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**Ethnic minority representation in the judiciary:
diversity among judges in old and new countries
of immigration.**



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Ethnic minority representation in the judiciary: diversity among judges in old and new countries of immigration.

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1 Introduction

Efforts to achieve diversity in the Dutch judiciary go back a long way, though the type of diversity aimed at has changed over time, starting with regional origin, moving on to religious background and then to professional and social background, political affiliation and sex.

Until recently little has been said about the ethnic origin of judges, but this has started to change in the last few years, and it is increasingly considered desirable for the judiciary to be diverse in terms of ethnicity as well. Why the current judiciary is lacking in ethnic diversity is not clear. Are the causes mainly on the supply side: are there simply not enough lawyers from ethnic minorities? do they not aspire to a career in the judiciary? or do they underrate their chances of entering it? Or are the causes mainly on the demand side: do the recruitment and selection mechanisms place ethnic minority candidates at a disadvantage? Given this uncertainty, opinions on how to achieve greater ethnic diversity also differ: is it just a question of time, or is a targeted policy needed to increase the proportion of judges from ethnic minorities?

These are the questions that the study discussed in this issue of *Rechtstreeks* sets out to answer. The Council for the Judiciary asked us to look at experience in a number of other countries where the same questions may have arisen. What is the situation regarding members of ethnic, cultural or religious minorities entering the judiciary there? What are the obstacles and incentives to ‘newcomers’ entering the judiciary? Are there countries that endeavour to achieve ethnic diversity when recruiting judges, and if so, what can the Netherlands learn from their experience?

Previous experience of other categories of ‘newcomers’ may also be instructive, so we also investigated the intake of women into the judiciary. Opportunities for women have been the subject of debate for some time in many countries, including the Netherlands, and more research has been done into this topic. Do the same mechanisms and barriers found in the case of women judges also affect members of ethnic minorities entering the judiciary?

This issue of *Rechtstreeks* sets out the main findings of our study.¹ We examined five countries in addition to the Netherlands, Germany, France, England, the United States and Canada.² All five of them share the common factor – amongst themselves and with the Netherlands – that they have attracted large numbers of immigrants in the past few decades, a substantial proportion of whom are from non-European or non-Western countries. Thus their post-war experience of immigration is comparable to a certain extent, and all of the countries studied have sizeable ‘visible’ immigrant communities.

The issue is organized as follows. Section 3 analyses the intake of ‘ethnic minorities’ into the judiciary in the Netherlands and the other five countries. Section 4 describes the debate on the diversity of the judiciary and types of diversity policy or affirmative action in the recruitment of judges. Section 5 analyses the obstacles and incentives to ‘newcomers’ entering the judiciary. Section 6, finally, looks at the lessons we can draw from experience in other countries. First, however, Section 2 discusses some differences between the countries under consideration which are probably factors that affect the intake of minorities into the judiciary.

A note on the terminology: various terms are used in the Netherlands to denote the sections of the population concerned, and other countries have their own terminology. There are problems with all these terms: for example, the Dutch word *allochtoon* (translated here as ‘non-indigenous’) which is used to denote persons with at least one foreign-born parent is not only artificial, it is also not understood elsewhere. When presenting the data we therefore use the terminology employed by our sources (national statistics, respondents) as far as possible.

1 A detailed report was published in 2006 by Wolf Legal Publishers, Nijmegen (Böcker & de Groot-van Leeuwen, 2006).

2 The material for this study was collected during the period from September 2004 to July 2005, using various methods, including a literature search, analysis of quantitative data, interviews and a written survey.

2 Differences between national contexts

2.1 National integration models and potential target groups

The United States and Canada are classic examples of immigration countries: immigration lies particularly at the heart of the national self-image of the United States, and Canada prides itself on having ‘invented’ multiculturalism. The European countries in our study, on the other hand, have developed into immigration countries and multicultural or multiethnic societies against their will. National integration models or ideologies differ sharply.

