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Gender Equality in the Judiciary in England and France: Making it a living reality

Elizabeth Gibson-Morgan
Université François Rabelais, Tours

Abstract

Under the much acclaimed section six of the European Convention on Human Rights, everyone has the right to a fair trial handled by independent and impartial judges. Equality before the law does not only apply to court-users, but to those in charge of delivering justice. Thus, from a purely legal viewpoint, gender should not be an obstacle in the recruitment process of judges and in their evolution within the judiciary. The independence of the latter should start with a fair transparent selection of those in charge of delivering justice. Yet, in spite of the progress made in both England and France to guarantee would-be judges equality of opportunity and thus a fair access to the judiciary within the spirit of the English Magna Carta (1215) and the values of the French Republic, there is still *de facto* a form of discrimination as well as a glass ceiling preventing women from reaching the top Bench. The question is highly topical as women now form the great bulk of law students in both England and France. Thus, 80% of the successful candidates to the French judicial training college are women, thereby modifying the composition of the judiciary, whereas, senior female judges in the UK, starting with Lady Hale – the only female justice of the Supreme Court – go on to criticise the lack of gender as well as of ethnic diversity in the judiciary. The Labour party is now calling for positive discrimination in the selection process.

Key words: women judges – the judiciary – impartiality – independence – judicial diversity – the ECHR

Résumé

En vertu du célèbre article six de la Convention européenne des droits de l'homme, chacun a droit à un procès juste et équitable assuré par un juge indépendant et impartial. L'équité ne s'applique pas aux seuls justiciables, mais aussi à ceux qui ont pour tâche de rendre justice, autrement dit, aux serviteurs de la loi eux-mêmes. Ainsi, du point de vue du droit, l'appartenance du juge à la gente féminine ne saurait en aucun cas constituer un obstacle dans le processus de recrutement et/ou d'avancement des magistrats. Pourtant, en dépit des progrès visant à garantir l'égalité des chances à la fonction de magistrat dans l'esprit de la Grande Charte des Libertés de 1215 au Royaume-Uni, et des valeurs de la République en France, il existe toujours dans les faits une forme de discrimination, voire un redoutable plafond de verre à l'encontre des femmes magistrats. La question est plus que jamais d'actualité car les femmes constituent la majorité des étudiants en droit au Royaume-Uni et en France, et sont de plus en plus nombreuses à rejoindre les rangs de la magistrature. Ainsi 80% des candidats qui réussissent le concours d'entrée à l'École Nationale de la Magistrature (ENM) sont des femmes, ce qui est en train de modifier la composition de la magistrature en France, alors que des femmes hauts magistrats à l'instar de Lady Hale – la seule juge de la Cour suprême du Royaume-Uni – dénoncent inlassablement le manque de diversité quant au nombre de femmes mais aussi de membres des minorités ethniques parmi les juges britanniques. Le parti travailliste réclame l'application de la discrimination positive au processus de recrutement des juges.

Mots clés: femmes juges – la magistrature – impartialité – indépendance – diversité du corps judiciaire – la CEDH

Introduction

“Dignity, equality and fairness. These are the ideas from which our various Human Rights flow” (...) the greatest of these is equality”, Shami Chakrabarti, the Director of the Human Rights Campaign Group Liberty¹ (Chakrabarti, 2014) asserted vigorously. In every democracy, equality before the law is indeed a core principle. Equality is enshrined in the French constitution and a statutory duty in the United Kingdom. It took France no less than a Revolution in 1789, followed by some fifteen fully-written constitutions including a major revamping of the current one in 2008 to enshrine equality in the law. The duty falls upon French judges as servants and living symbols of Republican Law to apply it correctly and equally for all.

Though still deprived of a codified constitution, the United Kingdom celebrated throughout 2015 the 800th anniversary of *Magna Carta*, a fully written feudal charter which established for the very first time that everybody, including the King, was subject to the law². One of its famous provisions under chapter 40 which is still part of the English Common Law reads: “to no one will we deny or delay right or justice”. An indispensable requirement of the Rule of Law is for British judges to be impartial and independent and they in turn have a special responsibility to make sure this founding principle of the British democracy is respected.

Unlike judges of the English Common Law, mainly defined as a judge-made law, French judges are mainly expected to be the mouth of the Law, interpreting it when necessary, but banned from taking part in the law-making process. The assumption in both countries is that the personal characteristics of individual judges, in other words judges’ political views, personal considerations or gender, are not relevant to how cases are decided. A most eminent British judge, the late Thomas Bingham, defined them in the following way: “judges are a neutral, colourless, undistorting medium through which the law is transmitted to those bound by it”³. (Bingham, 2011) In so doing they are very powerful, not that they detain any political power but they possess sentencing power which can go as far as depriving an offender, once convicted, of his most fundamental right: the right to liberty. Before 1969 in the United Kingdom and 1981 in France, judges held people’s lives in their hands as they could sentence serious offenders to death.

