

# What role do judges play in society and should issues of diversity and representation be considered when deciding the judicial board?

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We live in a diverse and multicultural society and we all have a different history and background which determines how we all relate to one another and how we react to different experiences. With everything going on in the world right now, it is difficult not to consider if there would have been another version of events if certain things were different. The coronavirus pandemic, Black lives Matter and various lockdowns and restrictions has also shown us how much control and power the decision makers in our society have over us, especially in a crisis. It has also highlighted that the people in power do not always have the answers. The pandemic has also been a stark reminder that no matter what position we hold in society, from students to judges, there are things in life we do not have control of. Coronavirus does not discriminate. This raises the idea of how our society works, and how all members of society have an important role to play so that we function as one.

The people at the top of the pyramid's actions, for example the laws and regulations they pass, play a key role on the quality of life of the people at the bottom of the pyramid. Therefore, it is crucial that the people with the decision-making abilities in society are the right people, they should be fair and make decisions that strive to better society. In addition, it is important that they are representative of society because it is possible that if the people who are making decisions have lived a completely different life to those they decide for, unjust outcomes could arise. This article will consider the role of judges as one of the bodies delegated with decision making powers. It will also focus on the importance of diversity and representation on the judicial board.

Judges are a fundamental part of how society functions as they have responsibilities, such as settling disputes between private citizens, applying and interpreting the laws parliament has created, and reviewing administrative decisions of public bodies to ensure legality. Therefore, it is essential that Judges are independent and free from any bias. An example of why this is important is found in the case *Dimes v Grand Junction Canal*<sup>1</sup> where a judge voted in favour of a company of which he owned shares. This shows that without judges being independent, unfair and unjust outcomes may arise. In Scotland, efforts have been made through the Judiciary and Courts (Scotland) Act 2008<sup>2</sup> to increase transparency of the process of appointing judges. This Act created the independent Judicial Appointments Board (JAB) and the Judicial Appointments Committee (JAC) for England and Wales which was established by the Constitutional Reform Act 2005<sup>3</sup>. This stopped the office of the Lord Chancellor from

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<sup>1</sup> *Dimes v Grand Junction Canal* [1852] 3 H.L. Cas. 759

<sup>2</sup> Judiciary and Courts (Scotland) Act 2008

<sup>3</sup> Constitutional Reform Act 2005

being able to select potential judges. Thus, it is argued that it provides more guarantees of a judiciary free from political interference and bias. Furthermore, it made the judicial appointment system more public as before these bodies were created, the process of appointing judges was very secretive.

Currently, the Judiciary of the UK is made up from a narrow social, economic and educational background. The majority of the judges in the UK are white, middle-aged, upper to middle class males who were educated at private schools and have degrees from Oxford or Cambridge. Professor John Griffith was a leading public law professor who often criticised the judiciary. His observations in his book 'Politics of the Judiciary'<sup>4</sup> pointed out many issues that may arise from having a Judiciary drawn from a narrow section of society. He observed that judges were part of a social elite and that they were, therefore, inherently hostile to groups that challenged the established status quo, for example, minorities or the working class. This highlights the issues that may arise with a lack of diversity on the judicial board as it is important that people from a range of backgrounds are given the opportunity to apply. People from different cultures, genders and ages will each bring their own expertise, skills and experiences to the role as a judge, not just the skills they gain from a law degree. We live in a diverse multicultural society, so it is important that the judicial board also reflects this. It is also argued that having a diverse judicial board will increase public confidence in the justice system as women and people from minority ethnic backgrounds will feel that decisions that affect them are being made by people who will understand them. It will also encourage more women and people from minority backgrounds to apply as they will see that there is an opportunity to do so.

