

## **Kuttan Menon Memorial Lecture**

### **Equality in the Judiciary**

#### **Lady Hale**

**21 February 2013**

Thank you for asking me to give this lecture in memory of Kuttan Menon. I do not think that we ever met, but reading Judge Goolam Meeran's eloquent recollections of him in the first lecture in this series,<sup>1</sup> I very much wish that we had done. We clearly had quite a lot in common. We were called to the Bar at around the same time. We left it after only a few years in practice, he to be a legal officer at the Commission for Racial Equality and me for academia, but I seriously considered applying for the equivalent of his post at the Equal Opportunities Commission when it was first advertised. We both returned to the Bar, he for some years and me for all of 11 days after leaving the Law Commission. Neither of us, I am sure, planned on becoming a judge. Judge Meeran says that when Kuttan mentioned the idea of becoming an employment judge to him, he said "don't be daft". One of my professors said something similar to me when the idea of becoming an assistant recorder was suggested (in an old-fashioned tap on the shoulder). Fortunately neither of us took any notice.

But of course the main thing which we have in common is a commitment to combating discrimination and, more positively, to the pursuit of equal treatment. In this he was obviously more effective than I have been. He brought the first successful

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<sup>1</sup> HHJ Goolam Meeran, "The early days of struggle and achievement in discrimination law", First Kuttan Menon Memorial Lecture 2006.

race discrimination claim under the 1976 Act. He fought to get tribunal judges to understand indirect and unconscious discrimination and victimisation.<sup>2</sup> He won the landmark decisions on drawing inferences and disclosing comparative material.<sup>3</sup>

The problem he faced – and to some extent we still face – is getting people who have never suffered discrimination simply on the grounds of the colour of their skin or the difference in their chromosomes to understand what it is all about. As I have heard Dame Sian Elias, Chief Justice of New Zealand, say, it is difficult to understand the humiliation suffered by people from visible minorities – in her country the Maori and Pacific Islander populations – unless you too have suffered humiliation in your life, as she did when she was battling for recognition as a commercial lawyer in New Zealand.

Which brings me to my subject. “In modern Britain”, declared my brother Sumption in his Bar Council Law Reform Lecture last November, “the fastest way to make enemies is to deliver a public lecture about judicial diversity”.<sup>4</sup> If so, I must have made a lot of enemies since I first started delivering lectures about it around the turn of the century.<sup>5</sup> I am going to start by taking it for granted that judicial diversity is a

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<sup>2</sup> Judge Meeran describes his victories in *Wilson v T & B Steelworks* (1977); *Hussain v Saints Complete House Furnishers*; *Issa and Rashid v West Yorkshire Foundries*; *Malik v British Home Stores*; *Kirby v Manpower Services Commission* [1980] 1 WLR 725.

<sup>3</sup> *King v Great Britain China Centre* [1991] IRLR 513, CA; *Vyas v Leyland Cars* [1980] AC 1028.

<sup>4</sup> “Home Truths about Judicial Diversity”, Bar Council Law Reform Lecture 2012.

<sup>5</sup> Eg “Equality and the Judiciary: why should we want more women judges?” [2001] PL 489; “Making a Difference? Why we need a more diverse judiciary” (2005) 56 NILQ 281; “The Future of the Judiciary”, Lecture at the opening of Salford Law School 2006; “Women in the Judiciary”, Lecture at Exeter University 2008; “It’s a Man’s World: Redressing the Balance”, Norfolk Law Lecture 2012.

good thing. The Neuberger Advisory Panel on Judicial Diversity<sup>6</sup> summed up the arguments which some of us have been making for a long time in this way:

“There is a strong case for judicial diversity. Not only should there be equality of opportunity for those eligible to apply but in a democratic society the judiciary should reflect the diversity of society and the legal profession as a whole. Judges drawn from a wide range of backgrounds and life experiences will bring varying perspectives to bear on critical legal issues. A judiciary which is visibly more reflective of society will enhance public confidence.”

The debate is not about whether judicial diversity is a good thing but about why it is and what should be done about it. And it raises an interesting conundrum in equality law which I would like to share with you. But first there are some uncomfortable truths to be told whichever side one takes in the debate.

