

**JUDICIAL DIVERSITY  
IN THE UNITED KINGDOM AND OTHER JURISDICTIONS  
A REVIEW OF RESEARCH, POLICIES AND PRACTICES**

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**Commissioned by  
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## Executive Summary

### Scope of the Review

- This Review addresses three main questions: (1) *What factors might directly or indirectly lead to a lack of diversity in the judiciary?* (2) *How does a lack of judicial diversity affect the justice system?* (3) *How can greater diversity best be achieved?*
- The Review covers academic studies, government commissions, policy initiatives and other practices in a range of common law and civil law jurisdictions that attempt to address these questions.

### The Study of Judicial Diversity

- Neither the judiciary nor judicial diversity have been studied in any substantive and systematic way in England and Wales.
- The majority of relevant research on the issue of judicial diversity has been carried out in the United States where judicial studies is a long-established academic discipline.
- Government statistics exist on the numbers and proportion of women and ethnic minorities at different levels of the judiciary in England and Wales, however, these are not always consistent and published academic work on judicial diversity provides only anecdotal information about ethnic minorities' and women's experiences of the judiciary and the judicial appointments process in this country.
- There are major structural and policy reasons for the lack of examination of judicial diversity and its effects in England and Wales: the judicial appointment process has been highly secretive; there are only small numbers of women and ethnic minority judges; and judicial diversity is a recent subject of policy debate.
- The establishment of a new judicial appointments process and the creation of a Judicial Appointments Commission (JAC) for England and Wales provides a unique opportunity to establish a framework for the comprehensive analysis of the appointment system and its impact on judicial diversity, as well as opportunity to establish a comprehensive monitoring system for appointments.

## **Extent of Judicial Diversity Work in Other Jurisdictions**

- The widest academic examination of the issue has been in the United States, where most of the empirical work has been carried out over many decades and within an established research framework of judicial studies.
- Some further empirical work has also been carried out in other jurisdictions, particularly in Europe and especially in regard to the role of women in the judiciary.
- Ethnic diversity is less prominent an issue in those European countries where ethnic minorities constitute only a very small proportion of the population.
- There have been numerous official reports and studies in Canada especially in relation to achieving diversity and gender equality in the legal profession.
- The United States has the most to offer in terms of conceptual and methodological frameworks for examining and monitoring judicial diversity in England and Wales.
- Each jurisdiction presents a different combination of background factors which are important to consider when comparing judicial diversity across jurisdictions: the nature of the judicial system, legal system, political system, constitutional system, and the nature of ethnic diversity in each jurisdiction.

## **Defining Diversity**

- There is a need for a more refined definition of diversity that more clearly distinguishes between the ability of women and ethnic minorities to achieve judicial appointment, and more clearly distinguishes between the ability of different ethnic groups to achieve judicial appointment.
- There is a need to distinguish between diversity in the judiciary and diversity in other professions. Diversity in the judiciary is not a strategy for economic success; it is part of the delivery of justice that is increasingly vital for the courts' legitimacy in a diverse society.

### **The Method of Appointment (judicial nominating commissions)**

- In the US, research on nominating commissions and diversity has focussed on two main issues: the extent to which the nominating commission system itself produces a more diverse judiciary, and the extent to which members of the nominating commissions reflect the diversity of the larger community.
- A recent US study on whether the composition of the nominating commission itself affects the diversity of the judiciary found evidence that diverse commissions attracted more diverse applicants and selected more diverse nominees. However, no clear consensus has emerged from the large body of research on this particular question, in large part because there are a multitude of commissions in over 30 states as well as various selection methods.
- The most comprehensive and recent study of judicial appointments at both the federal and state level in the United States found that the ability of ethnic minorities and women to attain a place in the judiciary is influenced by a combination of factors contingent on the level of court and the time period of appointment.
- The study also found that success rates differed significantly for women and ethnic minorities. Since 1985 women and minorities collectively have made great strides in terms of representation as appellate court judges, but the vast majority of the increase stemmed from gains by women not minorities.

### **The Nature of Judicial Office and the Judicial Profession**

- The “prestige theory” (that women and ethnic minorities are most likely to attain judicial office in less prestigious courts) was not borne out in reality in the United States. Women and ethnic minorities were in fact more likely to become judges on higher level courts than lower level courts.
- However, the prestige theory was a reality in the Netherlands, France, Italy, Spain and Germany, all countries where women have had substantial success in gaining appointment to the judiciary. This early success at gaining entry does not extend to progress into senior or even middle-ranking posts.
- Various studies revealed a similar pattern: female representation was highest at the lowest levels of the judiciary, and every step up the judicial ladder took more time for women than for men.
- Statistics show that the prestige theory also clearly operates for women and minorities in the judiciary in England and Wales. The only post where ethnic minorities approach representation in the legal profession is the bottom position of Deputy District Judge. Women have had somewhat more success but have no significant representation at the senior levels of the judiciary.



- Attitudinal research amongst European judges revealed significant differences between men and women in their motivation to become a judge, career ambitions, job satisfaction and impact on family life.
- Judicial diversity was also associated at the federal level in the US by a distinct “leadership factor”: gains in appointments by women and ethnic minorities resulted directly from clearly defined Presidential initiatives to increase diversity.
- The European experience indicates that the involvement of lower-ranking judges in the appointment process is more likely to lead to increases in the number of women and those from less traditional professional backgrounds in the judiciary, at least at the lower levels.

### **Judicial Background**

- Concern over the lack of judicial diversity in England and Wales extends to social background. Senior judges are still overwhelmingly privately educated with degrees from a select group of universities, and the position has changed little over 15 years.
- Of the current senior judiciary (High Court and above), 81% have Oxbridge degrees, 76% attended fee-paying schools, and half went to boarding schools.
- However, forthcoming research has found that no such educational bias operates in judicial appointments at the lowest level (Deputy District Judge).

### **Legal Profession (the Pool for Judicial Appointment)**

- The status of ethnic minorities and women within the legal profession as a whole is a crucially important issue for judicial diversity, as it is from this pool that candidates for judicial appointment are drawn.
- In England and Wales, the proportion of women and ethnic minorities at the bar and in the solicitors’ profession is steadily increasing. However, inequalities continue to exist between white males and both women and ethnic minority solicitors in relation to pay, prestige jobs, and promotion.
- In England and Wales, the partners at three of the five "magic circle" law firms and barristers at eight leading corporate and commercial chambers are still overwhelmingly privately educated and have degrees from the top 12 law faculties, a position that has changed little over 15 years.

- A recent Law Society report concluded that, given the levels of disadvantage at each stage of the education and training process for the legal profession, there is a potential for the gap between the advantaged and the disadvantaged groups to widen.
- A study of the rise of market-based diversity arguments in the legal profession in the United States revealed that black lawyers seeking to integrate corporate law firms have increasingly staked their claim on the contention that diversity is good for the business of law firms and clients.
- The “business case” for diversity is relevant to the issue of increasing diversity in the legal profession in England and Wales and has indirect implications for judicial appointments, as the legal profession forms the pool of potential applicants for judicial appointment.
- However, the business case for diversity has yet to be widely accepted and embraced either by the bar or the solicitors’ profession in England and Wales.

### **Effect of Judicial Diversity on the Perception of Courts**

- Large-scale studies of the perception of courts across a number of states in the United States have demonstrated that judicial diversity can have a powerful symbolic value in promoting public confidence in the fairness of courts, a vitally important issue in terms of access to justice.
- An American Bar Association study revealed that within ethnic minority communities, suspicion of the courts is compounded by a lack of diversity throughout the judicial system.
- However, it can be misleading to speak of a “minority viewpoint” about the courts. While Latinos and African American litigants were most likely to believe their race made a difference in how they were treated by the courts, for the most part Latinos shared the general perceptions of Whites about the fairness of the courts, and Latinos in many respects rated the courts in their community more highly than Whites.
- No comprehensive study of judicial diversity and the perception of the fairness of courts has been conducted here. However there is increasing evidence from individual studies that the lack of diversity in the judiciary has resulted in lower levels of public confidence in the courts.
- A recent survey of ethnic minority perceptions of fairness in the criminal courts in England and Wales found that ethnic minority defendants were particularly troubled by the lack of ethnic minority judges in the criminal courts, with 31% of ethnic minority defendants in Crown Courts and 48% in Magistrates Courts stating they would like to see more ethnic minorities sitting in judgement and amongst court staff.

- A recent study of the experience of ethnic minority magistrates in England and Wales found that in order for members of ethnic minority communities to have confidence in the impartiality of the justice administered in Magistrates' Courts, substantial numbers of magistrates from ethnic minority backgrounds needed to be appointed.

### **Effect of Judicial Diversity on Judicial Decision-Making**

- Recent studies of the effect of judicial diversity on judicial decision-making in the United States have indicated that when cases were decided by panels of judges from diverse backgrounds, the judges were more likely to debate a wider range of considerations; the existence of such diversity on panels was more likely to move the panel's decision in the direction of what the law required; and a diverse bench was an increasingly important element in achieving an independent judiciary.
- A study of all affirmative action cases in the US Court of Appeal from 1971 – 1999 found that adding a single non-white judge to a three-judge panel substantially changed the voting behaviour of the other judges on the panels, and indicated that racial diversity improved the judicial panel's adjudication.
- It is not possible to conduct this type of research in England and Wales at present, as the senior judiciary (where collegiate-style adjudication takes place) is not diverse enough to provide the basis for such research. However, it may be possible to conduct similar research in England and Wales with tribunals.

### **Diversity and Merit for Appointment**

- The growing body of research evidence on the effect of a diverse judiciary on improving both the public perception of courts and actual judicial decision-making raises the question of what should constitute "merit" for judicial appointment.
- Diversity is said to be integral to merit for judicial appointment in a diverse society because in making the judiciary more representative it fosters both the impartiality and legitimacy of the courts.
- Fair trial requirements are said to necessitate the structural impartiality of the judiciary (a judiciary comprised of judges from diverse backgrounds and viewpoints) and that such a judicial mix fosters impartiality by diminishing the possibility that one perspective will dominate adjudication.

- A survey of federal judges in the United States demonstrated that white and ethnic minority judges did in fact hold significantly different views of the justice system: 83% of white judges believed black litigants were treated fairly, while only 18% of black judges shared this belief.
- Legitimacy of the judiciary is a special concern in regard to groups who have traditionally felt excluded from the justice system, such as minorities, and who may be less likely to respect rulings from an institution that fails to represent them.
- Informal eligibility requirements for judges, such as previous judicial experience or educational qualifications from elite law faculties, can be tied to conceptions of merit which almost inevitably limit the diversity of the judiciary.
- Juries are one institution where diversity arguments are applicable to the judiciary, given their shared unique function of delivering justice.
- Just as democratic theory indicates that a diverse jury pool that represents the community is needed to deliver justice in its decision-making, the same democratic principles require diversity amongst judges who make decisions affecting society.

### **Legal Status of Unrepresentative Judiciary**

- Concern over the legal status of an unrepresentative judiciary in England and Wales has primarily centred on the appointment criteria for the senior judiciary, which require service on the higher court below and to “be known” to the senior judiciary.
- The appointment requirement of experience serving on the higher court self evidently disadvantages specific groups as there are either no or so few ethnic minority and female judges on the Court of Appeal (where appointments to the Law Lords exclusively come) and the High Court (from which appointments to the Court of Appeal are invariably made) to enable appointments of women and minorities to be made.
- The second requirement to “be known” by the consultees (who are largely senior judges) is said to disadvantage minorities and women as they tend to be outside the traditional judicial networks.
- Recent European Directives and a recent decision of the Northern Ireland Court of Appeal appear to bring judicial appointments within the scope of the Sex Discrimination Act and the Race Relations Act.

- Legal challenges to judicial appointments in the United States have been brought primarily by minority voters challenging the judicial election processes for state judges under the Voting Rights Act, and a number have been heard by the U.S. Supreme Court, forcing the judiciary to examine the relationship between judicial representation and impartiality.

### **Policies and Practices in Other Jurisdictions**

- There is no single model for increasing diversity. In practice individual jurisdictions have relied on a range of strategies to increase diversity.
- Common law and civil law jurisdictions which have succeeded in increasing diversity have utilised a combination of political initiatives, appointment commissions, changing conditions of employment, outreach programmes, task forces and legal challenges to appointments.

### **Applying Research and Policies to Judicial Diversity in England and Wales**

- Research and policy initiatives from numerous jurisdictions highlight five key judicial diversity factors: lack of representativeness, institutionalised discrimination or disadvantage; discredited appointments process; benefits of a diverse judiciary; levers for change.
- The main levers for bringing about change in the composition of the judiciary are: appointments commissions, career progression, and political leadership.
- Crucial factors enabling nominating commissions to deliver a more diverse judiciary are: diversity on the commission; diversity clearly incorporated into appointment criteria; active recruitment from under-represented groups; more knowledge-based than experience-based criteria for appointment; transparent selection processes; outcomes independently monitored; and strong political leadership.
- The imminent introduction of the new judicial appointments system provides a unique opportunity to study and monitor the process from inception. It is also important to examine the existing appointment process before the JAC begins operation, as results could be taken on board by the JAC in establishing its working methods.
- There is a clear need to focus on comprehensive empirical research as well as to develop a theoretical and conceptual approach to examining diversity in the British judicial system.

- The two main issues which need to be addressed with further research are (1) Where does the problem lie: in the appointment process, in the nature of the legal profession, or in both? (2) What is the effect of a lack of diversity on the perception of courts and on judicial decision-making?
- The implications for the new Judicial Appointments Commission are that several aspects of its work are likely to be most problematic and are a matter of priority to address: devising recruitment and consultation methods, defining merit in the context of diversity, and establishing an appointments monitoring system.



**Part One: The Background to Judicial Diversity**





## Part One: The Background to Judicial Diversity

### 1. Introduction

Despite it being officially acknowledged for over a decade that the judiciary in England and Wales is seriously unrepresentative in terms of ethnic minorities and women on the bench<sup>1</sup>, little substantive improvement in judicial diversity has occurred in this period. In 1992, 6.5% of judges in England and Wales were women and 1% were from an ethnic minority group. Today, in 2005, 16.8% of judges in England and Wales are women and 3.1% are from ethnic minority groups<sup>2</sup>, a clear under-representation in relation to the proportion of women and ethnic minorities both in the legal profession and in the general population<sup>3</sup>.

This Review examines research, policies and practices that address the following questions:

- (1) *Which factors might directly or indirectly lead to a lack of diversity in the judiciary?*
- (2) *How does a lack of judicial diversity affect the justice system?*
- (3) *How can greater diversity best be achieved?*

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<sup>1</sup> In 1992, the then Lord Chief Justice, Lord Taylor, publicly stated that: “The present imbalance between male and female, white and black in the judiciary is obvious.... I have no doubt that the balance will be redressed in the next few years.” Lord Taylor “The Judiciary in the Nineties” Richard Dimbleby Lecture (1992)

<sup>2</sup> The percentage of ethnic minority judges has only increased by 2.1% in the thirteen years since Lord Taylor’s speech, and actually decreased in some years during this period. Even though the percentage of women judges has more than doubled in the same period from 6.5% to 16.8%, the change has been extremely slow, has never increased by more than 1.5% per year and in many years showed no significant increase at all. For statistics on women and ethnic minorities in the judiciary in England and Wales from 1992 to 2004 see Table 2 and Table 25, Annex G in *Increasing Diversity in the Judiciary*, Consultation Paper CP 25/04 Department for Constitutional Affairs (2004). For statistics on women and ethnic minorities in the judiciary in England and Wales as of 1 October 2005 see *Judicial Statistics: Ethnic Minorities in the Judiciary (1 October 2005)* Department for Constitutional Affairs at [www.dca.gov.uk/judicial/ethmin.htm](http://www.dca.gov.uk/judicial/ethmin.htm), and *Women in the Judiciary* Official DCA Judicial Statistics (as of 1 October 2005) [www.dca.gsi.gov.uk/judicial/womjudfr.htm](http://www.dca.gsi.gov.uk/judicial/womjudfr.htm).

<sup>3</sup> In the legal profession in England and Wales, women comprise 32% of the Bar and 39.7% of solicitors, while ethnic minorities comprise 10.7% of the Bar and 7.9% of solicitors; see Law Society Annual Report 2004 and Bar Council Annual Report 2004, as well as the summary of Law Society and Bar Council statistics in Annex G *Increasing Diversity in the Judiciary* supra note 2. According to the most recent census, women comprise 51.1% of the population in England and Wales, and ethnic minorities comprise 9% of the population in England (7.9% in England and Wales combined); see gender and ethnicity statistics from Census 2001 on [www.nationalstatistics.gov.uk](http://www.nationalstatistics.gov.uk).

The Review covers academic studies, government commissions, policy initiatives and other practices that attempt to address these questions. The majority of the academic material covered in the Review is by necessity from other jurisdictions outside England and Wales, as there is little to no research on the subject of judicial diversity here. What academic research has been published here is almost exclusively descriptive, and no study here has so far provided a substantive analysis of the issue or a sound framework for future research.

Substantive research has been carried out elsewhere, primarily but not exclusively in the United States. The Review examines this research as well as policies and practices for increasing judicial diversity employed in other jurisdictions, both common law and civil law. As well as reviewing these studies and practices, the Review also attempts to distinguish what is and is not possibly applicable to the issue of judicial diversity here. Part 4 of this Review looks specifically at how these findings from other jurisdictions can assist in understanding the issue of judicial diversity in England and Wales, how the methodologies used might assist in establishing a framework for future research, policy development and monitoring of judicial diversity in England and Wales, and how these findings might help set the diversity agenda for the new Judicial Appointments Commission for England and Wales.

### **1.1 The Study of Diversity**

Diversity is a broad concept covered widely in a number of academic disciplines in this country, but generally not law. Diversity studies in Britain are by and large studies of race and ethnicity, even though within general policy discourse there is often an overlap with issues of gender (as well as sexual orientation, disability, and religion). Sociology has focussed on the classification of race, as well as theories and approaches to the study of racial discrimination in Britain<sup>4</sup>. Within specific social policy fields, diversity has also been the subject of numerous empirical studies: for

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<sup>4</sup> See for instance, A. Pilkington *Racial Disadvantage and Ethnic Diversity* (2003 Palgrave Macmillan); P. Ratcliffe *"Race", Ethnicity and Difference* (2001 OUP); B. Carter *Realism and Racism: Concepts of Race in Sociological Research* (2000 Routledge); D. Mason *Race and Ethnicity in Modern Britain* (2000 OUP); T. Modood et al *Ethnic Minorities in Britain: Diversity and Disadvantage: The Fourth National Survey of Ethnic Minorities* (1997 Policy Studies Institute); R. Jenkins "Doing research in discrimination: Problems of method, interpretation and ethics" in G. Clare Wenger (ed) *The Research Relationship* (1987 Allen and Unwin); M. Bulmer "Race and Ethnicity" in R.G. Burgess (ed) *Key Variables in Social Investigation* (1986 Routledge and Kegan Paul).

instance, in education<sup>5</sup>; medicine<sup>6</sup>; and employment<sup>7</sup>, many of which draw on census data<sup>8</sup>. In addition, there have been a number of large-scale policy reports: on multiculturalism in Britain<sup>9</sup>, ethnicity in education<sup>10</sup> and various studies of racism by the Commission for Racial Equality<sup>11</sup>. Despite this, few diversity studies have any direct bearing on the judiciary<sup>12</sup>.

Caution should be exercised in defining judicial diversity in England and Wales only in terms of ethnicity. Comparative work indicates that gender and appointments is equally important, and improving the role of women in judiciaries can be closely connected to an overall increase in diversity in general. Therefore, within this Review relevant studies of judicial diversity that encompass gender have not been excluded. However clarification is made where findings distinguish between ethnic diversity and gender diversity in the judiciary. In addition, it is also important to caution against thinking that “ethnic diversity” is a unified subject. Studies of diversity in the legal system elsewhere have revealed a more complex picture where socio-economic background factors overlap<sup>13</sup>. As numerous American studies have shown, viewing all ethnic minorities as a single group can often create a very misleading picture of the nature of bias in the legal system<sup>14</sup>.

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<sup>5</sup> D. Phillips, I. Law and L. Turney “Widening participation in UK universities: the challenges of achieving race equality (paper presented at UCLA 21<sup>st</sup> Century Project Conference, Rockefeller Foundation, Bellagio, Italy, March 2002); D. Owen et al *Minority Ethnic Participation and Achievements in Education, Training and the Labour Market* (2000 Department for Education and Employment); D. Gillborn and C. Gipps *Recent Research on the Achievements of Ethnic Minority Pupils* (1996 HMSO)

<sup>6</sup> For instance, L. Cooke et al *Racism in the Medical Profession: The Experience of UK Graduates* (2003 British Medical Association)

<sup>7</sup> For instance, H. Metcalf, T. Modood and S. Virdee *Asian Self-Employment: The Interaction of Culture and Economics in England* (1996 Policy Studies Institute)

<sup>8</sup> For instance, A. Heath and D. McMahon *Ethnic differences in the labour market: the role of education and social class origins* (2000 Oxford Sociology Working Papers)

<sup>9</sup> B. Parekh *The Future of Multi-Ethnic Britain* (2000 Profile)

<sup>10</sup> M. Swann *Education for All* (1985 HMSO Cmnd. 9453)

<sup>11</sup> These cover a range of issues such as housing, medical school admissions, public procurement.

<sup>12</sup> The one study with some bearing on judicial appointments is *The General Duty to Promote Racial Equality: Guidance for Public Authorities on their Obligations under the Race Relations (Amendment) Act 2000* (2001 CRE).

<sup>13</sup> See discussion of ethnicity and juries, judicial appointments and judicial decision-making studies in Part Two.

<sup>14</sup> See discussion in Part Two of studies revealing that African Americans have not been as successful as Hispanics in attaining judicial office in the United States.

## 1.2 Judicial Studies

Judicial Studies is a political science-based discipline with its foundations in the academic debate surrounding Legal Realism in the United States in the first half of the twentieth century<sup>15</sup>, and has subsequently grown into a rich field of academic study, producing a large body of both empirical and theoretical work<sup>16</sup>. The foundations of the field lie in well-established behavioural studies of the judiciary that acknowledge the political significance of judicial decision-making. The early work of Pritchett<sup>17</sup> and later work by Segal and Spaeth<sup>18</sup> established a typology for understanding judicial culture and decision-making. These empirical studies formed the foundations of the “attitudinal” approach to judicial studies in which legal rulings were explained in part in terms of judges’ individual policy preferences. Despite large numbers of empirical studies demonstrating this effect, some legal scholars continued to maintain a much more traditional “legal” view that judicial decision-making should not and does not depend on judges’ policy preferences but on judges’ adherence to legal precedent. More recently, a number of scholars<sup>19</sup> have attempted to bridge the gap between the two approaches to judicial studies, arguing for a “new institutionalist” approach based on examining how institutional factors (e.g., constraints of judicial office such as the formal requirements of the law or the nature of collegiate decision-making) might interact with judicial policy preferences to affect judicial decision-making.

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<sup>15</sup> In the 1920s, 30s and 40s “legal realists”, such as Oliver Wendell Holmes, Jerome Frank, Karl Llewellyn and Roscoe Pound, began to advance the belief in the indeterminacy of law, and argued for interdisciplinary approaches to law and that law should be used as a tool for social change.

<sup>16</sup> Judicial studies was also influenced by the rise of Critical Legal Studies in the 1960s and 70s (where proponents such as Mark Tushnet, Duncan Kennedy and Roberto Unger argued for a class/economic based interpretation of law and judicial decision-making), and more recently by the subsequent development of both Feminist Jurisprudence and Critical Race Theory.

<sup>17</sup> C.H. Pritchett *The Roosevelt Court: A Study in Judicial Politics and Values 1937-1947* (Macmillian 1948)

<sup>18</sup> J.A. Segal and H.J. Spaeth *The Supreme Court and the Attitudinal Model* (Cambridge University Press 1993)

<sup>19</sup> R. Smith “Political Jurisprudence, the ‘New Institutionalism’ and the Future of Public Law” 82 *American Political Science Review* 1989; H. Gillman “The New Institutionalism, Part 1. More and Less Than Strategy: Some Advantages to Interpretive Institutionalism in the Analysis of Judicial Politics” *Law and Courts* (Winter 1996-97); L. Baum *The Puzzle of Judicial Behaviour* (University of Michigan Press 1997); L. Epstein and J. Knight *The Choices Justices Make* (Congressional Quarterly Press 1998); M.M. Feeley and E.L. Rubin *Judicial Policy Making and the Modern State: How Courts Reformed America’s Prisons* (Cambridge University Press 1998). For a general overview see A. Bloom “The Post-attitudinal Moment”: Judicial Policy-making through the Lens of New Institutionalism” *Law and Society Review* (2001)

While this political science-based approach to the judiciary has gained ground in other common law and civil law countries, there is no significant academic history of judicial studies in Britain. This is due in large part to a well-entrenched reluctance in this country to acknowledge that the judiciary has political significance. Instead, a traditional approach to the judiciary has been adopted by the academic community in Britain, where judicial studies has generally been neglected by political scientists and legal scholars have primarily confined the study of the judiciary to a more narrow, legalistic analysis of judicial opinions. Griffiths<sup>20</sup> examination of the political role of the judiciary stands out as an exception in Britain, but its initial publication in the 1970s has not led to any sustained development of judicial studies here.

There are some understandable reasons for the lack of development of judicial studies here. On structural grounds, the lack of substantive judicial review of legislation due to the principle of parliamentary sovereignty, the lack of a formal written constitution and the absence of an entrenched bill of rights requiring judicial interpretation have historically not provided the judiciary with the conditions for “judicialization” – the expansion of the political significance of the courts into the policy domains of the other branches of government<sup>21</sup>. Perhaps as a consequence, the judiciary in Britain has traditionally had a low public profile, where decisions are reported but individual judges have tended to remain out of the public eye. Above all, however, the existence of a highly secretive appointment process has meant that the very foundations of the judiciary have not been open to scrutiny.

