, [2011] UKSC 33; *Rabone and another v Pennine Care NHS Trust*, [2012] UKSC 2; *R (on the application of KM) (by his mother and litigation friend JM) v Cambridgeshire County Council*, [2012] UKSC 23; *Aintree University Hospitals NHS Foundation Trust v James*, [2013] UKSC 67.

<sup>29</sup> [2016] UKSC 56, per Lady Hale at [1].

<sup>30</sup> *Ibid* at [34].

parenting and protecting children,<sup>31</sup> and gender differences in survivor pensions,<sup>32</sup> provision of local authority care,<sup>33</sup> access to state benefits and welfare reform,<sup>34</sup> and the location and availability of “approved premises” for offenders released from prison on license.<sup>35</sup> In other cases a substantive gender issue underlay an ostensibly procedural legal issue. For example in *Beghal v Director of Public Prosecutions*, [2015] UKSC 49, Mrs Beghal, a French national ordinarily resident in the UK, was stopped and questioned while passing through immigration at East Midlands Airport. She had been visiting Paris with her children, where her husband, a French national, was being held on terrorism charges. She refused to answer most questions and later pleaded guilty to willfully failing to comply with the requirement to answer questions under Schedule 7 the Terrorism Act 2000. While the Court considered, and confirmed, the compatibility of the power to stop, search, and detain a person travelling through a port or across a border without suspicion with the UK’s obligations under the European Convention on Human Rights, we classified this as a gender case as it was clear that it also raised issues in relation to the treatment of women, and wives in particular, as being guilty by association. Similarly, in *R (on the application of Mosley (in substitution of Stirling Deceased)) v London Borough of Haringey* [2014] UKSC 56, the London Borough of Haringey introduced a new scheme for the payment of Council Tax Benefit, under which the appellant would have to pay more. While the issue for the Court was whether Haringey’s consultation process had met the requirements of procedural fairness, were the new

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<sup>31</sup> E.g. *R (on the application of L) v Commissioner of Police of the Metropolis*, [2009] UKSC 3; *Principal Reporter v K and others (Scotland)*, [2010] UKSC 56; *AR v RN*, [2015] UKSC 35; *In the matter of EV (A Child) (Scotland)*, [2017] UKSC 15.

<sup>32</sup> *In the matter of an application by Denise Brewster for Judicial Review (Northern Ireland)*, [2017] UKSC 8.

<sup>33</sup> *R (on the application of McDonald) v Royal Borough of Kensington and Chelsea*, [2011] UKSC 33.

<sup>34</sup> *R (on the application of Mosley (in substitution of Stirling Deceased)) v London Borough of Haringay*, [2014] UKSC 56; *R (on the application of SG and others) v Secretary of State for Work and Pensions*, [2015] UKSC 16; *Nzolameso v City of Westminster*, [2015] UKSC 22; *R (on the application of Carmichael and Rourke) (formerly known as MA) and others) v Secretary of State for Work and Pensions*, [2016] UKSC 58.

<sup>35</sup> *R (on the application of Coll) v Secretary of State for Justice*, [2017] UKSC 40.

scheme to be retained it would have a significantly adverse impact on single mothers living with child dependent/s, who were more likely to be in receipt of Council Tax Benefit.<sup>36</sup>

Potentially feminist cases included those where the issue in the case itself was non-feminist, but it was related to, or likely to inform understandings of, a feminist issue. Most obviously, this included cases involving discrimination on grounds other than sex or pregnancy, but where the interpretation of the law would affect future sex and pregnancy discrimination cases.<sup>37</sup> We also included in this category cases involving the application of the public sector equality duty<sup>38</sup> and the right to speak publicly about experiences and consequences of sexual abuse.<sup>39</sup> Cases raised potential gender issues where the broader topic or subject matter predominately affected women, although the particular facts of the case at hand did not. Examples included part-time and precarious working,<sup>40</sup> and the payment or recovery of state benefits. In *Manchester City Council v Pinnock*, [2010] UKSC 45, for example, the question for the Court concerned whether the possession order issued by the Council following serious anti-social behaviour by members of the appellant's family was disproportionate and, as such, had violated his right to respect for his home under Article 8 of the European Convention on Human Rights. We classified this case as raising a potential gender issue because, although the tenant involved was the father in this instance,

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<sup>36</sup> In 2013, single men and women claimed Council Tax Benefit in more or less equal numbers, however ninety-four percent of single Council Tax Benefit recipients living with one or more child dependant/s were women (Department for Work and Pensions, *Housing Benefit and Council Tax Benefit caseload summary statistics: February 2013* (2013): <https://www.gov.uk/government/statistics/housing-benefit-and-council-tax-benefit-caseload-statistics-published-from-november-2008-to-present>).

<sup>37</sup> E.g. *Patmalniece v Secretary of State for Work and Pensions*, [2011] UKSC 11; *Homer v Chief Constable of West Yorkshire Police*, [2012] UKSC 15; *Seldon v Clarkson Wright and Jakes (A Partnership)*, [2012] UKSC 16; *X v Mid Sussex Citizens Advice Bureau and others*, [2012] UKSC 59; *Bull and another v Hall and another*, [2013] UKSC 73; *Akerman-Livingstone v Aster Communities Ltd*, [2015] UKSC 15.

<sup>38</sup> *Hotak v London Borough of Southwark*, [2015] UKSC 30.

<sup>39</sup> *James Rhodes v OPO (by his litigation friend BHM) and another*, [2015] UKSC 32.

<sup>40</sup> E.g. *O'Brien v Ministry of Justice*, [2010] UKSC 34; *Autoclenz Limited v Belcher and Others*, [2011] UKSC 41; *The President of the Methodist Conference v Preston*, [2013] UKSC 29.

responsibility for the (anti-social) behaviour of family members tends to fall disproportionately on women as single mothers.<sup>41</sup>

In classifying cases as (potentially) feminist/gender we did not seek to elevate these classifications to terms of art. Rather, as noted above, we used them heuristically to help us to pinpoint the kinds of cases most apt to elicit feminist judgments. There are clearly overlaps between the four groups of cases,<sup>42</sup> and others might classify individual cases differently. The precise classification of each case does not affect the analysis. Their collective purpose was simply to encourage us to think broadly about the kinds of cases in which feminist judgments might be found. Where we disagreed as to whether a case should be categorized as feminist/gender or not, we returned to the descriptions set out above and talked through our reasoning until we reached a consensus. However as noted, the fact that a handful of cases at the margins were included or excluded makes no difference to our findings.