Gender was not officially an issue in the Judiciary as those who deliver justice are not identified as men or women but simply as judges, that is to say, faceless judicial

¹ Shami Chakrabarti. *On Liberty*. London: Allen Lane, 2014, foreword, p10.

² Though Magna Carta did not put an end to the inequalities between men and women. See the article of David Carpenter in The Guardian entitled “Magna Carta: 800 years on”, published on 2 January 2015.

³ Thomas Bingham. *Lives of the Law. Selected Essays and Speeches 2000-2010*. Oxford University Press, 2011, p 128.

office- holders. As the experts of the European Commission for the efficiency of justice stated: “gender issues are new issues of concern within the judiciary”⁴ (Council of Europe, 2012). Judges are expected to leave their casual clothes, personal considerations and characteristics, prejudices, if any, at the door of the court-room. The way they dress, behave and speak in the court-room is highly codified. It is perhaps even more the case in the officially non-codified English Common Law where judges wear the full legal regalia with wigs and gowns. While this has its importance as it separates the judicial office from the person and thus guarantees judges’ anonymity, protecting them from potential retaliation and placing them in a position of authority, this strange world with its own codes, practices and rituals may appear somehow frightening, not to say dehumanized, in lay people’s eyes. Besides, unlike members of Parliament, judges are not the elected representatives of the nation and their judicial decisions are not based on political considerations. In the same way, they are not supposed to represent any particular category or sub-group of the population.

Thus, they are people with a special status and specific duties and responsibilities which are encapsulated in the oath they take before being able to sit as judges. Unlike French judges, British judges have to swear a double oath, an oath of allegiance to the Monarch as they are Her Majesty’s judges, officially appointed by the Monarch by patent letters, and a judicial oath swearing that they will “well and truly serve their Sovereign in their office and will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will.”⁵ French judges who are formally appointed by the President of the Republic under article 13 of the 1958 Constitution only have to take a judicial oath under which they swear to “fulfill their office well and faithfully, to keep the secrecy of deliberations and of the votes even after the end of their term in office and to behave in everything as a dignified and loyal judge”⁶. Both French and English judges are under a legal obligation of confidentiality. Yet, secrecy seems more deeply rooted in the United Kingdom than in France as its judges were recruited until fairly recently on the basis of secret soundings under the patronage of the Lord Chancellor⁷.

For a long time the judiciary in France and the United Kingdom had a common characteristic which was that it was a male preserve. Men were a majority in Law Schools and in the legal profession. Thus, in the Bordeaux Law School it was well-known in the past that young women joined the School not so much to read law but

⁴ Council of Europe, the European Commission for the Efficiency of Justice, “Evaluation Report on European Judicial Systems”, 2012 edition, p5.

⁵ <https://www.judiciary.gov.uk> (Courts and Tribunals Judiciary oaths) [Accessed 8/11/14]

⁶ In French, the judges’ judicial oath reads: «*Je jure de bien et fidèlement remplir mes fonctions, de garder le secret des délibérations et des votes même après la cessation de mes fonctions et de me conduire en tout comme un digne et loyal magistrat*».

⁷ <https://jac.judiciary.gov.uk> [Accessed 8/11/14]

to find a husband. French Law Faculties are very different now from what they used to be as there has been a massive feminization not only of students – two thirds of law students are women – but also of members of staff, except for university vice-chancellors. The British Queen’s Counsel, Helena Kennedy, has observed the same phenomenon in the United Kingdom, noting that “over 50% of students in law schools are female” and that “women are more visible in courts”⁸. (Kennedy, 2005) Yet, to date, there has not been a single female Lord Chancellor and Secretary of State for Justice in the United Kingdom⁹. By contrast, France has had three women *Garde des Sceaux* – Minister of Justice and Keeper of the Seals. Elisabeth Guigou, born in Morocco, was the first woman ever to become *Garde des Sceaux* in 1997 in the cohabitation government of the Socialist Lionel Jospin under the presidency of President Jacques Chirac. She did much to strengthen the presumption of innocence during her three years as *Garde des Sceaux*. Ten years afterwards, in 2007, Rachida Dati, a former graduate from the French Judicial Training College (ENM), was nominated at this prestigious office by the former President, Nicolas Sarkozy. She thus became the highest-ranking person of North African descent in France¹⁰. The current Socialist President, Francois Hollande, in the wake of the 2012 presidential election, appointed Christiane Taubira¹¹, a Black woman from Guiana, as *Garde des Sceaux* (Taubira, 2009) who is a staunch supporter of minorities’ rights¹². While the United Kingdom is trying to find ways out of a predominantly white male judiciary with only 23% women judges, the massive feminization of French judges with 64% of women well over the European average of 48% is starting to cause concern as some fear that male judges in France might become extinct¹³. Beyond the question of judicial diversity what is really at stake is the quality and efficiency of justice including access to justice.