### **1.3 The Study of Judicial Diversity in the United Kingdom**

If judicial diversity is broken down into its component parts, the reality is that neither diversity in a legal context nor judicial studies are well served by academic research in this country. Racism studies in Britain have encompassed the law, although these

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<sup>20</sup> J.A.G. Griffiths *The Politics of the Judiciary* (1971); also see R. Stevens *The Independence of the Judiciary: The View from the Lord Chancellor's Office* (OUP 1993); G. Marshall “Lions Around the Throne: The Expansion of Judicial Review in Britain” in J. J. Hesse and N. Johnson (eds.), *Constitutional Policy and Change in Europe* (Oxford University Press 1995)

<sup>21</sup> C.N. Tate and T. Vallinder (eds) *The Global Expansion of Judicial Power* (New York University Press 1995)

have primarily been based in the sociology and criminology fields<sup>22</sup>. One recent development in the study of ethnicity and the courts is the Courts and Diversity Research Programme (CAD)<sup>23</sup> under the direction of the Research Unit of the Department for Constitutional Affairs (DCA). Following the publication of the Stephen Lawrence Inquiry, which concluded that the investigation and prosecution of the racially-motivated murder of a black teenager in 1993 was marred by “institutional racism”<sup>24</sup>, the DCA embarked upon the first major attempt to examine whether, and to what extent, the court system in England and Wales deals fairly and justly with the needs of a diverse and multicultural society. The CAD research programme is specifically aimed at examining whether direct or indirect discrimination against ethnic minorities exists in the court system<sup>25</sup>. The CAD programme covers magistrates<sup>26</sup>, tribunals<sup>27</sup>, juries<sup>28</sup>, criminal court users<sup>29</sup>, family<sup>30</sup> and housing proceedings<sup>31</sup>. However, while this programme considers the judiciary from the point of view of the diverse users of the legal system, the one area it does not encompass is diversity in relation to the appointment of judges themselves. Two of the CAD research projects relate to the judiciary: the study of lay magistrates<sup>32</sup> and the study of tribunals<sup>33</sup>. The first study qualitatively examines the experiences of ethnic minority magistrates in England and Wales, but it is not (and was not meant to be) a systematic examination of whether discrimination or disadvantage occurs in the

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<sup>22</sup> B. Bowling and D. Phillips *Racism, Crime and Justice* (2002 Longman); D. Cook and B. Hudson (eds) *Racism and Criminology* (1993 Sage); L Gelsthorpe (ed) *Minority Ethnic Groups in the Criminal Justice System* (1993 Institute of Criminology); R. Hood *Race and Sentencing* (1992 Clarendon Press).

<sup>23</sup> see [www.dca.gov.uk/research](http://www.dca.gov.uk/research)

<sup>24</sup> W. Macpherson *The Stephen Lawrence Inquiry: Report of the Inquiry by Sir William Macpherson of Cluny* (1999 HMSO)

<sup>25</sup> One CAD research project (the Jury Diversity Project) examines diversity beyond ethnicity, encompassing juror gender, socio-economic status, religion and language as well.

<sup>26</sup> J. Vennard, G. Davis, J. Baldwin and J. Pearce *Ethnic Minority Magistrates' Experience of the Role and of the Court Environment* DCA Research Series 3/04 (2004)

<sup>27</sup> H. Genn, B. Lever and Lauren Gray *Tribunals for Diverse Users* DCA Research Series (forthcoming January 2006)

<sup>28</sup> C. Thomas and S. Lloyd-Bostock *Ethnic Diversity and the Jury System in England and Wales: Juror Summoning, Serving and Decision-Making* (forthcoming)

<sup>29</sup> R. Hood, S. Shute and F. Seemungal, *Ethnic Minorities in the Criminal Courts: Perception of Fairness and Equality of Treatment* DCA Research Series No. 2/03 (2003)

<sup>30</sup> J. Brophy, J. Jhutti-Johal and C. Owen *Significant Harm: Child Protection Litigation in a Multi-Cultural Setting* DCA Research Series No. 1/2003 (2003) and J. Brophy, J. Jhutti-Johal and E. McDonald *Minority Ethnic Parents, Their Solicitors and Child Protection Litigation* DCA Research Series No.5/2005 (2005)

<sup>31</sup> S. Blandy, C. Hunter, D. Lister and J. Nixon *Housing Possession Cases in the County Court: Perception and Experiences of Black and Minority Ethnic Defendants* DCA Research Series No.11/2002 (2002)

<sup>32</sup> Vennard et al (2004) supra note 26

process of appointing magistrates. The tribunal study was intended to be an examination of the experiences of ethnic minority users of tribunals, not a systematic examination of ethnicity in the composition of tribunals or of the appointment process for tribunal members.

The CAD research projects all highlight the fact that there has been virtually no examination of the concept of diversity in the judicial system in this country, no agreed methodologies for studying the issue or conceptual theories of diversity in the legal system in the United Kingdom. It has therefore been necessary for the purpose of this Review to explore the issue of judicial diversity beyond this jurisdiction. The most far-reaching and systematic analyses of the case for judicial diversity, the factors leading to a lack of female and ethnic minority representation, and the policies and practices most likely to increase diversity are from other jurisdictions. These include civil law as well as common law jurisdictions, although the majority of the academic work has been carried out in the United States.

Given the lack of academic work in the fields of judicial studies and diversity in the law in this country, it is not surprising that judicial diversity as an academic subject has received little attention here. Government statistics exist on the numbers and proportion of women and ethnic minorities at different levels of the judiciary in England and Wales<sup>34</sup>, but to date there has been no substantive analysis of such statistics or the appointment process itself. The legal professional associations have published data and conducted research on women and ethnic minorities in the legal profession<sup>35</sup>, and other legal jurisdictions within the United Kingdom have also begun to address the issue of judicial diversity<sup>36</sup>. Published academic work related to

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<sup>33</sup> Genn *supra* note 27

<sup>34</sup> However, some errors exist in the published statistics in the DCA Consultation Paper *Increasing Diversity in the Judiciary* *supra* note 2. Table 8 has what is probably a typographical error: the percentage of males obtaining an interview for Deputy District Judges (Magistrates) should read 59.1% (not 9.1%). But the figures for the total number of applicants for the DDJ (Magistrates' Courts) position in 2002-03 do not add up across tables. Table 8 (Gender) has the total number of DDJs (Magistrates' Courts) as 482, while Table 38 (ethnicity) has the total as 349 – this last figure in fact corresponds to the total number of DDJs (family division) in Table 8.

<sup>35</sup> See the Law Society *Equality and Diversity Research Studies*.

<sup>36</sup> For Scotland see *Judicial Appointments: An Inclusive Approach* Scottish Executive (2000) and *Gender Audit 2000: Putting Scottish Women in the Picture* Scottish Executive (2000). For Northern Ireland see D. Feenan *Applications by Women for Silk and Judicial Office in Northern Ireland* Report for the Commissioner for Judicial Appointments for Northern Ireland (2005). Scotland established the



judicial diversity provides impressionistic information about applicants' experiences of the judicial appointments process. A study examining factors which influenced whether women and minority ethnic lawyers applied for Silk or judicial office<sup>37</sup> found that these groups perceived indirect discrimination and patronage in the judicial appointments process. However, it did not systematically examine whether discrimination or disadvantage actually existed for these under-represented groups (women and minorities) in comparison with the group perceived to be advantaged in the appointment process (White males).

Beyond the absence of an academic tradition in judicial studies here, there are major structural and policy reasons for the lack of examination of judicial diversity and its effects in England and Wales. First, the issue of judicial diversity has been the subject of policy debate for a far shorter time here than elsewhere (especially North America). Second, the appointment process has been so secretive as to make analysis of the factors affecting the appointment (or lack of appointment) of ethnic minority and women judges extremely difficult if not impossible to examine in any systematic and valid academic way. Finally, beyond a general reluctance on the government's part to grant access to judges for research purposes<sup>38</sup>, until recently there have been few women judges and no ethnic minority judges with whom to carry out such research. Even now, the small number of ethnic minority judges<sup>39</sup> makes it difficult to examine certain issues (for instance, the effect of diversity on judicial decision-making) in any meaningful way.

Thus, the small amount of work to date in England and Wales related to judicial diversity has either addressed aspects of the court system outside of the mainstream

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first Judicial Appointments Commission in the United Kingdom in 2001 and a Judicial Appointments Commission for Northern Ireland has also subsequently been established.

<sup>37</sup> K. Malleson and F. Banda *Factors Affecting the Decision to Apply for Silk and Judicial Office* DCA Research Series No. 2/2000 (2000)

<sup>38</sup> It was not until 1989 that the "Kilmuir rules", guidelines from the 1950s which maintained that judicial impartiality depended on public silence from judges, were deemed by the then Lord Chancellor, Lord Mackay, to no longer be in effect. This paved the way for judges to participate in public debates on the law and legal system, although public discussion of individual cases remains theoretically out of bounds for judges.

<sup>39</sup> As of 2005, ethnic minority judges at each level of judiciary include: 0 of 12 Law Lords, 0 of 5 Heads of Division, 0 of 37 Appeal Court judges, 1 of 107 High Court Judges, 6 of 626 Circuit Judges, 60 of 1414 Recorders, 13 of 562 District Judges, and 41 of 966 Deputy District Judges. *Judicial Statistics: Ethnic Minorities in the Judiciary (1 October 2005)* Department for Constitutional Affairs at [www.dca.gov.uk/judicial/ethmin.htm](http://www.dca.gov.uk/judicial/ethmin.htm)

judiciary or has been descriptive work which has not created a framework for the analysis of the judiciary in this country or placed it within an existing and accepted framework for analysis. With a new judicial appointments process about to be established in England and Wales, a unique opportunity exists to establish a framework for a comprehensive analysis of both the past and future appointment systems and their impact on judicial diversity.

In April 2006, a new method of selecting nominees for judicial appointments in England and Wales will come into effect. Following consistent complaints that the appointments process (which relied to a large extent on secret “soundings” of the senior judiciary and appointment by the Lord Chancellor) lacked transparency and accountability, a new Judicial Appointments Commission has been established, responsible for nominating candidates for appointment by (or on recommendation of) the Lord Chancellor. The introduction of this system is an attempt to make the appointment system more transparent, by removing the discretion the Secretary of State (Lord Chancellor) has over appointments, and it also appears to be a direct move to increase judicial diversity. The JAC has been charged with a statutory duty to have regard to the need to encourage diversity in the selection of candidates for appointment<sup>40</sup>. The JAC will have lay as well as judicial and legal members, although the judicial/legal members will outnumber the lay commissioners by 3 to 2.<sup>41</sup> Part Four of this Review explores how research and policy development elsewhere may be utilised in establishing the working practices of the JAC, as well as in providing a more general framework for monitoring and research into the new appointments process.

#### **1.4 The Study of Judicial Diversity in Other Jurisdictions**

The widest academic examination of judicial diversity has been in the United States, where most of the empirical work has been carried out over a number of decades. However, some empirical work has also been carried out in other jurisdictions, and there have been significant policy developments in Canada and a large number of European jurisdictions, especially in regard to the role of women in the judiciary<sup>42</sup>.

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<sup>40</sup> See Constitutional Reform Act 2005, Chapter 2 Section 64.

<sup>41</sup> The details of the composition and scope of the new JAC are covered in more detail in section 3.2.

<sup>42</sup> See discussion below for judges in The Netherlands, France, Germany, Italy and Spain.

Ethnic diversity is less prominent an issue in some European countries, most notably those where there are minimal ethnic minority populations.

It is not surprising that the study of judicial diversity and policy development on this issue is so well established in the United States. The judiciary has had an acknowledged political significance virtually from the establishment of the republic<sup>43</sup>, and the existence of an entrenched bill of rights and the power of judicial review of the constitution have all contributed to the development of an academic discipline focussed on understanding the role of the judiciary in the American political and social system. On the specific issue of judicial diversity there has been a convergence of factors advancing the study of this issue in the United States: a publicly visible appointment process for the highest judicial offices (particularly the Supreme Court); a substantial number of women and ethnic minority judges at the state and federal level on the bench for a number of decades enabling long term, comprehensive studies of the effect of the appointment process on the diversity of the judiciary and the effect of judicial diversity on the court system; the development of critical legal theory; concerns over the disproportionate levels of ethnic minorities in the prison population and over harsher sentencing for minorities; and constitutional challenges to both judicial selection and adjudication by female and minority judges in discrimination cases.

Academic studies in the United States have often followed major policy initiatives to increase diversity in the judiciary and to reduce the overtly political nature of judicial appointments. In the 1970s, the introduction of judicial nominating commissions (known generally as “merit selection commissions”) at both the federal and state levels created the conditions for a large and continuing body of research examining the effect of the new judicial appointment systems in a large number of states and at the federal level. In one of his first acts on taking office in 1977, President Carter issued an executive order establishing the United States Circuit Judge Nominating Commission, specifically requiring the inclusion of both men and women as well as members of minority groups on these “merit commissions” for federal court appointments. This followed the earlier establishment of “merit selection

commissions” in a number of states (also referred to a “Missouri plans” for the state where the system was first introduced), in which a group of legal and lay commissioners are responsible for nominating candidates for judicial appointment by the state executive (governor)<sup>44</sup>. The intention of both the federal and state commissions was to depoliticise the appointment process, and especially in relation to President Carter’s federal commission, the intention was also to increase the diversity of those nominated and appointed to the judiciary.

The recent passage of the Constitutional Reform Act 2005 establishing a new system of judicial appointments through a Judicial Appointments Commission for England and Wales has created some similar conditions here.

### **1.5 How Applicable are Experiences of Judicial Diversity in Other Jurisdictions?**

In considering how applicable judicial diversity work from other jurisdictions is to the situation here, it is important to bear in mind that no one country has exactly the same legal, political and social profile as the United Kingdom, and each country presents different combinations of factors which are important to consider when comparing judicial diversity across jurisdictions. These factors include the nature of the judicial system, the legal system, the political system, the constitutional system, and the nature of ethnic diversity in each jurisdiction.

#### **Common law jurisdictions**

Traditionally, policy makers and the judiciary itself in this country have tended to look primarily to other common law countries for comparable experiences, which is not surprising given the shared principles in their legal systems. There has also been a tendency to focus on specific common law countries over others: Australia, New Zealand and Canada, for instance, before the United States<sup>45</sup>. However, each

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<sup>43</sup> At least since the landmark Supreme Court decision in *Marbury v Madison* establishing the judiciary’s power of substantive judicial review.

<sup>44</sup> These judges usually subsequently seek another term of office by running against their record in a non-partisan election.

<sup>45</sup> Other common law countries, such as South Africa, are also sometimes considered for comparative study. In the context of judicial diversity, the historical conflict between the white minority population and black majority is so fundamental to developments in the judicial system in the post-apartheid era, that the experiences with increasing diversity there need to be understood in this context. For

common law country presents both commonalities and distinctions in relation to both the judiciary and diversity. These need to be considered when determining research and policy application for England and Wales.

For instance, Canada has a unique two-tiered (and possibly three-tiered) legal system, comprising English common law, French civil law (and aboriginal law), and it also has a federal system of government, creating two distinct court systems. Judicial nominating commissions are used at both the federal and provincial levels, but a wide variety of commissions exist across the provinces, some of which bear more relationship to the new JAC than others<sup>46</sup>. Ethnic minority differences include a slightly larger ethnic population base (11%) than England and Wales. The nature of ethnicity is also distinct: a French speaking minority with historical constitutional rights, an aboriginal base, and a more recent immigrant population. Australia is also a federal system, with two separate court systems, and its ethnic minority population is much larger (25%) than Britain's, with a distinct aboriginal base. In New Zealand, the constitutional, legal and judicial systems are more closely aligned to the English system, but its ethnic population is primarily an indigenous aboriginal one (14% of the population) with its own unique legal principles. The United States is a federal system with a dual federal and state court system. It also has a larger ethnic minority population (20%) and a distinct history of legal and social repression of the Black population. But federal and state nominating commissions bear some close similarities to the new appointment system in England and Wales.

### **Civil law jurisdictions**

The experiences of European civil law judiciaries have often been overlooked in this country when judicial policy issues are raised. This is due primarily to a mistaken assumption that all European judges are “career judges” with no counterpart here.

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discussion of the difficulties of comparative analysis of judicial systems in established democratic regimes and regimes in the transition to democracy see C. Thomas (ed) *The Power of Judges* (OUP 2002). Section 174(2) of the South African Constitution requires that the “need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed”, and in making appointments to the Constitutional Court in South Africa, the Judicial Service Commission, has interpreted this section in its most fundamental sense: that judicial diversity is integral to the delivery of justice in South Africa. See JSC Guidelines for Questioning Candidates for Appointment to the Constitutional Court (1999).

<sup>46</sup> Information on Canadian nominating commissions supplied by J. Bellis, Canadian Ministry of Justice.

However, many of the current policies being explored in England and Wales for increasing judicial diversity are precisely those that encourage more of a structured judicial “career” (more flexible working conditions, a more structured system of promotion and appraisal, possibility of a return to practice, etc.). In addition, many European judiciaries recruit a proportion of judges only after considerable experience in the legal profession, in a similar manner to judicial appointments in England and Wales. As a consequence, academic and policy work on judicial diversity in civil law jurisdictions needs to be carefully examined for the most relevant experiences to the issue here. In addition, the extent to which judicial diversity impacts on the fairness of the judicial system is a concern for all other European countries bound by the requirements of the European Convention on Human Rights and the various Community directives on employment and equal treatment<sup>47</sup>.

### **1.6 Diversity in Other Professions**

Studies of diversity in other professions in Britain and elsewhere have advanced economic, social and ethical arguments for diversity, specifically arguing that a lack of diversity is bad for business. The “business case” for diversity is now openly discussed and sometimes endorsed by business, government and the public sector<sup>48</sup>. A report by the European Commission, which looked at the costs and benefits of diversity initiatives among 20 companies, found that diversity broadened management capacity, improved innovation, widened access to talent, reduced staff turnover, and avoided litigation costs<sup>49</sup>. However a large-scale review of research over the past ten years into the potential of diversity to add value to business performance concluded that there was a lack of robust academic work in this area to prove or disprove the case<sup>50</sup>. It also found that research about the “business case” for diversity is mostly concerned with race and age diversity and how diversity affects work groups, while there is relatively little analysis of diversity in relation to gender, sexual orientation, disability and religion or on how diversity affects performance, sales, costs and customer relations. The Institute for Personnel Development has subsequently

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<sup>47</sup> Discussed in more detail below at 2.3.2

<sup>48</sup> see *The Business Case for Diversity and Equality* Department of Trade and Industry (2003)

<sup>49</sup> *The Costs and Benefits of Diversity: A Study of Methods and Indicators to Measure the Cost-Effectiveness of Diversity Policies in Enterprises* European Commission (2003)

<sup>50</sup> T. Anderson and H. Metcalfe *Diversity: Stacking Up the Evidence* Chartered Institute for Personnel Development (2003)

recommended the use of diversity measurement and monitoring as the way forward to accumulate the evidence needed to make the case for diversity more robust<sup>51</sup>. It has also been suggested that regardless of whether diversity confers economic benefits to business, there remains a moral case for diversity in which fairness is a sufficient reward in itself<sup>52</sup>.

### **1.7 The Unique Need for Diversity in the Judiciary**

In relation to judicial diversity, it is important to caution against drawing too many lessons from diversity studies and initiatives in other professions. The concept of a “business case” for diversity is essentially an argument that diversity has economic benefits, and while improving the efficiency of the judiciary is an important concern in modern democracies, “profit” is not a concept central to ensuring a sound judicial system. So while human resources and best practices issues from other professions may be relevant to some extent to judicial recruitment practices, it is vital to understand the unique position of the judiciary in comparison to other professions in relation to diversity. Diversity in the judiciary is not simply a desirable policy stance or one likely to produce economic benefits to the court system. It is an element of the delivery of justice that is increasingly vital for the judiciary’s legitimacy in a diverse society. Unlike virtually any other profession, a judiciary that operates in a diverse society must itself be diverse in order to fulfil its very function - the delivery of justice. Research (reviewed in Part 2) indicates that because fairness is a (if not the) key measure of the judicial system, the judiciary’s lawmaking role requires it at some level to be in touch with (and therefore reflective of) society as a whole in order to both create the appearance and the reality of fairness in judgements.

As a consequence, diversity goes to the heart of the question of fairness in the judicial system. For this very fundamental reason diversity needs to be considered an integral part of what is meant by merit (ie, the qualities needed to deliver justice) for appointment<sup>53</sup>. For no other profession is this so fundamentally the case. The other

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<sup>51</sup> see *Managing Diversity: Linking Theory and Practice to Business Performance* Chartered Institute for Personnel Development (2005)

<sup>52</sup> S. Overell “Dealing with Hard Reality” *Personnel Today* 1 March 2005. His main argument is that the concept of the business case for diversity is a means of supplementing the moral imperative of equality with the imperative of rational self-interest.

<sup>53</sup> This is discussed in more detail in section 2.3.

institution where a similar connection between diversity and merit exists is juries. Here the view that juries, in order to deliver justice, must represent a reasonable cross section of society has long been accepted<sup>54</sup> (although, of course, juries are not a “profession”). There are also some correlations between the need for diversity in the judiciary and the increasing calls for diversity in the police forces in the United Kingdom<sup>55</sup>. This relates primarily to the first benefit of diversity in the justice system: that it increases the perception of the fairness of the system. However, where the experience of the judiciary and police diverge, is that with the judiciary there has also been research which demonstrates a second benefit of diversity: an improvement in the actual decision-making of the bench. Consequently, this Review focuses primarily on studies and initiatives relating to diversity in the justice system, and not on other institutions or professions<sup>56</sup>. The danger in drawing too many lessons from other professions outside the justice system is that, in approaching judicial diversity from an economic/profit perspective, the inevitable consequence is that diversity and merit will continue to be considered as separate aspects of the appointment process and the difficult issue of what constitutes merit for judicial appointment will also continue to be ignored.

### **1.8 Diversity and the Legal Profession**

One area connected to the judiciary where the “business case” for diversity is more directly relevant is in relation to the wider legal profession in general. Ultimately, the diversity of the legal profession in this country has consequences for diversity in the judiciary, as the legal profession exclusively provides the pool for all professional judicial appointments. Some work exists on the economic benefits of greater gender and ethnic diversity in private law firms, but again the work has primarily been done in other jurisdictions. In this country, while the Law Society and the Bar Council have collected data on the status of women and ethnic minorities in their respective

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<sup>54</sup> This is discussed further in section 2.3.3

<sup>55</sup> See for instance V.S. Kalra “Police lore and community disorder: diversity in the criminal justice system” in D. Mason (ed) *Explaining Ethnic Differences: Changing patterns of disadvantage in Britain* (2003 The Policy Press); Her Majesty’s Inspectorate of Constabulary (HMIC) *Winning the Race: Embracing Diversity* (2001 Home Office).

<sup>56</sup> Given the judiciary’s “law-making” role, it may be tempting to draw correlations with diversity initiatives in elected politics (see Saggar 1998). However, the judiciary maintains a distinctly different position in a democracy than popularly elected institutions; unlike elected officials that depend exclusively on their representative function for their legitimacy, the judiciary depends as well on independence from political institutions for its legitimacy.



branches of the legal profession and have subcommittees and working groups on the diversity issue, the business case for diversity has yet to be examined in any systematic way or fully embraced by the legal profession.

### **1.9 Applying Research and Policy Development to Judicial Diversity Here**

Extra-jurisdictional research and policy development can help to address the following aspects of judicial diversity in this country: what needs to be studied or monitored; what methods need to be employed; and what are the key diversity factors to be considered. In Part Four, this Review draws on the research reviewed and policies and practices examined to suggest approaches to judicial diversity in England and Wales in the future in relation to the new Judicial Appointments Commission, the legal profession and the wider research community.

## **Part Two: Review of Research on Judicial Diversity**



## **Part Two: Research on Judicial Diversity**

### **2. What Factors Affect Judicial Diversity, and What Effect Does Judicial Diversity have on the Delivery of Justice?**

There are two main areas of academic research covered in this Review: studies examining the factors that systematically influence judicial diversity, and studies of the effect of judicial diversity on the overall system of justice. In the majority of studies of factors that systematically influence judicial diversity, the most widely addressed issue is whether the method of judicial selection affects the relative success of women and minorities in attaining a seat on the bench. In studies on the effect of judicial diversity itself, the two main policy areas are the effect on the perception of the fairness of courts and the effect on judicial decision-making itself.

The vast majority of both the empirical and theoretical work on these two issues has been conducted in the United States over a substantial period of time, and therefore a significant amount of the material covered in this part of the Review relates to the American experience with judicial diversity. However, important studies have been conducted in other jurisdictions, and these along with any relevant data from England and Wales have been included in this part of the review. While there are obviously some differences between the American and British judicial systems and therefore all of the studies covered in the Review could not necessarily be precisely replicated here, their strength lies in highlighting the types of questions which need to be addressed here and the methods to be used in answering them.

#### **2.1 Factors Systematically Affecting Judicial Diversity**

##### **2.1.1. Judicial Selection Systems**

There is a large body of social scientific research in the United States examining the relative effects of the means of judicial selection on judicial diversity. Many of these specifically examine the question of appointment versus election of judges, however this Review is confined to studies examining the impact of appointment systems only, as there is no correlation between American judicial election systems and judicial selection systems in England and Wales. The main point of comparison is the “merit

selection commissions<sup>57</sup> introduced in the United States over the last 30 years, and the creation of the new Judicial Appointments Commission for England and Wales. American nominating commissions were introduced in order primarily to remove political patronage from the appointment system and to increase opportunities for members of under-represented groups to attain judicial office, and introduced a system whereby the executive would appoint judges based on nominations made by an independent nominating commission<sup>58</sup>. The new JAC in England and Wales operates under a similar system, the main difference being that while American nominating commissions usually submit a shortlist of nominees to the executive, the JAC will recommend a single candidate to the Lord Chancellor for appointment.

A substantial amount of research has been carried out in the United States evaluating the claimed benefits of nominating commissions: that they promote both judicial independence and judicial accountability, and produce highly qualified judges. These qualitative and quantitative studies attempt to measure the actual effects of selecting judges in this manner by examining the extent to which nominating commissions insulate judicial selection from the political process, and by examining whether the judges appointed by nominating commission are any different from those selected by other means<sup>59</sup>. Given the similarities between the American nominating commissions and the new JAC in England and Wales, American research on nominating commissions could provide a sound framework for studying the effect of the new JAC and its impact on judicial diversity. In the United States, research on nominating commissions and diversity has focussed on two main issues: the extent to which the nominating commission system produces a more diverse judiciary, and the extent to which members of the nominating commissions reflect the diversity of the larger community.

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<sup>57</sup> The term “merit selection” is usually used in the United States to describe these nominating commissions, but in this Review the term “nominating commissions” is used in order not to confuse the discussion in this section with the discussion later in Part Two on the issue of the role of “merit” in judicial selection.

<sup>58</sup> There is no correlation however with the second phase of US judicial selection where retention elections take place after a specified period on the bench. This Review is therefore confined to the study of the relationship between the judicial nominating commissions and judicial diversity.