### *Feminist Reasoning*

In identifying ‘feminist’ reasoning we again took a broad view, based on the literature on feminist judging.<sup>43</sup> This outlines two forms of feminist judicial approach: substantive and

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<sup>41</sup> According to a Ministry of Housing, Communities and Local Government report, in 2016-17, fifty-eight percent of Household Reference People in the social rented sector were women. The report continues: “This is unsurprising as lower incomes and lone parenting – both of which are more prevalent among women – mean women are generally more likely to be eligible for social housing which is allocated on the basis of need”: *English Housing Survey: Social Rented Sector 2016-17* (2017) at [1.7].

<sup>42</sup> See, e.g. *R (on the application of L) (FC) v Commissioner of Police of the Metropolis*, [2009] UKSC 3; *R (on the application of McDonald) v Royal Borough of Kensington and Chelsea*, [2011] UKSC 33; *O’Brien v Ministry of Justice*, [2013] UKSC 6; *FirstGroup Plc v Pauley*, [2017] UKSC 4.

<sup>43</sup> See, in particular, Hunter, “Can Feminist Judges Make a Difference?”, *supra* n 2; Hunter, ‘An Account of Feminist Judging’, *supra* n 6; Hunter & Tyson, “Justice Betty King”, *supra* n 7; Hunter, “Feminist Judging in the ‘Real World’”, *supra* n 2. Note that we were concerned only to identify feminist judging and judgments. We do not take the further step of considering whether Justices who wrote feminist judgments can be classified as feminist judges; cf. Beverley Baines, “Must Feminist Judges Self-Identify as Feminists?” in Ulrike Schultz & Gisela Shaw, eds, *Gender and Judging* (Oxford: Hart Publishing, 2013) 379.

procedural. Substantive feminist reasoning is reasoning which seeks to achieve gender justice and/or to implement feminist theoretical or ethical commitments, such as substantive equality, relationality, the ethic of care, reproductive justice, inclusivity, women's rights and the elimination of gender bias. Feminist processes of judging are methods and techniques which have been observed in decisions by feminist judges. These include "asking the woman question" (noting the differential impacts of apparently neutral rules on women and men, or on different social groups),<sup>44</sup> recounting the facts ("telling the story") in a way that brings previously marginalized experiences to the fore, placing the legal issues in their wider social and/or policy context, understanding the specificities of women's lives, paying attention to particularities and avoiding abstraction, believing women's accounts and affirming their experiences of violence and abuse, and citing feminist scholarship or feminist 'common knowledge'.<sup>45</sup> Our coding sheet for each judgment listed these diverse indicators of feminist reasoning and we noted whether any of them – and if so which ones – were present in any of the judgments in the case, as well as detailing how exactly these forms of reasoning were deployed or engaged.

In the course of our reading, we developed the further category of a 'missed opportunity' for feminist reasoning. This captured judgments in which a judge had gone some part of the way toward adopting a feminist approach but had ultimately failed to follow through, as discussed further below.

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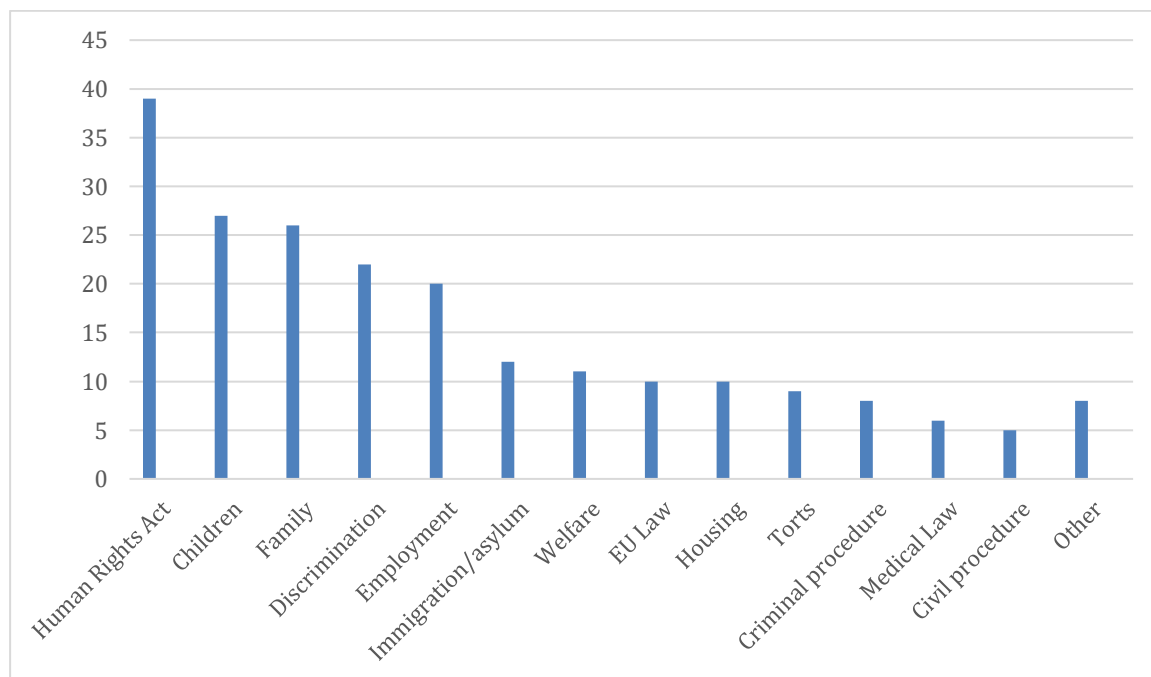
<sup>44</sup> See Katharine T. Bartlett, "Feminist Legal Methods" (1990) 103 *Harvard Law Review* 829.

<sup>45</sup> On feminist common knowledge, see Hunter, "Justice Marcia Neave", *supra* n 7 at 406-8.

### ***The Data Subset: Feminist/Gender Cases in the UK Supreme Court***

As noted above, our sub-set of feminist/gender cases consisted of 114 cases, around twenty percent of the total cases decided by the UKSC during the period of our study. The areas of law in which feminist/gender issues arise tend to be areas that involve the interests and treatment of individuals rather than corporate entities and areas which touch the lives of many women and men.<sup>46</sup> The distribution of feminist/gender cases in our subset by areas of law is shown in Figure 1. We did not attempt to identify a single or primary category for each case but rather assigned cases to as many categories as appeared relevant. Thus, the number of cases in Figure 1 sums to more than 114.

*Figure 1: Feminist/gender cases by areas of law (n=114)*



The 'Other' category included cases in banking law (1), constitutional law (1), criminal law (2), data protection(1), property law/equity (2) and tax law (1).

<sup>46</sup> See, eg, Hunter, "Justice Marcia Neave", *ibid*; Hunter, "Feminist Judging in the 'Real World'", *supra* n 2.



