

Home Truths about Judicial Diversity

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In modern Britain, the fastest way to make enemies is to deliver a public lecture about judicial diversity. Unless you confine yourself to worthy platitudes, you are almost bound to cause offence to some one. It is of course quite possible to live a reasonably fulfilled life without thinking seriously about the subject at all. You can simply take the received clichés off the shelf. That was probably my position in 2006, when I became a member of the Judicial Appointments Commission upon its creation. I was of course aware that the whole issue of diversity was important, politically sensitive and controversial. But I had no particular preconceptions, apart from an instinctive feeling that the reasons for the domination of the judiciary by white males were complex, and that the selection process was probably no more than part of the problem. By the time I left the Commission at the end of last year, I had come to the rather depressing conclusion that the whole subject was bedevilled by an unthinking resort to sterile formulae and an unwillingness to ask awkward questions or address real dilemmas. This does no justice to an important and difficult issue which calls for a more honest and objective appraisal than it has usually received.

The judiciary is recruited from a pool of highly educated and experienced legal practitioners. This pool is itself dominated by white males, for reasons that have deep roots in our history and culture. The problem begins with an educational system that tends to perpetuate disadvantage. It continues with patterns of working in ancient professions, and with

unspoken, often unconscious attitudes which have been many years in the making. The Bar has existed in one form or another for more than seven centuries. Helena Normanton, the first woman to practise as a barrister, was called just ninety years ago, this Saturday. Attitudes have changed. But their legacy will take a long time to disappear.

The basic facts will be familiar to all of us. As at April of this year, 23% of the judiciary of England and Wales were women compared with 51% of the population at large. 4% were from ethnic minorities, compared with 12% of the population at large. The proportion of both women and ethnic minority office-holders is at its highest among District Judges, Masters, Registrars, Costs Judges and deputy holders of these offices. In these categories it varies between 26% and 33%. It then tails off as one moves up the judicial hierarchy. 16% of High Court judges are women and 4.5% are from ethnic minorities. With one exception, the Supreme Court consists entirely of white males. These figures are imperfect, for they depend of the judges' own categorisations of themselves, which do not always correspond to the standard definitions. They also exclude tribunal judges. But they will have to do for present purposes.

The figures represent the current state of play. But it is not a static situation. The proportion of women in the judiciary has doubled since 1998, and the proportion of ethnic minority office-holders has trebled. To some extent, this trend is due to a stronger awareness of diversity as an issue among those responsible for selecting judges. But for the most part, it is the natural consequence of the progressive increase in the proportion of female and ethnic minority practitioners entering the legal profession since the 1960s. As these people move to the top of their profession, they represent a larger proportion of the pool available for judicial office. One would expect the results to be reflected in the appointments, and by and large they are. The regular series of statistics published by the Judicial Appointments Commission suggest that although there are fewer

applications from women than from men, the proportion of female applicants shortlisted and the proportion selected are converging with the corresponding proportions for men. In the case of ethnic minority candidates, the degree of convergence is less satisfactory. When I was a commissioner that seemed to be at least partly attributable to a tendency among ethnic minority candidates to apply at an earlier age and with less experience behind them. However, even critics of the current system generally accept that in the long term a judiciary broadly representative of the population at large will come about. The problem is not the direction of change. It is the speed. Human beings have a touching confidence in the capacity of their institutions to decree change, when in fact all that they can do is push them in the right direction.

In the course of this lecture, I want to examine the reasons for the relatively slow progress towards a more diverse judicial bench, and the arguments for and against a measure of positive discrimination in the appointments system. This is a debate that matters, because positive discrimination is, I believe, the only thing that is likely to accelerate the rate of progress significantly. It does not of course follow that positive discrimination is desirable, and I shall explain why in my view it is not. But it should at least be on the menu.

The starting point for any serious analysis of the current state of affairs is the statutory criteria for the appointment of judges. These broadly reflect the criteria which had been applied for years by the Lord Chancellor before 2006. The present position is that under Section 63(2) of the Constitutional Reform Act 2005, the Judicial Appointments Commission is required to make selections 'solely on merit.' Apart from the overriding requirement that those selected should be of good character, merit is the only criterion permitted by the Act. The Act does not define merit. But it does make it perfectly clear that merit is a criterion for assessing competing candidates for selection. It refers to their relative

ability to perform the functions that will be required of them if they are appointed. This embraces a wide range of personal and intellectual characteristics, as well as public expectations about how judges should behave. But the essential point to make is that under the statute merit is a characteristic of the individuals selected. Under our current statutory scheme, the concept of merit does not allow candidates to be selected with a view to altering the make-up of the judiciary as a whole.