8 Helena Kennedy. *Eve was framed. Women and British Justice*. London; Vintage Books, revised ed. 2005, p1.

9 The current Lord Chancellor and Head of the Justice Ministry is the former Education Minister, Michael Gove. He was nominated by David Cameron now serving a second term in office after his party won a majority of seats in the 2015 UK General Election.

10 She was trained as a judge in the Bordeaux Judicial College in 1997.

11 She was fiercely attacked for having sponsored what became the 2013 Law on Same-Sex Marriage in France.

12 She has herself written on the topic of equality and diversity including a book entitled *Egalité pour les Exclus: Le Politique face à l’histoire et à la mémoire coloniales*. Paris: Le Temps Présent, 2009.

13 Owen Bowcott, “UK among worst in Europe for employing female judges”, *The Guardian*, 20 September 2012.

One of the main aims of the current paper will be to show that a more gender balanced judiciary is key to the quality of justice along the lines suggested by Lord Falconer, a former Lord Chancellor, who claimed that: “If judges are insufficiently diverse, then their quality declines”¹⁴(Irvine, 1998). The first part will be devoted to the treatment of women judges by the law. Then, the next part will focus on the recruitment process of judges in France and England, examining more specifically whether it guarantees equal access to the Bench as required by law and whether equality has become a reality in both countries. Finally, the main trends and patterns regarding women judges’ status will be highlighted before drawing some general conclusions.

Equality proclaimed

Under one of the most famous provisions of the European Convention on Human Rights article 6 (1), which is now part of the French codified Law but also of the English Common Law, hearings must be carried out by an independent and impartial tribunal established by law. Thus, judicial independence is firmly rooted in both France and the United Kingdom. The need for an independent judiciary was already a key preoccupation for the drafters of the French 1789 Declaration of the Rights of Man and the Citizen¹⁵ which included the principle of separation of powers, a founding principle of the French Republic. Article 16 states that: “A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all”. In the United Kingdom where there is still no codified constitution, the independence of the judiciary from the executive was achieved very early on with the Act of Settlement 1701, yet there was no formal separation between the judiciary and the legislature until the Constitutional Reform Act 2005¹⁶. However, the highly paradoxical situation in both countries is that the responsibility for the independence of the judiciary lies with the Lord Chancellor and Secretary of State for Justice in the UK and the President of the Republic in France, who are not detached from party politics. In spite of that, significant safeguards exist to guarantee the independence of judges without which there can be no justice. Both countries have a remarkably competent judiciary which still benefits from people’s trust unlike many other institutions, including Parliament. However, equality and diversity are not always as well protected as they should be in the recruitment process of judges on the Bench, especially at the top.

14 This is what he said in a speech to the Association of British Women Barristers delivered in 1998.

15 The latter used the English Magna Carta (1215) as a source of inspiration.

16 Under section 3(1)

In France, formal equality was first introduced in the wake of the 1789 Revolution and in the Declaration of the Rights of Man and the Citizen that followed. Thus the French conception of equality is deeply embedded in the tradition of republican universalism. Article 1(1) of the Constitution of the French Fifth Republic states that: “It (France) shall ensure the equality of all citizens before the law, without distinction of origins of race or religion”. The fact that gender is not mentioned can be explained by the fact that the French people being indivisible like the Republic itself, no sub-groups or communities can be acknowledged officially. So, until recently, only formal equality was enshrined in the constitution which in France is at the apex of the hierarchy of norms. Yet the law of 8 July 1999 introduced equal access of women and men to electoral mandates, paving the way for the constitutional change of 28 March 2003. It led to the incorporation of a new paragraph in article 1 of the Constitution promoting “equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility”. Acknowledging professional equality between men and women as a constitutional principle is a significant step but it is not enough for, as Helena Kennedy pointed out, what matters is what she calls “ameliorative” or “substantive equality” (Kennedy, 2005), that is to say real equality. French legislators seem to have reached the same conclusion as can be seen with the law of 4 August 2014 - “la loi pour l’égalité réelle entre les femmes et les hommes” – aiming at introducing this time “real equality” between women and men. A few years before that law, on 12 May 2009, at the European level, the Committee of Ministers of the Council of Europe had officially adopted a declaration entitled “making equality between women and men a reality in practice”¹⁷ (Council of Europe, 2012), being fully aware of the gap between existing laws and the effective treatment of women.

In the United Kingdom, although the cause of equality for women had been a major issue since the beginning of the twentieth century, significant steps were only taken in the nineteen seventies. Thus the Westminster Parliament passed two inter-related Acts, the Equal Pay Act 1970 and the Sex Discrimination Act 1975, to restrict the unequal treatment of men and women. The 1970 statute introduced the principle that men and women doing comparable work should be treated comparably under their contracts, with the possibility for women whose rights had been breached to bring a claim before an industrial tribunal. A few years later, the Sex Discrimination Act 1975 prohibiting both direct and indirect discrimination was adopted to complement the Equal Pay Act 1970, extending protection to fields which were not related to the terms of a contract of employment.

