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Beatriz Esther Kohen

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**Gender Differences in the Family Law Courts of the City of Buenos Aires: A view from within.**

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### **Declaration**

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## Introduction

### The research problem and objectives:

The purpose of this research is to undertake an analysis of gender differences among the judges of the Family Law Courts of the city of Buenos Aires. A previously men-dominated career, the Argentine judiciary has only quite recently begun to include women within its ranks. I shall be examining the possible implications of women's entry into the judiciary, particularly in terms of exploring the men and women judges' perceptions on whether women bring any different values to the judiciary and, if so, what those values are and what is their capacity to impact the judiciary.

The advocates of a current within contemporary feminism called "cultural feminism"<sup>1</sup> have argued that, due to their embodied capacities to give and protect human life and to their traditional roles in the private sphere as mothers and nurturers, women in our culture, have developed a distinct moral language. This language emphasises care, relationships, connection and responsibility as well as certain capacities for empathy and the care of others.

Cultural feminists have argued that because of their different social roles and life experiences, men and women develop different moral tendencies. While women tend to connection, and develop an "ethic of care", men tend to independence and autonomy and develop an "ethic of justice" or a rights approach, relating their decisions to some hierarchy of abstract principles.

Their claim is that because of women's long exclusion from the public sphere they have been unable to influence it in the past and so, it is the masculine mode, based on objective, unemotional moral judgement that has been transposed into the legal system. To cultural feminists, it would be beneficial if women brought their developed capacities into the public

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<sup>1</sup> See chap. 1

world so that their "different voice" could be heard alongside the male voice (Gilligan, 1982:174).

Women's massive entry into the professions is quite recent. Thus, it is only lately that the judiciary has become a career option for women in Argentina. Women's entry into the study of law and the legal professions in important numbers in Argentina can be traced back to the late 1960's and early 1970's; a trend similar to that observed in most Western countries. By Latin American standards, the case of professional women in Argentina is quite exceptional, let alone the number of women judges, which is relatively high, even when compared with the representation of women judges in leading nations.

In the last thirty years the number of women judges in Argentina has increased considerably, rising from nearly 0% to nearly 50% in some instances and jurisdictions. The feminisation of the judiciary, understood as a noticeable growth in the number of women in the profession, seems an ideal case study to explore the effects of the incorporation of women into a men-dominated profession.

Women judges constitute a group of women who, by virtue of holding public office, wield power in one of the three branches of the State, and make important decisions of great consequence to the lives of the people involved in legal conflicts. This explains my interest in studying this special group of women.

If one considers that the application of the law is not mechanical, but implies an interpretation and is mediated by the worldview of the judge, as Mackinson and Goldstein have put it "...apart from implying the interpretation of the law, in a broad sense, each judgement transcends the ideology of the judge" (Mackinson, 1987: 178). Seen in that perspective, neutrality on the part of the judge becomes another myth sustaining the legal system.

Paraphrasing both Wilson and McGlynn, it then makes sense to wonder, whether women judges will make a difference (Wilson, 1990: 516 and

McGlynn, 1998: 813); that is to say, whether women use their presumed characteristics to administer and interpret the law differently from men.

The site of this research is the Family Law Courts of the city of Buenos Aires. The creation of special Family Law Courts in 1989 constitutes an aspect of a general trend towards the democratisation of Argentine society, particularly of family law. In fact, the restoration of democracy encountered a very outdated family law that was lagging behind and superseded by the reality of the Argentine family. This process of democratisation also involved the passing of very important laws, such as the law on divorce, shared custody, equal rights and duties for mothers and fathers in terms of material provision for their children, equality for children born in and out of wedlock and a law on domestic violence<sup>2</sup>.

The study of the Family Law Courts is important for various reasons. In the first place, it is one of the sections of the judiciary with the highest proportion of women. This allows for a study of a section of the judiciary that has gone well beyond "tokenism" (Kanter, 1977: 228). Secondly, being a fairly small section of the judiciary, it enables work with a fairly representative sample. Thirdly, since their creation is quite recent, these courts have not yet been studied. Finally, given that family matters are closely related to gender, it seems interesting to observe whether there are differences of orientation between men and women judges.

The main purpose of this study is, then, to explore whether women judges bring into the administration of justice the values of the so called "women's culture". The fact is, however, that this is not a simple task. To investigate whether women judges make a special contribution to the administration of justice is not devoid of theoretical and methodological difficulties.

From the theoretical point of view, many questions arise that will be considered in depth in the theoretical chapter. I am referring to issues such as the significance of feminisation, whether numerical or cultural; the extent to which it can be expected that men and women perform their

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<sup>2</sup> See chap.2.

tasks differently; the weight that should be given to socialization in a traditionally masculine profession. Other related queries are whether women can effect changes on the judiciary or conversely, they need to adapt to the prevailing masculine culture of the legal profession, the extent to which one can think of feminine qualities and the way in which differences among women -race, social or religious background, sexual orientation- can be accounted for.

**The research strategy:**

From the methodological point of view, the main issue is whether the fact that women might decide differently can be observed at all. It would have been interesting to observe the judges' actual practices since such an observation could provide data that would be less mediated by the subject under study.

The difficulties of observing judges' actual practices derive from the fact that legal procedure in Argentina is written and legal files in family proceedings are confidential. Family law judges also frequently hold hearings where all or some of the members of the family meet in court, summoned by the judge, to talk things over, with the idea of promoting certain agreements between the parts in conflict. It would, of course, be very interesting to be able to observe the way judges lead such hearings. Still, only one of the 24 Courts has a Gesell Chamber from where you can watch the hearing without being seen. Apart from the ethical issues related to confidentiality that this would raise, the presence of a researcher at the hearing could be difficult to explain and quite disruptive to all the people involved. Additionally, this would presuppose the compliance of the judge.

Also, even if one could observe the process of judgement, it seems absolutely necessary to take into account the uniqueness of each case. Close consideration should be given to the difficulty of finding comparable cases in order to do comparative work. As remarked by Bothelho Junqueira in her study of Brazilian judges, this is an issue that also applies when one intends to compare judgements (Botelho Junqueira, 1997: 4).

Moreover, the small number of women judges in higher tribunals where I could have observed men and women judging the same cases prevents me, for the time being, from envisaging such a research strategy.

The hindrances described above have prompted me to adopt an alternative methodological strategy: to explore the representations, attitudes, beliefs and meanings accorded by men and women family law judges to women's entry into the judiciary. I look particularly at their opinions on whether women judges perform their work differently from men judges and at their possible contribution, if any, to the administration of justice. Such a strategy minimises problems of comparability while, at the same time, brings very interesting and new material into the analysis. It enables us to penetrate the discourse of the judges touching on the ethical and practical aspects of their work and to fully appreciate the significance the judges ascribe to the problems and dilemmas they have to face in their daily practice. This also provides the possibility of reaching a better understanding of how women and men judges perceive the effects of gender in their professional activities and values.

The methodological strategy followed in this research is mixed. In order to picture women's situation within the legal professions and find their differential participation within its different branches, I resort to the use of a quantitative methodology, drawing on different sources to obtain the relevant data. Sometimes I draw on secondary data, although I repeatedly found myself in the need to actually produce some new data. In order to explore the motivations, values and beliefs of both men and women judges, I made use of a qualitative methodology, whose purpose it is to analyse the answers provided by the judges in both a personal data questionnaire and in an in-depth interview held with them<sup>3</sup>.

Thus, two instruments for data collection were designed: one was a self-administered questionnaire that the judges had to fill in with their personal data. This aimed at obtaining a picture of this section of the judiciary. The other was the interview guide, which led me through the interview. The

objective of the interview was to explore the views and opinions of the family law judges of the city of Buenos Aires on the massive entry of women into the judiciary and its possible impact on it. Of the 24 judges that comprise the Family Law section, 14 judges -8 women and 6 men- filled in the questionnaire, while 12 judges -6 women and 6 men- agreed to an interview.

#### **Contents and structure of the thesis:**

In the Introduction I include the research subject, argue about its relevance, and make explicit the objectives of my research. I also briefly present the general methodological strategy I will use in order to meet the mentioned objectives and convey the contents and structure of the thesis.

The introduction is followed by two parts. Part I contains the three chapters that provide the background for the research with the family law judges: Chapter 1 presents the discussion of the theoretical background to be used in the study, where I map the development of feminist legal theory in order to place the theoretical frame I will be using in perspective. I also convey how this theoretical framework depicts and explains the situation of women in the legal professions in contemporary society. Chapter 2 overviews the process of Argentine women's entry into public life and the professions. It addresses the socio-historical process that has led women's entry into public life, outlines the development of the women's movement, the evolution of legislation regarding women and the family, the changes occurred in family life and women's entry into university and the professions. Chapter 3 makes the first known approach to the situation of women in the law in Buenos Aires. In it, I give an account of women's participation in various fields of the legal profession: the academy, private practice and the judiciary.

Part II conveys the findings of the research with the judges; it comprises chapters 4, 5 and 6. Chapter 4 looks into the Family Law Courts and the way these courts progressed from the time of their creation, in 1989. It

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<sup>3</sup> See further methodological appendix for a copy of the questionnaire and interview schedule.

also provides a brief history and characterisation of their composition and compares the men and women family law judges according to their personal data, educational background, civil status, career data, and their social and religious affiliation. It ends with the analysis of the men and women judges' career trajectories. The analysis is based basically on the material contained in the answers to the questionnaires, except for the last points on the judges' careers and motivations, based on the responses to the interviews.

Chapter 5 and 6 deal with the men and women judges' basic views, values and attitudes, they draw on the judges' responses to the questions in the interview. Chapter 5 is organised around the judge's professional identities and values, it explores their motives for becoming family law judges, their representations on the "ideal" family law judge, and the way they experience the power and responsibility associated to their roles. The last section of the chapter examines the explanations of men and women judges about women's massive entry into the legal profession.

Chapter 6 examines the men and women family law judges' gender conceptions and their perceptions related to the emergence of large number of women in family law and the family law judiciary. It also explores their representations on gender and their awareness of discrimination. It ends with the consideration of the judge's discourse on whether women make a particular contribution to the family law judiciary by bringing to their work any special attributes or capacities.

The thesis ends with a section on the general conclusions. Appendix 1 and 2 follow the core of the theses. Appendix 1 is on Methodology and appendix 2 contains the Bibliography.

## Chapter I - What to expect from women judges?

### The insights from feminist legal theory

#### • I - Introduction

This chapter provides the theoretical background for my study on gender differences in the family section of the judiciary in the City of Buenos Aires.

My enquiry has been informed by "cultural feminism", a current within feminist thought, that has left a profound imprint on feminist thinking about the law. This is especially so with respect to women's increasing participation in the legal system and their potential contribution to the legal realm. At the same time, this current of feminist thinking has, aroused much criticism.

Carol Gilligan (1982), the main exponent of such ideas, has argued that, due to women's embodied capacities to give and protect human life and to their historical engagement with the private sphere of society through their traditional roles of mothers and nurturers, women in western culture have developed a distinct moral language that emphasises care, relationships, connection and responsibility as well as certain capacities for empathy and the care of others. Cultural feminists have argued that, because of their different social roles and life experiences, men and women are inclined to develop different moral tendencies. While women tend to connection and develop an "ethic of care", men have a propensity to independence and autonomy and develop an "ethic of justice" or a rights approach, relating their decisions to a hierarchy of abstract principles. The claim of cultural feminists is that, because of women's long exclusion from the public sphere, they have been unable to influence it in the past; thus, it is the masculine mode, based on objective, unemotional moral judgement, that has been transposed into the legal system. In their view, it would be beneficial if women brought their developed capacities into the public world so that their "different voice" could be heard alongside the male voice (Gilligan, 1982: 74).

The increase in the number of women within the legal profession has been interpreted by scholars such as Menkel-Meadow (1985, 1989, 1995, 1996), Jack and Jack (1989), Freyer (1995) and others who, inspired by Gilligan's theory of a feminine ethic of care, have attempted to explain the issue in terms of the difference women's massive entry into the legal professions might make. They have argued that the presence of significant numbers of women in the legal profession might have a profound impact on the legal system, bringing a different perspective to the law, employing a different set of methods and seeking different results from the prevailing legal tradition. Some consideration has also been given to the possible effects that the increasing number of women judges might have on the judiciary, especially in terms of speculating about the difference women judges could make to the administration of justice, in other words, whether they approach their work in different ways to men.

As a first step towards presenting the theoretical background for my study, I intend to outline the development of feminist legal theory in order to situate "cultural feminism" in its context. I will then describe Gilligan's thought and its applications to law and other disciplines, more particularly, to the way women judges, think and speak about their professional practice. I will then consider how newer approaches have advanced in thinking about women judges and their potential contributions to the system.

## **• II- An overview of feminist legal theory**

### **1- General aspects of the development of feminist legal theory**

In the last thirty to forty years a sustained tendency towards a growing participation of women in the professions in general and especially in the legal professions has been observed in many countries within the western world. A prolific feminist academic development has been noticed as well. Particularly in Anglo-Saxon countries, the latter trends have given rise to

the production of a large body of feminist theory and some research on the connections and intersections between gender and the law.

In these countries, with a common law adversarial legal system, different from Argentina's civil tradition, feminist legal scholars have made important theoretical contributions to legal theory and practice, covering a very wide range of issues. Feminist legal theory appears as an effort to introduce feminist theory into legal discourses. It followed what had been already initiated by feminist scholars in terms of raising critical questions, specifically in relation to women's relationship to law and legal institutions in an attempt to challenge law's professed gender neutrality. (Naffine, 1990: 1; Smart, 1989: 66; Fineman, 1991: 229; Conaghan, 2000: 352 and 359)

Legal feminism constitutes an analytic, academic and transformative political endeavour seeking to overcome women's disadvantage. Although these three aspects are inextricably linked, but, since academic and political concerns occur in different spheres and are subject to diverse conditions, they might not develop in a parallel manner (Conaghan, 2000: 351). Yet during the last few decades, feminist legal theory has contributed to a series of ongoing debates and brought forward quite a few changes within the legal system itself (Naffine, 2002a and 2002b).

As legal feminism progressed and its understanding of the law broadened, law has come to be interpreted by feminist legal scholars as a manifestation of power in society that is found not only in courts, cases, legislation and statutes, but in law's implementing institutions, such as the professions of social work and law enforcement. Law is found in the discourses reflecting understandings about "law", in the beliefs and assumptions we hold about the world in which we live, and in the norms and values we cherish. (Fineman, 1991: 237) As such, feminist legal thought is to be found in different settings: in print, in the legal academy, in courts and in substantive law (Dalton, in Olsen 1995: 4-5).

It expresses and is informed by various philosophical traditions such as liberalism, socialism, critical legal studies, critical race theory, psychoanalytic perspectives, post-structuralism, post-modernism and others (Bridgeman and Millns, 1998: 11; Conaghan 2000: 358).

In an attempt to organise the production of feminist legal thinking, various authors have distinguished three phases, closely linked with feminist currents -liberal, difference, radical and post-structuralism, which stand in a particular relationship vis a vis each other. Because these currents are not mutually exclusive and do not conform to a progression in which each phase is superseded by the one that comes next, they have been compared to an "ongoing conversation" (Bridgeman, 1997: 11), "a continuing dialogue" (Greenberg, 1992: ix), an "archaeological dig into law" (Naffine, 1990: 1) and as "competing philosophies of equality" (Bynion, 1993: 141, ft.7). As a matter of fact, each phase corresponds to a deeper understanding of the relationship of women and the law (Greenberg, 1992; Naffine, 1990: 1; Bridgeman and Millns, 1998; Smart, 1995, originally 1992).

Although there are points in which these different phases are clearly opposed, they all share the belief that law has evolved as a masculine discipline that has consistently excluded women's realities, interests and perspectives. Moreover, they also privilege an interdisciplinary approach and recognise women's experience as a valid and valuable source of knowledge.

In spite of the existing differences between strands or phases within legal feminism, central recurring themes can be identified in feminist legal scholarship. These themes correspond to both theoretical and substantive issues. The former have raised questions about the law as a tool for gender oppression and its potential as a tool for change. They have challenged dominant aspects of traditional legal theory such as the public and private divide and the relevance of rights discourse. They have promoted basic theoretical debates around sameness, equality and difference, along with the discussion of autonomy and the female body.

They have disputed law's neutrality while sustaining its male bias, and have put forward the need for a feminist epistemology and the creation of a feminist jurisprudence. The latter refers to employment discrimination and job preferences; family, including issues of gender and divorce; issues of property within the family and the way they result after divorce, domestic relationships, childbearing, child caring, custody; rape, harassment; domestic violence; the legal status of different sexual orientations; the limits to state intervention and the power of the various practitioners within the legal system.

More recently, post-modernism has brought new themes to the agenda, such as the need to be aware of differences like class, race or sexual preference existing among women, (Fineman, 1991: 236; Bridgeman and Millns, 1998: 11; Graycar, 1990: 30-62). The commonality in terms of the issues to be addressed must not be overstated; on the contrary, considerable weight should be given to the actual diversity in terms of the perspectives and positions sustained by the representatives of the different strands and to the controversial nature of their relationship.

## **2- The different phases of feminist legal theory**

As Naffine (1990) explains, tracing the main trends in feminist legal theory is not an easy task. First, because the need to categorise necessarily implies the oversimplification of an extremely rich and prolific body of theoretical production. Second, because of the particular relationship these different strands of legal feminism bear vis a vis each other. Actually, rather than viewing the development of legal feminism as a theoretical progression in which each phase is superseded by the one that comes after, most authors see it as an ongoing conversation. Therefore, whereas one could find contemporary adherents to any of such strands or phases, since feminist legal theory is a dynamic discipline in the process of being constructed, we might as easily find scholars who, while shifting from one phase to the other, feel that their work is in kinship with all three phases (Naffine, 1990: 1).

As has been mentioned above, in an effort to organise the production of feminist knowledge and theorisation on the law, various authors have distinguished three approaches or phases that are closely related to different feminist currents. (Naffine, 1990: 1-23; Greenberg, 1992; Smart, 1995: 197-202; Bynion, 1993: 140-143).

In the introduction to Frug's book *Post-modern Legal Feminism*, Greenberg has identified three approaches that she outlines under the labels of the "sameness/difference" model, the "dominance" model, and "postmodernism" (Greenberg, in Frug, 1992: ix). She states that each model provides powerful insights, but also has its limitations. She sees the discussion that arises from the consideration of these models as a continuous dialogue among legal feminists. Naffine calls her three phases "the male monopoly of law", "the male culture of law" and "legal rhetoric and the patriarchal social order", and states that, technically, one can find contemporary writers belonging in any of the three phases (Naffine, 1990:2).

Carol Smart gives her own account of the development on feminist legal theory (Smart, 1995: 186-202, first published 1992). Like Greenberg and Naffine, she refers to three stages that she calls "law as sexist", "law as male" and "law as gendered". Smart observes that these developments parallel others in feminist thought, and also remarks that these three levels of argument may be found to be deployed simultaneously in some feminist work on law (Smart, 1995:186-187).

Although it would be both interesting and illuminating to examine the different phases of feminism in more detail, space constrains such an endeavour. Thus, in sections a to d below, I briefly proceed to outline the development of feminist legal theory in order to place "cultural feminism" in its context. Accordingly, the following discussion cannot go beyond a brief description and constitutes a somewhat schematic approach to the main strands within legal feminism which, as such cannot capture the nuances within each phase. Then, because of the relevance of cultural

feminism to the subject matter of this research, the latter strand is presented and discussed in more detail.

#### **a - The first phase: Liberal legal feminism**

Although one can find contemporary feminists who adhere to liberal feminism, this phase corresponds with the earlier second wave feminist critique of the law, this first approach labelled as "sameness legal feminism" by Greenberg, which Naffine calls "the male monopoly of law", and Smart, "law as sexist".

Liberal legal feminists claim that no differences should justify discrimination on the basis of sex. They ask for equality in terms of sameness of attainment and therefore of treatment. Without denying differences between men and women, advocates of this strand would argue that the differences are not innate but social, and that they do not matter, and hence should not be relevant in terms of women's advancement towards gaining the same status as men. They believe that once the barriers have been removed and stereotypes overcome, men and women could be the same. Consequently, liberal legal feminists seek for equality of opportunity with men within a hierarchical society.

Feminists of this strand have striven to create formal legal equality for women; their focus has been equality on the workplace, as a precondition for women to be able to achieve economic independence and improved life conditions. This strategy, originated from women's exclusion, was designed to secure women's access to the public arena. Its effects have been substantive law reform, an increase in the number of women in the professions and a general acceptance of a principle of non-discrimination in access to employment and promotion.

Naffine characterises the first phase as one concerned with the male monopoly of law. She considers two books that stand out as the most representative works of liberal legal feminism: *Sexism and the Law* by Sachs and Wilson (1978), where the authors examine male bias in legal thinking in Britain and America in the 19<sup>th</sup>. and 20<sup>th</sup>. centuries, and *Women*

*and the Law* by Atkins and Hogget (1984), dealing with the legal treatment and construction of British women today. These authors' focal point of interest was how men had operated to keep the public sphere as a male preserve in order to maintain their own power and keep women in their place.

Liberal scholars such as Sachs and Wilson and Atkins and Hogget saw law as a rational and fair institution, capable of being impartial, thus accepting law's account of itself when it is not dealing with women. The failure they see is that law has not developed full and effective rights for women. Thus, their aim is to fully extend legal rights to women. While the underlying principle is that law can be impartial, the objection of this school is then directed to sexist law (Sachs and Wilson, 1978; Atkins and Hogget, 1984). They have made important contributions in terms of providing an intellectual framework for women's demands for equal treatment and for winning formal legal equality in substantive law.

However, as time went by, the limitations of liberal feminism became visible as, in spite of its efforts, it could do little to emancipate women by way of legal reform and was incapable of developing equality through the courts.

In spite of the achievements of liberal feminism, by the late sixties many feminist theorists recognised that "gender blindness" did not effectively bring about sexual equality in the law and that laws based on men's lives did not incorporate women's experience into public policy. This was particularly true of such aspects of women's lives like sexuality and reproduction. (Bynion, 1993: 141).

The well-founded fear that the law's recognition of differences would bring disadvantages to women left them with a formal equality from which they could not profit because of the particularities and constraints of their material lives. By the late 1970's many feminist theorists recognised that gender blindness was not enough to bring about gender equality. The feminist movement was then split on whether to continue to urge

sameness or concede difference: for example, should women equate pregnancy with prostate ailments or acknowledge the uniqueness of their childbearing capacities? (Dalton in Olsen, 1995: 7).

Liberal feminists were criticised by subsequent feminist writers because of their uncritical acceptance of law's own view of the social world and their tacit faith in much of the legal system (Naffine, 1990: 6); for only representing the interests of white middle class women, and for not claiming equality for all women (Evans, 1994: 15).

It was soon realised that a determination of equality required a comparison with a model, the model being the male standard. The fact that women differ from men determines that when women's rights are modelled in male rights, equality is not achieved (Greenberg, 1992: XI, Smart, 1989: 67). An example of this is the treatment of pregnancy as a disability.

Although many legal changes introduced during the last century have brought about improvements in women's position within society, many others have had little impact in practice (Fineman: 234). The paradoxical effects brought about by certain legal changes inspired in the sameness-of-treatment principle that do not take into account the realities of women's gendered lives have been pointed out by writers such as Martha Fineman and Carol Smart. Examples of these are the recent changes in family or matrimonial law that sought to impose 50:50 distribution schemes between the partners of marriage after divorce. The authors argue that proposed arrangements of that kind might seem gender neutral at first sight but, considering the actual situation of most women in contemporary society, it is highly unlikely that half of the family assets should suffice to provide adequately for them and their children after divorce (Fineman, 1991: 234; Smart, 1989: 67).

A similar effect has been observed after the introduction of equality-based custody, which has ended up by investing the non-care taking parent (usually the father) with the capacity to negotiate for a more convenient

financial arrangement against his newly gained custodial rights. Fineman argues that women's situation has become worse than it was when custody was "naturally" awarded to the mother (Fineman 1991: 234).

#### **b - The second phase of legal feminism: Difference and dominance models**

The reaction to the failure of the liberal approach in bringing about significant changes in women's lives through equal rights brought about the second phase of feminist writing on the law. Authors of the second phase of feminist theorising suspect law's professed objectivity and argue that law is an expression of masculinity. Law's structure, contents and methods represent the masculine perspective and have a masculine character. Law's claim of objectivity and impartiality actually serves to conceal its masculine bias. Accordingly, authors of this phase set themselves the task of exposing law's actual partiality and preference of men and their view of the world (Naffine, 1990: 6-12).

With the indictment of the masculinity of law at their base, two different currents can be distinguished as the main representatives of the second phase of feminist legal theory. These currents are difference feminism and dominance theories.

#### **i - Difference theories**

The consideration of differences between men and women was presented as an antidote to male bias in law, capable of exposing the inadequacy of the "neutrality paradigm", excluding women's experiences in law and revealing the power imbalance this represents. The discussion about gender differences has been one of the main themes within feminist legal theory. As exponents of difference feminism, cultural feminists advocate the consideration of differences between men and women.

Advocates of gender difference theories claim that there are behavioural, social, cultural and psychological differences between men and women. Some argue that these are biologically based. Most argue that women and

men are socialised, acculturated, or psychologically constructed differently from each other. Although such differences do not hold true in every case, they seem to be sex linked. In trying to identify the tendencies in gender construction, they have studied how the genders differ. They found that they needed to name and re-describe women's approaches and orientations because such traits had been described, if at all, from a male perspective and measured against a male standard.

They see principles such as impartiality, neutrality and objectivity as male principles devised to obscure law's partiality, its preference of men and of their view of the world. The law is masculine in terms of its contents and the ways it operates: the culture of objectivity and detachment, the adversarial model, its hierarchical organisation; all of them reflect law as a patriarchal institution. Being made by men, it serves as a means to secure their position of dominance. Men, they argue, have fashioned the legal system in their own image, creating an uncaring adversarial style that suits their own ways and, consequently, favours them (Naffine, 1990: 7-11).

The masculine perspective, which depicts a system of separate individuals who care only about their own rights and fear intrusion, ignores and devalues women's priorities such as human interdependence. The law, difference theorists argue, needs to be challenged from a perspective that not only takes into account women's experience in society, but also stems from it; i.e., a perspective capable of correcting the imbalance and unfairness of the legal system that results from the implementation of perspectives that have ignored the circumstances of women's gendered lives. This renewed perspective, which takes women's experience as a starting point, implies the use of a new methodology, based on the material, specific, concrete and contextual circumstances of women's gendered lives (Fineman, 1991: 234-235).

Unlike liberal feminists who want to eliminate gender differences, difference theorists learn from them, and some even celebrate different women's traits. Their claim is that, since women live in a society that treats them differently from men, different treatment, roles, expectations and

experiences based on gender correlate with different ways of thinking, relating and interpreting reality. These common traits and differences from men create issues of common concern for women. While difference feminists share an understanding of women's silence and a belief that, with voice, women might emerge with distinctive contributions, they do not agree on the sources of women's differences from men. Biology, the division of labour, psychological dynamics in identity formation, the political structure of gender relations are used, either together or alternatively, as diverse explanations of gender difference.

While liberal feminism would discount differences for strategic reasons in order to enter, on an equal standing, a realm that was already constituted by men, difference feminists claim that this realm should be reconstructed by and with women's participation, taking into account their specific needs and reflecting their realities. If, in terms of legal strategy, liberal feminism meant the embrace of equality in the law and anti-discrimination litigation, difference theory adhered to special protection.

Some authors of this phase will argue in favour of incorporating the feminist perspective to the prevailing masculine legal system in order to complement the masculine vision with the feminine perspective (Gilligan, 1982, 1985 in Mitchell Lecture: 56, Smart, 1989: 74). In fact, advocates of "cultural feminism" (also referred to as "relational" or "affiliational" feminism), a strand within difference feminism, value positively "women's culture" as a set of values developed in the private sphere. They argue that, out of their embodied experience to give and protect human life and their specialisation in childcare, women have developed special capacities for empathy and the care for others and recommend that such capacities should be brought into the public world (Gilligan, 82).

With respect to the legal system, cultural feminism looks for a more generative view of human life, capable of transcending the harshness of the masculine liberal ideal. To Gilligan, the "ethic of justice", that everyone should be treated the same, should be added to an "ethic of care", that no one should be hurt for the sake of producing a better outcome. Her

conclusion then, is neither to produce a separatist system of justice for women nor to replace the "ethic of justice" by the "ethic of care" (Gilligan, 1982: 174; Smart, 1989: 74).

## ii - Dominance theories

Cultural feminism has been the object of much criticism, coming particularly from authors of the dominance model who argue that the problem is not one of difference but one of domination. Writers who adhere to the dominance model want to supplant the masculine-oriented legal system by a whole new one based on women's values (Scales, 1986: 1381), arguing that it is not only the legal system that needs change, but patriarchy itself (Polan, 1982: 303; MacKinnon, 1985 in Mitchell Lecture: 28).

United States feminist Catherine MacKinnon, the most prominent legal feminist within the dominance model, has particularly criticised the sameness/difference model on the grounds that it does not address men's pervasive power over women, which is at the heart of women's subordination (MacKinnon, 1985 in Mitchell Lecture: 20-21). In the difference approach, especially in cultural feminism, MacKinnon saw the reinstatement of dangerous gender stereotypes which could continue to separate the sexes and devalue women (MacKinnon, 1985: 48; Greenberg, 1992: VIII-IX).

Notwithstanding the fact that Gilligan and MacKinnon coincide in their condemnation of the masculinity of the prevailing legal system, their writings differ in significant ways. MacKinnon specifically disputes the idea of a female ethical style that she sees as the convenient artefact of men (MacKinnon, 1985: 48). To her, the issue at stake is one of dominance, rather than one of sameness or difference in relation to the male standard. It is a system of power where women are powerless and men have the power to oppress women by controlling language, culture, social and legal institutions and, mostly, women's bodies (MacKinnon, 1985 in Mitchell Lecture: 18 - 22).

Mackinnon sees women's sexuality as the locus of women's oppression and tends to explain differences as a result of women's subordination. She locates women's oppression in the alienation of their sexuality, which leads to false consciousness. She argues that men's total power over women derives from their ability to reduce women to "walking embodiments" of their sexual needs. In her view, the law reproduces sexuality from the perspective of the male, not the female, and thereby ensures male control over women's bodies. In her view, domestic violence, rape, prostitution and obscenity laws have more to do with preserving men's rights over female sexuality than with the preservation of women's security (MacKinnon, 1979, 1982, 1983, 1985, 1987). Thus, the dominance theory presents an important theoretical framework within which to understand the harms of violence against women. Because such harms are experienced mainly by women and are a result of masculine dominance over women, an analysis is called upon to adequately address the patriarchal structures of power that perpetuate them (Bowman and Shneider, 1998: 252).

MacKinnon proposes a separatist system of justice for women and the development of a feminist jurisprudence. She argues that there is no room for women in the existing masculine legal framework. In her view, both liberal and difference theories, equality and special protection take the masculine model as the norm and, consequently, rather than trying to advance women's positions by making them as good as men, by fitting in within the masculine legal system, feminists should ask themselves what a legal system that takes women as the starting point would look like. She recommends the method of consciousness rising as a way to rediscover what is pre-culturally female (MacKinnon, 1979, 1982, 1983, 1985, 1987).

Implicit in the conception of law as an expression of masculinity sustained by both cultural and dominance feminists, there is a suggestion that women would do things differently and, according to some, better. Thus, women's subjugated position provides the possibility of a more complete or a less perverse understanding, and could form the basis of a more

desirable legal system from the perspective of women (Naffine, 1990: 8 - 10).

In spite of the fact that Mackinnon's main criticism of cultural feminism is its essentialism, she herself cannot avoid a different sort of essentialism when she refers to a truly female nature and concedes such an important role to sexuality (Smart, 1989: 76-77).

Paradoxically, although MacKinnon has been very critical of the use of masculine law, she has been very active and successful in bringing the law to challenge gender oppression. Through her work, she has brought about the enactment of important laws in the US in the terrain of women's sexuality, such as rape, pornography and prostitution, which were previously considered external to legal regulation (Fiss, 1994: mimeo). She justifies this by asserting that if women were to restrict their demands for change to spheres they can trust or control, there would be none:

"In point of fact, I would prefer not to have to spend all this energy getting the law to recognise wrongs to women as wrong. But it seems to be necessary to legitimise our injuries as injuries in order to deligitimise our victimisation by them, without which it is difficult to move in positive ways." (MacKinnon, 1987: 104 as cited in Smart, 1989: 81 and Evans, 1994: 20).

Authors such as Scales, for instance, who have absorbed the ideas of both MacKinnon and Gilligan, believe in the generation of a new legal approach (a feminist jurisprudence) more in consonance with the lives of women and view the feminist task as one that will develop a whole new law for women (Mackinnon, 1985: 21, Scales, 1986: 1381 -1391). Scales considered what a legal system might look like if it were moulded in the image of women (Scales, 1986: 1381). Her starting premise is that justice means different things to men and women and that there is a distinctively feminine legal style. Drawing on Gilligan's work and in agreement with her (Gilligan, 1982), Scales argues that boys and girls are socialised to see the world in different ways and consequently develop different styles of moral reasoning. Boys, who are encouraged to detach themselves from their mothers and flourish as independent beings, come to value autonomy and develop an ethic of rights. Girls who, by contrast, are encouraged to stay close to their mothers, grow to value relationships and

hence develop an ethic of care. Scales deplors the existing masculine style of law and its view of the social world in terms of the abstract competing claims of identical individuals, which she objects to because of its rigid focus on the rights of equal and disconnected individuals. To Scales, the rights approach that implies applying abstract principles regardless of concrete human and social situations, according to some supposed standard of fairness and impartiality seems decontextualised and uncaring. She prefers the female approach which, on the contrary, would tend to produce a unique solution to each unique problem. Since, in her view, both approaches are incompatible, the male view must be abandoned (in Naffine, 1990: 11). It is here where her analysis strays away from Gilligan's to come near to that of McKinnon's.

The search for a feminist jurisprudence signalled the shift away from a concentration on law reform to concern for some other fundamental philosophical and methodological issues regarding the law (Smart, 1989: 66). In that sense, it has produced work that has taught women a lot about themselves, empowered them by showing them some of the structures of their disempowerment, brought the enactment of certain very important laws in the area of sexual offences, offered them new critical tools and shown them new forms of communication and political action. (Dalton in Olsen, 1995: 10)

### **c-The third "phase" of legal feminism: deconstruction**

In spite of their achievements, both the sameness, the difference and the dominance models have come under the scrutiny of advocates of the third phase of legal feminism. In this third phase, writers argue that the first and second phases have invested law with too much power and overlooked differences within the category women and contest the tendency to grand theorising (Thornton, 1986: 21; Smart, 1989: 89). At the same time, they believe it is an oversimplification to think that the law favours men and damages women in a uniform way (Smart, 1989: 68-87; Dalton in Olsen, 1995: 10).

Critics of feminist jurisprudence like Olsen, Smart, and Naffine owe many of their insights to the postmodern critique of positivism which focuses on cultural representation. Based on the work of French scholars like Foucault, Lyotard, Lacan and Derrida, postmodern thought has emerged as a challenge to the "grand theories" of modernism which present themselves as coherent, all-embracing "meta narratives". It has had a marked impact on the jurisprudential community, particularly among feminists and has provided the background for the Critical Legal Studies movement.

From a legal theoretical perspective, postmodernism rejects the grand concepts of traditional theory and calls for its deconstruction. Concepts such as rights, equality, and rationality must be rethought from a critical standpoint, dismantling the perceived false certainties and revealing the realities of life. In this light, fragmentation, contingency and diversity come to replace certainty and coherence.

The implications of postmodernism for legal feminism are important, since many of the concepts used and produced by feminist jurisprudence to explain women's subordination are viewed as no longer sufficient and need to be revised. Basic concepts such as gender and patriarchy, private and public, come under the scrutiny of third phase legal feminists. Thus, third phase feminism has developed critiques that concentrate on the reality of the diversity of individual women's lives and conditions, rejecting the universal approaches provided by modernist thought and making room for diversity, plurality, competing rationalities and perspectives, and uncertainty in relation to theory.

They seek to uncover the ways in which "reality" is constituted by language. They recognise the importance of masculine power in creating women as different, and focus on the ways power is constructed through discourses, as well as on how language constructs women's identities. They speak of texts, read the world as if it were made of texts, and argue that there are no privileged readings for a text.

Thus, post-modernist thinkers insist on the deconstruction of gender differences and identities, on challenging overgeneralised assumptions about the social world, preferring the analysis of particular instances more related to everyday life. Wary about the use of dual categorisations and binary opposites, they believe that generalised perspectives are necessarily partial and remind us that, while the differences between men and women are significant, so are the differences among women.

Central to the project of deconstruction is the study of binary opposites. Following Derrida, Olsen (1995: 473-474) states that traditional social and legal theory, classical liberal theory, and the dominant ideology have structured thinking in terms of:

"a complex series of dualisms, or opposing pairs: rational/irrational; thought/feeling; reason/emotion; culture/nature; power/sensitivity; objective/subjective; abstract/contextualised; principled/personalised. These dualistic pairs divide things into contrasting spheres or polar opposites" (Olsen, 1995: 473).

This system of binary opposites is, according to Olsen (1995: 473), "sexualised". One half of each dualism is considered masculine; the other half, feminine. The terms of the dualisms are considered to constitute a hierarchy and, in each pair, the term regarded as masculine rises as superior, while the other is thought of as inferior. Law is identified with the male side of the dualism. This sexual identification of the dualisms involves both a descriptive and a normative element. Postmodern feminists reject both the sexualisation and the hierarchisation of the dualism.

Deconstruction opposes hierarchies and, by so doing, exposes the dualisms of our culture and disrupts the very terms of the dualisms. If we take the example of man and woman, deconstruction exposes inequality, not only interdependence. Woman is subordinate to man and, according to advocates of post-modernism as inequality is exposed, it is also subverted. Accordingly, some feminists view post-modernism as engaged with the subversion of what are seen as universalising or essentialising concepts like "woman" and "man".

The main accusation postmodernism levelled against the legal feminism that emerged during the 1970's and 1980's is that of essentialism or reductionism. Post modernist scholars refer to the fact that legal feminism from the previous phases was propounded by white, middle class women whose limited ethnical and cultural experience prevents them to speak on behalf of all women. Thus, they present deconstruction as a tool to revise old concepts and categories such as woman, gender or sexuality in the light of the different experiences of all women, including lesbians, women of colour and others (Barnett, 1999: 194-195).

At the same time, scholars of this phase have contested the enormous power that writers of previous stages accord to the law. Third phase writers have tended to resist the notion that law represents masculine interests in a uniform way. According to writers of the third phase, the actual relationship between law and the patriarchal social order is complex and variable. While law is invariably connected to the values and priorities of a sexist, male dominated society, this relationship is historically contingent, shifting and multifaceted. To writers of the third phase such as Olsen and Smart, although it may seem paradoxical, law serves at the same time to produce consent to its way of doing things by invoking a rhetoric of fairness and impartiality and to stifle dissent to the inequitable. Smart recommends that legal theorists expose law's "overinflated view of itself" and work towards strengthening other institutions within society less inimical to the interests of women (Smart, 1989: 68).

Yet if the search for the common characteristics of women leads to exclusion, the lack of a woman subject within legal feminism is not unproblematic. Anxiety about essentialism has generated excessive caution in the development of theory and its application. Thus, the main criticisms raised against third phase legal feminism are, firstly, that the consideration of diversity within the category woman may lead to breaking it down into "infinitely smaller groups until we end up with an analysis that can only effectively cover individuals" (Bender 1990, in Barnett, 1997: 204). Secondly, it has been criticised for its political implications, as it

upholds that no shared identity exists to unify women, it strips feminism of its political constituency and, thus, strips women from agency (Conaghan, 2000; Drakopolou, 2000; Naffine, 2002: 88-91). Thirdly, as Moller Okin and Nussbaum (cited in Naffine, 2002a: xii and xvii) have argued, by giving priority to cultural relativism, writers of this phase fail to condemn cultural practices that exploit women. Moreover, authors like Conaghan (2000: 367 and Drakopolou (2000: 207) have specifically addressed this problem and have argued that it has led to a "crisis of subjectivity "and a near death" to feminist legal theorising.

In section 2, I have briefly mapped the development of feminist legal theory, trying to situate cultural feminism in its context. The previous analysis provides a summary of the main positions in feminist legal theory, revealing a very prolific body of scholarship in terms of its theoretical contents and openness for debate and discussion. In a dialectical movement, these features have encouraged new theoretical and strategic challenges and brought about important changes in substantive law. The following section focuses on cultural feminism, conveys its main themes, its applications and influence, the debates it has originated, the criticisms it has raised, and explains its relevance for the ongoing research project.

### **3- Cultural Feminism:**

#### **a - Principal themes: the different voice**

The approach of American psychologist Carol Gilligan, clearly expressed in her seminal work *In a different voice: Psychological Theory and Women's Development* (1982), has made a profound impact on all areas of feminism, especially on the law. In the discussion above, an attempt was made to situate Gilligan's work amidst the development of feminist legal theory. Given that it offers a theoretical framework to study the potential contribution that women's participation could make to the legal system, in this section I will present the main themes of cultural feminism in more detail, explore its influence and discuss the criticisms it has aroused. I shall then go on to describe the work of scholars who, either

inspired by Gilligan's theory or reacting to it, have speculated on the situation of women lawyers and judges.

The starting point of Gilligan's work was a critique of then current theories of moral development that took the male model of moral development as the norm. She particularly criticised the work of Kohlberg who, in spite of not having included any female subjects in his studies, had made generalisations about the moral development of boys and girls. Since the traditional theory on women's psychological development was based on studies of male behaviour, it invariably found that women failed to develop on measurement scales.

Gilligan showed how an alternative perspective emerged when researchers included women in their studies and discarded frameworks constructed with only men in mind. The possibility occurred to her that girls' pattern of moral development could be different from that of boys. As a consequence, she purposefully did include female subjects in her studies on moral development and thus came to very different conclusions (Gilligan, 1982: 48). In her book, cited above, she attempts to describe women's moral development with the purpose to complement previous developments that had taken the male model of moral development as the norm.

*In a Different Voice* is based on three research projects conducted by Gilligan. The said projects considered how women decided whether or not to have an abortion, how they responded to Kohlberg's hypotheticals and how they made important life decisions (Gilligan, 1982: 71-74, 25-32, 151-174). More than half of the subjects who participated in Gilligan's studies were women. Based on an analysis of the responses of her research subjects, Gilligan constructs a new model of moral development. This new model, which she labels the "ethic of care or responsibility" is associated with women. She contrasts this model with an "ethic of rights or justice" that she attributes to men and has been described by prominent male theorists like Freud, Erikson, Piaget and Kohlberg.

Through her research, Gilligan discovered differences in the ways men and women tend to understand themselves, their environment and the way they solve moral problems. She found that men tend to define themselves through separation, measure themselves against an abstract ideal of perfection, equate adulthood with autonomy and individual achievement and conceive of morality in ladder-like hierarchical terms.

In contrast, she found that women often tend to define themselves through connection with others, interdependence and activities of care, and perceive morality in terms of an interconnected web. She found women's inner lives more complex in that they tended to develop a greater ability to identify with others and to sustain a variety of personal relationships. She located the origins of these qualities and capacities in women's involvement with families and the protection of human life. While women tended to understand moral conflicts as a problem of care and responsibility in relationships, men tended to emphasise rights and rules.

From his research with male subjects, Kohlberg developed a six-stage model of moral development. He observed that, when this model was applied to women, they showed a strong tendency to remain in stage three, a result that would suggest that women failed to develop morally. Instead, realising that the moral development of men and women differed, Gilligan elaborated a three-stage model for women more in consonance with the characteristics of their moral development. In addition, Gilligan objected to a hierarchical ordering of men and women's moral development that derived from the application of Kohlberg's scale to women.

In Gilligan's first stage, the individual is basically focused on caring for the self. This is a stage considered as "selfish" by those who have already left it behind. The second is the "feminine" phase, in which good is equated with caring for others. During this stage it is difficult to sort out the confusion between self sacrifice and care inherent in the conventions of feminine goodness. At the third stage, which involves "the transition from

femininity to adulthood", the individual learns how to care for herself as well as how to care for others and to take responsibility for moral choice.

Gilligan suggests that many gender differences grow out of different conceptions of self and relationships to others. Building on the work of Dorothy Dinnerstein (1976) and Nancy Chodorow (1978), who studied the effects of the fact that children are reared mostly by women (psychoanalytical object relation theory), she states that women who, unlike men, do not need to separate from their mother for their development, tend to understand people relationally, as interconnected and mutually dependent, whereas men, who do need to separate more drastically from their mothers, tend to conceptualise people as more independent, autonomous and ego boundaried.

In Gilligan's view, these different conceptions of self are very much related to the development of gender-linked moralities and appropriate behaviours. Women tend to develop a tendency to solve ethical dilemmas that maximises the preservation of relationships and that no one should be hurt. This is achieved through a contextualised ethic of responsibility and care, while men focus more heavily on ordered hierarchies of principles of justice and rights to solve moral problems -hence its relevance for the field of law (Gilligan, 1982: 5-32).

One of her studies addressed the interpretation of boys' and girls' different reactions to a moral dilemma. (Gilligan, 1982: 25-32). Two of the children studied, Jake and Amy, both aged 11, were of comparable intelligence and social backgrounds. The problem posed had to do with Heinz, a poor man whose wife required drugs in order to save her life. Heinz could not afford to pay for the drugs and the pharmacist would not lower the price. The children were asked whether, given the severity of the situation, Heinz would be morally justified in stealing the drugs.

Gilligan demonstrated Jake's and Amy's differing forms of reasoning. When asked if Heinz should steal the drug, Jake answered yes, on the basis that although this would amount to theft, the law can make mistakes

and, should Heinz be prosecuted, the judge would take this into account and give him a light sentence, since life is a higher value than property. Jake's reasoning followed a logical, rational pattern that Gilligan calls the "logic of the ladder". According to her, Jake considers the moral dilemma to be "sort of like a maths problem with humans" (maths being the only thing that is totally logical) (Gilligan: 1982: 25-32)

Amy, on the other hand, reasoned in a totally different way. Lacking Jake's confident logical approach, Amy first considered whether there were alternatives to stealing the drug (a loan or something else). When asked why Heinz should not steal the drug, Amy did not consider the law but its effects on the relationship between Heinz and his wife (if he got caught his wife would not get the drug and her health would become further impaired). Amy's whole response to the dilemma revolved around a concern for relationships, a reliance on people's connectedness rather than pure logic. Gilligan terms this "the logic of the web" (Gilligan, 1982: 25-32).

Viewed from one perspective, this could be interpreted to mean that Amy's development is "stunted by a failure in logic" (Freud, 1977: 342 cited in Smart, 1989: 73). That, however, would be a false interpretation grounded on the assumption that boys and girls must reason to a shared standard: a standard set by boys. In Gilligan's assessment, Amy's judgements contain insights central to an ethic of care, just as Jake's reflect the logic of an ethic of rights approach (Gilligan, 1982: 25-32). Gilligan also pointed out how most people in her studies, an average of 65% across 9 studies, represented both voices in defining moral problems, while there was a strong tendency to focus on one or the other voice. About 70% of those who used both orientations concentrated on one. Only three out of sixty men focused on care, while 60% of the women did so (Marcus, Spiegelman, Du Bois, Dunlap, Gilligan, MacKinnon and Meankel Meadow, 1985: 47-49). Her "different voice", Gilligan so clarifies, refers to a voice different from traditional theory rather than to a voice that differs from men's.

More recently, Gilligan has used a fable to test the tendencies of boys and girls to elaborate different moral languages in solving moral problems. In this fable two hard-working moles have dug themselves a shelter for the winter. When winter arrives, a less industrious porcupine attempts to share the moles' shelter. In their concern, they take in the porcupine and then are hurt by the porcupine's quills in the small space. The subjects of the study were then asked what the moles should do. Adolescents with a rights discourse, more often boys than girls suggested that the moles should throw the porcupine out because they had dug the shelter. Those using a care approach, more often girls than boys in the study, developed solutions like covering the porcupine with a blanket or asking the porcupine to dig and enlarge the shelter- in fact, the girls sought both to minimise the harm to all parties and meet their needs (Menkel-Meadow, 1995: 28-29).

Moreover, Gilligan's later research findings actually reinforce earlier conclusions. When asked to choose another way to solve moral dilemmas, boys and girls demonstrated an ability to shift from one form of reasoning to another, which suggests that boys and girls start from a particular focus or choice. To Gilligan this means that even if we are capable of both forms of problem solving, it is a moral choice we make when we decide how to reason and make moral decisions. (Gilligan, 1988: 73-74, 80-85)

In my view, four points stem directly from Gilligan's thought. In the first place, many women, out of their embodied experience to give and protect human life and their specialisation in child care, have developed special capacities for empathy and the care for others. In the second place, these capacities have been excluded from social discourse. In the third place, as Gilligan values women's culture positively, she recommends women to commit themselves to a mode of public discourse embedded into those caring capacities in order to reconstruct public life. In the fourth place, she argues in favour of extending the ethic of care to men through larger male involvement in the private sphere, since it is through such involvement that

the development of a morality based on commitment arises (Gilligan, 1982).

#### **b - Gilligan's influence on feminist legal theory**

Gilligan's insights have given rise to applications and reflections in different fields of social enquiry such as sociology, social philosophy, political science and the law. Different social scientists have attempted to apply the "ethic of care" approach to their own fields. Jacobsen (1985), for instance, has wondered about its effects on gender managerial styles, initiating a whole debate about women's leadership styles. Political scientists like Elshtain (1981), Ruddick (1984), Jones (1993) and Sevenhuijsen (1998) have considered how the "ethic of care" might be transposed to the public context, and Smart and Neale (1999) applied the "ethic of care" to post-divorce families and reform of divorce law. Sarah Ruddick, in turn, has written about "maternal thinking" as a kind of political discourse, an approach that sets out to foster growth while allowing for autonomy. She presents it as an "antidote to a male dominated culture, an alternative vision, "a way to be in the world", applicable to both men and women, whether they are parents or not (Ruddick, 1980: 343-346, 1984; Resnick, 1988: 1916-1918). Jones (1993) writes about "compassionate authority" and Sevenhuijsen of "judgement and care" (1996). They all look at the implications of the care approach for citizenship and political participation and point to the family as the site where an ethic of responsibility may develop. Similarly, Bender has advanced that:

"Gender difference and gender identity can be a starting point for feminist solidarity. Through feminist solidarity we can transform law from its current design as a tool to preserve existing distributions of power, forms of knowledge and hierarchies of values into a tool to empower and enable all people" (Bender in Barnett 1997, first published 1990: 210).

Gilligan's work has also initiated a specific debate around law and inspired many legal feminists who argue that, because the law has been infused with the masculine perspective, an approach to legal decision making based on separation, rights and abstract rules has come to represent the "correct" legal method, thus excluding the feminine perspective. She

insists on the fact that the masculine voice is not universal and that the feminine voice of experience and judgement should be heard alongside the masculine voice. Her work, therefore, constitutes the critique of any system of justice that celebrates the masculine voice devised by men (Gilligan, 1982; Smart, 1989: 74) and recommends that the "ethic of care" be added to the "ethic of justice".

Thus, Gilligan's work, combined with that of other feminist legal scholars, provides the foundation for a theory that states that the presence of women lawyers and judges in important numbers in the legal system has the potential to bring about a new perspective and, hence, changes in the legal system (Menkel-Meadow, 1989, 1995). As Menkel-Meadow comments:

"Gilligan never expressly sought to displace the male ethic of justice or rights, instead she sought to supplement or complement it, add to it, make it more robust by including another level of moral consciousness in legal and justice reasoning. The need to establish and clarify rights, individual autonomy and the predictability of clear rules must be tempered by acknowledging needs as well as rights, minimise harms to people when making choices, and being certain that particular rules when applied, do not wreak havoc in particular situations. This is equity modifying law, mercy tempering justice, common law interpreting statute, discretion softening rules" (Menkel-Meadow, 1995: 33-34).

In a different direction, Gilligan's theories have also inspired legal critics who promote the creation of a whole new system of justice, laying emphasis on community and solidarity and focusing on conciliation, as opposed to the adversarial male system (Kingdom, 1985; Bender, 1992; Rhode, 1986; West, 1986).

Robin West (1988: 1-72) has applied Gilligan's concepts to law and related the different women's voice to political theories like liberalism and critical theory. She has written about a "feminist voice" in jurisprudence. Unlike Gilligan, who explained how women and men differ in terms of psychoanalytical theory and women's cultural experiences, West's claim of gender difference is based on the physical experiences of being penetrated and of being attached to other human beings through pregnancy, sexual intercourse and breast feeding. Her emphasis lies in physical connection. West has attempted to bridge the gap between

cultural and radical (dominance) feminists by arguing that both strands of feminist thought clearly understand the central concerns of women's powerlessness and women's lives as physically different from men's. To her, all feminism rests upon the "connection thesis": "that women are actually materially connected to other human life. Men aren't" (1988: 14). According to West then, at an experiential level (whether acknowledged or not) all feminists are, at the same time, cultural and radical feminists in that they are drawn simultaneously to celebrate women's capacity for connection and to search for separation as a protection against invasion. The fact that West grounds her theory on physical connection is problematic for feminist thought due to its immutability. On the one hand, it could be argued that different meanings can be accorded to physical connection. On the other, one might say that some women who are not mothers may miss the experience of connection West refers to, and that, in many ways, men are also connected.

Commenting on the differences between different strands within cultural feminism, Evans has distinguished between strong and weak cultural feminists using biological determinism as the distinguishing criterion between these two strands. According to Evans, separatist scholars Daly and Rich, for instance, who believe that women differences are innate and good can be categorised as strong cultural feminists. Instead, because Gilligan believes that gender differences are not innate but social, and men could deploy the qualities observed for women, Evans labels her work as weak cultural feminism. Following the same logic, Evans would call West a strong cultural feminist (Evans, 1994:91). This distinction is crucial for my later discussion of the accusation of essentialism against Gilligan's thought.

As the above discussion shows, the appeal of Gilligan's work has led to a number of applications in theoretical and speculative forms. Some saw in her approach the revaluation of female qualities that had been denigrated by our male biased society and welcomed the valorisation of care, connection and nurture (Menkel-Meadow, 1989, 1995). Still, other feminist

writers saw in it the reinstatement of dangerous gender stereotypes which could continue to separate the sexes and devalue the female (MacKinnon, 1985: 47; Greenberg, 1992: VIII- IX), and others accuse Gilligan's work of essentialism and ethnocentrism. The next section considers the main objections to Gilligan's work.

### c - Criticisms raised by Gilligan's thought

Gilligan's work has given rise to a vast and enduring controversy. More than twenty years after "*In a different voice*" was published, the debate is still alive. Along the twenty years time span, various authors, surprised by the heat of the controversy have addressed the issue and tried to explain both the reasons for the popularity of the debate and its consequences for feminism (Davis, 1992, Drakopolou, 2000). As Davis (1992: 221) has argued, the attraction and popularity of Gilligan's work lies in the fact that she provided a surprising and novel account to explain central problems in feminist theory. In my view, the motive for this tremendous reaction is that the Gilligan debate has posed some issues that concern very important theoretical and political feminist dilemmas. The debate that followed the book's publication attempts to tackle the relationship between gender, care and morality. It mirrors some of the main tensions in feminist theory such as the problems of subjectivity, essentialism and women's political agency. Although these issues may well never be solved, their discussion has indeed proved empowering for the development of feminist theory.

Gilligan's work has been criticised on various grounds and from different stances. In this section I shall try to consider and deal with some of the criticism it has raised and then, in the next section, I will move on to the application, relevance and consequences of cultural feminism to my research on the different voice women might bring to judging.

It has been argued that women's identification with an "ethic of care" may have negative effects by further perpetuating their subordination and marginalising women who, because of their different situation regarding culture, class, sexual orientation or ethnicity, might not fit the "ethic of

care" model, which actually matches the model of the white middle class woman (Mackinnon, 1985: 47; Greenberg, 1992: viii- ix).

Gilligan's work has also been criticised for making generalisations based on sex, for favouring a dualistic oppositional view of gender and for her research methods (Davis, 1992: 219-220). Gilligan has been accused of essentialism by correlating women's social traits with their biology and for expecting all men and women to fall necessarily into such categories as "public" man and "private" woman, with all their typical set of characteristics. Moreover, some scholars have shown concern about the way she bases her work on the psychoanalytical object relation theory which, they argue, is not universal, but rather corresponds to white middle class, nuclear family life, and may be inapplicable to many other ways in which people are reared. Objections have also been raised to her work for giving too much weight to early experiences for the determination of adult identities.

Although the above criticisms are actually interconnected and the arguments within the ensuing debate intermesh, I will try to organise the following discussion around three basic concerns: the question of method, the problem of conservatism and the criticism of essentialism.

#### **i- The methodological problems**

Feminist writers have been critical of the methods used by Gilligan in *In a different voice*. Her methods have been considered flawed because she used very small and homogeneous samples that were deemed insufficient to make generalisations about girls' moral development and because she did not include control groups. Along the same lines, she has been accused of defective research logic and of making unsubstantiated interpretations (Davis, 1992: 223; Auerbach et al, 1985: 149-161)

In response to her critics, Gilligan wrote an article (Gilligan, 1986: 324-333) in which she explained that her argument was not statistical but interpretive, explaining that its value did not derive from the representativeness of the sample used, but instead aimed at providing

examples illustrating a different way of seeing a dilemma (Gilligan, 1986: 326). However, later on, taking into account some of the comments of her critics, Gilligan included a more heterogeneous sample in terms of race and social class (Heyes, 1997: 142-163). A full consideration of the methodological aspects of Gilligan's research and theory building methods would require a greater knowledge on my part of psychology and its methods. It would also be too lengthy and hinder me from considering other aspects of the controversy that are more central to this study.

Gilligan's critics emphasise the methodological aspects of her work. Finding flaws, they have tended to overlook other aspects. Even in the event that there were grounds to deem Gilligan's research methods faulty, her claims could still have been considered. Instead, as Davis (1992: 225) and Heyes (1997: 142-163) have suggested, Gilligan's critics have lain excessive emphasis on scientific method and objectivity has had an obscuring effect on the real issues under discussion. Even if method is very important to make valid knowledge claims, methodological considerations should not deter feminists from the constructive possibility of addressing the normative aspects contained in Gilligan's theoretical body.

## **ii-The critique of conservatism in Gilligan's thought**

Gilligan's writing has been criticised for its vulnerability to co-optation or appropriation by conservative forces. Many feminists fear that valorising women's differences will legitimate discriminatory treatment and assign women to conventional domestic maternal and other caring roles. Some feminists find Gilligan's theories reminiscent of a romanticised version of the 19<sup>th</sup> century "separate spheres" ideology that has been so harmful for women's position within society. Mackinnon, for instance, asserts that gender relations are in fact power hierarchies. Mackinnon finds Gilligan's theories quite disturbing because, in her view, Gilligan seems to value voices that are the result of subordination and oppression (Mackinnon, 1987: 38-39, in Smart, 1989: 75).

As discussed in an earlier section<sup>1</sup>, MacKinnon makes a distinction between difference and dominance theories, emphasising that it is power differences that create gender differences. She claims that what Gilligan has called women's "different voice" is the voice men have created in order to suit their interests best, and that the characteristics that Gilligan values are those of powerlessness and not women's "true feminine nature". One wonders whether an epistemological standpoint is ever attainable (the "true" feminine nature) and whether we will ever find a female identity that can avoid our own secular relationship with patriarchy without falling into a different type of essentialism (Smart, 1989: 72-82). According to MacKinnon, sex is a natural attribute that has been manipulated and exploited to suit the interests of male supremacy. As can be appreciated in the following quote, for her, women are doomed to total predetermination:

".... How to get women access to everything we have been excluded from, while also valuing everything that women are or have been allowed to become..." (MacKinnon, in Barnett, 1997: 213, first published 1987).

On the other hand, it can be argued that, even if the feminine voice that Gilligan identified in her work is the product of male oppression, it could still be used as a tool to disrupt patriarchal structures and discourses since, in fact, it has much to offer to the legal system. Furthermore, as a way to respond to MacKinnon's proposal that dominance theories offer a stronger analytical tool, it could be argued, together with West and Bender that, insofar as they acknowledge that women have been denied access to power, gender difference theorists, in fact, incorporate premises from the gender dominance theory. At least, difference theorists clearly understand that privileging men's narratives marginalises women's. Because of these power dynamics, difference theorists insist that the voices of those who, like women, have been silenced and excluded by the power structures of society should be heard.

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<sup>1</sup> See further section II-bii in this chapter.

Although one is bound to admit that there is truth in the argument that states that the "ethic of care" approach might make us prey to further stereotyping, marginalising those women who do not conform to the caring model (Greenberg, 1992: VII and IX), at the same time, it should be taken into account that such stereotyping had been going on long before cultural feminists identified or even celebrated woman's culture (Bender, in Barnett 1997, first published 1990: 208-209). Moreover, as Clare Dalton (in Olsen 1995: 12) reminds us, although anger and fear might seem legitimate reactions for women facing the care dilemma and the threat to fall prey to further stereotyping and to repeating very old roles, other options besides submission or denial of such care attributes could be found. As women, we can acknowledge these attributes, while at the same time remain aware of independence and self-realisation and struggle to resist claims for the exercise of care that might be detrimental to us. In fact, as a reply to her critics on this particular point, Gilligan (1984: 326-327) has argued that, far from unearthing the Nineteenth century image of the 'angel of the house', her work describes an active ethical perspective which calls into question the traditional equation of care with self sacrifice.

### **iii-The critique of essentialism in Gilligan's thought**

Newer criticism has arisen from authors of the third phase of legal feminism. Advocates of critical race theory and post-modernism have claimed that Gilligan's feminine subject fits the liberal assumption of a white middle class heterosexual woman. Consequently, this view is seen as a-historical, essentialist and insensitive to class, race and sexual preference, ethnicity, age and motherhood. Gilligan's work has also been criticised for sustaining biological determinism and for reinforcing a dualistic oppositional conception of gender.

Without denying the importance of the consideration of power differences among women for adequate feminist theorising, I would argue that these criticisms originate in a misunderstanding of Gilligan's argument. In spite of certain ambiguities in Gilligan's discourse, it seems clear to me that she

does not refer to innate sex characteristics but rather to socially constructed roles that give rise to different styles of moral development. Neither does she say that an ethic of care is better than an ethic of justice, nor that all women are the same. In addition, it is not apparent to me that she sustains that all women are different to all men, as becomes clear from the following passage of her book:

"The different voice I describe is characterised not by gender but by theme, its association with women is an empirical observation, and it is primarily through women's voices that I trace its development. But this association is not absolute, and the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalisation about either sex." (Gilligan, 1982: 2).

I believe that in spite of the fact that different socio-cultural constructions of gender such as race, class and sexual orientation may render women very different from one another, the gendered construction of women has strong cultural meanings in patriarchal societies. Discrimination of women persists; this makes women seem very different from men and often less valuable. I agree with Bender (1990: 204-205) when she argues that, although differences among women should not be overlooked, these differences "ought not to serve to break down the category women into infinitely smaller groups, until we end up with an analysis that can only effectively cover individuals" (Bender in Barnett 1997, first published 1990: 204-205). In the following quote Bender shows how difference feminism can integrate the anti-essentialist critique and maintain the use of the category "women" to the benefit of feminist solidarity.

"Domination, subordination, exclusion, lesser status, and interpersonal caregiving responsibility infuse women's experiences and gender construction in patriarchal societies, even though these phenomena manifest themselves differently in different women's particularised lives. Yet we can say meaningful things about women that respond to the concerns, needs and experiences of women from different economic classes, different races, different privileges and statuses. Women with all our differences accounted for, can achieve a feminist solidarity for social and legal transformation..." (Bender in Barnett 1997, first published 1990: 204-205).

Moreover, as Heyes (1997: 142-163) has claimed, Gilligan is an example of a difference writer who has taken seriously the critique of essentialism

incorporating new variables such as race and class in her later work on girls' moral development.

The charge of essentialism against Gilligan's work extends to her dualistic oppositional conception of gender. Indeed, as a difference writer, typical of the second phase of feminist theorising, intending to bring to light women's differences, Gilligan tends to make broad generalisations based on sex. Still, as authors like Evans (1994) and Frug (1992) have noticed, different positions can be distinguished within difference writers in that respect. Evans has distinguished between strong and weak cultural feminists according to the role they assign to biology in the determination of sex differences. Along the same lines, Frug has argued that Gilligan's work allows for different readings. According to her, Gilligan can be read from both a conservative and a progressive standpoint. Frug differentiates between progressive and conservative standpoints in terms of the role they ascribe to sex differences. She identifies as conservative readings those that present gender traits as inherent and universal (Sherry, 1986; West, 1986) and romanticise feminine characteristics, while more progressive readings will consider sex differences to be context-bound and stemming from particular circumstances that vary with each person (Frug, 1992: 36- 38, 47- 48).

#### **d-The problem of essentialism in difference feminism:**

Because of the strength and impact of the critique of essentialism raised against difference, women-centred theories (not just cultural feminism), I shall further discuss the issue in the next paragraphs.

As social science and feminist analyses evolve, difference theorists can better understand the structures of domination and realise how, as persons who have been themselves excluded from power in important ways, they can unconsciously reproduce patterns of exclusion in their own theorising (like women of colour, lesbians and poor women). By so doing, they can incorporate newer and richer approaches about particularised experiences, correcting previous oversights without giving up the

difference approach. Since, as women, we differ from one another by race, class, ethnicity, sexual preference and physical challenges, our work to preserve all women's lives will necessarily improve the lives of all people oppressed because of these identities. This integrated approach certainly enhances women's political potential (Bender in Barnett 1997, first published 1990: 204-205).

Conaghan (2000: 384) has identified a central dilemma in legal feminism: that of conceding differences within women without falling into the trap of losing the subject of legal feminism due to our inability to speak beyond our own experience. Faced with this dilemma, she expresses her despair as a scholar intending to retain her commitment to women's issues and to contribute to combat women's disadvantage without having to face the criticism of failing to take diversity into account. At the same time, she does not renounce acknowledging the strengths of the postmodern feminist critique. Even Harris (cited in Conaghan, 2000: 384), one of the main exponents of critical race theory, addresses the problem of how to organise politically around the notion of a shared identity and yet include the multiple identity claims of group members.

Various feminist authors have attempted to escape the critique of essentialism by invoking the plural women and arguing that "the leap from deconstructing woman to repudiating the experiences of real women is neither necessary nor inevitable" (Conaghan, 2000: 368 referring to Fuss's argument). They posit that the difficulties of woman centredness can be avoided by remaining sensitive to the multiplicity of women's lives and experiences and aware of the universalising and exclusionary tendencies implied.

A different response has been given by Spivak (cited in Conaghan, 2000: 368), who urges feminists to engage in strategic essentialism in defence of political agency. Others have invited feminists to focus on narratives, positing law as a "gendering practice" and tracking the way gender categories are formed discursively and endowed with meaning (Conaghan, 2000: 370-371).

All these responses have, however, been subject to further criticism on different grounds. While it has been argued that, far from countering essentialism the first type of response displaces it (Conaghan, 2000: 368, f.72), strategic essentialism is dismissed on the grounds that it cannot confront the risks involved. Furthermore, the focus on narratives has been criticised because it privileges theoretical approaches, taking the issue away from the concrete circumstances of women's lives with negative political effects (Conaghan, 2000: 369).

The above debate led Conaghan to come to terms with the idea that the category "woman of legal feminism" cannot be avoided; it just "cannot not be used" if the transformative aims of feminism are to be retained. Accordingly, she argues that anti-essentialism does not preclude generalised representations of women where appropriate, but rather questions the range of the situations where these generalisations are appropriate. Thus, she recommends that instead of renouncing legal feminism's transformative aspirations by forsaking the use of such categories, one should remain aware of the dangers involved. Categories should be used cautiously, from the perspective of a situated subject (Benhabib, 1990 in Benhabib, and Cornell: 120-149) that acknowledges the complexity of reality and approaches knowledge as tentative, open to revision and criticism (Fraser, 1997: 218, cited in Conaghan, 2000: 372).

At any rate, difference theorists have lent ears to the anti-essentialist warning related to the exclusion of women's multiple voices and, as a consequence, they are now more alert to the differences between women and less willing to generalise about them as a group. The theme of care has been lately rescued by scholars who, like Smart (1999), West (1997), Sevenhuijsen (1998) and Jones (1993), work in the fields of sociology, political science and political philosophy updating the discussion of care to put it in tune with the general debates within the social sciences today. They are now being more cautious in terms of the connections between gender and care, and have tended to distance care considerations from what might be viewed as essentialising invocations of gender categories.

Thus, as has already been noted, West (1988), an advocate of justice with a female character, had already argued in her earlier work that the "ethic of care" involved values at least as important and worthy of protection as autonomy and individualism. By 1997, she was more conscious of the risks involved in adopting an "ethic of care" untempered by justice, consistency, integrity and a universal impulse. She therefore recommends a middle ground: justice tempering care and care tempering justice (West, 1997: 88-93). Sevenhuijsen (1999) is an example of a scholar who has moved into social philosophy to apply the ethic of care in the context of a normative project addressing notions of justice, morality, citizenship and politics, while Smart and Neale (1999) have applied the concept of the "ethic of care" to the consideration of post-divorce families and new divorce legislation.