There are legislative attempts to encourage diversity in the judicial board. In section 14(1) of the Judiciary and Courts (Scotland) Act<sup>5</sup>, it states "In carrying out its functions the board must have regard to the need to encourage diversity in the range of individuals available for selection to be recommended for appointment to a judicial office." On paper this seems well and fair. However, it is followed by section 14(2)<sup>6</sup> which says that subsection 1 is subject to section 12. Section 12<sup>7</sup> lists the selection criteria for judges which is that "Selection must be solely on merit" and "the Board may select an individual only if it is satisfied that the individual is of good character.", which brings into focus the steps it takes to become a judge. On the surface, the criteria is fair, it is of course important that someone who has the power to make legal decisions should have a thorough background knowledge of law. However, the legislation does not take account for the fact that not all students aiming for a legal degree are given the same opportunities. To be able to base the criteria for appointing judges solely on merit, we must first get rid of the barriers that face aspiring lawyers at the education level. For example, in 1878, Janet Wood was one of the first women to complete a law degree in the UK. At the time, women were made to take a "Special exam for women"<sup>8</sup>. It should be

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<sup>4</sup> J.A.G Griffith, *Politics of the Judiciary* (Fontana Press, 1977)

<sup>5</sup> Judiciary and Courts (Scotland) Act 2008, s 14(1)

<sup>6</sup> *Ibid*, s 14(2)

<sup>7</sup> *Ibid*, s 12

<sup>8</sup> Lady Hale, '100 Years of Women in the Law' (*Supreme Court*, 2 May 2019)

<<https://www.supremecourt.uk/docs/speech-190502.pdf>> accessed 23 October 2020

noted that women were not granted law degrees at Cambridge until 1947<sup>9</sup>, meaning Ms Wood would simply have completed her degree, but she was not granted any qualifications for it. This history explains the trend in a high proportion of judges being male as it is only recently that women are being accepted onto law degrees.

Similar to Scotland's legislation, section 63(2) of the Constitutional Reform Act 2005<sup>10</sup> for England, also states that selection of the Judicial board must be "solely on merit" and you must also have spent a certain amount of years practicing as a qualified solicitor or advocate, depending on the court. There is a lot of debate about whether a judicial candidate's background and identity should be taken into account, or whether judges should be appointed solely on what they have achieved and their qualifications. An issue with appointing judges solely on merit is that in university systems there is a ranking system that means students who gain a degree from universities, like Cambridge and Oxford, are held higher than students from other universities. The students that are able to go to these schools are usually from middle to upper class backgrounds. This means that there will always be a majority of applicants to the Judicial board from backgrounds such as these and, therefore, leaves people from less advantaged backgrounds less room to progress in their legal career. This ranking system also means that people who cannot afford to go to these prestigious universities will never get the same opportunities as those who can.

Although recent legislation has taken steps to encourage diversity, there is still a long way to go. According to the 2019 Judicial diversity statistics, only 27% of High court judges are female and there are only 2 Asian or Asian British, and a further 1 judge from another ethnicity which is not stated.<sup>11</sup> Given that half of the population is female<sup>12</sup>, it is unjustifiable for there to be such a lack of female Judges. Diversity in the judiciary is not something that will happen overnight as the pre-existing views around who is qualified to be a judge will take some time to abolish. In 1996, the judicial appointments procedure argued that "it is not the function of the judiciary to reflect a particular section of the community, it is the judges role to administer justice and to do that requires above all, professional legal knowledge and competence. Social or other considerations are not relevant."<sup>13</sup> Many of the people who were put into decision making roles such as judges, when these views were the norm, are still in these positions today. This builds an extra wall to knock down until judicial diversity is achieved.

Empathy, by definition, is "the ability to understand and share the feelings of another". In a study by Martin L Hoffman on 'Empathy and Justice motivation'<sup>14</sup> he states that empathy "is critical to moral development and justice, thereby acting as a catalyst for societal cohesion

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<sup>9</sup> Stuart Roberts, *The Rising Tide: Women at Cambridge* <<https://www.cam.ac.uk/TheRisingTide>> accessed 23 October 2020

<sup>10</sup> Constitutional Reform Act 2005, s 63(2).

<sup>11</sup> Judicial Diversity Statistics <<https://www.judiciary.uk/publications/judicial-diversity-statistics-2019-2/>> accessed 23 October 2020

<sup>12</sup> Population, female (% of total population) <<https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS>> accessed 23 October 2020

<sup>13</sup> *Judicial Appointments Procedure* HC 52-II (1996), p.130

<sup>14</sup> Hoffman, M.L. Empathy and justice motivation. *Motiv Emot* **14**, 151–172 (1990). <<https://doi.org/10.1007/BF00991641>> accessed 23 October 2020

and unity". This links to another study done by Loren Toussaint and Jon R. Webb on 'Gender Differences in the Relationship Between Empathy and Forgiveness'<sup>15</sup> in which, after collating a variety of other research articles and tests on the same topic, comes to the conclusion that women are naturally more empathetic than men. This introduces the question as to if the difference in empathy levels between men and women will make an impact on their decision making as a judge and if empathy is an important factor for judges to have. Judges make decisions that have the ability to completely change people's lives, from taking away a person's freedom by imprisoning them to acquitting somebody who was wrongfully charged. Having empathy allows judges to have a better understanding of those individuals they are deciding for which is vital to ensuring the right decisions are made.