Similarly, France experienced significant change in the field of women’s legal rights in the nineteen seventies. Thus, in 1975, under the Presidency of Valéry Giscard d’Estaing (1974-1981), the French Parliament passed one of the most controversial

¹⁷ CEPEJ of the Council of Europe, 2012 edition, p275

pieces of legislation at that time but which proved to be a major breakthrough for women: the law making abortion lawful, more commonly known as the *Loi Veil*, named after the Minister of Health, Simone Veil¹⁸, a former senior judge herself¹⁹. She promoted women’s legal rights in France throughout her judicial then political career. That same year, France acknowledged the principle of equal pay for equal work but it took almost ten years to enshrine it in the French legislation with the law against sexual discrimination known as the *Loi Roudy* establishing the principle of equality in employment in 1983. Two years before, in 1981, for the first time in the history of the Fifth Republic, French people had elected a Socialist President, François Mitterrand, who was to serve two terms in office and who further developed measures to enable women to either continue working or leave temporarily the labour market when they became mothers with the introduction of parental leave in 1985²⁰.

However, the real turning point was the United Nations International Women’s Conference in Beijing in 1995 which helped France to move forward from the idea of protecting women as wives and mothers on the labour market to promoting gender equality in all spheres of society. With the return of the socialist party in 1997 under Prime Minister Lionel Jospin, women’s access to the labour market was perceived as a central issue for achieving gender equality. In 1998, Catherine Genisson was commissioned to undertake a report “for drawing an assessment of existing inequalities and the effectiveness of current legal provisions”. One of the main recommendations of the Genisson Report, entitled “More diversity at work for more equality between men and women”, was to improve women’s access to promotion and management positions within French civil services and a law to this effect was adopted in March 2000. (Documentation française, 1999) The same year, the Jospin Government introduced the Law on Parity aiming at equal access between men and women to elective office, fixing a fifty-fifty candidate quota for national elections. Yet, French political parties were ready to pay a fine rather than admitting women on their lists, and women are still underrepresented in the French Parliament.

The United Kingdom for its part adopted the Equality Act in 2006 which further extended protection against discrimination, including for judges given the public nature of their judicial office, and which provided for a Commission for Equality and Human Rights (CEHR). Under part 4 of the 2006 Equality Act: “It is unlawful

¹⁸ Simone Veil graduated from the Paris Political Institute and the Judicial College in 1954 - and was appointed to the highest French legal authority (the Constitutional Council) in 1998 for nine years (1998-2007). She published her memoirs in 2007 under the title *Une Vie* (Paris: Stock, 2007). In 2015, the

¹⁹ In the United Kingdom, the Abortion Act dates back to 1967. It did not lead to the same level of violence and personal abuses against Simone Veil including anti-Jewish comments as the French Law of 1975.

²⁰ The 1985 Act is more commonly known as the *Loi sur le congé d’éducation parentale*. For more information see <https://femmes.gouv.fr>

for a public authority exercising a function to carry out any act which constitutes discrimination or harassment". Finally, the Equality Act 2010²¹ was introduced as a single Act to replace all existing anti-discrimination statutes in order to simplify the law and make it more accessible. The objective was to "ban unfair treatment and help achieve equal opportunities in the work place and in wider society".

Formal barriers have been abolished and protective legal measures have been enacted in the French Judiciary but also in the English Judiciary. In addition to significant legal means and the array of legal texts officially protecting gender equality, one would expect the judicial professions, defending people's rights to secure equality, fairness, and justice to observe the same qualities among its members as this is what judges and lawyers fight for throughout their career. This should start with the application of objective criteria in the recruitment process of judges²² (Consultative Council of European Judges, 2001).

Although equality is a legal requirement, inequalities between men and women in the judiciary have not disappeared and forms of discrimination do take place *de facto* in fairly subtle ways.

Equality denied

One might wonder whether the training and appointment process of judges in France and England pays adequate regard to the constitutional principle of equality between men and women. As the experts of the European Commission for the Efficiency of Justice explained: "the methods used to recruit judges are a sensitive subject because it involves the issue of the independence of the Judiciary" (Consultative Council of European Judges, p247).

In the French Republic, which has a fully professionalised Bench, becoming a judge is a career choice made by students once they have their basic legal qualifications. The French legal system, unlike the one that applies to England and Wales, is divided into the judicial branch with, at the apex the Court of Cassation, and the administrative branch with the Council of State as its highest jurisdiction²³. So would-be judges aiming to join the former sit the entrance examination for the *Ecole Nationale de la Magistrature* (ENM) whereas future administrative judges sit the entrance examination for the *Ecole Nationale de l'Administration* (ENA) – a highly

21 It covers nine protected characteristics which cannot be used to treat people unfairly - age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

22 As it is stated in the Consultative Council of European Judges: "every decision relating to a judge's appointment or career should be based on objective criteria", Consultative Council of European Judges, Opinion N°1 (paragraph 37), 2001.