#### **e-Conclusion**

Heyes (1997: 142-163) frames the essentialism- anti essentialism controversy in an interesting way that takes us back to our previous consideration of the evolution of feminist legal theory. She considers this controversy as an example of the development of feminist thinking that shows "how feminist theorists have often failed to move on from an often dismissive anti-essentialist critique to a more nuanced, practical engagement with political projects" (Heyes, 1997: 242). In spite of its essentialist pitfalls, it is undeniable that grand theorising within legal feminism has given rise to very rich and instructive debates (Naffine, 2002, Conaghan, 2000) and, consequently its value should not be understated. As Heyes (1997: 242-263) has put it, the problem with third phase theories is that they tend "to throw the baby of political efficacy out with the bath water of essentialism". And thus she concludes that:

"The challenge facing third way feminist theory lies in the observation that neither interminable deconstruction nor uncritical reification of the category "women" is adequate to the demands of feminist practice. The task we have inherited is to take seriously the commitments entailed in anti-essentialism but to find ways effectively to incorporate them into resistive political projects" (1997: 243).

In spite of the fact that Gilligan's work has raised much criticism, its impact cannot be contested; every book or article about feminism acknowledges its influence. Its main contribution lies in the revaluation of the previously undervalued female characteristics. In spite of the objections raised against her work, it still poses the important question of whether the supposedly masculine values usually associated with good moral judgement should be accepted uncritically, and provides the arguments for a reconstruction of the public domain that encompasses different voices. In the next section, I shall move on to describe how it has been applied to interpret the effects of the massive entry of women into the legal profession and its consequences.

### **• III - Women and the practice of law**

#### **1 - Women lawyers**

##### **a - Introduction:**

Given the increased number of women entering the legal profession, it is important to consider the implications of the cultural feminist approach for the situation of women legal practitioners. The question posed is whether women in law will make a difference to the legal system.

Legal scholars have been attempting to answer this question since the 1980's when the number of women lawyers started to increase significantly. The progress of the debate in the twenty years that have gone by reflects socio-historical tendencies and mirrors academic production and political deliberation. I am referring both to the steady growth in the number of women lawyers over the years, to results of research on women lawyers, and to the main trends within feminist legal theory

**b - The difference lawyers could make to the legal system**

In the mid-eighties, Carrie Menkel-Meadow engaged in the application of Gilligan's theories to the case of women lawyers. In *Portia in a different voice: Speculations on a women's lawyering process* (1985), which considers the large increase in the number of women entering the legal profession, the author speculates as to whether women perform their work in ways different from the male norm, and whether their increased participation in such a male-oriented field can have potentially transformative institutional effects. Although in 1985 when Menkel-Meadow was first writing on the subject, women's participation in the legal profession was already widespread, it was also relatively recent. Therefore, lacking enough evidence to reach sound conclusions on whether women, when in sufficient numbers, would be capable of, or even want to introduce changes in the profession, Menkel-Meadow opted to wait until the number of women in the profession became significant enough so that more research could be carried out (Menkel-Meadow, in Barnett 1997, first published 1985: 196 -203).

In the meantime, she set out to speculate on the possible consequences of women's entry in large numbers into the profession. She thus decided to assume that gender differences exist as had been documented by the work of Simone de Beauvoir, Carol Gilligan, Nancy Chodorow, Jean Baker Miller, Anne Shaef and others, and leave to others the important enquiry into the origins of those differences -whether biological, sociological, political or a combination of these. In her view "as long as such differences exist", studies of the world should take into account women's experiences (Menkel-Meadow, in Barnett, 1997 first published 1985: 197). Building on Gilligan's thesis (Gilligan, 1982: 25-32), Menkel-Meadow analyses Amy and Jake's talents for the exercise of the legal profession, as they derive from their different experiences of the world. In the following extract, she considers the effects of different reasoning styles, how they inform the law and its practices as well as how they fashion the ways the legal system is structured and decisions are reached:

"...In conventional terms Jake would make a good lawyer because he spots the legal issues of excuse and justification, balances the rights, and reaches a decision, while considering implicitly if not explicitly, the precedential effect of his decision. But, as Gilligan argues, ...Amy's approach is also plausible and legitimate, both as a style for moral reasoning and as a style in lawyering. Amy seeks to keep the people engaged, she holds the need of the people constant and hopes to satisfy them all (as in negotiation), rather than selecting a winner as in a lawsuit...

She looks beyond the "immediate law suit" to see how the "judgement" will affect the parties...

And she is being a good lawyer when she enquires whether all the facts have been discovered and considered." (Menkel-Meadow in Barnett 1997 first published 1985: 198)

She also considers the impact of two different voices within the legal system, and the ways in which these voices can join together to create an integrated legal system:

"Thus, although a "choice of rights conception" (life vs. property) of solving human problems may be important, it is not the only or the best way. Responsibilities to self and to others may be equally important in measuring moral as well as legal decision-making, but have thus far been largely ignored. For example a lawyer who feels responsible for the decisions she makes with her client may be more inclined to think about how those decisions will hurt other people and how the lawyer and client feel about making such decisions...Jake makes a choice in abstract terms without worrying as much about the people it affects." (Menkel-Meadow in Barnett 1997 first published 1985: 198)

Menkel-Meadow identifies mediation as an alternative to the prevailing adversarial model that has characterised the legal system and counteracts the logic of litigation (so similar to a sports event, in terms of two opposing parties in a win/lose relationship) to the paradigm of mediation, where communication and party's protagonism are valued together with respect for the legitimacy of conflicting positions as a valid means to reach appropriate resolution of legal conflicts (Menkel-Meadow in Barnett, 1997 first published 1985: 202).

Along the same lines, more recently Freyer (1995) characterises the win-or-lose adversarial system of litigation as a system whereby the social ideal of justice is sacrificed. Freyer has argued that, faced with the "double bind", women have alternatives to offer to the legal system other than surrender or rebellion. Similarly to other feminist scholars such as West (1986) and Sherry (1986), the author parallels the "morality of rights"

characteristic of liberalism with the legal and judicial system's focus on individual achievement and personal autonomy. To the morality of rights approach, more characteristic of men within the profession, she opposes a morality of care, more characteristic of women. Of course, this has profound consequences in terms of the difficulties men and women lawyers face to adapt to their professional roles. Inhabiting the legal realm is less problematic for men law practitioners. Unlike women, who often face a dilemma involving conflict between their personal and their professional morality, men lawyers rarely experience that kind of tension between their moral orientation and the one prevailing in their profession.

Following Menkel-Meadow, Freyer looks to the alternative conflict resolution model that emphasises connection rather than autonomy as a more feasible alternative to add to the judicial system. She also advocates a more care-oriented judicial system to mitigate the setbacks of the adversarial litigation process. To her, the care-oriented lawyer should be able to find a middle ground where, without giving up completely her personal morality, she can fulfil her professional role by introducing ethical change in the professional culture. As can be seen from the following extract, like Gilligan and West, Freyer sustains that justice need not be uncaring and care need not be unfair:

"Both the rights-oriented approach and the care-oriented approach aim at a just society, and each checks the faults and excesses of the other. Both have something vital to offer and recognise that human welfare is not complete without the contribution of each." (Freyer, 1995: 217)

However, in 1985, at the time when Menkel-Meadow was writing her article, women lawyers, in spite of their increased presence, had been unable as yet to express a definite and clearly recognisable woman's voice. Organisational research results show that, when in token numbers (that is to say, in small proportions), women tend to conform to the already existing norms and to minimise rather than emphasise whatever differences exist (Moss Kanter, 1977; Menkel-Meadow, 1985; Mossman, 1993). Menkel-Meadow relates these findings to the case of women lawyers and raises the very crucial issue of whether women transform

themselves or the profession, when their numbers are not significant enough.

**c- Persistent obstacles<sup>2</sup>:**

Many more women have entered the legal profession since 1985 when Menkel-Meadow was writing, and some interesting research has been carried afterwards, particularly in the US, Canada, Australia and the UK, both from the cultural feminist and from other perspectives. Recent research looks into the ways women have been incorporated into the legal system. (Jack and Jack, 1988; Mossman 1989; Harrington, 1995; Freyer, 1995; Thornton, 1997; McGlynn, 1998; Sommerlad, 1998, 1999; Schultz and Shaw, 2003: xxv-lxii). Results show that the increased number of women entering the legal profession has not translated itself in terms of women's capacity to influence substantially the prevailing legal ethics, nor has it automatically ameliorated their status within the profession. Women's position within the profession remains marginal. Significant barriers to equality of opportunities for women persist.

Women are still over-represented at the lower end of the profession, and earning differentials in favour of men can still be observed. Research findings throughout the world show persistent occupational segregation. Women lawyers tend to concentrate on fields that are more consistent with stereotypic notions of what is thought of as women's work such as family law. Modern law firms require levels of commitment that do not take into account women's domestic roles and responsibilities. These same responsibilities undermine women lawyers' possibilities for rainmaking and bringing business to the firm. This generates a situation of inequality with their male counterparts and deters from their possibilities to become partners (Thornton, 1996; See further Spencer and Podmore, 1982; Jack and Jack, 1985; Menkel-Meadow, 1985, 1989, 1991, 1995; Mossman, 1988, 1992; Sommerlad, 1998, 1999; McGlynn, 1998; Kay and Brockman, 2000; Schultz and Shaw, 2003). Within such a masculine culture, family

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<sup>2</sup> For a further, more detailed discussion of international research findings related to the status of women lawyers, see chapter 3, section V.

roles must remain invisible. A point is made that women have to prove commitment by working longer and harder, and that feminine ways of participation are not welcome.

On the other hand, the masculinity of the legal world makes it very hard for women and other oppressed groups to instil alternative values into the legal system. This, in turn, raises the issue of whether professional context could do away with women's differences completely. It might be the case that once women enter into the profession, they have already assimilated its strong masculine culture through legal education and professional socialisation. The following quote by Menkel-Meadow highlights this point:

"... Many of us feel the differences everyday. What we deplore is when they are used to oppress or disempower us or when they are used as immutable stereotypes that prevent recognition of individual variations. We do not yet know how many differences will disappear into a world socially and legally constructed so that gender is not a basis for domination. My point of view is that while we are observing the differences we might ask if we have something to learn from them. Whether or not the different voice is gendered, we might look at how our legal system might take account of a few more voices" (Menkel-Meadow in Barnett 1997, first published 1985: 203).

#### **d - Updating the theoretical debate**

A few years later, in 1995, aided by a longer historical perspective and a stronger and more sophisticated theoretical background, Menkel-Meadow attempted a new look at this issue of a feminine ethic of care in lawyering and told us how she had come to realise that the matter was much more complex than she once thought (Menkel-Meadow, 1995: 25). In spite of this, she expresses that she still imagines an alternative model of the legal profession allowing for the possibility that women inhabit the role of the lawyer more comfortably. This model would be more cooperative, contextualised, less rule-bound, more responsive to others, more conscious of socially just ends and able to incorporate women's conception of psycho-social health and family balance (Menkel-Meadow, 1995: 47).

The basic difference from her earlier work derives from the post-modern premise that we cannot make claims for women based on a universalistic attribution of generalised characteristics of womanhood. Therefore, room

should be made for diversity in terms of the identity of women lawyers. (Carrie Menkel-Meadow, 1995: 47). Additionally, she now asserts that women are neither the only repositories of alternative values nor the only source of change, and comes to the conclusion that the "ethic of care" in law is a complicated matter that could be studied irrespective of its connection to gender. Moreover, she suggests it would be most beneficial to the quality of legal thinking and practice if other excluded groups besides women were admitted (Menkel-Meadow, 1995: 38). Still, Menkel-Meadow values the promise of an inclusive profession that allows for women and other marginal groups to express values different from the dominant ones and still be accepted within the profession. She also persists in her view that care is gendered in our culture, and will continue to be expressed in the law and legal ethics by women and other subordinated people (Menkel-Meadow, 1995: 27).

Menkel-Meadow's later work also insists on the fact that women's thinking of legal categories in different ways does not require adherence to an essentialist standpoint. She argues that, if only a few women do bring about a shift in the way we think about law, one can still say that women have made a special contribution to both the theory and the practice of law. In terms of the causes for women's preference for the ethic of care, she opts for a social explanation. She points to the effects of early family socialisation, and to later forms of social and institutional socialisation, like school, peers, the media and professional context, all of which impose gender stereotypes on children and adults with respect to how they should be and behave.

Menkel-Meadow also goes through existing research in order to trace the ethic of care in women's lawyering. Her conclusion is that research results are inconclusive. Some studies show no connection between lawyering style and gender, while in other cases they substantiate the claim that women prefer less confrontational styles for the resolution of legal conflicts. As an example of this, she considers the case of sociologist Fuchs Epstein who, after a lifetime studying women lawyers, reached the

conclusion that "difference is in the eyes of the beholder", in that those wanting to find difference will find it, while those wanting to find equality between men and women also will. Moreover, Fuchs Epstein sustains that there is more variation in lawyering orientations inside each gender than between genders (Fuchs Epstein, 1988: 72-98, cited in Menkel-Meadow, 1995: 35).

In spite of these findings, and facing at the fact that quantitative feminisation has not brought about a change in gendered practices and culture within the profession, legal scholars have continued to work on the issue of the difference women could make to the legal system. A very interesting, recently published collection of writings on the issue by Schultz and Shaw (2003) stands as a very good and comprehensive example of this line of work<sup>3</sup>. In the same way as the later Menkel-Meadow, contributors to the collection, aware of the current debate within feminist legal theory, acknowledge the theoretical problems involved in the subject matter and take the anti-essentialist critique seriously. Thus they consider the issue in a renewed light, bringing more complexity and caution into their work. With different results, they all engage into an enquiry that incorporates new variables and considers different social forces besides gender. They tend to set up their research projects in specific environments and search for results that are applicable to particular contexts. Their enquiry into the changes women could bring into the legal system is more sceptical and cautious with respect to the care orientation in lawyering and considers many other aspects with reference to women's impact on the legal profession (Shultz, 2003: liv-lvii and 307-318, Bothelho Junqueira, 2003: 437-450; Felstiner, 2003: 23-30; Boigeol, 2003: 415-416; Sommerlad, 191-218; Hunter, 2003: 103-120; Mather, 2003: 38-45 ). In the light of these articles, the effects of women's increased numbers in the legal profession remain contentious in terms of making a distinctive contribution to the legal system. In the introduction to the collection, Schultz concludes that women lawyers (2003: lix)

"...have at least succeeded in softening the rigid contours of the life model of the male breadwinner and in bringing about a flexibilisation of workplace structures. And there is an undeniable fact: women have changed the very tool of lawyer's work – they have changed the law. They have enforced legislative measures which take into account modern notions of equality, equal rights and (now) equal standing and have created the legislative base for women's participation in all social functions and in the exercise of power." (Schultz, 2003: lix)

In fact, as more women come to occupy positions of power in the public sphere as decision and policy makers, more and more emphasis has been laid on the fact that women should be represented in positions of power both on grounds of fairness and for the special capacities they could bring to public office (Malleon, 2003:15-21; Hale: 2001: 493-504; L'Heureux-Dubé,2001: 15-30) Various authors have shown special interest in exploring their characteristic forms of participation -if any- and its consequences (Sherry, 1986; Martin, 1993; Davis, 2003; Allen and Wall, 2003; Davis, Haire and Songer 1993; Graycar, 1998; Boigeol, 2003; Bothelo Junqueira, 2003). As members of one of the branches of government, women in parliaments and in the judiciary, have not escaped this trend. The next section explores the relationships between gender and the activity of judging.

## **2 - The impact of more women in the judiciary**

### **a - Introduction**

Questions similar to those raised above for the case of women lawyers have been posited for the case of women judges, namely whether women judges bring a different perspective to their professional tasks and whether the presence of women makes a difference to the administration of justice. In various countries, the recent increase in the number of women judges, above 'token' numbers, justifies the theoretical enquiry by feminist scholars into the impact of more women judges on the profession and facilitates empirical research studies on gender differences in judging (Sherry, 1986; Martin, 1993; Davis, 1993; Allen and Wall, 1993; Davis,

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<sup>3</sup> The book also brings a collection of articles from different countries that present a statistical description of the situation of women in the law.

Haire and Songer, 1993; Graycar, 1998; Boigeol, 2003; Bothelo Junqueira, 2003).

As McGlynn (1999: 95) has noted, the analysis can be broken down into two different themes. One has to do with the impact of the entry of women judges in large numbers in the legal profession. The other relates to the perspectives they might bring to bear on their roles as members of the judiciary.

Closely related to the issue regarding the potential impact of more women judges is a general consensus on the desirability of an increased number of women in the judiciary. This interest has been substantiated on different grounds such as democratic legitimacy, fairness, equity, representation, responsiveness to diversity, shattering of gender stereotypes and openness to different cultures and perspectives. As Malleson (2003: 15-22) highlights, there is today considerable consensus that these are the values inspiring modern democracies. It is also generally agreed that men should not retain a near monopoly of one of the branches of government. As such, arguments based on these values have been used to justify proactive equal opportunity policies and positive actions aiming at a judiciary that reflects the differences existing within society.

#### **b - The advantages of having more women judges**

##### **i - Democratic legitimacy, diversity and cultural representation**

This section covers the various arguments put forward by different authors in favour of having more women in the judiciary. There is first a proposition resting on democratic principles such as equality of opportunities and fairness. It is argued that, in a society that purports to be democratic and egalitarian, the participation of women and other excluded groups in the judiciary should be welcome as a matter of principle (Malleson, 2003: 2 and 2003a: 175-188; Hale: 2001: 493-504).

A different type of argument in favour of the increase in the number of women judges also connected to democratic legitimacy refers to cultural

representation within a diverse society. Various authors have argued extensively in favour of a diverse integration of the judiciary and insisted that there is a doctrinal justification for the appointment of more women and members of minorities to the judiciary (Griffiths, 1977, cited in Wilson, 1990-1991: 361; Shetreet, 1998: 183). This proposition rests on the principle of the "reflective judiciary" which calls for the judiciary to be reflective of society. Implied in the argument there is an appreciation of diversity and democratic fairness and a recognition that women are an excluded group. Consequently, the argument extends to other excluded groups. In this context, the process of judicial appointment appears as a crucial mechanism capable of ensuring that people from diverse social origins gain access to the bench (Malleon, 2003: 15-17 and 2003a: 175-188; Hale, 2001: 491-492; McGlynn, 1998: 172-193).

Moreover, senior judges such as Judge Abrahamson (1998: 200) in the USA and Lady Justice Hale (2001: 499) in the UK have argued that a reflective judiciary that includes substantial numbers of women and reflects the racial and ethnic diversity of the population is essential to the public perception of justice as fair, impartial and representative. In addition this would build up public confidence in the judiciary (Malleon, 2003: 20-21).

Legal scholars have also highlighted the cultural aspects of representation, adding a new facet to the democratic representation and legitimacy argument; namely, that it is advantageous to welcome the voices of the excluded and the different. On those lines, Karst (1988: 1957-1958) alerts us to the problems raised by the fact that in multicultural, class-divided societies, the judges and those who are judged are often acculturated in different environments and, consequently, inhabit different communities of meaning. Karst argues that judges, mostly white, male and upper class, will most probably have a vision of life quite different from that of most of the people being judged, like women, poor people, people from other races, ethnicities or religions. Similarly, Minow states that "...the very presence of different voices at the judgement table

is important on the context of a participative and democratic vision of society and of justice -even if they do not prevail in particular circumstances" (cited in Harvison Young, 1998: 351). And, in Hale's opinion, a system of justice "will be richer for diversity of background and life experience" and it "might well be expected to bring about some collective change in empathy and understanding for the diverse backgrounds, experience and perspectives of those whose cases come before them"( Hale, 2001: 504).

Likewise, Jennifer Nedelsky has advocated a more diverse judiciary as a means to expand the judge's individual perspectives. Inspired by the work of Hannah Arendt, she conceives of judging as a collective discursive process which acquires public validity as it transcends individual limitations and enters into an imaginary dialogue with others to win their consent. Through this imaginary dialogue with diverse perspectives, the judge's own perspective broadens. Thus, she invites judges to adopt the perspectives of the "other" in order to deepen and broaden their own perspective. She recommends various critical exercises for judges to be able to glimpse the perspective of "others", avoid "false impartiality" and accept the "other" as "us". The first exercise proposed is to explore one's own stereotypes and attitudes towards the "different"; the second is to search for differences and celebrate them, constructing new bases for connection, and the third is to cherish difference and welcome anomaly, trying to understand the self conceptions and perceptions of others, which might seem initially strange (cited in Minow, 1987: 79 - 81 and in Harvison Young, 1997: 348-351; Neldesky, 2003: 1-21, originally 1997).

## **ii - The shattering of gender stereotypes**

An additional argument in favour of more women as role models in authoritative positions stems from the recognition that women are an excluded group. Sherry states that the sole presence of women judges occupying authoritative positions will shatter the stereotypes about women's social roles and make it easier for other women to follow suit (Sherry, 1986: 160). Referring to the symbolic role of more women in

authoritative positions, Justice Abrahamson (1998: 199) has rightly suggested:

"As pioneering women in the field, women lawyers and judges challenge the conventions that for so long defined 'lawyer' and 'judge' as male. The mere presence of women conveys the message that women can be an important part of the legal profession and government" (Abrahamson, 1998: 199).

In the context of a society where women occupy senior positions in the public realm, children will be socialised with the knowledge and expectation that both men and women are capable of developing prestigious, empowering careers and women lawyers will probably feel more comfortable within a woman-friendly environment. This, in turn, will encourage the entry of more women to the legal system (McGlynn, 1999: 98; Durham, 1998: 218).

This is, of course, relevant to most men-dominated fields, but especially important for the legal field, with its impervious masculine character and, in particular, for the judiciary since, even in countries where the proportion of women judges is quite high, most of them are situated at the base of the judicial hierarchy and only very few reach the top of the pyramid. Without dismissing the symbolic benefits of having women in senior and authoritative positions within the judiciary, it must be pointed out that having one token woman at the Supreme Court is far from sufficient. Substantive numbers of women must reach top positions within the judiciary if gender representation is to be achieved<sup>4</sup>.

### **c - The difference women judges could make to the administration of justice**

#### **i - Can women effect changes within the judiciary?**

The last section discussed the reasons for the desirability of having more women judges. The more institutional aspects related to democratic representation and legitimacy were examined first. The next section deals with the difference women judges could make to the legal system. As

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<sup>4</sup> This is particularly relevant with reference to equal opportunity policies where, of course, the quota must be seen as a floor and not as a ceiling.

McGlynn (1999:100) has noted, this discussion entails the consideration of other topics that were examined extensively in previous sections on difference theories. The issues concerned were whether it could be said that women reason differently from men, whether it is true that all women are different from all men, and how gender and other aspects of identity, such as class, race or sexual orientation might affect judging.

Since these points were discussed at length above<sup>5</sup>, in this section I will just state that, in my view, posing the question of whether women bring any differences to the judiciary does not imply that all women reason in the same manner, nor does it overlook differences among women. In spite of the differences existing among them, women whose social and ethnic identities differ widely, do nevertheless share a number of experiences. While allowing for individual variations due to other aspects of identity, commonalities may have a potential to foster certain general tendencies on the way women may approach judging. Although a more diverse judiciary would be highly desirable, it must be remembered that, since the role of the judge implies holding academic qualifications, expert knowledge and work experience, judges are mainly recruited among elite groups belonging to the upper and middle classes that, in most societies, are quite homogeneous both in terms of class and race.

The difference women judges could bring to judging is a very complex issue that has given rise to a heated debate. The argument that justifies enquiring into the impact of more women judges on the bench (Wilson, 1990) relates to the understanding that the application of the law is not mechanical, but implies an interpretation on the part of the judge. Clearly, when judges come to the bench, they bring with them their own perspectives and life experiences (Kennedy, 1997; Resnick, 1988: 1926). Thus, interpretation is mediated by the judge's understanding of the law, his/her appraisal of the facts brought before him/her, his/her biography and worldview. Considering that women's lives and experiences are, in many ways, very different from men's, it seems plausible that these

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<sup>5</sup> This chapter considers such issues in depth in section II and III, above.

different life experiences influence the way women judges interpret the law, reach their decisions and exercise their professional activities.

Gilligan's work, combined with that of other authors within the difference paradigm in feminist jurisprudence, provides the basis for a theory stating that the presence of women judges may bring different perspectives to the judiciary, particularly in terms of infusing the values of care and connection, presumed as more typical of the ways of women, with some potential to promote changes in the legal system. Moreover, women's different life experiences could shape not merely the way they interpret the law and reach their decisions but also their working styles.

Three basic aspects dominate the debate around women's different voice of care in judging. The first relates to the very existence of the different voice and its content. The second has to do with the likelihood that women judges could bring their supposed caring tendencies into their activities and whether this different perspective has the capacity to effect changes within the judiciary. The third relates to the challenges a feminist approach would pose to the traditional masculine ethic of the profession and to the ways this different voice in judgement relates to impartiality as a universal aspiration for judges.

Various authors have developed on Gilligan's argument further to reflect upon the relationship between gender and the activity of judging and on how the alleged perspective of women could manifest itself in judging. Their argument proceeds from the assertion that, because the law has been so thoroughly pervaded by the masculine perspective, an approach to legal decision-making based on separation, autonomy, individual rights, freedom from interference, procedural fairness and concern for correctly applying the appropriate legal rules has prevailed. In contrast, the different feminine voice in judging would speak about connection, care, response to needs, substantive fairness, communitarian values and context.

Along the same lines, drawing on Gilligan's work and on political philosophy, Sherry (1988: 543-615) relates a feminine perspective in

jurisprudence to the classical republican tradition in political philosophy. In contrast to the modern paradigm, which is masculine, liberal, individualistic, atomistic, non-teleological, and rule-based, the classical model is communitarian, holistic, teleological, contextual and more consistent with the female way of moral reasoning (Sherry, 1988: 579). The author identified the characteristics of a feminine jurisprudence -one that emphasises connection in contrast to autonomy, context as opposed to fixed rules, and responsibility in contrast to rights (Sherry, 1988: 579). In her view, a feminine jurisprudence encompasses aspects of personality and relationship that are independent from political views -whether liberal or communitarian/feminist (Sherry, 1988: 583). To her, the influx of large numbers of women into the legal system might, at least, contribute to alter the tensions between the two paradigms.

From this perspective, the entry of more women judges into the legal system in considerable numbers would be advantageous in terms of introducing the values of care and connection. Thus, for instance, in *Caring for Justice*, West (1997: 88-93) argues for an integration of care and justice into judicial decisions. West advocates the reconceptualisation of legal justice to include both the principles of the ethics of care and the ethics of justice, two aspects that she sees as mutually dependent. She appropriately suggests that judicial decisions will not be just if they are not caring and will not be caring if they are not just (West: 1997: 88).

In addition, women judges' potential contributions to the judiciary could manifest themselves both in style -how they do things- and in substance -what they do- (Hale (2001: 498). I find this distinction most useful for purposes of orienting future research, since it facilitates the identification of women's possible contributions to the judiciary beyond those that could manifest themselves in their judgements. Women judges might, for example, promote changes in the procedures to be followed, which might make a difference to the service of justice without necessarily implying a different outcome to their judgements. A care-oriented judge might, for instance, make a point of creating the conditions that would make those

who come to court feel at ease with the system and thus improve the administration of justice, without changing the criteria inspiring his/her final decisions.

The problem seems to be that the impervious masculine character of law views all deviation whatever outside the framework of law as illegitimate (Sherry, 1988; West, 1986, 1997 and Resnick, 1988). Taking this into account, it makes sense to wonder whether legal education, with its strong masculine bias does not blur these supposedly feminine characteristics. Without completely ruling out the possibility that women judges could make a difference to the administration of justice, Malleson (2003: 13-15) expresses strategic concerns with respect to founding the argument in favour of more women in the judiciary on the difference they might make in terms of improving the judge's decision-making. Malleson rightly alerts us against the possibility that the basic argument in favour of gender equality could be undermined in the event that gender difference in the judges' decision-making might not emerge from the observation of judges' decisions. She thus relates the present discussion to the previous debate on the desirability of having more women judges.

In addition, it has been suggested that, apart from bringing a perspective of care and connection to the judiciary, feminist women judges might, through their activity, strive for the advancement of women in general (Bothelho 1995: 5, 2003: 446-449). Along those lines, Wilson (1990-1991: 364-371) sustains that, while there are whole areas of the law such as corporative, commercial and property law on which there is no feminine perspective, there are other areas of the law that further impinge on women's lives where the masculine perspective sets the rules. I am specifically thinking of tort law, criminal law and family law where the masculine bias bears such force that judicial revision from a feminist perspective should be given serious thought. I think Wilson is right in that it is in those areas where women could make and have in fact already made a special contribution. Legal matters such as those involved in sexual discrimination, domestic violence; rape, sexual abuse,

pornography, sexual offences and custody, alimony and property issues in divorce cases are just some cases in point.

In fact, since equality is one of the basic values of democracy and the most important constitutional principle in democratic nations, it would be legitimate for democratic judges to strive for equality in every respect, not just in terms of gender. The problem with reference to gender inequality is that, due to its lack of visibility, many women judges are not aware of it. It must be noted that only a few of the women appointed to the bench are feminists. This suggests that it is not enough to appoint more women to the bench. As Madam Justice L'Heureux-Dubé (2001: 30) has convincingly argued: "What is needed is a change of attitudes, not just a change in chromosomes".

Many senior judges such as Madam Judge Wilson, Justice Abrahamson, Madame Justice L'Heureux-Dubé and Lady Justice Hale have tried hard to promote changes in the attitudes of women judges in this respect. Justice Abrahamson (1998: 211), for instance, upholds that the time has come for each woman judge to play her role in infusing feminist jurisprudence into the judicial system, positing alternative solutions to procedure and evidence that take into account how gender impinges in the process of litigation and hence contribute to the construction of a fair society, improving all people's access to the system. Similarly, Judge Gladys Kessler, president of the American National Association of Women Judges has drawn our attention to the collective attitudes adopted by members of the NAWJ towards acts of discrimination. She emphasises that individual judges who are subject to such great restrictions would never have been able to take such stances without being accused of judicial activism (cited in Resnick, 1988: 1931).

Feminist legal academics have, however, been more sceptical about the actual capacity of women judges to effect changes within such a masculine institution. Authors such as Berns (1999) and Rackley (2002) have contested the assertion that women judges might bring the ethic of care into judging and thus make a difference to the administration of

justice. Their argument is that, even if we came to the conclusion that women judges, with their different gender identities and social experiences have actually something to offer to the legal system, there remains the uncertainty as to whether they will be capable of promoting change in such a masculine branch of the legal profession (Berns, 1999: 3; Rackley, 2002: 611; Hale, 2001: 501; Malleson, 2003: 13-14). Furthermore, it has been argued that expecting women judges to effect such a difference might be too much of a burden upon them (Hale, 2000: 501).

Thus, Berns (1999: 3) wonders about the very possibility that women as non-subjects could speak the law in a different voice. She doubts that a negation can speak at all and that she can speak a voice that denies hers. She distrusts that a woman judge can speak with authority and power as she wonders what happens to subjectivity when the subject is a judge, and reframes the question:

"What it might mean to be a woman and to act as a judge and as a woman in a world in which woman remains a negation- now that is a topic worth pursuing". (Berns, 1999: 3)

To Rackley, the woman judge is entrapped in a paradox. Given the difficulties involved in being recognised as a judge and at the same time remaining loyal to her own identity, the author fears that a woman judge is a contradiction in terms. As the traditional model of the judge is male, in order to become a judge she might have to forego her own voice and adopt that of a man, leaving the non conforming woman judge with the role of the other (Rackley, 2002: 603-624). In Rackley's view, the woman judge becomes a paradox in need to shed her difference and, at the same time, conform to the prevailing image of the judge. On the one hand, the presence of women is seen as desirable to bring their perspectives to the bench and making the judiciary more representative. On the other hand, as the judge is supposed to be without perspective, women's presence becomes pointless.

Both Berns and Rackley emphasise the difficulties women judges might encounter to shed their alleged difference amidst a masculine institution. Still, Rackley is persuasive when she invests women judges with the role

of disrupting the current culture within the law. According to Rackley (2002: 621-625), because of her otherness, the woman judge cannot help but disrupting and exposing the previous homogeneity and uniformity of the bench, showing the unavoidable gender dimension inherent to judging. From the tensions originated in her otherness, she can start a movement towards challenging the paradox involved in the construction of the woman judge as the other, imagine counter images of the judge that women and other underrepresented groups can comfortably occupy. Rackley convincingly suggests that through her corporeality and the expression of the contradictions implied in being a woman and a judge, the woman judge has the capacity to question the prevailing model of the judge and project alternative images. In spite of its strong masculine culture, the judiciary, like any other social institution, is neither completely monolithic nor immutable. Some of its members can accord different meanings to the role of the judge, and have different visions with respect to the activity of judging, sometimes in contradiction with the prevailing culture.

To me, the expression of these contradictions has the potential to disrupt the conventional image of the judge and propose alternative stances. As suggested by Needelsky (2003: 1-21, originally 1997), such a process might initiate a discussion encompassing both competing views on the role played by judges and of different interpretations of the law, and has potential to bring about institutional change. As an illustration of the latter point, let me bring into the discussion an event narrated by Justice L'Heureux-Dubé (2001: 24-27), a member of the Canadian Supreme Court. Her narrative provides an example of the sort of change a senior woman judge in a position of authority can contribute to the system by resisting claims of partiality for not fitting the white male paradigm.

In *Outsiders at the Bench*, Madam L'Heureux-Dubé (2001) gives an account of a controversy in which she was involved with a member of the Alberta Court of Appeal over "implied consent" in a sexual assault case<sup>6</sup>.

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<sup>6</sup> Re. Ewanchuck (1999) I.S.C.R.330 (cited in L'Heureux-Dubé, 2001: 24).

The Supreme Court of Canada unanimously overruled a split decision of the Alberta Court of Appeal authored by Justice McClung. The lower court judge had argued that, under Canadian Law, implied consent constituted a defence in a case of sexual assault. The contents of Justice McClung's decision, highly coloured "by myths and stereotypes" led Madam Justice L'Heureux-Dubé to write separately (L'Heureux-Dubé, 2001: 25), exposing the lower court judge's sex stereotypes. Feeling personally offended by Madam Justice L'Heureux-Dubé, Justice McClung wrote a letter of complaint to the National Post, a local newspaper. This debate transcended the Courts to reach the media, through which other members of the Canadian legal community became involved in the issue. Even an organisation of conservative women and an American judge joined in the argument. 'Real Women' accused Madam Justice L'Heureux-Dubé before the Canadian Judicial Council of using the Supreme Court of Canada to promote her own feminist bias, and Judge Kozinsky from California came to her defence. Consequently, the case and the debate that followed acquired public status. The final outcome of the ordeal was that Justice McClung was reprimanded by the Judicial Council due to his extra judicial statements to the press and Real Women's complaint against Madam Justice L'Heureux-Dubé was dismissed. The interest of the above case lies in the fact that it shows the difference a feminist judge can make in terms of the outcome of a specific judicial case. Moreover, it shows the impact that a discussion taking place in a court can make on the public debate. When the issue in question relates to gender inequality, it contributes to render women's subordination more visible to society.

In the next section I move on to consider the challenges posed by the assertion that women could bring different perspectives to the activity of judging poses to conventional theories of adjudication, in particular to impartiality and objectivity as universal aspirations for judges.

## ii - Feminist challenges to the traditional model of the judge

In this section I discuss the interplay of central aspects of the role of the judge such as impartiality, neutrality and objectivity as seemingly opposed to care, connection and bias.

Authors such as Resnik (1988: 1885-1944) have reflected upon the possible convergences between the language of judges within the liberal tradition and the language of feminism. In her view, the feminist stress on connection and the judicial aspiration for disengagement seem to preclude any possibility of convergence. Often used interchangeably when related to judging, terms such as disinterest, neutrality, disengagement, impartiality, objectivity and independence are words that denote a deep suspicion of relationship. In her analysis, Resnick draws our attention to the fact that other cultures do not require such qualities from their judges, and that the western legal tradition may be impoverished by the absence of feminist insights. Her opinion is that:

"...we could demand that those who hold power do so with attentive love, with care, with nurturance, with a responsible sense of one's self as connected to and dependent upon those who are being judged" (Resnick, 1988: 1922).

Still, Resnick argues that adding a bit of connection and responsible nurturance into the pot of disengagement and stirring is far from the transformative response feminist insights pose. In her view, what is needed is a revised list of judges' qualities. This involves much reflection on the desirability of such qualities as connection and care on the part of judges and the consequences to which these might lead; on whether these qualities are in need of contextual examination and finally, on whether all bias and interest should be disqualifying. Feminist revision can, according to her, lead to the recognition of the "tugs, the pulls and the burdens of judging", and serve as an antidote to the culture of hierarchy and objectivity prevailing within the profession (Resnik, 1988: 1926). Accordingly, the author advocates the consideration of the subjective elements in judging:

"Perhaps if we learned to speak of judging as a terrible and terrifying job, as a burden of inflicting pain by virtue of judgement, we might develop modes of resolution different from those so readily accepted today. We might seek more communal modes of decision making, insisting upon groups of two, three or more judges to share the honour, the obligation, and the pain of decision. When we recognise the burden and the pain of judging, we might uncover one element of adjudication that exists but is relatively unacknowledged. Much "adjudication" is not a win/lose proposition but an effort at adjudication with judges and juries responding to both sides, but currently without vocabulary or permission to express empathy to competing claims. Many verdicts allocate victory to both sides, but our tradition is to mask that allocation rather than to endorse the practice of seeing multiple claims of right. Feminism can help bolster our trust in practice and permit us to remove the facades of total victory and defeat." (Resnik, 1988: 1926)

Resnick's (1988: 1928-1940) view is that feminist theories on judging must build from the practice of judging. She draws our attention to the work of feminist judges who, like Judge Abrahamson, acknowledge that, when they come to the bench, judges bring with them their life experiences, which affect their views of life and law. Judge Abrahamson values the judge's capacity for empathy, and encourages other judges to participate in community activities and visit other Courts unrobed, in order to get the feeling of what ordinary people experience when they have to appear before the Court (in Resnick, 1988: 1928-1929).

The interplay of central elements of the judicial role such as objectivity, neutrality and impartiality on the one hand, and empathy and bias on the other is most crucial to the ongoing discussion (Cain, 1988: 1946). It entails a consideration of women judges' loyalties towards the law and towards their gender, and of whether these loyalties may compete with each other (Hale, 2000: 499). The following extract reveals the complexity of the issue:

"We want our judges to be affectionate, but we do not want our judges to be prejudiced. We want to have the good bias but not the bad one. Then, if there is good and bad bias, there is the difficulty to distinguish between the two, plus the difficulty to maintain the good bias (good connection) in the process of judging". (Cain, 1988: 1946).

The idea that impartiality does not mean that the judge has no prior conceptions or experience is not a feminist invention. It has been circulating for some time now, starting with the realists in the 1920's and following the Critical Legal Studies in the 1960's (L'Heureux-Dubé, 2001: 28). Thus, Lord MacMillan remarked:

"Impartiality is not easy of attainment. For a judge does not shed the attributes of common humanity when he (sic) assumes the ermine: The ordinary human mind is a mass of prepossessions inherited and acquired, often none less dangerous because unrecognised by the possessor". (MacMillan cited in Wilson, 1990-91: 361 and in Harvison Young, 1997: 346)

Along the same lines, as early as 1943, in one of his decisions while in the Second Circuit<sup>7</sup>, Frank commented:

"If however, bias and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will...Only death yields complete dispassionateness, for such dispassionateness signifies complete indifference" (Frank, 1943, cited in L'Heureux-Dubé, 2001: 27)

Cain has argued that, together with their legal knowledge, judges naturally bring with them a point of view to the courtroom (Cain, 1988: 1946). Thus, when considering neutrality and disengagement as aspirations for American judges, Cain presumes that the expectation is not that judges should act like robots, with no particular point of view, or that they should cast aside their life experiences during the entire process of judging. To her, the answer is rather that the legal system might change, so as to include more judges with a broad life experience, judges who mix with the people, identify with them, with a true ability to listen with connection to people's stories, without prejudging, before they engage in the necessary separation that judging involves (Cain, 1988: 1946).

A similar point is put forward by Kenneth Karst (1988: 1966-1967), who speaks of the judge's double capacity for empathy and principled detachment as "essential elements of the successful practice of the judicial art". Within the framework of a multiracial, multiethnic nation with a constitutional ideal of tolerance for difference, far from seeing empathy and impartiality as opposites, he conceives of them as complementary. He defines empathy as the readiness to be engaged in the experience of others, as the judge's capacity to approach all parties contending positions with due consideration, while he conceives of objectivity and impartiality not as "devotion to some self-applying mechanism that eliminates

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<sup>7</sup> In re J.P:Linahan, Inc., 138 F2d 650,651-52 (2d Cir.1943).

judgement from judging", but rather as "an effort to decide from an independent standpoint, as opposed to the point of view of one of the parties" (Karst, 1988: 1966-1967). The following quotation reveals his integrated conception:

"The same empathy that permits the judge to imagine the parties' experiences and thoughts and feelings also underlies his or her capacity for principled detachment - that is the only kind of objectivity we can properly expect" (Karst, 1988: 1966 -1967).

In short, as discussed above, the feminist revision of traditional elements of the adjudicating role does not relinquish impartiality. Far from posing a threat to judicial impartiality, it rather leads to a more encompassing view that sees empathy and impartiality as complementary.

#### **d - Conclusion**

The above section examined the relationships between gender and the activity of judging. I started by reviewing the arguments in favour of having more women in the judiciary: democratic legitimacy, equal opportunities, representation, diversity and cultural representation. The proposition that women judges could bring a difference to the administration of justice was analysed together with the challenges posited by feminist insights on traditional understandings of judging and women judge's capacity to effect changes in the legal system.

The contribution women judges could make to the administration of justice was examined in the light of the very tension between difference and anti-essentialism underlying the current controversy within legal feminism. As a consequence of this analysis, I came to the conclusion that, while no universal claims should be made in terms of the difference women judges can make to the legal system without falling into essentialism, it could at least be asserted that the presence of more women judges at the judging table serves to disrupt the conventional images of judging within a masculine profession. Accordingly, the issue of the effects of the entry of women in large numbers to the profession of judging seems well worth

investigating, albeit in specific contexts and bringing other variables besides gender into the analysis.

#### • IV - General conclusion

Chapter one aimed at providing the foundations for my research on gender differences in the family judiciary of the City of Buenos Aires. Given the "spiral relationship" existing between legal practice and legal theory (Grant Bowman and Shneider, 1998: 249), the chapter starts with an overview of feminist legal theory. In this outline I identified three major strands or phases of feminist legal theory: liberal feminism represents the first phase; the second phase comprises two different strands, difference and dominance theories, and the third phase, characterised by anti-essentialism, is inspired in the postmodern critique.

Whereas liberal feminism argued that women and men should be treated the same, second phase authors within the difference approach emphasise the need to understand the differences between them. Dominance theories within the second phase of feminist legal theorising focus on the embedded structures of power that make men the norm from which difference is constructed and the theories informed by the postmodern critique assert that there is no single female category, pointing out to the need of looking into the intersections of gender and other categories like race and class.

The latter approaches grew out of the incapacity of the first phase (the liberal paradigm) to bring about equality in practice. In particular, second phase authors within the difference approach addressed their efforts at understanding women's unique experiences of pregnancy and motherhood, while second phase writers who favour the dominance approach offer a framework to understand the harms of violence against women in areas such as domestic violence, rape, sexual harassment and pornography. Third phase writers articulate the need to account for the wide range of feminist perspectives.

Because of its relevance for the current research, cultural feminism, an exponent of difference theory, was situated within these strands of feminist legal theory, and within the prevailing debate within legal feminism. Cultural feminism revalues "the ethic of care" as expressed mainly in women's narratives relative to their moral choices. Cultural feminists recommend that this ethic based on care and connection, developed through women's involvement with the private sphere of society, be transposed into the public world to complement the prevalent masculine ethic of rights or justice characteristic of the legal system. In spite of the fact that it has given rise to much criticism, it has made a tremendous impact on feminist thinking on the law.

The work of scholars who applied the ethic of care to the study of the legal profession was then examined, as exemplified by the writings of authors such as Menkel-Meadow (1988, 1995), Sherry (1986), Bender (1992) and West (1988, 1997) among others, who drew on cultural feminism to reflect upon women's potential to bring the values of care and connection to the legal profession, so deeply infused with the masculine values of individual rights, autonomy and objectivity.

The last part of the chapter considers the arguments in favour of having more women in the judiciary and examines the ways in which different authors have treated the potential impact of the increasing number of women in the judiciary, a men-dominated branch of the profession. It introduces the main themes around which the issue revolves, the relationships between gender and judging ; the very existence of the different voice of care in the activity of judging and its content; the main challenges feminism poses to traditional conceptions of the judge and the capacity of this allegedly different perspective of effecting changes within such a masculine area of the profession.

The above analysis aimed at providing a theoretical framework for my research on gender differences in the family law judiciary of the city of Buenos Aires. The current theoretical discussion of the issue of gender differences within the legal profession was examined and the literature

relative to the particularities of women's participation within the legal profession was reviewed against the background of feminist legal theory. This aided me to identify the many theoretical problems to be addressed in this endeavour. Nevertheless, the personal interest that originally inspired the choice of my research topic remains vivid and the perspectives women bring to the activity of judging seem to me worth exploring and theoretically sound. Having understood that there is no universal answer to this question, and that each situation justifies an enquiry of its own with its corresponding conclusions, I have set myself the task to explore gender differences among the judges of the Family Law Courts of the city of Buenos Aires.

In the next chapter I trace and describe the development of the process of women's entry into the professions in Argentina, looking particularly into the legal profession -women lawyers and judges. I situate women's entry into public life as one aspect of the general process of institutional modernisation of Argentine society, examining, among other trends, the evolution of women's situation, their public participation, entry into higher education and the characteristics of the country's legal and political system. In the third chapter, I trace the entry of women into the legal profession and describe their participation in its different areas. To know the situation of women in the legal professions and the options open to them seems an essential step to be fulfilled before exploring gender differences in the way family judges approach their work and the possible effects that the increasing number of women judges may have in the family judiciary of the City of Buenos Aires.

## **Chapter 2 - Women's entry into the professions and public life in Argentina**

### **• I - Introduction**

Chapter I presented an analysis and discussion of the theoretical framework to be used in this research. Chapter II provides the socio-historical background necessary to understand women's entry into the legal profession and, as such, lays the foundations for my analysis of the Family Law judiciary.

This chapter gathers information coming from various sources with the purpose of tracing and describing the process leading to women's access to the professions in Argentina. As such, it sketches the evolution of women's growing participation in higher education and in public life, their general situation in the context of the country's socio-legal and political system, and the characteristics of women's social and political participation within the family and in public life, including the women's movement.

Section II situates women's entry into public life as one aspect of the general process of institutional modernisation of Argentine society and examines the evolution of women's participation in public life. Section III provides an overview of the current legislation regarding women, children and the family. Section IV traces recent developments within the family in Argentina. Section V looks at women's process of incorporation into higher education in general and into law in particular.

## • II-Women in Argentina's public life: an overview<sup>1</sup>

### 1- The historical, social and legal background to the entry of women into the professions in Argentina

In this section I refer briefly to the process of incorporation of women into Argentina's public life during the 20<sup>th</sup> century as the backdrop against which I will then trace the progress of women within the legal profession.

From its very beginnings in the 17<sup>th</sup> century, the university was the site for the education of the ruling elites. It was only in 1918 that this elitist tendency started to shift under the influence of secular education and the pressure exerted by emerging middle class groups that gave rise to a movement aiming to reform and democratise higher education. If anything, what this movement showed was that obtaining a university education and credentials already constituted an inescapable step along the road leading to social and political power.

Unlike what happened with primary and secondary education, the conquest of higher education for Argentine women was a difficult and slow process, which started later, towards the end of the 19<sup>th</sup> century. Only in 1889 did the first woman medical doctor graduate from university: her name was Cecilia Greerson. Her entry to university met great resistance among her men peers and she had to wait for three more years after her medical education was over to obtain her degree, and to be allowed to practice as a doctor (Maglie and Frinchaboy, 1988: 29). The first women lawyers -Celia Tapia and María Angélica Barreda- who obtained their degrees in 1910 had to overcome similar obstacles to practise their profession.

Women's marginal participation in the process of incorporation into higher education can be explained in terms of the prevailing general social context of female exclusion at the time. Until quite well into the

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<sup>1</sup> For references on the women's movement in Argentina published in English, see: Pescatello, 1972; C. Jeffress Little, 1978: 235-253; Feijoo and Gogna, 1990; Feijoo, 1993; Jaquette J. and S. Wolchik Eds, 1998, Arditti, 1999.

20<sup>th</sup> century, women were denied civil and political rights, long awarded to men. Until 1926, the Civil Code considered women to be incompetent, together with children and the mentally handicapped. Living first under the guardianship of their fathers and later of their husbands, married women were not allowed to inherit, or manage their own property; they could not enter into professions, legally binding contracts or join civil organisations without permission and were denied legal standing. They were banned from participating in elections. Married women only acquired civil rights forty years later. Women had to wait until 1947 in order to obtain the right to vote, since the 1912 Law of Universal Vote<sup>2</sup>, paradoxically, did not include them.

The general context of exclusion and subordination of Argentine women at the time explains the involvement of these pioneer professional women in the struggles for the vindication of the rights of women characteristic of the feminist movement at the beginning of the 20<sup>th</sup> Century (Feijoo, 1994:128). The inclusion of a brief consideration of the situation of these early forms of women's movement is justified in the belief that they constitute an important precedent in terms of the incorporation of Argentine women into public life. After a brief comment on the atmosphere of the times, my attention turns to the characteristics of Argentine women's early forms of public participation.

#### **a - The evolution of women's situation in Argentina**

##### **i - The participation of pioneer professional women in the early feminist movement**

The early and advanced, though scarce<sup>2</sup>, entry of these pioneer women to university in the first years of the 20<sup>th</sup> century highlighted the socio-legal, economic and political contradictions of the actual social situation of

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<sup>2</sup> According to the 1914 National Census, among the professionals there were 59 medical doctors and 6 lawyers.

See Henault, 1982: 45.

women at the time<sup>3</sup>. In fact, the vindication of civil rights for women was at the heart of the Argentine feminist movement for the first quarter of the twentieth century until the reform of the Civil Code in 1926, as was the vindication of women's political rights until 1947, when women obtained the vote. From 1902 on, numerous law projects were presented proposing legal reforms such as divorce and property rights for women<sup>4</sup>. The history of these 50 years of struggle to obtain civil rights, access to higher education, entitlement to participate in different economic activities and the vote, can, in fact, serve to portray Argentina's transition into modernity.

At the same time, the sole existence of these few professional women, very active within the women's movement, challenged one of the myths that sustained the subordination of women in their intellectual inferiority. It also introduced alternative models for the development of women's lives. At the beginning of the 20<sup>th</sup> century, it is surprising to discover the presence of a few women who were so far ahead from the stereotypical woman of the times, and so much in tune with the suffragette movement in Europe. It is all the more surprising indeed because these women have been kept invisible by traditional historical accounts, to the extent that they are unknown even to their own descendants<sup>5</sup>, who have lost all record of their lives (Feijóo, 1978; Henault, 1982; Jeffress, 1978; Barranco, 2002).

The advanced ideas of these pioneering women can be explained in terms of their international connections and their knowledge of French and

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<sup>3</sup> The very exceptional case of Julieta Lantieri is paradigmatic of this contradiction. Julieta Lantieri was a young feminist medical doctor appointed as associate professor of the Faculty of Medicine by a foreign professor in 1911. In order to practice as a faculty member, however, she was required to hold civic rights. Thus, she asked the government to make an exception and grant her Citizenship Papers. Being a woman, she was not supposed to obtain citizenship, but eventually she got her papers. Once she obtained citizenship, she developed a strategy to include the question of women's political rights into the public debate. Once a citizen, she was elected for Congress. After she had her citizenship papers she claimed to be eligible a representative, and, although she faced great resistance she would not cease in her attempts to become one. Finally, in 1920, long before she could vote, she was elected for congress (María del Carmen Feijoo: *Las Luchas Feministas*, 1978: 16).

<sup>4</sup> Especially by the Socialist Party, but their proposals were strongly opposed and sidetracked into committees for further consideration.

<sup>5</sup> Barreda was the first Argentine woman lawyer. I approached her niece in order to obtain more information about her, and found that she was not aware of the fact that her aunt had been the first woman lawyer.

English. In fact, they were very well connected internationally, their debates paralleled those of the feminists in Europe and the United States, a fact that made the Argentine movement more progressive<sup>6</sup>. For instance, Cecilia Greerson, the first woman doctor, who was of British descent, used to travel to London to contact the British feminist movement and imported both their ideas and tactics into Argentina. She participated in the Second International Women's Council Conference in London, where she decided to create the Argentine branch of the Council, which she did in September 1900 (Feijóo, 1978; Henault, 1982; Jeffress, 1978; Barranco, 2002).

From the very start, however, the Argentine women who participated actively in public life at the beginning of the century were clearly divided into two groups: one with a Catholic orientation and a more philanthropic agenda, aiming at improving women's and children's life conditions without questioning masculine supremacy, and the other, with a clearly critical and feminist standing advocating social reform aimed at ending women's oppression (Feijóo, 1978; Henault, 1982; Jeffress, 1978; Barranco, 2002).

The differences within the Argentine branch of the International Women's Council that ended in the expulsion of Cecilia Greerson from the organisation she had created nine years before, and the events around the organisation of the Centennial Celebration of Argentina's independence in 1910 are paradigmatic of this division. By 1910, Greerson objected to the fact that the Argentine Branch of the International Women's Council refused to include the universal vote among its objectives. The Council was already divided around the issue when, in 1910, Greerson publicly declared her adherence to feminism<sup>7</sup>. Her announcement led to an internal crisis that ended with Greerson's

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<sup>6</sup> An event that shows how well connected they were with their European counterparts was the mockery of elections they organised in 1920, in coincidence with the national elections. The mockery was actually a copy of what the Parisian feminists had organised a year before.

<sup>7</sup> She defined as "the evolution of the woman towards superior ideals and her participation in the progress of humanity" (Jeffress, 1978: 244)

expulsion from the International Women's Council and the creation of a new institution. Together with her fellow professional women, Greerson created the Feminist Socialist Centre in 1910 (Feijóo, 1978; Henault, 1982; Jeffress, 1978; Barranco, 2002).

As was mentioned above, the first group of the women's movement, whose members belonged to the Buenos Aires bourgeoisie, was very much influenced by the Catholic Church and oriented towards philanthropy. While aimed at promoting improvements in women's life situation and education, it did not question male supremacy. Its origins could be traced to the early national period when Bernardino Rivadavia, a Minister of Government, created the "Society of Beneficence of Buenos Aires". In its very long history, the society, established in 1823 and disintegrated in 1948, expanded from its original function of creating a school system for girls, encompassing the whole spectrum of social services for women and children. The "Society of Beneficence" made a significant contribution to Argentine society in terms of providing social services for the relief of poverty and sickness in a period of rapid urbanization and growing immigration. Moreover, it also served as a model for many other women charitable groups and as an outlet for the energies and social capacities of many non-working educated women. Inspired in thinkers such as Alberdi and Sarmiento<sup>8</sup>, who had drawn on American and European modern ideas with respect to the role of women in society and the benefits of women's education, these groups and societies had a significant and lasting impact well into the period of Argentina's modernization (Jeffress Little, 1978: 235-248). Their most salient contribution relates to the introduction of "normal"<sup>9</sup> (1870) and then secondary education (1900) for girls. Both types of education were instrumental in terms of raising Argentine girls' educational expectations

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<sup>8</sup> Both Alberdi and Sarmiento were thinkers of the '37 generation who eventually became presidents of Argentina. They were convinced that women should be educated to acquire the full duties of citizenship and thus contribute to societal development. Sarmiento, who was an inflexible advocate of universal and secular education, firmly believed that intelligent women had a special ability to educate young children.

<sup>9</sup> "Normal" school trains students to become teachers

and in creating the conditions for the later incorporation of women into higher education. Moreover, by strongly promoting women's access to secondary education, this more conservative strand laid the grounds for women's entry into the professions as from the late 1960's and early 1970's.

The second group, instead, had a clearly feminist and class position and a much stronger oppositional standing. It strongly advocated social reform as a means to bring women's oppression to an end. It was very much influenced by socialist and anarchist ideas brought by the strong migratory current coming from Europe that Argentina received, over a few decades at the end of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup>. Argentina, Chile, Uruguay and Paraguay were the Latin American countries where feminist ideals and movement were most advanced at the turn and the first decade of the century. Although many of these early pioneering women came mainly from middle class families, they had strong libertarian and socialist ideals and struggled for equal civil and political rights, universal vote and full autonomy for women (Feijoó, 1978).

The Centennial celebrations of Argentine Independence in 1910 gave women's groups the opportunity to publicise women's contributions and a time to stress the need to expand education and to reform the Civil Code. The celebrations found women divided into two strands. The internal division of the early women's movement precluded the possibility of a joint women's conference reuniting them both. The result was the simultaneous organisation of two conferences: a more conservative women's gathering organised by the Argentine Branch of the Woman's Council, and a more radical women's meeting, the "International Feminist Congress of 1910", sponsored by the Federation of University Women (Feijoó, 1978; Jeffress, 1978; Barranco, 2003).

The content of the discussion at each of the meetings reflected their opposing agendas. While the themes of the more conservative conference concentrated on women's possible contributions to society, they strongly objected to equality between the sexes on the grounds that it

might lead to chaos and disruption. They also upheld the belief that women's most significant contribution to society should come from civic education rather than from political participation on equal grounds with their men counterparts. On the other hand, the main focus of the "Feminist Congress" was how to achieve sex equality. Examples of recurring themes that appeared in the conference presentations were divorce, mixed and non-confessional education, joint custody, illegitimate children, the traffic of women and prostitution. Labour demands were very important because, at the beginning of the century women and children's working conditions were very bad. In spite of the prevailing ideology of domesticity, women, especially those from the lower classes, joined the labour force quite early in Argentina<sup>10</sup> (Feijoo, 1978: 20). Among the women who organised the congress, there was a constant preoccupation with children's and women's health issues related to their workplace as well as prostitution and the traffic of women.

My interest in the Feminist Congress comes precisely from the centrality given to legal reforms to improve the situation of women. In spite of the fact that there were only two women lawyers<sup>11</sup> at the "First International Feminine Congress of Argentina"<sup>12</sup>, the Rights Commission was a very popular one. Men and women coming from other disciplines submitted interesting papers referring to legal reforms. This showed early feminists' strong belief in the power of the law to bring about reforms in the situation of women<sup>13</sup>.

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<sup>10</sup>Women joined the local industries very early, in the late 19<sup>th</sup> century. With the emergence of Buenos Aires as a major trade and commercial center in the 1880's, women inundated the lower echelons of office workers and sales clerks, toiling for long hours and receiving minimal pay and few benefits (Jeffress, 1978: 241). The 1914 census showed that women constituted an important (22%) part of the economically active population, 7% of agricultural laborers, 30% of industrial and manual workers, 83% of domestic workers, 7% of commerce workers, 50% of teachers and other workers in education, 20% of those professions related to the Arts, 10% of those professionals related to the sciences and literature and 5% of public officials. See María del Carmen Feijoo, 1978: 20.

<sup>11</sup> They were Barreda, the first Argentine woman lawyer and Paraguayan Serafina Dávalos, who closed the Congress with her presentation.

<sup>12</sup> These records can be found at the documentation center of the Alicia Moreau de Justo Foundation.

<sup>13</sup> As Cynthia Jeffress put it: "They put too much faith in the power of law and reforms to change

Educated and determined women who, in spite of their middle class background, supported socialism and many of the strikes organised by the lower classes then created many women organisations. Some of their demands were on the feminist agenda until a few years ago. Examples of these are the divorce law (passed only in 1986); equality in the workplace; maternity leave; the 8 hours' workday; and equal pay for equal work. This last demand is still one of the basic claims of the present feminist movement in Argentina.

It should, however, be emphasised that, although emblematic, these pioneer professional women were quite exceptional<sup>14</sup>. The number of professional women would have to wait for a few decades to become numerically significant<sup>15</sup>.

The feminist movement in Argentina underwent different phases. It was very active in the first decades of the century, focusing in attaining civil rights for women. After the new Civil Code was approved in 1926, it went then through a long period of stagnation. Again and again the early feminist movement for the right to vote met the resistance of the Conservative Party. The Socialist Party proved to be a strong ally for the feminists, especially from the second decade of the 20<sup>th</sup> century. Once the party got into parliament, with little success, its representatives would repeatedly propose laws to grant women civil and political rights. Influenced by social and historical circumstances, the movement would unfold later in the century.

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age old customs and deep seated psychological attitudes toward women " op cit, 1978: 249.

<sup>14</sup> By 1900 only one woman had enrolled at a university level. In the 1901-1910 period the changes were slight, with two or three women at Medical School and no more than seven at the School of Architecture. Other schools had even fewer women recruits. Only after 1916 was there a clear increase in the number of women in Argentine universities, with 38 women in Medical School and more women entering fields such as Law, Pharmacy and Education (Ministerio del Trabajo, Oficina de la Mujer, 1970: 82).

<sup>15</sup> For the incorporation of women into higher education see section V in this chapter.

## ii - State action promoting women's progress within society

As a result of the presidential elections of 1946, President Perón came to office and, in September 1947, with a favourable parliamentary situation, he granted women the right to vote. Argentina was the 8th country in the region to give women the right to vote in national elections<sup>16</sup>. The strong presence of Evita Perón furthered the process of women's inclusion in the political life of the country. Evita created the "feminine strand" ("rama femenina") of the "Peronist" party and stimulated women's participation in party politics. In 1951, on the occasion of the first presidential elections after they had acquired the right to vote, women did very well. There was a very good female turnout and a very important number of women were elected. Almost 4 million women voted in the national elections. More than 60% voted for Perón, women got 6 seats in the Senate and 23 representatives. In the next two elections, in 1953 and 1955, their positions became even stronger, with 8 senators and 37 representatives, corresponding to 25 % and 16%, of the Congress respectively. Women would not recover this position even at the end of the century when quotas were established (Navarro Marisa, 2000).

These advances ceased when, in 1955, Perón was overthrown by the Armed Forces and the "Peronist" party was proscribed for almost two decades, during which democratic rule was frequently interrupted by military coups.

When, the Armed Forces called for elections, in 1958, various political parties updated their policy towards women. While they reversed their policy of exclusion of women from their lists, they put women in the last places within the list, which made it virtually impossible for them to get elected. As a result, only 4 women got elected that year.

Again, when in 1973 the military regime put an end to the proscription of the Peronist party, women came back to Parliament, gaining three seats

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<sup>16</sup> Actually, in the provinces of Santa Fé and San Juan women participated in local elections well before that date.

as senators and 20 representatives (Navarro 2000: 12 -14). In spite of this, the Peronists followed an erratic policy regarding women. After Juan Peron's death in 1974, the Peronist right wing struggled to control the administration led by his wife, Isabel Peron, and adopted anti- feminist measures. The free use of contraceptives was prohibited, and the executive vetoed a programmed reform of parental rights aimed to replace the Roman inspired law of "Patria Potestad".

Although unfavourable to women, these measures did not draw the attention of the public within the context of a nation that was suffering from political polarization, guerrilla warfare, right wing terrorism, economic crisis and the ever-present threat of a military coup (Feijoo and Nari, 1994: 112). In March 1976, a military junta took power. The Junta implemented a repressive policy of State terrorism and a set of neo-liberal economic measures of structural adjustment that heavily weighed on the poorest.

The military regime that ruled the country for 7 years suffocated all democratic activity. In spite of this, women resisted the dictatorship in various ways. They basically joined three kinds of groups in their struggle for emancipation. On the one hand, there were the women in the human rights movement. A second and very different mobilisation involved women who were struggling to obtain the minimum resources for their families to survive and, thirdly, there were the groups that gathered to fight for women's interests from a feminist perspective. All these groups participated in the opposition and resistance to the dictatorship, creating and helping shape the transition to democracy after Argentina's military defeat in the Falklands and the end of the military regime (Feijoo and Nari, 1994).

With the recovery of democracy in 1983, women came back to Parliament again, though in very small numbers. Only 12 women were elected to Congress. The next parliamentary and national elections in 1985, 1987 and 1989 did not bring about changes in the position of women. This was a symptom of what was happening to the women's movement. In spite of the significant contributions women had made to the restoration of

democracy, the new democratic regime was limiting their political participation. The women's movement failed to become an important political actor in the democratic interplay and remained more of an intellectual reference point. It is not clear whether this was due to discrimination on the part of the government, to the failure of political parties to include a significant number of women among their ranks, or to women's own political attitude and discourse. Probably, the situation was the result of the interplay of all these factors. The inescapable fact was that they were demobilised and far from sharing political power or receiving the benefits of democracy (Feijoo and Nari, 1994). Maria del Carmen Feijóo explains this in terms of the women's movement's failure to adapt to the dynamics and requirements of the new democratic politics, which call for negotiation and bargaining. She argues that, out of fear of being co-opted, women continued to use the confrontational discourse developed while they were part of the opposition to the dictatorship (Feijóo and Nari, 1994).

The very severe economic crisis and the growing male unemployment prevailing during the whole period of transition and consolidation of democracy threw women from all classes into the labour market to satisfy basic needs. Feijóo rightly suggests that the fact that they left behind their traditional roles to participate actively in the labour market may have had a potential effect in terms of empowering women in the redefinition of their private and public roles and in the pursuit of full citizenship.

During his presidential campaign in 1982, President Alfonsín had promised to bring about important changes in legislation with the capacity to improve women's lives. He spoke of the ratification of the United Nation's convention against all forms of discrimination against women (CEDAW), the divorce law and the restoration of reproductive rights. Consequently, President Alfonsín initiated an institutional process aimed at integrating women in equal terms into public life; President Menem later followed the same policies. Official institutions for the promotion of women were created. Although there is a network of such institutions all around

the country, through lack of official funding and the support of the women's movement, these institutions have not been effectively appropriated by women and thus, their impact has been limited. However, it should be acknowledged that, together with women's NGOs, they have brought about changes in the perception of domestic violence against women as a social problem affecting society as a whole.

The year 1991 meant a milestone to the process of women's inclusion in politics. Under the Menem administration of a quota system of a minimum 30% of women for the elections in the lower house of the National Parliament was established. This system gave women a better representation in the lower house. In 2000 there were 71 women out of a total of 257 representatives and 2 senators out of a total of 68; many of them are lawyers (Navarro, 2000).

These debates continue to this day. For example, initiatives to enlarge the quota to a minimum of 50%, the way it has been done in France, to make it extensive to the Senate and to executive posts, have occupied an important place in the media, giving rise to much public discussion, resistance and opposition.

### **• III -The evolution of legislation on women, children and the family**

#### **1 - Introduction**

Legislation on women and the family has undergone very important changes over the last half of the 20<sup>th</sup> century. In this section I provide a brief outline of changes that constitute the legal framework within which the family law judges participating in this study work. The restoration of democracy and its institutions in 1983 allowed for the creation of new spaces for women's issues in the realm of the State and brought the issue

of equality between the sexes into public debate. It also gave rise to critical awareness about the way social institutions work and of the actual gap between the existence of norms and their enforcement (Birgin, 1998).

A process of legislative reform aimed at eliminating discrimination in legislation was initiated with the transition to democracy, especially in the area of family law. In 1985, two important laws were passed: the law of "filiation" and "patria potestad"(Law n° 23,264)<sup>17</sup>, which establishes that the rights and duties over the children correspond to both the father and the mother and thus, in case of divorce, the "patria potestad" is exercised by the parent who has custody of the child. In cases of divorce or legal separation both parents are responsible for material provision for the children, independently of which parent has legal custody of the child.

It also puts on equal standing the children born in and out of wedlock<sup>18</sup>. It awards the mother -as the representative of her child- the possibility to claim for the father's legal recognition of a child born outside marriage. Extra-matrimonial paternity is legally established through the father's recognition, and can be established by a judge in court. When issuing a birth certificate, the Civil Registrar must not distinguish between matrimonial and extra-matrimonial children. In addition, law N° 23.264 awards the right to resort to DNA tests to prove filiation. The new status given to children born out of wedlock challenges, for the first time in the letter of the law, the model of the matrimonial family as the norm. (Birgin, 1998; Torrado, 2003: 138).

After a 1986 Supreme Court decision<sup>19</sup> that declared the unconstitutionality of the article of the Civil Code prohibiting divorce, Law N° 23.515 about civil marriage was enacted in 1987, consecrating legal equality between the spouses and establishing divorce. When the

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<sup>17</sup> "patria potestad" is the parent's or guardian's legal jurisdiction over children.

<sup>18</sup> Until then, children born out of wedlock were considered second class citizens. They did not have the same rights as the children born to a married couple.

<sup>19</sup> "Sejan JB c. Zaks de Sejean, Ana, s/inconstitucionalidad del art. 64 de la ley 2393", Supreme Court of the Nation, 27-XI-86.

relationship comes to an end, the spouses have two options: either personal legal separation established judicially or divorce. Personal legal separation does not end the legal bond and consequently does not allow the spouses to re-marry, while divorce does. To be able to obtain a divorce a couple must stay married for a period of three years, which enables them to apply for a divorce by mutual consent. Other causes for divorce anticipated in the law are adultery, attack on the life of the spouse or children, serious offences, desertion, and being separated for a period of three years.