### 2.1.1.a Appointments by Judicial Nominating Commissions

Numerous studies in the United States have attempted to assess what impact nominating commissions have on the racial and gender diversity of the judiciary<sup>60</sup>. Despite the wide number and range of studies, it remains a contentious issue whether the method of judicial selection influences the success of women and ethnic minorities in attaining judicial office. In an early study, Glick and Emmert<sup>61</sup> found that nominating commissions prevent ethnic minorities and women from reaching the bench by entrenching a system dominated by bar associations whose members are overwhelming white, male, Protestant, conservative establishment lawyers. A further study of women and minority judges appointed in New York City between 1992-1997<sup>62</sup> lent some credence to this conclusion, but it was focussed primarily on whether appointments or elections in a highly multicultural urban setting produced a more diverse judiciary. Three other studies found no correlation between the method of judicial selection and the diversity of the judiciary, specifically in relation to the number of Blacks on state courts<sup>63</sup>, the number of women, Blacks and Hispanics on state courts<sup>64</sup>, and the number of women on state courts of last resort<sup>65</sup>. Further complicating the picture, three additional studies have concluded that judicial nominating commissions lead to an increase in the diversity of the judiciary they appoint. Henry<sup>66</sup> examined all state courts and found that the number of women and minority judges increased under nominating commissions. Tokarz<sup>67</sup> found the same to be true for female appointments, and a subsequent study by Henry<sup>68</sup> found further

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<sup>59</sup> See M. Reddick “Merit Selection: A Review of the Social Scientific Literature” 106 *Dickinson Law Review* 729 (2002)

<sup>60</sup> As well as on other social characteristics of the judiciary and on judicial decision-making – these points are discussed in later sections of Part Two.

<sup>61</sup> H. Glick and C. Emmert “Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges” 70 *Judicature* 228 (1987)

<sup>62</sup> G. Brown *Characteristics of Elected Versus Merit-Selected New York City Judges: 1992-1997* (1998)

<sup>63</sup> N. Alozie “Black Representation on State Judiciaries” 6 *Social Science Quarterly* 979 (1988)

<sup>64</sup> N. Alozie “Distribution of Women and Minority Judges: The Effect of Judicial Selection Methods” 71 *Social Science Quarterly* 315 (1990)

<sup>65</sup> N. Alozie “Selection Methods and the Recruitment of Women to State Courts of Last Resort” 77 *Social Science Quarterly* 110 (1996)

<sup>66</sup> M. Henry *The Success of Women and Minorities in Achieving Judicial Office* (1985)

<sup>67</sup> K. Tokarz “Women Judges and Merit Selection Under the Missouri Plan” 64 *Washington University Law Quarterly* 903 (1986)

<sup>68</sup> M. Henry *Characteristics of Elected Versus Merit-Selected New York City Judges: 1977-92* (1992)

evidence that nominating commissions led to an increase in the number of women and minority judges in New York City.

These inconclusive findings may not be surprising given that many of the studies focussed either on a single state, a specific selection method, or a single court. Without any definitive or consistent findings from such a wide variety of studies, it has been suggested that other factors may in fact be more influential in affecting diversity on the bench, such as geographic region, pool of potential appointees, and the prestige of the court<sup>69</sup>. However, a recent large-scale study has attempted to make sense of these contradictory findings. Unlike the previous studies on appointment bodies and diversity, Hurwitz and Lanier gathered data on the racial and gender composition of all judges on all the courts of last resort and intermediate appellate courts in all 50 states, the District of Columbia and all federal courts in the United States for two cross sections of time, 1985 and 1999<sup>70</sup>. Their main finding was that the ability of ethnic minorities and women to attain a place in the judiciary is not solely a function of any single factor. Success is influenced by a combination of factors contingent on the level of court and the time period in question, and these influences differ significantly for women and for minorities.

Hurwitz and Lanier found that since 1985 women and minorities collectively (referred to as “non white males”) had made great strides in terms of representation as state appellate court judges, and their appointment rate had doubled on these courts in the 15-year period. However, when examining the success rates of women and minorities separately it emerged that the vast majority of the increase stemmed from gains by women not minorities, with minorities making only a gain of less than 1%. The method of judicial selection was significant in 1985 but has decreased in importance over time. The judicial selection method mattered least for women in both 1985 and 1999, and while ethnic minorities overall appeared to do less well under nominating

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<sup>69</sup> See P. Dubois “The Influence of Selection System and Region on the Characteristics of a Trial Court Bench: The Case of California” 8 *Justice System Journal* 59 (1983); B. Canon “The Impact of Formal Selection Processes on the Characteristics of Judges – Reconsidered” 6 *Law and Society Review* 579 (1972); Glick and Emmert (1987) supra note 61

<sup>70</sup> M. Hurwitz and D. Lanier “Explaining Judicial Diversity: The Differential Ability of Women and Minorities to attain Seats on State Supreme and Appellate Courts” *State Politics and Policy Quarterly*, Vol. 3 Issue 4 (Winter 2003); M. Hurwitz and D. Lanier “Women and Minorities on State and Federal Appellate Benches: 1985 and 1999” 85 *Judicature* 84 (2001)

commission systems, certain minorities (Hispanic males) actually fared better under this system. The results of this study clearly highlight the importance of distinguishing between gender and ethnicity in the appointment process and also distinguishing between ethnic minority groups themselves in any analysis of what impact judicial appointment systems have on the levels of diversity in the system. In its scope and methodology, this study provides an important framework for examining the effect of an appointment process on the diversity of the judiciary in any jurisdiction, and could serve as a useful model for assessing the impact of the judicial appointment process in England and Wales on the diversity of the judiciary here.

Further studies in the United States have also examined the impact of nominating commissions on other social characteristics of the judiciary beyond gender and race including: education, religious affiliation, legal experience, political experience, and localism<sup>71</sup>. In the most comprehensive study, Glick and Emmert<sup>72</sup> found that nominating commissions were more likely to appoint judges from prestigious law schools, less likely to place religious minorities on the bench<sup>73</sup>, less likely to appoint locally born and educated judges, and that the judges selected under this system did not have more legal or judicial experience and were just as likely to have political connections than those appointed through other means.

The first attempt in England and Wales to systematically examine the background characteristics of candidates for judicial appointment is currently underway to determine the factors which may affect success in gaining appointment to the bench<sup>74</sup>. The study examines the appointment of Deputy District Judges<sup>75</sup> (to both Civil and Magistrates' Courts) from 2003 to 2005, and examines the following background characteristics of all applicants: gender, ethnicity, professional background, age, income, education, prior appointment, legal practice specialisation, consultees and

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<sup>71</sup> Localism may be more of a relevant factor in federal and highly decentralised system such as US, Canada and Australia, but it may also increasingly have relevance here for instance in a newly devolved Wales.

<sup>72</sup> Glick and Emmert (1987) supra note 61

<sup>73</sup> Defined in the study as "low status" Protestants, Catholics and Jews

<sup>74</sup> C. Thomas and H. Genn *Appointment of Deputy District Judges 2003-05* Commission for Judicial Appointments (forthcoming 2006)

<sup>75</sup> the lowest level of professional judicial appointment in England and Wales



region of practice. It examines the success of candidates at each specific stage of the appointment process: sift, assessment centre, and appointment.

### **2.1.1.b Composition of Judicial Nominating Commissions**

The second aspect of nominating commissions' impact on diversity in the judiciary is the extent to which nominating commissions themselves are diverse in their membership, and the extent to which diversity within the commissions affects diversity in the nominations (and ultimately the appointments) made. There have been three major studies in the United States of the racial and gender composition of nominating commissions. The earliest study<sup>76</sup>, conducted shortly after the establishment of a number of state nominating commissions, covered 13 states and found that nominating commissions were overwhelming white and male, and that the lowest levels of minority and female representation were among those members of the commission representing the legal profession. A decade and half later, however, an even more extensive study<sup>77</sup> found that women had made significant gains on nominating commissions among both lay and legal members, but that ethnic minority representation across the commission members remained very low. The most recent study<sup>78</sup> addresses the more fundamental question of whether the composition of the nominating commission itself affects the diversity of the judiciary. Esterling and Andersen specifically examined the effects of gender and racial diversity within nominating commissions on the gender and racial diversity of both applicants and nominees for judicial office. In the five states examined, the study found evidence that diverse commissions attracted more diverse applicants and selected more diverse nominees for appointment.

### **2.1.1.c Politics and Judicial Nominating Commissions**

Over the last three decades there have been a number of American studies on the success of nominating commissions in depoliticising the selection of judges. Ashman and Alfini<sup>79</sup> provided an initial framework by examining the means of depoliticising

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<sup>76</sup> A. Ashman and J. Alfini *The Key to Judicial Merit Selection: The Nominating Process* (1974)

<sup>77</sup> B. Henschen, R. Moog and S. Davis "Judicial Nominating Commissions: A National Profile" 73 *Judicature* 328 (1990)

<sup>78</sup> K. Esterling and S. Andersen "Diversity and Judicial Merit Selection Process: A Statistical Report" *Research on Judicial Selection* (1999)

<sup>79</sup> Ashman and Alfini *supra* note 76

nominating commissions, including: mandating that no political considerations be made in selecting commissioners, mandating a partisan balance, restricting the political activities of sitting commissioners, limiting the number of consecutive terms of commissioners, and precluding eligibility for judicial office for a specified period after serving on the commission. Watson and Downing<sup>80</sup> found that commission members from the legal profession sought to elect like-minded legal professionals to the commission and promoted the appointment of judges likely to protect their clients' interests. However, it should be noted that even though this was a comprehensive study, it is now over three decades old. A more recent study<sup>81</sup> found extensive political activity among all commissioners prior to their selection to the judicial nominating commissions. Lay commissioners were particularly active, and the study suggested that this raised the troubling spectre of political favouritism within commissions.

Further research has examined how certain factors affect nominating commissions' selection of judges. Watson and Downing<sup>82</sup> found evidence of "panel stacking" (where the nominating commission submits a combination of nominees to the executive which offers no real choice) and "logrolling" (where commissioners agree to support one another's nominees). A much more recent study<sup>83</sup> found that more than half of all nominating commission chairs believed that political considerations entered into the commissions' deliberations on judicial appointments at least frequently and were of some importance in the final selection of judges. It has also been suggested that nominating commissions do not eliminate politics from judicial selection, but merely replace traditional party politics with Bar politics and executive branch politics<sup>84</sup>. Sheldon<sup>85</sup>, surveying the leaders of the state bar associations, found that where bar associations had a say in the selection of commission members bar leaders believed that at a minimum their bar was fairly effective at influencing judicial selection.

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<sup>80</sup> R. Watson and R. Downing *The Politics of Bench and Bar* (1969)

<sup>81</sup> Henschen et al supra note 77

<sup>82</sup> Watson and Downing supra note 80

<sup>83</sup> J. Martin *Merit Selection Commissions: What Do They Do? How Effective are They?* (1993)

<sup>84</sup> Watson and Downing supra note 80

<sup>85</sup> C. Sheldon "The Role of State Bar Associations in Judicial Selection" 77 *Judicature* 300 (1994)

Concern over the “political” aspects of how appointments commissions operate may appear to be particularly American. However, long held concerns over the central role of the Lord Chancellor (a senior executive branch official as well as a senior member of the judiciary) in judicial appointments makes these studies relevant for England and Wales, as well as contrary concerns that the new JAC may lead to an increase in the politicisation of judicial appointments. In addition, the more general findings of the behaviour of appointments commissioners should help to understand how the new JAC will affect the appointment process here. The studies by Watson and Downing, as well as Sheldon, also suggest a need for vigilance over the built-in dominance of the legal profession on the new JAC, where there is a 3 to 2 balance in favour of commissioners in legal/judicial practice compared with lay commissioners. Experience in other jurisdictions suggests that even lay commissioners usually have some legal “connection”, even if they have never been practicing lawyers<sup>86</sup>. In the United Kingdom, this touches on long held concerns over the dominance at all levels of the judiciary of those with traditional legal backgrounds: for instance, barristers’ greater success than solicitors, and the dominance of Silks and the civil bar in senior judicial appointments. However, no comprehensive analysis of judicial background has been conducted in England and Wales.

## **2.1.2 Judicial Office and Judicial Profession**

### **2.1.2.a Structure of the Judicial Profession**

One important development in a number of European civil law countries in recent years has been the creation of judicial self-governing bodies (usually referred to as higher councils of the judiciary) that exert some significant control over the judicial profession (most often in regard to promotion, appointment, salary and tenure). These new judicial bodies, comprised of judges of all ranks and lay members, have reduced the traditional influence of the executive, especially the Minister of Justice, as well as the senior judiciary. Thomas<sup>87</sup> has argued that the impact of these bodies on the judicial profession in European countries has some relevance here, especially with the

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<sup>86</sup> This is the case with most lay members of the Higher Councils of the Judiciary in continental Europe. See C. A. Thomas (ed) *The Power of Judges* Guarnieri and Pederzoli (OUP 2002).

<sup>87</sup> C.A. Thomas *Judicial Appointments in Continental Europe* LCD Research Series No. 6/97 (December 1997).

creation of a Judicial Appointments Commission. Both the Department for Constitutional Affairs and the Lord Chancellor have similar traditional powers in relation to judicial appointments and promotion as the Ministry and Minister of Justice in continental countries prior to the introduction of the higher councils. In addition, the traditional role played in the appointment process by senior judges in England and Wales corresponds to the traditional role played by higher-ranking judges in civil law systems, who were inevitably sounded out about appointments and made assessments of prospective appointees' legal abilities. Under the new higher councils, lower-ranking judges have representation and therefore play a more active role in the profession, and their involvement in the appointments process appears to encourage an increase in the appointment of women and those from less traditional professional backgrounds<sup>88</sup>. In most European countries with higher councils of the judiciary, women have significant representation in the judiciary and now outnumber men as applicants for judicial appointment and in new appointments.

### **2.1.2.b Career Progression**

A crucial aspect of the judicial profession affecting judicial diversity is not just the extent to which diverse applicants are appointed, but also the extent to which the profession is seen as one which provides equal opportunities for career progression. Several studies in continental Europe have explored the status and career ambitions of male and female judges. In the Netherlands half of all judges are recruited in the same way as judges in England and Wales are recruited – from experienced legal professionals after substantial period of time in practice. A study of career progression, expectations and ambitions of Dutch judges was conducted based on analysis of the gender, age, social background and career histories of all 932 judges, as well as interviews with 130 judges<sup>89</sup>. The study found that female representation was highest at the lowest levels of the career ladder, and every career step on the judicial ladder took more time for women than for men. The qualitative part of the study identified some possible reasons for this. While male and female judges both indicated that the next-highest level of the judiciary was their next target, men often

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<sup>88</sup> See Thomas *supra* note 86.

<sup>89</sup> L. de Groot-van-Leeuwen "De rechterlijke macht in Nederland; samenstelling en opvattingen van de zittende en staande magistratuur" *Gouda Quint* (1991)

mentioned even higher levels as their ambition, but women only referred to those highest positions as ones they were not aiming to achieve. In addition, while men and women both saw family responsibilities as relevant to their career ambitions, men gave this as a reason for their desire to get promoted, while women saw family responsibilities as reasons for not wanting promotion. A later study in the Netherlands interviewing 170 trainee judges also revealed that male and female judges choose their career for different reasons<sup>90</sup>. Two thirds of the women judges said they decided to become a judge because of it involved the delivery of justice. Less than half of the male judges even mentioned this factor, and the predominant reason for men to choose the judiciary was the challenge and variety of work it involved. In addition, only women judges mentioned the existence of flexible working hours and part-time employment opportunities in the judiciary as other factors.

Recent research commissioned by the European Union Social Affairs Commission found very similar trends in Italy, France and Spain<sup>91</sup>, perhaps a somewhat surprising result given that women now outnumber men as new judicial appointees and constitute almost half of all judges in these countries. In Italy, 40% of the current judiciary and more than 60% of new judicial appointees are women. However, the largest percentage of women in the judiciary are found in the lower ranks: there are no women in executive positions on the Court of Cassation; only 19 women in executive positions in the judiciary (president of the court) out of a possible 436 (4%); and only 67 women in the 693 semi-executive posts (presidents of divisions) (9%)<sup>92</sup>. Both male and female judges in Italy are attracted to the judiciary by the independence of the profession and the desire to serve the public and influence society. However, the social aspect of the profession is dominant for women judges, whereas the prestige and career prospects are again the dominant factors for male judges (most female judges actually answered “of no importance” to the career factor)<sup>93</sup>. In response to

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<sup>90</sup> L. de Groot-van-Leeuwen, S. van Rossum and K. Schuyt “De aanloop tot de rechterlijke macht; verslag van een enquête onder raio’s” *Trema* no. 5a 107-124 (1996)

<sup>91</sup> Information provided by M. Civinini, Italian Higher Council for the Judiciary (*Consiglio Superiore della Magistratura*) and Referendary at the Italian Supreme Court.

<sup>92</sup> *ibid.*

<sup>93</sup> The question posed was: *How much have the following factors contributed to your decision to enter the judiciary?* The possible answers were: *salary, job stability, certain career, family traditions,*

questions about what makes the work of a judge satisfying, women said they appreciate the possibility of being able to reconcile work and family, the flexible work hours and the stability of the job more than men, while men said they found the prestige, responsibilities, salary and continuing a family tradition in the judiciary as the most satisfying aspects of the position.

A study in Spain, where women make up 41% of the judiciary today (compared with 10% in 1985) and 60% of future judges enrolled in the Spanish judicial college, has examined what factors male and female judges feel account for this rapid increase and what women judges feel is the effect of this change<sup>94</sup>. This attitudinal study has been carried out periodically in Spain over a 20-year period, providing the means for examining changes and progress in the profession. When asked what accounted for the rise in women in the judiciary, men have been fairly consistent in their views over time, suggesting that women candidates prepare harder than male candidates for the judicial entrance examinations, and that the judiciary offers a better chance of promotion for women than the private sector or civil service. While the majority of women judges also believe that female candidates prepare harder for the judicial entrance examination, women increasingly believe that the judiciary offers better career prospects and that there is less discrimination against female candidates from assessors than among assessors for other professional posts.

In terms of the impact of women in the judiciary, the majority of women judges in Spain also continue to feel that most defendants were indifferent to whether a man or woman was judging them. However, 26% of female judges in Spain have experienced difficulties in their career because of their gender: 56% of these said this was due to chauvinistic, discriminatory attitudes, while 26% said it was due to the difficulty in imposing their authority. In relation to professional and family issues, in 1987 47% of the female judges were single, and perhaps not surprisingly only 28% of them felt their judicial career negatively affected their personal and family life. By 2003, however, 83% of female judges were married and 73% of all female judges felt

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*prestige, independence, high level of responsibility, possibility of intervening in society, possibility of providing a service for the public, possibility of reconciling work and family.*

<sup>94</sup> For details of the Spanish study see *Encuesta a una Muestra Nacional de Jueces y Magistrados: Sexto Barómetro de Opinión de la Judicatura Española* Consejo General del Poder Judicial (Julio 2003)

that their judicial career placed greater strain on their personal and family life than it did for their male colleagues.

A study currently in progress on senior judicial appointments in England and Wales takes an econometric approach to the issue of promotion to senior judicial positions<sup>95</sup>. Focusing on appointments to the Court of Appeal from sitting High Court judges between 1985 and 2005, the study is quantifying the importance of the following factors in determining promotion to the higher bench: (i) performance on the High Court bench (affirmations, reversals, citations by subject and court; rulings in judicial reviews; specialism); (ii) past performance at the Bar (ranking; specialism, including experience as a circuit judge; chambers) and (iii) social and educational background (gender, school, university).

### **2.1.2.c The Level of Court**

Beyond the appointment process itself and the conditions of employment for judges, an additional area of research into judicial diversity concerns the level of court to which women and minorities are able to gain appointment. Hurwitz and Lanier's large-scale study of diversity in judicial appointments in the United States (discussed earlier)<sup>96</sup> also examined whether the "prestige theory" of judicial appointments was borne out in reality. This theory asserts that "non white males" (women and minorities) are most likely to attain judicial office in less prestigious courts (for instance, in the United States this would be intermediate appellate courts rather than courts of last resort, and courts with district subdivisions rather than state-wide courts). However Hurwitz and Lanier found that, most recently, if anything the opposite was true: by 1999 women and ethnic minorities were more likely to become judges on higher level courts. A recent assessment made in 2005 of all minority judges on all state courts in America showed there was no discernable difference in the percentage of minority judges at every level of the state courts: 9.1% on all general jurisdiction trial courts (lowest), 10.7% on all intermediate appellate courts,

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<sup>95</sup> "Judicial Promotions" study being conducted by Jordi Blanes i Vidal and Clare Leaver of Nuffield College and the Department of Economics, University of Oxford (forthcoming).

<sup>96</sup> Hurwitz and Lanier (2003) supra note 70.

and 9.8% on state supreme courts (highest)<sup>97</sup>. This suggests that after over twenty years of advocating the appointment of under-represented groups to the bench, there is no longer a clear “ghettoisation” of appointments of minorities and women to lower level courts.

At the federal level, Hurwitz and Lanier also identified a distinct “leadership factor” producing an increase in women and minorities in more prestigious judicial posts. They found that much of the increase in diversity in the federal courts in 1999 could be attributed specifically to President Clinton’s openly stated intention in 1993 to name a judiciary that “looks like America”<sup>98</sup>. By 1999, 52% of Clinton appointees were women and ethnic minorities, whereas only 22% of the non-Clinton appointments on the bench at this time were women or ethnic minorities. The appointment process had not changed, only the President nominating the judges.

Research in Europe, however, indicates that the prestige theory is operating in many of those jurisdictions. In the Netherlands, the amount of time that elapses between promotions is longer for women than men, and despite the fact that the proportion of women in the judiciary has risen steadily to over 35% of all judges, vertical segregation continues to exist, with women judges concentrated in the lower levels (45.6%) and the middle levels (23.3%) of the judiciary<sup>99</sup> and with little representation at the senior levels (7.4%). In France, despite the fact that 57% of judges are women, they are primarily successful in gaining appointment to the entry level of the judiciary and have less success in gaining promotion to the higher levels. Women only hold 159 of the 730 higher judicial positions (21%) in France (what is referred to as the *hors-hiérarchie*). Amongst the most senior judicial positions there are only four women *premier presidents* of the Courts of Appeal out of 35 posts (11%), and even at the less senior level of president of lower court, where there are only 32 women out of

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<sup>97</sup> *Answering the Call for More Diverse Judiciary: A Review of State Judicial Selection Models and Their Impact on Diversity* Report of the Judicial Independence and Access to the Courts Project – June 2005 Lawyers Committee for Civil Rights Under the Law

<sup>98</sup> Sandra Torry “Seeing a Chance for Bench that Resembles the District” *Washington Post* August 9, 1993

<sup>99</sup> L. de Groot-van Leeuwen “Women in the Dutch Legal Profession (1950-2000)” in U. Schultz and G. Shaw (eds) *Women in the World’s Legal Professions* (Hart 2003)



the 180 positions (17%)<sup>100</sup>. In Italy, women now make up 63% of all new appointments to the judiciary, however they are significantly under-represented in the senior ranks: 4% of presidents of courts and 9% of presidents of divisions<sup>101</sup>.

Statistics on judicial appointments in England and Wales also make it clear that the prestige theory of judicial appointments operates here. Any increase in appointment of ethnic minorities has only really been achieved at the lower levels of the judiciary. Even at the lower and middle ranks of the judiciary the only post where ethnic minorities begin to approximate their representation in the legal profession (11- 8%) is the lowest level of Deputy District Judge (Magistrates' Court), where 6% of current appointments are held by ethnic minorities. There is virtually no ethnic minority representation in the senior ranks, with no ethnic minority Law Lords, Court of Appeals judges and only one very recent minority appointment to the High Court<sup>102</sup>. Women have had somewhat more success in gaining appointment but have no significant representation at the senior levels of the judiciary. All the Heads of Division are men, and there is only 1 female Law Lord (out of 12), 3 women Court of Appeal judges (out of 37), and 11 women judges on the High Court (out of 113)<sup>103</sup>.

#### **2.1.2.d Judicial Background**

The concern over the lack of judicial diversity in England and Wales extends beyond questions of gender and ethnicity to the concern that the judiciary are drawn from a very narrow social sector. This goes to the heart of the diversity issue, as it raises questions about the “connectiveness” between judges and the wider society, their understanding of social issues, and ultimately the relationship between judicial judgements and the society to which they apply. A recent survey by the Sutton Trust<sup>104</sup> revealed that the senior judiciary in England and Wales are overwhelmingly privately educated and come from the top dozen universities, and that this position has changed little over 15 years. The survey looked at the educational background of

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<sup>100</sup> Information provided by Laetitia Brunin Assistant Secretary General to the Chief Justice of the French Supreme Court (*Cour de cassation*)

<sup>101</sup> Information provided by M. Civinini supra note 91

<sup>102</sup> *Minority Ethnic Judges in Post* (as of 1 October 2005) [www.dca.gsi.gov.uk/judicial/ethmin.htm](http://www.dca.gsi.gov.uk/judicial/ethmin.htm)

<sup>103</sup> See official statistics published on the DCA website: *Senior Judiciary List* (as at 1 November 2005) [www.dca.gov.uk/judicial/senjudfr.htm](http://www.dca.gov.uk/judicial/senjudfr.htm). *Women in the Judiciary* supra note 2

<sup>104</sup> *The Educational Backgrounds of the UK's Top Solicitors, Barristers and Judges* Sutton Trust Briefing Note (2005)

judges in the High Court and above through to the law lords, and it found that there has been a very small shift in the university background of judges. In 1989, 88% of judges had been to Oxbridge, compared with 81% in 2004. The picture is very similar for school background: three quarters of judges serving in 2004 had been educated at private fee-paying schools, and half of the present judiciary went to boarding schools. A study currently underway by Thomas and Genn<sup>105</sup>, however, has found that there is no such bias operating at the lower level of the judiciary. The study examined the educational backgrounds of all applicants for appointment to the position of Deputy District Judge (both Magistrates' Court and Civil) from 2003-2005 and found no bias in favour of appointment of applicants from either Oxbridge or the top 12 law faculties at either the interview or appointment stages of the appointment process.

### **2.1.3. The Pool for Judicial Appointments**

#### **2.1.3.a The Legal Profession**

The status of ethnic minorities and women within the legal profession as a whole is a crucially important issue for judicial diversity, as it is from this pool that candidates for judicial appointment must be drawn in England and Wales. The Law Society has conducted a number of studies in recent years assessing the nature of the solicitors' profession in England and Wales, and a number of these studies relate specifically to issues of equality and diversity<sup>106</sup>. The Bar Council has also collected data on the gender and ethnic composition of the Bar<sup>107</sup>, but it has not examined the issues surrounding gender and race equality within the profession in the same depth as the Law Society. Ethnic minorities appear to be represented in the legal profession

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<sup>105</sup> Thomas and Genn *supra* note 74

<sup>106</sup> N. Fletcher *Equality and Diversity: The Legal Practice Course* Law Society (2004); D. Halpern *Entry into the Legal Professions: The Law Student Cohort Study, Years 1 and 2* Law Society (1994); M. Shiner and T. Newburn *Entry into the Legal Professions: The Law Student Cohort Study, Year 3* Law Society (1995); M. Shiner *Entry into the Legal Professions: The Law Student Cohort Study, Year 4* Law Society (1997); M. Shiner *Entry into the Legal Professions: The Law Student Cohort Study, Year 5* Law Society (1999); E. Duff, M. Shiner and A. Boon *Entry into the Legal Professions: The Law Student Cohort Study, Year 6* Law Society (2000); S. Vignaetra *Social Class and Entry in the Solicitors' Profession* Law Society (2001); *Equality and Diversity: Women Solicitors (Quantitative Findings)* Vol.1 J. Siems, *Qualitative Findings and Literature Review* Vol.11 L. Duff and L. Webley Law Society (2004).