Of course, the balance of qualities required by the judiciary as a whole is relevant for some purposes. It is, for example, perfectly legitimate under the current legislation to select candidates with an eye to achieving a proper balance between, say, chancery specialists and criminal lawyers, or between commercial lawyers and general common lawyers. But this approach is simply not available when it comes to achieving a satisfactory balance between men and women or between different ethnic groups. The difference is that if there is a special need for, say, chancery or family practitioners, then experience of chancery or family work is relevant to a candidate's ability to do the job better than a competing candidate. Racial identity or gender are not relevant to a candidate's ability to do the job. Indeed, it is a fundamental premise of our law on discrimination that they should not be treated as relevant. As the law presently stands, therefore, the Judicial Appointments Commission is not allowed to select a candidate over the head of a competitor who would do the job better, on the ground that his presence on the bench would improve the gender or ethnic make-up of the judiciary as a whole.

The point is reinforced by the next section of the Act, Section 64. Section 64 was loosely modelled on the corresponding provisions of the legislation governing judicial appointments in Northern Ireland. It requires the Commission to 'have regard to the need to encourage diversity in the range of persons available for selection for appointments.' It is confined to the composition of the pool of candidates from which

selections are made. It is also expressly made subject to the obligation to select solely on merit in Section 63. So the scheme of the Act is tolerably clear. The Commission's duty is to do its best to encourage applications from the widest possible range of eligible candidates, including those from non-traditional backgrounds. Having done that, it must select among them according to their relative aptitude for the job and nothing else.

The record of the debates and committee proceedings during the passage of the Act through Parliament leaves no doubt that this was deliberate. There were two schools of thought among Parliamentarians, sometimes referred to as the 'minimalist' and the 'maximalist' schools. Put crudely the minimalist position was that the function of a selecting authority was to identify those who were good enough to do the job, and then to choose from among them in accordance with wider criteria. These wider criteria would have included the desirability of a judiciary which was as far as possible as diverse as the population at large. The maximalist position was that the selecting authority should choose candidates who are not just good enough, but the best available irrespective of race, gender, professional background, or any other consideration. The maximalists prevailed in the drafting of the criteria for selection. But the Government introduced Section 64 by amendment during the passage of the Bill through the House of Lords. The effect was to introduce diversity as part of the Commission's duty in relation to the composition of the pool of candidates but not in relation to the criteria for selection.

More recently, the statutory criterion has been supplemented by section 159 of the Equality Act, the so-called tie-breaker clause. The effect of section 159 is that as between candidates who are equally qualified for the job, preference may lawfully be given to the one whose appointment would contribute to rectifying the under-representation of some disadvantaged category. Ambitious claims have been made for the tie-breaker clause. This is unfortunate, because its effect is likely to be very

limited. A practice corresponding to the tie-breaker was applied by the Judicial Appointments Commission for most of the five years that I was a commissioner. But it depends for its operation on there being a tie, and ties are not as common as you might think. In any large selection exercise, the usual pattern is that most candidates will bunched together in the middle of the ability range. They will be difficult to arrange in merit order. Many of them will be genuinely tied. But at the upper end of the ability range, there is usually clear water between every candidate once one looks at them in detail. Most selection exercises run by the JAC attract a large number of very high quality candidates. It is clearly in the public interest that this should continue. But the consequence is that it is usually possible to make all the selections from the top end of the ability range where there is a fairly clear order of merit. The more senior the judicial appointment in question, the more likely this is to be the case.

When the Judicial Appointments Commission started work in 2006, there was a strong political expectation that its creation would result in the immediate acceleration of our progress towards a more diverse judiciary. This did not happen. As a result, the Commission came under a certain amount of public criticism and faced strong political pressures to speed things up. However, no convincing case has ever been made that there is an implicit bias either in the Commission's procedures or the way that it applies them. The most vocal critics simply pointed to the high proportion of white males, as if it necessarily followed that they were not the best candidates. The more thoughtful critics have usually pointed to the role played in it by consultees and referees, who are commonly existing judges. A French judge once said to me: of course hardly any judges are women in England; they are chosen by co-option by the existing judges, who are men. You sometimes hear the same rather crude notion expressed in England. I think that there was some limited truth in it in the days when candidates were tapped on the shoulder by the Lord Chancellor. This was because the Lord Chancellor's Department