In France immigrants have traditionally been integrated via the path of assimilation: the ‘republican’ integration model expects them to adopt the French language and culture. Multiculturalism, which is – or was – more in vogue in Britain and the Netherlands, is referred to in France as *communautarisme*, a term with mainly pejorative associations. As a result, ‘affirmative action’ and recording and ‘monitoring’ ethnicity meet with more opposition in France than the other countries under consideration. Compared with France, there is a much greater willingness in Britain to recognize ethnic and cultural differences, hence the British integration model is often characterized as ‘multicultural’. It is only in recent years that Germany, which has experienced immigration on a larger scale than any other European country, has begun to see itself as an immigration country. Germany has not developed a clear-cut concept of integration yet, partly because under the federal system it is the Länder that are responsible for certain areas of policy.

Another difference lies in the potential target groups of diversity policy. In the Netherlands the authorities and researchers focus mainly on immigrants from ‘non-Western’ countries and their descendants,³ and in the other European countries the potential target groups are immigrants from outside Europe and their children and grandchildren. In France, Britain and the Netherlands a substantial proportion of these came from the former colonies.

In the United States the target groups encompass not only immigrants (Hispanics, Asian Americans) but also African Americans, who have a much longer history in the country – and moreover one of systematic discrimination. In Canada the target groups are aboriginals and other ‘visible minorities’, i.e. people who can be seen to come from indigenous and immigrant minorities, and the French-speaking minority. To some extent these different categories are faced with different barriers.

3 Statistics Netherlands (CBS) adopted a standard definition of non-indigenes (allochtonen) in 1999, under which a person is counted as non-indigenous if at least one parent was born abroad. Along with the standard definition a standard classification was introduced, whereby a distinction is made between Western and non-Western non-indigenes. The non-Western countries of origin include Turkey and all the countries in Africa, Latin America and Asia (except Japan and Indonesia). The main groups in terms of origin are Turks, Moroccans, Surinamese and Antilleans/Arubans.

Table 2.1 shows the sizes of the target groups (or potential target groups) of diversity policy in the countries under consideration. The sizes of the communities concerned vary considerably.

Table 2.1 Sizes of 'visible' minorities or immigrant communities in the countries under consideration

	Number	Percentage of total population
Netherlands, 2004		
Surinamese	325.000	2%
Antilleans	131.000	1%
Turks	352.000	2%
Moroccans	306.000	2%
Total 'non-Western' minorities	1.700.000	10%
Germany, end of 2003		
Persons of Turkish origin	ong. 2.500.000	3%
France, 1999		
Persons of North African origin	3.000.000	5%
Persons of African (sub-Saharan) origin	700.000	1%
England & Wales¹, 2001		
Asian/Asian British	2.270.000	4%
Black/Black British	1.140.000	2%
Chinese	230.000	0%
Mixed	660.000	1%
Other	220.000	0%
Total (non-white) ethnic minorities	4.500.000	9%
United States, 2000		
Black/African American	34.700.000	12%
Asian	10.200.000	4%
Hispanic/Latino	35.300.000	13%
Total minority population (non-white or Hispanic)	87.000.000	31%
Canada, 2001		
Visible minorities	4.000.000	14%
Aboriginal groups	1.000.000	3%

1 Just under 97% of the British ethnic minority population live in England; 1.2% live in Wales. As we only have data on judges, barristers and solicitors for England and Wales combined, here again we give the figures including Wales.

In the Netherlands the category 'non-Western non-indigenes' comprises a variety of immigrant communities that together make up 10% of the population. In the United States African Americans alone constitute 12% of the population, and Hispanics form an even larger group. It may be that the size of the minority population affects the intake into the legal profession and the judiciary: the larger its proportion in the entire population, the more pressure there may be to achieve proportionate representation; on the other hand, the more difficult it is to achieve this.