<sup>107</sup> For data from the Bar Council on women and ethnic minority barristers see *Bar Council Exit Survey 1988-98* (Bar Council 1999); *Bar Council Exit Survey 1998-2004* (forthcoming); also see summary data from the Bar Council on trends in women at the Bar (Tables 11 and 12) and ethnic minorities (Tables 35 and 36) in *Increasing Diversity in the Judiciary* *supra* note 2, as well as the Bar Council Annual Report 2004. Specific studies have also been carried out by specialist bar associations, see for

generally in proportion to their representation in the general population (10.7% of the Bar, 7.9% of solicitors compared with ethnic minority population of 9% in England and 7.9% in England and Wales). Women, however, remain under-represented, comprising 32% of the Bar and 39.7% of solicitors (compared with 51.1% of the population generally).<sup>108</sup>

The Law Society studies all indicate that both women and ethnic minorities in England and Wales continue to find progress within the profession more difficult than white males. A recent study<sup>109</sup> found that significant earnings differences exist between white males and the collective group of “non white males”: men earn 9.5% more than women, whites earn 17.7% more than ethnic minorities, and ethnic minority women earn 27.2% less than white men. While women trainee solicitors now outnumber male trainees (62.7% in 2002-03) over time a much higher percentage of men become partners than women (78% men compared with 45% women). A significantly higher proportion of ethnic minority solicitors (28%) were dissatisfied with opportunities for partnership than white solicitors (15.3%); and a significantly higher proportion of women (23.9%) were dissatisfied with opportunities for partnership than men (12.8%).

The Law Society Cohort Study has followed the career paths of approximately 4,000 graduates since 1993. The cohort members were first contacted when studying for either a law degree or the Common Professional Exam (CPE), and subsequently surveyed either on an annual or 18-month basis with the aim of reflecting the progress made by members of the cohort through the various stages of legal training. The most recent survey (1999) focussed on the transition from a training contract to work as a qualified solicitor and the conditions of work of newly qualified solicitors, and highlighted a failure of equality of opportunity.

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example *Pupillage, Maternity Leave and Pro Bono Work: A Survey by the Commercial Bar Association* (2004)

<sup>108</sup> Bar Council, Law Society and census statistics *supra* note 3

<sup>109</sup> J. Siems *Equality and Diversity: Women Solicitors*, Research Study 48, Volume 1, Quantitative Findings, The Law Society (2004); “Minority Ethnic Group Solicitors 2004”, Law Society Fact Sheet, REGIS database; *Entry into the Legal Professions: The Law Student Cohort Study Year 6*, Law Society Research Study 39 (2000)

A range of factors (social class, sex, ethnicity and type of university attended) have an impact on recruitment, employment options, pay and conditions. Previous analysis had shown that trainees earned lower salaries if they were from an ethnic minority group, were disabled or had attended a new university to study their first degree or the Legal Practice Certificate. As post-qualification salaries largely reflect earnings as a trainee, these groups do not subsequently catch up with their counterparts. While there was no significant gender gap in pay at trainee level, there was a significant difference in the rate at which men's and women's salaries increased after qualification. This gap was largely related to the different types of firms in which men and women obtained employment, and was not found for women and men in the same type of firm<sup>110</sup>. Findings of a recent study of the legal profession in Canada correspond to these Law Society findings. The study of the number, status and pay of Aboriginal, visible minority and women lawyers in Ontario found that by mid-career minorities in the legal profession have lower incomes than whites, and women have lower incomes than men<sup>111</sup>.

More than a third of newly qualified solicitors in England and Wales who found a job had not made a formal application, and had used personal and professional contacts to obtain positions. Almost three-quarters (74%) of those who wanted to stay in the same firm or organisation did so, especially those trained in City and large provincial firms. The high level of continuity from traineeship to employment as solicitors in these firms, and their preference for Oxbridge graduates, may explain why trainees studying in new universities were less likely to be retained on the completion of training.

Eight per cent (8%) of respondents reported being adversely discriminated against at work. Discrimination was reported to be on the grounds of (in order) sex, age, social class and ethnic origin. Seven per cent (7%) of women reported being sexually harassed and over 10% of all respondents reported being bullied. A senior colleague was most likely to be identified as the perpetrator of adverse discrimination, sexual harassment or bullying. The majority who reported having experienced this made no

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<sup>110</sup> *ibid.*

<sup>111</sup> M. Ornstein *The Changing Face of the Legal Profession, 1971-2002* Law Society of Upper Canada (2004)

formal complaint and only a small proportion mentioned this to a relevant staff member.

The most recent cohort study concluded that, given the levels of disadvantage at each stage of the education and training process for the legal profession, there is a potential for the gap between the advantaged and the disadvantaged groups to be widened. The report further concluded that because different groups bring with them different sets of talents and experiences which benefit the legal professions, the perception among entrants to the legal professions that there are limited options for some law graduates may eventually reduce applications from the disadvantaged groups for the initial and/or subsequent stages of legal education. This in turn may mean that the legal profession will be excluding talents and therefore weakening the profession. The Report went on to suggest that this issue is not only the responsibility of the legal professions, but of individual firms and chambers, government and educational institutions. It questioned the extent to which wider patterns of discrimination in society and market forces in the legal profession influence the distribution of entrants into the profession.

In this regard, the “business case” for diversity has particular relevance for the legal professions in England and Wales. A study by Wilkins<sup>112</sup> on the rise of market-based diversity arguments in the legal profession in the United States revealed how black lawyers seeking to integrate corporate law firms in America have increasingly staked their claim on the contention that diversity is good for the business of law firms and clients. However, the study also highlights the legal profession’s deep commitment to the idea that it is actually homogeneity not diversity that best serves firms and clients, and that it may be harder for the legal profession to overcome this belief and accept the business case for diversity than it has been in the wider corporate world. These are crucial issues for the legal profession in England and Wales to address, but the business case for diversity in the law firms has yet to be accepted widely by either the bar or solicitors in this country. This lack of acceptance of the business case in the

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<sup>112</sup> D. Wilkins “From ‘Separate is Inherently Unequal’ to ‘Diversity is Good for Business’: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar” *Harvard Law Review* Vol. 117, No. 5, March 2004

legal profession has implications for the pools of applicants to all levels of the judiciary in England and Wales.

### **2.1.3.b Education**

An underlying reason for the legal profession's lack of acceptance of the business case for diversity can be found in the recent survey by the Sutton Trust<sup>113</sup>, which as well as examining the educational background of senior judges in England and Wales also looked at the educational background of leading barristers and solicitors. It revealed that top barristers and solicitors are still overwhelmingly privately educated and come from the top dozen law faculties, and that this position has changed little over 15 years and in some respects is even worse today. The survey looked at the educational background of partners at three of the City's five "magic circle" law firms<sup>114</sup> and barristers at eight leading corporate and commercial chambers<sup>115</sup>. Among barristers aged under 39, in 1989 92% had been to Oxbridge, compared with 82% in 2004. If they had not been to Oxbridge, they had attended one of the other the universities with the most highly rated law departments<sup>116</sup>. Only 7% of barristers went to any other university, and this has changed little from 1989. The picture is more improved in the solicitors' profession. Among partners at the magic circle law firms in 2004, 53% had taken a first degree at Oxbridge compared with 65% in 1989, and a much higher proportion had studied at other top universities: 26% in 2004, compared with 19% in 1989.

When it comes to school backgrounds, the picture is much the same: 73% of the leading barristers in 1989 had attended fee-paying schools, compared with 69% in 2004. Among the magic circle law firms, 68% of UK-educated partners had attended fee-paying schools in 1989, compared with 55% in 2004. As of 2004, more than two

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<sup>113</sup> *The Educational Backgrounds of the UK's Top Solicitors, Barristers and Judges* Sutton Trust Briefing Note (2005)

<sup>114</sup> Allen & Overy, Slaughter and May, and Clifford Chance. Data was not available for Linklaters and Freshfields Bruckhaus Deringer.

<sup>115</sup> The barristers chambers analysed are those recommended for commercial law by Chambers and Partners and The Legal 500 for which the Trust had data. For 2004 these were 20 Essex Street, 7 King's Bench Walk, Blackstone Chambers, Brick Court Chambers, Fountain Court Chambers, One Essex Court and Quadrant Chambers (formerly 4 Essex Court). As far as possible the same group was used in 1989 however, 20 Essex Court and Blackstone Chambers were replaced by 3 Essex Court. Data was not available for two chambers – Essex Court and 3 Verulam Buildings

<sup>116</sup> University College London, King's College London, Nottingham, London School of Economics, Durham, the School of Oriental and African Studies, Manchester, Warwick, Bristol and Edinburgh.

thirds of barristers at top chambers and more than half the partners at leading law firms had been educated at private fee-paying schools.

Yet the figures disguise a shift in the opposite direction. When analysed by age, the survey found that the younger partners in law firms (those under 39) are almost as likely to have attended a fee-paying school as the older partners of 1988; and the older partners of both 1989 and of 2004 (many of whom could be the same people) are much more likely to have gone to state schools: 59% in 1988 compared with 71% in 2004. In the late 1980s, law firms did open up to a generation of lawyers with state-school backgrounds, who went on to become the 'young' partners of 1988 and may have gone further to become the 'old' partners of 2004. But access has since narrowed again. However, law firms are now taking entrants from a more varied range of universities: only 47 per cent of the younger partners of 2004 were Oxbridge-educated compared with 71% of the older partners in 1988.

Cole<sup>117</sup> found that 21% of students starting law degrees in England and Wales are from an ethnic minority background, which is significantly higher than the proportion of ethnic minorities in the general population. However, ethnic minority law students are most numerous at those universities that were colleges of higher education and polytechnics prior to 1992. These in turn, as the Law Society studies revealed, are academic institutions which employers favour less than Oxbridge and those with the top 12 law faculties. Furthermore, the Law Society Cohort Study found that graduates with contacts in the profession were more likely to secure a training contract with a firm after graduation, and that ethnic minorities are less likely than white graduates to possess such contacts<sup>118</sup>. Similar data is not available for the Bar, however the findings of the Sutton Trust on the lack of educational diversity at the upper levels of the Bar also point to the existence of progressive barriers to success for ethnic minorities within the legal profession as a whole based on educational background.

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<sup>117</sup> B. Cole *Trends in the Solicitors' Profession: Annual Statistical Report* Law Society (2001)

<sup>118</sup> D. Halpern *Entry in to the Legal Professions: The Law Cohort Study Years 1 and 2* Law Society (1994)

## **2.2 The Effect of Judicial Diversity**

The strongest case for judicial diversity is based on research which indicates that judicial diversity leads to increased public confidence in the fairness of courts and an actual improvement in the quality of judicial decision-making. A substantial amount of research has been carried out in the United States on these benefits. Moreover, this research suggests that judicial diversity may not simply be “beneficial” in a diverse society – it may be a key factor in justifying the essential guarantees of independence granted to judges in such democracies. In theory, the judiciary presents a fundamental conflict in any democracy, as it invests law-making powers in the hands of unelected officials. But it is the judiciary’s independence that sustains its legitimacy, and enables it to fulfil the other vital role in a democracy of ensuring the protection of individual rights. Such independence is justified first and foremost by its ability to ensure judicial fairness (or impartiality), both perceived and actual.

Recent research has drawn a direct connection between judicial diversity and two key factors: the public belief in the fairness of courts and the quality (and hence fairness) of judicial decision-making. And while the research evidence of the effect of judicial diversity on the quality of decision-making has been carried out in the United States, a significant amount of research has now been conducted in England and Wales drawing a direct connection between judicial diversity and the public perception of the fairness of courts. As a result, the issue of the benefits of judicial diversity overlaps substantially with the issue of how diversity fits into assessing merit for judicial appointment<sup>119</sup>. This is not surprising: if judicial diversity has such fundamental benefits to the justice system it reinforces the idea that diversity is integral to the assessment of merit for judicial appointment.

### **2.2.1. The Effect on the Perception of Courts**

In the United States, the issue of how judicial diversity affects the perception of the fairness of courts has been the subject of significant study and policy development. Task forces and commissions established in over 30 states to examine race and gender fairness in the courts<sup>120</sup> have prioritised this as the first issue to address in their reviews of diversity in their individual state court systems. These and other

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<sup>119</sup> See discussion on merit below in section 2.3



comprehensive studies of the perception of courts across a number of states have demonstrated that judicial diversity can have a powerful symbolic value in promoting public confidence in the courts, and that the issue of the perception of the fairness of courts is a vitally important one in terms of access to justice.

The National Center for State Courts conducted a large-scale study of the perception of the state courts<sup>121</sup> addressing two main questions: (1) do ethnic minorities and whites view courts differently; and (2) what impact does recent direct court experience have on opinions about courts? Importantly, the survey demonstrated that it is misleading to speak of a “minority viewpoint” on the courts. While Latinos and African American litigants were most likely to believe their race made a difference in how they were treated by the courts, for the most part Latinos shared the general perceptions of whites about the fairness of the courts. In fact, Latinos in many respects rated the courts in their community more highly than whites. However, the study found in general that the lowest levels of belief in the procedural fairness of courts were among African Americans. Amongst those with recent court experience (as jurors, litigants, witnesses), white jurors were the most likely to perceive the outcome of court procedures as fair, while African Americans with recent court experience had the lowest levels of belief in the procedural fairness of courts. A recent study by the American Bar Association further revealed that within ethnic minority communities, suspicion of the courts is compounded by a lack of diversity throughout the judicial system<sup>122</sup>. Disparities in minority conviction and incarceration rates in the United States are thought to provide at least a partial explanation for the higher levels of minority distrust of the judicial system<sup>123</sup>.

While no similar large-scale study of the perception of the fairness of the court system has been conducted in England and Wales, there is now increasing evidence that the lack of diversity in the judiciary in England and Wales has resulted in lower levels of public confidence in the fairness of the courts. A recent Home Office citizenship

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<sup>120</sup> See [www.ncsc.org](http://www.ncsc.org)

<sup>121</sup> *Perceptions of the Courts in Your Community: The Influence of Experience, Race and Ethnicity* National Center for State Courts January 2003; F. Bennack *How the Public Views the State Courts: A 1999 National Survey* National Center for State Courts (1999)

<sup>122</sup> *Justice in Jeopardy* ABA Report of the Committee on the 21<sup>st</sup> Century Judiciary (2003)

survey<sup>124</sup>, which included an investigation of perceived racial prejudice and racial discrimination in a range of public and private organisations in England and Wales, found that public expectations of unequal treatment were highest in relation to the criminal justice system. The survey found that one-third of black people who had contact with the courts said that they were likely to be treated worse than people of other ethnic backgrounds. A recent survey of ethnic minority perceptions of fairness in the criminal courts in England and Wales<sup>125</sup> also found that ethnic minority defendants were particularly troubled by the lack of ethnic minority judges in the criminal courts, with 31% of ethnic minority defendants in Crown Courts and 48% in Magistrates Courts stating they would like to see more ethnic minorities sitting in judgement and amongst court staff<sup>126</sup>. Another recent study of the experience of ethnic minority magistrates in England and Wales<sup>127</sup> asserted that in order for members of ethnic minority communities to have confidence in the impartiality of the justice administered in Magistrates' Courts, the appointment of substantive numbers of magistrates from ethnic minority backgrounds is required. The most common proposal by magistrates themselves to increase confidence in the courts was that more magistrates and court staff from the local ethnic minority populations be recruited<sup>128</sup>.

### **2.2.2. The Effect on Judicial Decision-Making**

Beyond the *perception* that diverse courts are fairer courts, there has been extensive study in the United States on what *actual effect* a diverse judiciary has on judicial decision-making. These studies attempt to test the view that judges with more diverse ethnic, gender and social backgrounds do actually bring something different to the process of judicial decision-making. Recent studies of the effect of judicial diversity on judicial decision-making by collegiate appellate courts in the United States have indicated that when cases were decided by panels of judges from diverse backgrounds, (1) that the judges on these judicial panels were more likely to debate a wider range of considerations in reaching their judgements than were homogeneous

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<sup>123</sup> See T. Kansal *Racial Disparity in Sentencing: A Review of the Literature* The Sentencing Project (2005)

<sup>124</sup> C. Atwood, G. Singh, D. Prime and R. Creasey *2001 Home Office Citizenship Survey: People, Families and Communities* Home Office Research, Development and Statistics Directorate (2000)

<sup>125</sup> Hood et al supra note 29

<sup>126</sup> *ibid.*

<sup>127</sup> Vennard et al supra note 26

<sup>128</sup> *ibid.*

groups of judges; (2) that the existence of such diversity on judicial panels was more likely to move the panel's decision in the direction of what the law requires; and (3) that a diverse bench was an increasingly important element in achieving an independent judiciary. There is no comparable research on actual decision-making in the England and Wales, in large part because the senior judiciary, which operates on a collegiate basis, is not diverse enough to enable such research to be carried out here at present<sup>129</sup>.

However, in the United States extensive political science-based empirical research has been carried out testing the fundamental tenet of legal realism: that the background and world view of judges influences cases. The dominant view is that judicial background influences "close" cases (i.e., cases at the margins which are more likely to make policy both for courts and society at large). In the United States (as in most other jurisdictions) these tend to be decisions of appeals courts issued by multiple judge panels. Some of this research is also based around critical race theory, which argues that there is a "voice of color" (or a multitude of "voices of color") and that minority judges may bring different views to the adjudication process than white judges<sup>130</sup>. In the same way, women judges may also bring different views to bear than male judges on certain types of cases<sup>131</sup>.

Research on judicial decision-making has traditionally adopted the "attitudinal" model of judicial decision-making, which examines the extent to which an individual judge's beliefs and attitudes affects his or her individual votes on cases.<sup>132</sup> The "contextual" approach developed this methodology further, by exploring the extent to which characteristics of *other* judges on a panel also influence the choices of a judge<sup>133</sup>. Most recently a third "social economy" approach has been developed,

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<sup>129</sup> The one collegiate quasi-judicial institution in England and Wales where sufficient diversity may exist to conduct such research is tribunals.

<sup>130</sup> For an overview of critical race theory see D. Kairys (ed) *The Politics of the Law: A Progressive Critique* (1982) and R. Unger *The Critical Legal Studies Movement* (1986)

<sup>131</sup> See Judith Resnick, "On the Bias: Feminist Reconsiderations of the Aspirations of Our Judges" 61 *Southern California Law Review* 1987 (1988); Shirley Abrahamson, "The Woman has Robes: Four Questions" 14 *Golden Gate University Law Review* 489 (1984)

<sup>132</sup> See for instance: Sheldon Goldman, "Voting Behavior on the United States Courts of Appeal, 1961-1964, 60 *American Political Science Review* 374 (1966); and "Voting Behavior on the United States Courts of Appeal Revisited" 69 *American Political Science Review* 491 (1975)

<sup>133</sup> Donald Songer and Kelly Crews-Meyer, "Does Judge Gender Matter? Decision-Making in State Supreme Courts" *Social Science Quarterly* 81: 750-62; R. Revesz "Environmental Regulation, 58

which considers both the characteristics of individual judges and other judges on a panel, but also examines possible “peer effects”: the effect of the *actions* of other judges, not just their personal characteristics.

One recent “social economy” study by Cameron and Cummings<sup>134</sup> suggests that peer effects are particularly crucial in studying the effect of judicial diversity on judicial decision-making, as it tests whether there is a “true” diversity effect. By this they mean: does the presence of one judge (for instance an ethnic minority judge) alter the deliberation process on a three-judge panel by supplying the other two judges (for instance, two white judges) with valuable information or unfamiliar but persuasive logic. If the other two judges consequently vote differently than they otherwise would have (based on previous decisions), diversity can be said to have improved the panel’s adjudication. To test this, they examined the effect of racial, gender and ideological diversity amongst three-judge panels on the US Courts of Appeal on all affirmative action cases from 1971-1999. They found that adding a single non-white judge to a three-judge panel increased the probability that the two white judges would vote in favour of affirmative action by 15%. This indicated that increasing racial diversity substantially changed the voting behaviour of other judges on the panels, creating a “deliberative effect” and indicating that racial diversity improved the judicial panel’s adjudication.

Sunstein<sup>135</sup> adopts a broader view of diversity, defined not strictly in terms of ethnicity and gender but also in terms of ideological perspective. His research, examining the decision-making of three judge panels on the Federal Court of Appeal for the District of Columbia Circuit from 1970 to 2002, suggests that a diversity of view on judicial panels was more likely to move the panel’s decision in the direction of what the law requires. Specifically, he found that a single judge appointed by a Democratic president on a panel with two judges appointed by a Republican acts as a

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Ideology, and the D.C. Circuit” 83 (8) *Virginia Law Review* 1717 (1997); F. Cross and E. Tiller “Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals” 107 *Yale Law Journal* 2155 (1998); G. Gryski et al “Models of State High Court Decision Making in Sex Discrimination Cases” 48 *Journal of Politics* 143 (1986)

<sup>134</sup> Charles M. Cameron & Craig P. Cummings, “Diversity and Judicial Decision-Making: Evidence from Affirmative Action Cases in the Federal Courts of Appeal 1971-1999” *Columbia Law Review* (2003).

<sup>135</sup> Cass R. Sunstein, *Why Societies Need Dissent* (Harvard University Press 2003)

whistleblower, discouraging the other judges from making a decision that is inconsistent with Supreme Court directives on when courts of appeal should uphold executive agency rulings. His work also suggests that judicial culture may ultimately be a far stronger determinant of judicial behaviour and judicial decision-making than any other factor or individual background characteristic.

While all these studies of the effect of judicial diversity were conducted in another jurisdiction, the conclusions are so fundamental - that a more diverse judiciary can enhance the quality, and therefore the fairness, of judicial decision-making - they should not be overlooked here<sup>136</sup>. In this way the perceived benefits of judicial diversity may be closely connected to the actual benefits: if ethnic minorities have lost confidence in the courts it may be that in some instances the absence of judicial diversity in reality contributes to weaker decision-making and that when judicial thinking is not dominated by a homogeneous perspective, faith in the courts and the judiciary can be expected to grow.

### **2.3 Diversity and Merit for Judicial Appointment**

The growing body of research evidence on the effect of a diverse judiciary on improving both the public perception of courts and actual judicial decision-making raises the question of what should constitute “merit” for judicial appointment. Despite official judicial diversity policy initiatives in England and Wales, all parties continue to assert that merit must remain the sole criterion for selecting judges.<sup>137</sup> However, little attention has been paid in England and Wales to how merit should be defined, and diversity is most often portrayed as an additional element which may be considered after other aspects of a candidate’s background (which by implication constitute “merit”) are considered. But one of the central questions posed by judicial diversity research is the relationship between diversity on the bench and merit for judicial appointment. Research evidence of the effect of judicial diversity on the

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<sup>136</sup> These findings are similar to psychologists’ research evidence on the benefits of a diverse educational environment: that it leads to a greater engagement in sophisticated thinking, and there are democracy outcomes and citizenship benefits related to post-university social integration. The US Supreme Court recently upheld an affirmative action program designed to ensure a “critical mass” of racial minorities in the University of Michigan Law School on the grounds that it contributed to the diversity of opinions in the educational environment [*Grutter v Bollinger* 539 U.S. 306 (2003)].

<sup>137</sup> See DCA Consultation Paper *Increasing Diversity in the Judiciary* supra note 2, and enabling legislation for the new JAC *Constitutional Reform Act 2005* (Chapter 2 section 64).

public perception of the courts and judicial decision-making, both from here and other jurisdictions, suggests that diversity could be integral (not additional) to merit for judicial appointments in a diverse society.

### **2.3.1 Why Diversity is Integral to Merit: Legitimacy, Impartiality & Compliance**

The more complex issue of how diversity fits into the concept of merit for judicial appointment has been explored in practice and theory in other jurisdictions. This section examines the theoretical work done in the United States on the relationship between diversity and merit. The remaining sections of Part Two of the Review examine how the concept of judges as representatives presents challenging questions both on a practical and theoretical level for the justice system.

#### **2.3.1.a Legitimacy**

Johnson and Fuentes-Rohwer<sup>138</sup> argue that diversity is one of the fundamental criteria for judicial appointment and that increasing the diversity of the judiciary will ultimately lend greater legitimacy to the courts. In their view debates over judicial diversity mistakenly often focus solely on numbers (how few minorities or women serve on the bench), whereas achieving diversity on the judiciary is about achieving the representation of myriad voices on the bench and the legitimacy this creates. Legitimacy is a special concern in regard to groups traditionally shut out of the justice system, and they argue that minorities are not likely to respect rulings from an institution that fails to represent them. In their view, judicial diversity enriches the decision making process because as judges interact with one another, they affect each other's views of particular cases or entire bodies of law. The give and take in arguments and deliberations is only likely to sharpen legal analysis, especially on multi-member decision-making bodies such as appeals courts. Studies that demonstrate that a minority jurist on a panel can challenge stereotypes, limit improper discussion and add important information<sup>139</sup> support this. In this way, a diverse judiciary fosters the legitimacy of the courts among the public, and such legitimacy enhances public compliance with court rulings.

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<sup>138</sup> K. Johnson and L. Fuentes-Rohwer "A Principled Approach to the Quest for Racial Diversity on the Judiciary" *UC Davis Legal Studies Research Paper No. 33* (February 2005)

<sup>139</sup> See Sylvia R. Lazos Vargas, "Does a Diverse Bench Attain a Rule of Law that is Inclusive? The Empirical Data and Possibilities of a Process Theory Model of Judging" *10 Michigan Journal of Race & Law* (2004)

### 2.3.1.b Impartiality

Ifill<sup>140</sup> argues that the effort to promote racial diversity on the bench is often couched in soft language of inclusiveness, public confidence and promoting the appearance of justice - not in more forceful language of rights and representation – and that this is due in part to a continuing resistance to the idea of judges as representatives. The reluctance to examine the potential diversity has to enhance judicial decision-making often stems, according to Ifill, from a profound discomfort judges and lawyers feel in challenging the prevailing notions of judicial impartiality. Ifill argues that the legal requirements for a fair trial are violated by the persistent presence of an all-white bench in jurisdictions with significant minority populations, and that fair trial requirements necessitate *structural impartiality* of the judiciary – that is a judiciary comprised of judges from diverse backgrounds and viewpoints. She argues that such a mix fosters impartiality by diminishing the possibility that one perspective will dominate adjudication, and that the findings from empirical research on diversity and judicial decision-making lend credence to this argument.