depended almost entirely on information supplied by judges in order to know who was worth considering. I do not believe that the judges were out to clone themselves then, any more than they are now. But it would be foolish to pretend that they were not occasionally influenced by unconscious stereotyping and by perceptions of ability moulded by their own personal experience. The absence of any wider sources of information made this very difficult for the appointments staff in the Lord Chancellor's Department to control. After 1995, the appointments system was progressively opened up to applications, and all appointments have now been applications-based for nearly a decade. The result has been that information is available to selectors from a much wider range of sources. The influence of the existing judiciary has been correspondingly diluted. But it has not been eliminated, nor should it be. Judges once appointed are difficult, and in the case of the High Court and above, almost impossible to remove. It cannot be right to make appointments simply on the basis of the information that candidates give about themselves, or on assessments made in the course of interviews and role-plays. The information that candidates give about themselves is inevitably selective, sometimes tendentiously so. Interviews are only a snapshot. They are unduly affected by the candidate's mood on the day and more generally by his or her interview skills. It cannot be in the public interest to marginalise or ignore the views of those such as professional judges, who have personal experience of doing the job and often have direct knowledge of a candidate's qualities or defects extending over many years. I would not deny that traditional stereotypes are a factor in some consultation responses and references, but I have to say that I saw little evidence of it in the five years that I spent reading these things. The JAC makes it perfectly clear in the material sent to referees and consultees what is expected of them. They are expected to give reasons for their views. Their influence is directly proportionate to the quality of those reasons, which is generally high. Under the current system, they can be

and are tested against other sources of information. The Judicial Appointments Commission considers every appointment as a body. It has a majority of lay members and a lay chairman. Its assessment panels generally have one judicial member but a lay majority.

Of course the Judicial Appointments Commission is fallible like all human institutions. And of course there are things that could be done to improve its procedures. But by and large I think that the Commission does a difficult job about as well as it can be done. The main defects of the current system are due to the Ministry of Justice and the Courts Service. The number one defect is that there are virtually no facilities for the training of those appointed to full-time judicial positions before they take them up. This lack of training facilities is aggravated by the highly prescriptive job descriptions prepared by the Courts Service and the Ministry of Justice when a vacancy needs to be filled. They commonly insist on the appointment of people who can, as the hackneyed phrase goes, 'hit the ground running' instead of having time to grow into the job. There is strong resistance to the appointment of people who may need time to acclimatise themselves to their new role. This attitude may be understandable at a time of financial stringency. But its effect is to put pressure on the Commission choose 'safe' candidates in preference to those with less experience but greater potential. The Commission is quite good at resisting these pressures. But it cannot ignore them altogether, because every selection exercise has to start with a vacancy notice in which the job requirements are spelled out by the ministry. Changes in this area would be welcome.

However, the real problem which the Commission has faced is more fundamental. The high expectation that it would bring about a sudden acceleration of the rate of diversification was simply unrealistic. It was based on the mistaken belief that the lack of diversity in judicial appointments was due the failings of the selection process previously

operated by the Lord Chancellor's Department. The statutory criteria which the Judicial Appointments Commission was required to apply in selecting judges were exactly the same as those which had been applied by the Lord Chancellor for years: in other words selection on merit alone. According to the 2003 consultation paper on judicial appointments, what was needed to improve the diversity of the bench was (and I quote) "a major re-engineering of the process for appointment". In other words, the whole issue was approached on the basis that it was all just a question of procedural engineering. Implicit in this idea was the assumption that there was a large untapped reserve of potential talent among women and ethnic minorities, comprising people who were at least as good as those who were actually being appointed, but who had been overlooked or devalued by the Lord Chancellor's Department. It followed that this had only to be corrected for the benefits to become apparent.

This was a desperately crude analysis of a complicated situation. But it was unintentionally encouraged by the assertion, constantly reiterated by politicians, senior judges and even occasionally by spokesmen for the Commission itself, that the achievement of a fully diverse judiciary was entirely compatible with selection on merit. Over the long term this is undoubtedly true. The ambition and talent required for a career leading to appointment as a judge is randomly distributed throughout the population. It is not the preserve of any one gender or ethnic group. It follows that selection on merit alone can be expected eventually to produce a diverse judiciary. But it will happen only over a considerable period of time. In the short term accelerated progress towards a diverse judiciary is not going to be achieved under a system of appointment on merit alone. It is a question of timing. This is the major source of unrealistic expectations, and therefore of disappointment in the outcome.

Without some kind of positive discrimination, the judiciary is never going to be significantly more diverse than the pool from which it is drawn, and

the pool from which it is drawn is not the population at large, but the legal profession. The main reason for the lack of diversity in the English bench is the undiverse character of the upper reaches of the legal profession. To be eligible for most judicial appointments, you must have been a practising lawyer for a minimum period of time, generally five or seven years. In practice, almost all candidates have many more years than this. There are two obvious reasons why applicants for the more senior posts are always likely to come from the top end of the profession. One is that the ablest practitioners are reluctant to apply young. They tend to enjoy their profession and will only leave it when they have got as far in it as they think they can, or feel like a change. The other is that long professional experience provides selectors with the evidence that is required in order to make an objective assessment of candidates. Not all of those who are appointed to the bench will have been good advocates at the bar or outstanding legal scholars. But almost all of them will have been able to point to a sustained track record of personal and professional achievement which is more likely to satisfy an objective selection panel.