The law also institutes that the spouses must now share certain decisions that were previously taken by the husband, such as the establishment of the family residence. Both spouses are bound to each other by identical and mutual obligations such as faithfulness, mutual assistance and food provision for each other and for the children, even in the event of divorce. The reasons for losing their rights is the same for both spouses: for instance, the obligation to provide for food (alimony) ceases when one of the spouses is living with a third party or commits a serious offence against the ex-spouse (Birgin, 1998; Torrado, 2003: 139).

Regulations regarding marital assets also changed as a consequence of the passing of the law of divorce. Thus, as from 1987, marital assets are made up of an estate composed by each spouse's properties at the time and any new properties acquired in any way except as inheritance, donation or legacy. Each spouse has the right to administer freely his/her own property and the commonly owned goods obtained through their own labour. Consent from the spouse is required, however, to sell, encumber or transfer real estate jointly owned and the house where the children live, even when it belongs to one of the spouses.

A paradigmatic example of the evolution of the law regarding women in the family has to do with the name of married women. Law N° 18.248 establishes that married women can decide whether they wish to add the husband's surname to their own. The use of the husband's surname, which was previously mandatory, preceded by the preposition "de", whose

meaning is "belonging to", has become optional.

Although at the time some women groups carried out important campaigns aimed at promoting significant changes in family law that placed women on an equal standing to men, authors such as Birgin (1998) have argued that the family law reform in the Argentine case was the result of the process of general democratisation rather than the effect of the pressure exerted by the women's movement. In any case, the process opened up a new space for the manifestation of women's interests and new channels for women's participation were established. As a consequence, many women's organisations were eventually created, with a certain capacity to make an impact on the public scene, the media, the universities and public institutions, generating processes of social reform which not only affected women but the whole of society as well. One such example is the 1994 enactment of the Law of Domestic Violence (Law N° 24.417), which was a victory obtained by the feminist movement after many years of public campaigning.

The domestic violence law can be seen as a State policy aimed at responding to domestic violence understood as a public problem. It deploys a public policy executed mainly by family law judges with the support of other public and private agents such as the public hospital, the police, the social services, the school and other community associations. It enables the victims of physical or psychological abuse perpetrated by a member of the family to resort to the Family Law Courts. The family law judge receiving the complaint may request an expert diagnosis of the family, exclude the perpetrators of violence from the conjugal home, and forbid their access to the home, school or workplace of the victims, order the return of the victims to the homes they were obliged to leave for security reasons, and establish provisional regimes of alimony, custody and visits.

The following testimony offered by a woman judge who participated in this study reveals that the period of reform of family law was an extremely

stimulating phase both in her life and in the life of the country:

"Alfonsín had just taken office and those were progressive times, involving the whole updating of the familial order based on the authority of the husband and on his prerogatives. It was a time when legal scholars were divided; there were those in favour of the changes and those that resisted democratic reforms. A new more democratic order was being constructed. It was the stage of democratic reforms, reform of custody, filiation; everything was being changed. I was among those who advocated and welcomed changes. This involved much study and research. I enjoyed participating in such an important process. It was the most stimulating and exhilarating phase in my whole career!" wj

During the first years of democracy, most discrimination within the law was eliminated with the democratisation of family law. The process was completed with the introduction of changes in legislation in other legal areas such as labour legislation, through the ratification of international ILO conventions that incorporated the principle of equal pay for equal work to labour legislation (Birgin, 1998). The passing of such laws as the reform of the Electoral Law called "Ley de Cupo" -Quota Law-, which turns the introduction of quotas in the lists for elective posts mandatory, stresses the importance and legitimacy of the issue of egalitarian legislation during the 1980's. However, there are still important aspects of family law that have remained backward and will need to be addressed in the near future. Examples of this are the rights of the concubines, the rights of the partners in homosexual unions, and the problems raised by the use of artificial reproductive techniques.

## **2 -The Constitutional Reform**

The 1994 Constitutional Reform constitutes a turning point in that it extends rights and guarantees to women. It consecrates the rights to equality, equality of opportunities and treatment for women and men, and introduces the legal tools and mechanisms for the enforcement of all rights recognised by the Constitution and all the International Human Rights Conventions. It also establishes measures of positive action to make the law effective (art. 75, inc. 22 and 23). With respect to family law in particular, the incorporation of the Human Rights Conventions introduces into national law democratic principles that reinforce the reform

in family law analysed above.

### **a - Women's Rights**

By incorporating the CEDAW into Argentinean law (International Convention for the Elimination of All Forms of Discrimination against Women) the Convention can be applied directly, with the same hierarchy as the Constitution. The road was therefore opened for women and women's organisations to use the Courts (Argentine Courts, those of the United Nations and of the Inter-American System) to demand the enforcement of their right to equality. The demands presented before the Inter American Court have been however, few. By way of example, there was a case in which a woman filed a claim against the Argentine State arguing that her representation rights had been violated by the order in which women candidates had been included in the electoral lists on the occasion of the 1993 elections. The Inter-American Court admitted her claim.<sup>20</sup>

Newer and more progressive, the Constitution of the City of Buenos Aires, adopted in 1996, went further in the process. It grants the right to be different and does not admit any kind of discrimination that could encourage segregation in terms of race, ethnicity, gender or sexual orientation. It dedicates a whole chapter to sex equality and establishes the following duties:

- a) To guarantee equality in the public domain through the establishment of positive actions and to promote it in the private sphere.
- b) To compel political parties to adopt positive actions to guarantee equality in the access to public posts and the management of financial resources at all levels and areas.
- c) To forbid the inclusion of more than 70% of persons of the same sex, and of more than three consecutive persons of the same sex on lists of

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<sup>20</sup> Informe n°102/99, caso 11.307, María Merciadri de Morini, Argentina, September 27, 1999. See further: <http://www.cidh.org/annualrep/99span/Admisible/Argentina11.307.htm>

candidates for elective posts.

d) To establish a quota for the conformation of collective bodies composed by three or more members.

e) To confer the Legislature and the Chief of Government the function of legislating and promoting positive actions to ensure equality among women and men, and to carry out educational programmes. with a gender perspective, especially in the areas of human rights and sexual education.

Regarding reproductive rights, the Constitution promotes responsible parenthood, establishes the right to decide about issues of reproduction and the obligation of the State to offer information on the available methods of family planning, as well as actual provision of legal contraceptive methods -abortion is illegal in Argentina. It also compels the State to provide integral health care during pregnancy, delivery and "puerperium".

Inspired in the above egalitarian principles, three laws have recently been passed by the Buenos Aires legislature. These laws have the potential to improve the quality of life of the women in Buenos Aires: a Law on "Equality of Opportunities and Treatment" (nº 474), a "Reproductive Rights Law" (nº 418) and a "Childhood Law" (nº 114). To date, the enforcement of these laws has been uneven. With respect to the enforcement of the law on Reproductive Rights, budgetary provisions have been made available for the purpose of its activation, which seems to be running quite smoothly. The main criticism levelled against the local government is that no new professional appointments have been made in order to satisfy the increased demand<sup>21</sup>.

Similarly, following the provisions of the "Childhood Law", a new agency has been created with the purpose of adapting all government programmes to the International Convention on the Rights of the Child: it

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<sup>21</sup> Internal unpublished report of the Women's Office of the Ombudsman of the City of Buenos Aires, 2002

is the "Council of the Rights of the Child". The local government is gradually taking the steps leading to its full enforcement. This is, however, a very complex task involving a shift from old to new criteria, namely from patronage or guardianship to a conception based on the child as a subject of rights.

Of the three, the enforcement of the law of "Equality of Opportunities", which established among its objectives the launching of an Equal Opportunities Plan by the local government, seems to be the slowest in terms of its enforcement. Two aspects seem to hinder the enforcement of this law. One is related to the fact that it does not establish the allocation of the necessary funding or the creation of a body responsible for its enforcement. The other obstacle lies in the very complexity of the task, which involves a deep change of orientation to be set up in all ten areas of the government of the City.

While the road was already paved in terms of the measures related to democratic representation and the establishment of gender quotas, the opposite seems to be the case with other governmental areas such as the measures aimed at improving the conditions for the participation of women in the economy. The fact that the latter also involves the participation of the private sector makes the task more complex and its implementation difficult.

It is necessary to acknowledge that, although it would now be difficult to find discrimination in the text of the law in Argentina, there is a wide gap between rights that are granted and rights that are effectively protected and vindicated. One thing is to proclaim rights; a very different one is to effectively satisfy them (Birgin, 1998). Although quite a few years have passed since the Constitutional Reform, women's groups do not seem to have appropriated the legal mechanisms offered by the Constitution; hence, there have been only few cases before the Courts demanding these new rights to equality. Lack of information about the law, the difficulty to gain access to the justice system, especially for poor women, and an endemic lack of confidence in the justice system can be

highlighted among the main obstacles.

Today, at the beginning of a new century, while most legal barriers to women's equality have been overcome, much has changed in terms of women's access to higher education. In spite of the fact that women have succeeded in obtaining equality with men in relation to legal rights and access to education, they still face invisible barriers and discrimination in terms of opportunities to reach the highest positions of power and prestige within society. Women have been and still are excluded or have had very marginal roles in both the administration government and the private sector (CELS et al, 2002).

### **b - Children Rights**

Like CEDAW, the Convention of the Rights of the Child was formally incorporated into the Constitution when the 1994 Constitutional Reform was carried out. This meant both a general change in the political conception of children and a change in their status before the courts. In the light of this democratisation of the law, children came to be understood as persons; subjects who, in view of their vulnerability, are not only entitled to protection but also to some specific rights that ought to be enforced (Grosman, 1994).

As the family judge must consider the child's rights and interests against the rights and interests of the parents and other members of the family, these new rights are crucial to my research into family law judges. Among the most important ones, I would stress on the child's rights to enjoy a family life, to grow, develop, and receive education in an atmosphere that will respect his/her autonomy in accordance with the stage of development he/she is undergoing, and the child's rights with respect to the vicissitudes and changes a family may suffer, such as the family break-up after parental divorce and the creation of new families after divorce. The legalisation of divorce and the incorporation of the criterion of the best interests of the child into law have made parental separation less dramatic. The concept of guilt has been removed from divorce procedures

and negotiated arrangements are favoured as opposed to more litigious solutions. Similarly, the law gives legitimacy to new forms of family life, different from the traditional nuclear family model, and has eliminated discrimination between children. Children born inside and outside marriage and legally adopted children are now given the same rights. Likewise, the voice of the child is more and more often being heard by the judge in cases having to do with the placement of children after divorce, the correction of parents and caretakers, child abuse and adoption (Grosman, 1994).

Nevertheless, as was mentioned with respect to the changes in legislation concerning women<sup>22</sup>, the gap between proclaimed rights and actual practices should not be underestimated (Birgin, 1998; Grosman, 1998: 19). The old order, based on the subordination to the authority of the father/ husband within the family, is reluctant to give way to a new culture based on individual rights. Poor socio-economic conditions also undermine the impact of this new legislation informed by a vision that conceives the child as a subject of rights.

#### **• IV - The evolution of the family in Argentina**

##### **1 - Introduction**

Following the previous discussion on Family Law in Argentina, this section considers the main trends in the recent development of the family. This section provides essential background analysis for my study of family law judges and the context within which they are working.

In its more classical conceptual version, the family's biological basis is closely linked to sexuality and reproduction. The family is the social institution that regulates, channels and confers meaning to these basic needs. It comprises daily cohabitation (living together) expressed in the

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<sup>22</sup> See section III-2a of this same chapter .



idea of the household, a shared economy, a collective domesticity, the daily sustenance that goes together with legitimated sexuality and procreation. Amidst the wide variety of family and kinship organisations conformed by different societies, the family, as a constant, is organised around three basic needs: cohabitation (living together), sexuality and procreation (Jelín, 1998: 15).

In Argentina, until quite recently, the Western model of the nuclear family composed by a monogamous couple living together with their children, with the father going out to a job for the maintenance of the family and the wife staying at home to take care of the children and domestic chores, was considered the ideal and normal family. As modern historiography shows, however, the naturalization of this family stereotype that has dominated western society for two centuries has served to hide both the fact that there have always been different ways to organise family ties and that this archetype of the patriarchal nuclear family, characterised by the concentration of power in the head of the family and the subordination of the wife and children is far from democratic (Jelín, 1998: 15-20).

Intense societal change, added to the feminist critique based on the gender perspective and the disruption of the distinction between the public and private domains, has come to question this idealised form of family life. This has given rise to new conceptualisations that recognise the multiplicity and complexity of family forms and the dilemmas and tensions implied (Jelín, 1998: 15-20).

The fact is that the three dimensions -cohabitation (living together)/sexuality/procreation- that conform the classical concept of the family have undergone profound changes. Monogamous marriage has lost the monopoly of legitimate sexuality, and procreation and childcare no longer necessarily occur under the same roof or on the basis of daily cohabitation (Jelín, 1998: 15-20).

In our days, this homogeneity of the ideal family coexists and contrasts with a plural reality where divorce, the creation of new stepfamilies, a

more aged population, unmarried mothers with their children, fathers who take custody of their children after divorce, adults who live alone but are still immersed in family networks and homosexual couples compose the more complex reality of family life (Jelín, 1998: 15-20; Torrado: 417-452).

The new heterogeneous reality of the family in Argentina inspires both regrets and sympathies: those who dislike it frequently speak of the "crisis of the family", while others tend to view it as an opportunity and as a result of a process of democratisation of the family in which intimacy, affections and pleasure acquire new and alternative meanings.

In the classical model, the family is very much identified with the private and domestic domain of women. In spite of the recent changes, evidenced, for instance, in the decay of the patriarchal authority of the husband and father, by the fact that women go out to work and may become heads of household, or by the fact that men keep the custody of their children after divorce, the realm of affection -domesticity- is still considered as the sphere of women. It is thus very important to be alert about the possible long-term impact of these new trends on gender relations (Jelín, 1998; Wainerman, 2003; Torrado, 2003).

It is clear that in the western world the family centred on patriarchal authority is decaying. The search for personal autonomy initiated by children wishing to escape paternal authority has now extended to the relations between the genders. In that respect, women's participation in the labour market provides opportunities for increased personal autonomy. This generates conflicts around who should have the responsibility for domestic work. Time budget research results show that, in general, if the time dedicated to domestic work is added to the time spent on paid employment, women work much longer hours than men (Kritz: 1986, cited in CELS et al, 2002: 14, ft. 46). This has become a matter for vindication of the women's movement both at the societal level and at the personal level in the private sphere of the family.

At the personal level, however, the situation remains ambiguous. While it

is true that women now demand recognition of their individuality and a more egalitarian distribution of the burden of domesticity, it seems that many are reluctant to resign the power that originates in their maternal roles, like those in charge of the welfare of the family (Jelín, 1998, Shmukler and Di Marco, 1997).

## **2-Recent family trends**

In the next few paragraphs, I will outline the basic trends of what has been occurring in the Argentine family in the last twenty years in order to provide a context for the research on the family law judges. As Catalina Wainerman (2003) puts it, in the last twenty years, the Argentine family changed more than it did in the whole first half of the twentieth century.

### **a - Main trends in marriage and cohabitation after the passing of the law on divorce**

According to the office of Statistics and Census of the city of Buenos Aires, when the law of divorce was passed in 1986, 13,056 couples turned to the Courts. In most cases they wanted to legally formalise separations that had taken place long before. In the next year, 18,112 couples (66.3%) resident in Buenos Aires attended the Courts in order to get a divorce. This is the year that will be remembered as a record for the number of divorces and legal separations. In 1989 the number of divorces started to decrease, with 11,740 couples (48%) turning to the Courts to get a divorce. From then on, the average number decreased greatly to remain constant at a level of 36%. (Victoria Mazzeo, 2000; Torrado, 2003: 276)

The high peak in the number of marriages right after the passing of the law on divorce is explained in terms of the regularisation of the marriage situation of the divorcees. After 1990, the rate of marriage started to decrease steadily, showing a social tendency for legal marriages to be replaced by cohabitation. During the 1990's, cohabitation without marriage became more and more frequent. Between 1990 and 1995 the number of cohabiting couples (in consensual unions) increased at a rate of 29%. In 1999, the number of couples in consensual unions represented 11% of

the number of married couples (Victoria Mazzeo, 2000).

According to the 1991 census, the number of divorcees was 180,704, whereas the number of separated persons who had been in cohabitation was 705,567. The number of married persons was 11,086,191 and the number of people in cohabitation was 2,423,479. These figures should not be interpreted as a crisis of the couple, since the tendency to live in couples has remained constant all along Argentine history. What these statistics actually reflect is the crisis of civil marriage as an institution. Cohabitation is chosen mainly by Argentine young couples as a transitional trial stage, especially in first unions, and as a more lasting strategy for couples going for a second chance (Susana Torrado, 2003: 241 and 313).

As Wainerman (2003: 12) explains, from the 1980's to the present, the Argentine family has undergone a radical and extremely rapid transformation. In this transition, it is hastily following the course chosen by more developed societies. A bird's eye view of the changes occurring within the Argentine family spots the following trends: a drop in the number of children; an increase in cohabitation or consensual unions as opposed to civil marriage; the tendency to postpone the age of marriage and a great variety in terms of the composition of the households. There is a proliferation of pregnant brides, extra-matrimonial children, separation and divorces, of households composed by single mothers or single fathers and their children, homosexual households, couples who decide to remain childless, households headed by women, and stepfamilies composed by couples who have divorced and remarried, bringing along their children by former spouses.

Moreover, the processes of growing individualisation of the young and of women have weakened the traditional family structure and rendered it unstable, leaving more space for alternative individual options and for new patterns of family life. Divorce and remarriage or new unions have generated different and more complex households (stepfamilies), with new constellations of family bonds where the kinship ties characteristic of

the nuclear family are acquiring new meanings. Today it is often the case that the members of the original nuclear family may not live together under the same roof, while, persons who are not related by blood ties have come to live together (Jelín, 2000: 55-104).

According to Wainerman, (2003: 12-13) this wide array of changes has been taking place under the inspiration of an ethic that emphasises individualism, autonomy and personal realisation over community and tradition. Under the influence of this new atmosphere, ideology has come to be replaced by psychology, homogeneity by diversity, duty by feeling, and obligation by pleasure. While the 1970's and the early 1980's witnessed the positive aspects of individualism, of which the women's liberation movement can be seen as a consequence, the economic crisis, later in the eighties, was accompanied by all the evils related with the crisis and the fall of the welfare State: growing unemployment, labour flexibilisation, social exclusion and the loosening of the bonds of solidarity. Towards the end of the 20<sup>th</sup>. century and the beginning of the new century, as the crisis became more and more acute, social bonds in Argentine society turned increasingly precarious and fragile, though flexible both in the realm of the labour market and of the family.

#### **b - Women's employment and family life**

As is clearly shown by statistics, one of the main characteristics of Argentine society today is the presence of mothers with domestic responsibilities in the labour market. While at the end of the 1980's both parents worked in only 2 out of every 10 families with children, at the end of 1990's the number had doubled. Following into the footsteps of more developed countries, where women's entry into the labour force coincided with the expansion of the welfare State and the provision of facilities for working women, Argentine women's growing incorporation into the labour force from the post war years to the mid 1980's was also associated with the process of modernisation that offered enhanced occupational opportunities for women. However, from the mid 1980's onwards, the acceleration in terms of women's participation in the labour market can no

longer be associated to modernisation since, in fact, the period was characterized by economic restructuring, structural adjustment and the loss of the bargaining power of the working population. Thus, in this context, women's growing participation in the workforce must be explained in terms of the unprecedented increase in the rate of masculine unemployment, particularly among men head of households (Cerrutti, 2003: 106).

As a consequence, women have gone into paid employment in order to maintain a certain level of family income to mitigate the deterioration of men's income and to resist downward social mobility within a context of structural adjustment. If we consider the unemployed population, amounting to 17% of the entire economically active population, the proportion of households where the woman worked and the man was unemployed grew from 0.4 % in the 80's to 4% in 2000 (Wainerman, 2003). In the 1980's, most of the women in the labour market were aged between 20 and 24 since, after marriage, they abandoned paid employment to dedicate to the home and children. Today, women who are economically active remain in paid employment until retirement, irrespective of the number of children and their ages.

However, while economic crisis is a very important reason for the massive participation of women in the labour force, Argentine society has undergone other changes that have influenced the social division of labour. The period has also seen a significant transformation in terms of cultural patterns that define gender roles and gender relations, especially around the acceptance of mothers' work outside the home (Cerrutti, 2003, 106-107).

On the basis of the household surveys carried out twice a year by INDEC, the National Survey and Census Institute, Wainerman (2003) examined the changes in the structure of the households composed by a nuclear family -a conjugal couple and their children- in the City of Buenos Aires and its metropolitan area, from 1980 to 2000. From the data in the following tables, we can understand the revolution in the realm of the

nuclear family in the last twenty years. As can be seen from table 1, in the 20 years between 1980 and 2000 the proportion of households sustained by a man has dramatically decreased and the proportion of households sustained by a woman has increased noticeably.

• **Table 1 - Households according to providers 1980, 1991 and 2000<sup>23</sup>**

Households	1980	1991	2000
Sustained by a man	74.5%	63.2%	54.7%
Sustained by a man and a woman	25.5%	36.8%	45.3%
Total number of households	1,069,141	1,324,629	1,320,576

Likewise, table 2 shows an important growth in the proportion of households with two incomes, regardless of their socio-economic status. As a matter of fact, as one goes up the social characteristics of households, the growth in the proportion of households with two incomes is higher. This is relevant to this research, since as can be seen in chapter 4 section II a, most of the women judges and some of the men judges in my sample will be found in the middle and upper social status categories and their participation in the labour force then appears more as a general trend than as an exception.

• **Table 2 - Households with two providers according to socio-economic level 1980, 1991 and 2000<sup>24</sup>**

Socio-economic level	1980	1991	2000
Low	17.0%	22.2%	32.2%
Middle	32.4%	45.6%	53%
High	31.6%	56.6%	64.3%
Total number of households	203,266	343,334	523,407

Along the same lines, as shown in table 3, when one focuses on the length of the working week, it can be observed that both the proportion of women working part-time and full-time has increased over the 1991-2000

<sup>23</sup> Extracted from Wainerman, 2003: 72

<sup>24</sup> Extracted from Wainerman, 2003: 79

period. The opposite can be observed in terms of the length of the men's working week: there is both an increase in the proportion of men working part-time and a decrease in the proportion of men working full-time. Between 1991 and 2000, the proportion of women working long hours a week rose from 58.5% to 64.5% and the proportion of women working part-time decreased from 41.5% to 35.6%, while the proportion of men who work part time tripled, rising from 2.5% to 7.5%, and the proportion of men working full-time decreased from 97.5% to 92.5%.

This indicates a general tendency for women to enter and for men to withdraw from the labour market. The implication of such a trend in terms of the internal arrangements inside the family cannot be overlooked, and this will certainly bear on the nature of the conflicts that reach the Family Law Courts.

• **Table 3 - Households according to length of the working week of the spouses 1991 and 2000**<sup>25</sup>

Households	1991	2000
Women - Part-time	41.5%	35.6%
Women - Full-time	58.5%	64.4%
Men - Part-time	2.5%	7.5%
Men - Full-time	97.5%	92.5%

In the 1980's, whereas in most nuclear families the husband used to have a higher level of educational attainment, today the level of educational attainment of husband and wife has levelled. Moreover, the proportion where the wife's educational attainment is higher than that of the husband has risen from 30% to 34%. The households with two incomes are more frequent among those where the wife is more educated than the husband.

Table 4 considers the level of educational attainment of the spouses in the households for the 1980-2000 period. There is an important decrease in the proportion of couples where the level of educational attainment of the

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<sup>25</sup> Catalina Wainerman, 2003: 88

wife is lower than that of the husband while, at the same time, the increase in the proportion of households where the wife's level of educational attainment is the same or higher than that of the man is apparent. This shows an important tendency towards levelling educational attainment for men and women in the time period. Women's massive incorporation to higher education from the late sixties and early seventies is an important precedent of this trend. As will be seen in chapter 4, because of their average age, the judges participating in this study have been part of this societal trend towards the inclusion of women into higher education.

• **Table 4 - Level of educational attainment of the spouses 1980, 1991 and 2000** <sup>26</sup>

<b>Wife's educational attainment</b>	<b>1980</b>	<b>1991</b>	<b>2000</b>
<b>Lower than the husband's</b>	24.4%	23.4%	17.8%
<b>Same as the husband's</b>	45.8%	42.6%	48.5%
<b>Higher than the husband's</b>	29.8%	34.0%	33.7%

The proportion of income that women bring to the household has also changed: the proportion of households where the woman makes less money than the man decreased from 60% to 54%. The percentage of women who make more money than their husbands increased from 5% to 11%.

The families where the women make more money than their husbands are more frequent in households with lower socio-economic level and educational attainment, and among young women up to thirty. This means that, as compared to earlier generations, the younger couples are starting their lives together under very different circumstances. However, as was suggested above, in the context of an impoverished Argentina, the increase in the economic participation of women in the last two decades must be understood in terms of economic necessity rather than as the

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<sup>26</sup> extracted from Wainerman, 2003: 85-86

effect of enhanced employment opportunities.

Nonetheless, according to Wainerman (2003), these raw figures suggest that a revolution in gender relations may be on its way. It would be interesting to know how these new arrangements are affecting gender relations. This requires knowledge of a great variety of aspects of family life such as the actual division of labour within the family among the members of the conjugal couple and the children; the responsibility for domestic work; the way decisions are made at the heart of the family; whether femininity and masculinity are being redefined as an effect of the large increase in the proportion of working mothers; how children respond to new gender roles that contradict the traditional stereotype; whether concrete men and women are capable of negotiating their new roles; whether the nature of the family conflicts has changed as a result of the new arrangements, whether the dominant stereotypes related to the roles of men and women in the family keep pace with societal change and whether they are resistant to change. Lately, some small-scale exploratory research regarding the domestic division of labour has been carried out with middle class families (Wainerman, 2003: 199-220) and with working class families (Cerrutti, 2003: 105-152) where both parents work out of the house. Results suggest that while the men have taken more active roles with respect to childcare and other activities related with children, the women still carry the main burden of domestic chores, which remains women's' privilege<sup>27</sup>. Women's actual accumulation of responsibilities – home, children, and work- hamper their capacities for full professional development.

Apart from the need to overcome deep-seated prejudices, the attainment of real gender equality as proclaimed by law, would require that the State set in motion public policies aimed precisely at creating the conditions for equal opportunities for men and women. As was seen in the previous section on legislation, according to the Constitution, the State should

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<sup>27</sup> A survey carried out in the City of Buenos Aires in 1999 showed that women work an average of 7 hours out of the home and then performing domestic chores in the home for another four hours. Clarín, 2/12/99, cited in Cels et al, 2000: 14, ft.47.

adopt measures of affirmative action to promote legislative and policy changes aiming at changing beliefs about gender roles and domesticity, encouraging less traditional attitudes and increasing the provision of social services. However, to make all these proclaimed women's rights effective, as shown in the shadow report on the enforcement of CEDAW submitted in 2000 by women NGOs, the Argentine government has still to take action inspired in the constitutional principle (Cels et al: 2000: 14).

In the first two sections of this chapter, I have outlined the entry of women into public life in Argentina. I have also referred to the evolution of the legislation regarding women, the family and children and to the main trends related to the development of the family in the last twenty years. I found that women's incorporation into public life in the 20<sup>th</sup> century was a crucial element of the process of modernisation of Argentine society. This process encompassed women's massive access to the universities and into the labour market and was followed by important legal reforms, setting the scene for women's increased participation in Argentine society. I shall now examine the process of incorporation of women into higher education.

- **V-The process of incorporation of women into higher education and the professions in Argentina**

- 1 - The incorporation of women into university**

- a - Introduction**

Before we move on to consider the incorporation of women into higher education in Argentina, it must be noted that I encountered a general difficulty in terms of the availability of relevant data. The few data available are practically inaccessible and fragmentary. Accordingly, the periodicity of the data used was dictated more by its availability than by a rational organisation of the material to be analysed. Since I was forced to use whatever data was available, the data in this section may appear

fragmentary and disintegrated. In spite of this, the data presented in the tables that follow give us a fair picture of the process of democratisation of higher education in general, and of the process of the inclusion of women within it.

**b - Evolution of women's participation in the National Universities**

I will look into the evolution of women's participation in higher education and the professions by following basic variables such as the distribution of men and women among the student population of the National Universities, the number of degrees awarded to men and women in the National Universities in general, and the distribution of the men and women graduates in the different specialities offered by the National Universities.

The data reflect a tremendous expansion in the general university attendance. This trend has remained steady for both men and women for a few decades now, particularly since the 1960's and 1970's.

Table 5 compares the participation of men and women in the student population of National Universities in 1941 and 1985, showing both an expansion in the number of men and women students and a particularly significant increase in the enrolment of women. This fact accounts for much of the general growth in the university registration.

• **Table 5 - Enrolment of the National Universities, in 1941 and 1985, by sex<sup>28</sup>**

<b>Sex</b>	<b>1941</b>	<b>%</b>	<b>1985</b>	<b>%</b>
<b>Men</b>	34,358	72.8	361,691	54
<b>Women</b>	5237	13.2	302,609	46
<b>Total</b>	39,595	100	664,200	100

Table 6 presents a comparison of the proportion of women and men in the

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<sup>28</sup> Maglie and Frinchaboy, 1988: 31

population of National Universities from 1970 to 1987. It shows both an important increase in the proportion of women in the total university registration and a steady trend in this direction. The proportion of women grew from nearly one third to one half of the total university enrolment over the seventeen-year period.

• **Table 6 - Enrolment of the National Universities by sex 1970 to 1987<sup>29</sup>**

YEAR+	% WOMEN	% MEN	TOTAL
1970	35.9	64.1	236,515
1972	36.8	63.2	297,529
1973	39.2	60.8	368,168
1974	39.7	60.3	441,302
1975	43.2	56.8	536,959
1976	42.9	57.1	532,525
1977	41.7	48.3	465,167
1984	44.8	55.2	507,994
1986	46.2	53.8	707,016
1987	46.9	53.1	755,206

A trend in the same direction can be observed when we look at the number of degrees awarded by National Universities. Table 7 presents the number of degrees awarded by National Universities to men and women for the 1900-1965 period (Ministerio de Trabajo, Oficina de la Mujer, Buenos Aires, 1965: 27-28). The number of degrees awarded to women from 1900 to 1920 amounted to 576; the number increased to 8341 for the twenty-year period from 1931 to 1950. This shows a slow but sustained trend for the period in question. However, it is only after 1950 that a dramatic increase in the number of degrees awarded to women can be observed. In the ten years between 1951 and 1960, the number of women increased to 14,415. As also shown in table 7, the number of women

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<sup>29</sup> Mujeres latinoamericanas en cifras: 66. A change in the admission policy of the university in 1973 explains the increase in the access to university for that year, while the period 1976-1983 corresponds to the period when the country was ruled by a military dictatorship. Again the government's policy explains the decrease in university enrolment for those years, and the return of democracy in 1983 marks a trend in the opposite direction from 1983 onwards.

graduates became significant much later than the number of men. The growth in the number of women graduates was very slow for the first half of the century, but became exponential from the 1960's onwards.

Between 1960 and 1965, the number of degrees awarded to women was 11,705 (28.2%), while the amount of degrees awarded to men for the same period was 29,796 (71.8%) over a total of 41,501 degrees<sup>30</sup>. Thus, the analysis of the table reveals a tremendous increase in the total number of degrees awarded by National Universities. The said increase was largely due to the great increase of the number of degrees awarded to women, as the rate of growth of the number of awarded degrees is higher for women than for men. The proportion of these degrees rose from 0.79 % in the five-year period from 1900 to 1905 to 29.7 % in the period 1961-65, while the proportion of degrees awarded to men decreased from 98.8 % to 71.8 for the same time period.<sup>31</sup>

• Table 7- Degrees awarded by the National Universities, by sex 1900-1965<sup>32</sup>

PERIOD	Women	Men	Total	% of women	% of men
1900-10	36	3,105	3,141	1.2	98.2
1911-20	540	7,261	7,801	6.2	92.8
1921-30	1,632	14,453	16,085	10.1	89.9
1931-40	2,770	19,735	25,275	10.9	89.1
1941-50	6,571	33,916	40,487	16.2	83.8
1951-60	14,515	48,896	63,411	22.8	77.2
1961-65 <sup>33</sup>	11,705	29,796	41,501	28.2	71.8

<sup>30</sup> These figures were taken from the original table, which was organised in 5 year periods and which I reorganised into ten year periods to make it shorter. (Maglie and Frinchaboy, 1988: 30-31)

<sup>31</sup> It is interesting to note that a survey carried out by the Foundation of the Chamber of Commerce in 1965 revealed the following situation with regard to men and women's opportunities in the labour market: The proportion of men working independently in their profession was much larger than that of women, while the number of professionals who work as employees of the State administration is as many as twice the number of men. The opposite was true with relation to private firms, where the number of professional men with a professional category and better salaries doubles that of women. See: Henault Mirta "La incorporacion de la mujer al trabajo asalariado" Todo es Historia, n.128.

<sup>32</sup> (after a table by Maglie and Frinchaboy, 1988: 30-31. The original table was structured into 5 year periods)

<sup>33</sup> Please note that this last period involves only 5 years, while the previous were ten- year periods.

Table 8 demonstrates 35 years later, a very different situation in terms of women's participation in the professions. Data published by the Ministry of Education show that the total number of university graduates in the country was 776,264, 51.7% women and 48.3% men. Thus, by 1998, the proportion of women among university graduates was already slightly higher than the proportion of men.

After having considered the striking general expansion in the number of graduates in the National Universities, I move on to consider the distribution of the university graduates in the wide disciplinary array of degrees offered. The largest number of graduates comes from the area of Economics including those trained in Administration and Accountancy, adding up to 133,394 graduates and accounts for 17.2% of all graduates, being 56.3% men and 43.7% women. Law graduates constitute the second largest number of graduates corresponding to 13% of the total number of university graduates; namely 101,181, 50.4% women and to 49.6 % men of the total number of law graduates (Eduardo Sánchez Martínez Editor, 1999: 364).

The professions that seem to attract more women are, in decreasing order, Psychology, where women constitute 92% of all psychology graduates; Education 85.3% women; Paramedics and Medical Auxiliaries with 81.5% women, Biological Sciences with 75.3% women, Philosophy and Literature with 61.8% women; Dentistry with 60.3% women, and Law with a percentage of 50.4% of women graduates. Only Veterinary and Agronomy, with a proportion of women of 4% and the various Engineering degrees with 10% of women, have remained as male clusters. Degrees related with the Humanities are, however, still much more popular with women (Maglie and Frinchaboy, Argentina, 1988: 29).

Career degrees such as Medicine, Architecture and Law, that were clearly male options at the beginning of the process of incorporation of women in the late 1960's and early 1970's, with a participation of women varying between 1% and 5%, became, in just a few decades, degrees where the

number of women at least equals that of men, thus mirroring the spectacular advance reached by women in higher education (Maglie and Frinchaboy, 1988: 30-31).

• **Table 8- University Graduates by degree career and sex in 1998<sup>34</sup>**

CAREER DEGREES	% of WOMEN	% of MEN	TOTAL	% of the total number of graduates
Law	50.4	49.6	101,181	13
Economics, Accountancy	43.7	56.3	133,394	17.2
Engineering	10.8	89.2	92,689	11.9
Medicine	45.4	54.6	84,387	10.9
Computer sciences	42.3	57.7	28,483	3.7
Psychology	92	8	50,402	6.5
Architecture	50	50	48,437	6.2
Paramedics	81.5	18.5	33,974	4.4
Biochemistry, Pharmacy	73.1	26.9	30,285	3.9
Communication journalism	46.6	53.4	9,863	1.3
Dentistry	60.3	39.7	28,721	3.7
Education	85.3	14.7	13,065	1.7
Philosophy	61.8	38.2	46,383	6
Biology, Ecology, Natural Sciences	74	26	18,167	2.3
Social service, Sociology	75.3	24.7	27,194	3.5
Veterinary, Agronomy	4.1	95.9	5,312	0.7
°Others	64.5	35.5	22,323	2.9
<b>Total</b>	<b>51.7</b>	<b>48.3</b>	<b>776,264</b>	<b>100</b>

#### **b - Women students at the UBA Law School**

After having considered the tremendous expansion in higher education from the sixties onwards, and having examined the distribution of men and

<sup>34</sup> Eduardo Sánchez Martínez Editor, 1999: 364

women students graduates in the different specialities for National Universities, I shall now concentrate on the evolution of women's participation in Law School. Because the UBA Law School is the largest and most prestigious in the country, I have decided to take it as the focus of this part of the study<sup>35</sup>.

UBA is the university with the largest number of students in the whole country and represents 25% of the country's university students: the number of students for 1997 was 206,941, with 58.3% women and 41.7% men (Ministerial de Cultural y Education. Secretarial de Políticas Universitarias, 1997 Table 3.1.4: 27). Regarding the evolution in the numbers and proportions of women law graduates (information provided by the Ministry of Labour) in the 1900-1965 period, the UBA Law School awarded a total number of 19,159 degrees, being 17,064 (89%) to men and 2,105 (11%) to women (Ministerio de Trabajo, Oficina Nacional de la Mujer, 1965: 27). The data also show that in the 1900-1960 period, the UBA Law School awarded a number of 827 (5.9%) degrees to women (Ministerio de Trabajo, Oficina Nacional de la Mujer, 1965: 27) and 13,845 (94.3%) to men, while in the , 1961-1965 period, it awarded 1278 (28.48%) degrees to women and 3200 degrees (71.4%) to men (Ministerio de Trabajo, Oficina Nacional de la Mujer, 1965: 28).

Although in the last few years a considerable number of private universities have begun offering Law degrees, according to the statistics of the "Colegio Público de Abogados of the City of Buenos Aires", at least 70% of its membership comes from the University of Buenos Aires. The remaining 30% is very fragmentary, dividing into small private universities in Buenos Aires and public universities of the rest of the country.

This shows that UBA is the most important national centre of the country for the training of lawyers and this justifies my decision to concentrate on the UBA Law School for this aspect of the study.

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<sup>35</sup> This data draws on a number of different sources. There is no central register or database providing all relevant information. Accordingly, the data was obtained from different people at the university.

The total number of women law students at the various National Universities<sup>36</sup> rose from 477 (4.8%) in 1941, to 27,014 (48.4%) in 1978<sup>37</sup> (Maglie and Frinchaboy: Subsecretaría de la Mujer de la Nación, 1988: 32). In 1980 this number was 15,354 and in 1987, 55,289 (FLACSO, Instituto de la Mujer, 1993: 67).

Table 9 compares the evolution of women's enrolment at the UBA Law School with the evolution of the general women's enrolment of UBA between 1964 and 1972. The situation described is one in which women seem to have been more numerous in the Law School than in other schools at the UBA.

• **Table 9 - Womens' enrolment in UBA Law School and in the overall student population of UBA 1964 to 1972<sup>38</sup>**

Year	% of women in UBA Law School	% of women in UBA
1964	33.9	32
1968	37.3	34.3
1972	45.7	41.4

#### **i -The training to become a lawyer at UBA**

The training to become a lawyer provides a very general education that allows for a great variety of activities. Since 1989 UBA has offered a 6-year study plan divided into three sections: the CBC or one year introductory Common Basic Cycle followed by the CPC, a two and a half year period when students receive basic legal education, and the CPO,

<sup>36</sup> Public universities depending on the national government

<sup>37</sup> As the authors comment, the statistics for registration for the different careers do not go earlier than 1941

<sup>38</sup> Mackinson de Sorokin, Gladis: Revista de Sociología del Derecho, No. 2 and 4

another two and a half-year cycle when the students receive more specific training.

As part of the CPO, and for a period of one year, they work at the legal aid section of the Court, under faculty supervision, assisting clients who cannot afford to pay for a private lawyer. On average, it takes students between 6 and 8 years to graduate as lawyers.

Once the students have completed the CPC, they become lawyers and they can further their education either going into specialised postgraduate courses or by doing a PhD. Lately, the offer of postgraduate courses has been improved and exchanges with foreign universities have been stimulated.<sup>39</sup> However, since no further preparation is required to go into practice, most go into the profession.

It must be noted that, unlike England and other common law countries, Argentina has a civil law tradition that does not differentiate barristers from solicitors and that there is no program of "in training" (training contract) after law school, as one could find in those countries. The fact is, however, that most law students work either in the courts or in private law firms while they study, in order to gain experience and mitigate the lack of practical training characteristic of their professional education. To be able to litigate, lawyers must become members of the "Colegio Público de Abogados" (Bar Association) of the jurisdiction where they want to litigate; membership is a compulsory prerequisite to enter in the profession<sup>40</sup>.

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<sup>39</sup> A newspaper article in "La Nación", one of the most widely read newspapers in the country, recently remarked that the CBC (the one year introductory Common Basic Cycle) of the Law School at UBA had been by far the largest choice among the students entering UBA in 2000. The Law School at UBA is densely populated, with more than 27000 students. Dr. Dalessio, the Dean of the UBA Law School explains the attraction of the Law School in terms of the variety of activities a law training allows for its graduates, who can go into public service, private law firms, the judiciary, or business companies. According to him, this makes a career in Law particularly attractive for the young people who are not very enthusiastic about a specific field of study, or do not have a strong vocation, but still want to go through further education. Moreover, the Dean points out that, compared to other careers, the study of law has always been more flexible, with fewer time requirements in terms of classes, in spite of the fact that it demands a lot of time of personal study. The Dean also explains that this flexible system allows students to concentrate the times and days of the classes and this mode makes it easier for law students to work. In fact 2/3 of the students work. La Nación on- line 06/07/00

<sup>40</sup> See chapter 3, section II.

## ii - Women in undergraduate legal education

According to a study by Agulla, in 1989, women constituted 51% of the students of the UBA Law School. In the same study, Agulla pointed out that, in 1989, women tended to stay on and earn their degrees more than did men at UBA Law School. Agulla also highlighted that women constituted a larger proportion of the postgraduate students, a proportion that in some courses reached 90%. Socio-economic and cultural explanations about the roles of men and women account for this situation. In 1989, like nowadays, men were still seen as the main economic providers, while women retained the main responsibility for childcare and homemaking. Accordingly, while men may feel urged to abandon the University in order to make a living, women can afford to stay on and further their education. Postgraduate studies seem particularly convenient during certain phases of a woman's life cycle when domestic demands are very strong, especially in those cases in which women's income is not so crucial for the family budget.

In 2000 the total number of law students at UBA amounts to 27,568, and is made up of 16,790 women (61%), and 10,778 men (39%)<sup>41</sup>. In 2000, Law is the school with the highest enrolment in the Common Basic Cycle Course (a yearly initial introductory course every student must undergo), with 7231 students enrolled, or 11% of the total enrolment of UBA. This number has been increasing steadily for the last few years. A recent article published by "La Nación"<sup>42</sup> mentions some preliminary findings of a pilot study according to which the student population of UBA Law School is largely made up by women (67%), under 30, attending the first years of the Law School and working while studying.

The analysis of the hundreds of courses offered by UBA Law School each term shows that there is no course on gender and the law at the undergraduate level, and there are only two chairs -Family Law and

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<sup>41</sup> Information provided by Dr. Brodsky, Academic Undersecretary of the UBA Law School in 2000.

<sup>42</sup> La Nación is the most widely read national daily newspaper, See "La Naclon on line", 06/07/00

Constitutional Law- offering courses that take gender into consideration. This means that, if students do not choose these particular chairs among the number of existing chairs, they may become lawyers without receiving any instruction in such matters.

### **iii-Women in postgraduate legal education**

From the 1980's onwards, postgraduate courses have flourished at the UBA Law School. These postgraduate courses could be assimilated to a postgraduate diploma, as they are less prestigious than a Master's degree. The UBA Law School does not offer Masters in Law. These postgraduate courses have become particularly popular with women students.

As can be seen from table 10, except for the postgraduate course in Criminal Law (53.1% of men and 47.8% of women), where there are more men than women, the percentage of women is everywhere higher than that of the men. In Family Law women are a majority, with a proportion of 81.2%. Women lawyers' preferred areas of specialisation after Family Law are Labour Law, with 60.5% and Natural Resources with 60.4%. In the rest of the specialisations, although the proportion of women is slightly higher, the number of women is very similar to that of men. This reality contrasts with that of the UK, where there are more men than women among the postgraduates (McGlynn, 1998: 24-26).

As show in table 10 listing the topics of the postgraduate programmes. offered by UBA Law School, unlike what has happened in other schools within UBA, the Law School has made no attempt to develop postgraduate programmes. on gender, whereas the School of Psychology and the School of Philosophy have done so. However, some of the courses in the Family Law postgraduate program work with a gender perspective. Although not surprising, it is rather striking that the massive increase in the number of women entering into the study of law has not had a significant influence on the contents of legal education in UBA.

• **Table 10 - Student participation in the postgraduate courses at the UBA Law School in 1999 by sex<sup>43</sup>**

<b>ORIENTATION</b>	<b>WOMEN</b>	<b>MEN</b>	<b>TOTAL</b>	<b>% of women</b>
<b>Criminal law</b>	153	167	320	47.8
<b>Natural Resources</b>	52	34	86	60.4
<b>Family Law</b>	151	33	184	81.18
<b>Socio-legal studies<sup>44</sup></b>	16	14	30	53.3
<b>Administrative Law</b>	55	48	103	53.3
<b>Labour Law</b>	43	28	71	60.50
<b>Corporative Law</b>	68	54	122	55.73
<b>Taxation Law</b>	80	81	161	49.68
<b>TOTAL</b>	618	459	1077	57.38

Thus far I have considered the situation of women postgraduates undertaking postgraduate courses. In relation to PhDs, it is possible to trace the number that have obtained a PhD in Law from a list of the approved PhD Law theses published by the Postgraduate Office (Facultad de Derecho y Ciencias Sociales, Departamento de Publicaciones, November 1999). Given that the names of the authors of the theses appear year by year according to the year of presentation of their PHD theses, an examination of the list provides an idea of the evolution in the female participation among the PhDs and whether gender plays any part in the choice of topics.

As can be appreciated from Table 10, in 1999 women in postgraduate courses outnumbered men by almost 14%. The examination of Table 11 shows, however, that the number of approved PhD theses presented by women has always been low and does not follow the general tendency towards the large increase in the registration of women that has taken place in university education since the 1960's. The titles of the theses do not suggest any noticeable tendency in terms of subject matter choice or

<sup>43</sup> Table provided by the Graduate Office of the UBA Law School in 2000.

<sup>44</sup> In spite of the name of the orientation, the course offered is Economic Law.

specialisation that could be accounted to gender.

On the other hand, the number of PhD theses in general decreased from 1974 onwards, especially in terms of PhD theses presented by men, while the number of PhD theses presented by women has remained low all along the fifty-year period. This could be partly explained as an effect of the military dictatorship that ruled the country between 1976 and 1983, and froze university life for quite a few years. Another possible explanation could be the availability of postgraduate courses from the 1980's, which the UBA Law School did not provide before. In the nineties, the expansion in the offer of postgraduate degrees such as Masters and PhDs in private Universities could be a factor explaining the low number of PhDs at the UBA Law School. The main point to be taken into account is that, until recently, holding a PhD in Law did not make much of a difference in terms of enhancing employment opportunities. The existence of a new system for the selection of judges that has implied the introduction of a new rationalized selection procedure to account for and compare the candidate's merits might possibly change this State of affairs. In that sense, holding a PhD might make a difference for individual candidates applying for a post in the judiciary. Accordingly, there might be an increase in those wanting to do a PhD.

• **Table 11 - PhD theses for the period 1949-1999  
by year and sex (in totals)**

Year	Women	Men	Total	Year	Women	Men	Total
1949	0	13	13	1975	1	11	12
1950	0	12	12	1976	0	6	6
1951	2	22	24	1977	0	6	6
1952	4	42	42	1978	1	3	4
1953	0	40	40	1979	0	3	3
1954	0	25	25	1980	4	3	7
1955	2	13	15	1981	3	6	9
1956	2	18	20	1982	1	4	5
1957	1	35	36	1983	2	8	10
1958	0	27	27	1984	1	1	2
1959	0	17	17	1985	4	5	9

1960	0	16	16	1986	0	1	1
1961	1	18	19	1987	3	7	10
1962	2	5	7	1988	1	10	11
1963	3	11	14	1989	2	6	8
1964	1	8	9	1990	2	7	9
1965	0	14	14	1991	5	8	13
1966	0	6	6	1992	3	4	7
1967	0	14	14	1993	1	7	8
1968	3	35	38	1994	4	6	10
1969	10	68	78	1995	1	1	2
1970	4	41	45	1996	1	0	1
1971	3	18	21	1997	1	9	10
1972	2	28	30	1998	2	8	10
1973	2	16	18	1999	2	3	5
1974	4	5	9	Total	90	697	787

## • VI - General Conclusions

In this chapter, I presented an outline of the advent of women into public life in Argentina, described the main characteristics of the women's movement, the evolution of the family and of law regarding women and the family. In the second section of this chapter, an attempt was made to chart the process of incorporation of women into higher education, describing the massive entry of women into university education and the professions from the late sixties and early seventies, as the background for the study of the evolution of women in the legal professions in Argentina. This issue will be developed in the next chapter.

Women's incorporation into public life in the 20<sup>th</sup> century was a crucial element of the process of modernisation of Argentine society. This process encompassed women's massive access to the universities and into the labour market and was followed by important legal reforms, setting the scene for women's increased participation in Argentine society.

In terms of political participation, the 20<sup>th</sup> century saw the advent of the women's movement, characterised by strong variations in terms of its

impetus and capacity to make an impact on Argentine society. The feminist movement was very vigorous at its early stages, from the turn of the century until 1926, when civil rights for women were finally obtained. It then entered a long period of lethargy, sporadically interrupted by relatively isolated campaigns. The early 1980's were somewhat of an exception in terms of women's activity. During the period of the transition to democracy the women's movement gathered strength and vigour in the defence of human rights and women's demands. Following the restoration of democracy, the movement participated in campaigns leading to legal reforms to then fall, once again, into relative stagnation. Today, the Argentine women's movement could be described as quite marginal, weak and fragmented, lacking organisation and political presence at the level of party politics and non-governmental organisations.

Although women from the lower classes had always worked outside the home, enlarged educational opportunities strongly influenced middle class women's prospects for employment. From the 1960's onward, a growing and steady tendency can be observed for women to obtain qualifications and participate in the labour market in positions that had previously been mainly occupied by men.

Women's growing participation was particularly felt from the 1980's onwards, when the economic crisis and changes in the male labour market, such as growing male unemployment, promoted an increased participation of married women in paid work in order to compensate for the impact of structural adjustment and male unemployment on the family budget. This tendency had a significant effect on the family, with dual career families becoming more common, as well as families where both the husband and the wife participate in paid employment, apart from the professions.

The pace of legal reform was unequal. Women were granted civil rights in the 1920's and political rights in the late 1940's. The restoration of democracy in the 1980's brought profound changes in legislation regarding the family and women's labour law that marked a peak in terms

of the updating of the Argentine legal system. In particular, the fact that divorce became legal legitimated changes that were already taking place within Argentine society and gave visibility to alternative family structures such as stepfamilies where newly formed couples cohabit with their children and children from previous marriages. Towards the late 1990's and the beginning of the new century legal reforms mainly centred around quotas for political participation and reproductive rights.

The striking expansion of higher education in the last fifty years encompassed significant changes in terms of the distribution of university enrolment along sex lines. With the massive entry of women into universities, many of the disciplines that had been male dominated exhibited dramatic changes in terms of the sex composition of their students, becoming gender-neutral or even female-dominated. Law appears as an example of the latter. The proportion of women among law students rose from 4.8% in 1941 to 61% in 2000. From the 1980's on, this high women participation in the enrolment of the UBA Law School expanded to the postgraduate levels. This growth in the proportion of women law students is the first cause for an increased participation of women within the legal professions. Its impact on the legal professions needs yet to be fully evaluated. It is nevertheless striking that this enhanced feminine presence in the law School has not resulted in the inclusion of gender in the curriculum, has not produced a substantive critique of the law from a feminist perspective, and has definitely not brought about important changes in terms of the use of the courts to claim for women's issues.

The societal changes overviewed in this chapter provide the backdrop for the study of women within the legal profession and contribute to explain the complex reality of the contemporary family, providing useful background information to understand the context within which the family judges work. The situation of women in the legal profession is the subject of the next chapter. It is going to be of particular interest to explore the

effects of the massive entry of women into the study of Law and into different strands of the profession.

## **Chapter 3 - Women lawyers in Buenos Aires today: activities, specialisations and status.**

### **• I - Introduction**

This chapter represents the first comprehensive attempt to describe women's participation in the legal profession in Buenos Aires.

In order to understand the participation of women within the judiciary it is essential to have a picture of the overall participation of women in the legal profession; to know about their opportunities, choices and preferences, about the options that are open to them and about how they are received by the professional community. This context can help us to understand the reason for such a relatively high proportion of women judges.

A short digression will be necessary, however, in order to briefly situate the issue in the context of the main characteristics of Argentina's legal system, the structure of the legal profession and the role of lawyers in society. It is not my intention to provide a complete picture of the Argentine legal system, but only of those aspects that are relevant to this study<sup>1</sup>.

### **• II - Argentina's legal system and the characteristics of the legal profession in Buenos Aires**

#### **1- Argentina's legal system and its judiciary**

Argentina is a federation; as such, its justice system is extremely intricate. It is divided into various levels that correspond to the different jurisdictions: federal, provincial and municipal according to a hierarchy corresponding to the three instances: the First Instance Courts, the Courts of Appeal and the Supreme Court. It is also split into sections related to the subject matters involved: -Criminal, Labour, Administrative, Civil, Family and Electoral Courts, among others. There are no lay magistrates, or juries in Argentina.

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<sup>1</sup> For more details on Argentina's legal system, see Cueto Rúa, 2000

## 2 - Judges in a civil law system

Unlike the UK's, with a common law legal system, Argentina's legal system lies within the civil tradition. Being a judge in a common law legal system is presumed to be very different from being a judge in a continental or civil legal system. This presumption comes from the fact that comparisons between the two are usually made with ideal models rather than with real life judges in mind.

In the next few paragraphs, I present the stereotype of the judge and his/her activity within each legal tradition. Within a civil legal system judges are not supposed to create and mould the law to treat similar cases alike according to judicial precedent in the way judges in a common law system do. Instead, they are meant to be scholars who interpret the statutes following strict procedural and logical rules. As Merryman puts it, in a civil system the judges speak the law, they are "the mouth of the law". In that context, the judge operates a machinery designed by the legislator, someone who performs the "very important but mechanically, narrow, uncreative function of applying the law to the concrete facts of each case" (Merryman, 1969: 34-38).

In a common law system, the judge's appointment comes relatively late in life as the crowning of a very successful legal career. They are well known, very powerful and prestigious persons who do not belong to the State bureaucracy, but are seen as mediators between the State and the public. This is especially so in the United States, where judges may have an active political stance in public matters, although not in England, where the tradition is for judges to be non-political,

In a civil law system, instead, the judicial career is one of the choices a lawyer can make early in his/her career when he/she finishes law school. They usually start at the lower echelons in the judicial career and then work up into senior levels. In a civil law system, judges constitute a power within the nation and they are civil servants, a part of the State bureaucracy enjoying the prestige any high ranked official does. Yet

his/her role is not thought to be so very important as that of a judge within the common law. Under this ideal model, and unlike the American common law judge, the civil law judge should not become involved with political matters or interfere with the other republican powers. He/she should only speak through his/her Judgements.

The two models epitomise the tensions between formality, modernity, rationality, and security on the one hand, and with antiquity, irrationality, contextuality and discretion on the other. The previous description describes orthodox theoretical models rather than actual judges within one or the other legal tradition. As Merryman puts it: "The important distinction between the common law and the civil law judicial processes does not lie in what the courts in fact do, but in what the dominant folklore tells them they do" (Merryman, 1969: 47)

In fact, both systems have evolved to incorporate new characteristics. More and more statute law is promulgated in the common law countries, counteracting the judge's discretion, and even judges interpreting statute in the civil law system must exercise discretion. Furthermore, new courts allowing for judicial review of the statutes are being created in countries with a civil law tradition and, more and more often, the judges see themselves in need to interpret written statutes -not always a self-evident process- in the light of the facts of the cases. It has by now become quite clear that, irrespectively of the legal tradition -common law/civil tradition- the judges do not often find all the answers in the statute. The need to interpret the law arises again and again. Thus, if one considers that the application of the law is not mechanical, but implies an interpretation and is mediated by the worldview of the judge, as Mackinson and Goldstein put it "Apart from implying the interpretation of the law, in a broad sense, each Judgement transcends the ideology of the judge" (Mackinson, 1987: 78), it becomes obvious that the judge's worldview, personality and culture come to play a very important role in the process of interpretation. Seen in that perspective, neutrality on the part of the judge becomes another myth

sustaining both legal systems<sup>2</sup>. This is particularly important in the context of this research, given that I intend to explore gender differences in the way the judges perform, think and speak about their work<sup>3</sup>.

Fucito (2002: 92) conducted a survey among judges looking at Argentine judges' actual practices and at how they situate themselves in terms to the antinomy between the judge "scholar" and the judge "hero". He came to the conclusion that the law performs a very vague role amidst the mosaic of interpretations that constitute the judges' daily practices. As a matter of fact, Fucito's study showed that, irrespectively of the section of the judiciary they belonged to, most of the judges in his research manifested to resort comfortably to equity, understood as the faculty of the judge to mitigate the harshness of the written law, depending on the individual case. The law, within which they move with relative freedom, appears as a general outline that orients their action. To Fucito, Argentine judges' empirical homemade approach to decision-making is far from the formalistic ideal of the civil law judge. Given that the judges make decisions with important effects on the lives of those involved in legal conflicts, and these decisions are not only based on the law, but also on their own values and worldviews, it becomes relevant to enquire into the values underlying these decisions. Later in the thesis<sup>4</sup>, my own analysis focuses on this aspect of adjudication highlighted by Fucito.

### **3 - The system of judicial appointment**

Until 1994, the president appointed judges with the agreement of a senate committee. They were elected for life and could only be removed through a senate impeachment. There was only one case of a judge's impeachment in more than 140 years. The old system of appointment of judges, consisting of the executive nomination of a candidate and its appointment by the senate, had often been highlighted as one of the

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<sup>2</sup> See further chapter 1, section III-2- b ii, for a feminist theoretical discussion of neutrality

<sup>3</sup> See discussion on gender in adjudication in chapter 1, section III of this thesis.

<sup>4</sup> See Chapter 5, section III-2.c.iv.

reasons for the traditional dependency of the judiciary on the executive. Such a system, which prevailed for over one hundred years, was highly politicised and damaged the reputation of the judiciary. As Fucito (2002: 62-63) argued, to become a judge, the candidate needed to have political influence. Likewise, the processes of both nomination and appointment of judges were themselves political. "Clientelism" -understood as political patronage- and nepotism flourished within the judiciary, jeopardizing technical and ethical competences, the two basic requirements to occupy a public post.

The National Constitutional Reform of 1994 brought about a change in the system of appointment of the judges<sup>5</sup>. A new collegiate agency was then constitutionally introduced for the selection, nomination, sanction and removal of judges. The "Consejo de la Magistratura" (Judgeship Council), an institution constituted by members of the executive, the parliament, the legal academy and the associations of lawyers and judges was established. The proportion in which each of these sectors should be represented within the Council of a total of 20 members was not specified in the National Constitution, so it took various years to reach a consensus about the constitution of the new agency. For a few years, this left the country without a system to appoint judges with the consequent problems such a vacuum brought about. Today, the balance within the "Judgeship Council" is made up in the following way: The president of the Council is the President of the Supreme Court and there are 4 representatives of the judges, 8 of the legislature, 4 of the lawyers, 2 of the academics and 1 of the executive.

In the new institutional organisation, the "Judgeship Council" has to organise the process of selection of candidates to become judges. For each vacant post, it presents the President with three candidates, among whom he chooses one. A Senate committee then approves the nomination. The new system is supposed to bring about transparency into the process and eventually make the judiciary more independent from the

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<sup>5</sup> National Constitution, art. 114.

government. The Council has been in operation for over two years now, but it has been very much criticised for its very low performance in terms of both nominating and removing judges. Since the new system maintained the roles of the executive and the senate in the process of appointment of the judges, its discretionary character was not fully eradicated. It just rendered the previous process of selection more rational and professional and set some limits on overt political discretion.

A lawyer must practise for five years before becoming eligible to be nominated as a judge. No special training is required in Argentina to become a judge. Recently, some private and public universities have started specialised courses for those who wish to go into the judiciary. Such courses, although by no means compulsory, offer an option for those who wish to further their education and the possibility to obtain an advantage in the process of selection of candidates that the "Judgeship Council" should hold.

#### **4 - The role of lawyers in Argentine society**

In Argentina lawyers play an important role in political life and participate actively within the three powers of the State. The judiciary is made up exclusively of lawyers, who are also present in important numbers in the executive and the legislatures. The three democratically elected presidents after the recovery of democracy in 1983 were lawyers, as are more than half of the members of Congress. Undoubtedly, this is a profession with close ties to political power.

As Ralph Dahrendorf argues, lawyers and jurists make 60% of all the important decisions in a society with rule of law. In the process of democratic reconstruction, during the transition to and reconstruction of democracy in the country, lawyers in the various fields of law have certainly played a very important role in Argentina (Dahrendorf, 1982 cited by Agulla, 1990: 19). Given that the rule of law, equality before the law and an enhanced citizenship should be among the basic tenets of an aspiring

democratic order, the relevance of lawyers in contemporary Argentine society should not be understated.

After the terrible human rights violations typical of the period of the military dictatorship that the country underwent between 1976 and 1983, lawyers' participation has been crucial in the process of re-establishing respect for human rights and the rule of law within Argentine society. How to cope with the horrors of that obscure period was a political matter that involved the whole of society after democracy was recovered. Lawyers certainly proved to be very influential within this process that is still under way.

On the other hand, as public deliberation and political circumstances led to the belief that a Constitution promulgated 150 years ago had proved inadequate and did not provide enough guarantees to safeguard a truly democratic society, a process in favour of constitutional reform originated. That process finally led to the 1994 Constitutional Reform and there, again, lawyers played an important role.

### **• III - Women in the law in Buenos Aires**

#### **1- Introduction**

At the end of the previous chapter, I examined the representation of women among law students at UBA. In this chapter, I examine the impact of the increased participation of women Law students in the legal profession. I consider women as legal academics and in legal practice and study women in the judiciary. This will provide the essential background to my research on women judges.

This endeavour and the difficulties it poses should be seen in the context of a country with a culture and tradition of neglect regarding information and access to it. Accordingly, Argentina has not invested many resources or energy in building a good national statistical system. Thus, it is rather lacking in terms of keeping historical and statistical records in general. The situation is even more precarious with respect to statistics disaggregated

by sex and referring to small numbers of relatively privileged middle class women. Unlike the circumstances current in more developed countries such as the UK, Australia, Canada and the United States, where there is a great wealth of studies and, consequently great availability of quantitative data on women in the legal professions, the matter has not aroused much interest in Argentina and thus statistics are practically non-existent. This is not peculiar to the legal professions. Actually, the status of women in the professions in general does not seem to have drawn much attention locally.

As a matter of fact, this chapter is the first comprehensive attempt to describe women's participation in the legal profession in Buenos Aires. Neither the various lawyers' associations nor the university have ever attempted such an undertaking. Ideally, a study of this type would require data referring to all the areas in which lawyers work. However, this is not a straightforward endeavour since, as mentioned, most of the relevant data are not available. Thus, in spite of my exhaustive efforts to obtain as many data as possible from secondary sources and to produce my own, it was not possible for me to bridge some of the gaps in the information obtained.

Fortunately, this culture is already changing towards a larger inclusion of sex disaggregated data in national statistics, as a result of the engagements assumed by the Argentine government in the International Women's Conference held by the United Nations in Beijing in '94 in terms of reporting to the United Nations the advances on the enforcement of the CEDAW<sup>6</sup>. Additionally, Argentine women NGOs (Non Governmental Organizations) are preparing their own "shadow reports" on the enforcement of the CEDAW<sup>7</sup>. Hopefully, following this trend towards the production of gender indicators, in due course, the culture will change and the lawyers' associations and universities will care to go beyond the record of the gender composition of their membership. In the meantime, however, research on the issue needs to start from a very low base, since there are

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<sup>6</sup> <http://www.cnm.gov.ar/arcainterv/participolit/lugdedecis.htm>

<sup>7</sup> See, for instance: Cels et al: CONTRINFORME, 2000.

few previous studies that refer only partly to some of the issues relevant to this research.

## **2 - Women Faculty at the UBA Law School**

Having examined in the previous chapter the representation of women among law students, this section will move on to consider the position of women legal academics. This is a very important realm of activity for law graduates. In Argentina, full-time university law teachers are very rare. Most teach on a part-time basis while also working in private practice or in the judiciary. Law teaching is therefore mainly a part time activity that provides great prestige and little money. Being a law teacher is undoubtedly regarded as a strategy for lawyers to ascend in the occupational ladder into other branches of the profession (Mackinson and Goldstein, 1978: 80; Agulla, 1990).

### **a - Structure of the Law School faculty**

Clearly, the professional structure of universities varies considerably from jurisdiction to jurisdiction. In this section I attempt to provide a rough explanation of the UBA Law School faculty structure. In the UBA Law School there are 8 departments: 2 departments of Public Law, and one of each of the following departments: Criminal Law, Private Law, Philosophy of Law, Labour Law, Socio-legal Department and Corporate Law. Related subject matters are organised under one department. Each department offers various courses and hosts more than one chair for each course. Table 12 illustrates this structure and shows the courses offered by each department.

• **Table 12 - Courses offered by department at UBA Law School**

<b>Department</b>	<b>Number of chairs</b>	<b>Courses</b>
<b>Public Law (2 departments)</b>	6	Theory of the State
	8	Constitutional Law
	4	Human Rights
	6	Administrative Law
	4	International Public Law
<b>Criminal Law</b>	14	Criminal law and procedure
<b>Private Law</b>	7	Civil law (chairs),
	6	Civil and Commercial duties
	8	Civil and Commercial Contracts
	5	Property law
	8	Family Law and Inheritances
	4	International Private Law
<b>Philosophy of Law</b>	8	General Theory of Law
<b>Labour Law</b>	7	Labour Law and Social Security
<b>Socio-legal</b>	5	Economic and Financial Analysis
<b>Corporate Law</b>	12	Commercial Law

Each Chair is headed by one "Profesor Titular" (Professor). This post is followed in the hierarchy by the "Profesor Asociado" (Associate Professor), who, in turn, is followed by the "Profesor Adjunto" (Adjunct Professor). The "Profesores titulares" (Professors) correspond to the highest post in the teaching hierarchy. They are in charge of the chair, followed by the "Asociados" (Associate Professors) and then by the "Adjuntos" (Adjunct Professors). In the lower ranks of the faculty hierarchy come those going through the teacher training scheme: the "Auxiliaries" who work assisting in practical work and tutor the students in small seminars, but do not normally lecture.

Traditionally, until quite recently, faculty members were appointed to occupy their teaching posts without going through a contest. However, in the last 8 years, and particularly after 1995, as the result of the process of reorganisation of the Law School, there has been a movement within the

academy towards making these posts obtainable through a selection contest. This process has been gradually put into practice and, given the high number of faculty members, it is taking a very long time. The new rules apply to all faculty members. All new appointees need now to go through a selection involving an open public contest. Even those faculty members who have held their posts for years have now to go through the process to be ratified in their posts. The same applies to those who want to proceed in the hierarchy. In addition, all members of the law faculty need to go through a selection contest every 7 years to retain their posts.

The fact that there are so few full-time university teachers accounts for the very high numbers of faculty members, since the large majority work only part-time. As mentioned above, faculty members fall into three categories in terms of hierarchy. Additionally, each category breaks into two categories according to whether the faculty member has already gone through the selection process and his/her post has been ratified. In that way, if the faculty member has gone through the process of selection, he/she is a "regular" member of the faculty. If he/she is still waiting to go through the process of selection, he/she is an "interino" (provisional) member of the university staff. The whole process of holding those selection procedures is taking a few years. Consequently, there are still many faculty members who have not gone through the selection process and have not yet become "regular" faculty members.

In addition, faculty members can hold a full-time, a semi-exclusive or a part-time position. Faculty who work full-time have a 45-hour working week and are excluded from working as lawyers. Faculty who have a semi-exclusive position have a 15-hour working week and, unlike those who work full-time, can work privately as lawyers. Finally, part-time faculty members have only a three-hour working week and no restrictions to their private practice.

Similarly, the situation of faculty auxiliaries has changed. A training scheme has been organised for those who wish to become faculty members at the UBA Law School. To do so, once the candidate obtains a

law degree and hence becomes a lawyer, if he/she wants to go into teaching he/she has to pass an examination to enter into the teacher-training career or "carrera docente" and thus becomes an Auxiliary to a faculty member. The lower rank of the teaching career is the "ayudante de 2a." or "2<sup>nd</sup> class auxiliary". Once he/she has taken some special courses, assisted in teaching for two years, he/she needs to pass another exam to then become a 1<sup>st</sup> class Auxiliary. He/she has to go through some further courses, assist in teaching for another two years and pass a new exam to become a "Chief of Practical Work" or "Assistant professor", who again goes through a similar process involving teaching and passing another exam: After that, if there is a vacancy for a post as an "Adjunto" or Adjunct professor, he/she can participate in a selection contest and eventually become one. During the 6 years of the Teacher Training Scheme, aspiring university teachers dedicate a lot of time and energy to this training, making hardly any money. Although transiting the teacher-training scheme is not the only way to enter the teaching career, it is certainly the most common one. Yet, a faculty member coming from another Law School or from another country, could, for instance, aspire to participate in a selection contest.