Ifill’s work further explores how judges can be impartial representatives. Unlike legislative representatives, judges cannot and need not decide cases based on constituent opinion; the representative role of judges requires only that they provide constituent communities the opportunity to express their values in the judicial development of public policy. Ifill argues that the idea that racial homogeneity on the bench may limit the depth and scope of judicial decision-making is borne out in research showing the different perspectives held by white and ethnic minority judges as well as white and ethnic minority lawyers in general. In a survey of federal judges, 83% of white judges believed black litigants were treated fairly, while only 18% of black judges shared this belief. Ethnic minority lawyers in the United States also perceive the justice system differently than their white counterparts: 90% of black lawyers said they believed there is more racial bias in the justice system than in the rest of society compared with only half of white lawyers<sup>141</sup>. In addition, African

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<sup>140</sup> Sherrilyn A. Ifill, “Racial Diversity on the Bench: Beyond Role Models and Public Confidence” 57 *Washington and Lee Law Review* 405 Spring (2000); Ifill, “Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts” 39 *Boston College Law Review* 95 (1997)

<sup>141</sup> Terry Carter, *Divided Justice*, American Bar Association Journal February 1999

American lawyers make up only a minute fraction of the partners and associates at the nation's elite law firms, from where federal judges traditionally come<sup>142</sup>. This means that most judges are likely to have practiced law in a racially segregated environment.

### **2.3.2. Legal Status of Unrepresentative Judiciary**

The legal status of an unrepresentative judiciary has been challenged in the courts in the United States on several occasions. Legal challenges there have been brought by minority voters challenging the judicial election processes for state judges under the Voting Rights Act. A number of these cases have ultimately reached the United States Supreme Court, and in its decisions the Court has acknowledged that judges can be considered "representatives". While the context of these cases is clearly not directly analogous to the situation in England and Wales (where there are no judicial elections), the underlying issue of the extent to which judges can be seen as representatives does go to the heart of the judicial diversity issue.

In *Houston Lawyers*<sup>143</sup> the Court concluded that the state's decision to elect trial judges brought the judiciary within the scope of the Voting Rights Act, and in *Chisom*<sup>144</sup> the court recognised that the term "representative" includes judicial elections. However, the Court has stopped short of articulating precisely how judges "represent", and Ifill has argued that in avoiding this discussion the Court also failed to describe how the "representative" function of judges should be reconciled with the requirements of judicial impartiality<sup>145</sup>.

Legal challenges were also brought by white litigants early on in the move to increase diversity on the bench in America. These litigants claimed that the race, gender and professional background of ethnic minority judges (as civil rights advocates) rendered them incapable of being impartial in deciding employment discrimination cases<sup>146</sup>. However, the notion that an "appearance of bias" attaches to minority judges deciding

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<sup>142</sup> *Miles to Go: Progress of Minorities in the Legal Profession 9*, ABA Committee on Opportunities for Minorities in the Profession (1998)

<sup>143</sup> *Houston Lawyers' Association v Attorney General*, 501 U.S. 419, 426 (1991)

<sup>144</sup> *Chisom v Roemer*, 501 U.S. 380, 399 (1991)

<sup>145</sup> Ifill (2000) supra note 140 at 27 and fn 282

<sup>146</sup> See *Commonwealth of Pennsylvania v Local Union 5442*, 388 F.Supp. 155 (E.D. Pa. 1974); *Blank v Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975); *Vietnamese Fisherman's Association v Knights of the Ku Klux Klan*, 518 F. Supp. 1017 (S.D. Tex. 1981)



discrimination cases was rejected by the courts in these cases. Ifill points out that these cases expose the litigants' underlying belief that only white judges can be impartial, and also exposes the underlying assumption that background influences perspective. If black and female judges can be suspected of bringing their race or gender perspectives to bear on issues of discrimination, then it also must be assumed that white and male judges also bring their race and gender perspectives to their decision-making<sup>147</sup>.

Despite the different context to legal challenge issues in England and Wales, these American legal challenges present two factors to consider here: the Supreme Court's acknowledgement of the connection between representativeness and the judicial function, and the unintended benefit of such legal challenges in exposing the complexity and contradictions within the debates over judicial diversity.

The unrepresentative nature of the judiciary in England and Wales has been questioned on legal grounds in the past, but no actual legal challenge has been brought to date. In 1991 a prominent human rights solicitor, Geoffrey Bindman, publicly suggested that a judicial appointments process that relied heavily on opinions of other judges in its consultation process could violate the Race Relations Act and the Sex Discrimination Act, both of which prohibit unintended indirect discrimination<sup>148</sup>. The then Lord Chancellor, Lord Mackay, went so far as to obtain a legal opinion, and subsequently claimed that this argument was wrong in law and fact.

More recently a discrimination law specialist has argued that existing recruitment practices for the senior judiciary (Law Lords, Court of Appeal judges and High Court judges) would now be open to legal challenge for being both indirectly and directly discriminatory under the provisions of the Sex Discrimination Act 1975 (SDA) and the Race Relations Act 1976 (RRA) due to the adoption of various European Directives<sup>149</sup>. Monaghan's assessment centres on the two requirements for senior appointment: previous experience in the higher courts below and the requirement that

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<sup>147</sup> Ifill (2000) *supra* note 140 at 25.

<sup>148</sup> *Law Society Gazette* 27 February 1991

<sup>149</sup> Karon Monaghan "Discrimination in the Appointment of the Senior Judiciary and Silk" Matrix Chambers ([www.womenbarristers.co.uk/doc/k\\_monaghan.doc](http://www.womenbarristers.co.uk/doc/k_monaghan.doc))

candidates be “known” to the senior judiciary. On the first requirement, Monaghan argues that requiring experience serving on the higher court below is self evidently discriminatory because there are either no or so few ethnic minority and female judges on the Court of Appeal (where appointments to the Law Lords exclusively come) and the High Court (from which appointments to the Court of Appeal are invariably made) to enable appointments to be made. Hence, the requirement of experience in the higher courts excludes virtually all otherwise qualified minority lawyers and most such women. On the second requirement to “be known” by the consultees (who are largely senior judges), Monaghan argues this disadvantages minorities and women who tend to be outside the traditional judicial networks.

The basis of this assessment is that recent legal changes affecting both the SDA and the RRA strengthen the grounds for concern about the legality of the judicial appointments system in relation to its impact on women and minorities. The legal opinion given to Lord Mackay in 1991 argued that the RRA did not apply to judges because they are not employees or holders of statutory office<sup>150</sup>. However, the RRA and SDA define employment as including “a contract personally to execute any work or labour”, and the European Equal Treatment Directive appears to bring judicial appointments within the scope of these employment provisions. The recent case of *Percival-Price v Department of Economic Developments*<sup>151</sup>, in which the Northern Ireland Court of Appeal ruled that tribunal members were “workers” in “employment” within the meaning of Community law and accordingly covered by the Equal Treatment Directive, lends credence to this argument.

The meaning given to indirect sex and race discrimination in the SDA and the RRA has been liberalised under the requirements of the European Race Directive<sup>152</sup> and the Revised Equal Treatment Directive<sup>153</sup>. Under the test of “disparate impact”, indirect discrimination does not now require proof of statistical or actual group disadvantage<sup>154</sup>. It will only now be necessary to demonstrate that an apparently

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<sup>150</sup> Information provided by Geoffrey Bindman, Bindman and Partners

<sup>151</sup> *Percival-Price v Department of Economic Developments* [2000] IRLR 300

<sup>152</sup> European Commission Directive 2000/43/EC

<sup>153</sup> European Commission Directive 2002/73/C

<sup>154</sup> This is due in large part because, for historical reasons, a number of European countries prohibit the collection of data on racial origin.

neutral practice employed in the course of making a judicial appointment would put persons of a particular racial group or gender at a disadvantage. The appointing authority would then have to establish that this practice was objectively justified. Monaghan argues that a court or tribunal will now be able to find disparate impact based on sociological, demographic or empirical research evidence. As this Review has shown, this type of evidence does exist in England and Wales, especially but not solely in relation to the impact of senior judicial appointments on women and ethnic minorities.

Under the new appointment system coming into effect in 2006, it seems increasingly likely that the Judicial Appointments Commission will be bound by the requirements of anti-discrimination legislation and directives. Under the RRA, the Commission for Racial Equality has the power to require public authorities to publish a Race Equality Scheme, and it has outlined the steps such public bodies should undertake to ensure full compliance with the RRA. These include: assessing and consulting on the likely impact of policies on the promotion of race equality; monitoring policies for any adverse impact on the promotion of race equality; publishing results of assessments and monitoring; ensuring public access to information and services; training staff in connection with duties imposed by the RRA.<sup>155</sup>

### **2.3.3 Defining Merit**

It has been suggested that “merit” is a constructed idea, not an objective fact, and that judicial appointments based on “merit” are largely mythical<sup>156</sup>. Other studies have examined how the concept of merit has been used in denying appointment as pretence for discrimination<sup>157</sup>. Also more subtly, informal eligibility requirements for judges, such as previous judicial experience or educational qualifications from elite law faculties, can be tied to conceptions of merit about who is qualified to be a judge and are requirements which almost inevitably limit diversity of the judiciary<sup>158</sup>.

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<sup>155</sup> *Commission for Racial Equality Assessment Template for Race Equality Scheme and Employment Duty* CRE (February 2005)

<sup>156</sup> Cheryl Harris, “Whiteness as a Property” 106 *Harvard Law Review* 1709 (1993) and Johnson and Fuentes-Rohwer supra note 138

<sup>157</sup> Richard Delgado, “Storytelling for Opportunists: A Plea for Narrative” 87 *Michigan Law Review* 2411 (1989)

This is borne out in the recent research by the European Social Affairs Commission, which showed that women clearly succeed in gaining judicial appointments where competitions are anonymous and the criteria for appointment are knowledge based, not experience based. The data in Italy (and France) bear this out. Sixty percent (60%) of successful applicants to the Italian judiciary are women for entry-level competitions that are purely knowledge-based and almost completely anonymous. However, after entry women find progression to the senior ranks, where appointment is increasingly experience and seniority based, extremely difficult. Only 7.9% of all senior judicial positions in Italy are held by women<sup>159</sup>.

Dutch research exploring the differences in attitudes to their judicial role between knowledge-based and experience-based appointees<sup>160</sup> also indicates that the ethos of the judiciary is affected by the nature of the criteria for appointment. In the Netherlands there are two separate appointment routes: one directly from university and one after at least six years' legal experience in the legal profession. The vast majority of those entering the judiciary via the second, experience-based route are men, and women's success at gaining appointment to the judiciary has primarily been in the first, knowledge based route. Research comparing how judges recruited via the two different methods view their role as judges revealed that judges appointed under experience-based system are much more likely to define themselves as members of an elite, independent legal profession more related to private practitioners, while those recruited via the knowledge-based system tended to identify more closely with government administration.

The concept of merit for judicial appointment is a major issue of empirical and theoretical work in the United States, often relating to high profile Supreme Court appointments where arguments can polarise over what constitutes merit and what is simply ideology. One very recent development in the study of merit for judicial appointment in the United States that has generated a significant amount of debate is a

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<sup>158</sup> Johnson and Fuentes-Rohwer supra note 138

<sup>159</sup> 86 of the 1129 "Executive" and Semi-Executive" judicial positions in the Italian judiciary. From M. Civinini supra note 91.

<sup>160</sup> L. de Groot-van Leeuwen "The Equilibrium Elite: Composition and Position of the Dutch Judiciary" *Netherlands Journal of Social Sciences* vol. 25 (1989)

work by Choi and Gulati<sup>161</sup> which examines what constitutes merit for judicial appointment (irrespective of diversity issues). They propose objective measures of judicial merit in order to make merit more transparent (and therefore flush out underlying “political” considerations that may be hiding behind the veil of “merit”). Their study constructs a theoretical “tournament” using data on opinions authored by federal circuit court judges from 1998-2000. A series of measures of merit are outlined based on productivity, opinion quality, judicial independence – including opinion publication rates, citation of opinions by other courts, citation by the Supreme Court, citation by academics, dissent rates, speed of disposition of cases, reversal rates<sup>162</sup>. This work clearly relates specifically to the US Supreme Court appointment process, but its attempt to measure “merit” raises questions relevant to what actually constitutes merit for judicial appointment in this and any other jurisdiction.

#### **2.3.4 Diversity as Merit for Judges and Juries**

One “judicial” institution where diversity arguments are applicable to the judiciary is juries. Ifill points out that there is already legal recognition in America of the connection between diversity and impartiality in terms of juries. In a series of cases<sup>163</sup> establishing the right to a jury pool that is representative of a fair cross section of the community, the United States Supreme Court established that impartiality is best assured when diverse viewpoints have an opportunity to interact in juror deliberations, and that exclusion of minorities and women imperils jury impartiality. While these are American legal cases, the principle underlying the fair cross-section argument for juries also prevails in England and Wales, where the

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<sup>161</sup> S. Choi and G. Gulati “Choosing the Next Supreme Court Justice: An Empirical Ranking of Judicial Performance” *University of California Berkeley Public Law Research Paper No. 141* (February 2004) and *Georgetown Public Law Research Paper No. 473281*; S. Choi and G. Gulati “A Tournament of Judges?” *Georgetown Public Law Research Paper No. 394700*.

<sup>162</sup> The work has generated much debate. In response Brudney outlines reservations about the performance measurement approach of Choi and Gulati, suggesting the importance of non-quantitative factors in determining merit, such as collegiality and career diversity; J. Brudney “Foreseeing Greatness? Measurable Performance Criteria and the Selection of Supreme Court Justices” *Florida State University Law Review* Vol. 32 (Spring 2005). Solum argues that while the Choi and Gulati concept is illuminating, it is unable to measure merit for judicial appointment as it fails to tackle the question of what is judicial excellence; this work attempts to establish techniques for discerning judicial excellence. L. Solum “A Tournament of Virtue” *University of San Diego Legal Studies Research Paper No. 05-16*.

<sup>163</sup> *Witherspoon v Illinois* 391 U.S. 510 (1968), *Taylor v Louisiana* 419 U.S. 522, *Morgan v Illinois* 504 U.S. 719

primacy of the principle of random selection of both jurors and juries in England and Wales is based in large part on the belief that this system is the fairest means of producing generally representative jury pools and juries in the Crown Courts. The basic premise of the Jury Diversity Project<sup>164</sup>, commissioned by the Department for Constitutional Affairs, is that jury pools at Crown Courts in England and Wales should be representative of the local population. It is the balance between random selection and representation which underpins the jury system, not simply the principle of random selection, and concerns have been raised in the past by government criminal justice reviews over the system's ability to produce racially representative juries<sup>165</sup>.

If all questions how diversity can be necessary for jury impartiality but not for judges, arguing that a racially homogenous bench carries with it all the dangers of a racially exclusive jury pool. Johnson and Fuentes-Rohwer also argue that just as democratic theory supports the idea that a diverse jury pool that represents the community is needed to deliver justice, the same democratic principles require diversity amongst judges who make judicial decisions affecting society. Just as a jury should generally reflect a cross-section of the community because that makes it more likely to reflect a range of community values, judges who reflect the diversity of the community are also more likely in the aggregate to reflect a range of views in that community. They also point out that support for racial or gender diversity in the judiciary does not demand support for every minority or female nominee, just as the requirement for a mixed jury pool does not mean that individual women and ethnic minorities may not be excluded from a jury for bias.

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<sup>164</sup> Thomas *supra* note 28

<sup>165</sup> See *Review of the Criminal Courts in England and Wales* (Auld Review) and *Royal Commission on Criminal Justice* (Runciman Commission)



**Part Three: Policies and Practices for Increasing Judicial Diversity**





## **Part Three: Policies and Practices for Increasing Judicial Diversity**

### **3.1 General Policy Approaches to Judicial Diversity**

Beyond the research and demographic studies conducted on the issue of judicial diversity covered in Part Two, different jurisdictions have adopted specific policy approaches to making the judiciary more reflective of the population it serves. There is no ideal model for increasing diversity, and in practice individual jurisdictions have relied on a range and mix of different strategies to increase diversity, including:

- Political initiatives
- Task Forces
- Appointment commissions
- Changing conditions of employment
- Outreach programmes
- Legal challenges to appointments

This section examines the variety and success of these policy approaches by individual jurisdiction.

### **3.2. Policy Approach in England and Wales**

The unrepresentative nature of the judiciary in England and Wales has been the subject of discussion for several decades, but has only recently been addressed directly by government policy. In 1992, the then Lord Chief Justice, Lord Taylor, publicly stated that: “The present imbalance between male and female, white and black in the judiciary is obvious. I have no doubt that the balance will be redressed in the next few years.” He went on to lay down a timetable for change, stating that: “Within five years I would expect to see a substantial number of appointments from both these groups.”<sup>166</sup> Thirteen years later, the percentage of ethnic minority judges has only increased by 2.1%, and actually decreased in some years during this period. Even though the percentage of women judges has more than doubled in the same period, the change has been extremely slow, has never increased by more than 1.5% per year and in many years showed no significant increase at all. In addition, where women and minorities have gained appointment to the judiciary, this is primarily at

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<sup>166</sup> Lord Taylor *The Judiciary in the Nineties* Richard Dimbleby Lecture (1992)

the lower levels of the judiciary. As of October 2005, only 16.8% of judges in England and Wales are women and only 3.1% are from ethnic minority groups<sup>167</sup>, a serious under-representation in relation to the proportion of women and ethnic minorities both in the legal profession and more generally in the population as a whole<sup>168</sup>. There are no ethnic minority judges and only 4 women judges amongst the 55 senior judicial positions in England and Wales<sup>169</sup>.

The formal power to appoint most judges is vested in the Crown, but in practice the Lord Chancellor and the Department for Constitutional Affairs (DCA) play the central role in judicial appointments in England and Wales. Following continuing concerns about the lack of openness and oversight of judicial appointments, a review of the system of judicial appointments was conducted in 1999 by Sir Leonard Peach,<sup>170</sup> which subsequently led in 2001 to the appointment of the Commissioners for Judicial Appointments (CJA). The CJA is an independent statutory body with the remit to review the judicial and Queen's Counsel appointment procedures, and to investigate complaints about the operation of those procedures<sup>171</sup>. However, the Commission has no power to appoint judges. Its remit extends to professional judicial appointments made or recommended by the Lord Chancellor, but excludes the most senior appointments (the Heads of Divisions and the Law Lords).

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<sup>167</sup> For statistics on women and ethnic minorities in the judiciary in England and Wales since 1992 see Table 2 and Table 25, Annex G in *Increasing Diversity in the Judiciary* supra note 2. The figures of 16.8% women and 3.1% ethnic minority judges are calculated directly from the most up to date figures of judges in post published by the Department for Constitutional Affairs. For details of women currently in judicial post see *Women in the Judiciary (as of 1 October 2005)* supra note 2. For details of ethnic minorities currently in judicial post see *Judicial Statistics: Ethnic Minorities in the Judiciary (1 October 2005)*. It should be noted that these figures conflict with one other set of statistics published by DCA, which suggests there are far more women and ethnic minorities in the judiciary. In DCA's Judicial Appointments Annual Report 2003-2004 (Chapter One section entitled "Improving Diversity in the Judiciary"), the government has asserted that 26.03% of the judiciary are women and 7.21% of judges are from ethnic minority backgrounds. However, as no explanation has been given on how these figures have been arrived at, and as they clearly conflict with the department's own most recent published statistics, caution should be exercised in quoting these Annual Report figures.

<sup>168</sup> For details of minority and female representation in the legal profession see note 3.

<sup>169</sup> See official statistics published on the DCA website: *Senior Judiciary List* (as at 1 November 2005) [www.dca.gov.uk/judicial/senjudfr.htm](http://www.dca.gov.uk/judicial/senjudfr.htm)

<sup>170</sup> L. Peach *Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel* (HMSO 1999)

<sup>171</sup> With the exception of the Law Lords and the Heads of Division

Since their appointment in 2001, the Commissioners have addressed the lack of diversity in the judiciary in Annual Reports<sup>172</sup> and written submissions<sup>173</sup>, and have carried out investigations and audits of possible bias in the judicial appointments process<sup>174</sup>. Most recently, the CJA has commissioned a literature review of ethnicity and the senior judiciary<sup>175</sup>, this current Review of research, policies and practices on judicial diversity in the United Kingdom and other jurisdictions<sup>176</sup>, and the first systematic examination of the factors leading to a lack of diversity in the judicial appointments process<sup>177</sup>. Several of the CJA Reviews of individual judicial appointment competitions have identified strong concerns about the judicial appointments process and recommended changes both immediate and for the new JAC. The review of the High Court 2003 competition concluded that radical change was needed to the High Court appointments competition, as the existing system was seriously lacking in transparency and accountability and changes were needed to increase applications from candidates from more diverse backgrounds<sup>178</sup>. The review of the Recorder 2004/05 competition highlighted two main areas of concern: continued practice of inviting members of the senior judiciary to comment on the outcome of interview panels, and the lack of successful female candidates. It also highlighted the need for the new JAC to be properly resourced to administer appointment competitions. The CJA's review of the initial stage of the Deputy Judge (Civil) 2005/06 competition concluded that the use of competency-based application procedures and the use of judicial appraisal may have contributed to a slight increase in the success of minority and female candidates in the initial stages of the competition.

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<sup>172</sup> CJA Annual Reports are available on [www.cja.gov.uk](http://www.cja.gov.uk)

<sup>173</sup> Including *Response to DCA Consultation Paper "Increasing Diversity in the Judiciary"* (CP25/04) Commission for Judicial Appointments (January 2005)

<sup>174</sup> Including *Report of the Commissioners' Review of the High Court 2003 Competition* CJA (July 2004); *Commissioner's Review of the Recorder 2004/05 Competition (Midland Circuit)* CJA (September 2005); *Commissioners' Review of the Sift Stage of the District Judge (Civil) Competition 2005/06* CJA (September 2005)

<sup>175</sup> T. Abbas *Diversity in the Senior Judiciary: A Literature Review of Research on Ethnic Inequalities* CJA (2005)

<sup>176</sup> C. Thomas *Judicial Diversity in the United Kingdom and Other Jurisdictions: A Review of Research, Policies and Practices* CJA (2005)

<sup>177</sup> Thomas and Genn *supra* note 74

<sup>178</sup> Specific recommendations included: elimination of the two track selection system (whereby candidates could apply or be nominated) with a move to application only; the end of automatic consultation with senior judiciary; development of generic competencies; roll out of a judicial appraisal scheme; advertising of all vacancies; final selection by a balanced panel of judicial and lay members; clear record of all decisions.

In the last 18 months, the DCA has adopted a more pro-active approach to addressing concerns over the lack of diversity in the judiciary. In summer 2004 it convened a number of working parties to examine the causes and possible means of redressing the lack of diversity prior to issuing a consultation paper, *Increasing Diversity in the Judiciary*<sup>179</sup>. The Consultation Paper outlined various possible policy options for increasing the numbers of women and ethnic minorities in the judiciary<sup>180</sup>. Following the consultation period, in summer 2005 the Secretary of State, Lord Falconer, announced legislative plans to allow a wider group of legal practitioners to apply for judicial office, and to reduce the period of practice required before applying<sup>181</sup>. In November 2005, the Secretary of State also announced that he was seeking advice from the Judicial Council on allowing judges to return to practice, and was instituting a disability action plan. Specific policies now in operation to encourage applications from underrepresented groups include: the “Step Up to a Judicial Career” programme which encompasses a series of events around England and Wales designed to provide information about applying for judicial appointment; the Work Shadowing Scheme which enables solicitors and barristers to follow the work of a Circuit judge, District Judge or Deputy District Judge over a 3 day period; the monthly E-Newsletter introduced in May 2005 with information on the appointments process and upcoming competitions; and a DVD on life as a judge.

However, by far the most significant policy change has been the establishment in 2005 of a new judicial appointments process, scheduled to come into operation in 2006. The Constitutional Reform Act 2005 established a new Judicial Appointments Commission (JAC) for England and Wales, which from April 2006 will be responsible for nominating candidates to the Lord Chancellor for almost all judicial appointments<sup>182</sup>. The current Commission for Judicial Appointments will cease to

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<sup>179</sup> *Increasing Diversity in the Judiciary* supra note 2; also see the government’s published responses to the Consultation Paper at [www.dca.gov.uk/consult/judiciary/diversitycp25-04.htm](http://www.dca.gov.uk/consult/judiciary/diversitycp25-04.htm)

<sup>180</sup> The DCA Research Unit has also embarked upon the first major attempt to examine whether direct or indirect discrimination against ethnic minorities exists in the court system through its Courts and Diversity Research Programme (CAD). See discussion of CAD in Part One.

<sup>181</sup> “Increasing the diversity of the judiciary – judges to come from wider pool of applicants” DCA Press Release 13 July 2005

<sup>182</sup> With the exception of the justices of the new Supreme Court.

operate once the new JAC comes into effect in April 2006<sup>183</sup>. Under the new JAC, the Lord Chancellor will, in most instances, only be able to recommend to the Queen or Prime Minister for appointment (senior judiciary) or appointment himself (all others) a candidate recommended by the JAC. The JAC will be comprised of 15 Commissioners and places the weight of representation in the hands of the judiciary and legal profession: 9 judges or practicing lawyers and 6 lay members<sup>184</sup>. The 6 lay members (including the Chair of the JAC) cannot be practicing lawyers or have held judicial office. The 9 legal/judicial members include: 3 senior judges, 1 circuit judge, 1 district judge, 1 lay magistrate, 1 tribunal member, and 2 practicing lawyers.

Under the JAC, once the Lord Chancellor makes a request to the Commission to recommend someone for appointment, the Commission can only recommend one person to the Lord Chancellor for appointment. The Lord Chancellor can ask for the selection to be reconsidered or can reject the nominee – but this can only be done twice in the course of a single appointment<sup>185</sup>. The Lord Chancellor can reject only on the grounds that the nominee is not suitable for office. The Lord Chancellor can ask for a reconsideration if he feels there is insufficient evidence that the person is suitable for the post or there is evidence that the nominee is not the best candidate on merit. The Lord Chancellor must give any of these reasons in writing to the JAC. The JAC can recommend the same person if the Lord Chancellor has asked for a reconsideration, but it cannot recommend that same person if the Lord Chancellor has rejected the selection. The Lord Chancellor can only reject the JAC's selection or ask for reconsideration twice. After that he must accept the JAC's third nomination (or go back to a nominee that Lord Chancellor asked JAC to reconsider – as long as that nominee was not resubmitted and rejected by the Lord Chancellor). The JAC has a statutory duty to have regard to the need to encourage diversity in the range of

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<sup>183</sup> Oversight of the judicial appointments process will then be the responsibility of the Judicial Appointments and Conduct Ombudsman. However, the Ombudsman's authority will extend only to second tier investigations of individual complaints about the process, unlike the current CJA which has the authority to investigate complaints directly and to initiate reviews of competitions and the appointments process in general.