There are also differences between the 'visible' minority or immigrant populations in the countries under consideration as regards level of education. In Germany, for example, Turkish youngsters are still relatively underrepresented in higher education. Young people of North African origin born in France have caught up with other youngsters from similar socio-economic backgrounds, but their representation in higher education is still below the average for French young people as a whole. Ethnic minorities in England, on the other hand, are well represented in higher education: over 19% of first-year students there were from minorities in 2004, more than twice the proportion of ethnic minorities in the English population. The visible minorities in Canada also have a relatively high level of education: 24% of them had a Bachelor's degree or higher in 2001, as against 15% of the population as a whole. In the United States the educational level of the African American and Hispanic communities is still below average. Asian Americans are relatively well educated: 44% of those aged 25 or over had a Bachelor's degree in 2000, as against 24% of the population as a whole. The figures for African Americans and Hispanics are 14% and 10% respectively. The educational level of the second generation of those from a 'non-Western' background in the Netherlands is comparable to that of second generation North Africans and Turks in France and Germany respectively. In 2003 14% of 'non-Western non-indigenes' in the 19-24 age group were in higher education, as against 30% of their indigenous contemporaries.⁴ Young people of Turkish and Moroccan origin in particular are still relatively underrepresented in higher education, albeit their numbers have been growing rapidly in recent years. The likelihood is that these differences affect the intake into the judiciary. The larger the size of the minority population and the higher its level of education, the more law students and lawyers it will have, and these figures determine the potential supply of candidates for the judiciary.

4 CBS, 2004.

2.2 The size of the judiciary and recruitment and selection

The sizes of the judiciaries in the countries under consideration also vary, and this could be another factor. The England & Wales judiciary, for example, is relatively small (see Table 2.2), so even appointing a relatively small number of minority judges makes a difference; in Germany, which has a much larger judiciary, far more appointments are needed to increase the proportion of ethnic Turkish judges.⁵

Table 2.2 The sizes of the judiciaries in the countries under consideration

	Number of judges	Number of judges per 100,000 head of population
Netherlands	2.200	13,8
Germany, 2005	21.000	25,5
France, 2003	5.200	8,7
England & Wales, 2005	1.500 ¹	2,9
	3.500 ²	6,7
United States, 2005	31.000	11,1
Canada, 2002	2.500	8,6

1 Excluding part-time judges and tribunal officers

2 Including part-time judges, excluding tribunal officers

The procedures for recruiting and selecting judges also differ. In the three common law countries of England & Wales, Canada and the United States they are recruited from a relatively limited pool of experienced lawyers. The selection mechanisms are also different: in the civil law countries of Germany and France the judiciary is made up of career judges, i.e. judges who have not previously had another occupation, whereas in the Netherlands the two systems (recruitment from the legal profession and career judges) are combined.

⁵ Persons of Turkish origin make up no more than 3% of the population in Germany, but this section of the population would only be represented proportionately in the German judiciary if it contained over 600 ethnic Turkish judges. In England & Wales, where ethnic minorities make up 9% of the population in total, they would be represented proportionately if there were 300 ethnic minority judges (full-time and part-time).

England & Wales

For a long time judges used to be recruited by means of a co-option system in England & Wales. The pool of candidates consisted mainly of barristers and – to a lesser extent – solicitors who had entered the profession at least twenty years ago and were ‘known’ to the older judges who were consulted as part of the procedure. There has been much debate on reforming the appointment system in recent years. An independent Judicial Appointments Commission has been responsible for selecting candidates for the judiciary since April 2006.

Canada

Most judges in Canada have over fifteen years’ experience in the legal profession upon appointment. A proportion of them are appointed by the provincial authorities. Patronage long played a decisive role in the appointment process. This changed in the 1980s, when commissions were set up, especially in provinces where the commission is also responsible for the initial recruitment of candidates. Similar changes were introduced in the selection procedures for judges appointed by the federal government.

The United States

Most state judges (i.e. judges working in the judicial systems of the individual states) in the United States will have been attorneys for ten to fifteen years prior to their appointment. Almost all states appoint judges for a specified period. The selection procedures vary from one state to another. Elections are held in 22 states. Judges are selected and appointed by the Governor or the legislature in six states. Candidates are selected on the basis of a merit plan (known as the Missouri Plan) in 22 states. This method is a compromise between appointment and election: the Governor appoints judges from a list drawn up by a special commission, and after they have completed their initial period the electorate decides in a non-contested election whether they will stay in office. Federal judges are appointed by the President with the ‘advice and consent’ of the Senate. Candidates have to appear before a series of bodies.