23 Those two French Courts are respectively known as *Cour de Cassation* and *Conseil d'Etat*.

prestigious *Grande Ecole*. Would-be judges will usually not practise as a lawyer first, but instead have to prepare a fierce competitive examination which, if they are successful, will allow them to be trained as judges in a specialised institution, a judicial school for would-be judges called the *Ecole Nationale de la Magistrature* (ENM) attached to the Ministry of Justice. France is proud of its tradition of competitive examinations which are a requirement for anyone who wishes to join the French Civil Service; judges themselves are civil servants though of a particular kind as they are sworn-in and enjoy special statutory protection from the executive. So no solid legal experience is required. The ENM is responsible for the initial and ongoing training of French judges and prosecutors and each year the school trains some 200 new so-called *auditeurs de justice* – trainee judges – as part of their initial training²⁴. Once they have qualified as a judge they will sit in junior posts and then hope to be promoted up the judicial ladder.

French women are particularly successful²⁵, whereas fewer men apply and those who do so tend to perform less well in the entrance examination. One reason may be that French men prefer to become lawyers which, in France, is a different career to the judiciary, partly because, in private practice, they can earn far more money than judges. Jean-Francois Thony, the former head of the ENM, explained that women law students prefer to be judges while men tend to go for the legal jobs that carry power (e.g. as prosecutors) or earn a lot of money, (e.g. jobs in corporate or taxation law). Also, women in France seem to be more attracted than men to the ideals of the judiciary and more motivated by the idea of serving the state²⁶. Indeed, the French public service is based on values and principles such as equality and neutrality. The French way of selecting future judges officially guarantees transparency and fairness as well as equality of opportunities since all candidates are on the same footing; it is also considered as a very independent process as it is not under the patronage of the executive. So in the French Republican tradition, there has been a long established, officially fair, recruitment and training process to secure a high quality judiciary

24 It lasts 31 months altogether, of which 11 months are spent at the judicial school and 20 in the courts, in lawyers' offices, with investigators, private companies, public administrations... [For more information see S. Bory, M. Charret-Del-Bove and E.Gibson *L'épreuve orale d'anglais aux concours administratifs, ministères de l'Intérieur, de la Justice et de la Défense*. Paris : Ed. Ophrys, 2011 as well as <https://enm.justice.fr>]

25 Their growing success dates back to the 1950s, when the old-boy network ruled and an overwhelming majority of judges were ageing men. The justice ministry's answer was to set up just after the Second World War the "Ecole Nationale de la Magistrature" - located in Bordeaux- which is now the gateway to a career in the judiciary or the state prosecution service.

26 Brenda HALE "Women in the Judiciary" (Fiona Woolf Lecture, 27 June 20140, <http://supremecourt.uk/docs/speech-140627.pdf> [Accessed 08 November 2014])

and to enable the best law students to succeed²⁷. Besides, the appointments of most judges have to be approved by a special instance, the High Council of the Judiciary²⁸, in which representatives of judges but also lay people sit.

This long-established recruitment process was however seriously challenged by what became one of France's most famous miscarriages of justice involving a young investigating judge with hardly any legal professional experience at all; Judge Burgaud was confronted by a case where children falsely pretended that they had been sexually abused. It is interesting to note that this young male judge gave much importance to children's testimonies not only giving them the benefit of the doubt but also placing the highest priority on their own welfare and interests – as it is in fact required in the United Kingdom under the Children Act 1989. This judicial case stood for a reminder of the fallibility or human frailty of judges and it led to serious questioning about the recruitment process of judges allowing very young people in their late twenties/early thirties to become judges without the need for any professional experience beforehand apart from internships lasting only a few months. It was thought that there was something seriously wrong in this recruitment process, and the uproar in French public opinion was such that the abolition of the ENM was even envisaged. In the end, a more limited reform was adopted regarding the entrance examination which now includes psychological tests to take the personality of would-be judges more into account²⁹. So it seems after all that the personality of a judge, in other words who the judge is, does matter. Special classes, the so-called classes *préparatoires intégrées*, were introduced under President Sarkozy to encourage young law students from poor and/or ethnic backgrounds, but of great merit³⁰ to take the ENM competitive examination, their training being paid for by the French state. Such a reform suggests that not all applicant judges are *de facto* on the same footing. Another aspect of the reform of the French judicial College and indirect consequence of the Outreau miscarriage of justice was to bring closer the training of would-be judges to that of lawyers-to-be which, until recently, were totally separate in France. Thus, French trainee judges now have to spend six months in lawyers' chambers to complete their initial training while some would-be lawyers can attend the lectures normally exclusively aimed at future judges. It is

27 It has not always been the case as prior to the 1789 Revolution would-be judges bought their judicial office - and were directly paid by the parties to a trial. Then, members of the 1789 Constituent Assembly working at democratising French institutions and at the first written Constitution thought it would be better for judges – more democratic for them to be elected (by the people). Finally, the election process of judges was replaced by a nomination process under the 1799/1802 and 1804 Napoleonic Constitutions. For more information see Jacques Godichot. *Les Constitutions de la France depuis 1789*. Paris : Garnier-Flammarion, 1970.