First, it is an uncomfortable truth that we have so few women and BME judges, especially in the higher judiciary.<sup>7</sup> We all know the story. 22.5% of the judges in the ordinary courts – what tribunal judges call the uniform branch – are women and 4.2% are BME. It only gets that high by including the larger number of fee-paid part-timers, many of whom will never become full time judges. The figures are better in the CID. 39.6% of tribunal judges are women and 8.7% are known to be BME. But this includes an even higher percentage of fee-paid part-timers.

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<sup>6</sup> Report of the Advisory Panel on Judicial Diversity, chaired by Baroness Neuberger, February 2010, p 4, accessible at [www.equality-ne.co.uk](http://www.equality-ne.co.uk).

<sup>7</sup> The figures as at April 2012 can be found at [www.judiciary.gov.uk/publications-and-reports/statistics/diversity-statistics-and-general-overview](http://www.judiciary.gov.uk/publications-and-reports/statistics/diversity-statistics-and-general-overview). They include tribunal judges for the first time.

The figures are much worse when you get to the higher echelons in either system. Only 26.6% of the upper tribunal judiciary are women, though 11% are BME. Only 15.5% of High Court judges are women and 4.5% BME; 10.5% of Court of Appeal judges are women and no BME; none of the five heads of division is a woman or BME; and in the Supreme Court there is still only me and the only ethnic minorities we have are the Scots and the Irish.

Second, it is an uncomfortable truth that we are out of step with the rest of the world, at least in the gender of our judges. The average across the countries in the Council of Europe is 52% men and 48% women. At 23% England and Wales is fourth from the bottom, followed only by Azerbaijan, Scotland and Armenia.<sup>8</sup> It is fair to say, however, that, across Europe, the gender balance gets worse the higher the court.

Professor Paterson at Strathclyde University has compared the proportion of women in the highest courts of the 34 countries in the OECD. At 8.0%, we were at rock bottom, albeit closely followed by Turkey. Even the other common law countries are currently much better than us: three out of the nine in the Supreme Court of the United States; three out of the nine in the Supreme Court of Canada; three out of the seven in the High Court of Australia; two out of five in the Supreme Court of New Zealand. Of course, not too much can be made of this when the numbers are so small but against this picture one out of (currently) eleven does not look good.

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<sup>8</sup> European Commission for the Efficiency of Justice (cepej), *European Judicial Systems*, Edition 2012 (2010 date), fig 11.30.

Third, it is an uncomfortable truth that so many of our top judges come from such similar educational and professional backgrounds and this often but not invariably means that they also come from similar socio-economic backgrounds. It is much harder to get reliable data on this. The Milburn Report showed that around 75% of judges, 68% of top barristers, and even 55% of solicitors were privately educated (though these percentages had decreased from the mid-1980s). It also showed that lawyers typically grew up in families with an income 64% above the national average, a rise from around 40% between the 1958 and 1970 birth cohorts.<sup>9</sup>

My brethren in the Supreme Court are a good illustration. They are a very varied bunch in some ways but they mostly fit the stereotypical pattern of boys' boarding school, Oxbridge college and the Inns of Court. All of them were very successful barristers in private practice before going on the bench, although two did other things first (I was not). All but one of them has a degree from Oxford or Cambridge (as indeed do I).<sup>10</sup> All but one of them went to an independent fee-paying school (I did not).<sup>11</sup> Indeed all but three of them went to boys' boarding schools (whereas I only lived in one).<sup>12</sup>

Please do not think that I am criticising them for this. For one thing, they cannot be blamed for their good fortune. For another, however great your advantages in life, you have to have the brains, the energy, the determination and the good luck to make the most of them. And for a third, this combination of educational establishments turns

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<sup>9</sup> *Unleashing Aspiration: The Final Report of the Panel on Fair Access to the Professions* Cair, Alan Milburn MP), accessible at [www.cabinetoffice.gov.uk/media/227102/fair-access.pdf](http://www.cabinetoffice.gov.uk/media/227102/fair-access.pdf).

<sup>10</sup> The exception is Lord Kerr, who was educated at Queen's University, Belfast; both Lord Hope and Lord Reed also have degrees from Edinburgh University.

