TRANSFORMATION IN THE PROFESSION:

THE GENDER BATTLE

I did not pick the name of this topic for this session. Jeremy Muller SC, the Convenor did, but if he wants to call it a battle, I will be a warrior in endorsing this battle.

When I received the copy of the draft final program for the World Bar Conference, I looked at it in naïve disbelief. The women in this room might have noticed, but did any of the male members of our profession notice that, at a conference at which there are delegates from some 10 countries, other than Esi Schimming-Chase SC from Namibia, there is not one other female practising advocate or barrister on the entire program. I thought: "Do I even need to make a speech." Does this program not speak for itself, and the issue here is that this was obviously not deliberate (one hopes) but isn't that the problem. I don't think, with due respect to our male colleagues, who drafted the programme, that it entered your minds that this program totally excludes women barristers.

On a lighter note of male exclusivity, the dress code for tonight says Black Tie or Business Suit. I intend wearing neither.

We know that gender is seen as less important than race in the process of transformation, obviously more particularly in South Africa, because of our abhorrent past system of apartheid. But it cannot be overlooked, nor relegated to the back of the queue. Whilst racism is the elephant in the room, in comparison, sexism is the fly on the wall, in the literal rather than the figurative sense.

And this brings me to the issue of Male Privilege. Peggy McIntosh, in "*Unpacking the Invisible Knapsack,*"[1] speaks of both male privilege and white privilege. In regard to structural racism and sexism, she states that:

"*it is a system in which policies, institutional practices and cultural representations work in various often re-enforcing ways to perpetuate racial*

and gender group inequity. These unearned privileges associated with being white and male, and the disadvantages associated with colour and gender, endure and adapt over time. This is not always by choice. Instead it is a feature of the social, economic and political systems in which we all exist."

As a white male, although you have been addressed on and purport to understand racism and sexism, which you might accept puts others at a disadvantage, are you aware of the corollary of racism and sexism which is white and male privilege, which puts you at an advantage.

McIntosh(1989) states "*White privilege and male privilege are an invisible package of unearned assets which you can count on cashing in every day but about which you were meant to remain oblivious*". White men contend that they support the improvement of women's' status, but they do not support the corollary, that this endeavour to achieve equality may result in the decrease in white men's advantages.

Thus, men constantly succeed and profit at the expense of other genders. That is called male privilege. And this prejudices everyone, including our male colleagues, particularly white men because "*accessing male privilege often requires you to conform to a toxic norm of masculinity.*"[2]

Pierre de Vos (2013) writing on structural racism which I will adapt to include both racism and sexism, for the purposes of this talk, stated as follows:

> "*I would contend that because of structural racism and [structural sexism] while males are almost always viewed as individuals who are assumed to be competent and virtuous until they prove otherwise while blacks and females are almost always viewed as having to prove themselves to be thought of as being as good as their white male counterparts.*"[3]

Michelle Norton (2017)[4] refers to the 2015 report commissioned by the Bar of England and Wales concluded that on current trends, a 50/50 gender balance

is unlikely ever to be achieved. And who better than someone as highly regarded as Lord Jonathan Sumption, whom you have no doubt admired and revered, to put the matter in perspective. In an interview in 2015[5], he said that it would take 50 years to achieve gender equality in the judiciary, which he regarded as a relatively short time (forgetting about the last 100 years). He also warned against doing anything that might make male candidates feel "*the cards are stacked against them*". The solution according to Sumption is that women lawyers should just be patient and wait another half a century for promotion.