In 2010, 32% of self-employed practising barristers were women but only 11% of QCs. Excluding those whose ethnicity is not recorded, ethnic minorities accounted for 11% of the self-employed bar but only 5% of QCs. Moreover, a high proportion of ethnic minority practitioners at the self-employed bar, nearly a third, practise on their own, without the administrative support and professional opportunities afforded by chambers. I am concentrating on the self-employed bar, because it is the pool from which the great majority of applicants for the higher judicial offices come. For a variety of historical and practical reasons, the proportion of solicitors which is experienced in the work of the courts is small, and the proportion interested in becoming judges smaller still. But it is right to point out that the corresponding figures for solicitors are not much better than those for the bar. For the most of the last 25 years a majority of those passing the solicitors' final examinations have been

women. In 2011, women accounted for 45% of solicitors in private practice, but only 27% of partners. The discrepancy was less extreme in the case of ethnic minorities. 11% of solicitors in private practice were from ethnic minorities, and 7% of partners. Attrition rates for women in both branches of the legal profession are high. Across the board, earnings, which are probably a fair reflection of professional opportunities, were significantly lower for both women and ethnic minorities than for white males.

The reasons for this pattern are beyond the scope of this lecture. Clearly, one of them is the time required to reach the top. This is a particularly important factor in the case of ethnic minorities, whose entry into the profession in large numbers is more recent than that of women. As more of them reach the top of the profession, this can be expected to make the pool of candidates for judicial appointment more diverse. It can also be expected in the long term to diminish the effect of gender and ethnic stereotyping which is chiefly responsible for the unconscious prejudice that many women and ethnic minority practitioners still encounter among colleagues and clients. However, although time will heal some of these barriers to professional advancement, it will not heal all of them. The major barrier to the professional advancement of women has been identified by the surveys commissioned over the years by the Law Society and the Legal Services Commission. It is that the exceptional demands which the profession makes on its most successful practitioners, in terms of commitment, working conditions and sheer hours. Not every one wants to put up with this. Those who do not, are making a perfectly legitimate lifestyle choice. Only the equal sharing of household and child-rearing obligations between men and women can be expected to have a significant effect on this critical aspect of the culture of the professional workplace. It may happen, but it will involve a very profound, long-term change in social attitudes, which is beyond the reach of legislation and has, as yet, barely begun. It is right to point out that studies carried out in

other jurisdictions suggest that these problems are by no means peculiar to England. They are common to almost all western societies.

One way of illustrating the impact of working conditions in the legal profession on judicial diversity, is to compare the diversity statistics of the mainstream judiciary with those of the Tribunal Service. Tribunal Service judges are also selected by the Judicial Appointments Commission, but they include a large proportion of non-lawyers. This appears to be the main reason why the proportions of women and ethnic minority office-holders are significantly higher: 43% and 12% respectively.

But perhaps the most striking way to illustrate the same point is to compare the experience of England with that of a jurisdiction in which judges are not recruited from the practising legal profession. France, like most civil law countries, has a career judiciary. Almost all judges embark upon a judicial career in their twenties with a period of training in the Ecole Nationale de la Magistrature, followed by an appointment at the age of 25 to 30 to an entry level judicial position. There is a procedure for lateral recruitment of candidates at a later stage of their careers, but the numbers involved are small and they tend to come not from independent practice but from the academic world. The impact of this system on ethnic diversity is impossible to assess, owing to the long-standing French taboo against collecting ethnically classified data. But the figures for gender diversity are very remarkable. A majority of French judges have been women for many years. The proportion in 2010, the most recent year for which I have figures, was 58%. This is an average over the whole judiciary. The proportions vary according to the sector. In some sectors, notably civil courts of first instance and family courts, the proportions are much higher, 74% and 76% respectively. The proportions in the upper reaches of the judiciary (the so-called *hors-hierarchies*) are less impressive. But they are a good deal higher than they are at the

corresponding level in England. 36% of the presiding judges of French first instance courts and 20% of the presiding judges of the regional courts of appeal are women. All of these proportions have risen rapidly over the past three decades. They are likely to go on rising rapidly, because the pool from which candidates for appointment are drawn is dominated by women. Currently, more than 83% of newly qualified graduates emerging from the Ecole National de la Magistrature are women.