France

There are a number of routes by which people can enter the judiciary in France. By far the most important one is the regular judicial training programme. Competitive examinations (*concours*) are held every year to recruit over 200 candidates. A *concours* consists of a written and an oral examination, which are marked by a panel. The written examination is marked anonymously, and only candidates who pass it can go on to take the oral examination. The panel decides which candidates are eligible for places and their order of merit.

Whether a candidate is given a place depends on the number of places available and his or her ranking. The number of candidates has increased substantially in recent decades: in the 1960s and 1970s there were three to five candidates for every place, 18 in 1994 and just under 22 in 2000.

Germany

University law studies in Germany culminate in the first *Staatsexamen* ('state examination'). Almost all lawyers go on to take a follow-up course, the *Vorbereitungsdienst*, which is particularly geared to the judiciary. The *Vorbereitungsdienst* culminates in the second *Staatsexamen*, the examiners for which are judges, members of the Public Prosecution Service and officials from the Ministry of Justice. Candidates for the judiciary are selected above all on the basis of the marks gained in the second *Staatsexamen* and the assessments during the *Vorbereitungsdienst*. As there are far more candidates than places, only those who have excellent marks stand a chance. Selection is carried out by a commission in some Länder: these commissions are usually made up of representatives of the executive and the legislature, the Bar and the judiciary, and in every case the court in question is asked to give its opinion. In other Länder the Minister of Justice is responsible for selection. A candidate who comes through the selection process is appointed as a *Proberichter* (probationary judge) for the first three to five years. Most *Proberichters* are given a life appointment at the end of their probationary period.

The Netherlands

There are two routes by which people can enter the judiciary in the Netherlands, the judicial training programme (RAIO) and the 'outsiders' route for experienced lawyers (RIO). Recent law graduates can apply for a place on the RAIO programme. Selection is carried out by the RAIO selection committee, the majority of whose members are members of the judiciary. Candidates send in an application form, on the basis of which they are screened to see if they meet the requirements as regards formal education. Selected candidates are invited to take a written analytical and cognitive test, a preliminary interview, an assessment and an interview with the RAIO selection committee. Whether a candidate is allowed to progress to each stage in the procedure depends on the result of the previous stage. In the three last-mentioned stages the emphasis is on checking that the candidate has the personal skills needed to be a judge, the requisite legal knowledge, the right image of the profession and sufficient social commitment. If the RAIO selection committee makes a positive recommendation in the final stage of the procedure, the Minister of Justice officially admits the candidate to the programme.

The RAIO programme combines theory and practice and trains lawyers to be judges and public prosecutors. It normally takes six years. The theoretical component comprises six courses, which are run by the training institution for the judiciary, the SSR (Studiecentrum Rechtspleging) in Zutphen. The practical component consists of a four-year internal traineeship and a two-year external traineeship. In the fourth year the student opts to be either a judge or a public prosecutor. Students on the programme are appointed by the Minister as 'RAIOs' (trainee judicial officers). Most of them complete the programme successfully and are then appointed as judge's assistants or deputy judges for a period of one year. An allocation committee decides where they will work. After a year they can be considered for appointment as judges: the court makes a recommendation to the Minister that the person be appointed to the bench.

To fill vacancies in the judiciary not filled by RAIOs, 'outsiders' are recruited, i.e. lawyers with experience in advocacy, the academic community, industry or the civil service. Six and ten years of work experience are required for the post of judge and justice respectively. Outsiders are recruited by advertisement, or they can apply to the appropriate selection committee on their own initiative. They are first screened to see if they meet the requirements as regards formal education and experience. To assess whether candidates stand any chance of successfully completing the selection procedure, or if there is any doubt as to whether they have sufficient relevant legal experience, they may be invited to attend an interview with a preselection committee. This is followed by an assessment, and the final stage of the procedure is an interview with the Committee for the Recruitment of Members of the Judiciary (CALRM in Dutch). Like the RAIO selection committee, the majority of its members are members of the judiciary. Approved candidates then have to apply to a court for a post. Many candidates sound out a court first to see if they stand a good chance before applying to the committee. Courts can nominate outsiders for appointment directly or take them on as trainees, and they are appointed as deputy judges/justices during their training. The training programme for outsiders takes one or two years, depending on the court. Once they have completed their training they are assessed by the court, which recommends the appointment of successful candidates to the Minister.