<sup>11</sup> Again the exception is Lord Kerr, who went to a Roman Catholic grammar school in Northern Ireland.

<sup>12</sup> The exceptions are Lord Neuberger, Lord Kerr and Lord Reid.

out some of the best-educated people in the country. But it also brings advantages in other ways, in who you know as well as what you know, and this can smooth your path and open doors which might remain closed to others. It can also bring with it the expectation that this will happen, an expectation which people from more modest educational backgrounds simply do not have.

On the other hand, it is an uncomfortable truth that our present unrepresentative judiciary are, apparently, very widely admired in the outside world. The Russian oligarchs want to litigate here because of their intelligence, their industry, their independence, their integrity and their incorruptibility – what I call the essential judicial in-quotients. Could this be anything to do with who they are?

It is another uncomfortable truth that our judiciary are better paid than almost any in Europe.<sup>13</sup> This is one of the many reasons why they are incorruptible. And it clearly does have a lot to do with who they are. If you assume that you are going to recruit your top judges from your top practitioners, then you have to pay them enough to make it worth their while. And it is not only the top judges. At all levels, people come into the judiciary having already achieved something in their professional lives. The rewards have to bear some relationship to the rewards of their other careers.

It is a final uncomfortable truth that the status and pay of judges in countries where there are far more women judges tend to be much lower than they are here.<sup>14</sup> We can argue about whether this is chicken or egg: are the status and pay lower because so many of them are women or are so many of them women because the status and pay

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<sup>13</sup> *European Judicial Systems*, note 8 above, figs 11.15, 11.19 and 11.23.

<sup>14</sup> *Ibid.*, cf fig 11.23 and fig 11.30.

are lower? In other words, because women are prepared to take lower paid and lower status jobs for a variety of reasons, including their domestic responsibilities? I incline to think that the latter is the correct explanation, for two main reasons: first, because many of the countries in which there are now so many women judges are civil law countries where there are many more judges anyway and that is one reason why they do not pay them so much; they also recruit by examination and young women are notoriously better at examinations than young men; and second, because some of them are former eastern bloc countries where one would not expect the status of judges to be particularly high.

It is this combination of uncomfortable truths which leads some people to fear that, if we changed the system so radically that the composition of our higher judiciary also changed radically, we might not like what we saw. In fact, might it not be a whole lot worse? Would a radical increase in the numbers of women and BME judges lead in time to lower pay, lower status and ultimately to a less able judiciary? I raise this demon, not because I believe in it, but because I fear that there are some who do, but may not wish to say so publicly.

Despite that, one of the biggest changes I have seen over the past two decades is that more and more people have come to recognise that we do have a problem. Authors as diverse as David Pannick in 1987<sup>15</sup> and Helena Kennedy in 1993<sup>16</sup> began to raise questions about the composition and appointment of the judiciary. JUSTICE proposed an independent judicial appointments commission as long ago as 1992.<sup>17</sup> Successive

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<sup>15</sup> *Judges*, Oxford University Press 1987, pp 59-60.

<sup>16</sup> *Eve was Framed: Women and British Justice*, Chatto & Windus, 1992, Vintage Books, 1993, esp pp 265 *et seq.*

<sup>17</sup> JUSTICE Report on the Judiciary in England and Wales, 1992.

Lord Chancellors, beginning with Lord MacKay, began to make a difference. The Lord Chief Justice, Lord Taylor, acknowledged in 1992 that things needed to change but thought that they soon would, as the talented women now joining the profession began to “trickle up”.

The pace hotted up after the 1997 election. The Labour party had already adopted proposals for a judicial appointments and training commission.<sup>18</sup> The legal professions set up a Joint Working Party on Equal Opportunities and Silk which reported in 1999. The Law Society’s had adopted a particularly far-sighted policy: an independent appointments commission; a modernised appointments process with no secret soundings; widening the pool of candidates; and developing a coherent judicial career structure.<sup>19</sup> Once in office, however, Lord Irvine dropped plans to consult on a judicial appointments commission and instead set up Sir Leonard Peach’s enquiry into the appointments process.<sup>20</sup> The result was the appointment of a Commission for Judicial Appointments to scrutinise his Department’s processes. The findings made uncomfortable reading. In June 2003, as part of the package aimed at abolishing the ancient office of Lord Chancellor, the Government announced that it would be consulting upon an independent judicial appointments commission.<sup>21</sup> This became official Government policy in 2004.