The French experience certainly suggests that where women can become judges without having to go through the ordeals of private legal practice, many more of them will want judicial appointment and get it. The procedures for selection and promotion of judges in France are rigorously based on merit. The powerful position of women in the French judiciary certainly suggests that whatever may be the cause of the glass ceiling that retards the progress of women to the top jobs, it is unlikely to be male prejudice or gender stereotyping. The consensus is that the most important single factor is career breaks for child-rearing. However, to an outsider such as myself and to quite a few insiders as well, the French situation seems just as unsatisfactory as our own, albeit for different reasons. The major factor behind the rising proportion of women embarking on a judicial career in France has been the increasing reluctance of men to contemplate a judicial career. Only about 16% of those sitting the final examinations of the Ecole Nationale de la Magistrature last year were men. The evidence is that in a world where professional and judicial careers are separate streams with very little in the way of transfer between them, men will opt disproportionately for professional practice. This is because it is perceived to bring higher financial rewards, greater independence, and more status than the judiciary, at a cost in terms of hours and working conditions which men are more willing to pay than women are. On the assumption, which seems reasonable, that men are just as capable of being judges as they were fifty

years ago when 93% of French judges were male, the current situation results from an artificial reduction in the pool from which judges are chosen, by the wholesale withdrawal of men. This hardly seems to be in the public interest and is no more compatible with a diverse judiciary than our own situation.

In England, the recruitment of judges from the higher ranks of the legal profession has, on the whole, served us well. It has generated a culture in which many of the ablest lawyers of their generation have come to regard judicial appointment as the culmination of a successful professional career. It has produced a judiciary of outstanding intellectual calibre and broad legal experience. It is a significant contributory cause of the highly developed sense of judicial independence among English judges. These are particularly important considerations in a system such as ours in which judges have a higher public profile and a larger role in the making of law than their civil law counterparts.

However, the price that we have paid for these advantages is a less diverse judiciary than most of Europe. We are simply deluding ourselves if we try to pretend that selection from that pool on merit alone will produce a fully diverse, or even a reasonably diverse judiciary quickly. It will happen, but it will take a long time. The average judicial career lasts for more than twenty years. It follows that even if a rigid quota system were to be introduced tomorrow morning requiring the appointment of women and ethnic minority candidates in proportions exactly matching their presence in the population at large, something which no one is suggesting, it would still take fifteen or twenty years to achieve a fully diverse judiciary. As it is, it seems certain to take much longer. Professor Alan Paterson offers the gloomy forecast that under the current system and on current trends it will take more than a hundred years. Personally, I think that it may take fifty. But we are both guessing. By any measure, this is a long haul.

The irony is that if the Lord Chancellor had retained the power to select judges, instead of passing it to the Judicial Appointments Commission in 2006, he could, and I suspect would, have treated diversity as a criterion for appointment. He would probably have done this with the minimum of fuss and without acknowledging publicly that he was doing so. The result would have been a somewhat faster rate of progress towards a diverse bench. However, the Lord Chancellor made appointments in the exercise of the prerogative power of the Crown. He was not bound by any statutory criteria, apart from the minimum period of legal qualification. Within the broad limits of rationality, he could do more or less as he liked. Even if he had gone badly wrong, the opacity of his processes would have made his selections difficult to challenge. The Judicial Appointments Commission is not in the same position. It has to apply statutory criteria for selection. Its procedures are published and they are relatively transparent. It records every stage of each selection exercise, and the record is subject to review by the Judicial Appointments and Conduct Ombudsman. It could not fudge or cheat even if it should want to. Some people have regretted the change for that reason. But I doubt whether a discreet change of practice by the Lord Chancellor could ever have been the right way of achieving a significant alteration in this important area of public policy. If our society wants to achieve a faster move to diversity than is consistent with selection on merit alone from the existing pool, it can do it. But it should be done overtly by amending the statutory criteria for selection, after a proper public debate about the wider implications. It should not be done covertly by a minister.

We need, as a society, to have an honest public debate about the hitherto unmentionable subject of positive discrimination. We have to decide whether we want to accept a measure of positive discrimination in the selection of judges, as the price of making faster progress towards judicial diversity. There are arguments both for and against it. But the real problem is that the debate has not happened. It has not happened

because of the conventional assumption that merit and diversity are compatible, even in the short term. This assumption enables us to pretend that the issue does not arise, that it is just a question of selecting on merit in a more intelligent way. Because we are not prepared to recognise that selection on merit is only compatible with a move to a diverse bench over a considerable period of time, we have never thought seriously enough about the choice to be made between them. I doubt whether we can afford to tip-toe round these issues for much longer.