The RAIO and RIO programmes are the standard, regulated routes to the judiciary. In order to provide career prospects for qualified legal staff (court legal advisers or senior court secretaries), and in view of the need for more judges, a 'third way' to the judiciary was created.⁶ Various district courts and appeal courts developed a procedure – known as 'Internal advancement to the judiciary' (IDR in Dutch) – for legal staff. A nationwide procedure has

⁶ This is in fact a revival of the state of affairs before 1957, when there was no RAIO programme but the internal route to the judiciary was by way of the post of Deputy Clerk of the Court.

now been developed, and this was introduced at the beginning of 2006. This involves an assessment, a selection procedure, a two-year internal training programme and a one-year external traineeship. Candidates who successfully complete the procedure are put forward to the CALRM. If the CALRM approves them they undergo training as deputy judges for one year; the court in question then recommends that the candidate be appointed as a judge in that court.

2.3 Prior experience of recruiting women judges

Obviously the selection procedures have an effect on the intake of ‘newcomers’ into the judiciary. Prior experience with women is that the proportion of women judges has gone up quicker in countries with a civil law tradition than common law countries: an international comparative study concluded that ‘In civil law countries women have, after slow beginnings, taken the judiciary by storm’.⁷

In France and Germany, where the judiciary is made up of career judges, the proportion of women judges has risen much faster than in England & Wales, the United States and Canada, where the members of the judiciary are recruited from a limited pool of experienced lawyers (see Table 2.3). The proportion of women judges has also gone up rapidly in the Netherlands, where there are a variety of routes that can be taken. In France women now make up about 50% of all judges, and the proportion is not much lower in the Netherlands; in Germany it is 30%. In Canada (Ontario) women make up a quarter of the judiciary, 20% in the United States. In England & Wales only one in six judges was a woman in 2003.

⁷ Schultz, 2003, pp. xlvi-xlvii.

Table 2.3 Representation of women in the judiciary and advocacy (percentages)

	Women judges (year)	Women among newly appointed judges (year)	Women advocates (year)
Netherlands	47% (2004)	55% (2004)	38% (2004)
Germany	30% (2002)	> 50% ¹ (2002)	24% (1999)
France	50% (2001)	± 75% ² (2005)	± 45% (2003)
England & Wales	16% ³ (2003)	31% (2003)	29-40% ⁴ (2000)
Canada (Ontario)	25% (2003)	34% (1989-2003)	35% (2001)
United States	± 20% (2000)		30% (2000)

¹ Probationary judges (*Richters auf Probe*)

² *Auditeurs de justice* recruited from the first *concours*

³ Excluding tribunal officers

⁴ Barristers: 29%; solicitors: 40%

2.4 Lay involvement in the administration of justice

Our study looked at professional judges; we have not systematically collected data on the representation of minorities among lay persons involved in the administration of justice. Lay persons play a very limited role in the Netherlands, but a bigger one in the other five countries, all of which have lay magistrates and/or juries. A criterion – at least in theory – when selecting people to sit on juries, and often when selecting lay magistrates, is that they should be as representative of the population as possible, the idea being that this boosts public confidence in justice. This may be the reason why countries where lay persons play a greater role in the administration of justice are more likely to have a diversity policy for juries and lay magistrates than for professional judges. The more lay persons are involved, the less need is felt for a diverse judiciary, perhaps: in a courtroom where there is a jury, the composition of the jury may contribute to acceptance of the court’s decision. Where we did come across relevant data during our study we do of course mention it in this report.

3 The intake of 'newcomers' into the judiciary

This section analyses the intake of 'newcomers' to law studies, advocacy and the judiciary. For most of the countries under consideration the quantitative data available left a lot to be desired. The most statistics were available for England & Wales, Canada and the United States; key informers were the main source of information for France, Germany and the Netherlands.

3.1 England & Wales, Canada and the United States

Figures on the ethnicity of judges, lawyers and law students were only available for the two Anglo-Saxon countries and Canada. They are based on 'self-identification': censuses there ask all the inhabitants which ethnic group they regard themselves as belonging to. Various organizations and bodies in those countries, including lawyers' professional bodies, also ask their members, staff etc. to state which ethnic group they belong to, usually based on the categories used in the census.