Charlotte Proudman (2015)[6] dealing with this in her article in the Guardian after this interview writes:

> "*Let me be clear Sumption's concern is not about finding 'good enough' women candidates to be QCs and occupy top judicial posts. His comments encapsulate his deepest fears that power vested in the old boys' network could come under siege. Sumption attributed the underrepresentation of women in the senior ranks of the judiciary to 'a lifestyle choice' by women unwilling to tolerate long hours and poor working conditions.*"

In response to a question whether the traditional old boys' network was part of the reason for lack of women's progress to the ranks of Queens Council and the Bench, Sumption stated: "*it is rubbish*".[7]

In England, as in South Africa, the empirical evidence demonstrates that the rate at which women leave the profession is unacceptably and shockingly high. Proudman (2015) points out that in the UK whilst 50% of people called to the Bar are women, only 12% are QCs and 20% are judges, and just one of the 12 Supreme Court justices is a woman. In South Africa, the statistics at the Bar are not much better. Out of 531 silks at the Bars in SA, there are only 44 female senior counsel, whilst there are 487 male senior counsel[8]. Proudman (2015) referred also to the comments of the President of the New South Wales Law Society who stated that for a long time now women have

represented over 50% of graduates and entrants to the Bar. The Law Society hoped to see greater representation of women in senior positions. However, The Annual Report reveals that it is far from the case right now.

Many decades have passed since women in South Africa began graduating from law school and, in recent years, in larger numbers than their male counterparts. The GCB statistics show that women at the Bar between 5 and 10 years, however, make up a significantly lower proportion of practising advocates and are hardly represented in the senior ranks of the Bar.

As Proudman (2015) puts it: "*What Sumption fails to identify is one of the prime causal factors: institutional sexism".* And this prime causal factor is not recognized by men in the profession either. Institutional sexism and institutional racism have much in common and that is where the concept of white privilege and male privilege come together to create, for those not part of that sector, a lethal combination.

Let us now deal with some of the ways in which male privilege manifests itself, more particularly in the legal work environment:

You are not stereotyped at work; like being mistaken for the secretary.
If you lose a case, you are less likely to have this seen as a sign that men should not be doing this type of work.
You don't question whether you receive work based on merit.
If a woman is briefed by a man or she is brought in as a junior it is not seen as her merit but whether or not the particular person has a "*crush"* on the junior advocate or worse that she is possibly sleeping with him.
As a white male, people do not assume that you got where you are professionally because of your race or your gender or because of an affirmative action program.
You live in a world where others assume that you are competent, intelligent and a person of integrity, whilst blacks and females almost always have to prove themselves to be thought of as being as good as their white male colleagues.

In a study undertaken by the Centre for Applied Legal Studies (CALS), it was found that "*Black and female lawyers face invisible rules determined by social interaction outside of work where informal engagements around weekends and sport take place*".[9] Male lawyers socialise on the golf course or at sporting events and they give each other work. This was repeated by many advocates who felt that they were excluded because of the fact "*that they don't play golf on the weekends with their associates or with their colleagues and can't afford to go skiing with the right people".*[10]

Women at the Bar noted that social conversations are often about cricket or rugby which are historically white or male sports in South Africa. One did note that the only unifying sport in discussion is the English Premier League. They must take an interest in historically white sports in order to participate in social conversations. But this seems not to be extended to them by their white counterparts.

During my early days at the Bar, I sat down at a table in the common room with two well-known counsel, Clive Cohen and Fanie Cilliers. They spoke golf and rugby throughout lunch. I was totally ignored. However, I did not move tables; that evening, I went home, read the back page of The Star newspaper and returned to lunch the following day with: "wasn't that an incredible try that Morne du Plessis scored on Saturday". They looked at me with new respect! Not that they immediately called me in to be their junior, of course. But as one of only 6 women at the Bar at the time, they ceased looking at me as an alien.

Participants in the CALS study noted that the so-called "*boys' network*"[11] existed and found that white male lawyers look after the interests of other white male lawyers. It was also noticed interestingly that there are now black boys' clubs that are emerging, and the result is that black and white female advocates fall through the cracks without the right connections either through gender, family, schooling or accent.

There is a virtually irrebuttable stereotyping that women can only do certain types of work, which is considered to be "*soft law".* The perception was that women "*can't do numbers*". All the advocates interviewed shared the observation that family law is seen as women's work and gaining exposure, and experience in commercial or corporate work can be difficult for female advocates.