<sup>184</sup> Constitutional Reform Act 2005 Schedule 12 §16

<sup>185</sup> For full details of procedure see Constitutional Reform Act Chapter 2 §63

persons available for selection for appointments<sup>186</sup>, subject to “selection being solely on merit” and that the person selected is of good character<sup>187</sup>.

### **3.3. Approaches to the Judicial Diversity Issue in Other Jurisdictions<sup>188</sup>**

This section provides an overview of approaches to judicial diversity taken in a number of both common law and civil law jurisdictions.

#### **Common Law Jurisdictions**

##### **3.3.1 United States**

Judicial diversity has been the subject of significant policy debate and reform as well as academic study in the United States for over 30 years at both the federal and state court level. There are some differences in approach between the federal and state systems, but both have relied on a range of approaches. At the federal level the main focus has been on political leadership initiatives, the creation of appointment commissions, and initiatives of the national bar association. At the state level there have been numerous approaches employed to increase diversity: the introduction of nominating commissions, the establishment of task forces to examine race and gender bias in the judicial system, as well as initiatives by the legal professional associations, and finally legal challenges to the system of judicial selection in some states.

At the federal court level from the late 1970s, the executive branch has at times taken an extremely pro-active, mandated approach to increasing diversity. Within a month of taking office in 1977, President Carter issued an executive order establishing the United States Federal Circuit Judge Nominating Commission for federal judicial appointments<sup>189</sup>. This created selection panels for each federal court circuit to assist the President in selecting nominees for the US Court of Appeals. The Executive Order clearly required the commission membership to be diverse, with the underlying intention that this encouraged the nomination of more diverse candidates. It required that each circuit commission include “members of both sexes, members of minority groups, and approximately equal numbers of lawyers and non-lawyers.” The panels

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<sup>186</sup> Constitutional Reform Act 2005 Chapter 2 §64

<sup>187</sup> *ibid.* §63

<sup>188</sup> For more details and statistics on all the jurisdictions reviewed in this section see “Judicial Diversity in Other Jurisdictions” Annex A in *Increasing Diversity in the Judiciary* supra note 2

<sup>189</sup> Executive Order February 15, 1977

were required to recommend 5 nominees to the President who would choose one to recommend to the Senate for confirmation. The introduction of the commissions (eventually for both federal circuit and district court judgeships) was controversial, but by the end of the Carter Administration there was a marked increase in the number of both women and minority nominees for federal judicial positions, and one-half of the judges chosen under the new system were female, black or Hispanic<sup>190</sup>. In the 1980s President Reagan rescinded the Executive Order for judicial nominating commissions, but President Carter's legacy remained through the many senators who retained the merit selection committee system at their state level to assist them in choosing candidates to recommend to the president for nomination. In the 1990s President Clinton adopted and broadened the Carter approach to affirmative action for federal court staffing by appointing women and minorities to more than 60% of all new judgeships. At the end of 2004, the gender division in the federal judiciary (encompassing the US Supreme Court, all Circuit and District Courts and the International Trade Court) was 74% men and 22% women<sup>191</sup>. Ethnic minorities comprised 17% of the federal bench<sup>192</sup>, just below the national population level of 20%. Within the group of federal judges from ethnic minorities, African-Americans are best represented (10.6% of the judiciary compared with 12.2% of the national population), with Hispanics (6.5% of judiciary and 14.2% of national population), Asian Americans (0.8% of judiciary and 4.2% of population) and Native Americans (0% of judiciary and 0.9% of population) clearly under-represented.<sup>193</sup>

The American Bar Association has a formal "Judicial Diversity Initiative." This involves the ABA's Judicial Division, whose "Goal One" advocates "increasing minority membership, including membership in each of the six Conferences." The ABA Judicial Division Standing Committee on Minorities in the Judiciary is responsible for implementing ABA and Judicial Division diversity initiatives, and its stated mission is to "promote full and equal participation by minorities in the judiciary and the ABA Judicial Division" by: assisting in identifying minority individuals for

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<sup>190</sup> H. Abraham *The Judicial Process* (7<sup>th</sup> ed)

<sup>191</sup> 3.5% of the seats on the federal bench are currently vacant

<sup>192</sup> Alliance for Justice ([www.afj.org](http://www.afj.org))

<sup>193</sup> Federal appointments are primarily to regional courts (circuits or districts), and it may be more appropriate to compare the proportions based on regional representation and regional minority populations.



leadership positions, for committee positions and for educational programs; providing information about minorities in the judiciary; and assisting with outreach and partnership efforts with minority bar associations.

At the state level in America, the number of states and the number of methods of appointing judges in the states<sup>194</sup> makes judicial diversity a rather complex issue. However, the main development from the 1970s onward has been the introduction of “merit selection commissions” where a group of legal and lay commissions are responsible for recruiting, interviewing and evaluating candidates’ suitability for state judgeships. The nominating commission is then responsible for submitting names (often more than one) to the body formally responsible for appointments, usually the state executive (governor)<sup>195</sup>. Each of the 32 states and the District of Columbia that have adopted this selection method has its own unique commission, although all roughly adopt the same structural approach. Commission members usually include judges, prominent members of bar associations, lawyers, designees from the executive or legislative branches, members of community groups, and academics. There is some evidence that nominating commissions, certainly in the early years, suffered from a lack of diversity as women and minorities were generally less likely to hold positions that provided the source for most commission member appointments (heads of bar associations, upper level positions in law firms, senior members of law faculties). However, of the 33 regional commissions in America, 7 have provisions requiring diversity amongst commission members<sup>196</sup>. In addition, 9 of the 33 commissions have specific provisions requiring that diversity be a consideration in selecting nominees to recommend for appointment, and 10 have formal rules against discrimination in the selection process. Since the introduction of state merit selection

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<sup>194</sup> The method of judicial selection varies by state (and sometimes within states by judicial position) but consists of five general processes: legislative appointment; executive appointment with confirmation, usually by the legislature; judicial appointment; partisan popular election; and non-partisan popular election. The merits and limitations of the various selection processes at the state court level are the subject of continuing debate, including debate around which process achieves a more independent judiciary and produces greater judicial diversity. See Resnick supra note 131

<sup>195</sup> The main difference between the JAC and the state nominating commissions is that most state commissions send a list of nominees (usually 3) to the executive who almost always has to appoint from the list provided. The same applies for federal nominating commissions.

<sup>196</sup> *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selection Models and Their Impact on Diversity* Report of the Judicial Independence and Access to the Courts Project – June 2005 Lawyers Committee for Civil Rights Under the Law. Report supplied by Judge Emmet Sullivan of the United States District Court for the District of Columbia Circuit.

commissions, women appear to have had more success than ethnic minorities in achieving higher judicial office at the state level in the United States<sup>197</sup>, and women comprise 25% of the judiciary on all state courts of last resort and intermediate appellate courts<sup>198</sup>. Less than half the states have any ethnic minority representation on the state's highest court, although some progress has clearly been made and there appears to be no discernable differences in the percentage of minority judges at every level of the state courts: 9.1% on all general jurisdiction trial courts (lowest), 10.7% on all intermediate appellate courts, and 9.8% on state supreme courts (highest)<sup>199</sup>.

Beyond the introduction of nominating commission, the vast majority of the 50 states have established state task forces and commissions to examine the issue of race and gender bias in the justice system<sup>200</sup> in recognition of continuing concerns over this issue<sup>201</sup>. They have all taken a holistic approach to the issue, examining public perceptions of bias in the justice system and its existence in the following areas: judiciary, court staff, juries, legal profession, sentencing, and law schools. Virtually all start with an assessment of the public perception of bias in the justice system, done initially through literature reviews, followed by opinion surveys and demographic surveys. Opinion surveys encompassed: public forums and hearings; studies of the perception of courts (amongst judges, court employees, lawyers, court users and the general public); and focus groups (on the public perception and experiences of the courts). One consistent finding across the states is that while there was a general belief that the system was fair in most respects, many reported harsher treatment or barriers for women and minorities.

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<sup>197</sup> Amongst all judges on all courts of last resort and intermediate appellate courts in all 50 states, the District of Columbia and all federal courts between 1985 and 1999, the rate of appointment of "non white males" doubled on state appellate courts, but the vast majority of the increase stemmed from gains by women not minorities, with minorities making only a gain of less than 1% in state appellate courts.

<sup>198</sup> New York, Washington, Ohio & Wisconsin are currently the only states with a female majority in the highest state court, and no state intermediate appeals courts have female majorities. Sixty-eight percent (68%) of the states have a female state Chief Justice or Chief Judge. New Mexico has the first woman Hispanic Chief Justice in the country. [www.ncsconline.org](http://www.ncsconline.org)

<sup>199</sup> *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selection Models and Their Impact on Diversity* supra note 25

<sup>200</sup> Almost all have been established by the state court of last resort, but there have also been studies by various bar associations and federal district courts.

Following the general findings from opinion studies, most task forces and commissions sought statistical information to test the perceptions for validity, although the commissions often found that hard data was not available on the representation of women and minorities within the different levels of the justice system. Findings specifically related to race and gender bias in the judiciary include:

- the public perceived a lack of diversity in the legal system, especially on the bench
- concentrations of minority lawyers in large metropolitan areas meant that there was only a small pool of qualified lawyers for judicial appointment in smaller metropolitan and rural areas
- there had been peak periods of minority appointments to the bench often coinciding with initiatives on judicial diversity by political leaders
- significant increases in minority law school graduates had not resulted in an increase in minority judicial appointments
- the lack of judicial diversity was affecting the employment of court staff
- there was not a high level of belief that judges made even-handed decisions regardless of their identity

Recommendations from the task forces and commissions fell broadly into three general categories: education, training and other programmes to directly address perceptions of bias; programmes and policies to reduce barriers to full participation in the legal system; and greater information gathering on diversity. Specific recommendations relating to judicial selection included: greater collaboration with bar associations<sup>202</sup>, greater collaboration with the executive<sup>203</sup>, judicial training<sup>204</sup>, the establishment of clear procedures to deal with judicial misconduct<sup>205</sup>, ensuring

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<sup>201</sup> The National Center for State Courts has compiled an electronic database of the main findings and recommendations of the various commissions and task forces. See *Race and Gender Fairness in the Courts: Task Forces, Commissions, and Committee Reports* at [www.ncsconline.org](http://www.ncsconline.org)

<sup>202</sup> *Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts*. Judicial Council of California. January 1997 (KFC 958C33)

<sup>203</sup> *ibid.*

<sup>204</sup> *New Mexico Supreme Court Committee to Study Racial and Ethnic Fairness and Equality in the Courts*. Final Report Santa Fe: New Mexico Administrative Office of the Courts 1999 (KFC 4110.5.A3 N49 1999)

<sup>205</sup> *ibid.* and *Report on the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts: Conclusions and Recommendations*. New York Law Journal/Law.com 1997

adequate female and minority representation on judicial nominating commissions<sup>206</sup>, monitoring of the gender and ethnicity of those serving on appointment commissions and conducting judicial assessments<sup>207</sup>.

There has also been collective action on the part of the majority of states to increasing diversity. Representatives from the various state task forces have formed the National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the State Courts, which meets annually, and the Race and Ethnic Fairness Initiative<sup>208</sup> under the umbrella of the National Center for State Courts has compiled an electronic database of the main findings and recommendations of all the state task forces and commissions on race and gender fairness in the courts<sup>209</sup>. In addition, the Center for Court Solutions in Washington, D.C. has also developed a detailed resource guide to assist courts in increasing diversity among judges and court staff, which provides a blueprint of steps to take and resources to help courts build solutions to fit their specific needs<sup>210</sup>.

### **3.3.2. Canada**

At the federal level in Canada judicial diversity has been addressed through a combination of political leadership, appointment criteria, appointment committees and professional associations. There have also been a large number of reports on diversity and gender equality in the legal profession in Canada over the last 20 years that have fed into the attempts to increase judicial diversity at both the federal and provincial levels. At the provincial level, the main factors for change have been political leadership, the introduction of appointment committees and the use of diversity criteria.

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<sup>206</sup> *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System*. March 2003 (KFC 510.5 D5 P4 2003)

<sup>207</sup> New York Report supra note 205

<sup>208</sup> [www.ncsc.org](http://www.ncsc.org)

<sup>209</sup> [www.ncsconline.org](http://www.ncsconline.org)

<sup>210</sup> Entitled *Diversity Solution Strategies*. The main steps include: gathering information; determining what changes are needed; identifying solutions; and creating an implementation plan. The guidelines suggest that successful implementation requires: leadership; continuity; a sense of urgency; the involvement of stakeholders; communications; a compelling vision; resources allocation; empowerment; and follow-through/feedback mechanisms. See [www.ccs](http://www.ccs)

Starting in the late 1980s, the Canadian federal government and Canadian provinces began to introduce nominating commissions for judicial appointments. Today all Canadian provinces have some form of nominating commission, which is responsible for assessing and recommending a shortlist of candidates to the executive for appointment. However, only one province, Manitoba, has any formally mandated demographic requirement for choosing members of the appointment body. It requires that, in making appointments to the commission itself, the diversity of Manitoba society shall be recognised. On all but three of the commissions, the legal members outnumber the lay members; and in the remaining three (British Columbia, Nova Scotia, and the North West Territories) there is a legal/lay balance<sup>211</sup>.

As in the United States, political leadership has played a major role in bringing about a more diverse judiciary in Canada. Here the approach to the issue of diversity has been a pro-active but not formally mandated policy of increasing diversity at both the federal and provincial court levels. In 1980, just over 3% of federally appointed judges were women, but by June 2003 this had risen to 26%. This increase is the result of various initiatives on the part of the federal Minister of Justice. In 1985 the Minister announced a new judicial appointments process which recognised that “the judiciary should represent a broad cross-section of Canadian Society. To achieve this, the appointment of women and individuals from cultural and ethnic minorities should be encouraged.”<sup>212</sup> Advisory committees that assess candidates for federal appointment are encouraged to respect diversity and give due consideration to all legal experience, including non-mainstream legal experience. Sensitivity to gender and racial equality issues are also recognised as important.

One province, Ontario, has taken a more activist approach than the federal government to increasing gender equality on the Bench. In 1988, the province established a Judicial Appointments Advisory Committee as a three-year pilot project. The Committee advertised extensively for vacant positions, explicitly noting in the advertisements that the Committee was seeking candidates who would reflect the diversity of Ontario’s people. The Committee also contacted community organisations that were in touch with lawyers from sectors of society that in the past were under-

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<sup>211</sup> Information provided by Judith Bellis, Canadian Federal Department of Justice

represented on the bench. Such organisations were asked to encourage these lawyers to apply for appointment. In pursuing its objective the Committee did not adopt numerical quotas, but demographic considerations were included in the assessment criteria used by the Committee in making recommendations for appointment. The criteria recognised that “the provincial judiciary should be reasonably representative of the population it serves. This requires overcoming the serious under-representation of women and several ethnic and racial minorities.”<sup>213</sup> Value was also attached to professional experience outside a traditional legal office (eg, in social agencies and policy development), and it was recognised that a great deal of relevant courtroom experience was not absolutely necessary. The Attorney General of Ontario also became personally involved, by writing to all women lawyers in Ontario who had been at the bar for ten years or more to encourage them to consider applying for the judiciary. When the committee started its work, only 4% of provincially appointed judges in Ontario were women. Within two years, 32% of judges appointed pursuant to the Committee’s recommendations were women, and during the next two years, 46% of the judges appointed were women.

Today, the Ontario Judicial Appointments Advisory Committee has four main criteria for judicial appointment: Professional Excellence, Community Awareness, Personal Characteristics, and Demographics. The Demographics criteria require that: “The Judiciary of the Ontario Court of Justice should be reasonably representative of the population it serves. This requires overcoming the under-representation in the judicial complement of women, visible, cultural, and racial minorities and persons with a disability.” Four other provincial or regional appointment bodies in Canada also have specific demographic criteria built into the selection process<sup>214</sup>. In 2001 *The Provincial Court Act* was amended to mandate the importance of reflecting the diversity of Manitoba society in both the composition of the judicial nominating committee and the criteria established by the committee for the selection of judicial candidates. Today, 30% of judges in the province are women, and the province has judges who are representative of Manitoba’s Aboriginal community, ethno-cultural community and the gay and lesbian community.

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<sup>212</sup> Canadian Ministry of Justice, *A New Judicial Appointments Process* (Ottawa 1985)

<sup>213</sup> Ontario Judicial Appointments Advisory Committee, *Interim Report* (Toronto 1990)

<sup>214</sup> Alberta, Manitoba, Nova Scotia, Yukon, and to a lesser extent British Columbia

A number of studies conducted in Canada over the last two decades have either influenced or charted the increasing diversification of the legal and judicial professions. The 1984 Royal Commission on Equality in Employment (Abella Commission)<sup>215</sup> established the “employment equity” concept, and it appears that this concept has increasingly influenced the legal profession and, as a consequence, the judiciary. In 1991, the Canadian Bar Association established a Task Force on Gender Equality to address the status of women in the legal profession. The Task Force’s report identified many examples of unequal treatment of the sexes in many aspects of the legal profession. Recommendations aimed at increasing the number of women on the bench included that:

- the federal Minister of Justice adopt an affirmative action policy for the appointment of women and minority women similar to that adopted in Ontario.
- the federal and provincial governments take all possible steps to eradicate from the judicial appointments process discrimination against women and minorities and have as their respective long term goals a federal and provincial judiciary which reflects Canadian diversity<sup>216</sup>

A number of very recent studies have highlighted the progress women have achieved in both the legal and judicial fields, but they have also highlighted the continued concerns about the lack of minority representation in both the legal profession and the judiciary. A recent Canadian Bar Association report<sup>217</sup> examined the “feminization” of the legal profession over the last several decades: females now outnumber males in law school, lawyers called to bar, and lawyers under the age of 30, although in the ranks of older lawyers the ratio is almost nine males to one female. As of October 24th, 51% of the federal judges appointed in 2005 were female, and there are currently 300 women judges out of a total of 1046 federally appointed judges, representing 29% of the judiciary. Women tend to be appointed at a younger age, by about six years, and as the proportion of new appointments that were women rose, the overall average age at appointment appeared to decline slightly in the decade

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<sup>215</sup> *Report of the Commission on Equality in Employment* (Abella Commission) (Ottawa 1984)

<sup>216</sup> Canadian Bar Association, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa 1993)

following 1985. Although one might expect the overall average age at appointment to continue to fall as more women are appointed, in recent years the age at appointment has been climbing among both men and women<sup>218</sup>.

However, other studies have also highlighted the continuing problems with representation, income and promotion for woman and especially for “visible minorities”. A recent study by the Law Society of Upper Canada found that Aboriginal persons and visible minorities are underrepresented in the legal profession in Ontario and that by mid-career they have much lower incomes than white lawyers, and that women lawyers have lower incomes than male lawyers<sup>219</sup>. The Canadian Bar Association report also highlighted the fact that even though the ethnic mix in Canada is increasing rapidly, this is not reflected in the make up of the legal profession<sup>220</sup>. This has consequences for the diversity of the judiciary, as the legal profession ultimately provides the pool of qualified applicants for judicial appointment. The Canadian Bar Association’s Aboriginal Law Section is currently advocating for permanent aboriginal representation on Canada’s Supreme Court, a move that may require amending the law that allocates seats geographically. The proposal is designed to make the Supreme Court’s composition reflect the three founding elements of Canada’s legal system: English common law, French civil law, and traditional aboriginal law<sup>221</sup>.

### **3.3.3. Australia**

Over the last decade there have been continuing calls for the appointment of more women to the Australian bench, but little action or change has occurred on the issue. In 1993 the Attorney-General released a discussion paper on judicial appointments in which he stated that “the fact that men of Anglo-Saxon or Celtic background hold nearly 90% of all federal judicial offices indicates some bias in the selection process, or at least a failure of the process to identify suitable female and persons of different

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<sup>217</sup> D. Brusegard *Implications of Demographic Change in the Legal Profession* Canadian Bar Association (February 2004)

<sup>218</sup> Information provided by Judith Bellis, Canadian Federal Department of Justice

<sup>219</sup> Ornstein *supra* note 111

<sup>220</sup> Brusegard *supra* note 217

<sup>221</sup> “Appoint Natives Ottawa Urged” *Toronto Star*, 3 August 2004



ethnic backgrounds as candidates”<sup>222</sup>. The next year, the Australian Law Reform Commission issued a report which addressed in part the issue of the under representation of women in the Australian judiciary<sup>223</sup>, and made three main recommendations related to the need for more women judges. First, an advisory commission should be established to advise the Attorney General on suitable candidates for judicial office. Increased consultation would be likely to identify candidates who may not otherwise have been identified and will promote a judiciary more reflective of the diversity of Australian society. The membership of the advisory commission should reflect the ethnic and cultural makeup of the community and there should be a balance of women and men on it. Second, federal judges should be able to be appointed on either a full-time or part-time basis. This would enable women and men to take proper account of their family responsibilities. Third, selection criteria for judicial appointment should be identified and publicised.

However, since 1994, the position of women in the federal judiciary has shown only limited improvement<sup>224</sup>. The situation for women on the High Court has actually deteriorated as there are now no women judges on the High Court. The position of women on the Federal Court has only marginally increased (from 11% to 13%). The greatest increase has been on the Family Court bench (an area of the judiciary women are often marginalized into), where the percentage of women judges has risen from 13% in 1994 to 30% in 2004. At the state and territorial court level, the percentage of women Supreme Court judges has increased from 4% in 1994 to 15% today<sup>225</sup>. The ALRC also found that while women made up 50% of law school graduates and 25% of the legal profession as a whole, they were leaving the profession at a much higher rate than men, and were clustered in the lower ranks of the profession. The Commission attributed this to discrimination, sexual harassment, and structural and cultural barriers. It recommended that lawyers’ professional associations take a more

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<sup>222</sup> Australian Attorney-General's Department, *Judicial appointments - procedure and criteria*, AGPS (Canberra 1993)

<sup>223</sup> It reported that over 90% of all federal judicial offices were held by men. There was one women High Court judge, only four women among the 34 Federal Court judges (11%), and seven women out of the 52 Family Court judges (13%). In the state and territorial courts, there were only six women among the 144 State and Territory Supreme Court judges (4%), and none among the Supreme Court judges in Victoria, Tasmania or Western Australia. Australian Law Reform Commission 69, Chapter 9

<sup>224</sup> Australian Institute for Judicial Administration ([www.aija.org.au/JudgesMagistrates.htm](http://www.aija.org.au/JudgesMagistrates.htm))

<sup>225</sup> Tasmania is now the only state not to have a woman on the Supreme Court, while the Australian Capital Territory has no women on the Supreme Court and Court of Appeal combined.

active role in changing the work practices and culture of the profession. In 1999 the Australian Women Lawyers Association issued a public criticism of the virtual absence of women judges in the higher federal courts. It called for a more open appointments process, which was supported by various groups, including solicitors groups such as the Law Institute of Victoria<sup>226</sup>.

#### **3.3.4. New Zealand**

The question of diversity in the judiciary is not a high profile government issue in New Zealand. Despite recent government reviews of both the system of judicial administration and the judicial appointment process, the government has not directly addressed the issue of women and minorities in the judiciary. A November 2002 report to the Attorney-General on judicial administration<sup>227</sup> recommended changes to the administration of the appointment of judicial officers, but did not mention the position of women or minorities in the New Zealand judiciary. In the July 2004 government consultation paper: *Appointing Judges: A Judicial Appointments Commission for New Zealand?*<sup>228</sup> the issue of judicial diversity was also not addressed.

Under the present judicial selection system, the suitability of prospective candidates is determined by four criteria, one of which relates to diversity: legal ability, qualities of character, personal technical skills, reflection of society. The government defines “reflection of society” as: “The quality of being a person who is aware of, and sensitive to the diversity of modern New Zealand society. It is very important that the judiciary comprise those with experience of the community of which the court is part and who clearly demonstrate their social awareness”. While this appears to recognise a positive relationship between judges and diversity, little actual diversity is found in the New Zealand judiciary. Along with Canada and Australia, the issue of judicial diversity in New Zealand has a specific aboriginal dimension. The Maori comprise 9% of the New Zealand population, and the unique aspects of Maori law have led to a separate Maori Land Court in New Zealand. Judges on this court are appointed by the Governor-General on the advice of the Minister of Maori Affairs. However, while the

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<sup>226</sup> “Solicitors Support Call for More Women Judges” *Law Institute of Victoria*, 25 March 1999

<sup>227</sup> *Judicial Administration Issues*, Chen Palmer and Partners 2003

<sup>228</sup> New Zealand Ministry of Justice, April 2004

requirements for appointment are that “a person must not be appointed a judge unless the person is suitable, having regard to their knowledge and experience of te reo Maori, tikanga Maori, and the Treaty of Waitangi<sup>229</sup>, there is no formal requirement that any of the 8 judges be Maori<sup>230</sup>.

### **Civil Law Jurisdictions**

Perhaps the most significant development in civil law jurisdictions in terms of diversity has been the rapid growth in the number and proportion of women in judicial office. Today most continental European judiciaries include substantially more women in the profession than the judiciary in the United Kingdom, and in several European jurisdictions women now outnumber men in the judiciary<sup>231</sup>. The experience of civil law countries is often overlooked in this country because their judicial systems are mistakenly considered incompatible with the British common law judicial system.

Civil law judiciaries are usually described as “career judiciaries”, meaning a civil service style judiciary where all judges are recruited by examination directly from university and progress up through a structured career system. However, most European civil law judiciaries employ some form of lateral recruitment of judges amongst experienced legal professionals much later in their careers, which is similar to the appointment process in England and Wales. The proportion of the judiciary recruited in this way varies from country to country on the continent, and this provides grounds for considering how the experience of civil law countries may be applied in England and Wales. In addition, a number of policies currently being pursued or considered by the DCA in this country in relation to the judiciary in general and judicial diversity in particular are ones designed to provide more of a structured career for judges. This also means that the continental experience with such judicial profession issues as appraisal schemes, promotions, career breaks,

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<sup>229</sup> Section 7(2A) Te Ture Whenua Maori Act 1993.

<sup>230</sup> At present there are 5 Maori women judges in New Zealand, including the current Chief Justice of the newly created New Zealand Supreme Court, and 3 of the 8 judges on the Maori Land Court are Maori women. In addition, at present over half of all law graduates and admissions to the bar are women. “Maori women in the judiciary” Hon Parekura Horomia, 22 March 2004

<sup>231</sup> Civinini supra note 91

secondments, flexible working hours and return to private practice provide important examples of how such structural aspects of the judicial profession may impact on diversity.

### **3.3.5 The Netherlands**

In the Netherlands there are two means of entry into the judiciary. Half of all Dutch judges are appointed directly after law school through a knowledge-based appointment scheme followed by a six-year training programme. The other half are appointed only after a minimum of six years' legal experience, most often in a private law firm. In this respect, the Netherlands provides an interesting testing ground for the effects on judicial diversity of the classic common law and classic civil law systems of judicial appointment.