#### **b - Women's situation within the Law faculty in 1989<sup>8</sup>**

The first study of legal academics was published by Agulla in 1989. I will first examine the situation for 1989 as discussed by Agulla before considering the changes that have taken place since then (Agulla, 1990: 26).

Table 13 shows the distribution of women and men faculty members at the UBA Law School according to the hierarchy of their teaching posts in the horizontal axis of the table and to the condition of their activity in the vertical axis of the table.

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<sup>8</sup> The lack of a central statistics office at UBA made it impossible to obtain information from a single source. This explains slight differences in the figures corresponding to the same data. Time differences within the same year and different measurement criteria could be made accountable for such differences. Whenever possible, an effort was made to check the data and to establish common criteria. The fact is, however, that it was not always possible to solve these problems.

• Table 13- UBA Law School faculty, according to sex, category and state of activity in 1989<sup>9</sup>

Category	"TITULARES"				"ASOCIADOS"				"ADJUNTOS"			
	W		M		W		M		W		M	
	N	%	N	%	N	%	N	%	N	%	N	%
<b>Emeritus</b>	0	0	2	0.1	0	0	0	0	0	0	0	0
<b>Consultos</b>	0	0	8	0.6	0	0	3	0	0	0	0	0
<b>Regular</b>	5	0.4	70	5.6	1	0	21	8	58	4.6	192	15.4
<b>Interino</b>	4	0.3	36	2.8	1	0	9	0.7	251	20.1	585	46.9
<b>Total</b>	9	0,7	116	9	2	0,1	33	2,6	309	24,7	777	62,3

In 1989, faculty members added up to a total of 1,246 between men and women, comprising 320 women and 926 men. Women were 24.8% of the faculty and men, 75.3%. As can be seen from tables 13 and 15, women concentrated on the lower ranks of the teachers' hierarchy: "Adjuncts" and "Auxiliaries", who were pursuing the teacher-training scheme. The proportion of women was almost zero at the highest levels of the hierarchy and quite high among the lower ranks. There were no women among the "Emeritus"<sup>10</sup> or the "Consultos"<sup>11</sup> in 1989, which was not surprising, given that there were very few women lawyers aged between 65 and 70 at the time. Agulla also suggests that in 1989 there were more women than men in full-time teaching and that, in general, women usually worked longer hours than men. In 1989, law teaching was more of a central activity for women than for men. This has usually been associated with the fact that, in Argentina, men are still the main economic providers and women the ones who retain the main responsibility for homemaking and childcare. Teaching schemes allow for more flexible timetables but pay lower salaries. Women's being the second salary, they can afford to dedicate more time to teaching. This explanation is very similar to the one provided in the previous chapter to explain the reason for the larger numbers of

<sup>9</sup> After Agulla (1990: 26).

<sup>10</sup> "Emeritus" are "profesores titulares" or "professors" past the age of retirement (60) who have gone through the category "consultos" for five years and remain as "honorary" members of the staff.

<sup>11</sup> The category "consultos" corresponds to "profesores titulares" or "professors" past the age of retirement (60) who still remain at the University for 5 more years with fewer responsibilities and lower payment.

women undertaking postgraduate degrees.

In addition, Agulla remarks that in 1989 women tended to participate in greater numbers in the more formative areas of law teaching, that is to say in those courses that related less to the technical specialities. Accordingly, we see that in 1989 women were under-represented among the senior levels of the university teaching staff and segregated according to specialities.

### c - Women's situation within the Law faculty in 2000

The tables shown below were produced by myself on the basis of the information gathered. Table 14 shows the distribution of the UBA Law faculty according to their sex and position for 2000. I will compare the present situation with the situation described by Agulla for 1989 in order to trace the evolution in women's participation within the Law Faculty. Most posts have been the object of competition, and nowadays faculty members who have not gone through the process hardly reach 5%, while, as shown in table 13, they were a large proportion of the faculty in 1989.

• Table 14 - UBA Law School faculty by sex and category in 2000<sup>12</sup> (regular and non regular<sup>13</sup>)

Category	Men	Women	% of Women
<b>Emeritos</b>	15	0	0
<b>Titulares consultos</b>	24	3	12.5
<b>Asociados consultos</b>	2	0	0
<b>Titulares</b>	95	17	17.8
<b>Asociados</b>	8	6	43
<b>Adjuntos</b>	333	159	47.7
<b>Total</b>	477	185	38.7

As explained above, regular faculty members are those who have gone through a selection contest to obtain the ratification of their posts. Compared with the numbers mentioned by Agulla in 1989, the number of faculty members that has not gone through the process today has

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<sup>12</sup> Information provided by Dr. Lilia Freire of the Board of Directors of the Law School at the UBA.

<sup>13</sup> As was explained above, the regular members of the faculty are those who have already gone through a selection process in order to be confirmed in their posts, whereas those who have not are "interinos", non-regular or provisional faculty members.

diminished greatly and amounts to no more than 5% of the total number. As already mentioned, in 2000 the regular faculty of the UBA Law School amounted to 670 (100%), 485 (72.38%) men and 185 women (27.61%)<sup>14</sup>. If we compare this table with that of 1989, we can see that, although there are still no women "emeritus professors", there are some (3) "consultos" and the number of women among the "professors" ("titulares") has increased considerably, together with the number of "adjunct professors" ("adjuntos"). While not on equal terms yet, women are certainly participating more actively within the UBA Law School than they did in 1989, and have gone up in the university hierarchy. Still, in spite of the fact that women's participation has increased considerably since 1989, table 14 clearly shows that, in general terms, the proportion of women still decreases as one goes up in the university hierarchy, showing an important degree of hierarchical gender segregation. My findings coincide with those of a recent survey (mentioned in chapter 2) that found that, in 2000, the majority of the faculty members of the UBA law School were men under 40, ranked as "adjuntos" (adjunct professors) and 94% of them also worked privately as lawyers (San Martín, 2000: 12)<sup>15</sup>.

As explained above, those who want to become faculty members at the UBA Law School undergo a long process of preparation or "carrera docente". The "Auxiliaries" play a very important role in teaching, marking exams and other related activities. As Table 15 shows, according to Agulla (1990: 41), in 1989 the number of women was 799 (44.3%) and the number of men was 924 (55.7 %). Women constituted a large proportion of those who were undergoing the teacher-training scheme; still, the number of men was higher. At the same time, in 1989, considering that the faculty members added up to a total of 1,246 between men and women, 320 women (24.79%) and 926 men (75.31%), it can be observed that the proportion of women in the teacher training scheme was much higher than the proportion of women among faculty members. Given that the teacher-training scheme is the main way to become a faculty member, this

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<sup>14</sup> Information provided by Dr. Brodsky, Academic Undersecretary of the Law School at the UBA

<sup>15</sup> San Martín: La Nación, July 10, 2000: 12.

suggests that in 1989 women were already pushing their way into the law faculty, anticipating a future increase in the proportion of women in the UBA Law faculty. However, the rise in the proportion of women within those attending the teacher-training scheme is not reflected on the numbers or proportions of women within the faculty members in 2000, with 485 men (72.38%) and 185 women (27.61%) out of a total number of 670<sup>16</sup>.

• **Table 15- Auxiliaries by hierarchy and sex in 1989**

Category	Men	Men %	Women	Women %	Total	%
<b>Chiefs of practical work</b>	240	63.32	139	36.67	379	100
<b>1<sup>st</sup>. class auxiliaries</b>	172	58.70	121	41.29	293	100
<b>2<sup>nd</sup>. class auxiliaries</b>	512	48.71	539	51.28	1051	100
<b>TOTAL</b>	924	53.62	799	46.37	1723	100

In table 16, I look into the gender composition of the teacher-training scheme for 2000. This should provide an indication of the gender composition of the future faculty. Compared to the proportion of women in the teacher-training scheme in 1989, the proportion of women has risen considerably (from 46.3% to 52.5%). This would suggest that, in the future, there could be a quantitative feminisation of the Law faculty.

• **Table 16 - Auxiliaries by hierarchy and sex in 2000<sup>17</sup>:**

Category	Men	Men %	Women	Women %	Total	%
<b>Chiefs of practical work</b>	321	47.7	352	52.3	673	100
<b>1<sup>st</sup>. Class auxiliaries</b>	190	42.1	261	57.8	451	100
<b>2<sup>nd</sup>. class auxiliaries</b>	1120	48.4	1191	51.5	2311	100
<b>Total</b>	1631	47.4	1804	52.5	3435	100

<sup>16</sup> Information provided by Dr. Brodsky, Academic Undersecretary of the Law School at the UBA

<sup>17</sup> Information provided by Dr. Mónica Pinto, the Academic Secretary of the Law School

**d- Gender and type of employment position in 2000**

As stated above, faculty working full-time have a 45-hour working week and work exclusively for the university. Faculty in the intermediate category, with a semi-exclusive work position, work a 15-hour week, and those in the part-time category work only three hours weekly. Neither of the two latter categories have any work restrictions.

The vast majority of the faculty members, 453 men corresponding to 93.4% of the men and 154 women corresponding to 83.4% of the women work part-time. As is clear from table 17, out of the 670 members of the Law faculty in the UBA Law School, only 15, (7 men and 8 women) work full-time at the university.

• **Table 17 - Full-time faculty by sex and category<sup>18</sup>**

Category	Men	Women
Titulares exclusivos	4	1
Adjuntos exclusivos	3	7

If we consider these numbers in terms of the percentage of the total faculty members, we can see that the proportion of full-time faculty is very low, representing only 2.2% of the whole faculty. Women and men working full-time represent 1.2% and 1% respectively of the total law faculty<sup>19</sup>.

However, when we look at the proportions within genders, we can see that men full-time faculty represent 1.4% of the total men faculty while women full-time law faculty represent 4.5% of the total women faculty. This means that, considered against the total men/ women law faculty, the proportion of women from the law faculty working full-time is larger than the same proportion for the men faculty members. Three main reasons can be invoked to explain the very small numbers of the full-time law faculty ("profesores con dedicación exclusiva"). In the first place, there are budgetary restrictions. The university cannot afford to pay many full-time

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<sup>18</sup> Same as 12

<sup>19</sup> Same as 12

teachers. On the other hand, the low salaries offered by the university do not stimulate full-time participation, especially since the faculty members with full-time dedication are not allowed to work as lawyers. As noted when analysing the same trend for 1989, the sexual division of labour inside the family may determine that, while men remain the main economic providers, women retain the main responsibility for homemaking and childcare. In such a context, due to the low salaries in teaching, men cannot afford to teach on a full-time basis while, compared to professional practice, teaching schemes allow for more flexible arrangements that seem to suit women's domestic roles better, even when they choose to teach on a full-time basis.

There is a third category called "semi-exclusive", between the full-time and the part-time type positions in terms of the working hours faculty members dedicate to the university. Table 18 shows the proportion of men and women within this category.

• **Table 18- Faculty members with semi-exclusive dedication by category and sex in 2000**

Category	Men	Women
Titular	16	7
Asociados	1	2
Adjunto	8	14
Total	25	23

The numbers in table 18 suggest that, for the same reasons invoked to interpret the higher proportion of women among the full-time members of staff, when men are not required to relinquish the profession, they maintain a high participation in teaching.

Table 19 examines the salary levels according to category and to employment position in terms of working hours. Even if men and women faculty members are paid the same, the examination of the low salaries awarded to all teaching categories supports the above hypotheses related to gender segregation in the law faculty, associated with differential roles for men and women within the family.

- **Table 19 - Monthly Salaries<sup>20</sup> at the UBA Law School, by category and type of position in 2000 (in US\$)<sup>21</sup>**

Type of position			
POST	Full-time	Semi- exclusive	Part time
Titular	1042	576	225
Asociado	955	540	211
Adjunto	850	446	178

### **e - Women's role within the University power structure**

Table 20 organises the authorities of UBA Law School according to their hierarchy and sex. Of the 10 key posts of the of the University of Buenos Aires Law School, the two higher posts are occupied by men, and only three are occupied by women. Neither the Dean nor the Vice Dean are or ever were women.

The Executive Board at UBA Law School is made up of representatives of the faculty, of the legal profession and of the students. In 2000 there were only 3 women among the 16 members of the Executive Board of UBA Law School: 2 of the 8 representatives of the faculty, none of the 4 members representing the legal profession and 1 of the 4 members representing the students. It is interesting to note that although men are the majority among the authorities of the UBA Law School, most of the posts occupied by men are honorific and prestigious but require less time and actual work. In contrast, the three posts occupied by women are crucial from the organisational point of view, and require full-time work. In terms of their functions, each of the three posts occupied by women require academic expertise and organisational skills, particularly in a period of reorganisation of the institution. The Academic Secretary is the person in charge of the co-ordination of all the courses provided by the university each semester, and of the relationship with the faculty members teaching those subjects.

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<sup>20</sup> Salaries increase with seniority, up to 120% after 30 years of service

<sup>21</sup> Information provided by Dr. Mackinson, vice-director of the Gloja Socio-legal Research Institute of the UBA Law School.

From 1995 on, this post currently held by a woman, has also to deal with the organisation of the recently implemented faculty selection contests. The woman in charge of Postgraduate, Research and PhDs secretariats with a huge task to perform has produced significant changes in the organisation of the postgraduate area. The Secretary of Institutional Relations is in charge of all the grants and of all the national and international institutional relations of the Law School. She has to take care of foreign students and Argentine students sent to study abroad by the university. Additionally, these women have continued with their teaching responsibilities. These findings coincide with research results in many jurisdictions that show that women academics tend to concentrate on this kind of "housekeeping" jobs (McGlynn, 1998: 46; Thornton, 1997: 106-129; Wells, 2003).

• **Table 20 - UBA Authorities in 1999 by sex<sup>22</sup>**

POST	WOMAN	MAN
DEAN		X
VICEDEAN		X
ACADEMIC SECRETARY	X	
UNIVERSITY EXTENSION SECRETARY		X
GENERAL ADMINISTRATION SECRETARY		X
SECRETARY OF RESEARCH AND PhD	X	
SECRETARY OF INSTITUTIONAL RELATIONS	X	
ACADEMIC UNDERSECRETARY		X
TECHNICAL UNDERSECRETARY		X

The question remains contentious whether it could be expected that, eventually, the tremendous increase in the number of women law students is going to even out men and women's participation within the Law faculty. As table 20 shows, men still hold the most authoritative posts within the university structure. The aspiration to equality requires more than just increasing the number of women. Although this is a necessary condition, it is nevertheless not a sufficient one. Women still have to advance much farther to share authoritative positions within the university organisation.

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<sup>22</sup> Source: Universidad de Buenos Aires, Facultad de Derecho y Ciencias Sociales. Oferta de Cursos de Posgrado 1999, Segundo Semestre Depto de Posgrado.

## f - Areas of specialisation of women and men within the university

In this section I trace the number of men and women in each department of the CPC, Common Professional Cycle<sup>23</sup> in order to be able to examine the preferred specialities by sex<sup>24</sup>.

• **Table 21 - Regular faculty members of the CPC by department and sex in 2000<sup>25</sup>**

Department	Men	Women	T	% W
Public law <sup>26</sup>	94	28	122	22.9
Criminal Law <sup>27</sup>	48	14	62	22.5
Private Law <sup>28</sup>	120	79	199	39.6
Philosophy of Law <sup>29</sup>	43	15	58	25.8
Labour Law <sup>30</sup>	19	7	26	26.9
Socio-legal Studies <sup>31</sup>	23	4	27	14.8
Corporate Law <sup>32</sup>	68	20	88	22.7
<b>Total</b>	<b>423</b>	<b>167</b>	<b>590</b>	<b>28.3</b>

<sup>23</sup> The Common Professional Cycle corresponds to the first three years of study, common to all law students irrespectively of their later specialisation.

<sup>24</sup> See section III-2 a and table 12 for a description of the organisation of the departments.

<sup>25</sup> See Table 12 above

<sup>26</sup> The two departments of Public Law offer the following courses: Theory of the State (6 chairs) Constitutional Law (8chairs) Human Rights (4 chairs) Administrative Law (6 chairs), International Public Law (4 chairs)

<sup>27</sup> The department of Criminal Law offers the following course: Criminal law and procedure (14 Chairs)

<sup>28</sup> The department of Private Law offers the following courses: Civil Law (7chairs), Civil and Commercial duties (6 chairs), Civil and Commercial Contracts (8 chairs), Property law (5 chairs), Family Law and Inheritances (8chairs), International Private Law (4chairs)

<sup>29</sup> The department of Philosophy of Law offers the following course: General Theory of Law (8 Chairs)

<sup>30</sup>The department of Labour Law offers the following course: Labour Law and Social Security (7 chairs)

<sup>31</sup> The Socio-legal Department offers the following course: Economic and Financial Analysis (5Chairs)

<sup>32</sup> The Department of Corporate Law offers the following course: Commercial Law (12 Chairs)

Table 21 shows the distribution of men and women among the different departments. The average participation of women law faculty is around 28%, the department with the highest proportion of women within its faculty is by far Private Law, and the department with the smallest proportions of women is Socio-Legal Studies. Considering that most faculty members also work as lawyers this suggests that women, in fact, must work in the area of private law and that, although the Department of Private Law is not just Family Law, this seems consistent with the belief that many women lawyers practise family law. This is of particular importance for this research, since the high proportion of women in Family Law at the University coincides with the high proportion of women family law judges and with the very high proportion of women taking up the Family Law postgraduate specialisation.

Along the same lines, there are 8 possible specialisations for postgraduate courses in Law; with a director each. Three out of the eight directors are women, the directors of the Family Law, Socio-legal Studies and Administrative Law specialisations. This suggests that, among the specialities, whether by preference or because they are pushed into these areas, women tend to be more numerous in Family Law and in the more politically oriented courses.

### **g - Women in the teaching hierarchy**

Table 21 shows how women faculty participate in the different specialities at the UBA Law School. In this section, I compare the different departments in order to examine the women's participation. As can be appreciated from tables 22 and 23, the departments with the largest proportions of women in high positions are Private Law, Labour Law and Public Law which, as we were just observing, are the departments with the largest proportions of women. McGlynn has noted a similar tendency in the UK for women to hold more senior posts in those departments with more women overall (McGlynn, 1998: 47). This is interesting since, as shall be seen later in section IV where I consider the participation of women within the different

branches of the judiciary, the sections of the judiciary with the highest proportions of women are also the Family Courts and the Labour Courts.

• **Table 22- Faculty members by category, department and sex, for 2000**

Department	WOMEN			MEN			T
	Titulares	Asociados	Adjuntos	Titulares	Asociados	Adjuntos	
Public Law (28 chairs)	4	1	29	20	3	87	144
Criminal Law (14 chairs)		2	12	5	7	36	62
Private Law (38 chairs)	4	3	59	28	2	98	194
Philosophy of Law (8 chairs)	1		14	6		36	57
Labour Law (7 chairs)	2		5	5		14	26
Socio-legal Studies (5 chairs)			4	4	1	18	27
Corporate Law (12 chairs)		1	19	9	2	57	88
<b>Total</b>	<b>11</b>	<b>7</b>	<b>142</b>	<b>72</b>	<b>16</b>	<b>346</b>	<b>594</b>

• **Table 23 - Faculty members by category, department and sex for 2000**

Department	WOMEN %			MEN %			T
	Titulares	Asociados	Adjuntos	Titulares	Asociados	Adjuntos	
Public law (28 chairs)	2.7	0.6	20.1	13.8	2	60.4	100
Criminal Law (14 chairs)		3.2	19.3	8	11.2	50.5	100
Private Law (38 chairs)	2	1.5	30.4	14.4	1	50.5	100
Philosophy of Law (8)	1.7		24.5	10.5		69.2	100

chairs)							
<b>Labour Law (7 chairs)</b>	7.6		19.2	19.2		53.8	100
<b>Socio-legal studies (5 chairs)</b>			14.8	14.8	3.7	66.6	100
<b>Corporate Law (12 chairs)</b>		1.1	21.5	10.2	9	64.7	100

## **h - Conclusion**

The previous sections examined the situation of women within the faculty of the UBA Law School. It was observed that although women have entered the UBA Law School in large numbers, when looking at their participation as faculty members, their numbers are still less significant than the numbers of men.

Moreover, women tend to concentrate on the lower echelons of the university hierarchy. Unlike that of men, the proportion of women is higher among those faculty members working full-time. I have argued that, most probably, this is related to men's and women's family roles in terms of the main responsibility for material family provision and of the result of the low teaching salaries. Again, women tend to cluster in certain areas of law teaching such as Private Law and Labour Law, which, as a matter of fact, are the areas where women enjoy a higher status in terms of the post hierarchy within the faculty.

In terms of the positions of women within the administration of the Law School, it has been seen that, while men occupy the more authoritative and prestigious posts women tend to occupy the positions that are more time-consuming and less prestigious.

The increased numbers of women now progressing through the teacher-training career would suggest that in the future women may make up a larger proportion of the faculty. It cannot be affirmed, however, that this participation will necessarily tend towards a more egalitarian participation

since, as has been shown, women still have a long way to go in that respect.

#### • IV- Women lawyers in Argentina today

##### a - The statistics

Currently, the number of women lawyers has almost equalled the number of men lawyers. To find out the number of women lawyers was not difficult since data published by the Ministry of Education show that in 1998 law graduates of both sexes constituted the second largest number of graduates in Argentina, 13% of the total university graduates, with 101,181 women corresponding to 50.4% and men to 49.6 % of the total number of law graduates<sup>33</sup>.

If we consider the actual contingent of women law graduates, we will note that there are more than 52,300 women lawyers; it is one of the largest groups of professional women. We will find women lawyers working in every field of law, in the judiciary, at the university, at law firms, in legislatures and in public offices as civil servants.

The "Colegio Público de Abogados" or "Lawyers' Public Association" is the equivalent to the Bar Association that lawyers have to join if they are to litigate before the Courts of the city of Buenos Aires. The "Colegio Público de Abogados" provided me with a list of its active members by the end of 1998. According to a 1987 previous measurement of the number of associates, 35% of its members at the time were women.

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<sup>33</sup> Ministerio de Cultura y Educación. Secretaría de Políticas Universitarias. La Educación Superior en la Argentina. Eduardo Sánchez Martínez Editor, 1999.

◦ **Table 24 - Members of the “Colegio Público de Abogados”<sup>34</sup> by sex and year of graduation (1914 to 1987)**

<b>Years of graduation</b>	<b>Men</b>	<b>Women</b>
1914-24	100%	0%
1925-35	99.9%	0%
1936-46	95%	4.5%
1947-57	91.1%	8.85%
1958-68	76.9%	23.1%
1969-79	63.2%	36.7%
1980-87	51.7%	48.9%

This list, provided by the “Colegio Público” for 1998, has been organised by year of birth and sex of the members. The heading of the list reads “Number of active members” (45,265), and the corresponding date is December 31, 1998. Given that the “Colegio Público de Abogados” requires a monthly fee, the institution regards as active members those who are not in arrears with the said fee.

The difference between the total number of lawyers and the number of active members within the “Colegio Público de Abogados” may be accounted for by those lawyers who litigate locally in their provinces, but do not do so in Buenos Aires; those lawyers who work in other branches of the profession that do not command membership of the mentioned association, like the judiciary, the legislature, the executive, “in house”, or do not work professionally as lawyers. There are also lawyers who though still appearing as active members of the institution must have long been dead or retired.

The “Colegio Público de Abogados” also provided me with the list of the universities from where its members graduated, which included the percentages of degrees given by each university. It showed that 70% of all members obtained their degrees from the UBA Law School. The remaining 30% had studied in private universities, many of them Catholic, or in either

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<sup>34</sup> Molinelli, 1989: 3, note 3.

public or private local universities of the rest of the country. A few members were awarded degrees by foreign universities.<sup>35</sup> This means that the UBA Law School covers the majority of lawyers.

The list provided by the "Colegio Público de Abogados" gives the total number of men and women members organised by year of birth and sex for those members born between 1897 and 1975. As common sense indicates, it is highly unlikely that anyone born before 1920 might still be an active member of the bar association by the end of 1998, and this is an indication of the weakness of the data obtained.

To account for this setback, I decided to start by the members who were born from 1920 onwards. So, a number of 940 members born between 1897 and 1919 made up of 53 women and 887 men were subtracted from the total number of members as they appear on the list of the "Colegio Público de Abogados", leaving 44,378 men and women lawyers. Since the number of members dropped dramatically for those born after 1970, simply because they are too young, I decided to subtract those members as well. The remaining number of graduates is then 40,004.

I then constructed a new table for the members of the association born between 1920 and 1969, and grouped them by decade, so as to be able to appreciate trends.

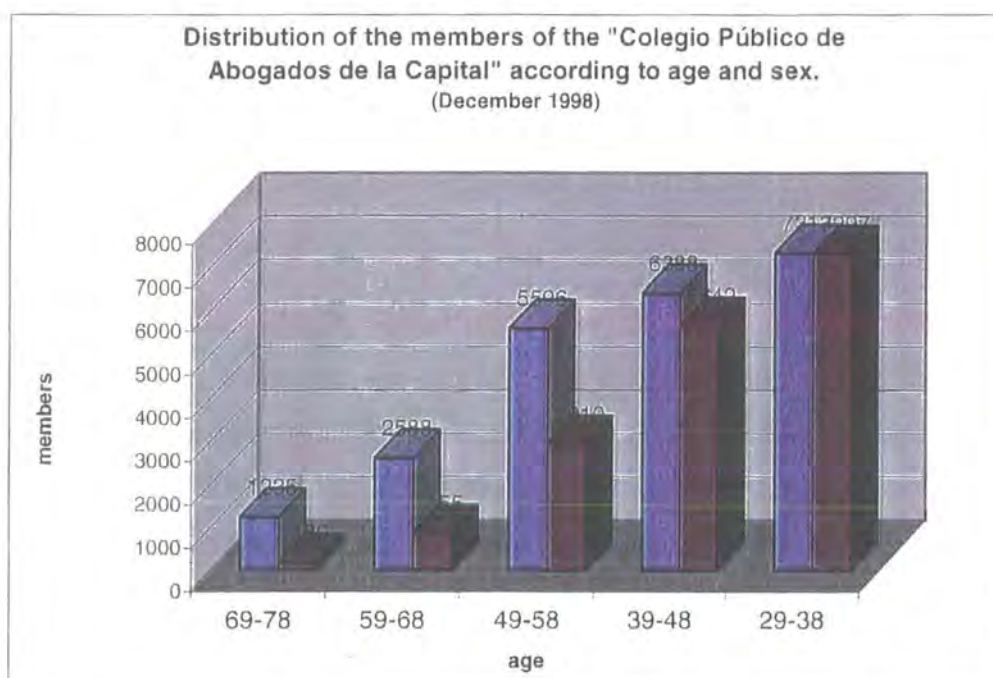
• **Table 25 - Members of the "Colegio Público de Abogados de la Capital" by sex and year of birth December 1998**

Year of birth	Age	Men	Women	Total	% women
1920-1929	69-78	1235	180	1415	12,7
1930-1939	59-68	2588	855	3443	24,8
1940-1949	49-58	5596	2910	8506	34,2
1950-1959	39-48	6388	5642	12030	46,9
1960-1969	29-38	7313	7297	14610	49,9
Total		23,120	16,884	40,004	42,20

<sup>35</sup>Extracted from table provided by the "Colegio Público de Abogados de la Capital" in August 1999.

Clearly, tables 25 and 26 show that as age decreases there is an increase in the percentage of women. This tendency, which starts more slowly for those born in the 1940's, and who presumably were awarded their law degrees between 1965 and 1975, becomes sustained for the following decades. For those born after 1950, the number of women members almost equals the number of men. This is quite in tune with the spectacular increase in the number of women registering at university, particularly UBA. Table 26, where the blue represents men lawyers and the pink women lawyers accurately shows this tendency.

- **Table 26: Members of the "Colegio Público de Abogados la Capital" by sex and year of birth in December 1998 (graph)**



### **b - Women lawyers and the labour market in general**

There is no previous study of the labour market for women lawyers in Argentina. Considering the fragmentary nature of the information available, it was necessary to devise alternative strategies to approach the issue regarding women lawyers' professional practice; namely, the actual activities and areas of specialisation of women lawyers within the profession. Thus, I decided to interview some key informants in order to

obtain some information that, albeit a poor substitute for valid data could partly orient my enquiry regardless of the purely anecdotal nature of the data thus obtained.

Still, the general perception shared by Dr. Pila Minyerski<sup>36</sup>, president of the Lawyer's Association and by other lawyers<sup>37</sup> I interviewed as key informants in order to compensate for the lack of available data, is that women work mostly as civil servants, at the university, in the judiciary - either as judges, or as part of the bureaucracy of the judiciary-, as mediators, in large law firms and in small law firms or solo firms doing family law and general practice.

The lack of available data made it impossible for me to investigate women lawyers' participation in the State bureaucracy and in the small and solo practitioners firms where women seem to concentrate. The participation of women lawyers in law teaching has been discussed in the previous section. Women's participation in large law firms will be examined in the next section.

With respect to women lawyers as civil servants, although the actual figures are not available, we can say that a large proportion of the women elected as members of the national and the city legislatures are lawyers. There also many women lawyers among the consultants who assist the members of Parliament and local Legislatures to write the law projects they submit and to examine those submitted by other members. Also, the ministries and other important offices of the executive have a legal department where, presumably a considerable number of women lawyers might work. At least, this is the common impression expressed by people related to the law, based more on experience than on actual statistics.

On the other hand, as Molinelli explained in 1989, by that time, legal departments in large business companies had grown less and less frequent and this has become a sustained tendency ever since. The

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<sup>36</sup> Interview with Dr. P Minyerski on July 13<sup>th</sup> 2000

current tendency is for companies to engage the service of law firms, so legal departments in business firms have disappeared or become very small and, even if they employed women, their numbers would be negligible<sup>38</sup>. However, the head of a firm that selects personnel for large law firms, a woman who asked for her name not to be disclosed has suggested to me that, in the last few years, large business companies have retained a small legal department to attend to internal matters such as labour claims and insurances. According to this key informant, these business firms tend to hire young women lawyers for these purposes.

A very large number of women lawyers have gone into mediation. At present three quarters of the more than 3000 mediators authorised by the Ministry of Justice are women. About five years ago the Ministry of Justice decided that in order to streamline the already extremely overburdened justice system, all civil cases should go through a process of compulsory mediation. A law was passed<sup>39</sup> that created the figure of the mediator "authorised" or qualified by the Ministry of Justice. It established who could become a mediator, the courses they should attend, and the hours of mediation they were supposed to have carried out in order to be allowed to mediate in civil cases. By then, two women judges from the Higher Civil Court<sup>40</sup> who could be considered responsible for the introduction of mediation in Argentina had already started a large school of mediation and lobbied for the passing of the law with a strong support from the USAID, (the Cultural Service of the American Embassy). At present, 2250 out of the 3500 mediators authorised by the Ministry of Justice are women<sup>41</sup>. The

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<sup>37</sup> See methodological appendix for more information on those interviews

<sup>38</sup> Molinelli, : "Los departamentos Legales de empresa en la Argentina" La ley, jueves 15 de junio de 1989: 3, ft. 3 .

<sup>39</sup> Law nº 24.573, October 25, 1995

<sup>40</sup> I am referring to Dr. Helen Highton and Dr. Gladys Alvarez, who, in the early nineties, created an NGO named LIBRA with the purpose of promoting the use of alternative methods of conflict resolution as a way to decongest the already overburdened justice system and to train lawyers and other related professionals in mediation.

<sup>41</sup> Data sent by fax by the Department of Mediation of the Ministry of Justice, in August 2000.

number of mediators is very large and I was unable to trace how many of them are actually active.

Although some of the mediators come from different backgrounds, like psychology or sociology, the Department of Mediation from the Ministry of Justice states that most of them are lawyers<sup>42</sup>. In any event, the large proportion of women mediators is significant. It could be explained either in terms of women's preferences or as a "niche" within the profession offering a possible way out to women that did not feel fulfilled working within the profession.

The judges who participated in this study found that this was mainly a consequence of the difficulties associated to making a career within a law firm. They also pointed to the fact that men are still given more room in certain areas of the profession and that men are not interested in mediation because of the low pay. Also, in their view, mediation appears as a viable alternative occupation for women who only want to work a few hours.

In addition, the judges attributed the very large number of women mediators to what they viewed as a feminine tendency to agreed-upon solutions over more adversarial ways of conflict resolution. Thus Menkel-Meadow's thesis (Menkel-Meadow, 1989), according to which women would tend to prefer less adversarial methods of conflict resolution, could be sustained in this context.

With respect to the areas of the profession with a higher feminine participation, both the key informants and the judges that participated in this study<sup>43</sup> argued that their impression was that women lawyers largely concentrated on family law, a choice that they explained in two main ways. On the one hand, they thought that working as a family lawyer was an easier task to combine with domestic responsibilities than other areas of the profession. On the other hand, they stated that, in their view, women

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<sup>42</sup> Data sent by fax by the Department of Mediation of the Ministry of Justice, in August 2000

seemed to prefer the family law subject matter and that their larger involvement with families prepared them for such an endeavour.

### **c - Women's participation in law firms during the period 1975-2000**

#### **i - Women in large law firms**

The study of the position of women in law firms was made through the analysis of the Martindale-Hubbell Directory<sup>44</sup>, a yearly international directory of the most important law firms all over the world. A comparative analysis of the Directory for different years will give us an idea of the evolution in the situation of women in large law firms<sup>45</sup>.

The Argentine entry for year 2000 lists law firms and lawyers working within each firm and organises the lawyers in terms of their relationship to the firm, that is to say, whether they are "of counsel", "members" and "partners" or "associates". The Directory also lists the areas of the law firm's expertise. Given that it does not define the categories used, I had a few conversations with people in large law firms to produce a definition. My conclusion was that the words "partners" and "members" are used interchangeably to refer to the partners of the firm, those lawyers who have full responsibility for the firms' assets, duties and liabilities and who divide between them the profits generated by the firm. The partners are those who decide on the commercial strategy of the firm. Clients are usually taken care of by a partner who is in charge and a group of less senior lawyers who attend the daily enquiries. Sometimes the partners are divided into senior and junior members or partners; the senior partners are usually the founding members, and these are internal divisions that relate to the way profits are divided and decisions taken. The associates, on the other hand, are the employees of the firm. They can also be divided into senior and junior, depending on their degree of responsibility and

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<sup>43</sup> See chapter 6, section II of this thesis.

<sup>44</sup> Martindale and Hubbell Law Directory for 2000, 1992, 1984 and 1975.

<sup>45</sup> In Argentina firms with more than 50 lawyers are considered large law firms.

autonomy, and usually start as junior associates and ascend on the hierarchy to the category of senior associate to then become partners. Sometimes they do not achieve this final goal. Some lawyers may remain in this category indefinitely, while others ascend. The "of counsel" category names lawyers of a certain age who, having been partners, continue to have a link with the law firm but do not share in either the profits or the responsibility of an active partner.

A brief explanation about the shortcomings of using the Martindale and Hubbell Directory need be given. In the first place, being a paid service, it is not an all-inclusive list. A mention on the Directory will depend on the law firm's willingness to pay so as to be included in it. Still, it appears that it has gradually become a common practice, since it is the place where prospective international clients might look for a law firm. A further setback of using the Martindale-Hubbell Directory is its international business bias. This means that the areas covered tend to emphasise those areas of law more related to international big business to the detriment of other specialities such as family law, where we might hypothesise that women tend to be more active. Moreover, the categories related to the job titles used in the Martindale and Hubbell Directory correspond to the model of the American law firm, which may often differ from the organisation of local firms.

In spite of these shortcomings, and given the lack of alternative sources of information, I believe that the Directory can provide valuable information in relation to the position of women lawyers within large Argentine law firms. What seems more difficult, though, is to envisage the situation of women in smaller law firms and as "solo practitioners" where, in fact, we might well find more women.

Moreover, since the Directory is published annually, the analysis of previous Directories enables us to trace the increasing number of women through a comparison with earlier Directories<sup>46</sup>. As a matter of fact, it has

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<sup>46</sup> I was able to obtain some odd numbers of the Martindale Directory on a visit to the office of Dr. Lynch, the President of the "Colegio de Abogados de Buenos Aires", one of the two voluntary

been used before for similar purposes, and a 1986 article published by Serra in the business section of the Argentine Playboy Magazine<sup>47</sup> provides a good example for this<sup>48</sup>. In it Serra shows how, according to the Martindale Directory for that year, the 34 largest law firms in Buenos Aires, which totalled 363 lawyers, employed only 23 women, amounting to 6.3% of the total number of lawyers in the 34 law firms.

The article also suggests that of the 34 firms only 5 were located in the area of the principal courts. This might indicate that such firms do not specialise in litigation. (The headquarters of most law firms that specialise in litigation can be found in the "Tribunales" or Court's area). As Serra remarks, the firms studied presumably specialise in patents and trademarks which is quite consistent with a period of great international economic expansion, at a time when the economy opened up to international trade as a consequence of an official economic policy that focused on joining international markets and on the privatisation of public services, mainly sold to big international corporations. His analysis suggests that women were clearly underrepresented in Buenos Aires big law firms in 1986. This is a trend that I will further investigate by comparing both earlier and later Martindale Directories.

The examination of four Directories between 1975 and 2000 (1975, 1984, 1992 and 2000 Directories) depicts the evolution of women's participation in law firms during the period under study. The 1975 Martindale Directory was the first I could trace containing data about Argentine law firms; it certainly shows a very different picture from the one that prevails a quarter of a century later. In 1975 there were only 15 law firms in the Argentine section of the Martindale Directory for the City of Buenos Aires. Their sizes, measured by the total number of lawyers working in the firms,

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lawyers' associations in Buenos Aires. The numbers for 1975, 1984, 1992 and 2000 (which was on the Internet) were examined in order to trace some sort of evolution of the participation of women lawyers within the large law firms that appear in the Martindale Directory.

<sup>47</sup> Serra, 1986.

<sup>48</sup> Bothelho Junqueira (1999) also analysed the Martindale Directory for her study on Brazilian lawyers

ranged from 6 to 38. The total number of lawyers working in these 15 law firms amounted to 202, only 10 of whom were women. Men represented 95% and women 5% of the total number of lawyers. Eight out of the ten women belonged to the category of members and partners, while 2 were associates. This shows that, in 1975, law firms employed few women, since 80% of the women were members and partners, thus ranking high in the firm's hierarchy.

The analysis of the 1984 Martindale Directory for the City of Buenos Aires shows that the number of large law firms rose to 30, with a total number of 366 lawyers, 341 men and 21 women. The proportion of women was 5.7%, demonstrating a marginal improvement in the ten-year period following 1975.

In 1992, the number of law firms published in the Martindale rose to 46. From then on, for the sake of our analysis, the 40 largest firms were ranked by size and measured by the number of lawyers in the firm. The percentage of women was then 5%. In 2000 the total number of law firms in the Martindale Directory for Argentina shows a total of 165 law firms located in the City of Buenos Aires and the rest of the country. There are women in 137 out of the 165 firms and this amounts to 83%. 28 law firms are men-only firms; four of them are not located in Buenos Aires. 2,300 lawyers, 1,632 men (71%) and 668 women (29%) work in the total number of 165 law firms. The 40 largest law firms congregate a number of 1387 lawyers, 68.2% men and 31.7% women. In fact, the period has seen a tremendous growth of the sector of business law firms and, at the same time, a considerable increase in women's participation has also taken place. Table 26 shows a slow yet sustained growth in the participation of women within the law firms with its highest peak in 2000. We can then conclude that, however slowly, the large increase in the number of women lawyers is making itself felt within Buenos Aires law firms. However, given that the number of women and men lawyers today is very similar, I feel bound to point out that women lawyers are underrepresented in large law firms.

Since it is my purpose to focus on the city of Buenos Aires, the firms located were separated and ranked by size, using the number of lawyers in the firm as the size criterion. The 40 largest law firms located in the City of Buenos Aires that appear in the Martindale Directory for the year 2000 add up to a total of 1,387 lawyers, 947 (68.2%) men and 440 (31.7%) women. This proportion is slightly higher than the one for the whole country. Its size varies between 208 and 8; the largest law firm in the city has 208 lawyers and the smallest, 8. The firm in the second place in the ranking has only 85 lawyers, thus one can observe a dramatic drop in the number of lawyers between the first and the second firm in the ranking. From then on, the distribution of the firms in the ranking is smoother in terms of size. Firms with more than 80 lawyers are rare. Today, a firm that has around 50 lawyers can be considered large.

In the following tables (27 to 31), we can see the characteristics of the 40 law firms in terms of the participation of women in general first, and then in terms of the positions they occupy within the firm hierarchies. Tables 26 and 27 show the very important increase in the proportion of women in large law firms in the last quarter of the 20<sup>th</sup> century, particularly from 1984 to 2000. In most firms the large boom in the number of women lawyers has taken place over the period 1992-2000.

- **Table 27 – Evolution in the gender composition in the largest law firms (1975 - 1984 - 1992 - 2000)**

Sex	1975	1984	1992	2000
Women	5	5.7	13	32
Men	95	94.2	87	68

- **Table 28 - Lawyers in the 40 largest law firms of the city of Buenos Aires by sex in 2000**

Sex	T	%
Men	947	68.2
Women	440	31.7
Total	1387	100%

Tables 29 to 31 show the positions women occupied within the law firms' hierarchies according to the 1984, 1992 and 2000 Martindale Directories. Tables 28-30 indicate that over the period under study, despite the numerical increase in the number of women in large law firms, women are not only underrepresented on the whole, but also make up a larger proportion of its lower ranks. As table 30 shows for 2000, the proportion of women decreases as one goes up the hierarchy of the firm, where they constitute 42% of the associates, 24% of the members and partners, with only one woman of counsel.

• **Table 29 - Lawyers by position and sex in 1984**

Categories	Men	Women	% of men	% of women	T
<b>Partners and members</b>	295	15	95.1	4.9	310
<b>Associates</b>	35	6	85.3	14.7	41
<b>Of counsel</b>	15	0	100	0	15
<b>Total</b>	341	21	93.1	6.9	366

• **Table 30- Lawyers in the 40 largest law firms in 1992 by position and sex**

Categories	Men	Women	% of men	% of women	Total
<b>Partners and members</b>	404	46	89.7	10.3	450
<b>Associates</b>	95	25	79.1	20.9	120
<b>Of counsel</b>	33	3	91.6	8.4	36
<b>Total</b>	532	74	87.7	12.3	606

• **Table 31 - Lawyers in the 40 largest law firms, by position and sex in 2000 (in numbers and %)**

Categories	Men	Women	% of men	% of women	Total
Members/partners	532	171	76	24	703
Associates	373	268	58	42	641
Of counsel/advisors	42	1	98	2	43
Total	947	440	68.2	31.7	1387

In Tables 32-34 I look into the combined effect of age and sex on the positions held by the lawyers within the firm hierarchy in 2000. Thus, as can be seen from table 32, a very large proportion of men (82%) among the members and partners, are over 30, whereas the situation of women is quite different. While the proportion of men members and partners under 30 is quite small (18%), the percentage of women members and partners under 30 (52.6%) is a little larger than the proportion of women over 30 (47.6%).

An optimistic reading of this table could lead us to interpret that this difference is an effect of the rapid and more recent increase in the number of women lawyers who might be pushing towards a more egalitarian participation within the large law firms. The same sort of argument; namely that only the recent entry of women in large numbers in the legal profession and their relative youth might explain the negligible number of women among the of counsel (Table 31). A more pessimistic interpretation would be whether young women are getting the lowest posts within the category- which, of course is not homogeneous, something that cannot be determined by just examining the Directory, but would require further investigation.

• **Table 32 - Partners and members by age and sex in 2000**

Sex	Men	Men	Men	Women	Women	Women
Age	30+	30-	N/S	30+	30-	N/S
Total	438	94	0	80	90	1
%	82%	18%	0%	46.7%	52.6%	0.5%

• **Table 33 - Of counsel by age and sex in 2000**

Sex	Men	Men	Men	Women	Women	Women
Age	30+	30-	N/S	30+	30-	N/S
Total	37	0	5	1	0	0
%	88%	0%	12%	100%	0%	0%

It is regrettable that the high number of unspecified ages for the associates category, as seen from table 34, does not allow for comparisons or conclusions. However, looking at the age and sex distribution of the associates for whom we do have the ages, we can find the larger proportions of women among the associates under 30 that correspond to 38.8%.

• **Table 34- Associates by age and sex in 2000**

Sex	Men	Men	Men	Women	Women	Women
Age	30+	30-	N/S	30+	30-	N/S
Total	104	95	174	50	104	114
%	27.8	25.4	46.4	18.6	38.8	42.5

### **iii - Women's participation within the firms with the largest growth between 1975 and 2000**

No clear association can be observed between the size of the firm and the proportion of women within it. In fact, the firms with the larger proportion of women tend to be middle-sized ones within the ranking of the larger firms; that is, approximately 50 lawyers, with a proportion of women around 40%. There is only one firm with a percentage of women exceeding 50%, (53,5%), and only one firm without a woman in it, which is the smallest one with eight members only.

There does not appear to be an association between the proportion of women and the specialities offered by the law firm. However, firms with the largest proportion of women within them are those that offer the widest range of specialities.

In spite of the assumption that more women lawyers practise family law, the few large firms that offer family law are not those with the larger proportions of women lawyers. At any rate, it must not be forgotten that it is not in the Martindale that one would either look for or advertise a family lawyer.

As can be observed from tables 35 and 36, an examination is made of the law firms with the largest growth within the various Martindale Directories considered. There does not appear to be a very strong relationship between the growth of the firms in the 25-year span and the growth in the number of women within them. In most firms the large boom in the number of women lawyers has taken place during the 1992-2000 period. Furthermore, in some very large firms a considerable number of women is only remarkable in 2000, when the number of women increased in all the law firms. One can appreciate that the rate of growth in the number of women lawyers was much higher than that of men for the same period. In the firms with the largest increase in the number of women, the total number of lawyers doubled, while the number of women among them multiplied nine times.

• **Table 35 - Women's participation in the 11 law firms with the largest growth from 1975 to 2000<sup>49</sup>**

Firm	1975			1984			1992			2000		
	T	W	%W	T	W	%W	T	W	%W	T	W	%W
1	19	1	5	22	2	9	34	7	20.5	208	80	38
2			0	7	0	0	21	5	24	55	15	27
3	11	0	0	8	0	0	17	0	0	82	17	21
4	9	2	22	11	1	9	19	1	5	51	17	33
5	7	0	0	20	2	10	12	3	25	28	12	43
6			0	17	0	0	37	4	11	59	16	27
7	25	0	0	28	0	0	29	1	3	85	24	28
8			0	11	2	18	16	4	25	35	12	34
9	17	0	0	9	0	0	14	3	21	43	23	53
10	38	2	5	45	4	8	48	3	6	67	18	27
11	13	0	0	15	0	0	12	0	0	20	5	25

• **Table 36 –Relationship between law firms' growth and the increase in the proportion of women within them for the firms with the largest growth between 1975 and 2000**

FIRMS	Total Growth	% of women
1 - Marval & O' Farrell	995%	From 5% to 38%
2-Baker & Mckenzie	686%	From 0% to 27%
3 - O'Farrel	645%	From 0% to 21%
4 - Abeledo-Gottheil	467%	From 22% to 33%
5 - Klein & Mairal	300%	From 0% to 43%
6 – Cárdenas, Cassagne & Asociados	247%	From 0% to 27%
7 - Beccar Varela	240%	From 0% to 28%
8 – Nicholson & Cano	218%	From 0% to 34%

<sup>49</sup> Firms 2, 6 and 8 did not appear in the 1975 Martindale

9 - M& M Bomchill	152%	From 0% to 53%
10 - Allende-Brea	76%	From 5 %to 27%
11 - Severgnini, Robiola, Grinberg & Larrechea	54%	From 0 % to 25%

#### **iv- Women in small law firms**

An examination was next made of the smaller firms in the Martindale Directories. In 1984 there were three law firms that practised family law, composed of 5 lawyers in total, all men. In the Martindale for 1992, 50% of the small firms are men-only firms and the remaining 50 %, only have a maximum of two women within them.

In the 2000 Martindale, the number of firms with 8 lawyers or less is much higher, about 75% of the total number of firms. There is also a "solo practitioner" firm with a woman as its only lawyer, and 2 firms where the number of women is higher than the number of men. However, the founders of the firms are mostly men: one is composed of 2 men and 3 women. In just two of the cases there are women among the founders.

If we take the men and women firms, 7 comprised the same number of women and men. But the usual situation is that there seldom are more than one or two women, only occasionally three. However, if we consider that we are talking of firms with 5, 6 or 7 lawyers, the number of women represents a proportion that is higher than that found in large law firms. The interesting finding about small firms, either with or without women in them is that whereas the large law firms rarely did family law, the small firms tend to do civil and family law. This is absolutely consistent with the fact that large business firms tend to serve business corporations and thus need a much larger number of lawyers within the firm.

#### **v - Women's trajectories within law firms**

A further investigation was made of individual women who appeared in the various Directories. I have found 39 women lawyers whose name appeared at least twice, usually between the 1984 and the 2000

Directories. Their ages range between 29 and 66, but most of them are over 50. Many have changed firms along their careers: 3 appear as partners in the 2000 Directory, all three in the same law firm. One appears as of counsel, 27 as members and partners and 8 as associates. Thus, 15 out of the 39 whose names appear repeatedly in the directories considered (38.6%) have gone up in the hierarchy, while 22 (or 41.4%) have kept the same position. In the 2000 Directory there were 8 small firms headed by women. Following backwards in the Directories the names of the women who headed those firms along the period, I found that two of these women had left larger law firms to establish their own businesses in smaller firms as they appeared as founders in new women-only firms.

#### **vi - Conclusion**

The previous sections examined the situation of women working in law firms through the analysis of the Martindale Directory to conclude that there was a tremendous expansion in terms of women's presence within law firms, rising from 5 to 32% in the twenty-five year period under study. This increase in the number of women lawyers occurred mainly between 1992 and 2000 and encompassed a phase of great expansion of the law firms in general. It must be noted, however, that the rates of growth for the women lawyers were much larger than those for men over the same period.

Nevertheless, considering that in 2000 the numbers of women lawyers equalled the numbers of men lawyers, it must be concluded that women are, as a whole, underrepresented in the large law firms. Additionally, they stand for a larger proportion of the firm's lower ranks. The proportion of women decreases as one goes up the hierarchy of the firm. Women constitute 42% of the associates, 24% of the members and partners, and there is only one woman of counsel. Given that the global number of women lawyers equals the numbers of men lawyers, some degree of gender discrimination cannot be discounted.

To obtain a better picture of the positions women occupy within law firms, I explored possible links between the proportions of women lawyers within firms and the size of the firms and with the firm's different growth rates during the period under study. I looked into the specialities offered by the various firms and the lawyers' ages. In addition, I tried to trace the trajectories of the women that appeared in various editions of the Martindale Directories. Thus, I discovered that the firms with the largest proportion of women tend to be the middle-sized ones within the ranking of the larger firms, with approximately 50 lawyers, and a proportion of women around 40%. I therefore suggested that, although there does not seem to be a clear association between the proportion of women and the specialities offered by the law firm, the firms with the largest proportion of women within them are those that offer the widest range of expertise.

A very large proportion of men over thirty were found among members and partners in 2000, whereas the situation of women is quite different. While the proportion of men members and partners under 30 is quite small, the percentage of women members and partners under 30 is much larger than the proportion of men for the same age category and a little larger than that of women over 30.

I argued that this age difference could be interpreted as an effect of the rapid and recent increase in the number of women lawyers, pushing towards a more intense and egalitarian participation within the large law firms. Likewise, the recent entry of women in large numbers into the legal profession might explain the negligible number of women among the of counsel (Table 30). Although the family stream in the postgraduate course of the UBA Law School seems to be made up mainly of female lawyers<sup>50</sup>, and the department of Civil Law and, within it, the Chair of Family Law seem to be the ones with the largest number of women, the six most important large firms doing family law are headed by men, and the professors in Family Law are also men. Hence, we find that, even in an

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<sup>50</sup> See table 10 in chapter 2.

apparently feminised area of the profession, men occupy the higher status posts.

In spite of the assumption that most women lawyers do family law, the few large firms that offer family law are not those with the largest proportions of women lawyers. It must not be forgotten, however, that it is not in the Martindale Directory that one would either look for or advertise a family lawyer. At any rate, when looking at the smaller firms in the directory I could observe that whereas the large firms rarely advertised civil and family law, small firms certainly did. It is indeed very difficult to evaluate the number of small and solo law firms that do family law. Solo practitioners are usually called "generalistas" (non-specialised lawyers) and practise in various areas of the profession.

I also followed up the careers of those women lawyers whose name appeared more than once in the directories examined. Their number added up to 39, with 15 (38.6%) having gone up in the hierarchy, while 22 (or 41.4 %) had kept the same position. In two of the eight firms headed by women, I could trace women lawyers who had left their law firms to found new only-women firms. The number of women that failed to develop a career within law firms is rather high, and this is suggestive of a situation in which women are at a disadvantage in law firms. As a matter of fact, the judges who participated in this study thought that women were not given much room in large law firms and argued that this might be an important factor in their decision to go into the judiciary.

#### **4- Women's participation in the professional associations**

Apart from the "Colegio Público", with mandatory membership, there are two voluntary lawyers' associations. The "Asociación de Abogados" is the more progressive, with a history of 65 years. In 1999, a woman was elected president for the first time. I will examine below the gender composition of the membership and evolution of women's participation within the Board of Directors of the association. There is also another voluntary association called "Colegio de Abogados de la Capital". It is

highly anti-Peronist and the smallest and most conservative of the associations. Women's participation has not been particularly active in either of the associations, reflecting a general situation that is common to all Argentine professional associations (Allegrone, 2000).

#### **a - The "Colegio Público" or Bar Association**

Apart from being the only association with mandatory membership, the Colegio has another very important function, which is the disciplinary control of its members through the Discipline Tribunal. This is an elected body, its members are totally renewed every two years, and some of its members are renewed through elections every year.

The Board of Directors of the "Colegio Público de Abogados" is the governing body of the Bar Association. It is composed in the following manner: a president, a first vice and a second vice president, a general secretary, a treasurer and a vice treasurer, 7 regular members of council and 12 substitute members, renewed every two years by elections. The analysis of the evolution of the gender composition of the main authorities of "Colegio Público" can give us a picture of the evolution of women's participation within the institution. I will examine the gender composition of the various Boards of Directors as from the creation of the "Colegio Público". Table 37 shows a slow but increasing tendency towards a growing participation of women among the authorities of the institution, especially among the lower ranks. One can observe a tendency for women increasingly participating among the highest authorities of the institution between 1986 and 1994, a tendency that nevertheless reverts from 1994 onwards.

• Table 37- Sex composition of the Board of Directors of the "Colegio Público de Abogados" from 1986 to 1999

PERIOD	1986-1988		1988-1990		1990-1992		1992-1994		1994-1996		1996-1998		1998-2000	
	M	W	M	W	M	W	M	W	M	W	M	W	M	W
President	1		1		1		1		1		1		1	
1 <sup>st</sup> . Vice president	1		1		1		1	1	1		1		1	
2 <sup>nd</sup> . Vice president	1		1			1		1		1			1	
General secretary		1		1		1		1		1	1		1	
Vice General Secretary	1		1		1		1			1	1		1	
Treasurer	1		1		1		1		1		1		1	
Vice Treasurer	1		1		1		1		1		1		1	
7 regular Council Members	7		7		5	2	5	2	7		6	1	5	2
12 substitute Council Members	10	2	10	2	9	3	9	3	8	4	7	5	7	5

In 2000, when the last elections for the authorities of the "Colegio Público de Abogados" or Bar Association were held, the failure to include women on the lists originated a campaign that transcended the boundaries of the institution. On the one hand, a group of women filed a claim before the City of Buenos Aires' Ombudsperson, who issued a recommendation for the Bar Association to revise and update its electoral statutes to reflect the prevailing legislation regarding women's representation in public institutions within the City. On the other hand, some of its women members initiated a lawsuit against the association<sup>51</sup>. As a result, the Administrative Court of the City assisting in the case ordered the bar association to include a minimum quota of 30% of women on the lists, in accordance with law 24012 of the City of Buenos Aires. The work of the active members of the "Colegio Público de Abogados" is organised into

<sup>51</sup> Causa 10958/2000: "Martha Paz y otros c/Colegio Público de Abogados de la Capital Federal

commissions according to subject matter. It hosts a women's commission, whose political profile within the bar association is very low, for it just organises a lecture every now and then. This demonstrates that women's issues are not of paramount importance for the institution. In fact, the group of women that campaigned for an increased participation of women among the authorities of the association did not belong to the women's commission.

#### **b - The Lawyers' Association**

With a membership of 5000, the Lawyer's Association of Buenos Aires is the largest and most representative voluntary association in the city and one of the largest in America. Its aims and objectives are firmly associated with the consolidation of democracy, the observance of the rule of law and progressive social ideals, and has incorporated in its statutes the defence of the democratic institutions consecrated in the National Constitution and its complementary laws. Its activities involve the association's contribution to the progress of legislation and the good functioning of the justice system, influencing a transparent nomination of judges. It organises a service of free legal aid for the poor, promotes comradeship among its members, has set the rules for a professional code of ethics, watches over its observance, and punishes transgressions. The Association also organises academic activities and publishes and circulates documents of legal interest. During the years of the dictatorship, the institution fought for the recovery of democratic institutions and the defence and respect for human rights. It has a pluralist perspective independent of any party allegiance, and is oriented to stimulate participation and the free confrontation of ideas. There has been a very low profile women's commission in the Lawyer's Association for many years now.

In 1999, for the first time in 60 years, a woman was nominated President of the Association. Dr. Minyersky is a senior university professor and a prominent family lawyer who leads one of the six most prestigious family law firms.

Table 38 and 39 show how, over a period of thirty years, the Lawyers' Association, a previously men-dominated association, has become an institution where the proportion of women has outnumbered the proportion of men.

- **Table 38: Gender composition of the Lawyers' Association in 2000**

<b>Lawyer's Associations of Buenos Aires</b>		
<b>Members</b>	<b>Number</b>	<b>%</b>
<b>Women</b>	1,406	54.6 %
<b>Men</b>	1,169	45.4 %
<b>Total</b>	2,575	100%

- **Table 39- Membership of the Lawyers' Association by decades from 1950 by sex**

<b>Year</b>	<b>% of Women</b>	<b>% of Men</b>
<b>1950</b>	3.9	96.1
<b>1960</b>	20	80
<b>1970</b>	30.4	69.6
<b>1980</b>	49.8	50.2
<b>1990</b>	59.2	40.8
<b>2000</b>	54.6	45.4

### **c-The "Colegio de Abogados de la Capital"**

The oldest and smallest of the lawyers' associations, the "Colegio de Abogados de la Capital", is also the most conservative one, both in terms of its politics and in terms of the inclusion of women within its ranks. It has a membership of 1,345, with a vast majority of men totalling 1,123. As from the time of its creation in 1913, the "Colegio de Abogados de la Capital" has had 35 presidents, all men. Only very lately has it incorporated a woman among its authorities as a vocal, which is the last post in the hierarchy. There is nothing that would indicate any interest in women's issues. There is no commission on gender or women's issues. Its membership is composed mainly by prominent men lawyers of the

establishment, with very high profiles, very often founders of large law firms<sup>52</sup>. The relatively marginal participation of women within the professional associations mirrors women's situation within the legal profession.

#### • IV- Women in the judiciary

##### 1-Introduction

I have examined above the characteristics of women lawyers' professional participation within the City of Buenos Aires, both within private practice and academia. In order to complete the picture I shall now look into their participation within the judiciary. Although I provide some data on the country as a whole, I shall concentrate on the courts whose site is the city of Buenos Aires.

A Federal State with 24 provinces, Argentina has a judicial system with a very complicated structure, characterised by the coexistence of various organisational dimensions or levels, i.e., jurisdictions -the Federal Courts, the Provincial Courts and the Municipal Courts-; instances - the First Instance, Courts of Appeal and Supreme Courts-; and specialisations or branches - for example, the Civil and Commercial Courts, the Administrative Courts, the Family Courts, the Criminal Courts, and the Labour Courts.

As a consequence of the 1994 Constitutional Reform, Buenos Aires acquired a new status, similar to that of a province. This meant that the city adopted its own Constitution or Statute in 1996, chose its governor and legislature through local elections and, later on, was gradually to acquire its own institutions, such as local police and local judges.

The resulting local Constitution is particularly modern and progressive when compared with the ideology of the average Argentine citizen. There

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<sup>52</sup> See <http://www.Colabogados.com.ar>

is a whole chapter (chapter 9) on sex equality with a strong emphasis on promoting equal opportunities for women. Article 36 introduces a 30% quota for women in every collegiate government agency. Accordingly, two of the five members of the recently nominated Higher Tribunal of the city are women, and one of them is the President of the Court. The same holds true for the "Judgeship Council", the institution in charge of the nomination of judges for the city of Buenos Aires. The Courts sited in the city of Buenos Aires include the Supreme Court of the Nation, the recently created Superior Tribunal of the city of Buenos Aires, the Federal Courts of the city of Buenos Aires, and the National Courts of Buenos Aires.<sup>53</sup>

## **2 - Women's participation in the judiciary in the city of Buenos Aires**

There are two previous research studies on women in the judiciary in Argentina<sup>54</sup> published in 1989 and 1991 respectively. The former is a general study of the judiciary in Buenos Aires with a chapter on women judges. The latter is a study on women in the judiciary in Buenos Aires<sup>55</sup>. I shall outline their findings so as to provide some comparative data.

In 1989, Mackinson and Goldstein<sup>56</sup> carried out their research into all the 1<sup>st</sup> and 2<sup>nd</sup> instance Courts of the City of Buenos Aires, collecting information about the judges' social origins, general education, legal education and social and cultural activities. Table 39 was constructed following the data provided by Mackinson and Goldstein<sup>57</sup>.

As is shown in table 40, in 1988 women constituted only 19% of the Courts of the City of Buenos Aires. Of the 66 women judges, 60 belonged to the 1<sup>st</sup> instance Courts and 6 to the Courts of Appeal. There were no women

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<sup>53</sup> With the autonomy of the city the National Courts of the City should become the Ordinary City Courts but the issue of the transference is still under discussion.

<sup>54</sup>G.Mackinson and Goldstein M., 1988 and Gastron A, 1991.

<sup>56</sup> G.Mackinson and Goldstein M.: La Magistratura de Buenos Aires. Un estudio sociológico, Literaria Jurídica Buenos Aires, 1988

<sup>57</sup> Mackinson and Goldstein, Op.cit: 63-64.

at the Supreme Court. Mackinson and Goldstein's main findings were that gender discrimination among judges exhibited the same pattern to be found in other occupations; namely, that women in the judiciary became less numerous as one went higher in the hierarchy, they worked longer hours for the same salary, were required to have more training for the same position, more seniority to attain promotion, and participated less in the cultural, political and scientific realms.

• **Table 40- Constitution of the Judiciary of the City of Buenos Aires in 1988 by sex<sup>58</sup>.**

Section	Men	Women	% of women	Total
<b>Federal Justice</b>	46	3	6.1	49
<b>Civil Courts</b>	43	8	15.6	51
<b>Criminal Courts</b>	52	12	18.7	64
<b>Commercial Courts</b>	36	5	12.1	41
<b>Special Civil and Commercial Courts</b>	42	16	27.5	58
<b>Labour Courts</b>	4	21	30.3	25
<b>Economic Criminal Courts</b>	14	1	4.1	15
<b>Electoral Courts</b>	1	0	0	1
<b>Total and %</b>	238	66	21,7	304 (100%)

In 1991 A. Gastron<sup>59</sup> published a research on women judges of the City of Buenos Aires, whose purpose was mainly to update data about the sex composition of the Courts of the City and explore the perception women judges had about discrimination against women within the judiciary. Gastron examined the sex composition of the Courts of Buenos Aires. As table 41 indicates, Gastron's findings corroborate those previously obtained by Mackinson and Goldstein in terms of the observed horizontal and vertical segregation of women in the judiciary of the City of Buenos Aires.

<sup>58</sup> In this table the first and second instance are considered together.

<sup>59</sup> Andrea Gastrón: "Situación actual de la mujer en el poder judicial", Premio Coca Cola en las Artes y las Ciencias, Buenos Aires, 1991.

Through her research, Gastrón<sup>60</sup> reaches the following conclusions (tables 41-44): in terms of the location of women judges within the judiciary of the city, she observed that the sexual stereotypes prevalent in society at large relating to the role of women were reproduced within the judiciary, a traditionally masculine realm. She found both vertical and horizontal occupational segregation: women concentrated in the lower instances (table 41) and in those sections of the judiciary more easily assimilated to the roles women perform in society as wives and mothers (tables 41-42). Women were to be encountered more frequently in the Civil<sup>61</sup> and Labour sections of the judiciary (tables 41-42). Along similar lines, the number of women within the criminal courts and the number of women judges acting in sections where the legal conflicts involved important amounts of money was very small (tables 43-44).

• **Table 41 - National Courts of 1<sup>st</sup>. instance of the City of Buenos Aires by section and sex in 1991<sup>62</sup>**

SECTION	WOMEN	%	MEN	%	TOTAL
Civil	34	33.6	67	66.3	101
Commercial	4	16	21	84	25
Criminal. and Correctional.	11	17.4	52	82.5	63
Labour	31	50.8	30	49.1	61
Econ. Crimin.	1	14.2	6	85.7	7
<b>TOTAL</b>	<b>81</b>	<b>31.5</b>	<b>176</b>	<b>68.4</b>	<b>257</b>

• **Table 42 - National Courts of 2nd instance of the City of Buenos Aires by section and sex in 1991<sup>63</sup>**

SECTION	WOMEN	%	MEN	%	TOTAL
Civil	5	12,8	34	87,1	39
Commercial	3	21,2	11	78,5	14
Criminal and Correctional	3	13	20	86,9	23

<sup>60</sup> Gastrón Op cit: 42- 43.

<sup>61</sup> The Family Law Courts, created in 1990 constitute a part of the Civil Courts.

<sup>62</sup> Gastrón, op cit : 25.

<sup>63</sup> Gastrón, op.cit.: 28.

<b>Labour</b>	2	8,3	22	91,6	24
<b>Econ. Crimin.</b>	0	0	6	100	6
<b>Social Security</b>	1	11,1	8	88,8	9
<b>TOTAL</b>	14	12,1	101	87,8	115

• **Table 43 - Federal Courts of 1st instance of the City of Buenos Aires by section and sex in 1991<sup>64</sup>**

<b>SECTION</b>	<b>WOMEN</b>	<b>%</b>	<b>MEN</b>	<b>%</b>	<b>TOTAL</b>
<b>Civil and Com.</b>	0	0	10	100	10
<b>Administrative</b>	0	0	5	100	5
<b>Crimin.and corr.</b>	2	40	3	60	5
<b>TOTAL</b>	2	10	18	90	20

• **Table 44 - Federal Courts of 2nd instance of the City of Buenos Aires by section and sex in 1991<sup>65</sup>**

<b>SECTION</b>	<b>WOMEN</b>	<b>%</b>	<b>MEN</b>	<b>%</b>	<b>TOTAL</b>
<b>Civil and Com.</b>	1	11.1	8	88.8	9
<b>Administrative</b>	1	10	9	90	10
<b>CrImIn.and corr.</b>	0	0	6	100	6
<b>TOTAL</b>	2	8	23	92	25

Table 45 summarizes Gastrón's findings in 1991 for the Courts sited in the City of Buenos Aires.

• **Table 45 - Courts sited in the City of Buenos Aires in 1991 by instance and sex**

<sup>64</sup> Gastrón ,op cit: 29.

<sup>65</sup> Gastron ,op cit: 29.

Courts	Women	%	Men	%	TOTAL
<b>1<sup>st</sup> Instance National Courts</b>	81	31.5	176	68.4	257
<b>2<sup>nd</sup>. Instance National Courts</b>	14	12.1	101	87.8	115
<b>1<sup>st</sup>. Instance Federal Courts</b>	2	10	18	90	20
<b>2<sup>nd</sup>. Instance Federal Courts</b>	2	8	23	92	25
<b>Supreme Court of the Nation</b>	0	0	5	100	5
<b>TOTAL</b>	99	23.4	323	76.5	422

I will now move on to my own analysis stemming from the examination of the judicial guide for 1999 of the sex composition of the Courts whose site is the City of Buenos Aires. The judicial guide is a directory of all the courts in the country, issued yearly by the FACA (Federation of the Argentine Bar Associations) and published by Rubinzal-Culzoni. Apart from listing all the courts it states the address of the court, the name of the judge and of the judge's secretary. When attempting to describe quantitatively the participation of women within the legal profession, the number of women in the judiciary is the easiest to measure. Although no public agency or the Judge's Association has ever produced complete statistics about the number and gender of the judges, an analysis of the judicial guide can provide such information. Various publications give us a partial picture of the participation of women in the judiciary, but none provides the whole picture.

Table 46 portrays the summary of this analysis. In tables 46 to 51 I present the sex composition of the different instances and sections of the judiciary sited in Buenos Aires in 1999.