Although judges are meant to be independent and free from bias, there are many things that may make this difficult to achieve. This puts forward the question "what is the perfect recipe for no bias?" As human beings we all have our own thoughts, feelings, opinions and without us even being aware of them, we all have our own implicit biases. This presents an issue for judges because it is near impossible for anyone to make decisions without interference from their pre-existing biases. Diversity in the judiciary could be the only answer to solve this question as having a diverse set of decision makers would mean that each can bring their own implicit bias to the table. This means that each section of society would have some form of representation on the judicial board instead of one small section of society deciding for the rest.

The law is also constantly having to change to keep up with new, modern ways of living. For example, in the past, society saw women's only function as having children and starting a family. Whereas today, there is a huge focus on women advancing in their careers and also a focus on men having more of a key role in family life, for example, the introduction of paternity leave to the UK in 2002<sup>16</sup>. If things did not evolve, we would not have any of the technological or social advancements we have today. If the decision makers in our society did not change and evolve with it, we would be left with a very unjust legal system and our growth would be restricted to outdated views.

The role of judges and the legal system is discussed in depth in the book "Eve was Framed" by Helena Kennedy<sup>17</sup>. She points out court room tactics that advocates and lawyers have to use in order to navigate around particular judges biases. In the introduction of the book she says "Most criminal lawyers like myself have had to make decisions throughout their professional lives on the basis that the judge will always prefer the police account unless the defence case is overwhelming"<sup>18</sup>. Although the book was written in 1992, Kennedys point still resonates today. More recent cases of injustices that involve police officers, such as the murder of George Floyd and Breonna Taylor in the US or Sheku Bayoh in the UK, show that there is often some reluctance in judges charging police officers. As shown by the recent

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<sup>15</sup> Loren Toussaint and Jon R. Webb. Gender Differences in the Relationship Between Empathy and Forgiveness. *J Soc Psychol.* 2005 Dec; 145(6): 673–685

<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1963313/>> accessed 23 October 2020

<sup>16</sup> The Paternity and Adoption leave regulations 2002, s 4(1)

<sup>17</sup> Helena Kennedy, *Eve was Framed* (Chatto & Windus Ltd 1992)

<sup>18</sup> Helena Kennedy, *Eve was Framed* (Chatto & Windus Ltd 1992) 6

protests in the US and protests in Scotland, a public outcry for justice is sometimes needed before any charges against the police or public enquiries take place, this is especially true when the victim is from a minority ethnic background. Nevertheless, this leaves the public wondering why this is the case? Who is to blame for the delay or lack of justice for minority ethnic victims? Judges may be more reluctant to charge police officers due to fears of harming prosecutors relationships with police. The police's reputation is also to serve and protect, so our basic instinct (until proven otherwise) is to trust them. This has an effect on Judges and Jurors as they may be more likely to believe a police confession, especially if they claim that they felt their lives were in danger and that's why they had to act the way they did. Nonetheless, these reasons do not give an explanation of the high numbers of minority ethnic people being accused or even killed by police.

The Black Lives Matter movement has shone a spotlight on the discrimination that people face due to ethnicity and colour. Discrimination undermines the principles of justice and equality under the law, yet the path to achieve a law degree is filled with many hurdles, that people from a white background do not have to face. White people experience a type of privilege that filters into all aspects of everyday life, from being able to walk down the street or drive without being wrongly profiled as a criminal to being rejected from job applications due to the colour of your skin. These are just a few examples of minor instances of discrimination that still happen today, and these are the added pressures that people from minority ethnic backgrounds have to deal with every day. In order for society to function, citizens must have trust in those who make the decisions. A lot of people from minority ethnic backgrounds have lost faith in our justice systems after repeated miscarriages of justice and the experience of harsh application of the law towards them. This is well explained by Trevor Noah who is a well-known political commentator, he says "society is a contract that we sign as human beings... amongst this group of us we agree on common rules, common ideals and common practises that are going to define us... There is no contract if law and people in power don't uphold their end of it." The Judiciary has a key role in sustaining this as their decisions signal to the public that the values and common ideals we all signed up to by being part of society are protected. This highlights the importance of having a diverse judicial board, as the foundation of human beings understanding is based on the experiences they have faced, this will have an impact on the decision's judges make.