28 It is known in French as the *Conseil Supérieur de la Magistrature* (CSM).

29 Conférence de presse Mme Rachida Dati, Garde des Sceaux, Ministre de la Justice, “Réforme de l’ENM”, Hôtel De Bourvallais (Paris, Ministère de la Justice), vendredi 22 février 2007.

30 Fifteen in the Paris ENM and fifteen in the Bordeaux ENM. “Le nouveau visage de l’ENM”, Jean-Francois Thony, 2007, www.boivigny.com [8/11/14]

interesting to note that this French reform was very much inspired by the training and recruitment process of English Common Law judges.

Though in the United Kingdom there is no specialized judicial school like the French one, merit is today as important as in France and it is now an official criterion for the selection of English would-be judges. “Don't be shy! Apply!” said the former Lord Chancellor, Lord Irvine, in 1998 in a speech to the Association of British Women Barristers to encourage women and people from ethnic backgrounds or other minorities to apply for judicial positions. He added: “Yes, it is true that many judges today are white, Oxbridge educated men. But, it is also true that they were appointed on merit, from the then available pool, at the time the vacancies arose [...]”. This state of facts could first of all be explained by the absence of a formal judicial career structure in the UK of the kind found in France. Indeed, appointment to the English Bench is regarded as an end in itself following a successful career as a lawyer – preferably a Barrister – as a founding principle is: “the better lawyer you are the better judge you will be.”³¹ (Irvine, 1998)

Traditionally, English judges were chosen primarily from the English Bar as success and reputation at the Bar were associated with independence and impartiality, considered as two key requirements in the judiciary. The Courts and Legal Services Act 1990 officially broke the monopoly that the Bar held on all superior judgeships in order to allow non-barristers, especially solicitor-advocates³², but also people who read law without necessarily having practised as lawyers, such as law academics, to join the Judiciary and thus widen the pool of would-be judges. It seems however that the Barristers' monopoly over the Bench has not completely disappeared. This is notably the view of Lady Hale³³, the only woman in the United Kingdom Supreme Court, who points out that “our divided legal profession is one of the principal differences between the UK and most of the rest of the Common Law world and is one of the main reasons for the continuing lack of diversity in the Higher Judiciary”³⁴ (Hale, 2014) adding that “top jobs are reserved for the top Barristers”. In fact such a division is less and less justified as Barristers are no longer the only ones with rights of audience in Higher Courts and now can themselves have direct access to clients, this used to be only possible for solicitors.

31 Lord Irvine's speech before the Association of British Women Barristers, London, The Barbican, 11 February 1998.

32 They are solicitors who after additional training obtained an advocacy certificate allowing them to plead not only in Lower Courts but also in Higher Courts just like Barristers-at-Law. For more information see <https://lawsociety.org.uk>

33 Lady Hale is herself a former Law Academic.

34 “Women in the Judiciary”, Lady Hale giving the Fiona Woolf Lecture for the Women Lawyers' Division of the Law Society, 27 June 2014, p14.

However, the judicial appointments process has improved significantly in England and Wales since the Constitutional Reform Act 2005 which, as far as the judiciary is concerned, aimed at increasing both equality and diversity. Part 4 provided for the setting-up of an independent statutory body free from the patronage of politicians, the Judicial Appointments Commission (JAC). The latter started to operate in April 2006. It was introduced “to widen the range of applicants for judicial appointment and to ensure that the very best eligible candidates are drawn from a wider range of backgrounds”. Appointments were to be solely on the basis of merit and solely on the recommendation of the newly constituted Judicial Appointments Commission (JAC)³⁵ with a reduced role for the Lord Chancellor³⁶ thus guaranteeing a fair and open selection process closer to the French type of recruitment. Before the creation of this independent commission³⁷, senior judges were recruited by way of invitation from the Lord Chancellor. Because the judicial appointments process relied on the soundings of the senior members of the judiciary and profession, it tended to be very conservative and unfair, especially to women and minority groups, but also often to solicitors. Yet, the Judicial Appointments Commission failed to fulfil its initial objectives and therefore to improve diversity in the judiciary especially in Higher Courts among senior judges. As Lady Hale put forward: “the gender balance gets worse the Higher the Court”³⁸ (Hale, 2014). Thus, on 1st April 2013 English women judges only formed 16.7% of High Court judges, 11.4% of Court of Appeal judges. As for the United Kingdom Supreme Court – which was also introduced by the Constitutional Reform Act 2005 even if it only started to operate in 2009 – it originally had one woman member and still has only one woman member – Lady Hale. To try to put an end to the lack of gender balance in the Judiciary an “Equal Merit Provision” was inserted into section 63 of the CRA 2005 by the Crime and Courts Act 2013. Under this new provision, “selection solely on merit does not prevent “the selecting body, where two persons are of equal merit, from preferring one of them over the other for the purpose of increasing diversity”³⁹ (Judicial Appointments Commission, 2014).