- **Table 46 - Sex Composition of the courts sited in the City of Buenos Aires in 1999**

<b>Courts</b>	<b>Women</b>	<b>%</b>	<b>Men</b>	<b>%</b>	<b>TOTAL</b>
<b>1<sup>st</sup> Instance National Courts</b>	116	39.6	177	60.4	293
<b>2<sup>nd</sup> Instance National Courts</b>	43	22.6	148	77.4	191
<b>1<sup>st</sup> Instance Federal Courts</b>	37	24.2	116	75.8	153
<b>2<sup>nd</sup> Instance Federal Courts</b>	5	13.9	31	86.1	36
<b>Supreme Tribunal of the city of Buenos Aires</b>	2	40	3	60	5
<b>Supreme Court of the Nation</b>	0	0	9	100	9
<b>TOTAL</b>	<b>203</b>	<b>29.6</b>	<b>484</b>	<b>70.4</b>	<b>687</b>

Taking into account the Supreme Court of the Nation, the Higher Tribunal of the City, and all the Federal and National Courts in the City, in 1999 there were 203 women judges and 484 men judges. The figure for women is equivalent to 29,6 % of the total number, which means that it increased from 21.4% to 29.6% of the total number of judges in the ten years following 1989, when Mackinson and Goldstein carried out their research. However, when looking at the participation of women at the various instances, a different, less optimistic picture transpires. While in 1999 women were 0% of the members of the Supreme Court and 40% of the members of the Superior Tribunal of the City, they constituted only 13.9% of the Federal Courts of 2<sup>nd</sup> Instance, and 24.2% of the Federal Courts of first Instance, while in the National Courts of Second Instance, the participation of women judges was 22.6% and 39.6% in the National Courts of first Instance.

In 1991 the overall proportion of women judges was 23.4% (table 45) while in 1999 it was 29.6% (table 46). The total number of judges grew from 422 to 687. This means that the growth in the proportion of women judges was not made at the expense of the participation of men judges.

Although there has been an important increase in the proportion of women in the judiciary over the period under study, the situation remains the same

in terms of vertical segregation, since the proportion of women decreases as one goes up in the hierarchy. As can be seen from table 46, apart from the case of the Supreme Tribunal of the City, appointed with a system of quotas, the general tendency is for the proportion of women to decrease as one goes up in the hierarchy; that is to say that vertical segregation is a fact.

In table 47 I examine the increase in the proportion of women in the different sections of the judiciary by comparing the results obtained for 1999 (table 46), with those obtained by Gaston in 1991 (table 45). Table 47 shows that the increase was higher in the lower and less important courts (the National Courts of First instance) with an increase of 14.2%, while in the rest of the sections the increase is around 10%.

• **Table 47 - Evolution in the proportion of women in the Courts of the city of Buenos Aires between 1991 and 1999**

<b>Sections of the Judiciary</b>	<b>Change in the proportion of women</b>
<b>Federal Courts of second instance</b>	From 12.1% to 22.8%
<b>Federal Courts of first instance</b>	From 31.5% to 39.6%
<b>National Courts of second instance</b>	From 12.1% to 22.6%
<b>National Courts of first instance<sup>66</sup></b>	From 10% to 24.2%

Tables 48 to 52 enable us to identify the sections of the judiciary with the highest proportions of women.

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<sup>66</sup> Note that two new sections were added to the First Instance National Courts: the Social Security Courts and the Oral Courts (criminal)

• **Table 48 - National Courts of 1<sup>st</sup>. Instance of the city of Buenos Aires by section and sex in 1999.<sup>67</sup>**

SECTION	WOMEN	%	MEN	%	TOTAL
Civil	40	40	60	60	100
Commercial	7	27	19	73	26
Criminal and Correctional.	21	34.4	48	66.6	69
Labour	42	52.5	38	47.5	80
Economic Crimes	0	0	8	100	8
Social Security	6	60	4	40	10
<b>TOTAL</b>	<b>116</b>	<b>39.6</b>	<b>177</b>	<b>60.4</b>	<b>293</b>

• **Table 49 - National Courts of 2nd Instance of the city of Buenos Aires by section and sex in 1999**

SECTION	WOMEN	%	MEN	%	TOTAL
Civil	9	23.1	30	76.9	39
Commercial	3	20	12	80	15
Crim.and Corr.	21	26.5	59	73.5	80
Labour	6	20	24	80	30
Higher Crime Court <sup>68</sup>	3	25	9	75	12
Econ. Crime	0	0	6	100	6
Soc.security	1	11.2	8	88.8	9
<b>TOTAL</b>	<b>43</b>	<b>22.6</b>	<b>148</b>	<b>77.4</b>	<b>191</b>

<sup>67</sup> Tables 46 to 52 were constructed using the Judicial Guide for 1999

<sup>68</sup> Created in 1992

- **Table 50 - Sex Composition of the Federal Courts of 1<sup>st</sup> instance of the city of Buenos Aires by section in 1999**

SECTION	WOMEN	%	MEN	%	TOTAL
Civil and Commercial.	0	0	11	100	11
Administrative	7	59.4	5	41.6	12
Social security	6	60	4	40	10
Oral courts	23	21.3	85	78.7	108
Criminal and correctional.	1	8.4	11	91.6	12
<b>TOTAL</b>	<b>37</b>	<b>24.2</b>	<b>116</b>	<b>75.8</b>	<b>153</b>

- **Table 51 - Federal Courts of 2<sup>nd</sup> instance of the city of Buenos Aires by section in 1999**

SECTION	WOMEN	%	MEN	%	TOTAL
Civil and Com.	1	11.2	8	88.8	9
Administrative	3	20	12	80	15
Crimin.and corr.	1	16.7	5	83.3	6
<b>TOTAL</b>	<b>5</b>	<b>13.9</b>	<b>31</b>	<b>86.1</b>	<b>36</b>

- **Table 52- Highest Courts sited in the city of Buenos Aires in 2000 by sex**

Highest Courts	Women	%	Men	%
Supreme Court of the Nation	0	0	9	100
Superior Tribunal of the City	2	40	3	60

If we look into each instance at the sections of the judiciary in terms of specialities, the sections of the judiciary with the highest proportions of women, in 1999 are as follows:

-For the National Courts of first Instance: the Social Security Courts (60%), the Labour Courts (52.5%) the Civil Courts (40%) and the Criminal and Correctional Courts (34.4%),

-For the National Courts of second instance: The Criminal and Correctional Courts (26.5%), The Higher Crime Court (25%) The Civil Courts (23.1%), the Labour Courts (20%), and the Commercial Courts (20%).

-For the Federal Courts of first Instance the Courts with the highest proportion of women are the Social Security Courts (60%), the Administrative Courts (59.4%), and the Oral Courts<sup>69</sup> (21.3%).

-For the Federal Courts of Second Instance, the Administrative Courts (20%), and the Criminal and Correctional Courts (16.7%).

The above data confirm vertical segregation since it is mainly in the National Courts of First Instance and in the Federal Courts of First Instance that we can find proportions of women reflecting the considerable increase in the number of women lawyers. In some cases the values reached outnumber the proportion of men, as is the case with the Social Security Courts (60%) and the Administrative Courts (59.4). The recent increase in the number of women in the latter sections is quite surprising, since neither Security Law nor Administrative Law could be considered traditional women areas within the legal profession. The large number of women within the Social Security Courts might be explained by the fact that they are relatively new courts and thus were created at a time when the number of women lawyers was already quite high. Instead, the Administrative Courts of first instance have been in existence for a long time. If one looks at previous Judicial Guides, it is possible to observe that these women administrative judges were court secretaries before becoming judges in 1999 after having developed a long career in the judiciary. These two examples suggest that at least at least in those sections, some change has been taken place regarding gender horizontal segregation within the judiciary.

The Higher Criminal Court created in 1992 is another example of a newly created court where the proportion of women is quite high (25%). The fact that both the Social Security Courts and the Higher Crime Court were created in the early nineties and are thus relatively new courts could be a common element explaining the high proportions of women within them.

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<sup>69</sup> Until 1992 every proceeding in the Argentine judicial system was written. In 1992 a judicial reform introduced oral proceedings in some criminal cases. As a consequence, both the Oral courts and the Higher Criminal Court were created.

If we move on to consider women's participation in the judiciary for the Nation as a whole, the latest measurement published by an official source was provided by the "Secretaría de la Mujer del Ministerio de Relaciones Exteriores, Comercio y Culto"<sup>70</sup> in 1999. According to these figures, taking into account the First Instance Courts, the Second Instance Courts, and the public prosecutors<sup>71</sup> in all sections of the judiciary (Criminal, Family, Civil, Administrative and Commercial Courts), the representation of women is 20% for the Federal Courts.

The distribution of women within the federal jurisdiction as a whole is 19% for the first instance and 13% for the second instance. Women constitute 19% of the Federal Courts of First Instance, increasing to 31% for the Federal Courts of First Instance located in the city of Buenos Aires<sup>72</sup>, while the proportion of women for the Federal Courts of second instance located in the city of Buenos Aires is 15%. For the Provincial Jurisdiction the percentage of women is much higher: 35% for Mendoza, 26% for Córdoba, 38% for Catamarca, 37% for Chubut, 45% for Chaco, and 28% for the City of Buenos Aires.<sup>73</sup>

While there are no women among the nine judges of the Supreme Court of the Nation, there are women at six of the provincial Supreme Courts located in Chaco, Corrientes, Córdoba, Mendoza, Misiones and Santiago del Estero<sup>74</sup>. At the highest level there are only 12 women over a total of 129 judges, with a proportion of 10%.

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<sup>70</sup> The Women's Section of the Ministry of Foreign Affairs. This section in charge of producing information with regarding the advance of women to be presented at the International United Nations Conference Beijing +5, held in New York in July 2000.

<sup>71</sup> Note that I did not take into account public prosecutors in my own analysis.

<sup>72</sup> Subsecretaría de la Mujer Ministerio del Exterior, Comercio Internacional y Culto, 1999. Comisión Ad Hoc para el Seguimiento de la IV Conferencia Mundial sobre la Mujer: 95.

<sup>73</sup> "Mujeres en Argentina. Estado de situación a 5 años de Beijing" Subsecretaría de la Mujer Ministerio del Exterior, Comercio Internacional y Culto, Repca. Argentina, 1999. Comisión Ad Hoc para el Seguimiento de la IV Conferencia Mundial sobre la Mujer, p.95.

<sup>74</sup> Subsecretaría de la Mujer Ministerio del Exterior, Comercio Internacional y Culto, Repca. Argentina, 1999. Comisión Ad Hoc para el Seguimiento de la IV Conferencia Mundial sobre la Mujer, p.94.

It can be then concluded that, as holds true for other sections of the women lawyers' labour market, women judges are more frequently occupying the most junior positions within the judiciary and that, although some change is starting to take place in terms of women's presence in new areas of the judiciary, their participation is far from egalitarian and does certainly not reflect the massive entry of women into the legal professions.

### 3 - The Argentine Association of Women Judges

In 1989, a group of Argentine women judges who were members of the International Association of Women Judges (IAWJ) created the Argentine Association of Women Judges (AAWJ)

For the celebration of the tenth year anniversary, the American Association of Women Judges decided to invite women judges from all over the world to a Conference held in Washington. The creation of the IAWJ originated at that conference. The idea was supported by 50 women judges from 26 countries, among which was Argentina, represented by Dr. Carmen Argibay, a judge from the Criminal Oral Court.

The main objectives of the IAWJ are<sup>75</sup>:

- To encourage the international creation and growth of associations of women judges to serve their members and increase efficiency of the judiciary through training and other support schemes.
- To promote collective actions undertaken by women judges from all over the world aimed at sorting the obstacles impeding real equality for all.
- To fight gender stereotypes in the legal system through the exchange of information, research, and training schemes.
- To foster cooperation among women judges.

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<sup>75</sup> See the web page of the Argentine Association of Women Judges: [www.amja.org.ar](http://www.amja.org.ar)

-To contribute to the development of laws on human rights and their enforcement and to discuss issues related with improving women's relationship with the legal system.

From then on, the IAWJ grew exponentially in terms of the number of countries and women judges that joined its ranks. In 1992, the IAWJ held its first conference, named "Catalysts for Change", in San Diego. The second IAWJ conference took place in 1994 with domestic violence as its main topic. Later conferences were held in Manila in 1996, focusing on "Equality through the Law"; and Ottawa in 1998, and in Buenos Aires in 2000, on "Women on the margins".

With very similar objectives to those of the IAWJ, the Argentine branch was created in 1993. It has since enjoyed a growing membership and organised various national and international conferences and seminars aided by the financial and technical support of the National World Bank and the IAWJ. The conferences addressed basic issues such as Domestic Violence, Child Abuse, Children's Rights, Access to justice, Women and Marginality, Poverty, Bioethics, the Law and the Female Body. In 2000, the AAWJ hosted the biennial International Conference of the IAWJ with a participation of nearly 300 women from all over the world. That year, Dr. Argibay, an Argentine judge, presided over the IAWJ.

The AAWJ has also organised 16 seminars. The purpose of these very intensive weekly seminars is to incorporate a gender perspective into the judges' framework and to foster the use of the human rights international conventions and the inter-American system of human rights focusing on the CEDAW, with special emphasis on women's and children's rights. Members of the judiciary from Argentina and other Latin American countries have thus been trained by members of AAWJ and other professionals under their guidance.

As opposed to the marginality of the women's sections of the various lawyers' associations, the AAWJ's activism and vigour cannot be underestimated. The importance of the existence of such an organisation

and its full impact are yet to be seen. Its aim -to disseminate a gender perspective among the judges- could, in fact, bring about important changes in the judges' professional practice. The mere possibility for the judges to reflect upon the ways gender impinges on the administration of justice will probably generate changes in their world vision with the capacity to influence their decisions and impact on the lives of those involved in legal conflicts.

• **V- Comparison with other local, Latin American and international research studies on women lawyers**

In previous sections I reported my quantitative research findings with respect to the positions of women law students (chapter 2 section V) and to the situation of women in three different areas of activity for women lawyers: law teaching (chapter 3, section III), law firms (chapter 3, section IV) and the judiciary (chapter 3, section V). In this section I relate my findings to other international quantitative research results on women in the law, including the Latin American region and the more developed nations in North America and Europe. I then go on to outline the justifications put forward by the various authors to explain their findings. A report of results obtained through more qualitative research projects intending to trace women's specific contributions to the judiciary can be found at the beginning of chapter 5 of this thesis.

I will first consider students and academics. Although in Latin America the situation of women lawyers has not aroused much attention in general, two research studies on women in the legal professions have been traced, one Brazilian<sup>76</sup> by Botelho Junqueira, and another Venezuelan<sup>77</sup> by Roche.

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<sup>76</sup> Eliana Botelho Junqueira "A profissionalizacao da mulher na advocacia. Relatorio Final" Fundacao Carlos Chagas, 1999 /Mulheres Advogadas: Espacios ocupados in "Horizontes Plurais, Novos Estudos de Género no Brasil" Fundacao Carlos Chagas, 2001:187-216/ Women in the Judiciary: a Perspective from Brazil in Schultz and Shaw (eds) "Women in the World's Legal Professions", 2003: 437-450.

<sup>77</sup>Carmen Luiza Roche: "The Feminization of the Legal Profession in Venezuela: It's Meaning for the Profession and for Women Lawyers" University Central of Venezuela. Paper presented at the

Neither of these authors has specifically studied the participation of women law students. However, they both report that the number of women studying law has risen dramatically, to reach equal numbers of men and women students and even a larger proportion of women over the last ten years (Botelho Junqueira, 1999; Roche, 2001). Research carried out in England (McGlynn, 1998: 7-25, 2003: 144-145); in New Zealand (Murray, 2003: 130); in Germany (Schultz, 2003: 276); Poland (2003: 372) and in France (Boigeol, 2003: 403-404) shows very similar results in terms of the participation of women in the study of law, often outnumbering the proportion of men. According to Shultz (2003: xxxviii), parity in terms of the numbers of men and women law students has been achieved in most countries and women's academic qualifications seem to be just as good or even better than those of men, both in terms of the results obtained and in terms of the level of the academic qualifications achieved (Shultz, 2003: xxxviii; McGlynn, 2003: 146). As was noted in chapter 2, section V, my findings with respect to women's participation among law students follow the same tendency. The proportion of women among the law students in Argentina rose from 4.8% in 1941 to 61% in 2000, revealing a global trend towards quantitative feminisation among law students. Moreover, in 1999 women amounted to 57.3% of all the postgraduate law students at UBA.

With respect to women legal academics, the two Latin American authors mentioned above did not study the gender composition of the law faculty (Botelho Junqueira, 1999; Roche, 2001). However, very much in tune with my own findings, authors such as McGlynn (1998: and 39-57 and 2003: 146) and Wells (2003: 225-246) in the UK and Thornton (1997: 106-129) and Hunter (2003: 99) in Australia have come across a similar difficulty for women teaching law to reach senior positions within the university hierarchy, as well as a tendency to concentrate in housekeeping types of jobs and pastoral roles within the university (Wells, 2003: 231-233). Thus, internationally, the number of women academics has increased mostly at the lower levels of the teaching hierarchy since glass ceilings are frequent

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2001 Joint Meeting of the Law and Society Association and the Research Committee on Sociology of Law (ISA) July 4 -7, Budapest Hungary.

at the higher levels (Schultz, 2003: xi; Wells, 2003: 226). In Argentina, it can be observed that, as is the case for women students, in spite of the fact that important progress has taken place in terms of women's participation in the academy, women academics' participation in the UBA law school follows the international tendency to concentrate on the lower echelons of the university hierarchy (in 2000, women constituted 17.8% of the professors, the highest post within the hierarchy and 43 and 47.7% respectively of the lower posts in the hierarchy; namely associate and adjunct professors) and to perform roles associated with gender stereotypes, involving a considerable load of administrative work.

As a result of the opening of new opportunities for women in higher education, in the late sixties and seventies there was a massive increase in the number of women lawyers in most western countries. Schultz (2003: xli) has argued that the large increase in the number of women lawyers creates the illusion that women have attained significant levels of achievement within the profession, while a closer look reveals major barriers to equal participation for women within the profession. Rhode (2003: 3) point to the persistent lack of acknowledgement of the fact that a "woman problem" still remains. This results in women lawyers' marginalisation within the profession

With respect to women's participation in law firms, international evidence would seem to support the hypothesis that, in spite of the fact that more women have entered legal firms, these firms are not friendly places for women (Jack and Jack, 1988; Mossman, 1989; Harrington, 1995; Freyer, 1995; Thornton, 1997; McGlynn, 1998 and 2003; Sommerlad, 1998, 1999, 2003, Kay and Brockman, 2003: 61; Botelho Junqueira, 1999; Roche, 2001). Replicating the results of international work, Botelho Junqueira (1999: 20-41, 2001:199) and Roche (2001: 10-19) have identified law firms as the main locus of discrimination for women lawyers in Brazil and Venezuela.

Although in most jurisdictions the number of women entering the legal profession continues to increase dramatically, this has not automatically

improved their status. Women's position within the profession remains marginal. Significant barriers to equality of opportunities for women persist. Women are still over-represented at the lower end of the profession and earning differentials in favour of males can still be observed (Mossman, 1989; Rhode, 2003; Shultz, 2003). Demographic work on the location of women lawyers throughout the world demonstrates continued occupational segregation, with women working disproportionately in fields that are either devalued by men or more consistent with stereotypic notions of what is thought of as women's work, such as family law (Menkel-Meadow, 1989, 1995; Shultz, 2003). While men tend to dominate in commercial and property work, women are more often found in fields where prestige and financial gain are low but more emotional labour<sup>78</sup> is required. Moreover, their domestic roles and responsibilities appear to prevent many women lawyers from following the masculine path of total commitment and availability to their professions that modern law firms require and men lawyers exhibit. Generally, this would seem to limit their partnership prospects. In addition, commercial lawyers are expected to bring business to the firm through ways that are basically masculine ways of networking, through golf, clubs and bars. Such expectations exclude women with domestic commitments. As Thornton puts it, "women remain fringe dwellers in the jurisprudential community" (Thornton, 1997; see also Spencer and Podmore, 1982; Jack and Jack, 1985; Menkel-Meadow, 1985, 1989, 1991; Mossman, 1988; Sommerlad, 1998, 1999, 2003; McGlynn, 1998 and 2003) As Shultz (2003: xlii) has suggested, the important question is whether this distribution of labour is perceived by women lawyers as resulting from their own choices or from structural constraints.

In terms of women lawyers' participation within law firms, there is an inverse relationship between the hierarchy of the post and the number of women. In addition, only few women reach the top levels of the profession

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<sup>78</sup> Referring to this gendered division of labour in law firms various authors have mentioned the existence of "hard and soft" (Connelly and Hilliard, 1993 cited in Botelho, 2001: 188) areas of the law and of "pink and blue files" (Sommerlad, 1994: 31-53, cited in Botelho 2001: 188)

(Botelho Junqueira, 1999: 20-35; Roche, 2001: 7-11). As Shultz (2003: xxxv) has noted: "While gaining initial access to the legal professions was one thing, achieving equal participation for women within them proved to be quite another". Different and subtler forms of discrimination have survived with the effect of excluding, rejecting and discouraging women lawyers. The result is that, while women today make up an important part of the legal profession, significant differences remain. As seen earlier in this chapter<sup>79</sup>, between 1975 and 2000 the proportion of women in large law firms rose from 5% to 31.7%.

My findings for the Argentine case coincide with the results of research carried out in other jurisdictions. In 2000, in spite of the massive entry of women into the legal profession the proportion of Argentine women lawyers working in large law firms remained relatively low, at 31.7%, quite below the proportion of women who have been obtaining law degrees (31.7%). Moreover, women tended to concentrate at the lower end of the firms' hierarchy and had great difficulty to become partners, constituting 42% of the associates and 24% of the members and partners<sup>80</sup>.

Interested in women's integration to the profession and in their potential for achievement, authors such as Menkel-Meadow (1989 and 1995) and Harrington (1995) in the United States; Thornton (1997) in Australia; Kay and Brockman (2003: 60-64) in Canada; McGlynn (1998 and 2003) and Sommerlad (1998, 2003) in the UK have attempted to discover what stands in the way of equal professional authority for women lawyers within the different scenarios where they develop their professional activities. Research findings show almost universally that partnerships are less likely to go to women than to men (Schultz: 2003: xliii), that women remain marginalised, underrepresented, underpaid and tend to be retrenched in segments of the legal service market dominated by women (McGlynn, 2003: 139; Schultz, 2003: xlii). Women lawyers are constantly subject to

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<sup>79</sup> See chapter 3, section IV of this thesis.

<sup>80</sup> See chapter 3, section IV of this thesis.

discriminating practices or, as Schultz concludes on the basis of international research findings:

"We have noted that due to the continuing gendered division of labour between the sexes in the family, female jurists work harder but stand fewer chances of professional success. There are intentional and unintentional mechanisms that produce professional hierarchies and persistent social forces that cause gender discrepancies. To name but a few: conscious and unconscious stereotyping (men as breadwinners while women work to meet the bill of the child-minder); the effects and notions of motherhood and even of femininity as damaging to professional commitment and efficiency; structural barriers in selection procedures and workplace arrangements; a male symbolic order based on homo-social bonding; male networks and style of working; a "hegemonic masculinity" with a fixation on male cultural capital as opposed to women's academic capital. This leaves women with no choice at all or with choices taken under pressure, thus belying rational choice theory" (Schultz, 2003: 1)

Moreover, the prevailing masculine culture in the legal profession requires women to abide by the rules of the game, which are, of course, masculine. Women must learn that feminine ways of participating are not welcome. This implies objectivity, emotional detachment, neutrality and conservative dress. In short, anything that the masculine culture would find unprofessional should be avoided, family roles must remain invisible, and women have to prove commitment by working longer and harder (Mossman: 1992, Jack and Jack: 1989; Sommerlad: 1998; Roche: 2001; Rhode: 2003). As Jack and Jack have discovered through their early research on American lawyers:

"The safest way to success is emulation of males, even to the extent of speaking louder and louder and actively becoming and intimidator" (Jack and Jack, 1989: 207)

In different countries and at different times, different authors seem to have come to similar findings in relation to women's marginal positions within the legal profession, and this carries substantial consequences in terms of the contributions women lawyers have been able to make to the legal system. If women occupy the least powerful positions within the profession, how could they, from the very margins, affect change within the profession? (Mossman, 1988, cited in Mather, 2003: 34). Authors such as Freyer have pointed to the fact that in countries like the US, Canada, Australia and the UK, women wanting to become successful lawyers often face a dilemma, a conflict between their own values and the adversarial

ethics prevailing within the profession that excludes feminine characteristics. If they adopt a care orientation they will be overtly undervalued (as too feminine); conversely, if they adopt a male assertive and aggressive orientation, they are judged as failing to conform to the feminine model (too tough). This phenomenon, called "the double bind", has been observed for other professions and especially for women managers, but I think it is more dramatic in the case of lawyers, given the strength of the masculine culture prevailing within the profession in spite of the large number of women in it (Freyer, 1995: 212-217; Rhode, 2003: 8-10 and 11). Thornton (1996: 97-121) and Harrington (1995: 3-5) have pointed to women's bodies as a source of dissonance that tends to marginalise women within a profession with a masculine culture. Our culture associates masculinity with rationality and femininity with corporeality and emotions. Thus, the idea that because the law has developed over the centuries as a masculine activity having more to do with the mind (reason), than with the body (sexuality) serves to explain why women in the law, mostly outsiders, have great difficulty in attaining authoritative positions. As men have been the ones who have traditionally wielded power both within society and the profession, rationality has come to dominate the ethos of the profession. Women's marginality within the profession is explained in terms of culture and of the power relationships between the genders.

As I move on to consider women's participation in the judiciary it seems clear to me that the situation of women in large law firms may serve as an explanation of some women's preference for the judiciary. Both Roche (2001: 19) and Bothelho Junqueira (1998: 211-214; 2001,187; 2003: 441) in their respective studies on the participation of women in the legal professions in Venezuela and Brazil have come to the conclusion that law firms are the greediest sector of the profession in terms of accommodating women within them. Accordingly, they have tended to explain women's incorporation to the judiciary in those countries as a consequence of the difficulty for women to enter and progress in the business sector of the profession. In fact, Latin American and French research shows that the

participation of women in the judiciary tends to be relatively larger countries that have adopted the civil law system<sup>81</sup> than in common law countries (Schultz, 2003).

However, in countries such as Brazil and Argentina, where women constitute around 20% of the judiciary, and even in countries such as France (Boigeol, 2003: 401-418) and Poland (Fuszara, 2003: 374-376), where the number of women is larger than the number of men, women's participation in the judiciary is concentrated in the lower courts, very often, in the sections of the judiciary with less prestige. There are, in fact, very few women in the higher posts of the judiciary. Such a tendency has been observed by Boigeol (2002: 412-413) in France and Fuszara (2003: 376) in Poland. I could detect a similar trend in Argentina, where women judges are found more often in the civil and labour courts of first instance<sup>82</sup>, although some women may be found at the second instance courts<sup>83</sup> and at the provincial supreme courts, but there are no women at the Supreme Court of the Nation. Venezuela is an exception in that respect, since for some time now, there have been various women members of the Supreme Court and women's participation in the upper courts is quite important (Roche, 2001: 7-8).

This tendency towards a higher participation of women in the judiciary within the civil law world has been related to various factors, among which the use of open examinations as a method for recruiting the judges has been particularly highlighted as a feature that tends to favour the entry of women and other excluded sectors to the judiciary (Boigeol, 2003: 405-406, Bothelho Junqueira, 2003: 440). The situation in the above-

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<sup>81</sup> According to Schultz, 2003: xxvii, there is great variation in terms of women's participation in the judiciary, ranging from quite high in Poland (63.6%) and France (54%) to quite low in the USA (10-12%), the UK 11,8%. See Schultz 2003: xxxvii-xxxviii.

<sup>82</sup> As seen in the previous section, the proportion of women for the National Courts of first instance in Buenos Aires is 40% for the Civil Courts - the Family Courts are part of the Civil Courts- and 52,5% for the Labour Courts .

<sup>83</sup> The proportion of women for the National Courts of first instance in Buenos Aires is 39.6%, 22.6% of the National Courts of second instance; 24.2% of the Federal Courts of 13,9% of the Federal Courts of Second Instance 40% of the Supreme Court of the City of Buenos Aires- a new court elected with a system of quotas, and 0.% of the Supreme Court of the Nation.

mentioned countries within the civil law tradition is, in fact, very different to that detected in the common law countries. As opposed to the current experience of countries with a civil legal system, in the common law world, nomination as a judge usually comes with seniority as the culmination of a long and successful career as a lawyer. In the civil law countries, a judicial career can be initiated quite early in the working life of a lawyer (Malleon, 2003: 177). Given that the massive incorporation of women to the legal profession is relatively recent within both legal traditions, in the common law countries only very few women have developed such long and successful careers. It has been argued that in countries such as the US and the UK (McGlynn, 2003: 155; Hunter, 2003: 91-92; Malleon: 2003: 175-180; Schultz, 2003, xxxvii and xlvi-xlviii) this has kept the proportion of women within the judiciary quite low and that, in due time, the proportion of women is eventually going to rise to proportions mirroring the proportion of law students (citing Sir Thomas Legg, Permanent Secretary of the Lord Chancellor's Department in 1996, Malleon, 2003: 178).

However, as both McGlynn (1998 and 2003) and Malleon (2003) have demonstrated that it is not just a question of time, the 'trickle up' argument mainly used by government and by conservative sectors is not borne out by evidence. As statistics on women judges show, there has been a considerable number of judges for sufficient years now to bring about changes in terms of an increase in the number of women in senior posts within the judiciary, but this change has not occurred.

Thus, Malleon warns us against taking the "trickle up hypothesis" too seriously, as she demonstrates that the general tendency has actually gone quite in the opposite direction (Malleon, 2003: 177-180). Accordingly, the author has recommended the introduction of proactive measures in the processes of selection and appointment of judges in order to ensure better opportunities for women and members of minorities to obtain posts in the judiciary (Malleon, 2003: 185-189).

Women's increased entry into the judiciary has been also explained as a consequence of the lessening in men's interest in judicial work, as has

been observed for France (Boigeol: 2003: 406-407) and the United States (Berger and Robinson: 1992-1993, cited in Botelho Junqueira, 2003: 440). The fact that women are often more numerous in the judiciary than in the law firms has also been related to women's domestic responsibilities. As opposed to what happens in law firms, a career in the judiciary may be easier for women to juggle the demands of family and profession (Boigeol, 2003: 409; Botelho Junqueira, 2003: 441). Additionally, the possibility to wield power from an early stage in one's career (Boigeol, 2003: 408; Botelho Junqueira, 2003: 440) and to obtain equal pay and stability have been used to explain women's attraction to the judiciary. The latter becomes particularly significant at times when women take maternity leave (Boigeol, 2003: 409; Botelho Junqueira, 2003: 441).

As mentioned earlier, my own findings in terms of women's participation within the judiciary suggest the existence of both a vertical and a horizontal segregation on the basis of sex. There are no women at the Supreme Court of the Nation, while there are women in 6 of the 24 provincial Supreme Courts. The proportion of women increases as one goes down in the hierarchical ladder: while the overall proportion of women in the judiciary is about 27%, in the Federal Courts the proportion of women decreases, constituting 13,9% of the Federal Courts of second instance and 20,5% of the Federal Courts of first instance. The proportion of women rises when one considers the local courts, where women constitute 18% of the local courts of second instance and 26% of the local courts of first instance of the city of Buenos Aires.

After having considered the situation of women among law students and academics in UBA Law School, in Buenos Aires' law firms and in the judiciary and compared my findings with the international trends for the participation of women in the legal professions, I am in a position to conclude that women's participation in these branches of the legal profession in Argentina tends to coincide with the international trends observed by various authors within both legal traditions, with the caveat that the proportion of women judges is slightly higher than the average.

Thus, as a whole, in spite of the increase in the number of women entering the legal professions, women's positions remain marginal.

## VI - General conclusion

In this chapter I presented a picture of various sectors of the labour market for women lawyers in the city of Buenos Aires, the law faculty, legal firms and the judiciary. Unfortunately, the lack of available data has prevented me from investigating other sectors where women lawyers work, such as the State bureaucracy, where women lawyers work as government officials, or the small firms where women work as solo practitioners or with a few other lawyers that do not advertise in the Martindale Directory.

This is the first original research showing that the large increase in the number of women obtaining law degrees has not yet made itself felt in any of the areas investigated. In spite of the obvious advances women lawyers have made in the last decades, the phenomenon of the glass ceiling common to many professional activities all over the world is a reality shared by women lawyers in Buenos Aires. It remains contentious whether this situation will change over time.

My findings very much coincide with other Latin American (Botelho Junqueira, 1999 and 2001; Roche, 2001), North American (Freyer, 1995: 199-218; Harrington, 1993; Menkel-Meadow, 1989: 196-255 and 1997: 196-203; Mossman, 1988: 567, Rhode, 2003: 3-21); Australian (Thornton, 1997; Hunter 2003: 87-103) and European studies (Boigeol, 1999 and 2003. 401-418; McGlynn, 1998 and 2003: 139-158); Sommerlad, 1998, 1998a and 2003: 191-224; Schultz, 2003: xxv-lxii and 295-321). It is striking to observe the persistence of gender discrimination against women in the legal professions in societies with very different levels of development and diverse cultural and institutional backgrounds.

Although in the last decades women lawyers have advanced considerably in all areas, for the time being, all legal fields are characterised by a high degree of vertical and horizontal segregation. The main locus of discrimination against women seems to be the large law firms, while the

conditions of participation in the law faculty and the judiciary seem to be less restrictive. This reality for women within professional associations mirrors the general situation of women lawyers: their participation is low at the highest levels and increases at the lowest levels of the lawyers' associations.

Nevertheless, the Argentine levels of participation of women within the judiciary can be considered relatively high, even when compared with the reality of more developed nations. Particularly in areas such as the Family Law Courts where the proportion of women judges does not go unnoticed.

This chapter has set the scene for my work with family law judges. In the next chapter, I consider the nature of the Family Law Courts of the City of Buenos Aires, which will be followed in the subsequent chapters by the examination of gender differences among the family law judges.

## **Chapter 4 - The Family Law Courts of the city of Buenos Aires, their history, description and constitution**

### **• I - Introduction**

In the two previous chapters I considered the background to women's entry into public life in Argentina, concentrating on women's advance in the legal profession, and described their participation in the various fields of activity within it: the academy, the private practice of the profession, and the judiciary.

Chapter 4 initiates part II of the thesis, where I report the findings of my research with the family law judges. The chapter starts with a review of international research on women judges that situates my own enquiry in the context of existing research. The chapter then moves on to describe the Family Law Courts in terms of their history, competence, constitution and sex composition. It describes the judges that comprise the family law judiciary according to their personal, social and educational characteristics and closes with the consideration of the family law judges' career trajectories and motivations.

### **• II - Review of previous international research on women judges and difference**

#### **1 - Introduction**

The great increase of women in the legal profession particularly, in the judiciary in proportions that go well beyond "token" numbers -more than 20%- in certain jurisdictions justifies the initiative to test the proposition that women judges could make a difference to the administration of justice (Moss Kanter, 1977: 228). Some research has been carried out to depict the population of women judges, to find connections between gender and adjudication and investigate the differences and similarities between men and women judges. As is the case with women lawyers, however,

research on the subject is rather scarce, preliminary and relatively inconclusive in its results.

Research of a statistical nature describing the numbers and locations of women in the judiciary was considered in chapter 3, section V. It constituted essential information to be obtained before attempting further analytical research. Its findings showed that, although the number of women in legal education has risen dramatically for most jurisdictions, this increase has not made itself noticeable in the different areas of the legal labour market, including the judiciary. Although in countries with a civil law tradition the proportion of women in the judiciary is higher than in common law countries, in countries within both legal traditions women tend to concentrate in the lower ranks of the judiciary and are underrepresented at its higher echelons.

At the end of chapter 1, I discussed the more speculative and theoretical work on women judges. The issues covered were, among others, the desirability of having more women in the judiciary and the discussion of the differences women could make to the administration of justice. I shall now consider the more empirically based kind of work, frequently related to concrete judicial discourses. Bearing in mind that this is a review of a relatively new research field, I am interested both in the methodological strategies deployed in order to carry out the research and in its findings, since the consideration of both aspects provides important information and insights to reflect upon my own work.

## **2 -Two research styles**

Some studies have been carried out, mainly in the US, on a large-scale basis, attempting to trace the "different voice" in women judges from a quantitative methodological standpoint, using a positivistic methodology and rigorous and highly sophisticated research methods, often collecting and/or producing new data that allow for generalisations. Most research studies in this group have looked into the outcomes of judges' decisions, namely, at their judgements. Thus, these studies have attempted to find

indications of the presence of different approaches in women judges' judgements (Gruhl, Spohn and Welch, 1980; Davis, Haire and Songer, 1993; Davis, 1993; Alliota, 1995; Allen and Wall, 1993). This kind of research has a highly predictive value but, on the whole, when compared to research based on more qualitative methodological criteria, its analytical power is poorer, not subtle enough and less in-depth. Instead, there are some research studies that, while relying on empirical evidence to draw conclusions on the relationships between gender, adjudication and other aspects of the activity of judging, have deployed a qualitative exploratory methodological strategy. Such studies have either gathered existing data (Sherry, 1980; Abrahamson, 1988; Durham, 1988;) or collected new information in an attempt to seize the judges' attitudes with respect to the issue of gender difference in the judiciary by means of surveys or interviews (Martin, 1993; Botelho Junqueira, 2003). This type of enquiry seldom works with the entire population or with a representative sample. Consequently, the conclusions reached through this type of investigation, though more nuanced and richer in terms of quality, cannot be generalised; hence they have poor predictive value. The results obtained by both types of research are, however, as contentious as the research carried out with respect to the potential contribution women lawyers<sup>1</sup> could make to the legal system.

In the following paragraphs, I categorise some research studies that examine the difference women judges could bring to the administration of justice in terms of their objectives and of the methodological strategy used to investigate. Thus, I start by considering the large scale quantitative studies aimed basically at comparing the voting behaviour of men and women judges and by analysing women's voting behaviour. Then I move on to consider the large scale studies using survey data to analyse the attitudes of women judges and the more conceptual analysis of women's collective contributions to the legal system and end by examining smaller scale qualitative research studies. I conclude by justifying my decision to opt for a small scale qualitative study set up in a particular context.

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<sup>1</sup> See chapter 3, section V.

## **a - Large-scale quantitative studies**

### **i - Studies comparing the voting behaviour of men and women judges**

Among the first type of research study mentioned above, there are some studies that have compared the decision making of men and women judges to find slight differences among men and women in terms of their judgements. Such is the case of an early study by Gruhl, Spohn and Welch (1980: 308-322) that examined the convicting and sentencing behaviour of men and women trial judges in a large metropolitan city in the United States, in 30,000 cases decided between 1971 and 1979, where male and female defendants were involved in felony cases. They proceeded by means of statistical analysis of judges' convicting and sentencing decisions, on the basis of a typology of charges. Starting from previous research on the different interests of men and women policy makers, their analysis showed that women were slightly more liberal than men in issues of crime control, and that women defendants were accorded a protective and chivalrous treatment by men judges, they started from the hypotheses that women judges would be slightly more lenient than men judges when convicting and sentencing. Accordingly, they expected that women judges would be less likely to convict and to incarcerate defendants when they did convict them, and less likely to incarcerate defendants for long periods of time. They also expected that men judges would treat women defendants more leniently (Gruhl, Spohn and Welch, 1980: 308-322).

Their findings showed that the actual convicting and sentencing behaviour of men and women judges did not differ significantly. Although women were slightly less likely to find defendants guilty in general terms, they were more likely to send defendants to prison and they tended to give slightly stiffer sentences than their male counterparts (Gruhl, Spohn and Welch, 1980: 308-322).

Their results were much more conclusive with respect to the testing of their second hypothesis, which showed that, although men and women judges tended to convict women defendants at a similar rate, women judges were considerably more likely than men judges to sentence female defendants to prison (twice as often). Women judges tended to treat men and women offenders with greater similarity than did men judges. While men and women judges treated men offenders similarly, women defendants were treated much more severely by women judges.

Davis, Haire and Songer's (1993: 129-133) research on the voting behaviour on the U.S Courts of Appeals constitutes a second example of a study using a quantitative approach to compare men and women judges' decisions. The authors started from the hypothesis that women judges might vote differently from their male colleagues in ways that would reflect a tendency to emphasise rights that are interdependent, like the right to full membership in a community, rather than rights against the community. They examined voting behaviour in cases related to employment discrimination, criminal procedural rights and obscenity, and were not able to fully prove their hypothesis on a different voice for women judges. They analysed the votes of all the judges that had served in the Courts of Appeal from 1980 to 1991. In all cases, the number of women judges was very small as compared to the numbers of male judges (always under 10%).

Votes in the different types of cases were categorised and connected to the gender of the judge. The results showed statistically relevant differences between men and women judges in two of the three areas considered. Employment discrimination cases revealed that women supported plaintiffs more often than their male counterparts, whereas the analysis of search and seizure cases showed that women judges were slightly more likely to support the claims of criminal defendants. In obscenity cases there were no significant differences between men and women judges.

Among the studies that look specifically at women judges' decisions, there is Sherry's early analysis of the decision making of Sandra Day O'Connor (Sherry, 1986: 543-615). Although Sherry used a theoretical, rather qualitative methodology, I am considering her work at this stage because she initiated a controversy that gave rise to many studies of a more quantitative nature. As was seen in chapter 1 section III-2, Sherry developed a theoretical framework drawing on Gilligan's theory and on political philosophy that she applied to the legal field. Sherry related the classical republican communitarian tradition in political philosophy to a feminine perspective in jurisprudence and looked for support of her theory in O'Connor's judgements in two areas: "religious establishment clause" and civil rights. As a result of her analysis, Sherry claimed to have observed a contextual approach and a tendency to reject rigid rules as well as "a uniquely feminine perspective" in O'Connor's decision making (Sherry, 1986: 579). From her research, Sherry concluded that O'Connor had tended to support individual rights when they involved community membership (Sherry, 1986: 604). The fact that she studied a single woman judge, did not work with all her decisions, and did not explain how the decisions were selected have earned her a well deserved criticism of essentialism. Moreover, further research has questioned O'Connor's different voice and reached exactly the opposite results (Davis, 1993: 134-139; Alliota, 1995: 232-235)

Davis (1993: 134-139), in turn, analysed all of O'Connor's votes in religious establishment<sup>2</sup>, civil rights and criminal procedure cases from 1981 to 1991. Using scalogram analysis and other quantitative techniques, she found little support for Sherry's thesis. Suspicious of the effectiveness of the analysis of case outcomes to test Sherry's hypothesis on the different voice in O'Connor's' jurisprudence, because it obscures the reasoning and the criteria used to reach these decisions, Alliota (1995: 232-235) proposed an alternative methodology: "fact pattern analysis". To her, this alternative method seemed more useful to explore differences

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<sup>2</sup> By religious establishment cases Davis refers to the US Supreme Court Jurisprudence of cases related to establishment clause (the part of the First Amendment on the separation of church and State).

between men and women judges, because it compares not only the substance of judicial selection, but also the arguments involved in the discussion that led to the decisions, and bring the judge's social attributes into the analysis.

In her sophisticated study of 40 Supreme Court Justice's decisions on Equal protection cases (346 votes cast from 1981 to 1985) Alliotta (1995: 232-235) brings gender along with other social attributes. She introduces class, education, and the judge's political party identification into the analysis, together with certain fact characteristics of the cases, the nature of the right presumed to be violated, whether the defendant was the national, the state or the local government, and whether the vote was cast by O'Connor or another Justice. Alliota reasons in the following manner: if Sherry's thesis was correct, Justice O'Connor's votes in equal protection cases would depend on the way she balanced the claimant's request for inclusion and the community's request for exclusion. Thus, it would be expected that Justice O'Connor be more willing to accept a claim that condemned an individual to outsider status when the criterion involved affected the individual tie to the community, such as race, gender, legitimacy, or cases of reverse discrimination, where the claims were generally brought by insiders. Her findings, like David's (1993: 134-139) did not provide, however, support for the different voice in O'Connor's jurisprudence.

Allen and Wall (1993: 156-161) analysed the role orientations of State Supreme Court Justices. They tested four possible judicial roles for women judges: "representatives", "tokens", "outsiders" and "different voices". The authors examined voting behaviour in three issue areas: women's issues, criminal rights and economic liberties. They found the strongest support for their construct of the "representative" and "outsider" roles, some support for the different voice role and virtually no support for the token role. They concluded that women judges were more likely to be

the most pro-women member of their court on women's issues<sup>3</sup> ("representatives"), to occupy positions at the extreme liberal or conservative wings of their courts ("dissenters") and to engage in both extreme and dissenting behaviour in criminal and economic cases ("different voices"). Although many of the large-scale studies reviewed borrow the "different voice" expression from Gilligan, it seems to me that their studies do not coincide with Gilligan's theoretical approach. In their effort to work with quantitative methodologies, they seem to void the concept from its original theoretical content.

As Malleson concluded from her assessment of the overall research findings on decision making outcomes:

"...it would seem that in terms of sentencing and general adjudication there are no clear or consistent differences between men and women on the bench. Only when the issue is one directly related to sex discrimination do any differences emerge and even here the findings are mixed. Moreover, where there are differences, these do not necessarily fit with expected gender patterns according to theories such as Gilligan's ethic of care/ rights dichotomy. (Malleson, 2003: 7)

The general inconsistency and inconclusiveness of the findings point to the fact that research on the subject is still embryonic, and in need of both theoretical and methodological refinement. The basic problems involved in this type of enquiry revolve around the theme of whether, given the strong masculine culture that prevails in the profession, there can be a different voice among women judges and if so, whether and how it is possible to systematically observe it. Should priority be given to behaviour or to discourse, and what is the relationship between them? Should one expect to find differences in the judge's attitudes and values, in case outcomes or on the ways judges write their decisions? How to apprehend the processes leading to these decisions?

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<sup>3</sup> Allen and Wall (1993: 161) explain that sex discrimination, sexual conduct and abuse, medical malpractice, property settlements and the relationship between child and parent all appear as

## **b - Qualitative studies on the impact of gender in the judiciary**

### **i - Large-scale surveys on the attitudes of women judges**

Large-scale studies were also conducted in the U.S. to examine women judges' attitudes. The strategy to ask the judges themselves about their role orientations seems to me much more interesting than that of analysing case decisions, since it enables the researcher to analyse data of a qualitative nature that is more focused and less mediated by presumed theoretical correspondences between the judges' orientations and their voting behaviour.

Martin (1993: 166-172) broadened the scope of the difference enquiry to include the "off the bench" and collective behaviour of women judges by using survey data rather than voting behaviour. Focusing on members of the National Association of Women Judges, Martin found that the organisation acted as a support group to promote a representative role for its members, that members of the NAWJ were more likely than non members to support the notion of representative roles for women judges, and that many individual members of the NAWJ sought to play an active role in their communities. 83% of the judges who were members of the NAWJ and 63% of those who were not agreed with the statement that "women have certain unique perspectives and life experiences, different from those of the men that ought to be represented on the bench by women judges" (Martin, 1993: 169) However, Martin found little support among women judges for the different voice theory and concluded that the representative role as seen for women judges by NAWJ members was relatively moderate, in accordance with the general conservatism of the profession.

In the same category, a large recent survey was carried out in New Zealand comparing the judges' perceptions on gender issues (Barwick, 2000 cited in Malleon, 2003: 3). One of the findings of this study showed that women would seem to believe more often than men that gender was

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integral parts of a pro-women agenda.

an important factor in the judges' decision making and 70% of the women as opposed to 39% of men judges agreed with the proposition that "judges judge by what they think is right and proper and that necessarily involves a particular set of values and standards influenced by gender".

In the Netherlands, a large survey carried on by Josten and Van Tijn (1991, cited by Schultz, 2003: 249) among members of the Dutch judiciary found that, while both supporters of difference and supporters of equality were to be found among the respondents, supporters of equality outnumbered supporters of difference. Thus, while 12% of the judges agreed with the idea that female judges treated family matters differently, 54% held a different view. Moreover, while 11% of the respondents believed that female members of the judiciary had a different approach to crime, 63% disagreed.

## **ii - Analysis of women judges' collective contributions**

Two studies can be said to stand out among those choosing a more qualitative approach: one by Judge Abrahamson (1998: 200-206) and one by Judge Durham (1999: 217-237). Both give an account of the impact of women judges on gender bias in the courtroom in the United States. They have examined the work of various women associations like "The National Association for Women Judges" and "The National Organisation of Women Legal Defence and Education" which, in the early eighties, formed an umbrella group named "The National Judicial Education Program to Promote Equality for Women and Men in the Courts".

Abrahamson and Durham examined reported results on gender bias in the courtroom to find that they were quite uniform in showing that gender bias affected women in all the roles they played in the judicial system; that is to say, as litigants, witnesses, attorneys, judges, jurors, defendants and court employees. Whatever their roles, women were mistreated, accorded less dignity and given less credibility than their male counterparts. In other

words they were harassed and discriminated against, both by men and by other women<sup>4</sup>.

Findings showed that women judges were more willing than men judges to intervene to stop gender biased behaviour in their courtrooms. They had campaigned for judicial education programs to educate judges about gender bias, had fought against discursive discrimination in language, and worked to make sure that the Courts had transparent, stereotype-free hiring policies to ensure equal opportunities to all groups. In both the views of Judge Abrahamson and Judge Durham, these women judges were making an important contribution to changing the atmosphere of America's courtrooms through increasing sensitivity to gender issues by means of discussion, scholarship and judicial education (Abrahamson, 1998: 200-206; Durham, 1999: 217-237).

Moreover, Durham argued that, in spite of their traditional legal training and their wide diversity in terms of political and social experiences, women judges had become more progressive on issues involving women. She stressed that these judges influenced women through their own votes and also by adding their perspectives to the debate and to the decision making process. These perspectives, in turn, gained legitimacy and became incorporated in case law and precedent, thus helping to build sensitivity to the pervasive attitudes to gender that consistently inform the law.

Durham also found various very interesting pieces of evidence showing how women judges could make and, had, in fact, made a difference, particularly on "women's issues", in such areas as domestic law (divorce, alimony and custody cases), and in areas of medicine law (surrogacy, maternal foetal conflicts, life support treatments) (Durham, 1999: 233).

As I overview existing research, my impression is that the more qualitative the studies, the richer the findings, particularly as one considers the novelty of the phenomenon under investigation, which calls for detailed and careful exploration of the situations of women as newcomers to public

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<sup>4</sup> Bogosh observed a similar tendency in her study of the Court Interactions in the Israeli Judiciary

settings such as the circumstances of women in the bench, and for a close examination of their experiences and perceptions.

Studies such as the ones reviewed in this section offer very powerful insights. As part of a general strategy to eliminate gender bias in the courts, these studies are less academic and more focused than scholarly research. Their findings are fairly specific and serve as a basis for policy decisions and programmes. As such, they offer a very interesting model to study women in the judiciary in other nations.

### **iii - Other strategies**

Different qualitative strategies have been deployed to evaluate women judges' specific attitudes. Fuszara, for instance, examined the opinions of 30 women litigants in maintenance cases to test the contention that the increase of women judges reduced gender bias in the courtroom. She found that women litigants complained of women judges' lack of impartiality and accused them of siding with the men (Fuszara, 2003: 376-377).

Schultz (2003: 313-314) drew on testimonies collected in the context of a small-scale qualitative study of women in the judiciary carried out in 1987 in the federal state of Hess to articulate a "catalogue of female qualities and behaviour in professional work". Schultz thus highlighted four categories. Each of these categories summarises different aspects of women's distinctive attitudes. Thus, "emotional climate" involves "understanding, nurturing, patience, warmth, showing one's feelings"; "co-cooperativeness" stands for "less litigious attitudes, less aggressiveness, more mediation; non-authoritarian style" implies "greater openness, less formality, no excessive self-esteem, readiness to admit to having made a mistake", while "less set on competition" is suggestive of "less statute orientation, less keen on career planning, greater focus on job in hand and team work".

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(2003: 264-265)

### 3 - Latin American research on women judges

Research on judges in Latin America is quite profuse but rarely takes gender as a variable. Its main focus is the administration of justice and takes mainly the form of very extensive diagnoses to serve as a basis for eventual systemic reforms of the judicial system, which appears to be slow, bureaucratic, expensive, inefficient, corrupt and often dependent on political power (Mackinson, 1987; Mackinson and Goldstein, 1988; Fucito, 1999, 2002; Bielsa and Brenna, 1993; Morello y Berizonce, 1994; Quiroga Lavié, 1998, Cueto Rúa, 2000). I was able to identify three Latin American studies about women judges, two of them from Argentina and one from Brazil. In neither of the Argentine studies did the difference that women judges could make to the system appear as a focal point of interest.

Mackinson and Goldstein (1988) analysed the judges of the City of Buenos Aires and included a chapter on the women judges for the same jurisdiction. Aires. It was the first study on the judiciary in Argentina to include gender as an important variable. The authors examined the participation of women within the judiciary in quantitative terms. They also collected information about the judges' social origins, their general and legal education, and socio-cultural activities. Accordingly, while this work was the first to examine the specific situation of women judges, it is mainly quantitative and is now out of date. In addition, it did not consider whether women exercise a "different voice". As can be seen in chapter 3, section IV, I used their findings on the location of women in the judiciary of Buenos Aires as a basis to compare them with my own data on the participation of women in the judiciary ten years later.

In the early 1990's Laura Gastrón (1991) published a book on the participation of women in the judiciary. She analysed women's participation within the judiciary in numerical terms. As with the Mackinson and Goldstein study, I used her data to draw comparisons with my own in order to assess the changes occurred in the meantime. From her statistical analysis of women's participation within the judiciary, the author concluded that women were discriminated against in the judiciary

(Gastrón, 1991: 96) She observed that sexual stereotypes about the role of women, prevalent in society at large, were reproduced within the judiciary, a traditionally masculine realm. She found both a vertical and a horizontal occupational segregation: women concentrated on the lower instances and on those sections of the judiciary more easily assimilated to the roles women, as wives and mothers, perform in society. Women were to be encountered more frequently in the civil and labour sections of the judiciary, with a small number of women within the criminal courts and very few women judges acting in sections where the legal conflicts involved important amounts of money. Gastrón also interviewed a small sample of five women judges to explore how they experienced their participation in the judiciary, asking particularly whether they thought women were discriminated against within the judiciary. The judges' perceptions confirmed her quantitative findings. Again, while this was a very important study, it did not further explore the differences women judges might bring to the judiciary.

Instead, Botelho Junqueira (2003: 437-450), a researcher from Brazil, used a qualitative methodology to study whether women judges made a special contribution to the administration of justice in the city of Rio de Janeiro. Unlike her U.S. counterparts, Botelho used a small sample and worked with a qualitative in-depth interview, on the basis of the discourse of women judges from different sections of the judiciary. Her work is of particular relevance to my own because of its regional location and because of the methodological strategy deployed, which bears some similarities to my own<sup>5</sup>. I think that, in the Latin American context, one of the factors determining the use of a small sample could be the lack of material resources prevalent in Latin America as compared to the U S. However, I am under the impression that, in Botelho's case, this choice relates to her focus on values and attitudes rather than on decision outcomes.

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<sup>5</sup> The most immediate differences in our approaches are that she includes only women in her sample, while I include both women and men, to be able to observe gender differences in the discourse of the judges. While she works with judges from different sections of the judiciary I only work with Family Law Judges.

Botelho Junqueira examined women judges' opinions and attitudes on a great variety of gender related issues such as the way in which they juggled work and family responsibilities, their motives for choosing the judiciary, their opinions on feminism and the contributions women judges made to the administration of justice, among others.

Botelho Junqueira's (2003) most significant findings with respect to the judges' perceptions about gender differences in the judiciary are a tendency on the part of women judges to be harder on women in maintenance cases and a propensity to be more attentive with the details regarding the facts of the proceedings. The author also observed that, in order to mitigate discrimination, women judges found that they needed to emphasise similarities with their men counterparts and thus, they tended to deny any gender differences (Botelho Junqueira, 2003: 449-450).

As Malleson (2003: 7) wrote with respect to the overall research findings on the judges' decision making: "The best that can be said on the basis of the research to date is that there may be some differences of decision making in some areas". However, qualitative research has brought to light some attitudinal differences among men and women judges (Bogosh, 2003: 251-252), although these might not affect the outcome of their judgements (Schultz, 2003: iv).

Malleson suggests that the explanations of the findings tend to vary according to the subject's epistemological position with respect to difference. This point is very similar to that made by Epstein with respect to women lawyers when she argued that "difference is in the eye of the beholder" (Fuchs Epstein, 1988: 72-98, cited in Menkel-Meadow, 1995: 35). While supporters of gender difference tend to believe that these findings mask differences, those against gender difference argue that, on the contrary, differences are overemphasised (Malleson, 2003: 8). Thus, those in the first group explain that the lack of difference observed is due to the token status of women judges, to the strength of the masculine culture of the law that does not allow for the expression of the feminine qualities and to the fact that women who make successful careers in such

a masculine environment are not typical (Malleon, 2003: 8). Those on the opposite side of the controversy attribute the differences to the various kinds of expertise that women developed in the areas where they concentrated within the legal profession before they came to the bench, rather than to any socially constructed gender differences (Malleon, 2003: 9).

Hopefully, in due time, as the number of women in the judiciary increases and research on the issue becomes more prolific, its conceptual and methodological tools will be improved and refined. Although a researcher's epistemological position is always an important factor in the research process, it is likely that, eventually, results may become more conclusive and their interpretation less dependent on the researcher's vision.

#### **4 - Conclusion**

In my view, most of the quantitative research studies that I have reviewed work with an operational definition of the "different voice" of women judges that does not coincide with the general conceptual framework of the legal scholars that have speculated on the basis of Gilligan's theory discussed in chapter 1. I would suggest that, in their attempt to work with a very large sample and quantitative methodologies, those researchers have tended to reduce and oversimplify the "different voice" approach.

Moreover, gender differences are a very complex issue. There is great difficulty in translating the concepts involved into easily measurable variables without diminishing its conceptual content. This is why I favour a more qualitative approach to the study of gender differences in the judiciary. Studies involving the explorations of women judges' perceptions on gender difference in the judiciary seem to be a better tool for that type of complex enquiry.

The decision to apply a quantitative or a qualitative methodology to the study of complex social phenomena can be framed in terms of different cultural traditions. While American studies presented first would be in line with a positivistic approach that intends to reach conclusions with large

population coverage on very specific issues such as the judges' voting behaviour, a qualitative research strategy is in keeping with a phenomenological approach. As opposed to the sophisticated quantitative methodologies used by American researchers, the qualitative approach I favour prioritises analytic refinement and aims at a thorough exploration and description of the representations, attitudes and values underlying judges' practices, attaching foremost importance to the subject's own explanations about their experiences and practices. A smaller scale qualitative study facilitates this kind of exploratory research and, consequently, I find it more appropriate at this stage. Qualitative findings throw light on the multiplicity of aspects involved besides gender, and could contribute to generate an agenda of issues to be further investigated on a larger scale.

The choice of a specific context such as the Family Law judiciary of the city of Buenos Aires relates to the understanding of the need to consider situated social subjects as opposed to invoking universalising categories of men and women judges. As explained at the end of chapter 1, attempting to draw conclusions for women judges in general might expose my work to justified criticisms of essentialism, for overlooking other aspects that should be taken into consideration such as class, race, culture, sexual orientation and handicap, among others. Having overviewed the incipient existing research on women judges and difference, and situated my research strategy in its context, I now move on to the analysis of the Family Law Courts that constitute the site of my research.

### **• III -The history, competence and constitution of the Family Law Courts**

#### **1 - Introduction**

In the Introduction to the thesis, I stated the reasons that led me to choose the Family Law Courts as the site of this research. I explained then that

Family Law Courts are relatively new courts that have not yet been studied. They have a high proportion of women within them and attend to matters that are very much related to gender. The purpose of the next sections is to describe the Family Law Courts in terms of their history and competence and of the evolution of their sex composition in order to provide a framework for the analysis that will ensue. I examine the family law judges' social and academic backgrounds, their career trajectories and their motives to become family judges.

## **2 - The Family Law Courts**

No attempt has yet been made to write the history or study the working of Family Law Courts in Argentina. Given the lack of documentation, in order to provide a very basic background for this study of gender differences within the family law judges, I had to examine the letter of the law that created the courts and reconstruct their history on the basis of the testimonies of the judges and other key informants.

Law 23.637 was passed in September 28, 1988, creating the Civil Courts specialized in Family matters. These Courts were created out of a split between what had constituted up to then the general Civil Courts under which the family competence and the civil patrimonial competence were subsumed. Until then, there had been 30 civil courts in the City of Buenos Aires with a certain degree of specialisation inside each court: the judge had two Court Secretaries: one took care of cases involving family matters and the other, cases related with civil patrimonial issues outside the family.

The Family Courts, as they are commonly called, started to work separately in 1989 to attend to matters that had to do with "family law and personal capacities". Their competence involves divorce, child custody and visits with the non-custodial parent, maintenance, allowances, adoptions, insanity, legal incapacities, estates and inheritances.<sup>6</sup>

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<sup>6</sup> As defined by the text of the law, the family matters to be dealt by the specialized courts are:

"1- Authorization to contract matrimony and opposition to its celebration

2- Inexistence or nullity of matrimony

3- Divorce and personal separation

4- Dissolution of the marital assets without divorce

At the end of 1988, an invitation circulated among all civil judges to opt for the family specialisation. Twelve judges accepted the invitation. Among those, eight were selected by the Ministry to become civil judges specialised in family law and appointed in 1989. Within the next two years the number of courts with special competence in family matters tripled, 8 more judges were designated the next year, and another 8 one year later. So, in 1989 there were 8 Family Law Courts then, in 1990 their membership increased to 16 and, in 1991, their number rose to 24. Since then, the courts have had one secretary instead of two. Today there are 24 Family Law Courts that still constitute a sub-section of the Civil Courts. The Upper Civil Court does not specialise in family matters; its competence has remained general.

Apart from the judge, the Court staff includes two lawyers, the Secretary and the Pro-secretary, who usually want to progress in the judicial career. They prepare the files and are entitled to sign certain resolutions within the process of divorce. They participate in the Court hearings and can lead and manage cases until the final judgement is written and signed by the judge. Each Court has two social workers among its staff. Experts such as medical doctors, psychiatrists or psychologists designated by the judiciary can be summoned by the judge to provide technical advice when required, at the expense of the people involved in legal conflicts. Whenever parties cannot afford payment, they are forced to use the lower quality public social services provided by the State and civil society organisations mainly dependent on the Catholic church and usually overburdened by the excessive demand.

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5- Liquidation or partition of the marital assets except when the dissolution is caused by death

6- Filiation claims or filiation impugnation

7- Adoption, its nullity or revocation

8- Deprivation, suspension and restitution of "patria potestad"

9- Minor custody and visits

10- Declaration of incapacity, disqualification and rehabilitation

11- Designation and dismissal of guardians and everything related with guardianship.

12- Granting guardianship of minors

13- Alimony among spouses, or derived from patria potestad or kinship

14- All other matters related to the name, civil status and personal capacities"

Source: Boletín Oficial 2 de diciembre de 1988, Art. 7 to 15. Biblioteca Digital, Ministerio de Justicia, Seguridad y Derechos Humanos. <http://www.jus.gov.ar>

In the Court staff there are also various non-professional employees, and a private secretary of the judge. These posts are often taken by law students. The Courts open at 7.30 and close at 13.30 each weekday. According to the statistics department of the judiciary, each court takes care of an average of 3000 cases yearly, and the average time for a case to be solved is approximately three years. The participation of the Family Law Court in divorce cases can be very lengthy, since it starts with the initiation of divorce proceedings, but might not end until the younger child comes of age. The whole process at the Family Courts seems very outdated and bureaucratic. Hand-sewn legal files are stored in collapsing shelves in the Court's Hall where lawyers and clerks wait to be attended to. There are very few computers at the Courts.

The various Family Courts are situated in three buildings in the proximities of the Palace of Justice. Only one of them seems to have been specially built for the use of the Courts. The two other buildings seem to be apartment buildings converted into Courts. None of them seem comfortable to those coming to court, for there are no special lounges or sitting rooms for people waiting to be attended to or spaces prepared for children. The atmosphere in the three buildings is very busy and rushed. Long lines of professionals<sup>7</sup> and clerks can be observed all morning long, waiting for the lifts. In contrast, in consonance with the high prestige accorded to the judicial office in Argentine society, the judge's offices are solemn, spacious and very formally furnished. Apart from the working space for the judge, there is a sitting space where the judge usually holds hearings, a key element in family processes.

As Mackinson and Goldstein have argued following Lautmann, the poor material infrastructure and the inadequacy of the buildings expresses the place given by politics to the administration of justice and is an indicator that it does not view the judicial system as a matter of paramount importance (Lautmann, 1974 cited in Mackinson and Goldstein, 1988: 80).

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<sup>7</sup> On a visit to the Family Law Courts one can note a marked women's presence among the professionals, while if one visits the criminal courts, women are very rare both among the professionals and the litigants.

In addition, the inadequacy of both technical and material resources has been pointed out as one of the main obstacles for the efficient administration of justice by all the judges who participated in this research.

### 3 - The constitution of the Family Law Courts

Table 53 represents the gender composition of the Family Law Courts in 2001, at the time when the interviews with the judges were held. The family section is composed by 24 courts, but at the time the research was carried out one of the courts was vacant because the judge had resigned more than two years before and his replacement had not yet been nominated<sup>8</sup>. Table 53 shows that, in 2001, in the Family Law judiciary women judges outnumbered men judges.

Of the 23 remaining courts, occupied by 10 men and 13 women judges, two judges, a man and a woman, were on sick leave, thus leaving 9 men and 12 women. The 3 vacant courts were being temporarily occupied by 3 men judges who managed the vacant court in addition to their own. I should think that the fact that women judges outnumbered the men judges in the Family Law section, as can be seen from tables 53, 58 and 59, proves its quantitative feminisation.

• **Table 53- Constitution of the Family Law Courts, by sex and standing in 2001**

Court N°	Judge's name	Sex	Standing
4	Silvio Pestalardo	Man	In charge
7	Omar Cancela	Man	Also in charge of Court 104
8	Laura Servetti	Woman	In charge
9			Vacant
10	Liliana Filgueira	Woman	In charge
12	Marcela Pérez Pardo	Woman	In charge
23	Jorge Noro Villagra	Man	In charge
25	Lucas Aón	Man	Also in charge of court 9

<sup>8</sup> As was explained in chapter 2, the delay in constituting the "Judgeship Council" left the country without a system of appointment of judges for a few years. See further chapter 2

26	Norma Abou	Woman	In charge
38	Mirta Ilundain	Woman	In charge
56	Miguel Guiraldes	Man	In charge
76	Ricardo Sangiorgi	Man	Also in charge of Court 102
77	Marta Mattera	Woman	In charge
81	Ana Pérez Catón	Woman	In charge
82	Irene Martínez Alcorta	Woman	In charge
83	Patricia Zabolinsky	Woman	In charge
84	Teresa Berzosa de Navelra	Woman	In charge
85	Gustavo Smuclir	Man	In charge
86	Victor Carrasco Quintana	Man	In charge
87	Graciela Varela	Woman	In charge
88	Hernán Coda	Man	In charge
92	María Bosio	Woman	In charge
102	Julio Irigoyen	Man	On sick leave
106	Myrian Rustan	Woman	On sick leave

Tables 54, 55 and 56 show the evolution in the constitution of the Family Law Courts. As explained above, the creation of the Family Law Courts was completed in three consecutive years, 1989, 1990 and 1991. While in 1989 men judges outnumbered women judges, during the three year period in which the creation of the Family Law Courts was completed, the proportion of women rose from 37% to 48%, to reach a percentage of 56% in 2001, as can be seen from tables 54 to 57.

• **Table 54 - Family law judges nominated in 1989**

Court number	Judge's name	Judge's Sex	Changes
7	Cancela	Man	None
8	Gatzke	Woman	For another woman in 1994(Servetti )
9	Cárdenas	Man	Vacant since 1998, the judge was not replaced after resignation

10	Filgueira	Woman	none
12	Perez Pardo	Woman	none
23	Noro Villagra	Man	none
25	Aón	Man	none
26	Repetto	Man	For a woman in 1994 (Abou)

• Table 55 – Family law judges nominated in 1990

Court number	Judge's name	Judge's Sex	Changes
81	Perez Catón	Woman	none
82	Martínez Alcorta	Woman	none
83	Mora	Woman	For another woman In 94 (Zabotinsky)
84	Berzosa	woman	none
85	Smuklir	Man	none
86	Carrasco Quintana	Man	none
87	Varela	Woman	none
88	Coda	Man	none

• Table 56 - Judges nominated in 1991

Court number	Judge's name	Judge's Sex	Changes
4	Pestalardo	Man	none
38	Ocampo	Man	For a woman in 1992(Ilundain)
56	Guiraldes	Man	none
76	Sanglorgi	Man	none
77	Mattera	Woman	none
92	Bosio	Woman	none
102	Irigoyen	Man	none
106	Gonzalez Pomez	Woman	For a woman in 1992(Rustan)

The rise in the proportion of women judges within the Family Courts can be accounted for both by the appointment of women to the new courts and by the replacements occurred between 1989 and 2001. Six judges resigned to their posts during the period. Five of them had been replaced by women, and the 6<sup>th</sup> had not been replaced. In table 57 I look at the evolution of the proportion of women among the family law judges in the 12 years following the Family Law Courts' creation in 1989.