The notable absences from the areas covered by the UKSC's feminist/gender cases are criminal law and evidence, which have featured prominently in both feminist judgment projects and in other empirical studies of feminist judging.<sup>47</sup> This is attributable to the nature of the UKSC's caseload. The Court hears very few criminal appeals,<sup>48</sup> and where criminal cases reach the Court's docket, they tend to raise procedural or human rights issues rather than questions of legal or evidential doctrine. In effect, Courts of Criminal Appeal in the UK's constituent jurisdictions are the final arbiters of criminal cases,<sup>49</sup> with permission to appeal to the UKSC in criminal cases being relatively rarely granted.

Every Justice on the Court during our study period sat on at least one of the feminist/gender cases we identified, however the cases were not distributed evenly among the Justices. Lady Hale sat on by far the largest number of feminist/gender cases. She participated in ninety-eight out of the 114 cases (eighty-six percent). Overall, Lady Hale sat on fifty-four percent of all cases decided by the Supreme Court during the study period, so it can be seen that she was disproportionately likely to sit on feminist/gender cases. By contrast, for example, Lord Mance, a commercial law specialist appointed to the court from its inception alongside Lady Hale, sat on only twenty-four percent of the feminist/gender cases. Apart from Lady Hale, those Justices whose representation on feminist/gender cases was higher than their representation on all cases were Lords Wilson and Kerr. Lord Wilson is a specialist in family law and immigration/asylum law, while Lord Kerr specializes in human

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<sup>47</sup> See Hunter, McGlynn & Rackley, *Feminist Judgments*, *supra* n 1, Part IV; Douglas et al, *Australian Feminist Judgments*, *supra* n 1, Part III and chapter 27; Enright, McCandless & O'Donoghue, *Northern/Irish Feminist Judgments*, *supra* n 1, chapters 23, 26, 27 and 29; McDonald et al, *Feminist Judgments of Aotearoa*, *supra* n 1, Part IV; Women's Court of Canada, "Rewriting Equality II", *supra* n 1; Hunter, "Justice Marcia Neave", *supra* n 7; Hunter, "Feminist Judging in the 'Real World'", *supra* n 2.

<sup>48</sup> Authors' data: criminal appeals made up less than five percent of the Court's caseload in 2009-15.

<sup>49</sup> Scottish criminal cases are finally decided in the Scottish courts as a matter of law (see *supra* n 8), while in England & Wales and Northern Ireland this is the case *de facto*.

rights and criminal procedure, and these specializations are likely to explain their frequent presence in feminist/gender cases.

As with presence on the bench, most of the Justices wrote the leading judgment (either individually or jointly) in at least one feminist/gender case, but some did so much more frequently than others. Lady Hale wrote the highest number of leading judgments in feminist/gender cases followed by Lord Wilson and Lord Reed. Lord Reed is a generalist with a particular specialization in tax law.<sup>50</sup> However he is also one of the Court's more frequent writers of leading judgments,<sup>51</sup> and this appears to have carried over to the feminist/gender cases on which he sat.

### ***Feminist Judgments***

After carefully reading all 114 cases in our data subset and applying the approach to identifying feminist reasoning described above, we found feminist reasoning by at least one of the Justices in sixty-five cases – that is, in just over half of the feminist/gender cases. These sixty-five cases included a total of seventy-three feminist judgments: seventy written by single Justices and three joint judgments. Forty of these judgments were leads, thirteen were concurrences and twenty were dissents. Thus, it appears that feminist judgments have become to some extent 'mainstream' on the UKSC in that the majority of those that were written constituted the leading judgment in the case. Almost all of the dissenting judgments containing feminist reasoning were by either Lady Hale (eleven) or Lord Kerr (six). In fact Lord Kerr was more likely to offer feminist reasoning in dissent than when he wrote leading (three) or concurring judgments (two).

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<sup>50</sup>. Hunter & Rackley, "Judicial Leadership", *supra* n 10 at 211, Table 2.

<sup>51</sup>. *Ibid* at 206, 210, Table 1.

### *The Forms of Feminist Reasoning*

The most popular form of feminist reasoning found in the cases involved an effort to contextualize the facts and/or the legal issues, either by specific reference to the lived experiences of the parties involved, or by locating them within a wider context or backdrop.

In *R (on the application of Carmichael and Rourke) v Secretary of State for Work and Pensions*, [2016] UKSC 58, for example, Lady Hale used her concurring judgment to draw attention to the specific adverse impact that housing benefit cuts introduced by the Conservative government would have on women living in sanctuary housing<sup>52</sup> – a point not noted by Lord Toulson in his leading judgment. The new discretionary housing payment scheme:

produces less certainty; it has a stricter means test; it offers different and less attractive routes of judicial challenge; it can be onerous to make applications; and it encourages short term, temporary and conditional awards. For a woman in a sanctuary scheme to have to endure all those difficulties and uncertainties on top of the constant fear and anxiety in which she lives cannot be justified.<sup>53</sup>

Similarly, in *Cameron Mathieson, a deceased child (by his father Craig Mathieson) v Secretary of State for Work and Pensions*, [2015] UKSC 47, a case involving suspension of a

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<sup>52</sup>. Under the cuts, people judged to be living in houses with more bedrooms than they needed for the size of their family had their housing benefits cut to reflect the number of bedrooms deemed necessary. This was widely dubbed the “bedroom tax”. Sanctuary housing schemes are arrangements offered to high risk victims of domestic violence to increase the safety of their homes, often including a reinforced ‘safe room’ into which they can retreat in case of intrusion by their ex-partner. Such ‘safe rooms’ were caught by the “bedroom tax”, resulting in survivors of violence having their benefits cut, meaning in many cases they could no longer afford to pay the rent or mortgage on their sanctuary house. A safety-net accompanying the cuts allowed local authorities to provide additional funding to some benefit recipients in cases of hardship, on a discretionary basis. However as Hale noted, access to this funding was far less secure and more onerous than the previous benefit provisions.