³⁵ The JAC makes recommendations to the Lord Chancellor and no one may be appointed whom the commission has not selected. For more information see <https://jac.judiciary.gov.uk>

³⁶ Although the Lord Chancellor retains the ultimate power to decide whom to appoint, or to recommend to the Queen for appointment, and thus maintains Parliamentary accountability, his discretion has been tightly circumscribed by the provision of the Act. Besides, because of its power to recommend one candidate for a post, whom the LC would have extreme difficulty in rejecting the JAC has become in effect an appointing body. The role of the LC has become purely formal.

³⁷ Members of the JAC are appointed by the Queen on the recommendation of the Lord Chancellor; it is composed of 15 members – 6 must be lay members, 5 must be members of the judiciary (3 judges of the Court of Appeal or High Court, including at least 1 Lord Justice of Appeal and at least 1 High Court judge, 1 circuit judge and 1 district judge), 2 must be members of the legal profession, 1 must be a tribunal member and 1 must be a lay magistrate. For more information see <https://jac.judiciary.gov.uk>

³⁸ Lady Hale, “Women in the Judiciary”, Fiona Wool Lecture, 27 June 2014, p4.

³⁹ Judicial Appointments Commission, “Equal Merit Provision: JAC Policy”, April 2014.

In France and in the United Kingdom, in spite of a very different training and recruitment process, either based on a fierce competitive examination or on a highly selective nomination process, the result is the same *id est* women are more successful. Yet, if women are more and more numerous than men in joining the Judiciary they also “leave the profession in greater numbers than men” in the words of Lady Justice Arden (Arden, 2008). Indeed, many women in the United Kingdom, especially faced with the impracticalities of the organisation of the profession starting with inflexible working hours and the difficulty of finding part-time judicial work, tend to leave the profession to fulfil family commitments⁴⁰. Whereas, in France, women, who account for eight out of ten new appointments of judges, find appealing the maternity leave and job security that the French judiciary provides – let alone the paid holidays – to the point that there are concerns about the risk of a shortage of judges in case of too abundant maternity leave among judges. In both countries it is difficult for women who have been on maternity leave to resume their career and catch up with men afterwards.

Moreover, in the two countries – as well as in Europe more generally speaking – the same phenomenon can be observed: that “there is a general trend of decrease in the percentage of women judges in comparison with men judges as one moves up the judicial hierarchy” (Bowcott, 2012). Judges of Supreme Courts in Europe represent less than 10% of all judges thus forming a kind of elite within the profession. French and British female judges tend to come up against a glass ceiling which prevents them from reaching the most senior positions in the judiciary. Thus, in France, in spite of a highly feminized judiciary in first instance and to a certain extent in second instance courts too, men are still more numerous in the French Supreme Courts – the Court of Cassation, the Council of State and the Constitutional Council. According to the statistics provided by the European Commission for the Efficiency of Justice on 31 December 2010⁴¹, out of a total of 223 top French judges, there were 119 men and 104 women. The gap does not seem enormous at first sight but it is still very much a reality. In the Constitutional Council, which checks whether laws before – or now after – having been promulgated by the President comply with the Constitution, there are three women⁴² and six men. What is perhaps even more striking is that, among its *ex officio* members who are former Presidents of the Republic, there is not a single woman. Indeed, France to this day has never had a female President, even if Ségolène Royal came close to becoming President in 2007. In the United Kingdom, it is even worse as – as seen previously: there has only been one Lady Justice in the United Kingdom Supreme Court since its setting-up in 2009, even if Lady Hale has become the Deputy-President of this

⁴⁰ However, in April 2005 part-time working for judges below High Court level was introduced partly relieving women from the pressure of long working hours difficult to reconcile with family life.

⁴¹ Council of Europe, CEPEJ Report evaluating European judicial systems 2012 edition (2010 data), CEPEJ Studies N18, 2012.

⁴² Mrs Claire Bzy-Malaurie, Mrs Nicole Belloubet and Mrs Nicole Maestracci.

highest court of appeal for the whole country.

So, in both countries, there is still much progress to be made to achieve judicial diversity and thus to have judges who are more reflective of society. One might wonder whether introducing a French type career judiciary in the United Kingdom would be a feasible and desirable solution to secure a more gender-balanced judicial profession. For, as Lady Hale argued, the lack of such a judiciary is detrimental to women and non-barristers. She is far from being the only one in favour of a career judiciary for the UK.

The House of Lords Constitution Committee, which launched an inquiry into the judicial appointments process in 2011, examining gender balance within the judiciary from a constitutional perspective, promotes “a judiciary in which lawyers are appointed to junior judicial roles at a much earlier stage in their career”⁴³ (House of Lords Constitution Committee, 2012), as in France. The idea would be to turn the Judicial Studies Board, initially set up in 1979 – responsible for judges’ training in England and Wales, running seminars on sentencing, providing courses for newly appointed judges as well as refresher courses for more experienced judges – into a Judicial Training College like the French one.