Lady Hale, who was the United Kingdom's first female head of the supreme court, often spoke out about the lack of diversity in the Judiciary. She said "Everyone with the requisite ability and personal qualities should feel that the judiciary is open to them, whatever their religion or belief, their sexual orientation, their socio-economic background or origins."<sup>19</sup> A lack of diversity leads to a situation where the judiciary operates in silo and the decisions that are made reflect the interests of a certain class or community. Furthermore, having a diverse judiciary would enhance the quality of decision making, as it will infuse a variety of ideas, views, and experiences to provide outcomes that create a fair and just society.

Along with creating an easier path to achieving a law degree, there also needs to be measures put in place for when women and people from minority ethnic groups get into roles as judges.

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<sup>19</sup> Lady Hale, 'Judges, Power and Accountability' (Constitutional Law Summer School, Belfast, 11 August 2017)

In a book called 'Women & Power', Mary Beard says "If women are not perceived to be fully within the structures of power, surely it is power we need to redefine rather than women".<sup>20</sup> Throughout history, women have been put into a box. In the past, a women's role in society was simply to start families and care for children. This left women with the choice of either having a successful career or having a family. To ensure both men and women are able to keep up with the long hours and hard work judges must fulfil, there should be flexible working opportunities put in place to ensure anyone with caring responsibilities for children or family members can take breaks without any detriment to their careers. This will encourage more women to apply as they will feel they are entering a job that means they don't have to sacrifice their family life for.

There are measures in place so that judges can identify those with disabilities in a court room and ensure adequate support is in place for them, whether it means having a sign language interpreter or ramps for entry into the court.<sup>21</sup> However, there should be a focus on ensuring those with disabilities feel like a law degree and a job as a judge is something that they can attain too. Whether it be increased awareness of disabilities at the education level and then onwards into the legal profession or dedicated classes at the education level for more students and lecturers to learn sign language. Actions like these would lead to more inclusivity and would ensure that nobody is left out in the path to attaining a law degree.

It can be very daunting being the only woman or the only person from a minority ethnic background in a predominantly white male workplace and, until a more diverse judiciary is achieved, women and people from minority ethnic backgrounds are always going to feel like the odd one out. As history does not think they belong there, they often have to go above and beyond to prove that they do, quite often meaning that they aren't allowed to fail as one mistake for a woman in a job can often have different consequences for a man in the same job. The topic of intersectionality is one that also needs attention here. Intersectionality is the overlapping of areas of discrimination or disadvantage, for example, a black woman will face issues of gender and race discrimination. There must be an increased awareness of this and support in place for those who experience in their judicial career so that the hurdles they face can be knocked down and they can progress in the same way other members of the judiciary can.

Although the trends in history explain why we have the judiciary we have today, there are hopeful statistics for the future. For example, the Law Society of Scotland published figures of the diversity of law students. In 2018/19, 13,365 (69%) students are female, 6,185 (30%) students are male, and 7,855 (39.6%) of students are from minority ethnic groups.<sup>22</sup> These are optimistic figures that show we could be moving away from the past historical trends, towards a new, equitable judiciary. It is vital that issues of diversity and representation are taken into account when making judicial appointments, but until there is equality across the board in education, we cannot base the appointment of judges solely on merit. Having a

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<sup>20</sup> Mary Beard, *Women and Power: A Manifesto* (Profile Books 2018) 83

<sup>21</sup> Judicial College, *Equal Treatment Bench Book* 2003

<sup>22</sup> The Law Society, *Entry Trends* <<https://www.lawsociety.org.uk/en/career-advice/becoming-a-solicitor/entry-trends>> accessed 23 October 2020

diverse judicial board will mean all members of society are represented and it will minimise space for any injustices to occur.