<sup>53</sup>. [2016] UKSC 58 at [77].

child's disability living allowance due to his extended stay in hospital, Lord Wilson demonstrated that this was not a hard or atypical case by referring to a number of surveys which showed that the vast majority of parents not only provided no lesser level of care when their children were in hospital but suffered increased costs in order to do so.<sup>54</sup> By contrast, Lord Mance in his concurring judgment in this case, based his reasoning on a narrower analysis of whether the Regulations treating hospitalized children differently from those not requiring hospitalization met the test of justification. He warned that courts should not be over-ready to criticize social security legislation, that lines had to be drawn which may not cater for every situation, and stated that he had found the case more finely balanced than Lord Wilson suggested.<sup>55</sup>

On other occasions, the exposition and analysis of the legal issues was supplemented by an expanded account of the facts of the case which demonstrated understanding of and empathy with the litigants' experience. This might take the form of giving a name to a previously un-named party – “we are concerned with a little girl, whom I shall call Amelia”<sup>56</sup> – or taking the time to acknowledge the grief of a parent who had lost a child:

In this day and age we all expect our children to outlive us. Losing a child prematurely is agony. No-one who reads the hospital's notes of the series of telephone calls made by this patient's father to the hospital on the night in question can be in any doubt of that.<sup>57</sup>

Another relatively frequent form of feminist reasoning utilized by the Justices in our data subset involved efforts to prevent or remedy injustice, for example by drawing

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<sup>54</sup>. [2015] UKSC 47 at [31]-[36].

<sup>55</sup> *Ibid* at [50]-[51].

<sup>56</sup>. *In the matter of B (A Child)*, [2013] UKSC 33 at [146] per Lady Hale.

<sup>57</sup>. *Rabone and another v Pennine Care NHS Trust*, [2012] UKSC 2 at [92] per Lady Hale.

attention to the impact of the decision on specific or disadvantaged groups, including references to historical injustice,<sup>58</sup> or by challenging gender bias.<sup>59</sup> *Gow v Grant (Scotland)*, [2012] UKSC 29, for example, was a case involving the provision of financial support by one former cohabitant to the other after the breakdown of their relationship. While Lord Hope's leading judgment focused on the application of the Scottish law to the facts of the case, Lady Hale used her concurring judgment to call for similar law reform in England and Wales to provide urgently needed financial remedies for cohabitants following relationship breakdown, and drew attention to the variety of sources of disadvantage which any new law would need to address:

There is a tendency to concentrate upon the younger couples who have children, where one of them suffers financial disadvantage as a result of having to look after the children both during and after the relationship ... This case is an example of such disadvantages arising in a completely different context, but one which is by no means uncommon these days: a mature couple, both of whom have been married before, each of whom has a home and an income from pensions or employment, but where one of them gives up her home and at least some of her income as a result of their living together (an occupational widow's pension, for example...). At the end of the relationship, one of them may be markedly less well off than she was at the beginning, whereas the other may be in much the same position as he was before or even somewhat better off.<sup>60</sup>

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<sup>58</sup> See, e.g., *Royal Bank of Scotland v John Patrick McCormack Wilson and another (Scotland)*, [2010] UKSC 50; *Principal Reporter v K and others (Scotland)*, [2010] UKSC 56; *R (on the application of Gujra) v Crown Prosecution Service*, [2012] UKSC 52; *R (on the application of A and B) v Secretary of State for Health*, [2017] UKSC 41.

<sup>59</sup> See, e.g., *Radmacher v Granatino*, [2010] UKSC 42; *In the matter of J (Children)*, [2013] UKSC 9; *In the matter of B (A Child)*, [2013] UKSC 33; *North and others v Dumfries and Galloway Council (Scotland)*, [2013] UKSC 45; *R (on the application of Coll) v Secretary of State for Justice*, [2017] UKSC 40.

<sup>60</sup> [2012] UKSC 29 at [51].

The use by judges of obiter comments to make a feminist point, as Hale does here, is a technique observed within the feminist judgments projects,<sup>61</sup> which we also found in several of the judgments in our UKSC data subset. The Justices made use of obiter comments, for example, in order to highlight the responsibility of public authorities, to note arguments that could have been but were not made by one or other of the parties, to draw attention to the broader implications of their judgment on related issues, or, where the decision was on a procedural matter, to express a view on how the substantive issue should be decided when it went to trial.<sup>62</sup> Some also used the opportunity to express disappointment with or disapproval of a compelled conclusion – “If there were any way in which we could legitimately rewrite the rule to produce a fairer result, I could see a persuasive case for doing so. Unfortunately I do not think this possible”.<sup>63</sup>

Other feminist judgments demonstrate an understanding of the realities of women’s lives, particularly, but not only, in relation to family relationships and domestic abuse,<sup>64</sup> or make women or gender issues visible within the narrative of the judgment. In *O’Brien v Ministry of Justice*, [2013] UKSC 6, for example, Lord Hope and Lady Hale in their discussion (and demolition) of the reasons advanced by the Ministry of Justice for not paying pensions to Recorders,<sup>65</sup> refer to the often gendered effects of discrimination against part-time

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<sup>61</sup> See, e.g., Rosemary Hunter, Clare McGlynn & Erika Rackley, “Feminist Judgments: An Introduction”, in Hunter, McGlynn & Rackley, eds, *Feminist Judgments*, *supra* n 1 at 14.

<sup>62</sup> See, e.g., *Re K (A Child) (Northern Ireland)*, [2014] UKSC 29; *Wyatt v Vince*, [2015] UKSC 14; *R (Ali) and R (Bibi) v Secretary of State for the Home Department*, [2015] UKSC 68; *R (on the application of Johnson) v Secretary of State for the Home Department*, [2016] UKSC 56.

<sup>63</sup> *AA (Somalia) v Entry Clearance Officer (Addis Ababa)*, [2013] UKSC 81 at [13] per Lord Carnwath. See also *Taiwo v Olaigbe*, [2016] UKSC 31.

<sup>64</sup> See, e.g., *Yemshaw v London Borough of Hounslow*, [2011] UKSC 3; *Jessy Saint-Prix v Secretary of State for Work and Pensions*, [2012] UKSC 49; *In the matter of B (A Child)*, [2013] UKSC 33; *Michael and others v Chief Constable of South Wales Police and another*, [2015] UKSC 2; *Sharland v Sharland*, [2015] UKSC 60; *R (on the application of Carmichael and Rourke) (formerly known as MA and others) v Secretary of State for Work and Pensions*, [2016] UKSC 58.

<sup>65</sup> A Recorder in England and Wales is a part-time (fee-paid) judge sitting in the County Court (civil jurisdiction) or Crown Court (criminal jurisdiction).

workers and use analogies from feminized areas of part-time work, such as supply teachers and agency nurses.<sup>66</sup> On other occasions feminist reasoning was more legalistic, for example, where the Justices adopted a purposive approach to the interpretation of progressive legislation,<sup>67</sup> or presented a potentially contentious (feminist) issue as a “matter of statutory interpretation”.<sup>68</sup>

Finally, we found instances where Justices made use of feminist ‘common knowledge’, that is, general feminist knowledge about women’s lives for which no evidence is required. Examples included knowledge about domestic violence and abuse,<sup>69</sup> experiences of pregnancy (including pregnancy and sex discrimination) and childbirth,<sup>70</sup> parenting and family life,<sup>71</sup> relative economic bargaining power,<sup>72</sup> and the vulnerability of victims of sexual violence.<sup>73</sup> In several cases Justices referred to feminist legal scholarship to underline their argument and/or approach.<sup>74</sup> While intersectionality was not a prominent strand of feminist reasoning within our sample, largely because relatively few of the feminist/gender cases raised intersectional issues, there were a handful of instances of such reasoning. For example *R (on the application of McDonald) v Royal Borough of Kensington and Chelsea*, [2011] UKSC 33 concerned the question of whether a local government care package for an elderly lady could include the provision of incontinence pads at night rather than assistance

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<sup>66</sup>. [2013] UKSC 6 at [58].