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<sup>18</sup> Labour Party, *Access to Justice: Labour’s proposals for reforming the civil justice system*, Conference paper, 1995.

<sup>19</sup> The Law Society, *Broadening the Bench: the Law Society proposals for reforming the way judges are appointed* (2000).

<sup>20</sup> Sir Leonard Peach, *An Independent Scrutiny of the Appointments Process of Judges and Queen’s Counsel in England and Wales*, December 1999.

<sup>21</sup> See Department for Constitutional Affairs, *Constitutional reform: a new way of appointing judges*, CP 10/03, July 2003.



There was more than one reason for this. Once the responsible minister no longer had to be a very senior and well-respected lawyer, qualified to head the judiciary, people were concerned about the influence of party politics on judicial appointments. We had not had party politically motivated appointments for a long time, possibly since the second world war, and no-one wants a system which looks anything like the partisanship of the American courts. So while the initial proposal was that five names would be put up to the Lord Chancellor for the most senior judicial appointments, this was eventually withdrawn, and only one name can be put forward. His options if he is uncomfortable with that name are very limited.<sup>22</sup> So we have gone from a process which, ostensibly, was solely in the hands of a political figure, to a process in which he has very little influence at all. Yet there seems to be general (though not universal) support, and certainly from the House of Lords Constitution Committee, for this withdrawal of the politically accountable Parliamentarians from the selection process.<sup>23</sup>

But a major motivation for the change was to increase the diversity of the bench at all levels. This too provoked a reaction in Parliament, because so many people thought that merit and diversity are competing rather than complementary values. So the proposal from the Joint Committee on Human Rights,<sup>24</sup> that there should be a duty akin to that in Northern Ireland, to appoint a judiciary reflective of the community it serves,<sup>25</sup> was rejected. Instead there is a duty to “have regard to the need to encourage

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<sup>22</sup> See, eg, his powers in relation to appointments to the Supreme Court, Constitutional Reform Act 2005, ss 28 to 31.

<sup>23</sup> House of Lords, Select Committee on the Constitution, 25<sup>th</sup> Report of Session 2010-2012, *Judicial Appointments*, HL Paper 272; cf, eg, the evidence from JUSTICE and from the Equal Justices Initiative.

<sup>24</sup> Joint Committee on Human Rights, 23<sup>rd</sup> Report of Session 2003-2004, *Scrutiny of Bills: Final Progress Report*, para 1.83.

<sup>25</sup> Justice (Northern Ireland) Act 2004, s 3.

diversity in the range of persons available for selection” (s 64(1)). But this is subject to section 63(2), which provides that selection must be “solely on merit”. So, as some of us have always known, it is not enough to get the appointments process right, though that is hard enough. We have to get the definition and assessment of merit right too and that is much harder.

Six years on there has undoubtedly been some progress. More women and BME candidates are applying and being appointed. The figures quoted earlier, uncomfortable though they are, are a good deal better than the figures of ten years ago. But it was always a mistake to think that transferring appointments from the Lord Chancellor to the Commission would do the trick. For one thing, the system was already beginning to change. As Lord Sumption has pointed out, under the old “tap on the shoulder” system the Lord Chancellor’s Department depended almost entirely upon the information supplied by the judges to know whose shoulder to tap. He does not believe that the judges were “out to clone themselves”, to utilise Helena Kennedy’s evocative expression.<sup>26</sup> But, he continues, “it would be foolish to pretend that they were not occasionally influenced by unconscious stereotyping and by perceptions of ability moulded by their own personal experiences”. I would merely drop the “occasionally”. And of course they were only fishing in the conventional pool.

However, by the time the JAC was set up, the great majority of appointments up to and including the High Court were based on applications rather than taps on the shoulder. The qualities thought to comprise merit had been made public. The methods

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<sup>26</sup> *Eve was Framed, op cit*, p 267.

of assessing these were being refined. The Commission simply carried on these developments with, I would suggest, more enthusiasm and more independent specialist knowledge of the best recruitment practices. They have also taken many more active steps to encourage under-represented groups to consider a judicial career.