Besides these anecdotal scenarios, women have other barriers to overcome, which men do not[12]:
If you have children but are not the primary caregiver for them, your masculinity will not be called into question.
If you have children and are the primary caregiver for them, you'll be praised for extraordinary parenting if you are even remotely competent.
If you have children and pursue your career at the same time, no one will think you are a bad parent for not staying at home.
You can be aggressive in court with no fear of being called a bitch.

I don't think I even need to mention the barriers that are put up when women fall pregnant, have children, and stay at home to raise the children (as they are expected to do), and then return to the Bar maybe a year later, basically having to start from scratch.

From a brief study of the demographics related to appearances in the Supreme Court of Appeal (SCA) and in the Constitutional Court (CC) over the past five years, white males still appear in over 50% of all cases both in the Constitutional Court and the Supreme Court of Appeal. They are followed by black males at 14% in the SCA and 21% in the CC. White females appear in about 10% of cases in both courts, and black female appearances in the CC has reached 12%, but in the SCA it is only 5%.
So, females remain at the bottom of the ranks, while white females have been overtaken by black males in both courts and by black females in the CC.

This brings me to a point in this discussion, where Ish Semenya SC and I differ on a fundamental issue. In 2016, the JHB Bar passed a resolution that,

in matters involving three counsel, at least one should be black. The initial proposal was that the resolution should refer to all women, not only black women. This was removed, because in Ish's words, in a statement made in favour of the resolution: "*There is no evidence that either historically or presently there are skewed briefing patterns involving white women".* This caused quite a furore amongst white women at the Bar and although by then, thankfully, I was not involved in the politics of the bar, I entered the fray and asked Ish from where he derived such evidence. I remarked that my experience as a junior for 18 years, a silk for 15 years and a Judge for 6 years differed greatly from his perception. I admit that I am endowed with the same white privilege that I have referred to above, and that I do not come from a disadvantaged background, but in the instance of white women in the referral profession, this privilege counts for very little and I was certainly not advantaged when it comes to briefing patterns.

I was 24 when I joined the Bar, almost 40 years ago to the day. As a junior, I chose not to be stereotyped and did not want to do family law, which is the work females were and are still associated with. As a result, I battled through my junior years, lucky to find a few attorneys who believed me capable of doing commercial work. I was fortunate to have certain senior male colleagues who helped me along with some junior briefs.

In the period of between 5 to 10 years, I was generally not considered competent for more complicated cases, whilst my male counterparts of the same vintage, who were, in my view, less competent (and who I had defeated in many cases) were flooded with such work.

I did ultimately succeed thanks to some very generous pass-ons from my male colleagues, which resulted in other attorneys then briefing me. But it was an uphill battle, almost always having to work harder than my male counterparts and almost always being judged as to whether I could dispel the notion that women shouldn't be doing that work. This pressure was one, which most male counsel who were my contemporaries, simply did not have to endure. As a silk, in 15 years, I can recall having just 1 or 2 female opponents in commercial matters. That is no black or white women were briefed in such matters. I assume that most of the senior South African

advocates here today will have had the same experience. My opponents were always white males, and in later years, black males. As a judge over the past 6 years, I can count on one hand, and that's being generous, the number of women in general that have been before me in a commercial matter of some complexity. Extremely competent white women, who have asked to remain anonymous, have reported to me on their experiences and their fight to get briefs in the more "masculine" field of corporate, competition and tax law.

Then there is the issue of the "dependable backup". In an article in the New York Times in 2017[13] written by Federal District Court Judge Shira A. Scheindlin, she wrote about her decades on the bench and the very few times she saw women in speaking roles in the courtrooms she presided over. That is not to say that the women weren't there; it's just that they were in the role of "dependable back-up". In the overwhelming majority of cases, men addressed her and not women. A female fairly senior advocate in South Africa reported to me that she was first briefed on a fairly complex matter alone. She conceived of the legal solution for the client on her own. She drafted all the papers in the matter for the client, over a lengthy period of time. She made every tactical call in the case during that time. But, in the week before the heads of argument were due, the attorney contacted her to say that the client wanted to bring a male silk in to lead her in the matter. Whilst the silk was highly regarded, the advocate felt that this was her case, but she would not be arguing it. It relegated her to the position of the dependable backup.