<sup>67</sup>. See, e.g., *North and others v Dumfries and Galloway Council (Scotland)*, [2013] UKSC 45; *South Lanarkshire Council v The Scottish Information Commissioner*, [2013] UKSC 55; *Bull and another v Hall and another*, [2013] UKSC 73; *Akerman-Livingstone v Aster Communities Ltd*, [2015] UKSC 15.

<sup>68</sup>. *Greater Glasgow Health Board v Doogan*, [2014] UKSC 68.

<sup>69</sup>. *Yemshaw v London Borough of Hounslow*, [2011] UKSC 3.

<sup>70</sup>. *Jessy Saint-Prix v Secretary of State for Work and Pensions*, [2012] UKSC 49; *Montgomery v Lanarkshire Health Board*, [2015] UKSC 11.

<sup>71</sup>. *Rabone and another v Pennine Care NHS Trust*, [2012] UKSC 2; *Humphreys v The Commissioners for Her Majesty’s Revenue and Customs*, [2012] UKSC 18.

<sup>72</sup>. *Radmacher v Granatino*, [2010] UKSC 42.

<sup>73</sup>. *R (on the application of Gujra) v Crown Prosecution Service*, [2012] 52 at [126].

<sup>74</sup>. See, eg, *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*, [2010] UKSC 31; *ZH (Tanzania) (FC) v Secretary of State for the Home Department*, [2011] UKSC 4; *R (on the application of A and B) v Secretary of State for Health*, [2017] UKSC 41; *Armes v Nottinghamshire County Council*, [2017] UKSC 60.

to go to the toilet, and Lady Hale's dissenting judgment (unlike those of her colleagues) specifically addresses the intersection of gender with age and disability in this case. *Taiwo v Olaigbe*, [2016] UKSC 31 concerned whether the mistreatment of migrant domestic workers by their employer fell within the racial discrimination provisions of the Equality Act 2010, and in her leading judgment Lady Hale refers to literature which identifies the particular vulnerability of domestic workers with precarious immigration status, the majority of whom are women.<sup>75</sup> And in *EM (Eritrea) v Secretary of State for the Home Department*, [2014] UKSC 12 Lord Kerr recognizes the particular embodied experiences of women asylum seekers when assessing their risk of inhuman and degrading treatment under Article 3 of the European Convention on Human Rights.

We noted 'missed opportunities' for feminist reasoning in fifteen of the feminist/gender cases. For example in *Amoena (UK) Ltd v Commissioners for Her Majesty's Revenue and Customs*, [2016] UKSC 41, the question was whether a mastectomy bra should be classified for tax law purposes as a bra, or as an "orthopaedic appliance", "artificial part of the body" or "other appliance...worn...to compensate for a defect or disability". In the former case customs duty would be payable but in the latter case not. While the court unanimously decided that the bra was an accessory for which no duty was payable, Lord Carnwath's leading judgment engages only minimally with the purpose and importance of a mastectomy bra. Apart from one brief reference to "lessening the psychological impact of having had the mastectomy",<sup>76</sup> the judgment prefers the relative safety of analogies with catheter drainage bags and printer cartridges.

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<sup>75</sup> *Taiwo v Olaigbe*, [2016] UKSC 31 at [25].

<sup>76</sup> [2016] UKSC 41 at [44].



As indicated in the above discussion, feminist judgments often stood out by contrast with non-feminist judgments in the same case, because they used identified techniques of feminist judging which other judgments did not use, and/or because they engaged with the substantive feminist/gender issues in the case while other judgments failed to do so. Other very clear illustrations of this contrast are found in the cases of *Yemshaw v London Borough of Hounslow*, [2011] UKSC 3 and *Radmacher v Granatino*, [2010] UKSC 42. In *Yemshaw*, the appellant argued that she had been made homeless as a result of domestic violence, triggering the Local Authority's duty under the Housing Act 1996 to re-house her. Her case hinged on the meaning of the term "domestic violence" in the legislation. Previous case law had confined the term to mean only physical violence. However in her leading judgment, Lady Hale extended its scope to encompass other forms of domestic abuse such as threatening behaviour, and psychological, emotional and financial abuse, in accordance with developing national and international understandings of domestic violence. In the same case Lord Brown delivered a concurring judgment in which he expressed considerable doubt as to whether the meaning of "violence" should be extended in this way. His judgment reflects deference to precedent and adherence to the traditional legal view of the concept of "violence", uninformed by decades of feminist theorizing, activism and law-making on the subject of domestic abuse. Yet he did not entirely reject Hale's reasoning, and ultimately concluded that his doubts did not carry him to the point of dissent.<sup>77</sup> In *Radmacher*, on the other hand, Hale's reasoning about the gendered impact of pre-nuptial contracts did not persuade the rest of the Court and she became the sole dissenter. The majority decided that pre-nuptial contracts should be recognized and given effect in English law, on classic liberal

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<sup>77</sup> *Yemshaw v London Borough of Hounslow*, [2011] UKSC 3 at [47]-[60].

grounds of liberty and autonomy,<sup>78</sup> and by analogy with any other kind of contract. Only Hale observed the salient differences between pre-nuptial contracts and arm's length commercial contracts, and the typical effects of such contracts on the equality interests of economically weaker spouses, who were usually (though not invariably) women.<sup>79</sup>

In 'missed opportunity' cases such as *Amoena*, it can be seen that the Justice offers a hint of engagement with the feminist/gender issues in the case, but quickly retreats from that engagement. In the approximately one third of the feminist/gender cases in which we found no feminist reasoning, none of the Justices engaged with the (potentially) feminist/gender issues raised by the case or deployed any of the techniques of feminist judging in their judgments.

Where feminist reasoning was present, it is notable that procedural rather than substantive approaches predominated. Contextualization, displaying understanding and empathy with litigants, making obiter comments about matters not strictly before the Court, understanding the realities of women's lives, making women or gender impacts visible in judgments, deploying feminist common knowledge and referring to feminist legal scholarship are all identified techniques of feminist judging, but they are primarily discursive strategies. They offer inclusivity in the way the judgment is written. Often they operate to lay the groundwork for a result which shifts power or material resources towards the excluded or marginalized group, but this is not always or inevitably the case. The only substantive approach to feminist judging which occurred at all frequently in the cases was that of seeking to remedy injustices, which clearly does entail an impact on the outcome of the case.