But there was still concern at the slow rate of progress. In 2009, the new Lord Chancellor and Secretary of State for Justice, Jack Straw, appointed an Advisory Panel on Judicial Diversity, chaired by Baroness Neuberger, which reported in 2010.<sup>27</sup> The politicians and Parliamentarians have kept up the momentum. In 2011, the House of Lords Constitution Committee launched an inquiry into judicial appointments, which reported in March 2012,<sup>28</sup> and the Ministry of Justice itself proposed a few modest reforms, some of which were aimed at increasing diversity.<sup>29</sup>

The main message to emerge from all this activity is that process of choosing the best candidates is only part of the story. It is but one episode in a long running serial. Either side of the JAC there sit episodes in the saga which tend to disadvantage non-standard candidates. This begins with our education system, which, as Lord Sumption puts it “tends to perpetuate disadvantage”, or as others might put it, “tends to perpetuate advantage”. The Sutton Trust has shown that students from independent schools are more likely to go to Oxbridge and other top universities than are state school students with the same grades – not necessarily because the universities are discriminating but because the state school students are not applying.<sup>30</sup> Recruitment to

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<sup>27</sup> *Op cit*, note 6.

<sup>28</sup> *Op cit*, note 23.

<sup>29</sup> Ministry of Justice, *Appointments and Diversity: A Judiciary for the 21<sup>st</sup> Century*, CP 19/2011, November 2011.

<sup>30</sup> Sutton Trust, *The Missing 3000*, State School Students under-represented at leading Universities, 2004; Sutton Trust, *State School Admissions to our Leading Universities, An update to*

law jobs, whether as barristers or solicitors, is left to the market. The market favours a small number of top universities. An Oxbridge graduate with a non-law or lower class law degree is more likely to be recruited than a post-1992 university graduate with a first class law degree.

The serial continues with what Lord Sumption calls “the patterns of working in ancient professions”. For the Bar, this means all the reasons why many able but sensible women choose either to go into another branch of the profession or to leave the Bar after giving it a go for a few years. I was once foolish enough to say that the Bar was one of the most family unfriendly professions in the world.<sup>31</sup> I was properly taken to task by a successful woman silk, who complained that I would put able young women off coming to the Bar by such accusations. Of course, it is possible to “have it all” if you have the sort of practice which pays so much for individual cases that you can afford to pick and choose between them, to live close to your work, to employ a nanny and other help in the house, to send the children away to boarding school and so on. It also helps to have a supportive partner. But that is not the life which I experienced at the common law Bar in the 1970s and I do not believe that it is the life that many young women experience at the Bar these days. If it was there would not be such a steady rate of attrition.<sup>32</sup> If the Bar were really serious about helping young women to stay in independent practice, it would have done more to support the project to set up a Bar nursery.

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*‘The Missing 3000’*, March 2005; Sutton Trust, *Sutton Trust Submission to Sir Martin Harris: Widening Access to Selective Universities*, January 2010.

<sup>31</sup> “An exclusive interview with Lady Hale, 16 September 2010, accessible at [www.ukscblog.com](http://www.ukscblog.com).

<sup>32</sup> Bar Council, *Bar Barometer: Trends in the Profile of the Bar*, December 2011; December 2012.

For the solicitors' profession, the patterns of work may be rather different, but the pressures of "presenteeism" in the top City firms are very like the pressures I see upon my investment banking daughter and they are very hard to combine with a normal family life. The other problem, as we all know, is that many solicitors' firms do not value judicial appointments in the way that the Bar traditionally has done. So they are not keen for their partners to take the part time fee-paid appointments which these days are an essential stepping stone to greater things.

Lord Sumption also refers to "unspoken, often unconscious, attitudes which have been many years in the making". It is not difficult to imagine what he means. It is, after all, not very long ago that women barristers and judges were not allowed to wear trousers in court, but were expected (and probably wanted ) to wear men's wigs, and (in the case of Dame Elizabeth Butler-Sloss) were addressed as "My Lord". Pretty young women elected to the Northern Circuit were expected to get up on the table (although not, as I recall, to dance round a pole).