Yet, the case of France is interesting as it shows that a career judiciary does not necessarily guarantee equality between men and women judges as the glass ceiling still exists. Besides, the French type of career judiciary tends to lead to a form of corporatism. As Sophie Boyron, a French senior lecturer in law at the University of Birmingham, explained “the recruitment, training and career structure of judges tend to strengthen [...] latent corporatism” influencing “the attitudes and societal choices of judges” (Boyron, 2013). Moreover, many efforts have been made in the United Kingdom, including the creation of the Judicial Appointments Commission, to abolish the existing corporatism based on the old boys’ network where judges were – and still are – tempted to recruit people like themselves. Lady Hale is among the English judges who think that the UK puts too much emphasis on legal professional experience rather than taking more into account “legal ability, personal qualities and potential”; but, as previously seen, this can be a handicap for future judges. If there is, undoubtedly, a need to rejuvenate the judiciary in England and Wales, a significant experience as a legal practitioner is what France still lacks. So it is important to find a happy medium. It is striking to note that Lady Hale very much promotes a French type of recruitment process of judges as a kind of role-model for the United Kingdom. However the two countries have very different legal cultures and traditions and it seems unwise to adopt a totally unfamiliar system – the French one – which has its own shortcomings. France for its part has moved in the opposite direction – mimicking the United Kingdom by encouraging more and more legal

43 House of Lords Constitution Committee, Twenty-Fifth Report, “Judicial Appointments”, 7 March 2012.

practitioners with at least some fifteen years of legal practice who want a career change, such as former advocates or prison governors, to join the Judicial Training College⁴⁴ and it has proved a change for the better.

Conclusion

Whereas Britain’s predominantly male judiciary is still a reality, in spite of the numerous laws and reports urging for greater diversity, the growing feminisation of the French Bench and the possible shortage of men in the near future have lately begun causing concern to the extent that France is now trying to find ways of getting more men into the judiciary; this includes a policy of quotas for male candidates. The former Director of the ENM Jean-François Thony, for his part, thinks that “there is no reason to be shocked when you see a tribunal composed of three women any more than one is when it is three men.”⁴⁵ (Koch, 2010) However, though he does not personally favour the introduction of quotas to make sure there are enough men judges, he is among those who would like to attract men back into the profession because judges should represent society at large. While French legal experts are pondering over the need to introduce quotas for male judges, two eminent British lawyers, Sir Geoffrey Bindman, QC, and Karon Monaghan, QC - appointed by the former British Shadow Secretary of State for Justice, Sadiq Khan, to consider what practicable steps the Labour Party could take to accelerate the move towards more judicial diversity - published their report in November 2014, where they concluded that: “a quota system should be introduced so as to achieve as quickly as possible a balance between the proportion of men and women, and Black, Asian and Minority Ethnic and White judges, in the Senior judiciary”⁴⁶ (Matrix Chambers, 2014). The problem with quotas however, apart from the fact that there is no consensus in the UK on such a policy, is that they are only temporary measures which fail to address structural inequality⁴⁷.

44 Under article-1 of the official regulations of the competitive examination.

45 Interview of Jean-François Thony by François Koch, “Il faut plus d’hommes au sein de l’ENM”, *L’Express*, 18 March 2010.

46 Matrix Chambers, Sir Geoffrey Bindman, QC and Karon Monaghan, QC, “Judicial Diversity: Accelerating Change”, November 2014, p61.

47 To solve the problem of women’s under-representation in French politics, the French Parliament passed a gender parity law known as the parity law in 2000 requiring all political parties to include equal numbers of men and women on their party lists for elections based on proportional representation such as European elections but also 52% of Senate seats as well as municipal and regional elections. The law on parity which came into force in 2000 – and which was amended in 2007 – led to fairly poor results in terms of women’s representation in spite of the penalties it imposed on political parties for non-compliance. Besides, many women themselves were not particularly favourable to such a law as they perceived it as patronising. For more information see Dr Rainbow Murray, *Parties, Gender Quotas and Candidate Selection in France*, London: Palgrave/Macmillan, 2010.

Even if the current analysis deliberately focused on the professional Bench, it would be unfair not to mention the importance of the Lay Bench (with some 29 000 lay magistrates) in the UK which is very much gender-balanced, as forty nine percent are women, and which very much depends on a strong sense of commitment of lay magistrates to their community. Unlike the professional Bench, they do come from a wide range of backgrounds and occupations. They very much embody a local type of justice, close to citizens geographically, but also socially and morally. They are the face of justice in the UK and a guarantee of its humanity.

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Auteur

Elizabeth GIBSON-MORGAN, Université François-Rabelais, Tours
UFR de Lettres et Langues > Département d'anglais, Constitutional Law, Law and Languages

Laboratoires : Institut de Sciences Criminelles et de la Justice (ISCJ)/N4633 Université de Bordeaux; membre associé Interactions Culturelles et Discursives (ICD) EA 6297 Université François-Rabelais

elizabeth.gibson@univ-tours.fr

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