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<sup>78</sup> *Radmacher v Granatino*, [2010] UKSC 42 per Lords Phillips, Hope, Rodger, Walker, Brown, Collins and Kerr at [78].

<sup>79</sup> *Ibid* per Lady Hale at [132], [135], [137].

It is notable, too, that many of these frequently occurring forms of feminist judging are not necessarily exclusive to a feminist approach, but may equally be deployed in pursuit of other social justice agendas or a broader 'humanist' philosophy. This applies to techniques of contextualization, demonstrating understanding and empathy, making obiter comments, seeking to remedy injustices, and possibly even references to feminist legal scholarship.<sup>80</sup> Forms of feminist judgment that might be identified as unique to feminism, such as understanding the realities of women's lives, making women or gender impacts visible in judgments and deploying feminist common knowledge were found less often amongst the feminist judgments in our dataset. We do not conclude from this that our definition of feminist judging is overly broad. All of the techniques and strategies referred to have been previously identified as elements of feminist judging, and they often occurred together in particular judgments rather than in isolation. Moreover, we do not believe that the 'feminist' label is only applicable to any 'pure' residue remaining after all other possibilities have been excluded.<sup>81</sup> Rather, we would argue that because of its broadly inclusionary commitments, some elements of feminist judging – and particularly its procedural elements – are likely to appeal to and to be adopted by judges who share those commitments for whatever reason, whether generally or in the circumstances of a particular case.

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<sup>80</sup> See, e.g., *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*, [2010] UKSC 31, per Lord Walker at [92]-[93] and Sir John Dyson at [112], citing Jenni Millbank, "From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom" (2009) 13 *International Journal of Human Rights* 31 concerning the treatment of gay and lesbian asylum seekers.

<sup>81</sup> See Rosemary Hunter, Sharyn Roach Anleu and Kathy Mack, "Judging in Lower Courts: Distinguishing Conventional, Procedural, Therapeutic and Feminist Approaches" (2016) 12 *International Journal of Law in Context* 337.

*The Feminist Judgment-Writers*

Unsurprisingly, Lady Hale was responsible for the great majority of feminist reasoning found in our data subset, either as the only Justice in the case to employ feminist reasoning (in thirty-four cases) or alongside other Justices who also employed it (in a further eleven cases). The latter group of cases comprised three judgments jointly authored by Hale and another Justice, and eight cases in which Lady Hale and another Justice used feminist reasoning in separate judgments. Twenty cases included feminist reasoning by another Justice without any contribution from Lady Hale. Among these, Lords Kerr and Wilson featured the most heavily, being the only Justice in the case to offer feminist reasoning in six cases each. Overall Lady Hale (forty-two) and Lords Kerr (eleven) and Wilson (eight) were the only Justices to author more than five feminist judgments.

The majority of Lady Hale's judgments with feminist reasoning were leading judgments (twenty-seven), with eleven concurrences and five dissents. Cases in which Lady Hale gave feminist reasoning included well-known feminist 'set pieces' such as her judgments discussed above in *Yemshaw* (domestic violence), *McDonald* (incontinence pads), *Radmacher v* (prenuptial agreements) and *Carmichael* (housing benefit cuts), and her concurrence in *Montgomery v Lanarkshire Health Board*, [2015] UKSC 11 (on the standard of care expected of doctors advising women about risks and options in relation to childbirth). It is notable that a number of Lady Hale's 'set pieces' have been dissents, providing a misleading picture of her feminist influence on the Court.<sup>82</sup> In fact, we found a larger number of less high profile leading judgments in which Lady Hale offered feminist reasoning,

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<sup>82</sup> Certainly she is not – in contrast to female comparators on other apex Courts – a “great dissenter” (see Hunter & Rackley, “Judicial Leadership”, *supra* n 10 at 200-20; cf Marie-Claire Belleau and Rebecca Johnson, “Judging Gender: Difference and Dissent at the Supreme Court of Canada” (2008) 15 *International Journal of the Legal Profession*, 57.

in relation to housing and welfare benefits, matrimonial property and reproductive justice, as well as in cases concerning discrimination law, employment law (particularly on part-time workers and equal pay), parents and children, the right to family life in immigration law and in cases of threatened extradition, positive duties of the state under the Human Rights Act, and access to justice.

Lord Kerr's and Lord Wilson's feminist reasoning occurred in very similar kinds of cases to (and sometimes the same cases as) Lady Hale's, although Lord Kerr's feminist reasoning tended to be more work, crime, benefits and torts-related,<sup>83</sup> while Lord Wilson's tended to be more related to children and family law or family life,<sup>84</sup> although he also delivered strongly-worded judgments employing feminist reasoning in two modern slavery cases concerning the ill-treatment of foreign domestic workers.<sup>85</sup>

Where feminist reasoning was given by both Lady Hale and another Justice, they did not necessarily adopt the same (feminist) approach. One interesting example of this difference was found in *Re K (A Child) (Northern Ireland)*, [2014] UKSC 29. K was a seven-year-old child who had lived with his maternal grandparents in Lithuania since his birth. In 2006 his mother had moved to Northern Ireland, leaving K with the grandparents by agreement, and in 2007 a court awarded them temporary care of K. By 2012 the mother wanted K to live with her in Northern Ireland but the grandparents did not agree. Aware that a custody challenge would be expensive, she took K from school and left the country with him. The evidence was that K was now thriving in his mother's care but the grandparents

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<sup>83</sup>. See, e.g., *Baker v Quantum Clothing Group Limited and others*, [2011] UKSC 17; *Sharif v London Borough of Camden*, [2013] UKSC 10; *Michael and others v Chief Constable of South Wales Police and another*, [2015] UKSC 2; *R (on the application of SG and others) v Secretary of State for Work and Pensions*, [2015] UKSC 16; *FirstGroup Plc v Paulley*, [2017] UKSC 4.

<sup>84</sup>. See, e.g., *In the Matter of S (A Child)*, [2012] UKSC 10; *Re K (A Child) (Northern Ireland)*, [2014] UKSC 29; *Wyatt v Vince*, [2015] UKSC 14; *In the matter of B (A Child)*, [2016] UKSC 4.