Tellingly, of course, he refers to the "ancient professions". One of the principal differences between this country and the rest of the common law world is that we still have a divided legal profession. This means that we have a comparatively small class of people who are seen as natural candidates for the bench, particularly in the higher courts. They are, because of the pressures under which they work, remarkably able, hard-working, independent-minded and courageous people. They also know what the courts are all about. And they are known to the judges whose views still count for something when it comes to judicial appointments.

So it is not surprising that there are stereotypes about who gets what sort of judicial job. Not long ago, it was taken for granted that only the top silks were qualified for appointment to the High Court bench. Successful senior juniors would qualify for the Circuit Bench. Solicitors would become county court registrars and stipendiary magistrates (not yet called judges). A much wider variety of professional lawyers, including quite a few who practised as academics, might become tribunal chairs. In recent years, we have seen a tiny number of solicitors become High Court judges; a much larger number of silks and solicitors become Circuit Judges; and barristers also becoming district judges. But the percentage of “non-barristers” listed against each judicial post in the official statistics bears out the traditional assumptions: they are less than 2% in the High Court and above but getting on for 90% of District Judges and 69% of tribunal judges (interestingly, the figure is much the same in both upper and first-tier tribunals).

Of course it is possible to argue that this is because they are the best qualified for the job. But I am simply not prepared to make that assumption. It is not made in other countries, such as Canada and Israel. It feels both self-seeking and implausible – self-seeking because it reserves the top jobs for the top barristers, only 12% of whom are women – and implausible because any University teacher can list many able graduates who could have made excellent judges but who went into a different branch of the law.

The next episode in the saga consists of the written or unwritten requirements for judicial appointment. These days, you are most unlikely to get a salaried appointment unless you have previously sat as a fee-paid part-timer at the same level. The good

side to this is that people can be tried out, and people can try out the job, before either side is committed to an appointment from which judicial independence means that, in reality, they cannot be sacked. The bad side is that you have to get on the ladder. But it is worse than that, because you won't get a High Court appointment unless you have sat as a deputy high court judge and until recently that was in the hands of the Heads of Division. Nor will you be thought eligible for, say, the Family Division unless you have already been ticketed to do public law family work. And the ticketing system has nothing to do with the JAC. It depends upon the business case as well as suitability. So there are some very able specialists who might be well suited to a High Court appointment who will not be thought eligible because they have not been granted the appropriate tickets.

Hence the main defects in the current system, argues Lord Sumption, are the lack of any facilities to train newly appointed judges before they take up their appointments and the "highly prescriptive job descriptions" prepared by the Courts Service and Ministry of Justice. The requirement is for people who can "hit the ground running" rather having time to work themselves in. This, he says, puts pressure on the Commission to choose "safe" candidates in preference to those with less experience but greater potential. He says that the Commission is quite good at resisting these pressures but it cannot ignore them altogether. This is where he would welcome some change and, of course, so would I, because it is just this sort of pressure which makes it difficult for non-standard candidates to be taken seriously.

The final episode in the saga is the lack of a proper judicial career structure which enables those who do have a salaried judicial appointment to make progress through

the ranks. At least the armed forces are only divided into officers and other ranks for entry purposes. The judiciary are divided into four: the “officers”, the High Court and above, the “non-commissioned officers”, the Circuit Bench and some equivalents, and the “other ranks”, the district judges and their equivalents and the “unranked”, the salaried tribunal judges. There is direct entry, after a period of part time service, at every level. Those hoping for promotion from one level to another have to compete with the direct entry candidates and may face a variety of difficulties in doing so.

So it is not surprising that the main message from Baroness Neuberger and the House of Lords is that we need to bring about change in as many of these episodes as we can. The legal professions, as well as the Court Service, the Ministry of Justice, the Lord Chancellor and the leaders of the judiciary, have to try to attack each of these obstacles to further progress. The principal recommendation of the Neuberger panel was that “There should be a fundamental shift of approach from a focus on individual judicial appointments to the concept of a judicial career. A judicial career should be able to span roles in the courts and tribunals as one unified judiciary.”<sup>33</sup>

My own shopping list would emphasise the need to look for and encourage top quality candidates from wherever they might be found among those who profess the law. This would include tackling the prescriptive job descriptions and lack of training. It would no doubt entail some changes in the selection processes, which can seem designed to favour those who are already familiar with the jurisdiction in question over those who with the greater potential. And it would entail giving some serious thought to the structure of the judicial profession as a whole. This would include methods of

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<sup>33</sup> *Op cit*, note 6, recommendation 1, p 7.



working, because some features of the judicial life are likely to deter some very able candidates from applying.<sup>34</sup> All of this would make it more likely that able candidates from non-standard professional backgrounds would be appointed and that in itself would be likely to improve diversity.