The CALS study identified that gender tends to be seen as less important in the process of transformation than race. It is perceived that both black and female practitioners have to work twice as hard to disprove the negative assumptions but despite that, they still only get half as far as their white male counterparts due to racism, prejudice, sexism and the presumed notion of their limited capabilities.

One of the biggest problems noted by women was that there is a lack of encouragement and support from other women. I can state that when I was at the Bar I hardly got briefed by women and if I did it was only in matrimonial

matters. This reminds me of an image I saw. A man climbing a ladder being helped up by the man above him, whilst extending his hand to help up the man below. The other image is a woman, trying to crash through a glass ceiling, whilst kicking the woman below her off the ladder. I endorse the words of Madeleine Albright: "*there is a special place in hell for women who don't help each other."*[14]

Women noted that those in senior positions doubt and question the intelligence, talent or prior experience of black and female practitioners. They were viewed as less than equal or worthy until they proved themselves differently. The presumption of intelligence was against them.

And then there is the further obstacle in the gender issue at the Bar. It is the obstacle called the "Imperative of Silence" around sexual harassment. Let me put it bluntly, sexual harassment is rife at the Bar. In an informal survey which I did amongst young women at the Bar, 70% of them admitted to having been sexually harassed. The Johannesburg Bar Council, and I assume others, have now introduced sexual harassment policies[15], but what one wonders is whether that will make any difference. As far as I could ascertain, despite the fact that such harassment permeates the profession, no one at the Johannesburg Bar has been charged with sexual harassment and very few women come forward even to tell their seniors or colleagues about it. Participants in the CALS research stated that there is insufficient understanding of the range of behaviours that constitute sexual harassment and a lack of understanding of the manner in which it impedes advancement. Women do not come forward because they fear that being too vocal will rock the boat and they will be seen as a troublemaker. This creates a system in which there is sexual harassment but no consequences. Because there is little, if any, relief for the victims of sexual harassment, the Imperative of Silence remains. Quite simply complaining about sexual harassment is seen as a career limiting move.

One participant noted:

> "*If you could get women to tell their stories of the Bar you would be shocked.*"

And let me tell you I have heard their stories and I am shocked. Men, on the other hand, on the whole do not have to worry about this. Unfortunately, the ethos of toxic masculinity is manifest in this sphere. In a recent report, two women at Grant Thornton (GT) were sexually harassed by the same man. They reported it to the Deputy CEO, a woman. Processes were followed and ultimately, as there was no satisfactory outcome, both women resigned and are unemployed. The harasser, on the other hand, continued to work for GT as a consultant. In their CEO's words, they are a "conduit for his salary"[16]. So is it any wonder, that women are either too fearful to report or can't be bothered due to the lack of consequences.

Comment [D1]: Where is this from?

Women who report are:

- Not believed
- If they are, the male will say it was friendly banter
- labelled as a troublemaker and the harasser and other men will pass on the message that briefing her is dangerous because you will be accused of sexual harassment

So, sexism and racism continue to permeate all levels of the profession. Again, quoting Pierre de Vos and adapting his descriptions to include sexism:
"I think Whites [and males], assume that they can address the consequences of structural racism [and sexism] merely by creating opportunities for blacks [and females] to "assimilate" into the normative white [male] world. Instead, you must challenge the basic assumptions according to which society operates, and in terms of which opportunities are distributed. In short, you attack and dismantle white [male] privilege, which is the flip side of the coin of structural racism [and sexism].
Some of us call this transformation".[17]

For most of us whites and for males, this induces fear and insecurity. We as whites, and you as males stand to lose "not only the unearned advantage in the world but the sense of being inherently virtuous and superior."[18]

The real obstacle to real transformation is that deep seated patriarchal racism and sexism cannot simply be wished away.