<sup>85</sup>. See *Hounga v Allen and another*, [2014] UKSC 47; *Reyes v Al-Malki and another*, [2017] UKSC 61.

sought his return, and the legal question was whether they had “rights of custody” within the meaning of the Hague Convention and Brussels II Regulations governing international child abduction. Lady Hale was extremely critical of the mother’s actions in attempting to circumvent the law and held that the grandparents did have rights of custody and K should be returned to Lithuania. But she was clearly also mindful of the fact that K was now settled and well cared for in Northern Ireland, and stayed her judgment to give the mother an opportunity to regain lawful custody of her child, explaining the steps she needed to take in order to do so. Lord Wilson, in dissent, would have held that the grandparents’ rights of custody terminated on the mother’s return to Lithuania. He also placed more emphasis on the current welfare of the child than on the mother’s past behaviour. Both judges, therefore, are concerned not simply to interpret and apply the law in the abstract, but concretely to achieve a result that promotes the child’s welfare, and both recognize that the child’s welfare is integrally bound up in his relationship with his mother. We therefore identified them both as feminist judgments, as they both adopted the feminist theoretical commitment to relationality. But while Lord Wilson found a direct route to the expression of this commitment (by his interpretation of “rights of custody”), Lady Hale’s feminist reasoning was complicated by other commitments (to her view of the law and her disapproval of the mother’s law-breaking), resulting ultimately in a compromise with herself to allow for the expression of all of these commitments.

Another case which involved different feminist reasoning was *Michael and others v Chief Constable of South Wales Police and others*, [2015] UKSC 2. In this case Ms Michael had been murdered by her violent partner, although her death might have been prevented had police responded promptly to her 999 call. Her parents and children brought claims for negligence against the police, and the question for the court was whether the police owed

Ms Michael a duty of care in these circumstances. The majority held that they did not and that the claims should be struck out. In separate dissenting judgments, Lord Kerr and Lady Hale explained why they would have upheld the appeals. Lord Kerr's focus was on remedying injustice in the particular case, and on the particularity of Ms Michael's experience as a highly vulnerable and frightened victim of domestic abuse. In his view, if the police knew of an imminent threat of serious harm to a particular individual calling for urgent action, and had the means of preventing that threat and protecting the individual concerned, they should owe a duty of care and be liable if it was breached. Lady Hale, on the other hand, placed the issue in the broader context of documented inadequacies in police responses to domestic abuse. In these circumstances, the imposition of liability in negligence could lead to improvement in those responses and help to counter dismissive police attitudes towards domestic abuse.

### *The Value of Feminist Judgments*

As the above discussion demonstrates, our analysis of cases raising (potential) feminist or gender issues reinforces the value of feminist judging in terms of both discursive inclusivity and substantive justice. Substantively, in at least some cases, injustices were remedied, gendered disadvantages and biases were identified and addressed, regulations based on false premises were struck down, and progressive legislation was interpreted purposively. Evidence that these outcomes would not have occurred in the absence of feminist reasoning may be found in non-feminist dissenting judgments in the same cases which would have decided otherwise. Feminist dissenting judgments in cases where the majority's non-feminist reasoning led to a result which failed to address gender bias or disadvantage also point to the substantive value of feminist judgments, as do cases in which existing

configurations of power and advantage were reinforced and injustices were not remedied arguably due to the absence of feminist reasoning by any of the Justices.

Examples of cases where feminist reasoning was entirely absent but could have made a difference to the result included *Norris v Government of the United States of America*, [2010] UKSC 9 and *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1. In *Norris*, Mr Norris sought to resist extradition to the USA on the basis that it would cause disproportionate interference with his and his wife's right to respect for their private and family life under Article 8 of the European Convention on Human Rights. His wife had a psychiatric condition which prevented her from travelling to the USA, but if he was deported she would lose his support in the UK on which she relied. A feminist judge might have demonstrated an understanding of the importance of relational support for individual wellbeing and the exceptional harm Mrs Norris would suffer as a result of Mr Norris's deportation. But the Court found the threshold of an exceptionally serious interference with Article 8 was not reached and authorized Mr Norris's extradition. In *Mirga*, Ms Mirga was an EU national who was entitled to claim benefits in the UK only after having worked in the UK for a period of twelve months. She had worked for seven months but then left work due to her pregnancy. Lord Neuberger, with whom the other members of the Court agreed, delivered a technical legal judgment which failed to consider the impact of pregnancy on workers' rights or the generally more interrupted patterns of women's workforce participation due to family responsibilities, and Ms Mirga's claim was dismissed. Again, a feminist judgment might have reached a different conclusion.

It must also be acknowledged that in some cases, a substantive feminist outcome was reached without any assistance from feminist reasoning. For example in *Child Poverty Action Group v Secretary of State for Work and Pensions*, [2010] UKSC 54, the Department



for Work and Pensions had aggressively sought to recover benefit overpayments caused by the Department's error, without a statutory basis for doing so. While this was a gender issue in that women were the majority of recipients of benefits and the targets of overpayment recovery, the Court reached its decision that the money had been recovered from recipients unlawfully and should be repaid to them on the basis of statutory interpretation and the principles of restitution, with none of the judgments referring to the gendered effect of the Department's actions. In *McDonald v Newton or McDonald*, [2017] UKSC 52, Lord Hodge, with whom the other members of the court agreed, arrived at a broad interpretation of the concept of "matrimonial property" in the Family Law (Scotland) Act 1985 by reference to the Act's stated aims and principles, without any acknowledgement that those principles were designed largely to protect wives from financial disadvantage following divorce, or of the gendered significance of the Court's decision. Similarly, in *Hewage v Grampian Health Board (Scotland)*, [2012] UKSC 37, the complainant, who was of Sri Lankan origin, had been harassed and bullied at work leading to her constructive dismissal. She brought sex and race discrimination claims and succeeded in the Employment Tribunal (ET). That decision was overturned by the Employment Appeal Tribunal, but the Inner House of the Court of Session (the Scottish Court of Appeal) had upheld her appeal and remitted the matter to the ET. The employer now appealed to the UKSC. Lord Hope's judgment focuses on whether the ET's reasoning on appropriate comparators and tests for discrimination was correct and finds that it was, rejecting the employer's appeal, without mentioning intersectionality or the wider purpose of anti-discrimination law.

These cases are akin to those involving a feminist concurring judgment, where the same result would have been reached with or without the feminist reasoning. Such cases often involved progressive legislation and/or progressive interpretations of statutes and

directives already established by the European Court of Human Rights, and where gender injustice arose from breaches of or attempts to circumvent the law, which the Court had no difficulty in correcting. In these situations, feminist judgments did not contribute to the achievement of substantively just and inclusive outcomes. But they could still be valuable (as concurrences) in contributing feminist reasoning to highlight the gendered context and consequences of decisions and to provide legal recognition to the previously excluded.