All this amounts to affirmative action but it does not amount to positive discrimination. Thus far Lord Sumption and I largely agree about the diagnosis of the problem, although we may not always agree about which parts of the explanation are a bad thing. Where I respectfully disagree (as we judges say) with Lord Sumption is in his belief that we will not make quicker progress (if it would be progress) without some measure of positive discrimination which he thinks would be a bad thing. I disagree because I think that tackling the above obstacles would make a considerable difference if it were done with the right amount of enthusiasm. I was glad to see that the House of Lords Constitution Committee did not see merit as narrowly defined and certainly did not see high quality advocacy as a necessary component.<sup>35</sup> But then I would say that, wouldn't I, not having been a high quality advocate myself, except in Faculty meetings?

The House of Lords Constitution Committee did take a tentative step in the direction of positive discrimination by recommending that the “tie-breaker” provision in section 159 of the Equality Act 2010 should apply to judicial appointments. Views differ about whether this would make a difference. Some think that it might do so in the larger selection exercises for the lower ranks of the judiciary, where it could be very

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<sup>34</sup> Dame Hazel Genn, *The attractiveness of senior judicial appointments to highly qualified practitioners, Report to the Judicial Executive Board*, Directorate of Judicial Offices for England and Wales, December 2008

<sup>35</sup> *Op cit*, note 23, para 84.

difficult to rank all of the candidates in strict order or merit. But for individual appointments at the higher levels, some doubt whether two candidates are ever truly equal, if you drill deep enough.<sup>36</sup> Others argue that the assessment of comparative merit is an inherently subjective exercise – how do you rate each candidate against each desirable quality and how do you rate each quality against the others? So you might well end up with candidates who were equally well-qualified.<sup>37</sup> I take the latter view, because there is so much room for variation in choosing, assessing and then weighting the various parameters involved in merit. The Constitution Committee were uncertain how often it would be used, but recommended that it should be allowed. It might enable more candidates from under-represented groups to be appointed. And it would “send out a strong signal that diversity in judicial appointments is important, without undermining the merit principle”.<sup>38</sup>

Lord Sumption does not say that he is against section 159, perhaps because he thinks it will have very little impact. He is certainly against any other kind of positive discrimination, whatever form that might take. This is for two main reasons. The first is that it would dilute the quality of the bench; it would deter the best candidates from applying – that is, the top white males would not apply if they thought (as was apparently the case when the JAC started work) that they would be discriminated against; and the top women and BME would not apply because they want to be appointed on merit alone and not because of their gender or ethnicity. We do not know whether this would happen. I tend to think that the judiciary would be better off without prima donnas who might not apply for such reasons. There is some evidence

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<sup>36</sup> Including Lord Sumption, JAC Chair Christopher Stephens, and Baroness Neuberger.

<sup>37</sup> Including the then Lord Chancellor, Kenneth Clarke, Lord Neuberger, Lord Justice Goldring and Lady Justice Hallett.

<sup>38</sup> Para 101.

that women are put off applying because of the perceived macho culture in the higher judiciary so they might welcome a more congenial atmosphere.<sup>39</sup> We are, after all, talking about minute differences in quality here. No-one is suggesting that people should be appointed who will not be able to do the job and do it very well.

His second reason is that he does not have much sympathy with the argument that diverse courts are better courts, because they are able to draw upon a diversity of experience in reaching their decisions.<sup>40</sup> He thinks it overstates the importance of personal as opposed to vicarious experience. He points out that many of the advances in recognising the vulnerability of women or developing the anti-discrimination laws were made by courts composed of white males. That is, of course, true, if only because for the most part there were no other sorts of court. We women have always recognised with gratitude that we would never have got anywhere without some wonderful men who understood and sympathised with our situation. You do not have to be a woman to be a feminist and the reverse is also true.