Intake of law students

In England law studies attract relatively large numbers of ethnic minority students: just under 30% of first-year law students there were from an ethnic minority background in 2004,⁸ three times as high as the proportion of minorities in the English population. The law also attracts large numbers of ethnic minority students in England compared with other subjects: only students of Chinese origin are more likely to opt for other subjects. In the Canadian Province of Ontario the law schools have relatively large numbers of students of Arab, Chinese, Korean or South Asian origin.⁹ In the United States minorities are still underrepresented – in relation to their proportion in the population as a whole – among law students: until 1985 less than 10% of students in American law schools were from minorities. From 1985 to 1995 – when many law schools applied a policy of affirmative action when admitting students – the proportion of minorities rose to just under 20%, but it has subsequently remained at that level. Only Asian Americans are better represented among law students than in the population as a whole.¹⁰

Intake into the legal profession

In England & Wales the percentage of ethnic minorities among barristers and solicitors is about the same as their proportion in the population as a whole (see Table 3.1). Indeed, the percentage of minorities among new barristers and solicitors is much higher than their

proportion in the population: 15-20% of new barristers and solicitors were from minorities in 2001-2004. By the end of the 1980s ethnic minorities were represented more or less proportionately in the barristers' branch of the profession, but in the much larger solicitors' branch their proportion did not begin to rise until during the 1990s. Apart from the difference in the sizes of the two branches, another factor was probably that there was a tradition of 'black' barristers: young people from the elites of the former colonies who came to study law in England were attracted to the Bar, as they would be able to set up as barristers on returning to their own countries. There was no such tradition in the case of solicitors, and moreover non-Brits were excluded from this branch until 1974.¹¹

In Canada and – above all – the United States the proportion of minorities in the legal profession is still way below that in the population as a whole (see Table 3.1). In the Canadian Province of Ontario visible minorities make up more than a quarter of the academically educated working population, and the proportion of minorities in the legal profession (9%) is particularly low in relation to this figure. Visible minorities are markedly better represented in other professions, e.g. among engineers (27%) and doctors (26%). The percentage of minorities among young lawyers did go up rapidly in the 1980s and 1990s in Ontario: in 1981 visible minorities made up 2% of lawyers in the 25-34 age group, as against just under 17% in 2001. The proportion of minorities in the 45-54 age group, from which most judges are appointed, is still low, however: only 4% of lawyers in this age group were from a visible minority background in 2001.¹²

The representation of minorities in the legal profession in the United States too lags markedly behind that in most other professions. Black lawyers there were excluded from the profession for a long time. In 1960 African Americans made up 1.3% of the profession. In the 1970s the percentage of black lawyers fluctuated around 3%, and around 3.5% in the 1980s. During the 1990s it gradually rose to 5%, and by 2000 African Americans made up 5.7% of the profession.¹³ Hispanics made up 1% of the profession in 1983, rising to over 4% in 2000.¹⁴ The proportion of Asian Americans in the profession was 2.3% in that year,¹⁵ making them less underrepresented than African Americans or Hispanics. The proportion of Asian Americans in the legal profession still lagged far behind that in other professions – even more than in the case of blacks and Hispanics.

8 Authors' calculation, based on figures from the Universities and Colleges Admissions Service (UCAS).

9 King, Warren & Miklas, 2004.

10 Chambliss, 2004.

11 Abel, 1995, p. 53.

12 Ornstein, 2004.

13 Authors' calculations, based on data from the US Census Bureau.

14 Authors' calculations, based on data from the US Census Bureau.

15 Authors' calculations, based on data from the US Census Bureau.

Intake into the judiciary

Table 3.1 shows the most recent figures for the representation of ethnic minorities in the judiciary in England & Wales, Canada and the United States. The Canadian figures relate to the Province of Ontario. In relation to their proportion in the population as a whole, ethnic minorities are underrepresented in the judiciary in all three countries, by a factor of about three in Canada and two in England & Wales. In the United States ethnic minorities are relatively better represented among federal judges than state judges: in the judicial systems of the individual states, which employ a total of 29,000 judges, minorities are underrepresented by a factor of three on average, whereas in the much smaller federal system (totalling 1,700 judges) the factor is one-and-a-half. This is probably due to the smaller size of the federal judiciary – where a relatively small number of appointments makes a difference – in conjunction with the appointment system (a few Presidents have