As discussed above, discursive inclusion was found more commonly than substantive feminist reasoning in the feminist judgments within our data subset. But even in cases where the result appeared inevitable, feminist reasoning enriched the judicial discourse by demonstrating understanding of and empathy for litigants, making women and gender issues visible, and transforming feminist knowledge into legal knowledge. Discursive inclusion could, also, indirectly, help to produce substantively inclusive results. In cases which could have been decided either way, facts were understood in their wider (gendered) social context, and the law was extended to incorporate the experiences of marginalized and disadvantaged groups. Moreover, feminist dissenting judgments which drew attention to ways in which the law was unnecessarily limited or produced unjust results, laid down important markers for future reference. Notably, feminist judgments typically spoke to a larger audience than the individual parties involved in the case, and thus they helped to connect the Court to the wider context in which it operates and the public it serves.

### ***Conclusion***

In response to the assumptions made by feminist judgments projects about the extent and value of 'real world' feminist judging, we set out to answer three research questions: who writes feminist judgments on the UKSC, what does feminist judging look like in this context,

and what is its value? In order to answer these questions we focused our detailed analysis on a subset of UKSC cases which raised (potential) feminist or gender issues. The sixty-five cases including feminist reasoning we identified make up a small proportion of the Court's total decisions during the period of the study. While our methodology means that this figure cannot be definitive, we consider it to be fairly indicative of the scale, scope and nature of feminist judgment-writing on the Court during that period.

In answer to the first question, it appears that just about every Justice may write the occasional feminist judgment, but those likely to do so with any degree of regularity are those who are feminists (Lady Hale) and those who share feminism's social justice and inclusionary concerns (Lord Kerr and Lord Wilson). By taking a systematic approach, we discovered a number of leading feminist judgments given by Lady Hale which had not received much public attention, and we discovered feminist judgments given by Lord Kerr and Lord Wilson which have likewise hitherto remained below the feminist radar.

In answer to the second question, feminist judging on the UKSC appears to be largely procedural. It involves techniques and strategies associated with feminist judging rather than necessarily aiming to achieve substantive gender justice. Nevertheless, a proportion of feminist judgments did have this aim, and in a proportion of cases, as leading judgments, they both succeeded and commanded the agreement of the Court as a whole. Feminist judgments on the UKSC are certainly not confined to dissents.

Likewise, the answer to our third question – the value of feminist judgments – appears to be primarily discursive. At this level, feminist judgments always make a difference, regardless of the result of the case, by drawing attention to the gendered operations of law and its social context, by writing marginalized experiences and subjugated knowledges into the text of the law, and by providing markers or starting points for future

legal developments. The picture is more complicated with regard to whether feminist judgments make a substantive difference. Where statute and case law already reflects feminist principles, feminist reasoning is not always necessary to the achievement of a gender-just, social justice or otherwise inclusive result. However there remain many instances where this is not the case. In such instances, feminist judgments can make a substantive difference in redistributing power and material resources away from their established holders towards those who have been previously disadvantaged.

Taken together, our findings suggest that while feminist judgments may play an important role in the pursuit of substantive gender justice, they are not a panacea. Feminist judgment writing – as with all judgment writing – is often constrained, usually personality dependant and sometimes flawed. They tell us again that who the judge is matters, and that feminism should matter to judges. And they tell us that there are still a significant number of cases raising feminist or gender issues that call out for feminist rewriting.

These findings, of course, raise further questions. One is about forms of feminist reasoning which were not evident in the UKSC's feminist judgments. The feminist judgment projects, for example, have brought to bear a much wider range of feminist theoretical positions than we found in the UKSC cases. Does this suggest that 'real world' feminist judgments are inherently limited in the range of reasoning they can realistically adopt, or does the limitation observed simply reside in the judges and/or the cases within our data subset? Further research is necessary to explore this question.

A second question relates to the perennial debate about feminist engagement with law reform. If substantively feminist outcomes can follow from the application of progressive legislation without the assistance of feminist reasoning, then arguably, achieving feminist-inspired or broadly progressive laws is more important for women and other

marginalized litigants than the writing of feminist judgments. Progressive laws can be applied by any judge, whereas the converse is not true: feminist judgments cannot produce inclusive results from exclusionary statutes. On the other hand, there is always the risk that a hostile judge may deploy tools of statutory interpretation to thwart the intentions of progressive legislation. And feminist judgments are crucial to the progressive development of case law and common law. Furthermore, beyond the interests of individual litigants, the presence or absence of feminist reasoning impacts on legal discourse, legal education, and potentially on future litigants. It is clearly not a matter of either/or but of both/and.

A final question concerns the future of feminist judging on the UKSC. Lady Hale will be retiring in January 2020, and Lord Wilson will follow a few months later. Thus two of the three Justices who have done most of the feminist heavy lifting on the Court will be gone. Lord Kerr will remain for another three years. Lord Reed, who relatively frequently sat on and wrote leading judgments in feminist/gender cases, but who sole-authored only one judgment employing feminist reasoning, has been named as the next President of the Court. What of the newer appointments to the Court? Our analysis did not include the two recently appointed women, Lady Black and Lady Arden. Lady Black (like Lady Hale and Lord Wilson) has a background in family law, while Lady Arden's background is in commercial law and equity. Neither self-identifies as a feminist and while both delivered gender-sensitive judgments on occasions in the Court of Appeal,<sup>86</sup> both have reputations more as formalists than as judicial activists. Among the men appointed to the Court subsequent to the end of our study period (Lords Lloyd-Jones, Briggs, Kitchin, Sales, Hamblen, Leggatt and Burrows),

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<sup>86</sup> See, e.g., *Re S (A Child)* [2012] EWCA Civ 617 per Black LJ; *Re W (Children)* [2012] EWCA Civ 1228 per Black LJ; *Fornah v Secretary of State for the Home Department* [2005] EWCA Civ 680 per Arden LJ; *Wilson v Health and Safety Executive* [2009] EWCA Civ 1074 per Arden LJ; *Steinfeld and Keidan v Secretary of State for Education* [2017] EWCA Civ 81 per Arden LJ (dissenting).

the majority have commercial law backgrounds and no known feminist, human rights or social justice credentials.

It may be that an era of feminist judging on the UKSC is coming to an end, and we will have to rely for some time on the hope of feminist and social justice outcomes from the application of progressive laws. But these speculations once more rest on public perceptions based on high profile decisions rather than systematic analysis. Our ongoing project is to monitor UKSC judgments under the Presidency of Lady Hale and beyond to explore these questions further. We hope that others will contribute similar research from their own jurisdictions. To the extent that there continues to be a paucity of 'real world' feminist judgments, however, past, present and future feminist judgment projects will continue to show how feminist judging can – and should – be done.