• **Table 57 - Evolution in the gender composition of the Family Law Courts between 1989 and 2001**

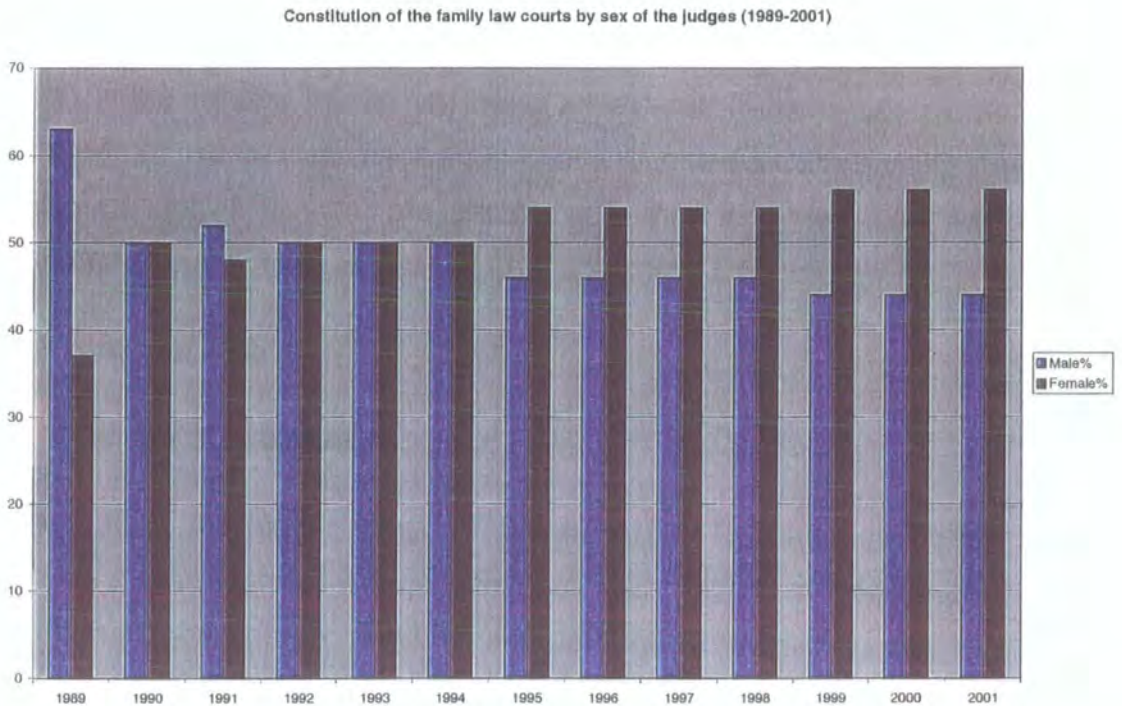
Year	Number of women	Number of men	% of women	Total number of judges
1989	3	5	37	8
1990	8	8	50	16
1991	11	13	48	24
1992	12	12	50	24
1993	12	12	50	24
1994	13	11	54	24
1995	13	11	54	24
1996	13	11	54	24
1997	13	11	54	24
1998	13	10	56	23
1999	13	10	56	23
2000	13	10	56	23
2001	13	10	56	23

• **Table 58 - Constitution of the Family Law Courts by sex of the judge (1989-2001)**

Year	Creation		Changes	Total	
	Courts	Woman %		Courts	Woman %
1989	8	37	-	8	37
1990	8	50	-	16	50
1991	8	48	-	24	48
1992	-	50	2	24	50
1993	-	50	-	24	50
1994	-	50	3	24	54
1995	-	54	-	24	54
1996	-	54	-	24	54
1997	-	54	-	24	54
1998	-	54	1	23	56

1999	-	56	-	23	56
2000	-	56	-	23	56
2001	-	56	-	23	56

- **Table 59: Constitution of the Family Law Courts by sex of the judge 1989-2001 (graph version)**



- **IV - The family law judges of the City of Buenos Aires: their social and academic backgrounds**

### 1 - Introduction

Before starting with the qualitative research into the family law judges of the city of Buenos Aires, it seemed essential to have a description of the judges that comprise the section. Since there is no general central register, the information on the judges was not available. Thus, in order to obtain relevant data, I distributed a questionnaire that included questions regarding their age, civil status, number of children, educational and social background, social and religious affiliation and work trajectories. The

following analysis is based on the answers provided by the judges<sup>9</sup>. In this section I proceed to analyse the responses to the questionnaires, holding sex as the independent variable.

In general terms, the analysis of the responses to the questionnaires shows a considerable uniformity in the constitution of this section of the judiciary: the judges that responded the questionnaires are mainly native of the Buenos Aires area, and are all white and able bodied. All but one (a man judge, whose father had been an almost illiterate manual worker) came from middle class backgrounds and received a Catholic upbringing – although not all of them are practising Catholics, all were or had been married at some point and all but one (a woman) had children.

## **2 - Personal data:**

### **a - Age and civil status**

The age of the judges ranged from 44 to 63. The average age of the judges that responded the questionnaire was 53; the average age of the women judges was 49, while the average age of the men judges was 58. As can be seen from tables 58 and 59, in such a homogeneous context, the sex of the judges seems a strong criterion for differentiation within the section. Thus, in addition to sex, age appeared as a possible discriminating factor to be investigated when relevant. Other remarkable differences between the men and women judges relate to their civil status and to their class origin: while all the men were married, only half of the women were.

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<sup>9</sup> All the judges from the Family Courts were approached, asked to fill in a questionnaire with personal data and invited to sit for an interview of approximately an hour to an hour and a half. Of the 21 Courts that received the questionnaire, fourteen judges (8 women and 6 men) completed the questionnaire. If we consider the number of courts vacant (3 two men and one woman) at the time when the questionnaire was distributed, the questionnaire sample corresponds to 66,6% of the population under study, while twelve judges, (6 men and 6 women) were available for the interview, corresponding to 57,1% of the population under study. Technically speaking this sample cannot be considered representative, because the judges that constitute the sample were not selected at random; still, being such a large proportion of the population in question, it can be expected that it should reflect the population fairly accurately. Unfortunately, it was not possible to compare the data obtained with the data on the judges that did not respond the questionnaire, as the relevant data were not available.

## **b - Social class and parentage**

To a lesser extent, as shown in tables 60 and 61, the social status of the women judges' family of origin also appears as a differentiating factor between men and women family law judges: as has already been mentioned, whereas it is true that their social background is overall middle class, it is also true that women come from families with a slightly higher social standing<sup>10</sup>. It should be remembered that their family of origin was basically and uniformly upper middle class, while the class origin of the men was slightly lower and more traditional in terms of the role played by women in their family of origin. The same seems to apply with respect to the status level of the family of creation of the judges, which appears a little higher<sup>11</sup> for the women judges, with a higher proportion of dual career marriages.

Overall, the men judges, had not had professional working mothers except for one man judge whose mother had a degree in philosophy, but never worked outside the home. Among the mothers of the women judges there was a professional working mother who also happened to be a judge. One could say there are none or very few modern<sup>12</sup> women role models in the families of origin of both men and women judges. This is very important because, belonging to the first generations of women judges, and occupying positions of power and prestige that result from their professional roles, our women judges are breaking certain patterns in relation with their family and social role models.

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<sup>10</sup> Irrespectively of the scale locally used by social scientists to determine the social status of occupations, the occupations of the fathers and mothers of the women judges correspond to a higher position in the scale than the parents of the men judges. The data collected on the number of years of study and the average income and prestige of the occupations of the mothers and fathers provide an idea of their relative status.

<sup>11</sup> Irrespectively of the scale locally used by social scientists to determine the social status of occupations, the occupations of the husbands of the women judges correspond to a higher position in the scale than the wives of the men judges, the data collected on the number of years of study and the average income and prestige of the occupations of the husbands provide a hint of their relative status the number of years of study and the average income and prestige of the occupations are the data collected that provide a hint of their relative status.

<sup>12</sup> The word modern refers to the role of the women in the judges' families of origin where most mothers were housewives, corresponding to the prevailing stereotype of the times.

The number of lawyers both in the family of origin and the family of creation of the women judges is higher among the women judges. There are three lawyers among the fathers of the women judges and one lawyer among their mothers, and there are four lawyers among their spouses or ex spouses, one of them a judge at the Criminal Court. Among the men judges, only one had a lawyer parent, while two had spouses who worked in the judiciary, one as a member of the Upper Civil Court and the other a Court Secretary respectively. According to this data, the tendency to pursue the same education and opting for the same career as their mother or father is higher among the women than among the men judges.

• Table 60 - Women judges' personal data

Average age	Marital status			Average n° of children	Spouse's Occupation			Father's Occupation				Mother's Occupation		
	<u>M</u>	<u>S/D</u>	<u>W</u>		<u>U</u>	<u>P/l</u>	<u>P/nl</u>	<u>U</u>	<u>P/l</u>	<u>P/nl</u>	<u>B</u>	<u>U</u>	<u>H</u>	<u>P/l</u>
49	4	3	1	Between 2 and 3	2	4	2	1	3	2	2	1	6	1

**Marital status:**

M- married

S/D-separated or divorced

W- widow

**Occupations:**

U -Unknown            H - Housewife

P/l -Professional lawyer

P/nl - Professional non lawyer

B - Businessman

• Table 61 - Men judges' personal data

Average age	Marital status	Average n° of children	Spouse's Occupation				Father's Occupation				Mother's Occupation	
			<u>U</u>	<u>P/l</u>	<u>H</u>	<u>T</u>	<u>U</u>	<u>P/nl</u>	<u>B</u>	<u>W</u>	<u>U</u>	<u>H</u>
58	MARRIED 6	3	1	2	1	2	2	1	2	1	2	4

### **3 - Educational background**

#### **a - Primary and secondary education**

Table 62 reveals differences worth noticing about educational backgrounds of men and women judges. While private and religious education prevailed both at the primary and secondary levels for the women judges (50 % and 75% respectively), instead, a very large proportion of the men attended public institutions for their primary and secondary education (95% and 95%, respectively). This points to a better capacity on the part of the families of the women to afford the costs of private education and, from the educational point of view, a stronger religious background. It is nevertheless surprising that some of the women who would later make a non-traditional option such as undertaking higher education and embracing a profession like the judiciary came from such a traditional background. Being part of the first generation of women judges, it would seem that the women with an upper middle class background entered the judiciary first.

#### **b - Higher education**

The tendency reverts when considering attendance to institutions of higher education. The proportion of women who attended private confessional Catholic universities is smaller than the proportion of men who attended private confessional Catholic universities (38.5% and 50% respectively), and smaller than the proportion of women who attended private institutions of primary and secondary education (50% and 75% respectively), and much higher than the percentage of men who attended private and confessional schools of primary and secondary education (5% and 5%, respectively).

The consideration of a previous study on Buenos Aires judges seems illuminating for the ongoing discussion on the judges' educational background despite the time gap existing between the two investigations. The analysis of the comparison of my own findings on attendance to

religious/non-religious educational institutions is interesting. In 1988, at the time Mackinson and Goldstein carried out their research for the whole of the National Courts, only 36% of the judges that participated in my research were already in the judiciary and the Family Law Courts had not yet separated from the Civil Courts. It is well worth noticing that this 36% is invariably composed by men, since none of the women in the Family Law Courts had entered the judiciary at the time. Let us remember that the Family Courts were created in 1989 and were filled mainly with existing civil judges. The comparison can only be made for secondary school attendance and university education, since the authors did not investigate primary school attendance in their own study.

Now, the authors highlight an overall dominant tendency for the whole of the National judges to attend single sex, public, and non-confessional secondary schools (Mackinson and Goldstein, 1988: 29). A striking difference can be observed in terms of religious/non-religious secondary school attendance between the women judges in the Family Law Courts and the whole of the National judges. While, as seen above, the former tended to attend private and confessional secondary schools, the latter followed the general pattern observed by Mackinson and Goldstein in secondary school attendance.

With respect to the university attended by the 106 judges that participated in the Mackinson and Goldstein survey, 89.6% had attended national public non-confessional universities, 0.94% attended a private non-confessional university, while 7.54% went into private confessional universities (Mackinson and Goldstein, 1988: 33). Among the family judges that participated in this study we could observe a higher incidence of private confessional Catholic university attendance (42.6% of the judges in the sample went to private confessional universities and 57.4 went to public non confessional universities; 38.5% of the women judges and 50% for the men attended private confessional universities). It seems that the family law judges' education is more religion oriented than that of the National judges as a whole.

This high incidence of a Catholic university education among the family law judges as compared to the whole of the National judges is a rather interesting finding. One wonders whether the process of nomination of family law judges favours a Catholic education. Given that the family is such a cherished and crucial social institution within the Catholic worldview, another possible explanation could be that a Catholic education might awaken the interest for family issues and hence the judges' choice for the Family Law Courts. In any event, this would seem to be in keeping with the judges' responses with respect to their practice of the Catholic religion as can be seen from table 64 below.

In view of the difficulty to explain the high incidence of a Catholic higher education among the family law judges, I hypothesised that it could have been related to the temporary closing of UBA during the dictatorship. Thus, I investigated the years when the judges pursued their legal studies to see whether they coincided with the years when the UBA was closed. The result was that all the men had finished their studies well or just before the coup d'état that brought about the military regime, and half of them had studied law in a Catholic university. As for the women, 38.5% of the women studied in a Catholic university, from these, only a third pursued their studies of law in coincidence with the military regime, while the remaining 61,5% studied law at UBA -the national public and non-religious University of Buenos Aires-. 60% of them had finished their studies by the time the of the coup and 40% studied law during the dictatorship. My conclusion, then, is that the high incidence of Catholic higher education among the family law judges cannot be accounted for by the closing of UBA during the dictatorship, and therefore, the explanations presented above seem more plausible.

### **c - Postgraduate education**

As can be seen from table 62, I also observed a tendency for a higher level of educational attainment among women judges. In terms of their educational backgrounds, as stems from the analysis of the questionnaires, many of the women had done the postgraduate course in

family law, and one of them had studied sociology, while the men, in general, had only attended some courses and seminars not leading to a particular degree.

This aspect appeared consistently in the responses to the questionnaires. Although during the interviews the women never explicitly declared to have furthered their university studies in order to counterbalance discrimination, but rather explained it as a requirement of the family law subject matter, and to the fact that women are more studious, it may have been an unconscious factor in their decisions. Various possible factors may impinge either separately or concomitantly on the women judge's higher level of educational attainment.

In their 1988 study of the National judiciary<sup>13</sup> of the city of Buenos Aires, Mackinson and Goldstein observed that the number of women largely decreased as one went up in the hierarchy of the judiciary and that, for equal posts, women had higher qualifications. They also performance better than the men judges in terms of marks in their university trajectories. They interpreted this as a certain degree of sex discrimination and hypothesised that women might go into further studies to counterbalance perceived discrimination and respond to the differential demand. The authors reached the conclusion that the typical sexism of the larger society had been transposed into the judiciary. (Mackinson and Goldstein, 1988: 63-71)

Women's higher propensity to continue their education could also be explained by the increasing availability of educational opportunities. As women family law judges are, on the average, younger than their men counterparts, it might be thought that they have had more opportunity to avail themselves of these opportunities. If we consider that women are, on average, 9 years younger than the men, this variation could also be related to the actual increased supply of further education. Nevertheless, although the age difference amounts to nine years, the difference in terms

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<sup>13</sup> From 1988, the Family Law Courts of the City of Buenos Aires have been a section of the National Judiciary

of the average time since graduation is smaller: four years only. Given that the large explosion in terms of the offer of post graduate courses occurred in the 80's, when the women in my study were around 30 and the men around 40, it would seem that the age of the judge could make a difference in terms of the availability of post graduate degrees.

In a previous research I did on the maternal ideal of professional mothers<sup>14</sup>, many of the women explained their tendency to go into postgraduate education as a strategy to keep in touch with the profession while undergoing a period of high domestic demands when they had small children in the house. In other words, this would be a period in which they would find it harder to assume professional responsibilities. However, we cannot be certain about this, as I have not investigated the period of postgraduate study of the judges. One final factor accounting for the different behaviour of men and women judges with respect to postgraduate education could be their class origins. Women's higher social status would facilitate their persistence in higher education, while men's lower social status -the need to work while studying, added to the pressure to earn a living may provide an explanation for their earlier departure from the educational system. Nevertheless, qualitative data discussed in chapters 5 and 6 indicate that many of the women also worked while studying, although they often expressed that they "did not need the money" and worked as a means to acquire some practical tools to mitigate the highly academic nature of university training.

• **Table 62 - Educational attainment, women and men Judges in 2001**

<b>Educational Level</b>	<b>Type of Institution</b>	<b>Women</b>	<b>Men</b>
<b>Primary</b>	<b>Single sex, religious and private</b>	<b>50</b>	<b>5</b>
	<b>Mixed, non confessional and public</b>	<b>50</b>	<b>95</b>
<b>Total</b>		<b>100</b>	<b>100</b>
<b>Secondary</b>	<b>Single sex, religious and private</b>	<b>75</b>	<b>5</b>
	<b>Mixed, non confessional and public</b>	<b>25</b>	<b>95</b>
<b>Total</b>		<b>100</b>	<b>100</b>
<b>University</b>	<b>Private</b>	<b>38,5</b>	<b>50</b>
	<b>Public</b>	<b>62,5</b>	<b>50</b>
<b>Total</b>		<b>100</b>	<b>100</b>
<b>Postgraduate</b>	<b>None</b>	<b>26,5</b>	<b>66,6</b>
	<b>Spare courses</b>	<b>12,8</b>	<b>16,6</b>
	<b>Postgraduate degrees</b>	<b>62,5</b>	<b>16,6</b>
<b>Total</b>		<b>100</b>	<b>100</b>

#### **4- Social and religious affiliation**

Even in the context of a Catholic country like Argentina, with a Catholic population above 80%, it seems striking to observe a Christ image hanging on the wall of most of the judges' offices. In a recent article<sup>15</sup>, an American observer has noticed that the same applied to the public hospitals of the country, in spite of the fact that patients may belong to

<sup>14</sup> B. Kohen: "The maternal ideal of professional mothers: an ideal in transition " M.A. thesis, FLACSO, 1989, Buenos Aires, Argentina.

<sup>15</sup> Pablo David Flores: La iglesia católica en La Argentina. <http://www.angelfire.com/ego/pdf/Index.html>.

other cults. Flores understands that this is probably a residue from colonial times, given the very important role performed by the Catholic church in Spanish colonisation. Although the Catholic church has been increasingly losing influence since colonial times, it has undoubtedly been a very important political actor within Argentine Society, capable of great persuasion over the Argentine State, with a proved ability to interfere in the contents of educational curricula. (José Luis Romero, 1994: 337-338) Actually, until the restoration of democracy and for decades, the Department of Education and the Department of Justice were merged into a single office, the Ministry of Education and Justice.

The homogeneity of the research sample in terms of religion is remarkable. It would be desirable that other faiths be represented in the family judiciary not only on the grounds of democratic representation but also because of the way religious ideas regulate family life. Yet it seems worth noticing that most men judges declare that they are practising Catholics while, in spite of their Catholic upbringing, a considerable amount of the women say they are not. Accordingly, many more men than women judges have a religious image hanging on the wall of their office. This could be related to the women's younger age, a general tendency towards secularisation as times progresses, to their greater acquaintance and allegiance with the ideas coming from the "psy" professions and, presumably, with a different idea of religious tolerance.

It is frequently mentioned that the Catholic church exerts a strong influence on the nomination of the Family Judges, as a means to keep under surveillance certain aspects of the family that it deems important. Although this assertion has acquired the status of common knowledge, it would, of course, be very hard to prove. What can be affirmed is that, because of lack of transparency and objective criteria, the old system for the nomination of judges (applying to all the judges in this section) may allow for such pressures.

Luis Alberto Romero, a prominent Argentine historian, recalls the strong opposition of the conservative sectors of the Catholic church when the laws

of divorce and the "patria potestad" were passed in 1987. The promulgation of these laws meant the culmination of the project of modernisation of Argentine society, where family relations were lagging behind the recent western trends. He discusses how the church, apart from attempting to exert pressure over the government and the legislature through the usual methods, mobilised its adherents, driving the students from the Catholic universities out into the streets of Buenos Aires to protest against the "evils" brought about by democracy- drug use, terrorism, abortion and pornography, The demonstration marched along behind a student holding an image of the Virgin Mary (José Luis Romero, 1994: 337).

It also seems noticeable that, in spite of their family commitments, as can be seen from table 63, the women tend to participate in community associations more than the men do. This may be suggestive of a stronger community orientation among women.

• **Table 63-Social and religious affiliation of men and women judges**

<b>Affiliation</b>	<b>Responses</b>	<b>Women</b>	<b>Men</b>
<b>Religion</b>	<b>Declared to practise the Catholic religion</b>	62,5%	83,3%
	<b>Declared not to profess any religion in spite of the fact of having been educated as Catholics</b>	37,5%	0%
	<b>- Declared to belong to the Catholic religion but not being a practising Catholic</b>	0%	16,7%
	<b>Total</b>	100%	100%
	<b>Presence of a religious image in office</b>	33,4%	83,3%
<b>Membership of professional associations</b>	<b>Association of Magistrates</b>	100 %	100 %
	<b>Association of Women Judges</b>	62,5 %	0 %
<b>Membership of community associations</b>		50%	25%

## **5 - The trajectories and motives for becoming judges:**

### **a - The judges' career trajectories**

In the previous section, the judges in the Family Law Courts were described in relation with their personal data, civil status, social origins, educational backgrounds, religious and social affiliations, with special attention on how these data related to their sex. In this section, I compare the trajectories of men and women judges and their motives for choosing the family section within the judiciary.

Data on the trajectories of the judges were obtained through written responses to the questionnaires and appear in table 64. Testimonies from the interviews were used to complete the information obtained in the questionnaires. A question about why they had become family law judges was asked early in the interview and a question asking what attracted women to the judiciary and to the Family Law Courts, in particular, was posed in addition.

The average time as judges for the men is almost twice as long as that for the women, twenty and eleven years, respectively. Although the women in the sample are considerably younger than the men (nine years younger), the difference in terms of the time since graduation is shorter (26 years for the women and 30 years for the men).

• **Table 64: Career data of men and women judges**

<b>Career data</b>		<b>Women</b>	<b>Men</b>
<b>Average time since graduation</b>		26 years	30 years
<b>Average time as judges</b>		11 years	20 years
<b>Work history:</b>	<b>Went straight into the judicial career</b>	50%	50%
	<b>Worked as lawyers both as solo practitioners and in law firms before going into the judiciary</b>	50%	50%
<b>Teaching:</b>	<b>University teaching</b>	87,5%	100%
	<b>Does not teach</b>	13,5%	0
<b>Career continuity:</b>	<b>Declared to have had continuous careers</b>	75%	100%
	<b>Stopped working altogether because of motherhood</b>	25%	

**i- Women judges**

Of the 6 women family law judges interviewed 3 went straight into the judiciary, where they developed a career that started from the very bottom of the hierarchy of the courts as junior court employees and went through every step of the court hierarchy until they were appointed to the judicial post. The remaining 3 worked as lawyers before going into the judiciary, Of those, 2 went into the judiciary after a practice of at least 20 years as family lawyers and the third, after working briefly as a lawyer in private practice, initiated a career in the judiciary as a public defender before she became a judge.

Regarding their motives for becoming judges, two of the women entered the judiciary for fortuitous reasons (family ties within the judiciary that facilitated entry; difficulty to initiate private practice for fortuitous reasons). Four women judges said that their decision to enter the judiciary had been inspired by a strong interest in and vocation for the judiciary and/or the family specialisation, half of them invoked a strong vocation for the judiciary from the time they were students and the other half a strong interest in the family section arising from their practice as family lawyers.

On the other hand, although only 25% admitted having stopped work for some time because of motherhood, one can clearly see the impact of domestic commitments in the women judge's careers. As I explored the issue further during the interviews, it became clear that, in spite of the fact that 75% of the women judges declared that they had continuous careers they had actually introduced changes in their career paths as a consequence of motherhood. The lack of acknowledgment of the impact of their maternal responsibilities in their career paces reveals itself in their claim to have had continuous careers when in fact they had not. One can see that, to them, to have a continuous career meant not to have stopped work altogether. This attitude appears to me, as a defence against discrimination: the women judges just did not want to appear any different from the men judges<sup>16</sup>. It is nevertheless striking how domestic duties become invisible even in the discourse of very clever women.

## **ii - Men judges**

Four of the men judges went straight into the judiciary, where they developed a career, starting from the very bottom of the hierarchy of the courts until they were appointed to a judicial post while the other third (2) worked very briefly as lawyers and, soon thereafter, initiated a career in the judiciary.

In terms of their motives for becoming judges, three of the men judges opted for the judiciary because they did not like to work as lawyers. Of the

remaining three, two judges expressed a strong interest and vocation for the judiciary from the time they were students, and the third decided to stay on when offered a post as a judge after having gone through the whole ladder of the court hierarchy although, as a student, he had thought of working as a private lawyer.

### **III - The judicial career in the Family Law Courts**

As Mackinson and Goldstein have affirmed, if nomination is a political act, no general pattern can be observed. What to many is the beginning of a professional career, for others is the culmination of a bureaucratic career that responds to more organisational parameters. (Mackinson and Goldstein, 1988: 78). Apart from the fact that the law requires 5 years since the time of graduation to be nominated as a judge, the data on the trajectories show that both men and women judges have developed academic careers by teaching at universities, and arrived at the judiciary with a considerable degree of work experience, legal knowledge and familiarity with the work of a court. Their experience comes either from having worked in a court as clerks early on in their legal studies (as students) and having gone through part or the whole work ladder of the court bureaucracy, or from having worked as independent lawyers for many years before becoming a judge. As a matter of fact, two of the women judges went straight into the judicial post and both of them had worked as family lawyers between 20 and 25 years, while the rest, both men and women, were nominated judges after having developed a career within the judiciary, and/or worked briefly as lawyers before entering the judiciary. In terms of their educational backgrounds many of the women had done the Postgraduate Course in Family Law, one of them had studied sociology, while the men in general had only pursued some specialisation courses that did not lead to a particular academic degree. Moreover, women judges frequently refer to the added benefit brought about by the incorporation of studies in interdisciplinary human fields such as sociology, psychology and anthropology to their legal backgrounds. In

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<sup>16</sup> See Chapter 6, section III-2a on the judges' awareness of gender discrimination within the judiciary.

their view knowledge of these disciplines dramatically enriched their perspective in legal matters. This appeared a real asset for family law judges.

#### **b - Men and women judges' motivations**

If we add up the number of women who had made a consistent choice to become judges early on when they were students and those who chose to become family judges out of a strong interest stemming from their activity as family lawyers, we get a high proportion –two thirds of the women- with a strong motivation to become family law judges. The proportion of the men judges in the same category is only one third, which is half of the proportion for women.

Moreover, these highly vocational men and women did not only refer to their strong vocation and determination, they also defined their work as an “apostleship”, a “mission”, a service. With respect to the motivation to start a career within the Law, they expressed an altruistic orientation and a desire to do justice already observed by other researchers among women family law lawyers (Maher, 2003: 37 and 41) and women trainee judges (de Grout, 2003: 345 and 349).

As can be appreciated from the judges' testimonies, the satisfaction that comes from performing a service to the community hardly outweighs the hardships of the job, caused by emotional stress, the tremendous work overload and other problems basically related to the lack of technical and material resources. An example of this can be seen from the following quotes belonging to three women judges:

“I always wanted to become a judge and never even thought of working as a lawyer, so when there were openings in the civil section and then in the specialised Family Law Courts I consistently applied...My drive came from my passion, my love for justice...” wj

“ I prepared myself from the very beginning and with strong determination to become a judge ...never minded the obstacles, that's the way I am, when I am determined to do something, nothing will stop me. I went through all the work scale of the judiciary; everything was good enough for me, I was never choosy, because I understood that was the path I had to take ...To me, the power I have as a judge is at the disposal of the people...I see my work as a means to preserve the human rights of those involved in legal conflicts.” wj

"I always understood my work as a mission always, as a defender of the poor, of those who did not have a voice or legal representation. Now as a judge, as well as when I was a counsellor to minors, that was the orientation I gave to my career." wj

At the same time, while two of the men judges expressed a similar degree of vocation and commitment, a high proportion of the men judges only chose to become judges after discarding working as private lawyers, which they discovered they did not like. The two following quotes belong to the two men judges who expressed a great vocation and enthusiasm for the judiciary. Coincidentally, these two men judges were the youngest among the men judges interviewed and those who had never practised as private lawyers:

"It is the agenda of the family courts that attracted me, its human content, the possibility of acting with a spirit of reconciliation. This is particularly interesting when there are children involved, you have to aim towards a satisfactory solution for both the parents and the children, taking the particular circumstances of the case into account. I always work with the familial imperative in mind." mj

"Since I was a teenager I have wanted to become a judge. What I liked best was the fact of being able to help people to decide when they could not manage on their own. I always saw myself as someone involved with an activity having to do with service...always in relation to the church and to justice...That early and prolonged experience on social justice with the church led me to think that it was through the exercise of the power of a judge that one could most extraordinarily offer a service of justice. It seemed to me it was the maximum power one could aspire to in order to be able to do justice. Of course, one could do justice in different ways and realms. I have always believed that the best robe was that of the judge, and this explains my permanent power and vocation to become a judge...I never considered another section. That was my vocation. The idea of helping people out in their everyday problems was very attractive to me. And the family, it seems to me that the family holds the great secret of the evolution of a society: the future of a society is the future of the family. It's all very connected. To me, family matters are more important than patrimonial matters and that is why I oriented myself in that direction." mj

Furthermore, an interesting point is raised by both a woman and a man judge as they explain their preference for the judiciary rather than for the private practice of law: they point to the judges' possibility to pursue justice, as opposed to the private lawyer's requirement to promote the interest of the clients:

"My drive came from my passion, my love for justice, from the possibility to have an aseptic, uncontaminated practice of the profession. As a judge you can go for what is just, fulfil this desire for justice, whereas when you are a lawyer you are guided by the interest of your client." wj

"The judiciary allows you to arrive at settlements, to pull the persons away from extreme positions, while this is very difficult to obtain from the lawyer's role, because the lawyer is too involved in the problems of the party he represents." mj

Instead, the following comments from men judges show how they decided to become judges after having realised that they did not like the private practice of law:

"With great sacrifice I had opened my own office, and realised that I did not like the profession so much. I presented my curriculum vitae at various courts and sections and was very lucky, I was offered a position within the judiciary. My wish then was to become an administrative judge, but I was offered a position at a civil court." mj

"I only thought of becoming a judge once I had experienced that I did not like the private practice and preferred the judiciary...it has to do with your personality. Private practice meant that I had to do a lot of public relations; you need certain qualities that I lacked, such as a certain commercial orientation. It did not fit my personality. So, I thought I'd rather go into the justice system aiming at the judiciary, I'd rather solve cases in court." my

These findings need to be considered both in relation with the judges' social backgrounds and with the traditionally prescribed social roles of men and women within the family. The fact that, unlike men's, women's salaries are often not the main source of the family income, added to their relatively higher social status of origin, might explain the reason why they approach choices related to work in a more expressive manner, as they can afford to be more vocationally oriented. On the other hand, because men come from a lower social status group and because they are under the pressure of being the breadwinners, they seem to make choices with a more instrumental orientation.

In addition, there is a general belief that, because of their traditional social roles within the family and their larger involvement with it, women tend to prefer family matters and to understand their work roles in a more "missionary" and altruistic fashion, consistent with an "ethic of care". As a matter of fact, the two men judges that understand their work in terms of service are both very much involved with Catholic groups with a strong community orientation, also consistent with the "ethic of care" described by Carol Gilligan.

#### IV - Conclusion

I started this chapter by reviewing research on women judges and difference and situated my own enquiry within the diverse body of existing research. I then moved on to describe the judges in the Family Law Courts in relation with their personal data, civil status, social origins, educational backgrounds, religious and social affiliations, with special attention on how these data related to their sex.

In general terms, the analysis of the questionnaires shows a considerable uniformity in the constitution of this section of the judiciary: the judges that responded the questionnaires are all white, able bodied, all but one (a man) came from middle class backgrounds, received a Catholic upbringing – although not all of them were practising Catholics. All were or had been married at some point and, and all but one (a woman) had children. Their age varied between 44 and 63, the average age of the judges that responded the questionnaire is 53 and  $\frac{1}{2}$ , the average age of the women judges is 49, while the average age of the men judges is 58. In such a homogeneous context, the sex of the judges seems a strong criterion for differentiation within the section. Their age could also be a discriminating factor to be investigated.

Nevertheless, amidst this uniform tendency, I was able to identify certain differences with respect to the personal characteristics of men and women judges, the more striking ones being their age -women judges are on average nine years younger than men judges-; their civil status -whereas all the men are married, only half of the women are; the social status of their family of origin -that of the women judges is slightly higher, basically and uniformly upper middle class, while the class origin of the men is slightly lower and more traditional-; the social status of the family of creation -which appears a little higher and more modern for the women judges- with a higher proportion of dual career marriages.

In terms of their feminine role models, it can be asserted that there are none or very few modern women role models in the families of origin of

both men and women judges. There are no professional working mothers among the men judges, and there is one lawyer among the mothers of the women judges. This is very important because, as they belong to the first generations of women judges, as pioneers who occupy positions of power and prestige stemming from their professional roles, our women judges are breaking certain patterns in relation with their family and social role models.

As to educational data and career trajectories, the most interesting findings that emerged from the analysis pointed to women's considerably higher level of educational attainment, to men's longer seniority in the judicial post, and to men's career continuity and women's career discontinuity due to motherhood.

As to religious and social affiliation, women and men judges differ with respect to their practice of the Catholic religion: the men seem to practice the Catholic religion and have a religious image hanging on the wall of their offices more often than the women. In spite of their domestic demands, women tend to participate more than men in community associations.

Their career trajectories, their motivations to become family judges were also explored in this section. Apart from differing in their career continuity, the men, in general, answered that they had continuous careers and that their family responsibilities did not affect their work because their wives were in charge of the home and children. No other important variations in the trajectories of the judges were found that could be accounted to their gender.

Instead, there are gender differences with respect to their motivations to become family judges. Although highly vocational judges were found both among the men and the women, the proportion with a strong vocational orientation is higher among the women, who also expressed to understand their work in a "missionary" fashion more often than the men.

In spite of a reality that very often contradicts the prevailing stereotype<sup>17</sup>, women's more vocational, expressive choices and men's more instrumental ones can be explained by the persistence of the traditional division of labour inside the family.

Overall therefore I found that the family law judges are a relatively homogeneous group, where the sex of the judges can be considered a strong criterion for differentiation within the section. I also discovered that the women judges in the study belong to a first generation of women occupying important positions in the public sphere and that they have a tendency to attain higher educational levels than the men. Because of their child caring roles, women's careers tended to be more discontinuous than those of the men judges. In addition, women frequently claimed a strong vocation and appear as better disposed to think of their work in a missionary fashion.

In this chapter the Family Section of the Judiciary of the City of Buenos Aires was described in terms of the characteristics of the men and women judges that comprise it. The last section in the chapter on the judges' career trajectories and motivations denoted a certain transition in that it involved the analysis of material of a more qualitative nature. In the next chapter, decidedly qualitative, I will be moving into the comparative analysis of the representations of men and women family judges on their own activity.

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<sup>17</sup> See forthcoming section on the recent evolution of the family in the Greater Buenos Aires area.

## **Chapter 5 – Representations of the Family Law Judges of the City of Buenos Aires I: Motivations, Professional Identity and Values.**

### **I - Introduction**

In chapter 4 I described the men and women judges belonging to the Family Law Section of the Judiciary of the City of Buenos Aires on the basis of their personal data. Overall I found that the family law judges are a relatively homogeneous group, where the sex of the judges can be considered a strong criterion for differentiation within the section. I also discovered that the women judges in the study belonged to a first generation of women occupying important positions in the public sphere and that they had a tendency to attain higher educational levels than the men. Because of their child caring roles, women's careers tended to be more discontinuous than those of the men judges. In addition, women frequently claimed a strong vocation and appear as more inclined to think of their work in a missionary fashion.

Following on from the above analysis, this chapter considers aspects of the professional identities of family law judges included in this study. I first investigate the judges' professional values through the analysis of their "ideal" family law judge. I then examine their experience of the power and responsibility associated with their role. At every stage, I look for gender differences and similarities among men and women judges.

### **II - The "ideal" family law judge**

#### **1 - Introduction**

As Toharia (1975: 102-103) explains, three distinct aspects of the judge's role can be described. There is first the prescribed institutional role that comprises the set of norms regulating the role of the judge. There is, on the other hand, a distinct yet related aspect that corresponds to the way the judges actually perform their role. Although these two facets of the

judge's role may differ in some ways, there is generally a considerable degree of overlapping between them. A third aspect can be additionally distinguished, the "ideal" role, which refers to the qualities which, according to those who inhabit the judge's role, ought to be present in a judge. This last component reflects the representations of actual judges' on the "perfect" or "ideal" judge and, as such, its contents are subjective and, therefore, variable. It reveals the judges' basic professional values and priorities. The exploration of the judges' ideals and the consideration of their responses in association with the gender of the respondent facilitate the enquiry into any possible gender differences in men and women judges' conceptions of the ideal judge

In this section I investigate how men and women judges within the family law section conceive of the "ideal" family law judge. As a first step I pinpoint the qualities men and women attribute to the "ideal" family law judge and then proceed to an analysis of these qualities. The analysis will be centred on the qualities, abilities and capacities men and women judges value in an "ideal" family law judge<sup>1</sup>.

The next section records the items that appear on the list of qualities required by men and women judges from the "ideal" family judge. I then go on to consider the meanings judges accord to the most relevant capacities they attribute to the ideal judge. Although my analysis will make it clear that these qualities frequently appear to be interconnected, I will make an effort to treat them separately or, at least to organise them by categories. Eventually, I will come back to the qualities and to the way they come to bear on the judges' daily work.

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<sup>1</sup> An open question about the attributes of the "ideal" family law judge was included in the interview with the family law judges that participated in this study. The responses were analysed by means of a technique called "content analysis". The qualities appearing in the answers of the judges were listed and categorised in terms of affinity, which means that different words used to express the same type of quality and the qualities that were related were put in the same category. These categories were classified according to the sex of the respondent and then organised in accordance with the frequency with which they appeared in the judges' discourse. Once the final lists of qualities by sex was ready, the analysis of differences and similarities was carried out.

## 2 - The qualities attributed to the "ideal" family judge

### a-Women judges

According to the women judges interviewed, the most important qualities of the "ideal" family law judge are being ready to act timely and quickly; being humane, empathic, humble, culturally sensitive and able to understand the different cultural codes of the families that come to court. Women judges also stress real vocation, personal involvement and care for the people involved in legal conflicts, and lack of prejudice and ability to keep an open mind, on the other. The "ideal" judge should be capable to read between lines, that is to say that he/she should be able to understand beyond what the people who come before the court are actually saying and must conceive the judiciary as a public service. Women judges also emphasise the need for the family law judge to be knowledgeable, particularly of the different disciplines related to the family subject matter. The "ideal" family law judge should be familiar with and keep updated in psychology, anthropology and sociology, must be aware of the importance of immediacy and nurture proximity and close contact with the litigants. Women also point to moral characteristics such as honesty, fairness and earnestness.

Among the secondary characteristics mentioned by the women judges are qualities such as knowledge of the law, common sense, life experience, emotional stability, the capacity to organise the Court's work properly in order to make it productive for the court to run smoothly, and the ability to work in connection with different social institutions<sup>2</sup>.

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<sup>2</sup> It is interesting to note that these characteristics match the catalogue of feminine qualities constructed by Schultz on the basis of a study of the women in the Hesse judiciary in Germany. Schultz constructed her catalogue on the basis of four categories: "emotional climate", "cooperativeness", "non authoritarian style", and "less set on competition". Each of these categories contains a set of qualities, which very much coincide with the qualities mentioned by the women judges in my study (Schultz, 2003: 313-314).

## **b - Men judges**

To men judges, the most valued qualities of the "ideal" judge relate by far to having or preserving a moderate, calm, sensible and controlled spirit, knowledge of the law, a capacity for objectivity, neutrality, equidistance and equanimity. With a similar emphasis, men refer to morally oriented behaviour -qualities such as being principled, humble, honest and morally sound-, and keeping an open mind, remaining free of prejudice and sensitive to the context

The secondary qualities associated by men judges to the "ideal" judge are the power of synthesis, practicality, and a capacity for empathy, sensitivity, humanity, and immediacy<sup>3</sup> (immediate responsiveness).

## **c - The analysis of men and women judges' ideals**

In this section I explore the characteristics men and women judges value in the "ideal" family judge. I start by looking into the similarities and differences between men and women judges' ideals and then move on to consider the meanings accorded by judges to the different attributes they highlight.

The analysis of the responses of men and women judges reveals that, with a different emphasis, a large number of qualities often appear in the discourse of both men and women judges. Other desired abilities were, however, found in the responses of the judges that clearly differentiate the men and the women judges' ideal. I am referring to the desired features stressed by the men and not mentioned by the women, and vice-versa.

In spite of slight differences, the responses of men and women judges show considerable agreement on certain required characteristics of an "ideal" family law judge. With varying degrees, qualities such as empathy, immediacy, sensitivity to the context, humility, lack of prejudice, honesty,

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<sup>3</sup> The judges interviewed understand immediacy as a complex capacity defined in terms of the judges' proximity and availability to the litigants and as the readiness to act quickly when required.

and knowledge often appear in the discourse of both men and women judges.

The qualities that differentiate the ideals of women and men judges are objectivity, equanimity, equidistance, composure, thoughtfulness, moderation, and control; in fact these are the qualities especially stressed by men judges. The need for the judge to be well acquainted with interdisciplinary knowledge, to view his /her work as a public service, and the ability to work with other institutions as the required characteristics of an "ideal" family judge are the qualities emphasised by the women judges. When put into practice, the qualities mentioned only by the men judges are consistent with an individual work style, while the abilities mentioned only by women judges call for the deployment of a more collective work style.

Also, as I compared the model of the family law judge for women judges with that of men judges, I realised that the list of required qualities was longer among the women. Additionally, a strong reference to altruism and to responsibility towards others, together with an emphasis on the need to be timely, act quickly and think of the judiciary as a public service were present in their ideal. The ideal of women judges appears as more demanding and stressful than that of men. Women's double role, together with their more recent acquaintance with the profession, with its consequent lack of confidence contributes to make this ideal even tougher on women judges. Thus, one woman judge expresses this as follows:

"I am terribly exacting in terms of the qualities required from a good family judge, to tell the truth, I would not know where I stand compared with my own ideal." wj

The following table summarises the information given above. The attributes mentioned by both men and women judges are shown in blue, those mentioned only by women judges are highlighted in red, while the qualities mentioned only by men judges appear in green. The graphic expression of the results of this aspect of the research facilitates the perception of the considerable overlapping between the ideals of men and

women judges as well as the priorities accorded by men and women judges to the qualities attributed to the “ideal” judge.

• **Table 65 - The qualities of the ideal family law judge according to men and women judges**

	<b>The most valued attributes</b>	<b>The secondary attributes</b>
<b>M E N</b>	Moderation, composure, a controlled spirit; objectivity, neutrality, equidistance and equanimity; sensibility; knowledge of the law; earnestness, humility honesty sensitivity to the context; being principled, being morally sound, keeping an open mind, remaining free of prejudice.	Power of synthesis, practicality; empathy, ability to listen, sensitivity, humanity; immediacy.
<b>W O M E N</b>	Humanity; empathy; immediacy proximity and close contact with the litigants and readiness to act timely and quickly; being culturally sensitive, being able to understand the different cultural codes of the families that come to court; lack of prejudice, ability to keep an open mind; capacity to read between lines; real vocation, personal involvement, care for the people involved in legal conflicts; conception of the judgeship as a public service; knowledge, particularly of the different disciplines related to the family subject matter, being updated in psychology, anthropology and sociology;.	Knowledge of the law; common sense, life experience, emotional stability; capacity to organise the Court's work properly in order to make it productive and for the court to run smoothly, ability to work in connection with different social institutions.

**i-Knowledge**

I start by dealing with knowledge because it is a universal professional requirement for a judge. It is interesting to observe that, in their discourse, men and women judges tend to lay emphasis on different kinds of knowledge.

While men judges tend to stress knowledge of the law, women judges, without denying this requirement, insist on the additional need for the family law judge to be well acquainted and keep updated with interdisciplinary knowledge related to the family subject matter. Along those lines, women judges explain that, owing to the complexity of the family subject matter, the "ideal" family law judge should be knowledgeable of different human sciences to be able to work across discipline boundaries in collaboration with other professionals.

Since knowledge of the law is a universal prerequisite to become a judge, and one of the essential elements of the judge's role, it seems to me that it need not be discussed in this context<sup>4</sup>. The situation is different with respect to women judges' strong tendency to highlight interdisciplinary knowledge as a fundamental requirement for an "ideal" family law judge. Let us remember that until 1988 family law cases had been subsumed under the general Civil Law Courts. The creation of the Family Law Courts recognised the specificity of family law and, hence, the realisation that family law cases involved the need to draw on additional tools that, in a way, transcend the boundaries of the law, understood in a strict sense. In any event, this tendency on the part of women judges is a rather striking finding of my research and one that is ubiquitous in the interviews with women judges. At this point I would like to present some very preliminary explanations for such a tendency, to which I will return in the next chapter as I consider the possible impact of the increasing number of women in the judiciary.

The biographies, trajectories and educational backgrounds of men and women judges could partly account for this tendency. The analysis of the questionnaires shows that the women are on average nine years younger than the men judges of the Family Law section; in addition to this, they have been judges for a period of eleven years, while the men have been judges for an average period of twenty years and graduated in law four

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<sup>4</sup> The same applies to aspects like honesty and moral competence; qualities stressed both by men and women judges.

years earlier than the average woman judge. Another relevant divergence in the trajectories of men and women judges lies in the fact that, differently from men's, the curricula of the women judges demonstrate a propensity to pursue post graduate education. The age difference between men and women judges might be a factor partly explaining the latter propensity, given that the boom in the supply of postgraduate courses in the Law Schools started in the 1980's, a time in life when women, being around 29 on average, might have been more inclined than their male counterparts (around 39) to go into post graduate education.

This certainly must have given the women more exposure to the kind of interdisciplinary knowledge that they consider essential for an "ideal" family law judge. As a matter of fact, many of the women have completed the Postgraduate Course in Family Law at UBA, which has a very strong interdisciplinary orientation, and quite a few among them teach family law and/or have gone into research in the field. The mentioned Postgraduate Course in Family Law at UBA seems to have made a powerful impact on their conception of what family law is about, in the manner of a strong interdisciplinary orientation.

On the other hand, both the analysis of the questionnaires and of the trajectories of the women judges show that through their involvement with professional work they are actually part of a generation of women who are breaking with traditional models, both within the family and in relation to women's public roles. In this context, since women are newcomers to the profession, and given the masculine language of the law, it would not seem far-fetched to imagine that this transitional phase may be characterised by a certain lack of self-confidence in the exercise of the profession. Thus, the possibility to lean on a consistent body of knowledge for the exercise of their professional tasks might partly provide the security and assurance they might be lacking. I shall now move on to consider other attributes present in the ideal of the family law judge according to both the men and women judges in this study.

## **II-Empathy, connection, immediacy and a contextual approach**

As was seen in chapter one<sup>5</sup>, in an attempt to apply Gilligan's approach to the legal field, Menkel-Meadow (1985, 1989, 1995) speculated on the possibility that the entry of a considerable number of women to the legal profession might make a difference to the legal system by infusing an "ethic of care" to their professional tasks as opposed to the "ethic of justice" prevailing within the legal system and more frequently associated with men. The basic argument, grounded on Gilligan's approach, was that women might bring with them certain tendencies towards care, connection, responsibility, altruism and sensitivity to needs, assumed as more typical of women. These features might, in turn, result in a different exercise of the legal professions. This different approach to the legal profession would bear an emphasis on relationship rather than on rules, with less confrontational styles of conflict resolution and a contextual approach to decision-making.

In this section I intend to relate the above speculations to my findings with respect to the qualities of the "ideal" family law judge according to the men and women judges in the study. Many of the qualities attributed to the "ideal" family law judge recall the qualities Gilligan and Menkel-Meadow have associated with the deployment of the "ethic of care" within the legal field; namely, empathy, immediacy and a contextual approach (Gilligan, 1982; Menkel-Meadow, 1985, 1989 and 1995)<sup>6</sup>.

With a different emphasis, both the women and the men judges in this study value empathy (understood as the capacity to stand in the shoes of the people that come to court), immediacy (understood as close contact with the clients of the system, availability to the litigants and readiness to act quickly when required), sensitivity to the context and a contextual approach (understood as the attempt to get acquainted with the

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<sup>5</sup> See chapter 1, section III-1b

particularities of each case) as important qualities of the "ideal" family judge. In the next paragraphs I analyse how judges understand this related set of capacities as factors that may facilitate their understanding of the cases before them. Additionally, especially the women also mentioned real vocation, personal involvement and care for the people involved in legal conflicts.

As the following quotes reveal, empathy is understood as the judges' ability to empathise and sympathise with the situation the litigant is going through and also to understand his/her cultural code and value system. Family law judges acknowledge that, very often, judges and litigants are acculturated in different communities of meaning; and hence the need for the judge to be able to listen with attention and be culturally sensitive. Sensitivity to the context appeared frequently in the discourse of the judges as a quality going hand in hand with empathy. The judges, men and women, justify their importance in the assertion that each case is unique. Thus, it is essential for the judge to understand the context of the conflicts he has to act and decide upon. Open mindedness and lack of prejudice also appear in the judges' testimonies as part of the capacities to be deployed for a full understanding of the people that come to court.

"You need to understand that the person who comes here is probably undergoing one of the hardest periods in his/her life. It is essential to be able to imagine how this person is feeling at each stage. This is very important."  
mj

"Each family has its code...We need to understand these codes better, because of the large immigration we are receiving. A Bolivian family does not behave like an Argentine family." wj

As stems from the testimonies of the judges, they understand empathy as a capacity that can be developed and is achieved through personal effort on the part of the judges. In this following quote, a woman judge adds a new aspect to the understanding of empathy. She not only speaks of her effort to get into the litigants' shoes in order to understand his/her worldvision, but also mentions the importance of humility, tolerance, respect for difference and for the litigant's autonomy, and her preference

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<sup>6</sup> See chapter 1, section III-2b

for a solution that takes into consideration the specificities of each case and the cultural aspects involved:

"I try hard, though, to understand the values present in each family, especially when those values are different from my own. I think that, especially in those cases, you need to be particularly respectful. I encounter to find their own solutions, in coincidence with their own value systems. I strongly believe that we should not impose our own. As a judge, this requires from you a thorough work with your own self ..."wj

In the previous section I considered the emphasis women judges lay on interdisciplinary knowledge. Women judges declare they draw on interdisciplinary knowledge in order to achieve a thorough understanding of the situation they have before them. Thus, in the women judges' conception, interdisciplinary knowledge is at the service of empathy. This reminds me of Fox Keller's (1985: 116-117) conception of "dynamic objectivity". In her study on scientific knowledge as a basis for judgement, Fox Keller opposes a strict notion of objectivity in which the knower is absolutely removed and detached from the object that she calls "static objectivity", to a different conception of objectivity that she calls "dynamic objectivity", in which the knower is included as a subject, and makes use of subjective experience, as she puts it, "in the interest of a more effective objectivity". She states:

" I define objectivity as the pursuit of a maximally authentic, and hence maximally reliable understanding of the world around one-self...Dynamic objectivity aims at a form of knowledge that grants to the world around us its independent integrity, but does so in a way that remains cognizant of, indeed relies on our connectivity to that world. In this, dynamic objectivity is not unlike empathy, a form of knowledge of other persons that draws explicitly on the commonality of feelings and experience in order to enrich one's understanding of another in his or her own right. By contrast, I call static objectivity the pursuit of knowledge that begins with the severance of subject from object, rather than aiming at the disentanglement of one from the other. For both static and dynamic objectivity, the ambition remains the same, but the starting assumptions one makes about the nature of the pursuit bear critically on the outcome. (Fox Keller, 1985: 116-117)

Fox Keller's conceptual framework borrows from Schachtel the notion of "allocentric", other-centred perception, which requires a complete focusing on the object, so that it is perceived in "the fullest possible way" and "wants to affirm others in their total and unique being". (Fox Keller, 1985: 119) Along similar lines, American feminist philosopher, Benhabib also advocates an approach that views the other, the object as a concrete,

incardinated subject which she calls the "concrete other", as the precondition for a full appraisal of the other. To the women judges in this study, interdisciplinary knowledge constitutes a tool that contributes to reach a better assessment of the litigants as "concrete others" (Benhabib and Cornell, 1990: 120-149).

### iii - The interplay of empathy and objectivity

In chapter one<sup>7</sup> I mentioned how, at a conceptual level, Karst (1988: 1966-1967) refers to the interaction of empathy and objectivity. Karst speaks of the judge's double capacity for empathy and principled detachment as "essential elements of the successful practice of the judicial art" (Karst, 1988: 1966 -1967). Within the framework of a multiracial, multiethnic nation like the United States, with a constitutional ideal of tolerance for difference, far from seeing empathy and impartiality as opposites, he conceives of them as complementary. He defines empathy as the readiness to be engaged in the experience of others, as the judge's capacity to approach all parties' contending positions with equal regard, while he conceives of objectivity and impartiality not as "devotion to some self-applying mechanism that eliminates judgement from judging", but rather as "an effort to decide from an independent standpoint, as opposed to the point of view of one of the parties". He writes:

"The same empathy that permits the judge to imagine that party's experiences and thoughts and feelings also underlies his or her capacity for principled detachment, that is the only kind of objectivity we can properly expect" (Karst, 1988: 1966-1967).

A similar idea is set forth by Cain when considering neutrality and disengagement as aspirations for American judges. Cain presumes that what is meant is not that judges should act like robots, with no particular point of view, or that they should separate from their life experiences during the entire process of judging. To her, judges may identify with the people and listen with connection to people's stories, without prejudging,

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<sup>7</sup> See chapter 1, section III-2bii.

before they engage in the necessary separation that judging involves (Cain, 1988: 1946).

The conceptual framework outlined above integrates elements from the "ethic of justice" and from the "ethic of care". This is very useful for the analysis of the intersections of empathy and objectivity in the discourse of the men judges in this study. As can be seen from the following quote, this man judge seems to take women's presumed capacity for empathy for granted and to value it especially:

"If, as I mentioned previously, one of the basic virtues of a family judge is to be able to listen and to understand what people who come to court are going through, then, we are very lucky today to be able to share this task with women". mj

Instead, in the following quote, a man judge asserts the value of empathy. He expresses some concern regarding women's capacity to keep the necessary distance decision-making requires. He is suspicious of women's capacity for objectivity and reveals a sense in which objectivity is somehow seen as a masculine capacity:

"Economic crisis and migration have had a serious effect on the family. The judge, coming from an upper middle class background, needs to make a special effort in order to understand very different cultural codes, like those of the immigrants who believe that child battering or child abuse are normal behaviour. Empathy is important to know what is going on, but then you should be able to come back to an objective position. Not everyone can do that, particularly women." mj

The latter quote points to the need to consider the interplay between empathy and objectivity as requirements of the "ideal" judge that are present in the testimonies of men judges. As has been mentioned earlier, men judges emphasise the family law judge's need to be objective, to preserve equanimity and equidistance. No woman judge included objectivity among the main qualities of the "ideal" family law judge. Only one woman judge mentioned objectivity in her discourse. She thought of objectivity as distance and as a fundamental part of the judicial role. In that sense, this particular woman judge situates herself apart from most women judges who, unlike her, mainly valued connection and proximity as essential elements of the family law judges' role.

Those are the qualities that differentiate the men's conception of the "ideal" judge from the women's. In addition, men tend to associate objectivity with other features of the "ideal" judge such as composure, thoughtfulness, moderation, sensibility and control. Acquaintance with interdisciplinary knowledge may lead to a relativist standpoint that challenges notions such as neutrality and objectivity. This might explain why women judges hardly mention such attributes when they specify the "ideal" qualities of a family law judge.

The men judges in the study include characteristics such as sense, moderation, thoughtfulness, equidistance, neutrality, equanimity and objectivity. These qualities, related to the image of the judge as "the wise old" man are the paramount qualities traditionally assigned to law and its practitioners. The law has, in fact, evolved as a masculine discipline, with a strong emphasis on rationality, objectivity and distance, understood as emotional neutrality. Men's stronger identification with traditional beliefs in relation with the role of the judge can be explained in terms of their historical involvement with the law in general, and with the role of the judge, in particular.

A parallel can be drawn between these features emphasised by the men judges in this study and the "ethic of justice". Qualities such as neutrality and objectivity, traditionally associated to individuality and autonomy, evoke an individual style of professional exercise that coincides with the liberal ideal (Sherry, 1988; West, 1988; Benhabib, 1992; Jones, 1987 and 1993; Okin, 1992; Naffine, 1990; Sevenhuijsen, 1996).

In the context of the interviews the men judges define objectivity in two main ways. Objectivity is referred to alternately as the capacity to keep detached and avoid getting too involved emotionally, in agreement with a positivistic vision of objectivity and as the capacity not to impose one's own ideal or image of the family and being open to diverse family forms, more in consonance with an interpretation of objectivity similar to that of Fox Keller's, mentioned in the previous section.

At the beginning of this section I quoted a man judge who clearly distinguished between empathy and objectivity and defined objectivity as the capacity to take a certain distance from the litigants. Implied in his testimony there was a sense of objectivity as a rather masculine feature:

"Empathy is important to be able to know what is going on, but then you should be able to come back to an objective position. Not everyone can do that, particularly women." mj

Still, in the next passage another male judge seems to define objectivity as empathy and sensibility to the context:

"In the family section more than in any other section, personal ideology plays a very important role as do other factors such as your education and your life experiences. There is a lot that is subjective, that has to do with one's personality or with the attitude you take towards family problems. There are those judges who share a common philosophy and can take an objective standpoint, who can learn to listen and to observe, and who try to learn how to understand the people they are attempting to help. There are others with a different attitude and a different idea about the way one should work in a family law court. I would not know whether this is good or bad, the fact is that there is a wide disparity of criteria within family law judges." mj

At first sight, the mention of objectivity and neutrality alongside with empathy, immediacy and a contextual approach as necessary and central characteristics of the ideal family law judge seems to involve a contradiction. It raises the issue of whether imposing distance might preclude the possibility of contextually apprehending, understanding and capturing, in their full complexity, the legal conflicts the judges have before them.

However, applying Karst's conceptual analysis to the understanding of this apparent contradiction in the context of the general discourse of men judges, I have come to a conclusion. When men value simultaneously, ideal qualities -such as empathy, immediacy and a contextual approach on the one hand, and objectivity, equidistance and equanimity on the other- rather than seeking to establish a distance with respect to litigants, they are actually emphasising impartiality, understood as the capacity not to take sides with the parties involved in family conflicts. Thus, they speak of a certain distance, small enough to enable them to get a clear picture of what the case is about but, at the same time, large enough to avoid excessive emotional involvement. This speaks of different stages in the

process of adjudication. Such stages, in turn, require deploying different abilities and attitudes in accordance with the needs of the moment in the process. It also reflects the judges' constant struggle to situate themselves in a point of equilibrium between distance and proximity with respect to the litigants so as to respond to the requirements at each stage. It would then seem that there is an initial stage when proximity facilitates the judge's appraisal of the details of the case and a later stage, in which distance permits the judge to take a stance that helps him/her to remain equidistant with respect to the parties involved in the legal conflict he/she has to decide upon.

#### **iv - Conceptions of justice: contextual thinking**

As mentioned before, according to Gilligan and Menkel-Meadow, one of the consequences of the application of the "ethic of care" to the legal field would be the deployment of a logic based more on context than on rule concerns. This section considers the impact of contextual thinking in the daily practice of the activity of judging, particularly with respect to the extent to which family law judges are constrained by the letter of the law.

In fact, judges mention contextual thinking among the qualities of the "ideal" judge and, in their discourse, they relate contextual thinking to the aspiration to make fair decisions. Accordingly, it seemed interesting to explore the representations of the judges with respect to the interplay of contextual thinking and the application of the law. During the interview, I asked the judges whether they had ever experienced a situation in which they felt that the application of the law did not lead them to the just solution, and, if so, how they had dealt with such a dilemma.

Only three out of the twelve judges,-two women and one man- answered that if they faced such a dilemma, provided that no legal way out was found, they would have no other option but to apply the law, and as one man judge said:

"...hope for the Upper Chamber to find a solution better than my own." mj.

The rest of the men and women judges explained that the way they usually worked was first to become familiar with the facts of the cases and, from there, try reach a fair solution. Only then would they move into looking for the law that gave this solution legal support. In addition, most of them expressed that with the incorporation of the International Human Rights Treaties in the Constitutional Reform<sup>8</sup>, the law had become very comprehensive and so they thought it virtually impossible not to find legal support for a just decision. The following two quotes exemplify the dominant responses of the judges:

"Often what is legal is not just. Anyway I can always resort to prioritising justice or to making what is just look legal." wj

"It is a dilemma that occurs rather frequently. Still, I believe that that is where the task of the judge lies, in dictating a resolution in accordance to the needs of the case: To put it in an exaggerated manner, 'with or without the law'. Articles 15 and 16 of the Civil Code establish that a civil judge must never evade judgement because of the obscurity of the law. A civil judge is forced to find a solution. I was nominated to do justice, to make just decisions. If by applying the statute I am unjust, then I am not doing justice; thus, I'd rather not apply the norm. I must not endanger the real spirit of the law by applying a statute too strictly. I somehow have to find the just solution; the possibility is always there. The law is one of the most inexact sciences, because each professional has his/her own interpretation, according to the authors one reads, etc. There are at least five different libraries. All this makes the law very imprecise and somehow exempts us from the responsibility that an exact science would impose; namely, that two plus two makes four. In law two plus two may make five or one, or even six, so I plunge into the pool and judge with equity and if the parts do not like it, they can always appeal and the Upper Court will decide whether to revoke or dictate a different resolution. What attracted me most from the judicial office was this faculty to apply the law according to a general conception that involves legal, sociological, philosophical and cultural insights." mj

According to the testimonies of the judges, personal interpretation of the law plays a very important role in decisions. This means that there is a lot of room for discretion in the activity of the judges. Thus, the theoretical description of the judge's role within a civil law country<sup>9</sup> does not portray the actual power he/she enjoys. In that context, who the judges are becomes an extremely important issue.

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<sup>8</sup> Art.75, Inciso 22 Constitución Nacional, 1994

<sup>9</sup> As seen in chapter 3, section II.2

There are no significant differences in the responses of men and women judges with respect to this issue, they both accord great significance to the special characteristics of each case and agree on the importance of the interpretation of the law. These findings are essential mainly because they dispute one of the strong tenets of the civil legal system, namely that the judges are "the mouth of the law", civil servants that merely apply the law to concrete cases<sup>10</sup>. Applying the law to concrete cases would, in Gilligan's language amount to applying the "ethic of justice" approach; that is applying a hierarchy of abstract principles and opting for the most valued legal principle to solve the cases. My findings show, however, that this is not the case with the Buenos Aires family law judges that participated in this study. As stems from this research, rather than merely apply the statute, they tend to give pre-eminence to substantive fairness and to the concrete circumstances of each case. Thus, the approach to decision making for both men and women judges seems to be more in tune with Gilligan's "ethic of care".

#### v - Conclusion

This section explored the characteristics men and women judges value in the "ideal" family law judge. The responses of the men and women judges were compared to find that a large number of qualities appeared with a different emphasis in both the responses of women and men judges. Empathy, immediacy, sensitivity to the context, humility, lack of prejudice, honesty and knowledge of the law often appear in the discourse of both men and women judges. Other abilities were found, however, that clearly differentiate men and women judges' ideals. Among those, I am referring to objectivity, equanimity, equidistance, composure, thoughtfulness, moderation, and control as the qualities stressed by men judges, and to the need for the judge to be well acquainted with interdisciplinary knowledge and to view his/her work as a public service as the required characteristics of an "ideal" family judge according to women judges. Those differentiating qualities were associated with a tendency towards a

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<sup>10</sup> As was seen in chapter 3, section II.2.

more individual work style among men judges and a tendency to a more collective work style among women judges.

From the analysis of the differences and similarities in the responses of men and women judges I concluded that the ideal of the women appeared to be more demanding than that of the men. I suggested that the difficulty of living up to such a tough ideal could partly explain the more acute sense of discomfort manifested by the women judges with the power and responsibility associated with their role that will be considered in the next section.

• **II - Power and responsibility as a burden:  
representations of the family law judges on their own  
power**

**1- Introduction**

This section aims at understanding how men and women judges experience the power and responsibility associated with their roles. Quite early in the interviews, the judges were asked a question regarding the way they experienced the power and responsibility associated with the judicial role. Whenever they suggested that they experienced it as a burden, I asked them how they coped with it. Accordingly, this section does not only explore the way the judges experience this power and responsibility, but also the strategies they employ in order to mitigate any perceived hardships. Responses to other questions in the interviews that made reference to the issue under discussion were also used for the analysis of this section, particularly one question in which I asked the judges to volunteer a judgement or refer me to a published judgement<sup>11</sup>.

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<sup>11</sup> At the end of the interview I asked the judges whether they would agree to volunteer a judgement that they found particularly interesting in the context of my research. One of the reasons for asking the judges to volunteer a judgment, instead of finding it myself has to do with the fact that family law judicial files are confidential. Accordingly, only the parties and their lawyers are entitled to read them. There is, on the other hand, the procedure for publication of judgements in Argentina. First instance judgements are not usually published, both because, not being final, they are usually appealed and because most legal actions in the family law field are not of particular academic

## 2 - Perceptions on power

### a - Against arrogance:

In a recent book on the Argentinean judicial power, Felipe Fucito argues that one of the findings of his research on Argentinean judges was their arrogance, to which he reacts by arguing that "the judge is not a god on Earth" (Fucito, 2002: 68). Bothelho Junqueira observed a similar propensity in her own study of Brazilian judges (Bothelho Junqueira, 1997: 27-31).

Contrary to their findings, I observed a tendency to demystify the power of the judge among both women and the men judges in my study. As was seen in the previous section, the reactions of the judges interviewed are in accordance with the fact that they consider humility as a paramount quality of the "ideal" family law judge. Their expressions seem to go more in the direction of criticising the arrogance of power that is characteristic of the traditional Argentine judge rather than towards the denial of the power they actually wield since, actually, their discourse shows that they are quite aware of it.

In the next quote, a man judge explains the two distinct attitudes with respect to arrogance that can, in his opinion, be found among the family law judges:

"...I would say that one of the aspects around which the judges divide is basically the attitude the judge must adopt or assume towards the case and towards the family. Two groups can be clearly distinguished around the issue: those who think that the judge must maintain this huge distance, like between the powerful and the powerless, and those in favour that the family judge enter the family transitorily in order to inject the law where it is missing and then leave. This is the big difference between the traditional judge, -one who arbitrates- and the modern judge, -one who manages. That is where the main difference lies." mj

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interest and so, law journals rarely publish them. Accordingly, law journals only publish and comment judgements from the family law judiciary that are of particular interest, that is, when they are especially innovative and/or refer to fundamental rights. In that case, the judge or the lawyers in the case send it to the law journals to be published and commented on. Thirdly, the choice of this research strategy aimed at obtaining the judgments chosen by the judges themselves, which might reveal some of their priorities and interests.

In the following quotes, a man and a woman judge present their own perspective on their role, taking sides with those judges tending towards humility:

" There is a wide variety of styles within the family law judges in terms of the way authority is exercised. There are some like myself, for whom it is very important to realise that we judges are not the finger of God and to understand our own limitations. There are things we are just incapable of solving. My own style is trying to accept my own limitations, while at the same time making the effort to overcome them." mj

"My own ideology has to do with the belief that we work as judges, we are not judges. The judiciary is a job like others, but with some special characteristics. It is a service and, most of all, what I repeat now and again is that we pay a service to the community and we are not over or above others. Insofar as you adopt this position and understand that one is not a judge but one works as a judge, it becomes clear that one is not entitled to judge anyone anywhere at any time. One is only entitled to judge within one's jurisdiction." wj

Various reasons could be raised to explain their attitude against arrogance, as opposed to Fucito's findings. There is, in the first place, the objective fact that they are all first instance judges that belong to a section of the judiciary that is not regarded among the most prestigious. In the second place, the specificity of the family subject matter that, as the judges explain, requires immediacy, proximity and humility with respect to the litigants, could provide an explanation of such a modest approach. On the other hand, since humility is much valued within the Catholic tradition, the prevailing Catholic orientation of the judges within the Family Law section could also be a factor calling for humility on their part. As was explained in a previous chapter<sup>12</sup>, all the judges in the family law section that participated in this study were selected by means of the old system of judicial appointment. This very archaic system did allow for external pressures in the process of selection of the judges. Given that the family terrain is very dear to both the Catholic Church and the Catholic tradition of the Argentine State, there circulates an urban myth with respect to the strong influence of the church in the appointment of the family law judges. However, given the lack of transparency of the system, it is impossible to

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<sup>12</sup> See chapter 3, section II.3 for information on the system of appointment of judges in Argentina.

prove such an assertion. Some of the data collected in this study<sup>13</sup> give a clear indication of this. I am referring to the fact that most judges emphatically declared professing and practising the Catholic religion, that most of them also had a Christ figure hanging on the wall of their office right behind their desk. Likewise, many of them had had a Catholic upbringing and had attended Catholic educational institutions at the primary and secondary levels and had studied law in Catholic universities.