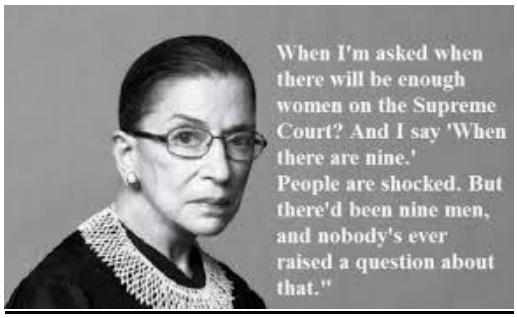
And let me state that the question of transforming the judiciary cannot be achieved through meritorious selection if women at the Bar face attrition at the alarming rate that they do.

The lack of transformation in the judiciary is linked to a lack of transformation in the legal profession. We need to realize that the disparaging effects of structural racism and sexism negatively impact on society as a whole and make it more difficult for people of talent to succeed merely because of their race and gender.

We need to recognise that it is in the interests of our society, as a whole, to challenge and obliterate structural racism and sexism in order to ensure that our profession will flourish from the talents of all lawyers, regardless of race and gender, so that society will ultimately reap the full benefits.

In conclusion, I can do no better than to quote the words of the indomitable, Ruth Bader Ginsburg:

“When I’m asked when there will be enough women on the Supreme Court? And I say, ‘When there are nine’. People are shocked. But there’d been nine men, and nobody’s ever raised a question about that.”



[1] Macintosh, P. (1989): Unpacking the Invisible Knapsack, excerpted from Working Paper #189 White Privilege and Male Privilege a Personal Account of Coming to See Correspondences through Work in Women’s Studies. Wellesley, MA: Wellesley College Center for the Study of Women.

[2] Op Cit.

[3] De Vos, P. (2013): Structural Racism, The Daily Maverick, https://www.dailymaverick.co.za/opinionista/2013-11-27-structural-racism-the-invisible-evil, 27 November 2013.

[4] Norton, M. (2017): Where are the Women?, Advocate, Vol. 30, No. 1, http://www.sabar.co.za/law-journals/2017/april/2017-april-vol030-no1-pp27-34.pdf, April 2017
[5] Walker, P. (2015): Don't Rush Gender Equality in the UK Judiciary, says Supreme Court Judge, The Guardian, https://www.theguardian.com/law/2015/sep/22/gender-equality-warning-uk-legal-profession-supreme-court-judge-jonathan-sumption, 22 September 2015.
[6] Proudman, C. (2015): Sumption Encapsulates the Law's Sexism: Only Quota can Challenge Male Privilege, The Guardian, https://www.theguardian.com/commentisfree/2015/sep/24/sumption-law-sexism-quotas-male-privilege-women-judiciary, 24 September 2015.
[7] Op Cit.
[8] General Council of the Bar Statistics 2017
[9] Centre for Applied Legal Studies, (2014): Transformation of the Legal Profession, the Centre for Applied Legal Studies, https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Transformation%20of%20the%20Legal%20Profession.pdf, August 2014.
[10] Op Cit.
[11] Op Cit.
[12] Johnson, M. (2016): 160+ Examples of Male Privilege in All Areas of Life, from https://everydayfeminism.com/2016/02/160-examples-of-male-privilege, 25 February 2016.
[13] https://www.nytimes.com/2017/08/08/opinion/female-lawyers-women-judges.html?smprod=nytcore-ipad&smid=nytcore-ipad-share
[14] https://www.nytimes.com/2016/.../madeleine-albright-my-undiplomatic-moment.html
[15] https://johannesburgbar.co.za/wp-content/uploads/HARASSMENT-POLICY-2-Oct-2012.pdf
[16] Interview on Radio 702 Eusebius McKaiser 28 March 2018
[17] Ibid, de Vos.
[18] Op Cit.