Women have made progress in gaining representation in the judiciary and make up over a third of the judiciary in The Netherlands. However, virtually all women judges are recruited through the knowledge-based early entry system, and virtually all male judges (97%) enter the judiciary later in their careers through the experience-based system.

As discussed earlier in Part Two of the Review, men and women in the Dutch judiciary choose the judiciary for very different reasons, with women attracted to the justice element and men attracted to the challenge of the job. As their judicial careers develop, the amount of time that elapses between promotions is longer for women than men, and the prestige theory clearly operates in the judiciary in the Netherlands. Despite the fact that the proportion of women in the judiciary has risen steadily to over 35% of all judges, vertical segregation continues to exist, with women judges concentrated in the lower levels (45.6%) and the middle levels (23.3%) of the judiciary<sup>232</sup> and with little representation at the senior levels (7.4%).

### 3.3.6. France

In France judges and prosecutors form the same professional group and are all referred to as “magistrates”. As of January 2004 women made up 53% of the French *magistrature*, with 57% of judges, and 40% of prosecutors<sup>233</sup>.

Most French judges enter the judiciary through a knowledge-based recruitment system directly after university, and then enter the Judicial School for a number of years of training prior to being appointed as a lower-level judge. However, the French also have several special recruitment channels for those entering the judiciary at a later stage of their careers, and while these only constitute a minority of judicial appointments they more closely approximate the appointment process in England and Wales. Direct recruitment of senior judges (to the Court of Appeal and Court of Cassation) is open to individuals with 15 years of professional experience in the legal, economic and political fields, who are 50 years of age or older. Direct recruitment of judges just below this level (senior positions in First Instance Courts) is open to individuals with 10 years professional experience (as above), who are 35 years of age or older. There is also direct recruitment of entry level judges from among experienced professionals; the requirements here are either 8 or more years legal experience in private practice, in elected local government or as a lay judge, or civil servants and other state employees who are 45 years of age or older.

Despite making up more than half of the current judiciary in France, women are primarily successful in gaining appointment to the judiciary through the main entry point, and have much less success in the experience-based selection process. They also have less success in gaining promotion to the higher levels of the judiciary in general. Women only hold 159 of the 730 higher judicial positions in France (what is referred to as the *hors-hiérarchie*). Amongst the most senior judicial positions there are only four women *premier presidents* of the Courts of Appeal out of 35 posts (11%), and even at the less senior level of president of lower court, where there are only 32 women out of the 180 positions (17%)<sup>234</sup>.

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<sup>232</sup> L. de Groot-van Leeuwen “Women in the Dutch Legal Profession (1950-2000)” in U. Schultz and G. Shaw (eds) *Women in the World’s Legal Professions* (Hart 2003)

<sup>233</sup> Data provided by Anne Boigeol *L’Institut d’Histoire du Temps Present*.

<sup>234</sup> Information provided by Laetitia Brunin Assistant Secretary General to the Chief Justice of the French Supreme Court (*Cour de cassation*)

There is increasing concern in France about the lack of ethnic minorities in the judiciary, especially at a time when the society faces a number of legal and political challenges to do with achieving a balance between integration and respect of human rights, especially in relation to the Muslim community. France has the largest Muslim population in Europe (approximately 10% of the population), primarily from Northern Algeria. A survey in 2004 revealed that between 50-80% of prison inmates in France are Muslims, and recent surveys have also highlighted growing concerns about possible discrimination by the French police. However, there is a general reluctance in France to factor in background considerations such as ethnicity in judicial appointments, and there are also legal restrictions on collecting data on racial origins<sup>235</sup>. These factors make it both urgent and more difficult to actually assess the extent of the lack representation amongst ethnic minorities in the judiciary and legal profession.

The question of ethnic diversity in the judiciary in France provides some grounds for comparison with England and Wales, as France and Britain have the largest ethnic minority populations in Europe, and both share a similar post-colonial immigration-based minority population. The under-representation of ethnic minorities is a cause for concern for the French government, and a special task force (*observatoire des carrières de la justice*) was created in 2004 by the Minister of Justice to recommend policies to improve judicial careers from both a gender and ethnicity perspective.

### **3.3.7. Italy**

In Italy, judges and prosecutors also form the same professional group known collectively as “magistrates”. However, unlike the situation in France, the vast majority of Italian magistrates are appointed through the traditional civil law system of direct recruitment after university. Today women comprise an estimated 38% of the 9100 magistrates, but most significantly they now substantially outnumber male candidates as both applicants and appointees.

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<sup>235</sup> Information provided by Antoine Garapon, Secretary General of the *Institut des Hautes Etudes sur la Justice*.

Until 1963, women were legally prohibited from being judges (under a the 1941 decree that required judges to be male citizens). But since 1965 when this prohibited was repealed, the number of women in the Italian judiciary has risen constantly. However, despite their representation in the judiciary in such large numbers, the prestige theory operates in the Italian judiciary for women: the large percentage of women in the lower ranks (especially the first level) does not correspond to the number of women who reach executive position, where the places are still mostly filled by men. In order to understand and overcome what it perceived to be objective discrimination against women in the judiciary, the Italian Higher Council of the Judiciary carried out research in 2004.

Judges are selected almost exclusively by means of public entry examination, which all law graduates can take part in and which currently includes a pre-selection examination, then a written examination and finally an oral examinations. The selection system is almost totally anonymous: examiners can only identify the candidates when the oral examination takes place, and at this point the number of candidates has already been drastically reduced. The judicial selection commission is by statute also made up of at least one-third women (art. 57 Leg. Decree n. 165/2001), in line with the European Commission's recommendations on the composition of juries and awarding commissions. The most recent figures indicate that women make up 63% of all new appointees<sup>236</sup> under this strict knowledge-based appointment system. The study conducted by the Italian Higher Council of the Judiciary also revealed that women now outnumber men and in applications for the judiciary and there are more women than men registered for law degrees in Italian Universities<sup>237</sup>.

Both these facts led the study to explore whether it was possible to speak of a “female vocation” for the judiciary. An attitudinal study of male and female judges found that both men and women are attracted by the independence of the role and the desire to serve the public and influence society. However, the social reason is dominant for women, whereas the responsibility of the role, the prestige and career are dominant

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<sup>236</sup> Data provided by C. Guarnieri, Dipartimento di Organizzazione e Sistema Politico, University of Bologna.

<sup>237</sup> During the academic year 2003-2004 there were 39,423 students enrolled in the faculty of law, 16,973 of whom were men and 22,450 of whom were women. Data supplied by M. Civinini supra note 91

for male judges. Most women judges said that career was of no importance, but unlike their male counterparts female judges appreciated the possibility of being able to reconcile work and family, the flexible working hours and the stability of the job.

Despite their significant numbers in the judiciary, women judges in Italy are significantly under-represented in the senior ranks. There are only 19 women in charge of executive positions (as President of the Court or Prosecutor's office etc.) out of a total of 436 (4%); of these 19, 11 are the heads of juvenile courts and 2 are Presidents of Penal Execution Courts (positions which are not often sought after). Out of 693 semi-executive posts, (e.g. Presidents of Division), only 67 (9%) are filled by women. Female representation in the Court of Cassation is still minimal, and all those who are women are councillors while all the executive posts are filled by men. One of the main reasons that there are very few women is that the selection system for higher level judicial positions strongly privileges seniority compared to skills. This is a disadvantage for women, as the retirement age is currently 75 years and candidates for executive roles always include judges nearing the end of their careers (even when only 13 years of service are required for a given post), and these most senior judges are predominantly men. Of the 937 judges over 65 years of age only 39 (4%) are women compared with 898 men. Given this lack of career prospects over time, a large number of women judges retire before they are 75 years old.

In addition, the selection criteria for many senior positions (on the Court of Cassation, the National Anti-mafia Office, some semi-executive posts, and as councillors in the Appeal Courts) favour those with higher academic qualifications and experience in specialist legal fields. As family commitments are predominantly the responsibility of women in Italy, it is generally more difficult for women judges than it is for their male counterparts to devote time to working on law journals and commissions or to conducting independent research. The Italian study found that women judges tended to commit any spare time to improving their immediate professional performance (for instance preparing cases and holding hearings). In addition, the study also found that



it is more difficult for women judges to obtain appointments that can be a qualification for promotion<sup>238</sup>.

The study found that job security and the possibility of reconciling work and the family are extremely important elements in women's choices of becoming judges. The conditions of employment in the Italian judiciary which support this include: lifetime appointment (dismissal is a disciplinary measure only adopted for serious violations) and a mix of legal measures that protect maternity rights (pregnancy leave, parental leave to be able to look after children, flexibility working hours until children are 3 years old, measures that aid transfers to the family's place of residence). However, the research found that that one of the main difficulties for a female judge is reconciling work and family commitments during the course of her career, specifically the ability to achieve the experience necessary to gain promotion to the semi-executive and executive posts in the Italian judiciary.

### **3.3.8. Spain**

In Spain, women make up 41% of the judiciary today and 60% of future judges enrolled in the Spanish judicial college. This is a sharp increase since 1985 when women only comprised 10% of the judiciary. As discussed earlier in Part 2 of this Review, the Spanish Higher Council of the Judiciary has been conducting an attitudinal study of Spanish judges over a 20-year period, focussing in part on what it refers to as the "feminization of the judiciary"<sup>239</sup>. The study periodically explores whether there has been any reaction against this feminization, by exploring the views of both male and female judges on the judicial profession in general and the views of female judges on their particular experience serving in the judiciary.

The most recent version of the study has examined what male and female judges feel accounts for the rapid increase in the percentage of women in the profession and what women judges feel is the effect of this change. Male judges have been fairly

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<sup>238</sup> In Italy, only 15% of the extra-judicial appointments (teaching in specialised schools, universities, training courses) are awarded to women; only about 12-13% of the 1000 judicial instructors for the current year are women.

<sup>239</sup> For details of the Spanish study see *Encuesta a una Muestra Nacional de Jueces y Magistrados: Sexto Barómetro de Opinión de la Judicatura Española* Consejo General del Poder Judicial (Julio 2003)

consistent in their views over time about what accounts for the rise in women in the judiciary, suggesting that women prepare harder than male candidates for the judicial entrance examinations, and that the judiciary offers a better chance of promotion for women than the private sectors or civil service. The majority of women judges also believe that female candidates prepare harder for the judicial entrance examination, but women judges increasingly believe that the judiciary offers better career prospects and that there is less discrimination against female candidates from judicial appointment assessors than from assessors for other professional posts. The majority of women judges also continue to feel that most defendants were indifferent to whether a man or woman was judging them. However, 26% of female judges in Spain have experienced difficulties in their career because of their gender: 56% of these said this was due to chauvinistic, discriminatory attitudes, while 26% said it was due to the difficulty in imposing their authority. The study also explored the specific issue of the impact of their job on their professional and family lives. In 1987 when the study first examined this issue, 47% of the female judges were single, and so perhaps not surprisingly only 28% of them felt their judicial career negatively affected their personal and family life. By 2003, however, 83% of female judges were married and 73% of all female judges felt that their judicial career placed greater strain on their personal and family life than it did for their male colleagues.

### **3.3.9. Germany**

Unlike the situation in France and Italy, in Germany judges and public prosecutors do not belong to the same organisation. However, they share a common legal education and training leading to the “qualification for judgeship”. This qualification is a necessary requirement to serve in all legal professions and the higher ranks of the civil service, and consequently these legal professionals tend to identify themselves as part of one legal professional group known as *Juristen*. There is also some lateral mobility among judges, public prosecutors, private attorneys and government officials.

Appointment to the German judiciary at either the federal or *Länder* (regional) level depends on marks obtained in examinations and performance during a lengthy training period. Selection for regional level courts is made by the *Land* Ministry of Justice where candidates apply, and most German regions operate ‘soft’ quota

regulations in respect of women. Judicial appointees are under a probationary period ranging from three to five years, and can be moved from one position to another and required to undergo further evaluation before finally becoming life-tenure judges<sup>240</sup>. Women have made significant gains in the German judiciary in recent years, despite the limited number of judicial appointments that have been made in these years. In 1960 just 2.6% of the judiciary were women, but as of 2003, women represented 30.1% of judges<sup>241</sup>, 32.99% of public prosecutors and 27.9% of lawyers. However, research has also shown that women lawyers are generally less specialised and the highest proportion of specialists are in the financially less rewarding field of family law<sup>242</sup>.

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<sup>240</sup> Thomas supra note 86

<sup>241</sup> 6291 of the 20,901 judicial positions in Germany are held by women

<sup>242</sup> Data provided by Ulrike Schultz, Fern Universitaet in Hagen.

**Part Four:**  
**Applying Existing Research and Policy Development from Other Jurisdictions**  
**to the Issue of Judicial Diversity in England and Wales**



## **Part Four: Applying Research and Initiatives from Other Jurisdictions to the Issue of Judicial Diversity in England & Wales**

### **4.1 Drawing Lessons from the Review**

Previous sections of this Review have examined existing research as well as actual practices related to judicial diversity in other jurisdictions. This section of the Review specifically addresses what lessons can be learned and conclusions drawn from the experience of other countries. More specifically, it outlines three main issues: (1) what are the key factors affecting judicial diversity, (2) how can the study of judicial diversity be advanced in England and Wales, and (3) what are the priorities for the new Judicial Appointments Commission to ensure that it meets its statutory duty to encourage diversity in the appointment of judges in England and Wales.

### **General Conclusions**

The weight of research into judicial diversity has clearly been carried out in the United States. However, as Part One of the Review explored, this is to be expected given the long tradition of judicial studies and the early attention placed on and policy initiatives put forward to redress judicial unrepresentativeness in America. There has been long-term, comprehensive research in the United States into what affects diversity in the judiciary and what effect diversity in turn has on the justice system itself. However, a number of other jurisdictions have also advanced research into judicial diversity, and recent studies in Italy, France, Spain and the Netherlands have contributed to understanding gender differences in career progression and attitudes to a judicial career. In contrast, the United Kingdom has yet to make any significant contribution to the study of judicial diversity.

The Review also indicates that there are direct correlations in the experiences of different jurisdictions, whether common law or civil law. And while no one jurisdiction has the “perfect model” for addressing judicial diversity, some jurisdictions have been more successful than others at bringing about improvement in the representation of women and ethnic minorities in the judiciary. However, one clear conclusion from both the research and policy review is that distinct differences

exist between women and ethnic minorities' ability to gain appointment the bench. Hurwitz and Lanier's comprehensive study<sup>243</sup> of the success of women and minorities in America in gaining office at the appellate court level in all 50 states, the District of Columbia and the federal judiciary found that "non white males" have made significant gains over the last 20 years, but that women made up the vast majority of these gains and that the lack of diversity is most acute for specific minorities. The lack of minority representation in the judiciary in the United States continues to be an issue of concern and has on occasion actually prompted constitutional challenges to the lack of racial diversity on the state bench. In Canada, women have also made significant gains over the last two decades, but similar problems exist with increasing minority representation, especially native peoples' representation<sup>244</sup>, generating calls for reform and possible legal challenges. Continental Europe is where women have made the most dramatic gains over the last 15 years, and in a number of these countries women now outnumber men in the judiciary. However, ethnic minorities are virtually non-existent in most European judiciaries and in France, for instance, there are currently significant problems and concerns over the lack of minority representation in the judiciary<sup>245</sup>. The clear indication is that women gain ground quicker in the judiciary than do ethnic minorities, and that the door has to be pushed much harder to open the judiciary to greater minority representation in comparison to greater gender equality.

However, despite women's quicker progress into the judiciary in most jurisdictions, the reality is that women remain under-represented on the bench in both the United States and Canada, and despite their very significant gains in European judiciaries the "prestige theory" is clearly in operation for women judges there. In the Netherlands, France, Spain and Italy, women have the highest representation at the lowest levels of the judiciary, and every step on the career ladder takes women judges longer than their male counterparts. The door to senior judicial appointment remains shut to most women even in jurisdictions such as the Italy, France and Spain where women now comprise over half of all judges or new appointments to the judiciary.

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<sup>243</sup> Hurwitz and Lanier supra note 70

<sup>244</sup> Ornstein supra note 111

<sup>245</sup> However, in a number of European countries it simply does not make sense to focus on ethnicity in the judiciary, as nation populations in these countries are essentially homogenous.

Despite the substantial amount of research from other jurisdiction on the issue of women and minorities in the judiciary, the Review also highlights the fact that there has been virtually no research on the wider aspects of judicial diversity, such as religion, disability, or sexual orientation. There has been a small amount of research in the United States and the Netherlands on religious affiliation of judicial appointees, both suggesting that minority religions are poorly represented in the judiciary<sup>246</sup>. However, all other aspects of diversity remain largely unexplored.

#### **4.2 Key Judicial Diversity Factors**

A number of key factors have emerged which appear to affect the state of judicial diversity across the jurisdictions covered in this review. In some countries attention has perhaps been focussed more on certain factors over others, but all the factors are relevant in one degree or another to the research and the policies pursued by different jurisdictions. The issues shaping judicial diversity concerns and policies here and elsewhere include: **A Lack of Representativeness** in the judiciary leading to **Institutionalised Disadvantage or Discrimination** providing the basis for a **Discrediting of the Appointments Process**. As a result, an unrepresentative judicial system will not enjoy the **Benefits of a Diverse Judiciary**, including increased public confidence in the fairness of courts and improved quality of judicial decision-making. However, research and policy developments across a range of jurisdictions indicate that there are several primary **Levers for Change** that are essential to achieve a more diverse and representative judiciary. These include: appointment commissions, career paths and political leadership.

These five key judicial diversity factors and their inter-relationships are examined below in more detail, drawing on the Review of research and policy developments in different jurisdictions. Finally, these factors are used to identify priorities for the new Judicial Appointments Commission in England and Wales, the legal profession and the wider research community in order to enable the JAC to deliver a more diverse judiciary.

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<sup>246</sup> Glick and Emmert supra note 61



### 4.3 Lack of Representativeness

Statistics and research have clearly indicated that the judiciary in England and Wales is seriously under-representative, and they have done so for some time. The extent of the lack of representation varies according to both the group in question and the level of judicial post. Statistics make clear that the prestige theory is clearly in operation in England and Wales<sup>247</sup> for both minorities and women, with appointments concentrated in the lowest levels of the judiciary. Research in England and Wales has also revealed that the prestige theory operates in relation to education in both the judicial and legal profession. As the Sutton Trust study revealed<sup>248</sup>, the senior partners in the top law practices share the same narrow Oxbridge, fee-paying school background as the senior judiciary (who invariably come from these practices).

The prestige theory also operates in other jurisdictions, especially and perhaps surprisingly where women have made significant and rapid progress in the judiciary. Studies of women judges' progress in the Netherlands, Italy, France and Spain all reveal a lack of advancement beyond the lower ranks of the judiciary. Despite their now dominant numbers at the entry levels of the judiciary in these countries, women judges in these jurisdictions nonetheless have not been able to attain senior judicial positions in any numbers. Clearly no "trickle up" effect has taken place even when women make up almost half of all judges and their numbers have been rising for many years.

Conversely, the most comprehensive examination of judicial appointments by gender and race in the United States has revealed that the prestige theory does not operate there, and that in 1999 women and minorities were in fact more likely to become judges on higher rather than lower level courts<sup>249</sup>. A more recent assessment of all minority judges on state courts in America showed there was no discernable difference in the percentage of minority judges at every level of the state courts: 9.1% on all general jurisdiction trial courts (lowest), 10.7% on all intermediate appellate

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<sup>247</sup> DCA statistics supra notes 102 and 103

<sup>248</sup> Sutton supra note 104

<sup>249</sup> Hurwitz and Lanier supra note 70

courts, and 9.8% on state supreme courts (highest)<sup>250</sup>. Hurwitz and Lanier's research suggests this more equitable distribution of women and minorities in the American judiciary may be a function of the fact that policies to achieve greater diversity have been pursued for almost three decades and championed by prominent political leaders.

These findings highlight the crucial importance for future monitoring and research of judicial appointments in England and Wales to carefully examine the relative success rates of under-represented groups according to the level of judiciary, and whether segregation in the judiciary according to the level of judicial position is being addressed.

#### **4.4 Institutionalised Disadvantage or Discrimination**

This factor relates to whether the lack of representativeness suggests institutionalised discrimination or disadvantage. Data collected for England and Wales suggests clear disadvantage (if not discrimination) at virtually every stage of progression in the legal and judicial career path: from education, to joining the legal profession, and ultimately to gaining appointment to the judiciary. So while 21% of all those registering for law degrees in this country are from ethnic minorities (greater than their representation in the population), they are over-represented in the "new universities"<sup>251</sup> – not the Oxbridge/top 12 faculties attended by the senior partners of the most successful law practices and by members of the senior judiciary. Not surprisingly, the Law Society found that these new universities are the ones employers favour least, and that minority law graduates were less likely to have contacts in the profession and were therefore less likely to secure training contracts.

Even once women and minority solicitors gain employment after qualification, they increasingly find themselves at a disadvantage as they advance within the profession. The earnings gap becomes increasingly wider between white male solicitors and both ethnic minority and female solicitors. Perhaps not surprisingly, as their careers progress both women and ethnic minority solicitors are significantly more dissatisfied with the opportunities for partnership than their white male colleagues.<sup>252</sup> This

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<sup>250</sup> supra note 97

<sup>251</sup> Cole supra note 117

<sup>252</sup> Law Society studies supra note 106

progressive widening of disadvantage was also mirrored amongst minority and female lawyers at mid-career in Canada, where their numbers had decreased and they had lower status jobs with lower incomes than their white male counterparts<sup>253</sup>. For women in particular these conditions appear to contribute to higher attrition rates in the legal profession in England and Wales. This can have an impact on judicial appointments, as this ultimately reduces the pool of potential female applicants (although the percentage of women in the legal profession who are eligible for appointment still allows for significant numbers of women to be appointed to the judiciary).

These studies and statistics reveal a system of “trickle up disadvantage” operating against the under-represented groups, in which at each stage of career progression leading towards judicial appointment these groups are progressively less likely to succeed. When this ultimately reaches the point of senior judicial appointment, the result is that women and especially ethnic minorities become institutionally barred from appointment<sup>254</sup>. As all appointments of Law Lords are drawn from the Court of Appeal and there has never been an ethnic minority Court of Appeal judge, the appointment process itself excludes all ethnic minorities from even the possibility of appointment. As there is only one ethnic minority judge in the High Court, it also means that all ethnic minorities (except one) are also excluded from the possibility of appointment to the Court of Appeals. The other practical requirement for senior appointment - to “be known” by the consultees (who are largely senior judges) - is also likely to disadvantage minorities and women, as they tend to be outside the traditional judicial networks.

#### **4.5 Discredited Appointments Process**

The existence of institutionalised discrimination or disadvantage in the appointment process can lead to the discrediting of the appointment process, especially amongst members of the under-represented groups – precisely those which the appointments process needs to attract in order to increase diversity. Ultimately, it can also expose appointing authorities to the potential for legal challenges to appointments.

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<sup>253</sup> Ornstein *supra* note 111

The legal status of an unrepresentative judiciary has been formally challenged in the courts in the United States, and despite their uniquely American context, these cases have required the judiciary itself to address the difficult underlying issue of the nature of representation in the judiciary and its relationship to judicial impartiality. No legal challenges to judicial appointments in England and Wales on discrimination grounds have been brought to date. However, recent legal changes affecting both the Sex Discrimination Act and the Race Relations Act strengthen the grounds for concern about the legality of the judicial appointments system in relation to its impact on women and minorities. Various European Directives<sup>255</sup> and a recent decision of the Northern Ireland Court of Appeal<sup>256</sup> appear to clearly bring judicial appointments within the scope of these employment provisions, at the same time as the Directives have liberalised the meaning of indirect discrimination. It will only now be necessary to demonstrate that an apparently neutral practice employed in the course of making a judicial appointment would put persons of a particular racial group or gender at a disadvantage. As this review has shown, this type of evidence does exist in England and Wales especially, but not solely, in relation to the impact of senior judicial appointments on women and ethnic minorities. A continued lack of progress amongst women and ethnic minorities in achieving appointment to all levels of the judiciary under the new JAC is only likely to expose the JAC to the same criticisms levelled at the old appointments process and increase examination of potential violations of anti-discrimination measures.

#### **4.6 Benefits of a Diverse Judiciary**

There is a clear conflict between (1) the existence of a lack of representation in the judiciary in England and Wales leading to institutional disadvantage which discredits the appointments process and creates possible grounds for discrimination claims and (2) the substantial evidence of the benefits of judicial diversity. The benefits of diversity in the judiciary are demonstrated first by research evidence exploring what the effect is of a lack of judicial diversity on the perception of courts, and second by the research evidence demonstrating the effect of diversity on judicial decision-making.

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<sup>254</sup> Monaghan *supra* note 148

<sup>255</sup> European Commission Directive 2000/43/EC and European Commission Directive 2002/73/C

<sup>256</sup> *Percival-Price* *supra* note 150

#### **4.6.1 Perception of and Confidence in the Courts**

Comprehensive studies of the perception of courts across a number of states in America have demonstrated that judicial diversity can have a powerful symbolic value in promoting public confidence in the courts<sup>257</sup>, and that the issue of the perception of the fairness of courts is a vitally important one in terms of both access to and delivery of justice. A number of recent studies in England and Wales have directly and indirectly addressed the relationship between ethnicity, judicial diversity and confidence in the fairness of courts. Separate projects within the DCA Courts and Diversity Research Programme have individually found evidence that the lack of diversity in the judiciary in England and Wales can be related to ethnic minorities' lack of confidence in the fairness of courts. Studies in Crown Courts and magistrates' courts found that the lack of diversity amongst those presiding over judicial proceedings had an effect on minorities' confidence in the fairness of those proceedings<sup>258</sup>.

However, because these findings are from disparate sources and collected in a variety of different ways, the full impact of the combined findings has perhaps not been felt. A more comprehensive study of whether ethnic minorities and whites view the courts (and judicial diversity) differently in terms of the fairness of courts and confidence in the judiciary, and what impact recent direct court experience has on these different group's opinions about the courts, would more directly address the issue of whether the current make-up of the judiciary meets the justice needs of a multicultural Britain.

#### **4.6.2 Judicial Decision-Making**

Perhaps some of the most compelling findings on the effect of increasing diversity on the courts are those from the United States that show a demonstrable effect on the quality of judicial decision-making when diversity was increased on appeals courts. A number of studies have found that when appeals were decided by panels of judges from diverse backgrounds as opposed to homogenous panels: (1) judges were more likely to debate a wider range of considerations in reaching their judgements<sup>259</sup> and

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<sup>257</sup> supra note 120

<sup>258</sup> see Hood et al supra note 29, Vennard et al supra note 26.