However one looks at it, there are in reality three reasons why one might legitimately regard the present situation as unsatisfactory and want to see it changed. The first is that if women and ethnic minorities comprise a much smaller proportion of judges than they do of candidates, one has to ask whether this is due to a failure in the selection process. I have already given my reasons for believing that the process is in fact careful, fair and meritocratic, as the statute requires it to be. That leaves two substantial arguments. One is that justice is administered better by a diverse judiciary. The other is that public belief in the legitimacy of the judiciary depends at least in part on the symbolic impact of its being staffed with people who are recognisably representative of society at large. These are not usually presented as arguments in favour of positive discrimination. But that is on analysis what they quite clearly are. Both arguments are saying that we ought to be looking not only at the relative merits of individual candidates for the job, but at the merits of different possible compositions of the judiciary as a whole. On this view, the best possible judiciary may not necessarily be the one which contains all of the best available individuals. I do not myself accept either of these arguments, for reasons which I will explain. Moreover, as I have pointed out, neither approach is permitted by the Constitutional Reform Act. But they are both supported by distinguished and experienced voices, and backed by a certain amount of research. In spite of its portentous title, the Act is not

writ in stone. We can have whatever statutory regime we like, provided that we think seriously about its implications.

Does a diverse bench administer justice differently or better? A great deal of research has been done on this subject, almost all of it in the United States. Some of it has been cited in the literature on judicial diversity in England, on the assumption that its conclusions may have a broader application. I cannot claim to have read all of this material. But I have read a lot of it and I have to say that I have found it rather unenlightening. Broadly speaking, most of it seeks to establish a statistically significant connection between the presence of one or more women or non-whites on a multi-member panel of judges, and the likelihood of a 'liberal' or a 'conservative' outcome. The criteria used for identifying any particular outcome as 'liberal' or 'conservative' seem to me to be rather crude, even as applied to the areas of civil rights, discrimination and penal policy on which most the research has concentrated. Moreover, most of it makes no, or very little allowance, for the possibility that the outcome, however classified, may actually be attributable to the facts of individual cases or the state of the law, rather than to the gender or ethnic balance of the tribunal. Even so, most of this substantial body of work is inconclusive. The general tenor of the rest is that in politically charged cases the most significant influence on outcomes in these cases is the political affiliation of President or State Governor by whom the judges in question were appointed. Race appears to have no discernible effect on outcomes, and gender a very slight one. Some but not all researchers claim to have detected a greater propensity on the part of panels with at least one female member to prefer 'liberal' outcomes in discrimination or civil rights cases and 'conservative' outcomes in criminal cases. Without being either a statistician or a sociologist, I have serious doubts about the value of this work even in the United States. I do not think that it transfers easily to a jurisdiction such as ours where there is a strong judicial culture

of political neutrality and judicial appointments have not been influenced by political affiliation since the second world war.

A more moderate, and to my mind more persuasive approach has been proposed by the current Chief Justice of Canada, Beverley MacLachlin, when addressing the issue of gender equality. She has distanced herself, surely rightly, from the view that women judge differently from men, or come to the business of judging with different ethical preconceptions. In a lecture delivered in Sydney, Australia, in 2006, she pointed out that this view overstated gender differences.

“In fact, men and women are diverse, come from different cultural and social backgrounds and possess a variety of values. To suggest a single feminine world view discounts the incredible variety and diversity of women... We are all trained jurists, and when we apply the law and common sense, we are likely to come to the same conclusions irrespective of gender.”

However, Chief Justice McLachlan argues that the quality of justice is nevertheless improved by a diverse bench for a more subtle reason, namely that a diverse judiciary is able to draw on a wider range of collective experience.

“Jurists [she says] are human beings and, as such, are informed and influenced by their backgrounds, communities and experiences. For cultural, biological, social and historic reasons, women do have different experiences than men. In this respect women can make a unique contribution to the deliberations of our courts. Women are capable of infusing the law with the unique reality of their life.”

Similar views have been expressed by Chief Justice Elias in New Zealand.

I have the strongest doubts about this argument. In the first place, it can only apply to judicial decisions by multi-member panels operating in a collegiate fashion. In this country, that means the Supreme Court, the Court of Appeal, and certain tribunals and magistrates courts. Single-judge courts, which make the great majority of judicial decisions, are by definition undiverse. Secondly, I think that it overstates the importance of personal as opposed to vicarious experience. No judge, from whatever background he or she may come, can ever claim personal experience of more than a tiny proportion of the situations which he or she is called upon to consider. Most judicial experience is necessarily vicarious and always will be. It is derived from intelligent social observation, and a sensitive empathy with those who find themselves in situations that the judge is unlikely to have experienced himself. I do not doubt that men and women have experiences of life that differ in some respects. But I deny that because a particular kind of experience is specific to one gender, judges of a different gender cannot comprehend it equally well.