#### **b - Power as endurance**

Conscious of the impact their decisions can have on the lives of people involved in legal conflicts, both men and women judges tend to experience the responsibility and the power they wield as a burden. As can be appreciated in the various testimonies below, the reason for this uneasiness relates to the uniqueness of the Family Law Courts in that, differently from other courts, they deal with deep human suffering, which implies the stress of emotional involvement on the part of the family law judge, particularly because children are often involved. In the following testimonies, the judges simultaneously express their awareness of the great amount of power they wield as family law judges and the ways in which they experience the burden of adjudication in such a sensitive field. The judges are conscious of the fact that, although the higher tribunal can revise the decisions of the first instance, the effects of their actions and judgements are very often extremely difficult to reverse. This makes them feel extremely responsible for the consequences of their actions, which becomes a tremendous source of stress<sup>14</sup>:

“Well, I must say that the responsibility worries me a lot, sometimes I just cannot sleep because, in actual fact, the power one wields as a judge is great. As a family law judge you could ruin many people's lives. May be this

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<sup>13</sup> See chapter 4, section II for an analysis of the educational and religious background of the judges that participated in this study.

<sup>14</sup> As seen in chapter 1, section III-2cii Resnick (1988: 1926) recommends judges to connect with the painful aspect of their professional roles, “to recognise the pain and the burden of judgment” and to “speak of judgement as a terrible and terrifying job”, in order to be able to generate renewed forms of conflict resolution.

is true for all judges, but of course, in the family section there are many children involved." wj

"It's a job where you worry a lot. One needs to be very careful when it comes to making decisions. The family law judge is very powerful and this implies a great responsibility because mistakes can have very important consequences, like when you exclude a member of the household because he is violent or when you decide to give a child for adoption, etc..." mj

"In situations when you really have power it is tough and it is very often lonely. But, in fact, the power is relative because the Upper Chamber frequently revises judges' decisions... On the other hand, as a family law judge one has a lot of power in terms of the decisions one can make, the measures one is entitled to take (restraining orders) in limit or emergency situations, like when the judge has to decide whether to exclude a violent husband from the family home, or when you have to evaluate the risk of abuse a child is running and when you have to make a decision on whether to put a child in an institution, or commit somebody to a psychiatric clinic. All these decisions can make real differences to the lives of the people involved in family legal conflicts and then, if you make a wrong move, it's really difficult to undo the harm." wj

Moreover, proximity with respect to the litigants and the need to act quickly when faced with emergencies appear as factors that leave the family law judge vulnerable to pressure and strain:

"Because of the proximity with the clients, family law judges are subject to a much stronger pressure... Since decisions so frequently seem to be so very urgent, family law judges endure a lot of stress." .wj

In fact, only one of the men judges and one of the women judges declared to feel completely comfortable with the power they wield. As can be seen in the next quote, the thought of pursuing "a job like any other job", although possibly unrealistic, helps a woman judge to feel comfortable with her role:

"I think of the judiciary as a job, a job like any other job. I was never interested in the power aspect of the judge. I think of the judiciary as a job whose characteristic is making decisions that affect other people's lives and I feel comfortable with that role; I sleep well at night." wj

In the case of the following quote by a man judge, establishing a "healthy distance" seems to be the antidote against excessive emotional involvement:

"I am happy being a family law judge in spite of the fact that the job presupposes a strong emotional involvement. I feel well and sleep well at night because I make a point of establishing a healthy distance, because if you become too involved, then you do not sleep well at night." mj

What becomes clear from both quotes is that, whereas judges feel comfortable with the power they wield, they need to resort to some kind of strategy or internal negotiation to achieve a sense of comfort.

#### **i - Gendered authority: women's stronger sense of discomfort**

In fact, as discussed above, most family law judges experience their high level of responsibility as a strong burden. In that sense, women seem to go one step further: they speak of suffering, of endurance. Although two of the men judges also talked about health problems derived from the stress of the job (abdominal pain-sleeping problems), the men's expressions with respect to the way they feel about the power they wield reflect that they cope better with this aspect. In the following quotes, women judges describe how overwhelmed and disturbed they feel by the power and responsibility of the job:

"Power is something that one endures rather than something one enjoys" wj

"To me, responsibility is a burden that makes power unpleasant" wj

"I came to a point where I found domestic violence hearings so stressful that I decided to delegate them to my secretary, at least for some time. I spoke with experts from other parts of the world and they told me that job rotation is common practice in family courts because the grief is so impregnating." wj

"The job is so stressful because most of the time the resolutions a family judge must take in cases of domestic violence or person's protection cases, for instance require immediate action. This is very stressful, if you add all the external pressures, power is far from rewarding..." wj

"I always say that when we achieve a success it is the team that has succeeded ...but when we fail the failure is a failure of the judge; as a judge you are very exposed to criticism." wj

The strength and frequency of the women judges' own comments relative to the discomfort they feel about power and responsibility is striking. They mention health-related symptoms such as problems with sleep and the need to resort to personal therapy. Many of the women judges referred to this need to resort to psychotherapy as a means to cope with the excessive burden of responsibility, while none of the men did. Women's larger involvement with the domestic sphere and their greater responsibility for the welfare of their own families, added to the need to

juggle domestic and work responsibilities<sup>15</sup>, may be a factor explaining this sense of being overburdened. On the other hand, these differences in the tolerance to the stress of power and responsibility and its expression may be suggestive of a greater tendency to empathy on the part of the women judges. The fact that they identify more with the parties involved in legal conflicts leaves them more exposed to the stress involved in their work.

Other intervening factors must be considered, such as men's longer familiarity with power, which implies a different sense of authority: men not only are seen as more authoritative than women, but also feel more legitimated to exert power. As newcomers to positions of authority, women do not feel entitled to exert their authority and this may become a cause for anxiety. In the case of women family law judges that participated in this study, women's perceptions with respect to their own authority seem to reflect the societal tendency.

Women's relationship with power has been a recurring theme within feminist literature. In the context of feminist theory, women's powerlessness has been seen as deriving from the public/private divide, from women's central participation in the private realm, and related to the hierarchical relationship existing between the public and private spheres. Early gender socialisation in the home and the school, added to the ambiguous and often contradictory feminine role models circulating in society and in the media -women simultaneously appearing as the "angels of the house" and the modern, assertive professionals- contribute to promote conflict and confusion with regard to women's gendered identities and expectations in relation to power.

Women's increased participation in the public sphere in positions of authority led Jones (1987) to the study of women's relationship with authority, emphasising the entitlement aspect of the exercise of power. To analyse the relation of women with authority, Jones proceeded to

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<sup>15</sup> This point is further developed in chapter 6, section II-1.

deconstruct the concept of authority. Her conclusion was that, in Western industrial societies, authority is gendered and that women are seen as less authoritative than men. To her, this comes as a consequence of the disjunction of authority and compassion in traditional political theory. This dichotomy contributes to the identification of men with authority, to women's segregation from authority, and to the association of women with compassion<sup>16</sup> (Jones, 1987: 152-168).

Apart from the stronger discomfort appearing in the narratives of the women judges, there were other hints indicating that the men and women judges in the study related to authority in different ways. Towards the end of the interview, I asked the judges if they wished to complete their testimony by volunteering one of their judgements they thought of special interest<sup>17</sup>.

To my surprise, the responses of the men and women judges to my request were markedly different: while many of the men were willing and prepared to offer a judgement; in contrast, none of the women did. The women judges justified their behaviour by saying that first instance judgements are rarely published and that, additionally, they were not very important in the context of the family law judiciary<sup>18</sup>. To the women, the most important part of their task is the work they carry out with the family group with the purpose to generate the conditions that will enable the family to reach certain agreements. Then, once the agreements have been reached, what they do is just to homologate these agreements in their judgements.

Along the same lines, a man judge also expressed that "there is no stronger law than the law of the family", by which he meant that the judge's

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<sup>16</sup>On this type of process, see the commentary of Olsen's work in chapter 1, section II-2c.

<sup>17</sup> See note 12

<sup>18</sup> The local procedure for the publication of judgements (see note 12) determines that the chances of having a judgement published in a law journal is directly related to the judges' social connections with the law journals. Research on women in the legal profession in other jurisdictions has consistently found that, when compared to men, women lack social capital (Schultz, 2003: xlv) and thus, it is more likely that men get their judgements published.

power to impose an external solution upon a family conflict is useless if the family is not prepared to enforce it. In order to avoid the symbolic violence involved in such an imposition, many family law judges tend to promote the parties' empowerment in the attainment of solutions agreed upon, rather than force a ruling that, in the long run, the parties might not have the willingness or the capacity to sustain.

The reasons women judges gave for their refusal seem credible for they accounted for their refusal in ways that were consistent with their other responses. This discourse suggests a different conception of power, in which the power of the judge becomes the power to empower others: namely, the parties involved in the legal conflict. Still, it is rather striking that the men were prepared to hand over a judgement while the women were not. I found it surprising that some of the men judges that were prepared to give me a judgement had also mentioned the importance of the hearings as a mechanism to promote agreements between the parties involved in family conflicts. If the judgement constitutes the judges' most authoritative piece of writing, the women's refusal to volunteer a judgement requires an explanation and an interpretation. In my view, men and women judges' different reactions to my request are also suggestive of certain insecurity and of a different representation of their authority. Women judges' refusal reinforces the idea that they have difficulties accepting that they are legitimated to exert their power.

The above discussion can be related to Berns's analysis of the phrase "woman judge" which, in her view, expresses a contradiction since "woman" suggests powerlessness while judge implies "authority". In her reflections on the woman judge, Berns expresses concern about women's powerlessness. The situation just narrated with respect to women judges' reaction to my request echoes in Bern's words. Considering that both judgement and the law necessarily imply some kind of force, she considers how it is possible for a woman to speak the law:

"...that a negation can speak at all. Some might say that she cannot speak and speak the law, that to speak a law that denies her voice, that insists that

her speech is, ultimately, not just impossible but somewhat not law"(Berns, 1999: 1).

Berns also asks how it is possible for a woman to speak a law that is alien to her: "...how there we speak it without becoming spoken by it and losing our own voices, such as they are" while at the same time "...her judgement cannot be other than her own, cannot be remitted to someone else..."(Berns, 1999: 2).

Apart from the two instances already mentioned, other examples revealing women's difficulties with the authority side of their role were identified in the discourse of the judges. In fact, at various points in the interviews, both men and women judges depict situations that reveal the idea that authority is gendered. Thus, the narratives of the judges reflect the women judges' difficulties to exert their authority and the tendency of both the men judges and the litigants to view women as less authoritative. For instance, in the next quote a man judge expresses his opinion that, regardless of his/her sex, and independently of the reactions it may raise, a judge has no choice but to exert authority:

"It may be that you create certain impressions on others that may have a gender origin. But I do not think that this kind of thing should impress you at all ...May be a masculine authority generates more compliance among the people that come to court. Still, when you have to exert authority, it is the same for men and women. May be women find it harder, but when you have to exert authority, there is just no way to avoid it." mj

In the following quote, another man judge asserts the gender dimension of authority and claims that, as a man, he has more tools at his disposal:

"Even though a woman has the power that comes with the judicial post, there are some cases that require the presence of a masculine authority. For instance, in domestic violence cases there is a strategy I very rarely resort to, consisting in dismissing everyone in the office and staying alone with the violent man to talk to him, "man to man", in a strong and masculine language." mj

Along similar lines, a woman judge gives two examples of strategies she has developed when problems related with authority arise during a hearing. The judge gives two examples: she tells of how sometimes she puts on an act with her secretary in which she leaves the room temporarily and then, when she comes back, the secretary says in a solemn voice:

"Everyone stand up, your Honour the Judge is entering the room". The second example refers to a different strategy she deploys when a violent husband looks as if he is going to get out of hand. The woman judge explained that she gets the Court Secretary, a man, to lead the hearing.

## ii - Coping with the discomfort

As to the way judges deal with the stressful aspects of the power and responsibility associated to the judge's role, women judges mention that their personal therapy helps them to deal with these feelings. For example, a woman judge said, "therapy helps me to deal with this anxiety and to be able to make decisions". One of the judges also mentioned sharing his worries with his wife and leaning on her for emotional support.

When asked how they coped with this problem, many of the judges, men and women alike, also say that, because of the multiplicity and diversity of perspectives present in the interdisciplinary team, being able to share the "loneliness of the moment of decision" with the interdisciplinary team eases the burden of responsibility in decision making. Thus, two men judges state:

"Responsibility is heavy and, although the ultimate decision lies with the judge, it helps a lot to be able to discuss the case with the interdisciplinary team." mj

"I tend to counterbalance this heavy burden by seeing dear friends, talking and sharing activities with them and sharing the loneliness of decisions with my interdisciplinary team. The fact of having discussed the case with people whose perspectives are different -because they have different professional backgrounds and belong to different genders- eases the weight of loneliness at the time of decision making, bringing in calmness and assurance" mj.

One of the factors that, according to the judges seems to ease the malaise and renders the stress of the job more tolerable is the thought that they are performing a service to the community, especially for the women who have been socialised in a way that tends to promote a vocation for service. The following quotes show how, as has already been seen in the section dealing with the trajectories and motivations of the

judges, women judges tend to understand the judiciary as a public service, in a "missionary" manner:

"This is a public service, whose aim is to preserve the human rights of the citizens. The power of the judge is at the disposal of the needs of the people involved in legal conflicts." wj

"The judgeship is a job like others, but with some special characteristics. It is a service and, most of all, what I repeat now and again is that we pay a service to the community." wj

"If you regard your work as a public service then you need to have a very great commitment ...you have to stay there until the problem is solved." wj

### **3 - Conclusion**

This section focused on an analysis of the representations of women and men judges on the power and responsibility associated with their professional roles. Both women and men judges are very conscious of the important consequences their decisions might have for the future lives of the people involved in legal conflicts and, consequently, they insist on the very careful attention these decisions require. Although both show great commitment to that aspect of their job, women appear to be more overwhelmed by the power and responsibility implied in their position, and their testimonies reveal problems to acknowledge their own authority.

### **V- General conclusion**

Chapter 5 examined aspects of the judges' representations relating to their professional identities. It referred to their conception of the ideal family law judge and to the way judges experience the power and responsibility associated to their roles.

The conceptions of men and women judges on the "ideal" family law judge were considered next. It was found that although there was a considerable overlap in terms of the qualities attributed by men and women judges to the "ideal" family law judge, there were differences in emphasis as well as in the mention of attributes that clearly differentiated men and women judges' ideals. Qualities such as empathy, immediacy, sensitivity to the

context, humility, lack of prejudice, honesty, and knowledge of the law often appear in the discourse of both men and women judges. Among the abilities that clearly differentiated the men and the women judges' ideal, were objectivity, equanimity, equidistance, calmness, thoughtfulness, moderation, and control as the qualities stressed by the men judges, while women lay emphasis on the need for the judge to be well acquainted with interdisciplinary knowledge and to view his/her work as a public service. These different abilities highlighted by men and women judges were associated with a tendency towards a more individual work style among men judges and a tendency to a more collective work style among women judges.

As the ideal of the women appears to be more demanding than that of the men, I suggest that the difficulty to live up to such a demanding ideal could partly explain the more acute sense of discomfort with the power and responsibility associated to their role and their professed difficulties to exert authority, as manifested by the women judges.

As was explained in chapter 1, following Gilligan's model of two different moral orientations associated with gender, Menkel-Meadow speculated on the possibility that once the number of women in the legal profession became significant, differences might emerge on the moral orientation of men's and women's professional attitudes. Her hypothesis was that while men would approach their work by means of an ethic of justice, women would deploy an "ethic of care" (Gilligan, 1982; Menkel-Meadow, 1989 and 1995). Now, when I relate my findings in this chapter to the above speculations<sup>19</sup>, I cannot come to a definite conclusion. As a matter of fact, while some of the results of my work with the family law judges seem to substantiate the cultural feminist thesis, others do not.

It is to be noted, that the men in the sample stress on objectivity, neutrality and equidistance while the women emphasise vocation, care and personal involvement. Women also conceive their professional activity as a service

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<sup>19</sup> See chapter 1, section II-3 and section III.

to the community and experience the power they wield as a strong responsibility. All of this would seem to support the cultural feminist thesis. However, the fact that men as well as women value empathy, immediacy and a contextual approach as qualities of an "ideal" family judge would indicate that the men judges seem to embrace certain qualities that a "Gilliganesque" analysis would find more characteristic of the "women's voice" and the "ethic of care". This questions Gilligan's assertion with respect to the prevalence of either the "ethic of care" or the "ethic of justice" in the majority of the cases.

The nature of the family subject matter could provide a possible explanation of my findings around the embrace by both men and women judges of certain characteristics related to the "ethic of care" along with the coexistence of both logics. It might be the case that involvement with families fosters a particular type of approach connected to the "ethic of care" (Flanagan and Jackson, 1993: 71-73). Religion could also be considered a factor explaining the judge's adoption of an "ethic of care" approach. Smart has suggested that in some ways, the different women's voice might have already penetrated the judicial discourse (Smart, 1989: 74).

A very interesting finding related to men and women judges' tendency towards contextual thinking that revealed itself in the way they reach their decisions in the solution of the cases, that is, by finding what they deem as the just solution first and then look for the law that gives this solution legal support. This points to the high level of discretion involved in the judges' decisions.

The content of the next chapter will provide more evidence to throw light upon the discussion of these first research findings. In the next chapter, the axis of the analysis moves away from aspects closely related to the judge's professional identities, so as to examine the judge's perceptions and opinions on the effects of more structural trends such as the emergence of large numbers of women into the administration of justice. It also explores the judge's awareness of discrimination and ends by

exploring their opinions regarding the difference women judges could make to the legal system.

## **Part II, chapter 6. – Representations of the Family Law Judges of the City of Buenos Aires II: Difference, Discrimination and Gender**

### **• I - Introduction**

In chapter 5 I analysed my findings about the professional identities of family law judges. Notwithstanding some differences of emphasis, considerable agreement was found with respect to the characteristics attributed to the “ideal” family law judge by the men and women judges. While the men tended to value an individual work style more, the women seemed to prefer to work collectively with other professionals. Both men and women family law judges highly valued empathy, immediacy<sup>1</sup>, knowledge and honesty among other characteristics of the ideal family law judge; while the men prioritised objectivity, equanimity, composure and thoughtfulness. Being well acquainted with interdisciplinary knowledge and understanding the judge's work as a public service appeared as the attributes that differentiated the women's ideal of the family law judge from the men's. Additionally, the women appeared to feel less comfortable with the power and responsibility associated with the judge's role. This was due to the fact that the women's ideal seemed more demanding.

In this chapter I analyse how the judges interpret more structural trends such as the large entry of large numbers of women into family law and the Family Law Courts; the judges' awareness of gender difference and discrimination, and their views on the difference women judges make or might make to the family law judiciary.

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<sup>1</sup> Note that the judges understand immediacy as immediate responsiveness

- II - Perceptions of men and women judges in relation to the large number of women in the Family Law judiciary.

## 1 - Introduction

My analysis of the participation of women in the legal professions and in the judiciary in Argentina<sup>2</sup> showed the existence of sexual segregation and sexual segmentation within the justice system. The large entry of women into the judiciary is concentrated mainly at the first instance level in the Civil, Family and Labour Courts. Women are located more often at the bottom of the judicial pyramid; the sections of the judiciary that host more women are those held by the judges in this study as the less prestigious, because the cases dealt with by these courts involve small amounts of money and have little political impact. As can be seen from international research studies on the legal profession, this situation mirrors the situation of women jurists in many jurisdictions (Schultz, 2003: xlvii). However, more women are being gradually appointed at the second instance courts and the Supreme Courts of the provinces, but there are still no women at the Supreme Court of the Nation.

During the interviews with the men and women judges, I shared with them my findings with respect to women's participation within the legal professions, with particular emphasis on the family law field and the family law judiciary. I then asked them for their comments and views on this information and any analysis thereof that they could offer. Given that women's family responsibilities emerged from the judges' responses as a significant factor explaining the high proportion of women in the Family Law Courts. For the analysis of this section, I bring in other material from the questionnaires and the interviews touching on the issue. I am referring particularly to a questionnaire item asking the judges whether they had a continuous career and an interview question asking them how they managed to juggle professional and family responsibilities.

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<sup>2</sup> As seen in chapter 3, section III

## 2 - Reasons for the large number of women in family law and in the family law judiciary:

### a - The explanations

As a rule, no significant differences were found in the responses of the men and women judges with respect to the reasons for the large proportion of women working in family law and in the family law judiciary. The judges mentioned various reasons to explain the large numbers of women in the field of family law and the high proportion of women in the Family Law judiciary. I shall refer to cultural arguments first and then move on to consider the more structural type of argument put forward by the judges.

#### i - Cultural arguments: ability and preference

Some men and women judges believe that women are culturally more prepared to choose the family law speciality. They think that women in general like family law best, and that because of their presumed patience, special sensitivity and larger involvement with family life seem to be better equipped to deal with family matters and work as family lawyers or family law judges. As Thornton puts it:

"The correlation between women and family law reflects the public/private dichotomy, and the gender segmentation that has developed in legal practice, paralleling the gender segmentation that characterises paid work generally. Family law, like raising children, is understood to be based on experiences and practices with which everyone (particularly women) are thought to be familiar rather than on acquired technocratic knowledge (Thornton, 1996: 279)

The following quote from a man judge illustrates this point:

"In the past the men were reluctant to accept this invasion of women to the judgeship. Even the judicial post, as it comes with the share of power you were referring to before, was considered more appropriate for a man, because of the personality structures of men and women. I will use the criminal section as an example; a woman was not well accepted as a criminal judge... the fact that she would deal with criminals, rapists... There are quite a few women criminal lawyers and judges but it was not well accepted. Some time ago it was thought that being a woman was not compatible with the post of instruction judge or criminal judge. The fact that

she would need to show up in a police station at three o'clock in the morning, or in a prison to talk with the criminals ... This would give rise to rather comic situations, especially if she was young or pretty. A man was not at risk, even if he was young or unexperienced. The family section, yes, that was considered appropriate for a woman, that was the ideal!" mj

However, for the women judges in this study, being a family law judge requires specialised training, and they point to the fact that women seem to dedicate more time to further training than men as an explanation for the large proportion of women among the family law judges. This is consistent with the analysis of the questionnaires in chapter 4, which showed a much greater level of specialised educational achievement among the women judges<sup>3</sup>, and with the importance the women judges accorded to specialised training and interdisciplinarity when they referred to the "ideal" family law judge<sup>4</sup>.

## **ii - Structural arguments: the gendered division of labour**

Most of the judges, independently of their sex, interpret the concentration of women in family law in more structural terms, as the result of the division of labour that resulted from the entry of women into such a masculine profession. They suggest that there is an internal segmentation within the legal labour market and that women get the less prestigious posts. Interestingly enough, researchers on the judiciary have observed a similar trend for France, Brazil, Germany (Schultz, 2003: xvii and 281-282; Botelho Junqueira, 2003: 440-442). Moreover, they argue that the reason for this is to be found within the family, in the traditional gendered division of labour that corresponds to the societal stereotype. It has been argued that as the "exemplar of the feminine", family law has become stigmatised and perceived as of low status because "it has to do with women, women's experiences, and the values associated with the feminine" (Thornton, 1996: 276).

According to the prevailing sexual stereotype of the nuclear family, the traditional division of labour inside the family has remained intact in spite

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<sup>3</sup> See chapter 4, section III

<sup>4</sup> See chapter 5, section III-2-a and chapter 6, section V-2e

of the mother's professional work. The father is still seen mainly as the breadwinner and the mother as the main parent responsible for the children and the domestic sphere. In the view of the judges, because of the work regime in the family courts, working in the family law judiciary seems easier to combine with women's domestic responsibilities than developing a career in other areas of the legal profession. Like in other jurisdictions, the effects of the double shift are visible. Being in charge of the home and children, women "naturally" settle to work in the less demanding and prestigious courts such as the Family Law Courts, while the men prefer the more lucrative or prominent sectors of the legal profession, such as the large legal firms and the more prestigious sections and higher instances of the judiciary (Schultz, 2003: xvii).

### **iii - A matter of culture, choice and of social pressure**

Regardless of their sex, some judges opt for one of the above mentioned explanations, while most tend to combine various types of reasons in their account. Accordingly, in the opinion of the judges, the large presence of women in family law appears, in part, to be a natural tendency, a personal choice and, in part, as the effect of economic and social forces. As Schultz has written, about the women judges in the family law judiciary in Germany: "Self selection and allocation go in tandem" (Schultz, 2003: 282). The next testimonies illustrate this assertion. In the following quote, a man judge combines vocational and social arguments in his explanation. He refers to a natural tendency, a special interest or taste for family law and to the fact that there is more room for women in this sector of the profession because it is not very lucrative:

"Because of their proximity to the family, due to their social roles, women seem to be better equipped to deal with family matters. Also, since they are not so much concerned with making money as men are, they can follow their vocation and specialise in something that interests them more, such as family law, in spite of the fact that it is not a very lucrative area." mj

This woman judge emphasises the economic and labour market aspects:

"I think that the reasons explaining the large numbers of women in mediation and in family law are interlinked and have a strong economic component. When you go to conferences on family law you mainly see

women, while the attendance at conferences on commercial or criminal law is mainly masculine. I do not believe this could be attributed to a special feminine interest in the family field, I would rather say it is because the family section is a section that does not involve large profits, and, this is the reason why men are not very interested and so they leave room for the women." wj.

In the previous quote, a woman judge interprets the large numbers of women in the field of family law as the effect of market forces that make it very difficult for women to advance in other areas of the profession. In general, the judges' explanations relate to the way the legal labour market has evolved. When referring to the large number of women lawyers working in the family law area, the most frequent answer was that, since there is not much money involved in family matters, men lawyers, who bear the larger weight of family provision, look for the more lucrative sectors of the profession. Thus, they leave room for the women who, earning what one might call a "supporting salary", can afford to follow the dictates of their presumed vocation.

If the judiciary in general offers work stability and prestige, from the point of view of the salaries offered, it lags well behind a successful career as a lawyer. This, as happens in other civil law jurisdictions (Schultz, 2003: xlvii), expels men while attracting women. On the other hand, and very much as is the case with other parts of the world<sup>5</sup>, in spite of their participation in the professions, women have retained the main responsibility for organising childcare and the family home. As was seen in chapter 3<sup>6</sup>, it is very difficult for a mother to develop a career within a law firm, they have to endure enormous personal sacrifice, put in an impossible number of hours and meet a very high level of commitment and rainmaking capacities with very few chances of reaching top positions. One could say that to develop a career within a law firm is not an option open to a young woman who wishes to start a family, or has family demands. Thus, a woman judge explains:

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<sup>5</sup> See chapter 1, section III-1b on the international situation of women in the legal professions.

<sup>6</sup> See chapter 3, section... for the situation of women in large legal firms in Argentina.

"The men seem to have retained the weight of economic provision and to be more ambitious in that sense, while here -meaning the judiciary- you have to stick to different values, because of the lack of economic incentives, the economic ceiling is low. A woman that counts on the economic support of her husband can somehow afford the luxury to follow her vocation and develop a career in a field that is less profitable than the independent exercise of the profession. If a career as a lawyer offers a much better economic reward, given that the successful law firms make large profits, it is very difficult to pursue a career within a law firm for a woman. Whereas in the judiciary, with all its incompatibilities, the money is less, but it is easier for a woman." wj

As a means to explain the high proportion of women among the family law judges, the judges referred to the working hours of the Family Courts. For instance, while the Criminal Courts have a full, long working day, the Family Law Courts are open from 7.30 am to 1.30 pm. As the following quotes show, compared to other sections of the judiciary, the time requirements of the Family Law Courts seem to fit women's domestic responsibilities better than the hours of other sections of the judiciary, since they allow women to juggle professional and domestic demands, and so attract more women:

"Another factor explaining the large number of women in the Family Courts is the fact that it is an activity more compatible with motherhood, because of the working hours. The Family Courts open in the mornings, and you just work for a few hours in the afternoon." mj

"... at some point, it seemed a profession easier to juggle with domestic responsibilities, because of the fixed hours that gave you the illusion that you would have time to organise all the rest, namely family life" wj

"... there is this big inequality when you compare the hours with those of the Criminal Courts where people work much longer hours..." wj

It is to be noted that, the judges refer to the actual time requirements of the different sections of the judiciary since, in theory all courts have the same working hours, from 7.30 am to 13.30 pm. In fact, however, if you compare the time requirements in the Criminal Courts and in the Family Law Courts there appear important differences. For instance in the Family Law Courts, with some exceptions, the judges actually stop working at 1.30 pm, and at 15.00 pm there is usually no one left in the Family Law Courts. Instead, in the Criminal Courts, the staff rarely leaves before 18.00 pm. Due to the nature of the subject matter, the fact that they work with the police, the work in the Criminal Courts is much more time consuming. Actually, 1.30 pm is the time when they stop receiving the public, but they are obliged to

attend to all the emergencies arriving at the court after 1.30 pm. They also have to take turns to be on duty on weekends and at night. The fact is, however, that the Criminal Courts rather than the Family Law Courts are the exception. In the other Civil Courts, in the Administrative and Labour Courts and Social Security Courts, for instance, the work regime is very similar to that of the Family Law Courts. This means that the justification the judges give to explain the large numbers of women in the Family Law Courts is not completely accurate, since the same argument would apply to any section of the judiciary apart from the criminal courts. This suggests that when women decide for the Family and the Labour Courts among the different courts that have a lighter timetable, one could presume that they exert some choice or that entry into the Family Law Courts is easier for the women.

As a matter of fact, this type of explanation was never mentioned when the judges considered what attracted the men to the Family Law Courts. Men mostly explained their attraction for the Family Law Courts as a matter of special interest for the subject matter due to its human content. As an example, the following testimony of a man judge emphasises the vocational element in his choice for the Family Law judiciary<sup>7</sup>:

"If I am here it is because of my passion for the family subject matter. If I wanted to I could easily apply for a post in the Civil Upper Court, or to a different section of the judiciary. I am here because here is where I want to be. I do not plan to leave, because it is from here that I want to make my contribution to society." mj

It was thus found that, in the judges' perspectives, the domestic responsibilities of the women judges have an important impact on their careers. The traditional sexual division of labour inside the family home acts as a strong predictor of what attracts and/or repels women and men members of the legal profession to and from its various fields of activity. This factor commands the choices that men and women members of the legal profession make when they opt for the sections in which they will

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<sup>7</sup> Botelho Junqueira (2003: 439-459) reports very similar findings with respect to the reasons that inspire men and women to choose the judiciary in Brazil. While men report that they choose the judiciary for the challenge involved, the women report to choose it because it is more convenient and easier to combine with domestic responsibilities than is the private practice of law.

develop a career. According to the judges, in agreement with the dictates of the sexual division of labour within society, men tend to opt on the basis of their function as economic family providers and women on the basis of their family commitments in terms of childcare and home organisation. In this respect, in the view of the judges that participated in this study, women are driven into the family judiciary because the men prefer more prestigious sections and thus leave room for the women. In addition, women choose the Family Law judiciary because it is more flexible in terms of timetable and hence less demanding and easier to juggle with domestic demands.

#### **b - Juggling career and family responsibilities**

The aim of the last section was to explore how women and men judges interpreted the large entry of women into the legal profession and the large proportion of women among the family judges. In accordance with the traditional division of labour within the family, women's need to accommodate their private domestic responsibilities and their professional duties appeared as a very important factor affecting the choices they make in terms of their participation in the different areas of the profession. Therefore, I decided to ask the judges about the ways in which they organised housework and childrearing activities in their own families.

The issue is, of course, much more relevant to the women than to the men judges, since most the men answered that they had continuous careers and that their family responsibilities did not affect their work, since their wives were or had been in charge of the home and children. As Epstein has written, this pattern is common to most societies:

"It is a ubiquitous finding that that wives' employment has only a modest effect on the household division of labour in all countries...They usually retain responsibility for the household's daily organisation and physical chores, including washing, cleaning and preparing meals (Epstein, 1988: 210).

In spite of the fact that women have entered the labour market and participate in a wide array of professions, traditional beliefs about the division of labour within the family persist in Argentine society, placing an

unfair burden on women. Actually, the analysis of the questionnaire data shows the impact of family responsibilities on the women's careers, but having no impact on the careers of the men judges. While only six women sat for the interview, eight women filled in the questionnaire<sup>8</sup>. The analysis of the women judges' responses to the questionnaire related to career continuity show that six out of the eight women judges declared that they had continuous careers, while two declared that they had stopped work altogether because of motherhood. The latter two were the two who did not volunteer for the interview in spite of having filled in the questionnaire. Nevertheless, when, I had the opportunity to explore the issue further during the interview I realised that this first response to the questionnaire was actually hiding the effect of family commitments on the women judge's careers. Of the six women who sat for the interview, two had slowed their work pace when their children were young; one had had her children before graduation and started to work only after they were of school age; one had studied before getting married and became a mother once her career was well advanced; one opted to stop teaching while her children were young and one did not have any children. Thus, except for the woman judge who did not have any children, the careers of the women in the Family Law Courts were affected by their domestic responsibilities, particularly when their children were young.

Furthermore, the testimonies of the women judges show the interplay of domestic responsibilities and career duties in their lives and strategies to which they resort in order to make their work compatible with their family responsibilities. While social provision of good quality childcare is almost non-existent in Argentine society, there is wide availability of relatively cheap domestic service. Besides, the support of mothers and mothers-in-law in childcare activities is a very extended social practice.

The ways in which these women adapted their career paths appear to me as different strategies the women judges display in order to juggle professional and family responsibilities, strategies that become more vivid

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<sup>8</sup> See chapter 4, section II

as part of the women judges' narratives. The next quotes exemplify some of the strategies displayed by the women judges to accommodate their job requirements and family demands. They all found themselves in need of introducing some changes in their careers to leave room for ever increasing family responsibilities. Thus, the woman judge in the first quote resumed her studies only after her children were of school age:

"When I got married I gave up my studies and had my children. After my third child was born I came back to University. I studied law while the children were at school" wj

The woman judge in the second quote postponed the birth of her children until the time she had resumed her professional education:

"I made the most of it [referring to her various courses of study] while I was single. Now everything is becoming more difficult and complicated.... It has to do with gender, how to articulate my time to be able to pursue my work and fulfil the homely tasks related to my family, husband and children and everything becomes very complicated." wj

It is interesting that, the woman in the third quote created the conditions that allowed her to combine professional work and childcare:

"Although I never stopped work, for quite a few years I kept coming back home several times a day. I would mix childcare with my work. My office was always located in the Court area and so was my home. So when my child was small I kept coming and going from one to the other, probably more than it was necessary. I took him to school in the mornings, I then went to work at my office or to the Courts, then in the afternoon I picked him up to take him to special classes, etc." wj

The woman judge in the last quote, a private lawyer at the time when her children were growing, kept her work to a minimum for a few years to be able to respond to family demands and went into the judiciary after her youngest child started school:

"I never stopped work altogether... When my first child was born I worked as a private lawyer. I had my own office, so when my first daughter was born at first I had my mother and my mother-in-law who took turns to take care of her while I was at work. Soon I realized it was a crazy arrangement, so I decided to close my office, kept only the cases I was most interested in and referred the rest to different colleagues. I had a working space at home with my law books and that's how I organized my work while my children were growing. Taking only the very interesting cases. I only came back to work full time when my fourth child was six, that's when I started to work at the judiciary as a public defender." wj

With respect to the internal division of labour within the families of the judges, only one of the women judges claimed to share domestic and childcare responsibilities with her husband, and only one of the men judges mentioned helping<sup>9</sup> his wife with the children and the home chores. These two judges are among the youngest in the group of the family law judges that participated in the study; their relative youth might be a factor explaining their more egalitarian orientation with respect to domestic duties. Although this man judge expressed that he prepared breakfast, took the children to school and helped them with homework on a daily basis, the rest of the men judges declared explicitly never to have changed a nappy, and that the only activity related with childcare that they took charge of was taking the children out.

In the following quotes, two men judges explain their conjugal domestic arrangements. In the first two quotes, in spite of the important differences in terms of their contribution to childcare, they both refer to their role as marginal. The first quote belongs to an older man judge, while the second belongs to a younger one. The ten years' age difference between them could be a factor explaining their different attitudes and their involvement with childcare activities. While, in the first case the judge's contribution in that respect appears as sporadic, in the second it involves daily practices. The behaviour reported by the first judge is more paradigmatic of the general attitude of the men family judges, whereas the daily involvement of the younger judge with his children could be suggestive of an attitudinal generation difference. This is consistent with the remark that the older judge makes when comparing his son's attitude to childcare to his own.

"I would take my children out but never bathed them or changed diapers. Things have changed a lot now, I have a son who deals with his own son as his wife does: He changes his diapers, feeds him, and gives him a bath..."  
mj

The younger man judge has a clearly different attitude, in spite of which he is quite aware that the main responsibility for the home and children

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<sup>9</sup> The use of the word "helped" by the man judge implies the belief that it is her work and he just "helps".

lies with his wife and thus, his daily activities of childcare do not impinge on his work life. It is interesting to note how, in his testimony, the allocation of the work involved in childcare goes "naturally" to the woman. He observes how women take on this responsibility without questioning it and, moreover, have difficulties letting the men in. His vision very much coincides with the testimony of the women judges in this study and with international research results on the subject (Bothelho Junqueira, 1997: 48-55; Schultz, 2003: xlv):

"We still maintain a family structure where the role of women is basic. The burden of the management of the family home still weighs heavily on women's backs. It is not a cultural imposition, in fact culturally women assume this responsibility. I would not know if this is a natural or a cultural tendency. Sometimes I think it is rather natural, it is fantastic how women assume this responsibility, in the hardest of times they find the strength to go on, to carry on with the household. This responsibility with the domestic sphere interferes with women's possibilities to develop their full professional capacities... Because in my own case, for instance, I leave home early in the mornings. It is true that I prepare breakfast and take the children to school, all this takes me about an hour, but then, I am free until the evening to dedicate my time to my work, and of course I can advance in my profession. In the evening when I come home, say from 6 to 8 I go on with my family functions, a bit of checking up on the kids, a bit of quarrelling apart from establishing some dialogue with my wife. The case is not the same for my wife who has to divide her time between her various roles, her mother role and her professional role. And of course, although it has been a frequent subject in our conversations and discussions, it is not a matter that she is being forced into. She seems to feel that nobody cooks the way she does, and so forth. What I see is that women tend to assume these roles without vacillation, they do not seem ready to abandon them." mj.

The following two quotes account for the variations about the internal arrangements within the families of the women judges. While the first woman judge expresses distress because she is in charge of all the domestic and childcare activities, she seems to take it as a given role, one that women have to perform on their own, without the father's help. At the time of the interview this woman was the youngest among the family law judges and the one with the strongest domestic burden. She had three young children and was expecting her fourth:

"Women's work brings changes into the family dynamics and organisation. The need to take care of everything to do with the home and the children and at the same time to respond to the requirements of such a demanding job makes life very complicated and stressful. I have the same problems working women usually have with the organisation of the home. May be the women lawyers have the option to share their work with a partner, while

when I have a hearing I have to be there myself, I just cannot send a replacement." wj

The second woman judge, instead, tells how, while being responsible for the children's care and the member of the couple who accommodated her work to fit her family commitments, she always counted on her husband's support to secure both their children's welfare and their career advancement:

"I was able to rest upon the unconditional support of my husband to make all this possible... We mutually support each other's personal projects a lot, as a means to make them come true. There was a long period, though, when I had to abandon teaching and research, to just dedicate myself to my family and the judiciary. Then, I returned to academic life, accommodating it with the needs of the family, I did the postgraduate course in family law. When I was in the process of writing the thesis, my husband would take the children to our house in the countryside on weekends, so that I could write, and I do likewise whenever he needs it. In that way, both of us were able to advance in our careers, avoiding any harm or deprivation to our children, and spending some time together at the same time." wj

Although important differences can be appreciated in the testimonies of both women judges, the previous discussion suggests that professional work does little in the way of promoting change with respect to women's identities, which remain linked to a traditional definition of motherhood.

### **c - Conclusion**

The observed sexual segregation in the profession was explained in terms of the traditional gender roles inside the family. The important proportion of women in family law and the family law judiciary was seen partly as a matter of preference or choice and partly as a matter of social pressure.

According to the judges, men and women judges opt for the areas of the profession that are most compatible with their family roles; namely men's roles as the main economic providers and women's roles as the main responsible for home organizing and childcare. Rarely sharing such chores with their husbands, the women refer to the need to adopt certain strategies allowing them to accommodate work and family commitments. Although the women rarely acknowledge it, these arrangements are not without adverse effects in relation to their career advancement.

As a consequence of their breadwinning roles, the men tend to prefer the more lucrative sectors of the profession like the private practice of law in large commercial firms. They thus leave room for women in the less lucrative sectors like litigation in the family law area, mediation and the judiciary, which, at the same time, appear as more compatible with their central role in the domestic sphere and their presumed abilities and preferences.

Although there is less economic incentive in the judiciary than in large law firms, women seem to prefer the judiciary because of its stability and fixed hours, because it seems easier to combine with motherhood. The large proportion of women in the family law judiciary was seen as a consequence of the shorter working day of the Family Law Courts as compared to the criminal courts.

In the next section I will explore the judge's awareness on discrimination within the judiciary and the family in the context of a general discussion of their perceptions on gender and difference.

- **III - Perceptions of gender difference and discrimination among the family law judges**

**1 - Introduction:**

In this section, I examine various instances in which the judges refer to discrimination; I refer first to the way the judges speak about their personal experiences of discrimination (gender and other types) within the judiciary. I then consider the judges' awareness of the effects of gender on the lives of the persons that come to court. In the third place, I will examine the judges' consciousness of the potential for discrimination involved in their own activities<sup>10</sup>.

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<sup>10</sup> The analysis of the first aspect mentioned above was based on the responses to an interview question aimed at exploring their awareness of discrimination within the judiciary. In particular, I asked them whether they had ever been subject, or heard of any type of discrimination within the judiciary.

## **2 - Awareness of discrimination within the judiciary**

In an article where she reported the results carried out in a historical research aimed at investigating whether there was discrimination against the Jews within the Argentine judiciary, Canceglia argues that the organisational characteristics of the Argentine judiciary such as its unwritten rules, its internal codes and customary practices, its hierarchical organisation and the opaque prevailing criterion for the nomination and promotion of its members could facilitate discriminatory practices within its ranks (Canceglia, 1999: 325). Accordingly, since gender discrimination is a reality at a societal level, one would expect gender discrimination to emerge within an institution such as the judiciary with a tradition and an organisation that may encourage discriminatory practices

### **a - Gender discrimination**

As was seen in chapter 4<sup>11</sup>, the analysis of the questionnaire showed the family judges as a relatively homogeneous group in terms of most variables studied, such as class origin, class status, educational background, religious and social affiliation. Age and sex appeared instead as critical variables with a potential capacity to differentiate the family judges. Yet the analysis of the judge's testimonies shows little awareness of gender in general and consequently, a very weak consciousness of gender subordination and discrimination among the family judges.

In a way, the discourse of the judges is not surprising. It would not be expected that the judges of a purportedly egalitarian society, with a

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For the analysis of the second and third points on the judge's gender awareness and their consciousness about the potential for discrimination in their professional activities, I used comments made by the judges throughout the interviews. No single question was made aimed precisely at obtaining this information, although many of the comments are responses to questions on the changing nature of the family in Argentine society, on the ideal qualities of a good family judge, and on the problems that worried them most. See the interview guide at the methodological appendix.

<sup>11</sup> See chapter 4, section III

relatively new Constitution, explicitly prohibiting any kind of discrimination and having incorporated many International Human Rights Treaties, like the CEDAW, would admit the existence of any kind of discrimination within its ranks. Although in Argentina there is a civil legal system, the judges have the power to control the constitutionality of substantive law, to declare unconstitutional any law violating the right to equality and to penalise human rights violations.

On the other hand, as has been argued in chapter III<sup>12</sup>, this egalitarian legislation came forward more as a consequence of the general institutional modernisation of Argentine society at the advent of the restoration of democracy than as a result of the pressure of the women's movement or the influence of feminist scholarship. It must be acknowledged that, in fact, feminist discourse has hardly penetrated Argentine society, where feminism does not enjoy much prestige. As a matter of fact, none of the women judges that participated in the study identified herself as a feminist, and a few among them made a point in making it clear that they were not feminists, through remarks such as:

" I have to confess that I am not much of a feminist." wj

This is not an indication that these women are not in favour of the advancement of the situation of women in society. In fact, a few of the women and at least one of the men gave testimonies that prove their commitment to such an endeavour. Still, a linguistic obstacle seems to prevent the identification of Argentine women with the label "feminist" which locally has a "negative" connotation. Using Cockburn's expression, Thornton has referred to this phenomenon as "the sustained 'anathematising of feminism'" which, in her view, originates in the "fear it arouses in many men" (Thornton, 1996: 270)

The following assertion of a man judge is emblematic of the little meaning gender can have in the view of the judges:

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<sup>12</sup> See chapter 3, section 1-b.

"The situation of women everywhere is equated to that of men. There are no differences any more. I teach at University, where there are as many women as men... Here, for instance, an Association of Women Judges was created a few years ago. I frankly cannot see the reason for having a separate association. This is a discrimination that just doesn't make sense to me, since we are all doing the same work irrespectively of our sex. We all perform the same role, work for the same people, and have the same academic background." mj

Actually, as was seen in the previous section, this man judge was one of the judges who explained the high proportion of women in the Family Law Courts as a consequence of the fact that men preferred more prestigious sections within the judiciary and thus left these posts to the women. Furthermore, shortly after having voiced the above remark, he acknowledged that there was only one woman in the whole history of the Argentine Supreme Court. Nevertheless, this did not seem to him, an indication of gender discrimination or a reason that could justify the creation of a women's association which, instead, he considered an act of discrimination.

Moreover, except in the cases in which the judges have undergone training by the Argentine Association of Women Judges, aimed specifically at fostering awareness of gender discrimination and promoting the use of International Human Rights Conventions, feminist discourse has had very little influence on the ideology of the judges. The three judges (two women and one man that had undergone the training mentioned above) whose discourse, without expressing an allegiance to feminism, denotes a certain degree of awareness of gender discrimination in society at large. these were the same judges that identified the existence of slight gender discrimination within the judiciary.

The more salient aspects in the judges' testimonies with respect to a sensitivity to gender in relation to gender inequality within the judiciary relate to the women judges' difficulty to reach the higher posts within the judiciary, and to the way they retain the main responsibility for the organisation of the home and childcare. In any event, they rarely referred to these inequities as examples of discrimination. Various authors have observed a similar tendency among women in the professions in general

and in the legal professions in particular to deny gender discrimination and have explained it in different ways. While some favour psychological explanations (Rhode, 1991:1775, cited in Hunter, 2003) others opt for structural explanations (Kanter, 1977: 228; Cox, 1996: 13 and 125 cited in Hunter, 2003) and a third group explain such a tendency as a stage in a dynamic discursive process of identity formation and projection (Hunter, 2003: 116).

The authors in the first group assert that women's refusal to identify themselves as victims is a strategy to protect themselves. Authors such as Rhode emphasise that women may not want to pay the costs in terms of loss of self-esteem and efficacy implied in identifying themselves as victims or want to go through the unpleasantness involved in identifying the perpetrators of injustice, so they prefer to revise their conceptions of blame and merit (Rhode, 1991:1775, cited in Hunter, 2003). Crosby, on the other hand, applying the sociological theory of relative deprivation to the situation of senior women in male dominated contexts, argues that in spite of the existence of objective signs of gender discrimination, women do not register them as such because they have never experienced a situation of real equality (Crosby, 1982: 7 cited in Hunter, 2003).

The authors in the second group tend to emphasise that male hegemonic values foster conformity and false consciousness among these women, thus preventing them from relating their own experiences at work with gender discrimination. Kanter, who was the first author to identify the position of "token" within male dominated work settings, argued that token women showed their gratitude for being allowed in by not criticising or complaining about their situation (Kanter, 1977: 228). Furthermore, it has been put forward that women internalise the terms of patriarchal society to a point that they contribute to its perpetuation by restricting other women's alternative positions and potential claims for gender equality in the workplace. Thus, according to both the approaches outlined above, as Hunter has put it: "..one needs both desire and a sense of entitlement in order to experience discrimination" (Hunter, 2003: 115).

Finally, the authors in the third group, inspired by Bourdieu's concept of subjectivity "as the ongoing corporeal and mental interiorisation of multiple social locations" see senior women's denial of discrimination in men-dominated settings as a discursive practice; an ongoing process of identity formation. They pay particular attention to the narratives in which women situate themselves with respect to their gender, articulating sameness and difference (Hunter, 2003: 115-116). Hunter claims that, when compared to psychological and structural explanations, this last type of explanation of denial presents the benefit of according women "a considerable degree of agency".

In my view, the three approaches are complementary and are supported by my research results. The third approach has the additional value of explaining the contradictions appearing in the testimonies of the women judges that participated in my study. This is discussed in more detail in section 5d in this same chapter, where I consider how the women judges' first reaction is to deny the existence of any difference based on gender in the context of the judiciary and then the same women fall into contradictions.

Only three of the twelve judges interviewed, two women and a man, made straightforward comments that had to do with their personal experience of gender discrimination within the judiciary. Other judges referred to other types of inequities such as discrimination on the basis of being outsiders. At any rate, all of them underrated these indications of gender discrimination within the judiciary and thought of it as something of the past that was well in a process of disappearing. As one of the groups in Hunter's study on the denial of gender discrimination in the Australian bar, that she names "the no but yes group", the women judges in my study tend to simultaneously deny, minimise, admit and excuse gender discrimination within the judiciary (Hunter, 2003: 123).

In the following passages the judges comment on their experiences. In the first quote a woman judge refers to the instances where she perceives gender discrimination in the judiciary:

"Access is quite difficult for women in sections that deal with issues of high political content or political power. In fact, historically there was only one woman who ever reached the Supreme Court of Justice in the 60's and never again... Although in the Upper Civil Court there are quite a few women." wj

Another woman judge conveys how she felt prey to prejudice at various points in her career, first when she was first aspiring to become a judge, and currently having to endure humorous remarks from men judges as she competes in a contest for a place in the Civil Upper Court. As agreed by Thornton: "The use of humour and jokes is a subtle reminder of the otherness of women in the public sphere. It is a way of putting them down in male-dominated organisations" (Thornton, 1996: 251):

"I had to show a lot of firmness to be taken seriously. Because two factors coincided in my own case: I was very young and I was a woman, I graduated very young so that was "Bingo!!!"...I do not think that these distinctions prevail any more, since you see, nowadays the court personnel is largely composed by women. But a few years ago, it was different you could feel the resistance...At the first instance, one can observe that there is certain equality. Just today as I was waiting for the elevator I was reading the board at the ground floor hall and I was thinking that the number of women and men in the building was quite even. It is different in the Upper Court where specialization does not exist, the upper tribunal deals both with civil and patrimonial matters, there, and the number of men judges is much higher...I am not made to feel that there is much discrimination nowadays, but, now that I am following this process of selection to compete for a post at the Upper Civil Court, I frequently have to face jokes like the other day, a male member of the Upper Court was telling a colleague in my presence: Beware they are going to fill up the Upper Civil Court with women!!!...When, in fact, this was far from reality, I am the only woman that, according to the results obtained up to now, has fair chances to be nominated. The rest is made up by men, and I am not complaining, because all the candidates that reached the first places in the exams are excellent, and nobody could deny their professional value. But this sensation that they are going to have the court filled up with women when there was just another woman candidate apart from myself!!!...I do not know yet what the outcome will be, there are more instances yet to go, like formal objections and such. The sole idea of seeing women coming seems menacing ... It is, of course, a masculine universe." wj

Although raised by a man, the following quote refers to gender discrimination against a woman, his wife. Despite his personal underrating discrimination in the judiciary, in his testimony he comments how he perceived gender discrimination through her experience when applying for a post in the family law judiciary.:

"I do not think there is so much discrimination today, and I would say that the introduction of the Council of the Judgeship for the selection of the judges is probably going to eliminate that sort of problem. But we have only had a woman once in the Supreme Court's history. My wife is a civil judge,

fifteen years ago she wanted to opt for the family specialisation, like myself. She was not allowed to, and you can see the discrimination in the argument, they said no because her husband was already in the family section. Now she is very happy to have been rejected because of the emotional stress the family specialisation involves. But then, she was very unhappy, and it was hard for her to accept it." mj

#### **b - Discrimination of other outsiders**

A different type of discrimination was mentioned by a woman judge who explains how her career trajectory, the fact that she was nominated as a judge after having litigated for many years, instead of having followed the more traditional path of developing a career within the judiciary, was the reason for a certain resistance and discriminatory comments on her colleagues:

"There is discrimination, but it has nothing to do with gender or age. If you do not come from inside the judicial family, if you do not get to the judgeship from inside the judiciary, then you will have to face discrimination. It is tough, and makes itself felt. It is very hard to compete if you come from outside. You have to make extra efforts if you do not come from within, competition becomes very tough... The judicial career has a peak, a top, it ends when you become Court Secretary. But people here feel that if they have gone through the whole judicial career they should automatically become judges and that the Court Secretary is the more legitimated person to become the Court's judge. It might be... In my view, you can be as well equipped to become a judge if you come from the profession as if you come from the judiciary." wj

Other judges mentioned other instances of discrimination that they underrated. A certain tendency to prejudice and a strong Catholic bias were also recognised as may be noticed from the following quotes:

"I believe that in the judiciary there are very prejudiced people....The fact is that the Judgeship has been a very closed, difficult to access institution, with a great tradition of judicial families, not always with a democratic ideology." wj

"...I would not like to sound patronising but, because of the knowledge I have of all family judges, you must remember that I knew them as a lawyer, before I was a judge, and that I also knew them from university. I believe they are all very committed to their role. Anyhow, it seems to me that there are groups that tend much more bent on imposing their own ideology. There are some groups which are extremely religious, very Catholic. I do not actually know if this could be avoided." wj

"Discrimination in the judiciary?? No, I should think that it mainly occurred in the past... Religion yes, may be one could say that a certain degree of discrimination on the basis of religion persists." mj

### c - The understated nature of discrimination

Yet if some of the judges identify some instances of discrimination-, gender or some other type of discrimination-, for most, as can be seen in almost all the quotes in this section this is something that mainly occurred in the past, and they all seem to think that it is in the process of disappearing as a result of the new system for the nomination of judges. The following testimonies of two women judges reveal the judges' confidence in the new system of selection and appointment of the judges as a remedy to any remaining vestige of discrimination within the judiciary:

"I believe that some vestiges of discrimination still persist, certain strategic posts have not yet been occupied by women, although I think this is a tendency that is being reversed with the change in the system of nomination of judges and, as a consequence of the more open selection proceedings that are now taking place. Women are doing very well. In fact, the first woman to go through such a selection is Dr. Stella Maris Martínez, and she was nominated as Official Defender before the Supreme Court and took office on June 20<sup>th</sup>. She is not the only woman that did well in a selection. I do not know what is happening now with the selection processes." wj

"My feeling is that we have progressed a lot. Whereas before women used to be discriminated against, they are now getting more and more respect and recognition. They have come to deserve the place they have achieved since they are professionals of great quality." wj

In spite of the fact that most of the judges in the study acknowledged the gender segmentation of the judiciary, a fact which I think is a clear indication of gender discrimination, the judges overall do not think that there is a problem of gender discrimination within the judiciary. This denial of gender discrimination is striking and is certainly related to the invisibility and naturalisation of gender subordination. As can be perceived in the judges' testimonies, this denial goes beyond gender and suggests that the judges also ignore other types of discrimination taking place within the judiciary.

The following quote, in which a man judge justifies the differential opportunity a member of a judge's family has to enter the judiciary, provides an example of the ingrained and pervasive nature of discrimination. This is how he explains why, in his view, this should not be regarded as discrimination or nepotism:

"What you find here is the same as you find in other spheres. In the same way as things are easier for the son of a medical doctor who goes into medicine, here, it is very likely that the son of a judge starts to work in a court. I think these are just concrete possibilities life offers." mj

In my view, these testimonies indicate levels of tolerance to injustice that should raise concern when expressed precisely by those who should be administering justice.

#### d - Awareness of the family as a site of women subordination:

In the last section on the judges' awareness of gender discrimination within the Family Law judiciary, I explained that women's under-representation in part as a function of their lack of gender awareness. Conceived as the basic domain of women, the family is one of the main locus of gender subordination (Barret- Mc Intosch, 1982). As the section of the judiciary that deals with family relations daily, the family law judiciary would certainly benefit from an increased knowledge of the ways in which gender makes an impact on the family and on the distribution of power within it since, as Graycar (1995: 262-282 and 1998: 1-21) has put it, through their activity the judges create reality and hence, including the reality of women's lives. I could appreciate, however, that the family judiciary has remained quite impervious to the feminist critique of the patriarchal marriage and the patriarchal family<sup>13</sup>. This critique suggests that women's responsibilities within the traditional family jeopardise their personal development in the benefit of the development of the husband and children (Shmukler, 1982).

Moving on to the next section, I consider another aspect of discrimination, namely that of the inequality between the sexes in family life. I look particularly at the judges' representations with respect to the family as a site of women's subordination in the context of the important changes Argentine families underwent over the last twenty years.

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<sup>13</sup> The patriarchal marriage has been defined by Shanley as uniting a man and a woman, providing the foundations for a family that may include biological or adopted children, as assigning different roles to men and women, as being indissoluble except for the most grievous offences. The conservative family is regarded as the foundation of society, as essentially good for individuals and having great public benefits, preserving it from the worst ills from crime to poverty (Shanley, 2003: 1).

As a matter of fact, gender roles are naturalised and rendered invisible in the accounts of both the men and the women judges, to the extent that they hardly register women's subordination and systematic gender inequalities within the family. The reason for this might be found in the Catholic influence on the ideology of the judges<sup>14</sup>. The following quote from a man judge reveals the Catholic view of the family as a refuge. In Lasch's words, a "heaven in a heartless world"<sup>15</sup>, the family is viewed as the unproblematic harmonious integrated basic human cell, capable of protecting and fulfilling the needs of all its members.

"To me, the family is this natural realm around which the human being can develop and fulfil its needs. It is basically the space where this human being can meet with authentic solidarity. The space where you give and where you endure. The way I see it, it is the place where you can always find an answer to what is happening, whether good or bad. A refuge, the great human refuge that humanity is always seeking for. The point is that the family is under the attack of selfishness, of the exacerbated individualism present in human nature." mj

Along similar lines, other men judges frequently refer to the familial imperative, without leaving room for conflicting rights or different interests within the family members:

"In that sense, it is important to consider that the real matter in a family case is the family, the family as a unity, a single entity, not the husband against the wife or the wife against the husband" mj

"I have always worked with the familial imperative in mind, even before I was a family judge, when I worked in civil patrimonial cases, always looking for a solution that would suit the family as a whole" wj

Yet if most family judges are certainly lacking in terms of a comprehensive critical approach towards the patriarchal family and the preservation of the rights of its individual members, they are aware of the consequences of their religious beliefs on their work as family law judges and some of them, particularly among the women, exhibit a less monolithic view of the family. Thus, a man judge highlights religious beliefs as one of the main differences in the way family judges approach their work:

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<sup>14</sup> For an account of the Catholic view of the unity of the family see further: "Familia y Valores", *la Nación*, 17 de Abril de 1999. It very much coincides with the definition given by Shanley in the previous quote.

<sup>15</sup> I am borrowing the expression used by Lasch as the title of his book on the family .

"Let's not forget that in the family area there are a lot of issues that are deeply entangled with religious beliefs. I think that religious beliefs could be making a big difference in that sense, because of the way they impregnate family matters" mj

And, as can be observed in the following passage of a woman judge, the judges are not completely gender blind:

"I believe that what matters most is not to lose track of what constitutes the problem of each and every member of the family. Because if you look only to the women related problems or aspects, you run the risk of overlooking the whole net of problems of the family. Men also face very serious difficulties when the family breaks up, especially from the fact of being apart from their children. Because even if it is true that in divorce situations men exert their power over their wives through money, there is no doubt that women use the children for the same purpose. Although most of the time women have to face the tremendous responsibility of the children, it is a big burden for the men to be separated from the children. That is why more and more men ask for custody." wj

In a different tone, another woman judge expresses clearly a much more open view of the family:

"I shall give you an article I wrote on the crisis of the Argentine family where I argue that what is in crisis is not the family but the traditional family. And, this is a crisis that I welcome!!!" wj

Some of the comments of the judges show that, to some extent, the judges perceive certain gender inequalities and partially register the impact of gender roles within the family. Still, as I could appreciate through their answer regarding the problems that worried them most in their practice as family judges, the situation of women within the family does not appear as a central preoccupation of the judges. This is not the case when it comes to problems affecting children,

In chapter III <sup>16</sup> I considered the main changes that had taken place in the family in the last 25 years as a result of social change and immigration, a fact to which the judges are very much aware as can be seen from the analysis of the interview. The following comments clearly show that all the judges are very mindful of the important changes undergone by the family in the last twenty years with the large participation of women in the labour

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<sup>16</sup> Chapter III, section 1c

market standing out as one of the main reasons for their new and increased autonomy:

"The Argentine family has incorporated important changes. The man used to be the head of the household in every respect, he ruled over the ideology and the economy. Now this hegemony is being contested. We have many families where the man has ceased to be the breadwinner and this causes a distortion in the traditional sexual division of roles. Now the men are sometimes the ones who stay at home in charge of the children and some of the chores and it is the woman who goes out to work for the family sustenance. And this inevitably changes the balance of authority inside the family. Whether you like it or not, money brings power." wj

"I would not know whether it was for better or for worse, but in my parent's times I do not think there were many families with such problems for, in general, women's lack of economic independence and training made them stay married, independently of whether they were happy or unhappy... May be this makes the families less stable. In my experience, in 99% of the divorce cases it is the woman who makes the decision, because either she has fallen out of love, or because her new independence allows her to choose what she wants to do when she is unhappy about certain things. So now, she can say: 'I am going to stay on my own with the children'... When the husband has been unfaithful, it is the woman who generally asks him to go, to leave the family home. Because even if the man has stopped loving his wife, even if his married life is very bad, and there is another woman, the man finds it very hard to leave his home and his children to become a visiting father, and that is why the decision is generally taken by the wife... even when she is not the 'guilty party'." wj

"The incorporation of women from the middle classes to the labour market has had terribly damaging and disruptive effects on family life: In my view, mothers should be in charge of their children while they are growing" mj

Some of the judges have mentioned that the difficulties women have to obtain a good economic settlement after divorce is a consequence of their marginal role in the management of the family assets. They explain how, in the end, women are frequently left with less money than they would have been entitled to, as illustrated by the following two quotes:

"But here you see in the daily practice how society buries rights recognised and written in statutes, because women have been too busy with the children to follow what has been going on with their husband's businesses. Because in a family, economic progress is usually slow. Very few families start affluent, but at a certain point economic progress takes place and very often, the wife has not perceived it. She has not been attentive; then if the couple decides to get a divorce, it becomes very difficult for the wife to proceed to the liquidation of the marital assets. It is difficult for the judge to proceed to take the necessary measures when, in general, women generally claim much less than they would be entitled to, because they do not have enough information, they have lost track of the family property after many years in which they have not been attentive enough and the men have not been transparent enough. ...Also, because material interest is not generally seen as a feminine quality... So, they very often find themselves alone, having to take care of their children, completely unprotected economically." wj

"There are judges who allow the ex husband to have complete control over the ex wife's expenses. I do not think this is right." mj

As can be appreciated from the judges' testimonies, all of them are ready to acknowledge that most frequently women and children are the victims and men the perpetrators of domestic violence and child abuse. The following quote from a man judge is typical of the answers of all the judges to the question I asked about tend to be the main victims of violence and abuse within the family. Their words show that they are aware that women endure certain systematic damaging situations within the family:

"When we talk of abuse, the children, and when we talk of violence, the women." mj

In spite of this, when asked about the most worrying and painful problems they have to face as family judges, their responses reveal that children are a paramount preoccupation of the judges, while women are not mentioned:

"Basically, I would say conflictive divorces that generate family violence and child abuse. Not only child abuse, but also the abuse of child abuse. Because the false claim of child abuse is an abuse in itself. I believe violence is the worst thing a human being may endure. It hinders the person's normal development." mj

Thus, particularly the men judges also highlight how, encouraged by unscrupulous lawyers, women tend to use the children to increase their bargaining power in order to obtain better economic deals, even if sometimes they resort to claims of dubious or inexistent violence or child abuse. This can also be observed in the following quote of a man judge in response to the same question. The response also discloses a suspicious attitude towards women and their lawyers:

"Women use their children to get better economic settlements. Sometimes they deny access to the children's father pleading that he is been abusive. In the past, women did not report child abuse; on the contrary, they would hide it because they felt ashamed. When somebody reported child abuse one would not doubt it, but nowadays, I am more inclined not to believe that it is true, because it has become common practice for the lawyers to advise their women clients to claim that there has been sexual abuse in order to be able to negotiate better money conditions with the children's father. And you can see it clearly as the mother who denied access on the grounds of abuse at one point, will allow the child to go to spend the weekend with the

supposedly abusive father as soon as the dissolution of the marital assets is ready!!!” mj

As can be appreciated from the following quotes of a woman and a man judge, the men and women judges refer to the way men suffer from being away from their homes and apart from their children. This was a recurrent remark:

“Men also face very serious difficulties when the family breaks up, specially from the fact of being apart from their children. Because even if it is true that in divorce situations men exert their power over their wives through money, there is no doubt that women use the children for the same purpose. Although most of the time women have to face the tremendous responsibility of the children, it is a big burden for the men to be separated from the children. That is why more and more men ask for custody.” wj

“Although after divorce the men seem to “adopt” the family of the new wife and see much more of her children than his own, at the beginning they suffer a lot from being apart from their children.” mj.

The overall impression to be gained is that, apart from certain exceptions, the judges' testimonies appear to be sympathetic to the men involved in divorce cases. The judge's tendency to highlight the suffering of the men in divorce cases could be explained as a tendency to redress the vestiges of the traditional protective attitude towards women and children that prevailed in the judiciary before family law reform took place. As was explained in chapter 2<sup>17</sup>, before the reform, family law had been very archaic and inequitable. It conferred the men in the family excessive rights over their wives and children, consequently granting them with too much power. As demonstrated by research that aimed at investigating sexual stereotypes among judges of the Upper Civil Court, by way of compensation for the deficiencies of the law, the judges then tended to approach women and children in divorce cases in a highly paternalistic fashion, for they were the ones in need of care and protection (Harari and Pastorino, 2001: 132-136). Given that the rights of the members of the family are now balanced, at least in the letter of the law, the judges may feel that men's subjectivity has acquired a different meaning.

#### d - Awareness of cultural differences

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<sup>17</sup> See chapter 2, section III

Another interesting point the judges refer to is the need for them to be aware of the cultural differences among those that come to court, and the requirement of not imposing their own personal values on the families of the litigants, which might lead them to discriminatory practices or at least into symbolic violence. It seems interesting to note that the judges, having difficulties in seeing themselves as objects of discrimination, realise the potential for discrimination involved in their own activity. The following assertion from a woman judge very much represents the spirit of the testimonies of the judges in general:

"I try hard, though, to understand the values present in each family, especially when those values are different from my own. I think that especially in those cases you need to be particularly respectful. I strive for them to find their own solutions, in coincidence with their own value systems. I strongly believe that we should not impose our own. This requires from you, as a judge, a thorough work with your own self." wj

This same judge explains her position in relation to the presence of religious images in the judge's office at the Court. Just 4 of the 12 Courts visited on the occasion of the interview (headed by 3 women and 1 man) did not exhibit a Christ image:

"When I first came to the Court there was a big Christ hanging on the wall. I have been brought up as a Catholic myself. This means that I went through Catholic baptism, communion, the whole lot. But, on the other hand, in spite of all this, I am not a Catholic now. I took the image away, both because I did not identify with it, and because I thought that if anyone practising another religion came here for help, being Jewish, Islamic or Buddhist, it would not be fair to have this Christ hanging there." wj

Likewise, another woman judge suggested that:

"The legal system should respect the characteristics of each family, since I believe there is not just one family model. We have to make decisions here that have to do with facts, not only with rights. We have to be extremely careful not to imprint our own stereotypes on these families, not to impose our own views on how the children should be raised. Each family has its code...We need to understand those codes better, because of the large immigration we are receiving. A Bolivian family does not behave like an Argentine family. Of course, there are certain minimums that are untenable, like the sexual initiation of girls by their fathers, something that is more tolerated in other cultures." wj

The last part of the latter quote is particularly interesting because it shows that for this judge, imparting justice sets limits on empathy and respect for cultural differences. The example she gives of the sexual initiation of girls

by their fathers may be a practice that is tolerated in other cultures, but it is a taboo within Argentine culture, and just as it is in most societies, so to her it is untenable. She thus expresses that justice imposes limits on culture tolerance. To her, justice means avoiding the harm done to a young girl through forced sexual intercourse with her own father. This reminds us of the argument of Moller Okin when she warns us against the danger of gender discrimination implied in cultural relativism. Moller Okin calls for limits regarding respect for cultural differences in situations where justice is at stake (Moller Okin, 1998: 678). In agreement with the position advocated by West, she calls for a decision that is based both on justice and on care (West, 1997: 93).