<sup>259</sup> Cameron and Cummings supra note 134

(2) the decisions of these diverse appeals court panels were more likely to be in line with interpretation guidance from the Supreme Court<sup>260</sup>.

However, this is one major area where there is no statistical or empirical research of any kind available in England and Wales. The lack of diversity in the senior judiciary here precludes similar work here with appeals court panels. Only once levels of ethnic minorities and women in the appellate judiciary have increased and been sustained for some time can such studies be conducted here on the effect of increased diversity on the actual judicial decision-making of the appellate court.

#### **4.7 Levers for Change**

The research reviewed in Part Two and the policy approaches of other jurisdictions examined in Part Three have identified several specific structural, institutional and individual factors that act as levers for changing the composition of the judiciary and creating a more diverse bench. The three main levers for change are: nominating commissions, career paths, and political leadership.

##### **4.7.1 Nominating Commissions**

A large amount of empirical research on nominating commissions has been carried out in the United States over the last 30 years. There is a widespread tendency to suggest that the findings of this body of research are inconclusive. However, this Review has argued that this does not necessarily mean that it is not possible to identify studies that are most relevant to the current situation in England and Wales. The important requirement is that the specific questions being addressed in the American studies are examined closely and those studies with the most application for the appointments process here are identified. Four specific aspects of nominating commissions appear to have the most relevance here: the composition of the commission, the dynamics between commission members, the criteria used by the commissions for judicial selections, and the outcome of the commission's judicial selection process itself.

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<sup>260</sup> Sunstein *supra* note 135

### **Composition of Commissions**

Studies in the United States examining the composition of judicial nominating commissions initially suggested that it was difficult to achieve diversity amongst the commission members<sup>261</sup>, but that eventually women made significant gains on these commissions although the number and proportion of minority members remained low<sup>262</sup>. However, Esterling and Andersen's study has the most direct relevance to the central diversity issue, and they found evidence that diverse membership on commissions tends to attract more diverse applicants and select more diverse nominees<sup>263</sup>. This clearly indicates that the membership of the new JAC is a crucial issue that needs to be studied from the outset and monitored in terms of impact on applicants and nominees here.

### **Operation of Commissions**

The more general findings in American studies of the behaviour of commissioners are also relevant to the issue of what impact the new JAC may have on the appointment process here. Concern over the "political" aspects of how appointments commissions operate may appear to be particularly American, however what is defined as political influence in America also relates to the influence of the senior judiciary and leaders of the legal profession. Studies of these issues and concerns can have application here, given the concerns expressed in the past over the role of senior officials and the senior judiciary in the judicial appointments process in England and Wales, and more recent concerns about the extent to which the new JAC may or may not lead to an increase in the politicisation of judicial appointments.

The studies by Watson and Downing as well as Sheldon also suggest a need for vigilance over the built-in dominance of the legal profession on the new JAC. There is a 3 to 2 balance on the new JAC in favour of the legal/judicial commissioners compared with the lay commissioners, and experience in other jurisdictions suggests that even lay commissioners usually have some legal "connection", even if they have never been practicing lawyers<sup>264</sup>. In the United Kingdom, this touches on long held

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<sup>261</sup> Ashman and Alfini supra note 76

<sup>262</sup> Henschen et al supra note 77

<sup>263</sup> Esterling and Andersen supra note 78

<sup>264</sup> This is the case with most lay members of the Higher Councils of the Judiciary in continental Europe. See Thomas supra note 86.

concerns over the dominance within the judiciary of those with traditional legal backgrounds: for instance, barristers' greater success than solicitors, and the dominance of high earning silks from the civil bar in senior judicial appointments. These findings suggest that this is a particular issue to be monitored or researched in relation to the new JAC.

### **Appointment Criteria used by Commissions**

Numerous appointment commissions in both Canada and the United States include diversity considerations as clear elements in the criteria used to assess candidate merit for appointment. The Ontario Judicial Appointments Advisory Committee, for instance, employs four main appointment criteria, one of which is that “the provincial judiciary should be reasonably representative of the population it serves. This requires overcoming the serious under-representation of women and several ethnic and racial minorities.” Seven state nominating commissions in America also include similar appointment criteria provisions. Such incorporation of diversity into the concept of merit also relates to the works covered in Part Two which questioned whether “merit” for judicial appointment was an objective fact or whether it is a constructed idea<sup>265</sup>, which might be used (consciously or unconsciously) as a pretence for discrimination<sup>266</sup>.

This has significance here, where discussions about increasing diversity in the judiciary inevitably maintain that merit will remain the sole criterion for selecting judges, but where there has been little attention paid to what in practice this means. What appears to be suggested is that diversity is an additional element that may be considered after other aspects of a candidate's background (which by implication constitute “merit”) are considered. However, the research evidence of the effect of judicial diversity on the public perception of the courts and on judicial decision-making indicates that diversity can in fact be integral to merit for judicial appointments in a diverse society. This topic is often seen as a particularly complex and sensitive one, and that may in part explain why there appears to be a lack of clarity or attention paid to addressing exactly how diversity fits into the assessment of merit for judicial appointment in England and Wales.

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<sup>265</sup> Johnson and Fuentes-Rohwer *supra* note 156



## **Commission Selection Outcomes**

Ultimately, it is the selection decisions of commissions that must be analysed for their impact on judicial diversity levels. The results of the Hurwitz and Lanier study highlight the importance of distinguishing between the selection of women and ethnic minorities, and also distinguishing between the selection of individuals from different ethnic minority groups in any analysis of what impact judicial appointment systems have on the levels of diversity in the system. Other research carried out here, such as the Sutton Trust study on the educational background of the senior judiciary and the forthcoming research on the background characteristics (personal, profession and social) that influence candidate success rates in gaining appointment as a Deputy District Judge<sup>267</sup>, also highlights the need to look beyond specific issues of gender and ethnicity in outcomes audits of the appointment process. These studies provide important frameworks for examining the effect of an appointment process on the diversity of the judiciary in any jurisdiction, and could serve as useful models for assessing the impact of the judicial appointment process in England and Wales on the diversity of the judiciary in future.

### **4.7.2 Career Paths**

The Review has also highlighted the fact that diversity concerns continue even when members of under-represented groups gain appointment to the bench. The rapid and significant success of women in gaining appointment in traditional career judiciaries suggests that (1) knowledge-based recruitment at (2) the early stage of a legal career benefits women. The Review highlights this in the research and experience in Italy, France, Spain and the Netherlands. Later recruitment, where selection is measured on specific types of legal experience or being known by the legal and judicial hierarchy, appears to disadvantage women and minorities. The French and Dutch experience with dual recruitment systems bears this out, with women failing to gain similar levels of appointment under the experience-based recruitment channels. In addition, the relative lack of success of women and minorities in common law judiciaries, which have only an experience-based recruitment channel, strongly reinforces this conclusion. As women succeed in very significant numbers in gaining entry to the

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<sup>266</sup> Delgao supra note 157

judiciary via the more objective knowledge-based route, but subsequently do not enjoy further career progression, there must inevitably be something in the process of advancement in a legal career or the rigidity of the selection criteria in experience-based selection systems that has produced the lack of representation and the institutionalised disadvantage against women and minorities. The Italian study identified a number of factors, but a central issue was that as the criteria for promotion became more experience based, this increasingly disadvantaged women judges who have to balance family and work commitments in a way that their male counterparts generally do not.

One other important development in a number of European civil law countries in recent years has been the creation of higher councils of the judiciary that control promotion, appointment, salary and tenure. These new judicial bodies, comprised of judges of all ranks and lay members, have reduced the traditional influence of the executive, especially the Minister of Justice, as well as the senior judiciary. The impact of these bodies on the judicial profession in European countries has some relevance here, especially with the creation of a Judicial Appointments Commission. Both the Department for Constitutional Affairs and the Lord Chancellor in many respects have enjoyed similar traditional powers in relation to judicial appointments and promotion as the Ministry and Minister of Justice did previously in continental countries. Under the higher councils, lower-ranking judges now play an active role, and judicial appraisal is also an important factor in the appointment process, a change that has coincided with an increase in the appointment of women and those from less traditional professional backgrounds (at least to the entry levels of the judiciary). As DCA is beginning to introduce appraisal schemes for some judicial posts, and the new JAC will institutionalise a role in the appointments process for lower-ranking judges, these are additional issues to be examined in future.

Finally, the study currently being conducted on promotion to senior judicial posts in England and Wales is also examining the type of experience and background that predisposes candidates to successful promotion to the higher ranks (performance on lower courts, personal background, gender). However, these types of studies are

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<sup>267</sup> Thomas and Genn *supra* note 74

invariably hampered by the secrecy and lack of transparency in the appointment process in England and Wales, most notably at the level of senior judicial appointments. Under the new JAC, it is hoped that there will be no distinction in terms of transparency between senior and other appointments, thereby enabling a greater understanding of the nature of career progression.

### **4.7.3 Political Leadership**

One final but undeniable factor leading to the diversification of the judiciary is political leadership. This “leadership factor” is much more difficult to measure empirically, but it has been demonstrably effective in the United States at the federal level and in Canada at both the federal and provincial levels. The direct involvement of senior political leaders in championing the appointment of women and minorities to the bench in both the United States and Canada indicate this is a key element of a successful judicial diversity policy, perhaps especially in common law countries.

In the 1970s President Carter was the first to adopt the nomination commission model for federal appointments as an openly acknowledged means of producing a radical reappraisal of the appointment process and change in the gender and race of appointees. President Clinton’s re-adoption of the policy a decade later, coupled with a very publicly acknowledged commitment to increase diversity, produced significant change in appointments at the federal level. In Canada, the personal actions of a number of federal ministers of justice and provincial attorneys general have also contributed to significant increases in women applying and attaining judicial office. In the late 1980s the Attorney General of Ontario, Ian Scott, not only introduced a new appointments committee as a pilot project, but followed this up personally by writing to all women lawyers in Ontario who had been at the bar for ten years or more to encourage them to consider applying for the judiciary. Within two years, 32% of judges appointed were women, and during the next two years, 46% of the judges appointed were women.

Even though political leadership appears more difficult to measure than other levers for change, Hurwitz and Lanier’s comprehensive study of the success of women and minorities in attaining state and federal judicial appointments over a substantial time

period in the United States identified the importance of what they term the “leadership effect” in bringing about change in the composition of the federal judiciary. In large part this was because many of the appointment structures they examined remained the same, and the only identifiable difference accounting for an increase in the appointment of women and minorities to the federal bench was the change of President with a clear public commitment to increasing diversity.

#### **4.8 How Diversity Factors Interact**

The five main diversity factors outlined above do not operate in isolation, and the experiences of individual jurisdictions along with judicial diversity research all indicate that there are strong connections between the five factors (some causal some reinforcing). For instance, the success of civil law jurisdictions in substantially increasing the number of women in the judiciary (overcoming lack of representativeness) strongly suggests that employment practices can certainly create the conditions which initially make the judiciary both an attractive and plausible professional option for women (career path issues), who almost invariably have larger family responsibilities than men. It also suggests that the way in which the legal profession and the judiciary operate in common law jurisdictions can work against gender diversity. Late entry into the judicial profession in common law jurisdictions where selection is based primarily on experience appears to be a factor (appointment criteria). This is further reinforced by women’s inability to progress to the higher levels of the judiciary in European countries (lack of representation and career progression issues) due in part to promotion being based on experience (appointment criteria), which disadvantages women (institutionalised disadvantage).

However, women and to some extent minorities have made much more progress in some common law jurisdictions, such as the United States and Canada, than in others, such as Australia and New Zealand. Greater judicial diversity in these common law countries appears to be a result of a combination of clear political leadership and the use of appointment commissions where diversity is either mandated in the membership of the commission and/or incorporated directly into the appointment criteria and/or championed by senior political figures with responsibility for crucial aspects of the appointment process. President Carter’s introduction of federal judicial

nominating commissions and the introduction of state “merit plans” were a means of removing perceived bias in the judiciary appointments process, alongside a clear intent at least at the federal level that appointment commissions would encourage more diverse appointments and would themselves be diverse. It is hard to imagine that the advances in the appointment of women and minorities on the federal bench in the United States would have been brought about simply by creating judicial nominating commissions and without the overtly public commitment and behind the scenes persuasion of both President Carter and President Clinton.

#### **4.9 Advancing the Study of Judicial Diversity in England and Wales**

The introduction of judicial nominating commissions for judicial appointments at both the federal and state levels in the United States in the 1970s created the conditions for a large body of research examining the effect of the new judicial appointment systems. The imminent introduction of a new judicial appointments system in England and Wales provides similar conditions for establishing the basis for significant substantive judicial research in this country. Even though this country is a substantial distance behind the United States and other jurisdictions in terms of judicial diversity research, for a number of reasons it should actually be easier to examine many of these issues here.

Unlike the situation in the United States, with its complex system of courts and judicial selection systems<sup>268</sup>, in England and Wales there is a unified court system and there is also an increasingly unified appointment system. Therefore, in applying empirical methods from American studies, the factors affecting diversity levels should be able to be isolated more easily as there are far fewer external variables to take into consideration (i.e., the variety of selection methods, legal cultures and political contexts in America). However, the drawbacks here are likely to be the continued resistance to this type of political science-based empirical research into the judiciary and the continuing lack of diversity in the judiciary to study outcomes.

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<sup>268</sup> It is this factor which has made it difficult at times to draw clear conclusions from the substantial body of research in judicial nominating commissions and diversity conducted in the United States on this issue for over three decades.

In a large number of areas there is clearly a lack of information about judicial diversity in the England and Wales, but some groundwork has been established with data gathering on the legal profession and government data on judicial diversity. While there is some descriptive, anecdotal work on judicial diversity issues in Britain, there is virtually no substantive research, and there is now a clear need to focus on comprehensive empirical research. There is also a more fundamental need to develop theoretical and conceptual approaches to examine diversity in the British legal system. American approaches need not be relied upon exclusively, as institutional and social differences exist here. British work can draw on American approaches, but a British-based approach is ultimately needed (for instance to take into account ethnicity differences and institutional differences).

The two main issues to be addressed here are (1) Where does the problem lie: is it the appointment process, the nature of the legal and judicial profession, or both? (2) What is the effect of a lack of diversity on the perception of courts and on judicial decision-making?

### **Appointment Process Research**

Research has revealed the need to take into consideration the subtleties of diversity<sup>269</sup>, as well the need to examine informal as well as formal aspects of the judicial appointment process (e.g., the role of the bar<sup>270</sup>, educational background<sup>271</sup>, etc.). Esterling and Andersen's study<sup>272</sup> on whether the gender and racial composition of the nominating commission itself affects the diversity of applicants and nominees for judicial office, could serve as a model for future research on whether the composition of the new JAC affects diversity levels in England and Wales, and this would require collection of personal background information on JAC members from the outset.

In examining why certain groups are not attaining judicial office, what is needed is a systematic explanation of the dissimilar success rates of women, specific ethnic minorities, and specific legal professionals. In order to do this, the concept of

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<sup>269</sup> Hurwitz and Lanier supra note 70

<sup>270</sup> Sheldon supra note 85

<sup>271</sup> Sutton supra note 104

<sup>272</sup> Esterling and Andersen supra note 78

“judicial minorities” needs to be broken down and examined in more detail (for example, are women more or less successful than ethnic minorities; amongst ethnic minorities are Black candidates more or less successful than Asian candidates). The forthcoming study of the process and outcomes of the Deputy District Judge competitions from 2003 to 2005<sup>273</sup> is designed to provide a comprehensive framework for both future monitoring and research of judicial appointments. That study has also revealed an increasing need for comprehensive data collection and monitoring at all levels of the judiciary, as well as independent monitoring of such data.

The more general studies in America of the decision-making behaviour of appointments commissioners<sup>274</sup> should help to understand how the new JAC will affect the appointment process here. And other American studies of the built-in dominance of the legal profession on commissions<sup>275</sup> also point to the need to explore the issue of legal background across the range of judicial appointments.

European research on the attitudes of male and female judges<sup>276</sup> can also serve as models for examining change and progress in the judicial profession here. The 20-year attitudinal study of judges in Spain<sup>277</sup> has provided that country with the means for understanding and addressing the changing concerns of judges in that country. This type of study would be extremely valuable here if it was begun at the outset of the JAC, as it would establish the basis for monitoring changes within the judiciary here and also contribute to the wider body of research on the judicial profession in Europe.

### **Effects Studies**

While some recent studies in the England and Wales have addressed the issue of the effect of a lack of judicial diversity on the perception of the fairness of courts, they are disparate studies usually involving different types of court (Crown Courts<sup>278</sup>,

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<sup>273</sup> Thomas and Genn supra note 74

<sup>274</sup> Watson and Downing supra note 80; Martin supra note 83; Henschen et al supra note 77

<sup>275</sup> Sheldon supra note 85

<sup>276</sup> de Groot-van Leeuwen supra notes 89, 90 & 160; Civinini supra note 91

<sup>277</sup> supra note 94

<sup>278</sup> Hood et al supra note 29

magistrates' courts<sup>279</sup>, tribunals<sup>280</sup>) and as such cannot individually provide a comprehensive understanding of this effect. One possibility would be to draw together existing findings, and then conduct more comprehensive opinion research into the perception of fairness of courts based on the composition of judiciary, similar to the studies conducted on state courts in the United States<sup>281</sup>. Such a survey would need to examine judicial representativeness across the spectrum of courts (civil and criminal courts, as well as tribunals) and at each level of the judiciary. It could be conducted initially as a stand alone study, but then be repeated at intervals to monitor any effects which may occur as a result of any increases in judicial diversity.

The one major area where there is no statistical or empirical research of any kind available in England and Wales is the effect of judicial diversity on judicial decision-making. The findings from this research in the United States<sup>282</sup> are significant and should not be underestimated. However, the lack of diversity in the senior judiciary in this country precludes this type of research here with appeals court panels. Only once levels of ethnic minorities and women in the appellate judiciary have increased and been sustained for some time can such studies be conducted here on the effect of increased diversity on the actual judicial decision-making process.

However, this type of decision-making research could possibly be done here at present with tribunals. Some tribunals are collegiate adjudication bodies where there may now be sufficient numbers of female and minority members to enable such research to be conducted. This work could in turn strengthen understanding of the benefits of judicial diversity and the need to include such considerations when assessing merit for judicial appointment. The need to provide strong evidence of the benefits of judicial diversity should not be underestimated. Media coverage of government policy discussions on judicial diversity<sup>283</sup> clearly indicates how much more needs to be done to make the public case for a diverse judiciary here.

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<sup>279</sup> Vennard et al supra note 26

<sup>280</sup> Genn et al supra note 27

<sup>281</sup> supra note 120

<sup>282</sup> Cameron and Cummings supra note 134, and other studies supra note 133

<sup>283</sup> In summer 2004, the *Daily Mail* headlined DCA's policy discussions on judicial diversity as *Race 'quota' scheme to appoint more black judges* and claimed that "Black lawyers should be given jobs as judges on grounds of race as well as ability, according to a plan being considered by the Lord Chancellor." Thursday 10 June 2004.



## **Legal Profession Research**

While the Law Society has conducted long-term comprehensive studies of the profession and the relative success of different groups, the Bar has clearly not addressed these issues to a comparable level, and there is a clear need for much more substantial data gathering and analysis of diversity in the Bar. In addition, neither professional bodies have addressed the economic benefits of diversity to the legal profession in any substantial way. The institutionalised disadvantage experienced by both women and minorities in the legal profession highlights the need to examine the actual business case for diversity in the legal profession. There are lessons the legal profession could draw from other professions (and other countries) in relation to assessing how greater diversity could be economically beneficial to firms and chambers. However, there has been no real movement on the part of the legal profession in England and Wales to contribute to evidence that diversity is good for business. This is clearly an area for the Bar and Law Society to address, possibly drawing on the guidelines established by the Chartered Institute for Personnel Development<sup>284</sup>.

While some information already exists on the progress of women and minorities within the legal profession (especially solicitors), the specific question of why some members have greater success in attaining judicial appointment has not been addressed in any systematic way. In order to identify the factors that may affect the success of those from more diverse backgrounds in attaining judicial appointment in comparison with those from more traditional backgrounds, it is crucial to examine and compare results from all members of the legal profession, not just those who fit a diversity profile.

This touches on a wider issue about how judicial diversity issues are addressed. Qualitative studies which only examine the perspectives of “minority” groups ultimately are weaker than a combination of quantitative and qualitative work that encompasses the perceptions of the “advantaged” groups as well and compares the relative success in gaining appointment between all groups. It is also important that a wide range of “pools” of potential judicial appointees is covered. This would include:

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<sup>284</sup> supra note 51

those at the early stage of training, just entering the profession, approaching the level of experience required for a first application, recently eligible for judicial appointment, currently outside the judicial eligibility rules, as well as those in all levels of judicial office.

#### **4.10 Implications and Priorities for the New Judicial Appointments Commission**

The recent passage of the Constitutional Reform Act 2005 establishing a new system of judicial appointments through a Judicial Appointments Commission for England and Wales has created similar conditions here as experienced in the United States in the 1970s and 1980s. This change in the appointment system also coincides with judicial diversity gaining in importance as a policy issue in England and Wales as well. As a result, the findings of this Review have specific implications for the new JAC, and suggest that there are certain priorities for the JAC at this unique period of its development and given its remit to encourage greater judicial diversity.

The Review of research and practice suggests several specific factors which, if combined, are more likely to enable nominating commissions to deliver a more diverse judiciary:

- The Commission membership itself needs to be diverse (in terms of gender, ethnicity and socio/educational background).
- The Commission needs to establish mechanisms for encouraging those from under-represented groups to apply.
- The appointment criteria need to clearly and significantly include diversity considerations.
- A greater reliance may need to be placed on knowledge-based criteria for appointment which appear to be less discriminatory.
- The use of experience-based criteria needs to be carefully monitored for the tendency to result in institutionalised disadvantage or discrimination.
- The processes and outcomes of the Commissions need to be both transparent and independently monitored.
- There has to be strong political leadership and willingness to bring about diversity.

Within this group of factors, several specific aspects of the work of the JAC are likely to be more problematic than others and are clear priority areas for the JAC to address.

### **Devising Recruitment and Consultation Methods**

One of the early priorities of the JAC will be to establish a distinction between the encouragement of individuals to apply for judicial position and the establishment of an “inside track” to appointment. The history of the “tap on the shoulder” as a means of recruitment has been problematic and a serious cause for concern in England and Wales in the past. However, the methods employed in other jurisdictions to increase applications for judicial office from members of under-represented groups have clearly involved direct encouragement of individuals to apply.

In Canada and the United States significant energies are devoted to outreach programmes by appointments commissions in order to inform eligible lawyers about the process and to actively encourage applications from those with non-traditional legal backgrounds for judicial appointment (sectors of the profession where many women and ethnic minority lawyers are found). These jurisdictions consider active recruitment to be an essential aspect of the work of the commission that is free from the inherent inequalities of the tap on the shoulder, primarily because the encouragement to apply is always followed by a rigorous post-application process using evidence-based assessment of all the candidates.

In addition, these jurisdictions inevitably undertake extensive investigations and consultation on all candidates. Here, the JAC will need to establish a distinction between clear evidence-based consultation and automatic informal consultation with the judiciary. In the past such informal consultation has led to serious criticism and a discrediting of the appointment process, especially but not exclusively amongst under-represented groups. The disadvantage of such consultation was that it was both secret and widely believed not to be required to evidence-based. Other jurisdictions rely heavily on confidential consultation with members of the judiciary in assessing candidates for judicial appointment, however such consultees are required to have direct profession knowledge of candidates that can be substantiated, and they are never the sole source of appraisal for judicial candidates.

All of these aspects of the recruitment process raise important questions for the JAC, not just about the openness and transparency of the process, but equally about the resources available to the JAC to conduct a thorough and equitable recruitment and assessment process for all judicial candidates.

### **Defining Merit in the Context of Diversity**

The question of the relationship between diversity and merit remains unresolved in England and Wales. At present it appears that diversity is an additional element that may be considered after other aspects of a candidate's background (which by implication constitute "merit") are considered. A number of other jurisdictions which have succeeded in increasing diversity on the bench have adopted a different approach, where diversity is instead incorporated specifically into the criteria for appointment. In Ontario and in a number of American states, the need for the bench to reflect the make up of the specific jurisdictions is a key appointment criteria.

This is a particularly sensitive aspect of the appointment process, but one that the JAC nonetheless will have to address in carrying out its statutory duty to promote diversity in the judiciary. It will also be for the JAC to carefully consider how the concept of "merit" may operate through informal eligibility requirements for judges (such as previous judicial experience or educational qualifications from elite faculties) in ways that may be tied to conceptions of merit about who is qualified to be a judge and are requirements that inevitably limit diversity amongst judges.

### **Monitoring the Process**

It seems increasingly likely that the JAC will be bound by the requirements of anti-discrimination legislation and directives, and as such may find that it is required to publish a Race Equality Scheme. This will require the JAC to: assess and consult on the impact of policies on race equality; monitor policies for adverse impact; publish results of assessments and monitoring; ensure public access to information and services; and train staff accordingly.<sup>285</sup> The Review of both research and practice has

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<sup>285</sup> *Commission for Racial Equality Assessment Template for Race Equality Scheme and Employment Duty* CRE (February 2005)

shown how vital it is for the JAC to have a comprehensive appointments monitoring scheme in place at the start of the Commission's work in April 2006.

To be comprehensive such an appointments monitoring scheme needs to:

- cover the full range of judicial posts within the authority of the JAC
- enable a detailed analysis of success rates by a range of candidate background factors
- examine the outcomes of competitions as well as the processes
- incorporate independent assessment

The JAC will also have to establish a complaints procedure which will engender confidence amongst those who may feel their application has not been handled correctly. This may be a particularly difficult process to get right, because the JAC will in effect have to police itself. While oversight of the new judicial appointments process will be the responsibility of the Judicial Appointments and Conduct Ombudsman<sup>286</sup>, any individual who has a complaint about the JAC's handling of an appointment will at least initially have to make that complaint directly to the JAC itself. The Ombudsman's authority will extend only to investigations of complaints made about the JAC's own investigations of individual complaints about the process. Unlike the current Commission for Judicial Appointments, the Ombudsman will have no independent authority to directly investigate complaints made by candidates for judicial appointment or to initiate reviews of competitions and the appointments process in general. For this reason, some independent monitoring of the JAC processes and outcomes is likely to instil greater confidence in the process.

The imminent introduction of the new judicial appointments system provides a unique opportunity to study and monitor the process from inception. It is also important to examine the existing appointment process before the JAC begins operation, as results could be taken on board by the JAC in establishing its working methods. This work needs to begin before the JAC is fully functioning, and then needs to be consistently and independently monitored over the long-term. Only in that way can the experience

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<sup>286</sup> Constitutional Reform Act 2005, Section 101-105

and policy development here, which has produced a new appointments process with a statutory commitment to increase diversity, begin to contribute to the wider international debate about the means and benefits of a diversity judiciary.