The image of the inward-looking, out of touch judge is a journalistic cliché, and it is no doubt true of a few judges. But as a generalisation it is manifestly false. We quite rightly expect judges to understand the position of, for example, asylum seekers, immigrants, and other socially disadvantaged categories, without personal experience of being in their position. The case-law amply demonstrates that they do. By statute a newly appointed judge is not permitted to have had personal experience of committing crimes. But an understanding of the position of those who do commit them is required of every judge who is called upon to hear a plea in mitigation or receive a social enquiry report. Family judges are daily required to understand a wide range of gender-specific concerns of both spouses, although the judge can share the gender of only one of them. In *Radmacher v. Granatino*, the Supreme Court decision on the legal significance of prenuptial agreements, Baroness Hale observed that there was a gender dimension to the question, because of the possibility

that pre-nuptial agreements could become an instrument of oppression. She famously asked whether such an issue was suited to decision by a court comprising eight men and one woman. My own provisional answer to that question would be Yes. The issue would be that that it is just as suitable for decision by a court with a majority of men as the many earlier cases in which all-male panels of the Court of Appeal or the House of Lords recognised the vulnerability of women in a relationship commonly dominated by men. The doctrine of presumed undue influence and the deserted wife's equity in the matrimonial home are both principles of law originally formulated and developed by all-male courts. The same is true of most of the seminal decisions made by white male judges over the last forty years which have reinforced the statutory protection against gender and race discrimination. And I would say that it is equally true of the careful and impartial women judges at every level who daily deal with the emotional and material problems which matrimonial breakup poses for men as well as women.

Quite apart from the lack of any empirical evidence, there are other objections to the notion that a diverse court produces a higher quality of justice. If personal experience of belonging to a relevant group is desirable, there will be very many relevant groups apart from women and ethnic minorities who are entitled to be represented. Even among women and ethnic minorities, there will be countless sub-groups, each with their own particular and equally relevant experience. Should we distinguish between ethnic minorities according to whether they are of Caribbean, African, Indian or Chinese origin, or between Christian, Muslim and Hindu, all categories with a unique quality of personal experience? If vicarious experience of life is not good enough, then how far should we go in ensuring that disputes are referred to judges with some relevant personal experience? How far can one go in this direction without undermining the objectivity of the judge, which necessarily depends on a certain personal distance from the facts? Ultimately, the emphasis on

personal judicial experience of diverse social groups leads to the fragmentation of the judicial function. It leads to an attitude of mind which treats appellate courts as a sort of congress of ambassadors from different interest groups. I cannot be alone in regarding this as a travesty of the judge's role.

I turn to the other argument in favour of positive discrimination, which is based on concerns about the lack of legitimacy of an undiverse bench in the eyes of the wider public. In principle, I accept this. I think, however, that it is unfortunate. The call for more members of particular groups on the bench is a symptom of the fragmentation of our society. It is influenced by a widespread belief that judicial decisions are vitiated by the social ignorance of judges, or by their tacit loyalty to their class, gender, race or other constituency, or by inescapable social conditioning. I regard this belief as profoundly mistaken. I think that it is also unrealistic. Whoever they are and however recruited, judges as a group will never be representative of the public at large. Even in a fully diversified system, we would continue to expect our judges to have outstanding intellectual and personal qualities which will necessarily mark them out from the average.

But the existence of a widespread feeling that an undiverse bench lacks legitimacy ought to be a source of concern whether or not we happen to agree with it. The judiciary has immense power. In the nature of things, judges cannot be democratically accountable for their decisions. It therefore matters very much that their role should be regarded as legitimate by the public at large. Legitimacy depends on collective sentiment, and cannot be analysed exclusively in rational terms. There has never been a sufficiently comprehensive and carefully designed survey of public attitudes to the judiciary, to enable firm conclusions to be drawn about this. But there are certainly significant groups who question the legitimacy of an undiverse bench in modern social

conditions, and their view is increasingly shared by the public. What remains entirely unclear is whether the public would still take this view if they appreciated that faster progress towards a diverse judiciary would require the partial abandonment of selection on merit. Selection on merit alone is of course itself fundamental to the perceived legitimacy of the judiciary. This is a real dilemma.

In any honest debate about positive discrimination, we would need to measure the advantages of a more representative judiciary against a realistic assessment of the cost of achieving it. In particular, we need to make some assessment of the impact on the quality of the bench which would result from qualifying the principle of selection 'solely on merit'. Because we have so far managed to persuade ourselves that the question does not arise, very little research has been done on this question either. But however much research was done on it, the answer would probably always be at least partly a matter of informed impression. My own, I hope informed, impression is that the impact on the quality of the bench would be serious.