Similarly, as can be appreciated in the following two quotes, the women judges point not only to litigants of different cultures or ethnic groups but also to litigants from the lower classes, emphasizing what a difficult, confusing and traumatic experience coming to court could be for many of the parties involved in a family conflict. Litigants and witnesses belonging to the lower classes frequently do not know their rights, they do not understand how the courts work, they do not see clearly the difference between a criminal and a family court. All these factors can turn the experience of appearing before a court of law frightening, particularly as the courts are not a friendly environment:

"One of the works that needs to be done is to demystify. When we summon people to come to court, just the sound of the word court frightens them, they confuse the family courts with the criminal courts and fear to being sent to jail. We need to explain what our work is about, because they are scared of the judiciary..." wj

"It is very difficult for the judge to find the adequate point in terms of distance and proximity but, basically, it is actually very difficult for the people that come to court. It is a frightful experience; they come to court carrying their problems on their backs and they have no idea about what they will find here... The Courts are such a confusing scenario. It is hard to find your way around, the buildings are inadequate, unfriendly." wj

As I commented chapter 5<sup>18</sup> of this thesis, it is here that the capacities for empathy, immediacy and contextuality advocated by both men and

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<sup>18</sup>See Chapter 5, section III.2.c.ii

women judges come to bear on the judges' daily work. In the testimonies presented in this section it can be appreciated how, according to the judges, the latter abilities help to promote tolerance and respect for cultural differences in order to avoid symbolic violence.

#### **e - Conclusion**

In this section I examined the judges' perceptions of discrimination within the judiciary and the family amidst a general discussion on their awareness of difference in general. I came to the conclusion that, although some of the judges are, to a certain extent, aware of some degree of discrimination within the judiciary, be it gender or another type of discrimination, in general they thought of the judiciary as a relatively egalitarian institution and referred to discrimination as something that mainly occurred in the past. Moreover, it was their opinion that, if some residues of discrimination persisted, they were going to be eliminated by the new system of selection and appointment of the judges consecrated in the Constitutional Reform in 1994 that introduced a Council of the Judgeship for the appointment of the new judges that would eventually show its effects on the composition of the judiciary.

Similarly, in spite of the fact that the discourse of the judges shows some recognition of the effects of gender on the lives of the people involved in legal conflicts, the lack of a comprehensive critical gender perspective is notorious. Instead, the judges were quite aware of the potential for discrimination involved in their practices, of the need to make sure not to impose their own conceptions on the families that come to Court, and to respect the diverse family forms.

The next section will focus on the analysis of the judges' opinions on whether the women family law judges make a particular contribution to the judiciary.

### **• V - Do women in the family judiciary make a difference?**

#### **1 - Introduction**

In this section I analyse the opinions of the judges on whether women judges bring to their work any particular attributes or capacities on the basis of their gender and on whether they make or will make a particular contribution to the judiciary.

The analysis of this section is based on the responses of various questions from the interviews: a personal question asking the judges whether they think their sex affects the way they work; a more general question relating to the attributes and abilities women bring to the judiciary, and a question regarding the possible contributions women might make to the administration of justice. An additional question was also used for the analysis of this section. I asked the judges whether there exists a homogeneous or dominant culture within the family law judiciary and, when I received a negative answer, I asked them on what lines the family judges were divided.

## **2 - Any difference?**

### **a - Different reactions**

Some of the men judges have pointed out that, since there is independence among the courts, they are in a better position to give opinions on the women lawyers, their court secretaries and court employees in their own court, rather than to the women judges because, as they say, they are not familiar with the way the other family courts work. Thus, when asked about the capacities women judges might bring to their work, they raise the following objections:

"The vision of the judge is a bit isolated, I am here and have no idea of what happens in the Court next door..... Occasionally we have meetings with other judges to discuss common problems or preoccupations; we do speak about such problems...May be the lawyers or the people who come to court have the opportunity to compare. We judges can't ... The Courts work independently from each other. It's impossible for a judge to know how the judge on the other side of the corridor works, or how he/she conceives of the family." mj

"It's hard for us to know, I think you should ask the judges in the upper court since they receive the cases that are appealed, so they might be better informed on the issue. For that sort of information, you could also contact the lawyers who litigate in the Family Courts." mj

While, women's first reaction tends to deny any differences in the working styles and decision making of the judges that could be related to gender, men can soon identify certain feminine traits, be they strengths or weaknesses.

The reasons for such uniformity in the responses of the women judges could be attributed to the fact that the law has mainly evolved as a masculine discipline. As such, its value originates in the capacities generally associated with the masculine intellect; namely, the capacities for abstract reasoning, neutrality and objectivity, while emotions and corporeality are the antithetical, less valued qualities generally associated with femininity (Naffine, 1990: 26-27).

As Menkel-Meadow (1996: 57) reminds us, unlike what happened in other professions such as medicine, for instance, where women entered the profession arguing that they could contribute their special feminine capacities, women's beginnings within the legal profession were strongly marked by their attempt to show that women could practice law as men did. This was the main argument of the "persons cases" through which women obtained the right to exercise the legal professions. If the women aiming to progress in the field feel that the law is quintessentially masculine, from where it follows that the capacities the law values the most are those usually associated with masculinity, their denial of any characteristic derived from their gender, and their attempt to demonstrate that they are the same as men, and as good as men is to be expected and, moreover, is perfectly understandable (Kanter, 1977; Rhode, 1991; Hunter 2003).

In my view, this denial of differences accountable to gender on the part of the women judges must be interpreted as a defence against eventual discrimination, a stance that Giddens (1981: 87) may have called "practical consciousness"<sup>19</sup>, particularly since as the interview proceeds,

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<sup>19</sup> In Giddens's understanding, the concept of "practical consciousness" refers to a tacit type of knowledge located between consciousness and the unconscious, skillfully applied to alternative modes of behaviour that the subject is unable to formulate discursively.

they will refer to differences and potential contributions. It seems to me that it is interesting to elaborate on the contradictions in the discourse of the women judges<sup>20</sup>.

On the other hand, the situation of the men judges in that respect is rather the opposite. Comfortable and secure in their posts, they seem to have less at stake in the answer to the questions mentioned in the introduction to this section. Thus, they hastily identify what they believe to be the feminine characteristics, or else resort to the dominant stereotype.

Most of the men judges think that women and men are equal in terms of their abilities. They are actually keen to assert that women are as capable, intelligent and responsible as men, but, that being different from men, they might bring their presumed different attributes or capacities into their work. They also convey their belief that the feminine and the masculine perspectives are complementary and celebrate the coexistence of both perspectives within the judiciary.

As was explained at the beginning of this section, the men judges do not feel that they have sufficient experience to give an opinion on the way women judges work, since there is independence between the courts. Accordingly, they feel more entitled to speak of women lawyers, with whom they interact daily. Thus they observe that women lawyers tend to become too involved with their clients' problems and thus lose the necessary objectivity. Still, they expressed that, in their view, the women judges tend to understand the resolution of conflicts more as a matter of interdisciplinarity rather than as a matter of law. Because of the importance this last aspect acquires in the discourse of both men and women judges, it will be discussed separately.

I first look at the responses of the men judges, then into the responses of the women judges, and end with the analysis of the women judges' strong emphasis on interdisciplinarity as highlighted by both women and men judges.

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<sup>20</sup> See section III-2.a in this chapter .

## **I - Sustaining the traditional stereotype**

As a first reaction, many among men and women judges alike were surprised by my question with reference to the different contribution women judges could make to the judiciary. In fact, most of them acted as if they had never thought about the issue, as becomes clear from the following quote of one man judge:

"Mmmm....Men and women are very different, I suppose this might have some sort of implication on the way one works." mj

In contrast, another man judge celebrates the incorporation of more voices to the judiciary:

"This large entry of women brings with it the incorporation of different perspectives. This is always enriching and makes it possible to transcend the partial male view that prevailed before." mj

The next man judge goes a step further. He makes a clear association between women and sentimentality, which evidently he thinks is beneficial to and lacking from the neutral realm of law:

"I do not believe in absolute equality between the sexes. I am convinced that women are as capable as men but, nevertheless, there is something that permeates their activity. A woman judge is not the same as a man judge, the same applies for a school headmaster or a teacher. There is an externalisation of sex that some may view as given by nature or by god, if they are religious. We have different personalities and biological structures, different hormones that determine different behaviours and abilities and so, the women seem to be more fit than the men for some activities. Mediation could be considered one of these...I also think that women judges are more formal, they tend to stick much more to the letter of the code...I think we might observe this formalism at the beginning but, as women progress, I expect that some feminine traits will become manifest in their work and more specially, that certain aspects related with love will show. Women's views on childhood and the family seem different I think this is good and will soften the rigidity of legal matters. Because of our personality structure we, [the men] do not tend to bring in our feelings and, in my opinion, this possibility to bring sentiment into the practice of a judge is advantageous."  
mj

Along the same lines, another man judge highlights stereotypical qualities attributed to the women in the judiciary and welcomes their incorporation within it:

"Women are more sensitive, more intuitive, have more capacity for empathy and this has brought a less formal atmosphere into the judiciary. Women's nature makes them more apt to find pacific solutions, more empathetic. In order to promote agreements, you need to have this capacity to connect

with your inner self. Just because women menstruate every month they are more connected to their own corporal changes, they are more aware of their selves. This is not the case for men...Also, women are more direct when they speak and their commitment is very strong...In spite of the fact that the law was exercised by men for centuries, the image of justice is, after all, a woman. Women bring humanity into the judiciary." mj

Still, as can be perceived in the two following quotes, three out of the six men judges feel that these presumed feminine characteristics may endanger objectivity as one the basic aspirations of the judges' role:

"Women are as intelligent as men. Here one meets good women lawyers. They tend to get too much involved and this is not advisable, because they may lose objectivity." mj

"Women lawyers may put in more energy, but are also less objective. They tend to take sides for one or other of the party in legal conflicts. All the women in my staff are in therapy, because in that job reality hits you hard and they cannot keep their distance. One of my daily fights with employees in my court -all women- comes from the fact that they tend to take sides and there I am, struggling to maintain a certain equilibrium, which is not always an easy matter, especially considering that I cannot be there every day and in every case, with the huge work overload we have!" mj

If these men judges doubt that women can be objective and define objectivity as the basic characteristic of the judge, then may be in their minds they feel that they should not be judges. Still, it must be remembered that they are referring to women lawyers and not to women judges. As will be seen later in this section, women judges feel that the judge's role preserves them from the danger of lack of objectivity.

As can be seen from the following quote from a man judge who has warned us that women may lose objectivity due to their tendency to get too emotionally involved with their cases, women are not the only ones to risk losing objectivity:

"There is this case I mentioned before, where I had taken these two girls away from the family home because they were sexually abused by their Paraguayan stepfather with their mother's connivance. They appealed and the Upper Court in the hearing mistakenly gave the children back to the parents. I had a liver attack, it was the first time ever I had a sentence revoked by the Court of Appeal. We had been able to prove the abuse in the civil proceedings, something really difficult to achieve... To make it short, I ended up taking the children away from the family again, with the good fortune that I could nominate as foster parent a woman lawyer who treats them as princesses, she takes them to the Colón Theatre and next year she is taking them on vacation to Europe: they changed the shanty town for the Colón Theatre." mj

It does not seem to me, that in the above mentioned case this male judge was able to keep what he called the "necessary distance". On the contrary, he seemed bent on taking these girls away of the family home as a means to prevent their re-victimisation by an abusive stepfather and a compliant mother.

As I observed in the section on the "ideal" family law judge<sup>21</sup>, objectivity is understood as an ideal capacity not to take sides with either of the parties involved in a legal conflict. However, a woman judge explains that the family subject matter seems to confront the judges with situations in which the ideal seems really difficult to attain:

"Family law is very special: it is the field of law that brings us closer to human suffering. Here we have to deal with extremely painful personal matters. It is very different from other law realms where what people may win or lose is just money." wj

As Thornton has rightly argued:

"Family law, with its vexed emotionalism, cannot be reduced to a set of abstract principles, for there is always a context, distraught husbands and wives, crying children, anger, pain and recriminations" (Thornton, 1996: 276).

Also, apart from the implied difficulty there are times when remaining distant and neutral could be morally unacceptable and thus, unjust. According to the testimonies of the judges, the latter is particularly true when children are involved and, as this one man judge has argued:

"Argentina has been very protective of its children." mj

It is interesting to see that although women judges tended to agree with the men judges with respect to the women lawyers' excessive emotionality and their consequent lack of objectivity, they see themselves as judges as very different from the women lawyers. These two women judges express that the judge's role and the distance the judge is supposed to keep with respect to the litigants protects them from the danger of losing objectivity. Thus, as can be appreciated in the two following quotes, while they also complain of women lawyers' lack of

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<sup>21</sup> See chapter 5, section III.

objectivity, they strongly deny any differences about the way in which men and women judges perform their tasks:

"I think that women lawyers identify too strongly with the client, they cannot avoid becoming emotionally involved; too much, I'd say. So, they tend to fight much more than the men lawyers do with the lawyer of the other party and with the other party. Men tend to keep much more distance." wj

"As I said, the first thing I thought was that women lawyers might be more inclined to conciliation. But as I mentally reviewed of the attitudes of women lawyers... I changed my mind. Rather, they seem to me very aggressive. When they are better equipped, in terms of family law training, this makes them less so. But, when they do family law, without the necessary substantive skills..., then it is very tough, very tough indeed." wj

As can be observed from the testimony of the judges, this tendency of women lawyers to get too involved emotionally with their clients is counterbalanced in the case of the women judges by the definition of the judge's role, which implies a certain distance and the preservation of a neutral standpoint:

"I believe it is different with the judges, I do not think it has anything to do with gender at all. The distance judges establish with the people that come to court depends on their personal styles and characteristics, histories, training... it doesn't seem to me that it has anything to do with gender. Gender is just another variable. I think that unlike what tends to happen with the lawyers the difference with the judges lies in the fact that keeping distance is an important part of the judge's role." wj

"Being a judge implies a superior attitude where gender plays no role." wj

## **ii - Gender awareness: contradictions in women's discourse**

In this section I examine women judges' gender awareness. As mentioned earlier, in that respect women judges' discourse is far more complex than that of their men counterparts. Women will start by denying any characteristic derived from gender. At the very most, accept that gender is a variable having the same weight as other variables such as personality, life history, class or ideology, as if gender played no part in the construction of these other variables. Yet, later in the interview, they contradict this first assertion. For example, when referring to the judges' capacity to identify with the litigants, a woman judge states that:

"I do not think this has anything to do with gender. To me, it has more to do with personality. There are men and women judges who can do it, while others, whether men or women cannot. In that sense one can appreciate

differences. I have come across judges that are very sensitive, alert and involved with the people in Court.. As a matter of fact, I know men judges who seem to me more attuned to the needs of the people and many women who are much colder and more detached." wj

Another woman judge expressed that she did not think that the sex of the judge had any effect on his or her working style:

"In my view there are no fixed gender tendencies, but personal orientations: both men and women can have a great involvement with their work." wj

But then she observed differences:

"While women become very involved from the very beginning, men tend to keep more detached and do not mix work with personal matters... Women tend to identify more with family matters and this leads them to get too involved, sometimes at the risk of losing objectivity...Women are very competitive and complicated, they tend to fight a lot, to get the personal mixed up with the professional, something men do not do. I would rather not have three women in a tribunal...I believe that one of the reasons why there are more women in mediation is that they are more patient." wj

And, when asked about women's potential contributions, she asserted that:

"Women tend to work out agreements, while men are more adversarial." wj

When asked whether she thought that women made any difference to the judiciary, another woman judge said that being woman made no difference to her work because "being a judge implies a superior attitude where gender plays no role". However, throughout the interview she made certain assertions that showed that she thought that being a woman did make a difference. For example, to explain the large numbers of women in mediation, she speaks about "a feminine essence" that would make women more given to agreed upon solutions and, also describes the application of international conventions as a "women's initiative and victory", due to the fact that the promotion of the use of international conventions was one of the aims of the educational programs for judges held by the AAWJ. In addition, she mentioned that being a woman has enabled her to sense very subtle matters related to pain and suffering. At the same time, she suggested that if I asked that question to the men in her staff I would get a positive answer, since they were always making comments that linked her reactions to her gender:

"if you asked the men in my staff, (the secretary of the court or my own personal secretary they would answer yes, since they often tell me I said ay such and so because I are a woman!" wj

Another woman judge strongly states that:

"...gender does not make any difference"

In contrast, when asked about the contribution women can make to the profession, she said that she believed:

"In the long run, the fact that women are more honest and have a stronger commitment to basic values, will have consequences for the profession."

This seems an interesting discursive contradiction. On the one hand, she says there are no differences accountable to gender and, on the other, she makes a statement about women being less corruptible. She also expressed a preference to share work with men than with women, because she thinks that the men are more reliable and straightforward than the women, but, when asked about the interaction with other family judges, she mentioned that she met periodically with five judges: all of them women!

Similarly, two of the women judges that had first claimed that there were no gender differences among men and women judges then argued that women's involvement with family life favoured their understanding of family matters:

"Women tend to have a comprehensive vision, they tend to see the other side of an issue. Because of their familiarity with daily life, they are aware of aspects that men often overlook. Their vision is different, neither better nor worse, but complementary and enriching." wj.

"Women's involvement with family matters should not be overlooked. The fact that one is a woman and has been so much closer than the average man to the daily experience of child rearing makes it easy for the woman judge to understand what it is all about. I have a son and a daughter in their twenties. Being separated myself, and having experienced all the stages children go through, the early childhood problems, the school years, the relationship with their father, I personally have been much closer to my children than the conventional father would have been." wj

The above testimonies clearly demonstrated the contradictions in the discourse of the women judges with respect to gender difference, which I interpreted as a strategy tending to avoid gender discrimination. As

shown, the women judges in this study denied gender difference but then referred to examples of gender difference. The mentioned contradictions reveal that, as Bothelho Junqueira observed for the case of Brazilian judges, the women judges are involved "in a constant effort not to perceive themselves nor be perceived as different from their men colleagues"(Bothelho Junqueira, 1997a: 63).

In her research on the attitudes towards gender discrimination among women barristers in Australia, Hunter (2003: 114-130) found a very similar pattern of response among one group of women barristers that she calls "no-yes-but" group (Hunter, 2003: 123). Interestingly, Hunter (2003: 127) relates the observed denial of discrimination among Australian women barristers to their denial of femininity and their attempt to present the bar as a non-gendered scenario. Similarly, in my own study, the women judges, perhaps unconsciously, rehearse a strategy of denial of gender difference which, being an oxymoron, they are unable to sustain discursively.

### **c- Interdisciplinarity**

One of the important findings of the section on the "ideal" family law judge<sup>22</sup> was that women judges valued very highly both interdisciplinary knowledge on the family and the possibility of counting on good interdisciplinary advice to understand and deal with the cases that they have to decide upon. So they made it explicit that it was very important for them to be able to work in groups with experts coming from other professions like psychiatry, psychology, sociology and social work. They think that the human sciences have a lot to offer to law practitioners in the field of family law, particularly to family law judges who can, in that way, make better informed decisions. In fact, as can be appreciated from the following quote of a man judge, a point on which both men and women judges agree is on the women judge's stronger emphasis on interdisciplinarity:

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<sup>22</sup> See chapter 5, section III.2.c.i.

"There is also a certain difference in that certain judges, mainly women tend excessively to refer all cases to the psychologist, the social worker, the interdisciplinary team, thus taking it away from the field of law." mj

His explanation goes like this:

"women's stronger sensitivity leads them into a closer analysis of the case...when they say they would like to work more on the case, what they mean is that they would like to look at it from an interdisciplinary perspective." mj.

Actually, women judges explain this tendency in terms of the particular requirements of the subject matter. The following assertion made by a woman judge exemplifies how judges justify the active role of the interdisciplinary team on the face of the limitations of the legal approach for the resolution of family conflicts:

"People expect more from the law that the law can do. There are problems the law cannot solve, they require changes in the attitudes and positions people assume." wj

In order to promote the required changes in the attitudes of the litigants, women feel that they need expert knowledge besides knowledge of the law and professional advice.

Most judges, both men and women, are conscious of the changes undergone by the Argentine family, a realm where, according to them, in a matter of twenty to twenty five years relative uniformity has been replaced by a widespread diversity. The traditional nuclear family has been in part superseded, giving rise to new and diverse family forms among the middle classes as much as among the poor, largely differing from the traditional model of the nuclear family in terms of the size and composition of the households, and the prevailing values and attitudes.

Under the pressure of increased poverty and with significant numbers of immigrants among the poorest, new family forms have emerged as a result of the formation of new stepfamilies, where children from previous marriages cohabit with one of the parents, their new partners and their own children. Single parent households and stepfamilies coexist with traditional nuclear families that have remained intact. For both men and women judges, the need to understand properly this new and complex

reality calls for immediacy, close contact with the parts involved in family conflicts and an empathic attitude on the part of the judges. Along the same lines, in a newspaper article an ex-family judge suggested: "The law and the legal academy seem to have remained unaware of the existence of these new family integrations, and of the particular problems and conflicts involved; only family psychology seems to have moved fast enough...<sup>23</sup>" Thus, he gives support to the women judge's tendency to emphasise interdisciplinarity and to resort to expert knowledge and advice upon which to base their decisions.

Also, to many of the judges, the women, this new reality calls for an interdisciplinary approach, as a woman judge puts it:

"It is also important that family judges have specific training. They should be familiar with psychology, anthropology and sociology. Any judge would, of course, benefit from a training other than legal training, but this is particularly relevant in the case of family judges... Family law is very special, it is the field of law that brings us closer to human suffering, here we have to deal with extremely painful personal matters, it's very different from other law realms where what people may win or lose is just money. That is why a family judge needs to be very much aware of the reality of the people that come to court. One must be interested, involved, always studying because we permanently find ourselves in need to resort to disciplines that transcend the knowledge of the law. I always say that the code establishes that the "best interest of the child" be pursued, but in order to know what is the meaning of 'the best interest of the child' you inescapably need to resort to other disciplines." wj

And so, she speaks of a very fruitful work association she has with a researcher in the field of family law:

"We constantly share and exchange views with Dr. Grossman, she brings in theory and research and I, my daily practice at the Court. We complement each other nicely." wj

Moreover, to illustrate what they thought were the benefits of the interdisciplinary approach, two of the women judges gave me documents written by themselves on related issues. One of the women judges handed a very long report prepared by herself, together with the interdisciplinary team, on the evolution of a case of a young girl who had been a victim of sexual abuse. A second woman judge offered me an

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<sup>23</sup> Eduardo José Cárdenas: "Después de la separación, otra pareja y otra familia." La Nación 17/4/99.

article on the evolution of the Argentine family and a third one, who holds a degree in sociology, gave me a report with the results of a survey on the opinions of the family judges on various issues related to their work.

In addition, the latter woman judge stated how highly she values her studies of sociology. According to her, sociology is “the other side of the law”, a useful tool for the successful resolution of legal conflicts. Another woman judge conveyed that her interdisciplinary knowledge helped her to understand the very diverse cultural codes the people that come to court bring with them:

“Knowing that people from different cultures have different cultural norms has helped me to understand, although not to justify, certain behaviours that are tabooed in our culture. Now that we have so many immigrants from Bolivia and Paraguay among us, we can see that to them, for instance, the defloration of a girl by her father is a relatively common practice. Still, to me there are some universal principles that should not be ignored.” wj

Another woman judge stresses how important the prompt assistance of an interdisciplinary team can become:

“Given the discretionary power family judges wield to take some cautionary measures which might make important differences to the people involved, for instance, excluding a person from the family home, dispose the institutionalisation of a child, order a person’s admission into a psychiatric clinic, or order a blood transfusion to a child belonging to a sect that does not accept such a practice...All these measures are subject to revision by the Upper Court, but, in the meantime, they can imply great personal costs” wj

In that context, as a judge, she feels she can make better, more informed decisions on the basis of good expert advice:

“If one can base one’s decision on a conclusive technical report stating that a child is at risk or that he/she is being sexually abused, then you can feel more comfortable with your decision to take a strong measure.” wj .

Interestingly enough, this confidence in the “psy” professions does not only translate in their resort to interdisciplinarity for the resolution of cases that come to court but also, it extends to their personal life. Many of the women, while none of the men, mentioned that their private personal psychotherapy helps them a lot, not only to keep a balance in order to mitigate their constant exposure to human suffering derived from family conflicts, but also as a means to understand how these conflicts echo in

their own psyche. The following testimonies from women judges illustrate this point:

"As a family judge you could ruin many people's lives. May be this holds true for all judges but, of course, in the family section there are many children involved. Therapy helps me to deal with anxiety and to make decisions." wj

" I take good care of myself, I have my space for personal validation, I would not dream of losing it, I have been on therapy for fourteen years and I do not think I could do without. Let me tell you I think all family judges should be on therapy, and more, I definitely believe the judiciary should pay for it!" wj

"Family matters are complicated because they have a resonance in your own self. One is a son or a daughter, can become a mother or father, husband or wife. Usually, by the time one becomes a judge one has transited all those roles. So there are many resonances, many unresolved personal aspects might arise of which one may be unaware. I believe that no family judge can do without a few years of therapy." wj

Undoubtedly, women's greater familiarity with the human sciences -that was observed in the analysis of their educational backgrounds in chapter 4<sup>24</sup>- can explain this tendency to found their decisions on the advice of the interdisciplinary team. In an earlier section on the characteristics of the "ideal" family judge according to women and men judges it was argued that women's lack of assurance could partly account for their resort to interdisciplinary knowledge for the resolution of family conflicts<sup>25</sup>. In my view, the possibility to lean on a consistent body of knowledge for the exercise of their professional tasks might partly provide the security and assurance that, given their recent entry into the profession and the masculine language of the law, they might be lacking.

Both women's greater acquaintance with the human sciences and the possibility of mitigating their lack of professional assurance seem plausible explanations for women's greater reliance on interdisciplinary knowledge. Still, I think one could appeal to a third sort of justification that accounts for women's tendency to view a case in its whole complexity, and not just as a matter of legal resolution.

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<sup>24</sup> See chapter 4, section III.2.c.i

<sup>25</sup> See chapter 5, section III.2.c.i

If both women and men mentioned empathy, contextuality and immediacy as characteristics of the "ideal" judge, this stronger feminine tendency to resort to interdisciplinarity could be revealing a different, much stronger emphasis on contextual thinking on the part of the women judges. As was argued in the conclusion to chapter 5, Benhabib examines the Gilligan-Kolberg controversy and argues in favour of an approach that situates the subject in its particular circumstances. Certainly, the human sciences can provide a very useful tool in such an endeavour (.Benhabib, 1990: 120-149).

### **i - Men and interdisciplinarity**

Men judges also resort to the assistance of the interdisciplinary team, but this is an issue that women emphasise much more, to the point that they insist that the judge him/herself should be familiar with the human sciences. When the women spoke of the "ideal" characteristics of a family judge, they referred to these capacities as of paramount importance, while the men did not.

In the testimony that follows, a man judge argues that, as the women judges tend to rely heavily on the authority of the human sciences, rather than being put in terms of a rights discourse, the cases seem to become devoid of their legal content. I would rather say that, when the women refer to interdisciplinary knowledge in order to fully understand the case they have in front of them, they are giving pre-eminence to the conflicts and problems that underlie the legal conflict in question. As a matter of fact, when asked whether there is a culture within the family judges and, if so, on what lines the judges divided, many of the judges identified this aspect as one that draws a line between different judges. The following quote illustrates this point:

"There are two different schools, one of them states that this is a Court of law and here we must apply the law. I do not need a social worker or a psychologist to come here to contaminate the work of the Court with weird ideas. Here everything runs according to the law, one dictates resolutions and once they are firm they are executed and that is it. This is not a psychologist office, here we apply the law, it's not a place where you come for therapy...And there are Courts that work following another model. There is a judge, for instance, who considers that child abuse is not a matter for

the Family Courts. If there is a presumption of child abuse, then the case must be referred to a Criminal Court, because child abuse is a criminal offence...If abuse can be proved by the criminal court then the abusive parent goes to jail, and if it is not, then the case is filed. There are others, though, with a more flexible approach. They know that penalisation is very hard on the children. They prefer to initiate an investigation with the help of professionals from other disciplines, and act on the case in order to mitigate the child's exposure and avoid the re-victimization that comes with a criminal action." mj

I must say that although this type of comment was one that I encountered repeatedly throughout the research I have not come across any judge expressing such strong disagreement with the interdisciplinary approach. As a matter of fact, the following quote from a man judge represents the most critical remark about interdisciplinarity:

"My opinion is that channelling the cases to the interdisciplinary team is good for certain cases and bad for others. There are certain cases where it is necessary to set some limits to the people involved in legal conflicts. To me, only the law has the capacity to set such limits. This is the reason why I think you do not have to channel every case through to the interdisciplinary team. I'd rather say that the judge needs to carefully select which cases should be referred to the interdisciplinary team and which should not." mj

In contrast, when asked about the main obstacles or difficulties they had to face in their work as judges in the family law judiciary, the men and women interviewed unanimously complained about the lack of sufficient human technical resources both for diagnosis and for treatment in the context of their tremendous work overload. As a matter of fact, and mainly through lack of funding, the judiciary in Argentina suffers from the same deficiencies as most state provided public services. This is how they put it:

"The worst part is that we lack the human and institutional resources to meet the demand. This brings despair to our work, because we have only two social workers in our staff, and we have to count on the good will of those psychoanalysts, psychologists and systemic therapists that collaborate with us for free." mj

## **ii - Institutional resistance**

Apart from the lack of resources, introducing psychologists as stable members of the court staff seems to involve more substantive differences. At the same time as women judges perceive themselves and are perceived by others as the "champions of interdisciplinarity", both men and women judges complain that, officially, the interdisciplinary team is composed by just two social workers, and no psychologist or

psychoanalyst is allowed into it by the Supreme Court<sup>26</sup>. This refers back to the discussion in the previous section on the men judges' attitude towards interdisciplinarity, where I recount that many judges had referred to some colleagues' very derogatory position touching on interdisciplinarity. I reported then that I did not come across any of these judges in the research. Thus, I think that these judges were implicitly referring to the position of the Supreme Court.

In spite of the resistance they encounter, the judges resort to strategies that enable them to count on the work and support of the "psy" professions they consider so important. As for the denial of discrimination, I think Giddens's concept of "practical consciousness"<sup>27</sup> can be applied here. Although women do not confront the Supreme Court nor question its authority in their practices, they deploy certain strategies that allow them to count on professionals who collaborate with the judge's work for free, helping with the assessment and evaluation of the cases. The next extracts from interviews evidence this:

"At the Family Courts we have only two social workers in our staff, we do not have psychiatrists or psychologists. Not officially, at least, but I do have both psychologists and psychiatrist that have collaborated with the Court for years without charging any fees." wj

**So, you do not have the faculty to nominate an Interdisciplinary team?**

Yes, we do, but we do not have the means to do so. When the people involved in a case can afford it, we can summon an expert from those that appear on the list. Still, most people cannot afford that, thus we have to rely on the existing social services, like the forensic medical body, the professionals that collaborate with us for free, the medical services from the hospitals... In that sense, the exercise of power is quite tough for the people involved. We are talking of children, of the sick, people to whom our decision makes a difference... This is not something that has to do with money, it can cause very traumatic damage." wj

" ... What we want and what we need is an interdisciplinary team. In "ideal" terms each court should have one." wj

**I am told that the Supreme Court will not authorise psychologists.**

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<sup>26</sup> In June 1999, a group of Family Law Judges wrote to the Supreme requesting a interdisciplinary team , to be able to respond to the increased demand created by the Law of Domestic Violence , but the Court did not approve their request (Watera, M.R., 2002).

<sup>27</sup> Same as 19.

No, it will not. Originally in the court staff included a social worker, eventually we had two. I then asked for a psychologist or a psychiatrist in place of the second social worker, but my petition was denied." wj...

#### **On what grounds?**

Psychologists are more questioned than psychiatrists, but I do not agree. In my view, both could make a very important contribution, irrespectively of their line of work, provided they are open to other lines... We obtained the best results working with professionals with a systemic outlook, but we have also worked with people with different perspectives, and we absolutely need them." wj

Undoubtedly, this is an interesting paradox. Is the system so schizophrenic as to forbid what a large proportion of its members claim for? Is it not interesting to note that that which is forbidden acquires the status of a demand, especially although not exclusively through women's voices? Has this got to do with the fact that law is a phallogentric discourse? Somehow this reminds me of Thornton on women's difficulties in penetrating the legal discourse, as she speaks of women as "fringe dwellers on the jurisprudential community" (Thornton, 1996: 3). Yet, in a way, as we have seen, women judges succeed in making an imprint on the administration of justice by counting on the services of "psy" professionals that work outside the justice system in spite of the resistance of the judicial authorities, showing their resilience to the systemic opposition they encounter. As Mary Jane Mossman, citing Galileo, puts in the foreword to Thornton's book: "E pur si muove"- And still, it moves- (in Thornton, 1996: X).

#### **d - Conclusion**

This section explored basically two issues the opinions of the men and women judges in the Family Law Courts about the attributes women might bring to the judiciary and on whether they thought women judges could make a difference. In that sense, the responses of the men and women judges were very different. The men in general resorted to the dominant stereotype, and attributed to the women judges the traditional feminine nurturing and empathic capacities welcomed women because, as they said, the legal domain would benefit from those feminine attributes. Instead, with an attitude that was interpreted as a defence against

potential discrimination, women instead, initially denied any gender differences, admitting at most that gender played at most the same role as any other variable but later mentioned examples of gender differences. They then said they thought women judges were more patient; had a stronger tendency to agreed upon solutions and to see legal matters in a more integral way, and to rely on interdisciplinary support. Certainly the women judges' emphasis in interdisciplinarity appeared both in the testimony of men and women judges as the most noticeable difference women were bringing to the family law judiciary.

## • VI - General Conclusion

This chapter analysed the reasons given by men and women family law judges regarding the large number of women in the family law area and in the family law judiciary. In the first place, to explain the large numbers of women in family law the judges argued that as women entered the profession, the men left the family area to look for more profitable sectors of the profession, thus leaving room for women entrants. In the second place, the judges argued that, through their larger involvement family life, women developed both the preference and the capacities that made them more suitable to deal with family matters. In the third place, and particularly women judges, related the large numbers of women in family law to the fact that the family subject matter requires specialised knowledge and that women tended to supplement their legal studies with specialised training on the family.

With respect to the large proportion of women among the family law judges, the responses of the judges indicated that women's domestic responsibilities acted as a factor explaining the options women take in terms of the section of the judiciary for which they apply. When asked about the reasons for the large numbers of women in the Family Law Courts the fact that these courts work only in the mornings, rather than women's preference for the family speciality was highlighted in the first

place by the respondents. In addition, they believe that women prefer the family subject matter as a consequence of their different personal experiences and their larger involvement with the family.

Thus, the traditional sexual division of labour within the family emerged as a factor determining the choices men and women members of the legal profession make when they opt for the sections in which to develop a career. This pointed to the significance of the "double burden". According to the judges, following the societal stereotype, men tend to opt on the basis of their function as the main economic family providers and women on the basis of their family commitments. While women developed certain strategies to juggle career and motherhood that brought discontinuities to their professional lives, men, in general, had continuous careers since their family responsibilities did not affect with their wives in charge of the home and children.

Both men and women judges appeared to have little awareness of gender discrimination. They tended to deny and minimise discrimination and mainly spoke about it as something that happened in the past and was disappearing due to the incorporation of a new system for the selection and appointment of the judges. Although the reasons that could explain this general denial of discrimination especially on the part of the women were put forward, it was argued that this denial was suggestive of an excess in tolerance to injustice that was worrisome on the part of those who administer justice.

While the judges were reluctant to acknowledge discrimination within the judiciary and the family, they were very aware of the potential for discriminatory practices in their own work through the imposition of a family model that may not coincide with that of the actual families that come to court.

I also found very little awareness among the judges of the effects of gender on the family. I argued that, as those having to make important decisions with respect to the future of the families that come to court, the

family law judges would have benefited from a more complete vision of the effects of gender on family life and the lives of its individual members.

With respect to the judges' opinions regarding the women judges' possible contribution to the administration of justice, the responses obtained from men and women were very different. While women judges initially denied any capacity that could be derived from gender, men judges very much sustained the traditional stereotype. In the opinion of the men, women's entry has a potential to make a big difference in the administration of justice, particularly to the family judiciary where, in their own words, the humanity women bring is welcome.

I also gave an account of women's initial denial of any gender differences affecting their activity as judges is frequently reversed in other sections of the interview when they identify some tendencies that, in a way, contradict their first response. Reminded of the fact that the law evolved for centuries as a masculine discipline, I explained this in terms of a strategy from the part of the women judges to anticipate and avoid discrimination, by insisting that gender does not make any difference in adjudication and the women can administer justice as well as the men do.

There is, however, an aspect related to the potential contribution women could make to the administration of justice where there is a high level of agreement in the responses of both men and the women judges. This relates to women's greater tendency to resort to interdisciplinarity, as an essential tool for the exercise of their work as family judges. It is not surprising that women who did not participate in the creation of the law attempt to expand its boundaries to make it more reflective of their conceptions on social health, and more responsive to the needs of the litigants. After all, the law particularly family law must serve not just to organise social life but also to help people to lead rewarding and happier lives.

This was explained in the first place in terms of their greater exposure to the human disciplines, as women judges had a greater level of

educational attainment than their men counterparts, particularly in the human disciplines. In the second place it was argued that resort to interdisciplinarity, as the possibility to rely on a consistent body of knowledge on which to found their decisions, could bring women judges a sense of assurance that they might be lacking, for they are relatively newcomers to the profession. In the third place, it was explained that women judges tended to look at family problems in their full complexity with a greater sensitivity to the context, a different conception of psycho-social health. They are prepared to understand the problems at a deeper level, as a means to not only find a legal resolution to the case, but also attempt to work out a resolution of the underlying conflicts, as a means to prevent new ones.

Overall, both men and women judges eventually mentioned the existence of certain gender specific attributes women bring to the judiciary with a potential to bring about changes to the family judiciary, especially in terms of making it more sensitive to the reality of the litigants undergoing a family conflict and particularly bringing an improved understanding of the underlying non-legal problems.

It was also noted that, while the women judges appear as the "champions of interdisciplinarity", the Supreme Court does not allow judges to have members of the "psy" professions as full members of their staff. This reminded me of Thornton's observation in terms of the persistence of women's marginality within the legal field (Thornton, 1996: 3). Nevertheless, apart from resorting to the cooperation of professionals from the social and state provided health services and on independent experts nominated and authorised by the judiciary, the judges are entitled to consult a limited number of times a year, both men and women judges (probably more often the women than the men) deploy strategies that enable them to rely frequently on the collaboration of psychiatrists or psychologists that aid the court free of charge.

In the concluding section I integrate the different aspects investigated throughout the thesis and the partial findings presented in its various chapters.

## Concluding section

The originality of this study lies in the fact that it is the first comprehensive attempt to depict the situation of women in the legal professions in Buenos Aires. It is also the first research project studying the Family Law Courts and the first one to consider women judges and the difference they might make to the administration of justice.

In order to assess women's contribution to the Family Law judiciary this thesis explored the attitudes, values and beliefs of the men and women family law judges of the city of Buenos Aires and their opinions with respect to the difference that the increasing number of women entrants could make to the judiciary. In this concluding section, I shall briefly recount my work, highlighting what I deem to be my most important findings.

In Argentina until the last couple of months, for the reasons discussed further below, this subject has not generated much interest. Thus, existing research on women in the judiciary is very scarce, and the little there is, touches only tangentially on the issue of gender difference. The structure of the thesis reflects the unavailability of relevant knowledge and data. This meant that I had to start from a very low base, putting together a considerable body of existing and new information to supply my research into the family law judges with the necessary theoretical, socio-historical and institutional context. Accordingly, the first part of the thesis presents the background for my study, while the second part reports the findings of the qualitative research.

This thesis began by analysing the theoretical framework provided by feminist legal theory, paying particular attention to the ways legal feminism has explained the situation of women in the legal professions. Feminist legal theory accounts for a very rich, prolific, complex and controversial theoretical tradition working across disciplinary boundaries and paralleling the development of feminism. It is a theoretical body that has progressed

in different strands, the main tenets of which are not necessarily mutually exclusive.

The analysis of "cultural feminism" -the strand within legal feminism that oriented my research- against the backdrop of the main debates within feminist legal theory provoked much reflection about the research questions, its aims and the risks involved in the proposed enquiry. The current debate within feminist legal theory acknowledges the theoretical problems involved in the subject matter, taking the anti-essentialist critique seriously. The discussion of the dangers of essentialism entailed in the cultural feminist approach point to the need to design a research strategy aiming at counteracting such risks. In line with the work of other researchers working internationally on women in the legal professions, I consider the issue in a renewed light, bringing complexity and caution into it. The theoretical revision enabled me to frame valid and thoughtful research questions. Accordingly, my research project is set in a specific environment -the Family Law Courts of the city of Buenos Aires- searching for results only applicable to its particular context. This enquiry is thus sceptical and cautious with respect to the attribution of the care orientation to women in law and considers other aspects besides gender and different social forces related to the values and attitudes that women can bring into judging.

The acquaintance with the various strands within feminist legal theory, facilitated the appreciation of the different theoretical and methodological tools these strands could supply for the advance of this research. Therefore, the enquiry resorts to research tools devised by the different strands of legal feminism. The methods of liberal feminism intending to examine the participation of women in society were very helpful to search into the situation of women within the legal profession in Buenos Aires, while, the approach of difference feminism proved most valuable to envisage the exploration of the impact of gender differences in the values and attitudes of men and women judges.

Likewise, the review of the main socio-historical trends giving rise to women's increasing participation within the professions in Argentina demonstrated the multifarious relationship between the strengthening of democratic institutions and the advance of women within society. The analysis of Argentinean women's incorporation into education and their fight to obtain civil and political rights in the context of the systemic fluctuations of the country's emerging democracy and its fragile economy proved to be extremely useful. It revealed that while a democratic context is crucial for women's social progress, even within democratic rule, women's demands for equality are relatively marginal. Thus, while democratic rule appears as a necessary requisite for women's advancement in society, it is, nevertheless, not a sufficient condition. This explains part of the difficulties in promoting significant transformations in gender related issues.

The description of women's participation in the different branches of the legal profession constitutes a most necessary base line that was previously unavailable. As such, it will be extremely helpful for further research. It basically showed that, like in other parts of the world, law is an inhospitable institution when it comes to incorporating women. The analysis of the situation of women in the legal professions in Argentina demonstrates that the large increase in the number of women receiving legal education is not making itself felt in terms of women's participation in the legal realm. Despite women's advances, all areas of legal practice exhibit a high degree of vertical and horizontal segregation, the large legal firm being the main locus of discrimination. Women are mostly situated at the lower end of the hierarchy of the firms and only very rarely become partners. While large law firms prove to be inimical to the incorporation of women, legal education and the judiciary appear as branches of the profession where women can develop careers that are easier to combine with their needs and family responsibilities. In the view of the judges that participated in this study, this explains women's preference for the judiciary over large law firms. In a similar way, the central roles of men and women within the family; i.e. men's role as economic providers and

women's role as those in charge of the home and children are the reasons given by the judges throughout the research to justify important choices and decisions.

One remarkable finding is that women in law teaching -a part-time and low-paying branch of the profession- work on a full-time basis more often than men do, and, when they perform important roles as authorities of UBA Law School, they frequently occupy the less prestigious and more time consuming posts, performing pastoral and housekeeping tasks. Another revealing finding is that women judges are concentrated in the lower instances of the judiciary, within the sections more related to their traditional family roles. Although the participation of women in second instance courts and in the Supreme Courts of the provinces is increasing, there are still no women at the Supreme Court of the Nation.

The examination of the recent trends in family life and family law provided a valuable context for the enquiry with the family law judges. Women's increased participation in paid employment as a result of their enlarged educational opportunities and growing male unemployment, appears as one of the more striking phenomena over the last 20 to 25 years in Argentine society. Even if its effects need still to be fully studied, this appears as a very important issue framing the work of family law judges.

The creation of the Family Law Courts coincided with a period of profound changes initiated with the recovery of democracy. Embedded in a general societal trend to update family law and eliminate gender inequalities within the law, it should be seen as an aspect of the modernisation of family law centred around the passing of the law of divorce, and as a response to the demands posed by changes in family life. Thus, if the study of the Family Law Courts presents a very partial view of the situation of women within the judiciary, it certainly accounts for a key period in Argentinean history. The latter period, characterised by important transformations, coincides with a time of relatively intense activity of the women's movement, which became more involved in matters strongly related to gender.

The high number of women in the family law judiciary, as compared to other sections of the judiciary, parallels the transition from private to public undergone by Argentine women in recent times. The family law judiciary represents a bridge between the private sphere of the home and the public realm of the law and legal institutions. In that sense, it is analogous to women's public participation in other branches of the State, such as the legislature and the executive, in which women are frequently in charge of areas related to the roles they have traditionally performed within the family.

The findings show a considerable uniformity in the composition of the Family Law Courts: the judges are all white, able bodied and have received a Catholic upbringing; most come from middle class backgrounds, are or have been married and have children. In such a homogeneous context, the sex of the judges seems a strong criterion for differentiation and so does their age, since women are, on average, 9 years younger than men judges. Men and women family law judges also differ with respect to their practice of the Catholic religion, men seeming to practise the Catholic religion more often than women, although all of them have had a Catholic upbringing. Civil status also varies with gender: while men are all married, half of the women are widows, separated or divorced. Men and women judges in the family law section also differ in terms of their educational attainment and career trajectories. Women have a higher level of educational attainment and men a longer seniority in the judicial post. While the men judges have had continuous careers, the women judges' careers have often been discontinuous.

As members of the first generation of women judges, the judges participating in this study are pioneers who occupy positions of prestige stemming from their professional roles. Thus they break certain patterns in relation to their family and social role models. However, the responses of both the men and women judges reveal that these women belong to a transitional generation. Since parental responsibilities within their families have not yet been redefined in accordance with their increased participation in the public sphere, their domestic responsibilities have

affected their career choices and chances for advancement. Thus, I found that younger women judges who are mothers of young children have been significantly overburdened as a consequence of the traditional parental role allocation along gender lines. As mentioned, before, whereas the careers of the men are continuous, those of the women are comparatively more discontinuous. The discontinuities in the women's careers, due to interruptions related to motherhood and child caring, have certainly had negative effects on their chances of professional advancement. Bearing in mind the situation of women within the judiciary and the effects of the double shift, I will borrow the expression coined by Spanish sociologist M.A. García de León (1994: 76) to characterise the women judges in this study as members of "a discriminated elite".

Whereas men's roles of economic providers inspire their career options, women judges show a stronger vocational orientation and understand their work in a "missionary" fashion more often than the men. Along the same lines, the judges explain the large numbers of women in family law mostly as a consequence of the entry of women into the legal profession. They argue that women's entry into the profession has resulted in the men leaving the family law area to look for more profitable sectors. The large proportion of women among the family law judges is also explained in terms of family gender roles. The fact that the Family Courts work only in the mornings, rather than women's preference for the family specialty was highlighted by the respondents as a reason for the large numbers of women in the Family Law Courts. In addition, women's preference for the family subject matter appears to be related to their different personal experiences and their larger involvement with the family. In the view of the judges, through such an involvement, women develop both the preference and the capacities that make them more suitable to deal with family matters. Besides, particularly women judges believe that the Family Law judiciary requires specialised knowledge and training on the family. Accordingly, they explain the large numbers of women in the Family Law judiciary as a consequence of women's higher propensity to add further specialised training to their legal studies.

Although I observed a considerable overlap in terms of the qualities attributed by men and women judges to the "ideal" family law judge, there are however, differences in emphasis as well as the mention of attributes that clearly differentiate the men and the women judges' ideals. Qualities such as empathy, immediacy, sensitivity to the context, humility, lack of prejudice, honesty, and knowledge of the law often appear in the discourse of both men and women judges. The abilities that clearly differentiate the men judges' ideal are objectivity, equanimity, equidistance, composure, thoughtfulness, moderation. The need for the judge to be well acquainted with interdisciplinary knowledge and to view his/her work as a public service are the required characteristics of an "ideal" family law judge emphasised by women judges. I associate these different abilities highlighted by men and women judges with a tendency towards a more individual work style on the part of the men judges and a tendency to a more collective work style on the part of the women judges.

As the ideal of women appears to be more demanding than that of men, I propose that the difficulty to live up to such a demanding ideal can partly explain the more acute sense of discomfort with the power and responsibility associated to their role and their professed difficulties to exert authority.

Both men and women judges appear to have little awareness of gender discrimination, they tend to deny and minimise discrimination and mainly speak about it as something happening in the past, destined to disappear due to the incorporation of a new system for the selection and appointment of judges. In fact, it will be very interesting to examine the processes of selection of new judges by the "Consejo de la Magistratura", with a focus on how gender impinges on the nomination of judges. In the meantime, the denial of discrimination on the part of the judges suggests a preoccupying excess of tolerance to injustice on the part of those whose task is to administer justice.

Similarly, very little awareness was found on the effects of gender on the family. As those who make important decisions affecting the future of the

families that come to court, family law judges would benefit from a more complete vision of the effects of gender on family life and on the lives of its individual members. While both men and women judges are resistant to acknowledge discrimination within the judiciary and the family they are very aware of the potential for discriminatory practices involved in their own work.

They are very conscious of the danger of symbolic violence they might exert through the imposition of a family model that may not coincide with that of the actual families that come to court. This reveals a tendency to contextual thinking that is also evident when they describe the way they reach their decisions in the resolution of the cases that come before them. That is, they first find the just solution and only then look for the law that gives support to that decision. This challenges one of the main tenets of the civil law system, according to which civil law judges are just "the mouth of the law", and shows the high level of discretion actually involved in adjudication. In turn, this points to the relevance of the real persons behind the judges' robes, to their moral values and personal conceptions of justice.

With respect to the contribution that women judges could make to the judiciary, the responses obtained from men and women are very different. While women judges initially tend to deny any capacity that could be derived from gender, the men judges very much sustain the traditional stereotype. Men judges think that women have a potential to make a big difference in the administration of justice, particularly in the Family Law judiciary where, as they claim, the humanity that women bring is necessary and welcome. Women's initial denial of any gender differences that might affect their activity as judges is frequently reversed with the progress of the interview, when they identify some tendencies which, to some extent, contradict their first response. Bearing in mind the masculine character of law, this can be explained as a strategy on the part of women judges to anticipate and avoid discrimination by asserting that gender does not make any difference in adjudication and that women can administer justice as well as men do.

A point of convergence among men and women judges is women's greater tendency to resort to interdisciplinarity as an essential tool for their work as family law judges. It is not surprising that women who did not participate in the creation of the law attempt to expand its boundaries to make it more reflective of their conceptions on social health, and more responsive to the needs of the litigants. After all, the law, and particularly family law, must serve not just to organise social life but also help people to lead rewarding and happier lives.

Women judges' greater tendency towards interdisciplinarity can be interpreted in terms of various factors. In the first place, as a consequence of their greater exposure to the human disciplines. In the second place, it seems to me that leaning on a consistent body of knowledge on which to found their decisions can provide the women judges with a sense of self confidence which, as newcomers to the profession, they might be lacking. In the third place, I associate women's tendency to interdisciplinarity with their propensity to look at family problems in their full complexity with a greater sensitivity to the context and a different conception of psycho-social health and to understand the problems at a deeper level. Thus, they not only find a legal solution to the case but also work out a solution of the underlying conflicts in order to prevent new ones. Actually, the most significant contribution that women are making to the family law judiciary consists in the introduction of an interdisciplinary approach for the resolution of family problems.

Overall, both men and women judges eventually mention the existence of certain gender specific attributes that women judges contribute to the activity of judging with a potential to introduce changes to the family law judiciary. In their opinion, these differences move in the direction of making the family judiciary more sensitive to the reality of the litigants undergoing a family conflict, More particularly, women bring an improved understanding of the underlying non-legal problems.

Although the aim of my research was not to test the cultural feminist approach in the context of the family law judiciary, I used its conceptual

framework to orient my enquiry on gender differences among the family law judges. Following Gilligan's model of two different moral orientations associated to gender, Menkel-Meadow speculated on the possibility that, once the number of women in the legal profession became significant, differences might emerge on men's and women's professional attitudes. While men would approach their work by means of an "ethic of justice", women would deploy an "ethic of care" (Gilligan, 1982; Menkel Meadow, 1989 and 1995).

However, if I relate my research findings to Gilligan's model of two different moral orientations corresponding to the way men and women approach their professional activities, by means of an "ethic of care" for the case of women as opposed to an "ethic of justice" for the case of men, my findings are not conclusive. This is consistent with the research results of other scholars working internationally on the subject. As a matter of fact, while some of the results of my work with the family law judges seem to substantiate the cultural feminist thesis, others do not.

The findings suggest that, while men judges stress on objectivity, neutrality and equidistance, the women emphasise vocation, care and personal involvement. In addition to this, the cultural feminist thesis about different moral orientations associated to gender would be supported by the way women view their professional activity as a service to the community and experience the power they wield as a strong responsibility. On the other hand, although women lay a stronger emphasis on empathy, immediacy and a contextual approach, the fact that men as well as women deem those aspects as important would suggest that the men judges embrace certain qualities more characteristic of the "women's voice" and the "ethic of care". This questions Gilligan's assertion with respect to the prevalence of either the "ethic of care" or the "ethic of justice" in the majority of the cases.

The nature of the family subject matter could provide a possible explanation for my findings about men and women embracing certain characteristics related to the "ethic of care". By way of example, the

presence of children, who are frequently abused, and of women suffering from domestic violence epitomising those in need of care in family conflicts would justify the deployment of the "ethic of care" among family law judges, irrespectively of their gender. While involvement with families appears as fostering a particular type of approach connected to the "ethic of care", performing similar research in other branches of the judiciary could elucidate the point.

On the other hand, religion can be considered as a variable intervening in the judges' adoption of a care approach. The testimonies of the judges the sample reflect a considerable uniformity in terms of religion, as all of the judges in the sample have had a Catholic upbringing and most of the men practise the Catholic religion. Given that care and compassion constitute central imperatives of the Catholic ethic, religion could also be considered to be a factor explaining the judges' embrace of a caring approach, especially since the men judges who appear as the most caring are those who explicitly expressed the strongest adherence to Catholic principles. Let's just remember that Gilligan's work was set up in the North-American scene with an overall preponderance of the Protestant religion, thus not reflecting the particularities of the Argentine case. Although the latter point would, however, make the subject of a whole new thesis, it can certainly be pointed out that the contents of a "Catholic ethic of care" would presumably be somewhat different from those of a "Feminist ethic of care". While these ethical approaches are not mutually exclusive, one could expect the former to be rather conservative, while the latter would be more progressive. What my research clearly shows is that the deployment of an ethic of care does not lead to an adherence to feminism on the part of either men or women judges.

As mentioned before, a very significant finding of this research referred to the way the judges reached their decisions. Both women and men judges stated that the way they reached their decisions was by first deciding what a fair solution would be and then look for the law that would give legal support to that solution. As was argued above, this pointed to the significance of a judge's approach and moral values.

Despite the fact that women judges lay a stronger emphasis on care than men judges, both tend to deploy their caring capacities when exercising their work as family law judges. This is a crucial discovery. According to the family law judges that participated in this study, a caring approach certainly makes a difference to those coming to court searching for a legal resolution to their family problems. Thus, I think that it must be valued positively as an important constituent of an adequate service of justice. Bearing in mind that a new process for the selection of judges is being implemented in Buenos Aires, I would suggest that when considering candidates for the family law judiciary, special consideration be given to the candidates' capacities for deploying a caring approach, along with the more traditional requirements, such as knowledge of the law, fairness and honesty. In addition, the demonstration that both men and women judges value a caring attitude with respect to the litigants and are capable to deploy a compassionate approach will contribute to demystify the conventional stereotype that regards family law as an area within the legal profession for which women are better endowed.

## Postscript

An important event is taking place in Argentine society as I am writing this concluding section that puts the research question that inspired this thesis at the centre of the public debate. As part of a general process towards the strengthening of key public institutions, the newly elected government has taken the lead in a movement aimed at "cleaning" the judiciary from corruption and political patronage. It has gone as far as to promote the impeachment of a member of the Supreme Court. In addition, faced with the new reality, a highly controversial Supreme Justice decided to resign from his post. There are presently two vacant posts in the Supreme Court of the Nation and the President has decided, for the first time ever in Argentine democratic history, to nominate a woman as a candidate to fill the vacant post. As was mentioned in chapter three, a woman was appointed to the Supreme Court only once in the 1960's by a "de-facto" government, but no women have taken part in the Supreme Court after her resignation.

Through this nomination the present government has demonstrated its intention to settle a long standing debt with Argentinean women and the desire to start balancing the lack of gender equilibrium prevailing within the judiciary documented in chapter 3. Likewise, important reforms have been initiated by both the executive and the parliament, inspired by a determination to instil equity and transparency and thus improving the process of appointment of the Supreme Courts Judges. Traditionally, the nomination of candidates for the Supreme Court had been a very closed and opaque event that involved only the President, the Agreements Commission of the Senate and the Senate itself. Thus, the President elevated a request for agreement for a candidate of his choice to be considered by the Agreements Commission of the Senate. This commission analysed the proposal sent by the President for the appointment of the nominee as a Justice together with information related to the candidate, to later reach an opinion with respect to the candidate

and recommend that the Senate should give its consent or dismiss the candidate postulated by the President.

In the last six months, and as a result of the pressure exerted by a group of civil society organisations working in the area of justice and democracy, both the executive and the parliament have taken important steps aimed at changing this state of affairs, opening up a space for the participation of civil society in the process of appointment of the Supreme Court judges<sup>1</sup>.

In June 2003 the President decided to limit his constitutional powers with respect to the nomination of the Supreme Court Judges<sup>2</sup> and give more participation to society in the process of appointment. Accordingly, in July 2003, the Senate reformed the rules governing the process<sup>3</sup>. Thus, a space was opened up in which the executive publishes an extended curriculum vitae of the appointee, and the citizens are given some time to express in writing -either individually or through their organisations- their support or disagreement with the President's appointee. Likewise, they can send questions to the Senate that will be incorporated into a Senate-held public hearing, in which the candidate has to respond to the questions posed by the representatives and the citizens. Only after all these steps have been fulfilled will the Senate reach a decision as to whether or not to consent to the President's nomination .

Towards the end of last year, a Supreme Court vacancy<sup>4</sup> was filled using the new procedure. A very prestigious man of law was appointed to the Upper Court. His nomination met with great support from most sectors, but not from the Church, for he is presumed to be a homosexual, with a very progressive standing. At that time, in spite of expressing their support for the candidate, women's organisations made it clear that they had expected a woman to be appointed then. Probably this had some effect on the President's choice for a woman for the present vacancy.

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<sup>1</sup> See document presented by the organizations: "Una Corte para la Democracia" [www.adc.org.ar](http://www.adc.org.ar)

<sup>2</sup> Decree 222/2003 , June 19, 2003.

<sup>3</sup> See [www.senado.gov.ar](http://www.senado.gov.ar) for the full text of the new rules of procedure for the appointment of Justices.

<sup>4</sup> Created by the resignation of one of the Justices in 2002.

Thus, from July 2003 Argentina saw an increasing public interest in the judiciary and mainly in the constitution of its Supreme Court. Additionally, the nomination of a woman in January 2004 brought to the larger society a discussion that had rarely escaped the secluded boundaries of the feminist movement and the conservative Catholic Church. The fact that the new appointee, Dr. Carmen Argibay, presently serving as a judge at the Hague's Court of Human Rights, made very daring declarations to the press, identifying herself with feminism, disclosing her position as a militant atheist and advocating the de-penalisation of abortion originated a most fervent public discussion.

Issues that until very recently had been a very marginal matter, both within academic and political spheres, became the object of the most heated discussions and, for weeks, the subject of editorials in the most important newspapers. Gender representation and other matters widely discussed throughout the thesis, such as the reasons for wanting more women in the judiciary and the difference women could make to the administration of justice, became central matters within the public debate. Instead of being centred on the candidate's capacities for holding the post of Justice, the ensuing public debate focused on abortion. The Catholic church, in despair, brought all its weapons into the battle. The Ministry received thousands of letters both in support and in opposition to Argibay's nomination.

In the first days of March 2004, the President announced that he was going to nominate another woman for the next vacancy. He has already given the name of a judge of the Upper Civil Court, Dr. Helen Highton, who was mentioned before in the thesis as one of the introducers of mediation in the judicial system. According to political commentators, to neutralise the public unrest caused by Argibay's declarations and to appease public deliberation, President Kirchner chose the most conservative among the women he had listed as candidates to the Supreme Court as the nominee for the next vacant post. The President's attitude denotes that the interference of the Catholic church is far from being something of the past. Highton herself declared to the press that she only spoke through her

judgements. In any event, it seems that there will shortly be two women, two very different women indeed, in the Argentinean Supreme Court, thus reversing a very long standing tradition of gender exclusion.

Although the previous discussion and the ensuing ideological controversy, may seem anecdotal and marginal to the chore of this thesis, the debate now taking place epitomises the strong internal connection between the contents of the chapters constituting the first part of this thesis. The different profiles of the two women candidates clearly illustrate the argument about the differences existing between women that constituted an important part of the theoretical discussion in chapter 1. The nomination of two women to the Supreme Court, associated with a process of increasing transparency and public participation in the process of nomination of Supreme Court Judges, demonstrates the connection between gender equality and the development of strong democratic institutions. This association was considered in chapter 2 as I overviewed women's public participation in the context of the democratic fluctuations that characterise Argentina's recent history and when I described the inequality in the participation of women investigated in chapter 3. Furthermore, the presence of two women among the nine justices in the Supreme Court of the Nation will, in a few years, provide the opportunity to analyse their decisions and see whether they make a difference to the administration of justice. I hope that my work will serve then as a precedent to these new and exciting possibilities for research on the subject.

## Methodological Appendix

This study's general methodological strategy was presented in the Introduction. The techniques used to collect and analyse the data obtained were introduced as I proceeded with the analysis. The methodological strategy was justified in the Introduction and at the end of the section on international research on women judges to be found in chapter 4. Accordingly, this appendix just contains a few explanations regarding timing and the two pieces used for data collection.

Chapter 3 refers to the situation of women lawyers in the different branches of the legal profession. This involved the use of quantitative methods. As I searched for secondary data that was mainly unavailable I had to produce my own data. I started by interviewing key informants who provided me with a general explanation of the workings of the different branches of the legal profession. Thus between March and October 2000 I held various interviews with the following persons:

-Dr. Hebe Herbón, Director of Postgraduate Studies at UBA Law School; with Dr. Gladys Mackinson, Director of the School of Socio-legal Studies at UBA Law School; Dr. Roberto Saba, professor of Constitutional Law at UBA Law School; Dr. Cecilia Grossman, Director of the Postgraduate Course on Family Law; at UBA Law School; Dr. Martin Bohmer, professor of Law at UBA Law School; Dr. Nelly Minyersky, President of the Lawyer's Association, Dr. Horacio Lynch from the Buenos Aires' Lawyer's Association; Dr. Soffa Harari, Dr. Haydee Birgin, family law lawyers and with Dr. Paola Bergallo and Dr. Natalia Gherardi, lawyers working in two large law firms. I also conducted an interview with a woman who selects personnel for large law firms and who asked for her name not to be disclosed.

I then contacted different persons at the Law School of the UBA, at the Bar Association the Lawyers' Association the Association of Buenos Aires' lawyers and the AAWJ that provided me with data that was available on the basis of which I proceeded to the analysis. In order to analyse the

evolution of the situation of women lawyers in law firms I used 4 different numbers of the Martindale-Hubbel Directory for Argentina and to measure women's situation within the judiciary I consulted the Judicial Directory for 1999. In order to assess the evolution of women's participation in the Family Law Courts I was allowed to consult the files of the "Under-Secretariat of the Civil Upper Court".

Two instruments for data collection were designed for the research into the Family Law Judiciary. One was a self administered questionnaire aimed at obtaining a picture of this section of the judiciary that the judges had to fill in with their personal data. The other was the interview guide that led me through the interview. The objective of the interview was to explore the views and opinions of the family judges of the City of Buenos Aires on the impact of the massive entry of women into the judiciary and its possible impact. While the questionnaire collected both quantitative and qualitative data, the interview collected just qualitative data.

In order to proceed with the research I decided to approach all 24 family judges. There are 24 Family Courts in the City of Buenos Aires. The official records shows 13 women and 11 men. However, three were vacant at the time when I started the fieldwork in June 2001. One of the judges, a man, had resigned to go into private practice. Two, a man and a woman, were on sick leave. In all three cases they were substituted by one of the men judges, who then became responsible for two Courts. Of the remaining 21 judges, 12 are women and 9 are men.

The questionnaire schedule was prepared and handed in personally by myself to the private secretary of the judge, together with a letter of presentation explaining the purpose of the research study and inviting the judges to fill in the questionnaire and, if possible, to be available for a later interview of approximately one hour was. The letter also explained that the information provided by the judges would be confidential and, in case the research was later published, their names would not be identified. The questionnaire aimed at obtaining personal and demographic data, data on

the judge's family and educational and social background, civil status, religious affiliation, teaching and other activities.

I had expected most of the judges to fill in the questionnaire, so that I would obtain a fair picture of this section of the judiciary and have the opportunity to process the questionnaires before the interview: In actual fact, many of them filled in the questionnaire before me at the same occasion as the interview was held, which actually gave me a very short time to consider the answers of the questionnaires.

Of the 21 judges, 14 filled in the questionnaire and 12 were available for an interview, 6 men and 6 women. Of the two women judges who filled in the questionnaires but were not available for the interview, one said she was too busy and so would not be available, and the other agreed with me on a date for the interview, but in the meantime had a serious health problem which led into a very long sick leave. This interview was postponed until a later time when the judge would recover and resume her activity. Of the 7 judges who decided not to fill in the questionnaire, at least three said that they thought the questions were too personal and invasive. The remaining four said they were too busy and consequently not interested. Obtaining the interviews was very difficult. The judges are very busy people who zealously defend their time and their privacy. It was easier to arrange the interviews with the men, who answered quite readily to my request, while the women took more time to decide whether they would be willing and available. An interview lasting approximately an hour was arranged with the judges at their office. Between the months of June and December 2001, I interviewed the 12 judges. In one of the interviews with a man judge, his personal secretary, who is very interested in mediation and family violence, was present at the interview. Of the 12 judges, two men did not allow recording but were patient while I made extensive notes.

By April 2002, I had transcribed the interviews, translated two of them into English and proceeded to the analysis of the questionnaires.





**Did you practise as a lawyer?**

**YES**

**NO**

- as a solo practitioner
- as a partner of a law firm with other lawyers
- as an employee in a law firm
- as a in company lawyer

**Do you teach? Or have you done so in the past?**

**YES**

**NO**

**Subject:**

**Was your working life continuous**

**YES**

**NO**

**If you stopped work at certain times, give the reasons**

**4-Social information**

**Professional Associations you belong to:**

**Community associations you belong to:**

**Do you practise a religion?**

**If so, which?:**

**Interview schedule (12 judges):**

1- I see from your answer to the questionnaire that you have been a family judge for X years now. Can you tell me how you became a judge and if it was something you had intended from your early days as a law student and, if not, when did you decide to become a judge? What were your motivations? Can you tell me about your role models and mentors, if any?

2- What are, according to you, the qualities of an "ideal" Family law judge?

3- How do you feel about the power you wield as a judge and about the responsibility implied in being a judge?

4- What would be your definition of the family in the light of the social and legal changes that have been taking place in the Argentine family in the last few years?

5- What do you think about the main changes that have been set forth in family law in the last 20 years?

6- What do you think about the introduction of mediation, its potentialities and problems? Why would you say there are so many women mediators?

7- Are there formal or informal opportunities for the family judges to get together to share problems, experiences, preoccupations. Would you say there is a "culture" in this section of the judiciary? Do you feel that your personal values fit those the system requires from your position? Explain. Or do you feel you can be yourself at work? Explain

8- Do you think that the fact of being a man/a woman has affected your work in any way?

9- Do you think men and women have to demonstrate different qualities? Explain

10- One of the most important changes that have taken place in Argentina is the large number of women entrants into the legal profession? How do

you explain this? How do you experience this? Do you think that this has made or will make any difference to the profession? In what way ?

11- The same for the judiciary. Do you think that women bring something different to the judiciary?

12- In your view, is there any discrimination within the judiciary?

Have you been the object of any discrimination yourself?

13- Have you found that the application of the law sometimes does not lead to the just decision? How do you face such a dilemma? How free or constrained do you feel by the letter of the law?

14-What are, in your view, the most serious family problems that appear in the Court? Please state them in order of importance.

15- How effective do you think Family Courts are? Which would you say are the main obstacles you have to face as a family judge? Do you feel you can make a difference in the quality of life of the people involved in judicial conflicts?

16- Please tell me about the professional resources you have in your staff at the Court . Do you have an interdisciplinary team? Please describe how you work with your team ?

17- 1) Could you tell me about a difficult case that left you a feeling of satisfaction because, in spite of the difficulties involved, you could reach a suitable solution ? Please explain .

2) Could you tell me about a case which left you with a feeling of dissatisfaction because you could not reach a suitable solution? Please, explain .

18- Would it be possible for me to see a judgment of yours that you find particularly significant ?

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## **List of abbreviations**

**AAWJ-** Argentine Association of Women Judges

**CEDAW-** Convention for the Elimination of any type of Discrimination against Women

**CPC-** Common Professional Cycle

**CPO-** Oriented Professional Cycle

**IAWJ-** International Association Of Women Judges

**ILO-** International Labour Organisation

**INDEC-** National Institute of Statistics and Census

**NAWJ-** National Association of Women Judges (US)

**NGO-** Non-governmental Organisation

**UBA-** University of Buenos Aires

**UK-** United Kingdom

**US-** United States