I too used to be sceptical about the argument that women judges were bound to make a difference,<sup>41</sup> but I have come to agree with those great women judges who think that sometimes, on occasions, we may do so.<sup>42</sup> That is the result of the lived experience of being a judge for 19 years now and a Law Lord for nine. Of course, the cases I remember most clearly are the ones where I failed to make a difference, because I failed to persuade my colleagues to see things the same way as I did. On those

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<sup>39</sup> Hazel Genn, *op cit*, note 34.

<sup>40</sup> Erika Rackley, *Women, Judging and the Judiciary: from difference to diversity*, Routledge, 2013, argues that this is the argument which really matters, because it is the one which demands that something be done.

<sup>41</sup> “Equality and the judiciary: why should we want more women judges?”, *loc cit*, note 5.

<sup>42</sup> Beginning with Madam Justice Bertha Wilson, “Will women judges really make a difference?” (1990) 28(3) Osgoode Hall Law Journal 507.

occasions, there is still a benefit in having someone there to voice the minority view, perhaps to lay down a marker for the future, and perhaps to reassure that part of the human race that holds up half the sky that someone up there is listening.<sup>43</sup> More objective evidence for difference lies in *Feminist Judgments*, a recent experiment in re-writing a variety of well-known judgments from a feminist perspective and seeing what a difference that can make.<sup>44</sup> This shows that a different perspective can indeed make a difference, not only on so-called “women’s issues”, but on the whole range of legal issues which may come before the courts. Different voices add variety and depth to all decision-making. Women judges may think that some of the results are only common sense – which just shows how gendered a concept like common sense can be.

So I agree with Professor Paterson, that what a person can “bring to the mix” is an important component of his or her merit, at least in a collegiate court where decisions are made in panels.<sup>45</sup> Everyone brings their own “inarticulate premises” to the business of making the choices inevitably involved in judging. As Robert Stevens has argued, “The reason why England needs a more diverse bench is because there needs to be a greater diversity in the ‘inarticulate premises’”.<sup>46</sup> The great Lord Bingham seems to have agreed. He pointed out that merit “is not self-defining”. It “directs attention to proven professional achievement as a necessary condition, but also

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<sup>43</sup> Madam Justice Claire L’Heureux-Dube, “The Dissenting Opinion: Voice of the Future?” (2000) 38 Osgoode Hall Law Journal 495/

<sup>44</sup> R Hunter, C McGlyn, Erika Rackley, *Feminist Judgments: From Theory to Practice*, Hart, 2010.

<sup>45</sup> Alan Paterson and Chris Paterson, *Guarding the guardians? Towards an independent, accountable and diverse senior judiciary*, CentreForum, 2012.

<sup>46</sup> “Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World” (2004) 24 *Legal Studies* 33.

enables account to be taken of wider considerations, including the virtue of gender and ethnic diversity”.<sup>47</sup>

We take it for granted, at least for the High Court and Court of Appeal, that the candidate’s area of professional expertise can be taken into account. In the Supreme Court, that expressly includes the need for expertise in the law and practice in Scotland and Northern Ireland.<sup>48</sup> There would be nothing to stop our seeking a diversity of professional and other backgrounds. The difficulty lies in taking the protected characteristics into account.

Our equality laws depend upon the proposition that race and sex are *not* relevant qualifications, or disqualifications, for any job save in very exceptional circumstances. It may be a genuine occupational qualification to choose a black Othello or a female Desdemona, but could it be thought a genuine occupational qualification to bring a minority perspective to the business of judging in the higher courts? So do we need to revive the argument for some special provision, akin to that in Northern Ireland, to enable the appointing commissions to take racial or gender balance into account when making their appointments? Would that really be such a bad thing?

I think not, but I do wonder how Kuttan Menon would have answered that question.

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<sup>47</sup> Tom Bingham, “The Law Lords: who has served”, in L Blom-Cooper, B Dickson and G Drewry (eds), *The Judicial House of Lords 1976-2009*, Oxford University Press, 2009, p 126.

<sup>48</sup> Constitutional Reform Act 2005, s 27(8).