There are two reasons why making diversity a criterion for appointment would adversely affect the quality of appointments. The first one is self-evident. If you dilute the principle of selecting only the most talented candidates by introducing criteria other than individual merit, you will by definition end up with a bench on which there are fewer outstanding people. But there is a more serious problem even than that. It is the impact that the change would have on applications. The quality of judicial appointments is highly sensitive to the quality of applicants. The qualities required for appointment to the bench, particularly at the more senior levels, are relatively rare. Those who possess them are in the nature of things likely to have many alternative opportunities open to them. Most of those opportunities will be a great deal more remunerative. Quite a few will also be more interesting and enjoyable than many

judicial appointments. Practice at the upper reaches of the bar or a solicitor's firm is intellectually highly satisfying. Successful practitioners will usually have a more varied and challenging diet of work than most first instance judges. Even the Court of Appeal has to deal with a fair amount of mundane business which would rarely if ever come the way of an experienced QC or litigation solicitor. These drawbacks of judicial life will become more significant if the government proceeds with its current proposals on judicial pensions. Nevertheless, as matters stand, very large numbers of outstanding candidates do apply for judicial appointment, and it is important to understand why they do. First, they are attracted by judiciary's collective reputation, which is heavily dependent on the principle of selection on individual merit. Secondly, there is a strong culture of public service in the legal professions. It is easy to scoff about this. But it is a matter of daily experience that highly qualified candidates are willing to accept judicial appointment, even though it is not in their financial interest to do so and even though the life is often less agreeable than the alternatives. Thirdly, there is the tradition, which is particularly important at the bar, that judicial appointment is the ultimate accolade of a successful career. These things are very much in the public interest. They have made a contribution to the quality of the judiciary that would be hard to overstate. But like all human arrangements which are founded on convention and sentiment, this is a fragile construct. Once undermined, it will not easily be recreated. Outstanding candidates will not apply in significant numbers for judicial appointments if they believe that the appointment process is designed to favour ethnic or gender groups to which they do not belong. They will not walk away out of pique. They will do it because the qualification of the principle of appointment on merit will have undermined much that makes judicial office attractive to outstandingly able people. Judicial appointments which are not made 'solely on merit' will lack the prestige in their eyes that was previously due to the assumption that only the best people get

appointed. There will quite simply be better things for the most attractive candidates to do. The Judicial Appointments Commission has some experience of its own to bear this out. Applications for its early selection exercises were disappointing. Some outstanding candidates who could have been expected to apply held back. Consistent anecdotal evidence and questions at outreach events, suggested that the main reason was the perception that the JAC had a covert agenda of positive discrimination. There was a dramatic improvement in the quality of applications in subsequent years once this impression had been dispelled. Selection on merit alone has been at the forefront of the Commission's message since its inception, and has been one of the main factors in the degree of trust that it has achieved among candidates at large.

Few constituencies would be more seriously affected by the introduction of diversity as a criterion for selecting judges than women and ethnic minorities. Positive discrimination is patronising. Those women and ethnic minority candidates who have been appointed under the current system are justifiably proud of having achieved this under a system based exclusively on individual merit. Many, probably most of those who are not judges but aspire to be appointed, do so because the principle of selection on individual merit makes it an ambition worth achieving. A partial abandonment of that principle would therefore be likely to make judicial office a great deal less attractive to the very people that its proponents are trying to help.

I am well aware that there are countries which have experimented with varieties of positive discrimination. Canada is probably the most notable example. Some Canadian provinces such as Ontario have explicitly adopted diversity as a criterion for appointment. At Federal level, at least three places on the nine-strong Supreme Court of Canada are by convention reserved for women. But Canada has a geographically dispersed legal profession, in which the functions performed by barristers

and solicitors in England are fused. Those who know both systems appear to agree that judicial appointment is not so often seen as the culmination of a successful professional career in Canada as it is in England.

Moreover, while Canada has experienced high levels of immigration for many years, it has been significantly more successful than we have in integrating immigrants into the established patterns of Canadian life. We have, I fear, to devise our own policies in the light of our own conditions, some of which are a great deal more problematic.

I do not expect every one to agree with the views that I have expressed. In any event those views are necessarily provisional, for there remains much that we do not know and much that we cannot foresee. What I hope I may have persuaded you to accept is that the whole subject of judicial diversity is an exceptionally complex and delicate issue, in which crude slogans, easy clichés and simple policy prescriptions are likely to have unintended and damaging side effects. They are likely to undermine much that is good about our current system, without necessarily curing what is bad about it. In this area, as in life generally, we just cannot have everything that we want. We have to make choices and to accept impure compromises. We may even have to learn patience. The alternative is to do serious harm to the quality and standing of the judiciary, undermining an institution which however imperfect has been one of the more successful areas of English public life.