Table 3.1 Representation of ethnic minorities in the judiciary in England & Wales, Canada (Ontario) and the United States, 2004-2005

	Number of judges	Proportion of judiciary	Proportion of legal profession	Proportion of total population
England				
Ethnic minorities	139 ¹	4%	9-11% ²	9%
Ontario				
Visible minorities	14	7%	9%	19%
VS: State courts ³				
African Americans	665	6%	6%	12%
Hispanics	320	3%	4%	13%
Asian Americans	122	1%	2%	4%
VS: Federal courts				
Minorities ⁴	154 ⁵	19%	12%	31%

1 Exclusief tribunal officers

2 Barristers: 11%; solicitors: 9%

3 Judges presiding over general jurisdiction state courts

4 African Americans, Hispanics, Asian Americans, Native Americans

5 Federal judges in active service on courts of general jurisdiction

Sources: Department for Constitutional Affairs; Bar Council; Law Society (England & Wales); Judicial Appointments Advisory Committee 2004; Ornstein, 2004 (Ontario); Chambliss, 2004 (USA)

deliberately sought out candidates from black, Hispanic or other minority backgrounds). The increase in the number and proportion of minority judges in England & Wales is a recent development. At the end of the 1990s less than 2% of judges in England & Wales were from a minority ethnic background. Between 1998 and 2005 almost a hundred minority judges were appointed, and the percentage of minorities among newly appointed judges rose from 4% in 2000 to 15% in 2004. The rise was based on a greater consensus on the need for a more diverse judiciary. In Ontario most minority judges were appointed during the 1989-95 period, and this was probably connected with the creation of a Judicial Appointments Advisory Commission in December 1988. In the United States it is clear that most minority federal judges were appointed by the Democratic Presidents Carter (1977-80) and Clinton (1993-2000): African Americans were more than proportionately represented among the judges they appointed. We do not have comparable figures for state judges in the United States. In all three countries the intake of 'newcomers' into the judiciary does not seem to have come about 'by itself'.

Comparison with the proportion in the legal profession

Judges are recruited from the profession in all three common law countries, so it makes sense to compare the proportion of minorities in the judiciary with their proportion in the profession (see Table 3.1). In Canada and the United States we find that the percentage of minority judges is similar to that of minority lawyers. In relation to their proportion in the profession, then, minorities are not badly underrepresented in the judiciary: indeed, in the United States the proportion of minorities in the federal judiciary (19%) is substantially higher than their proportion in the profession (12%). In the Canadian Province of Ontario it is true that the proportion of visible minorities in the judiciary (7%) is slightly lower than in the profession as a whole (9%), but we need to remember that only lawyers with at least ten years' experience can be considered for appointment as judges, and visible minorities are even less well represented in this category: only 4% of lawyers in the 45-54 age group (from which most judges are appointed) were from visible minorities in 2001.¹⁶ In England & Wales the proportion of minorities in the judiciary (4%) lags far behind their proportion in the profession (9% or 11%), but it is mainly barristers and solicitors with over fifteen years' experience who are appointed as judges, and, as in Canada, minorities are even less well represented in this recruitment pool there. No less than 7% of barristers with over fifteen years' experience were from minorities in 2003, however, as against under 2% in the case of solicitors with that much experience.¹⁷

16 Ornstein, 2004, p. 8.

17 Department for Constitutional Affairs, 2004.

3.2 Germany and France

There were no figures on minorities in the judiciary, the advocacy and law studies available for Germany or France, so we had to rely on the impressions of key informers and counting 'foreign' names on lists of judges and advocates. In Germany we looked mainly for data on judges, lawyers and law students of Turkish origin, and of North African and African origin in France.

In Germany the law is relatively popular with students of Turkish origin, but many of them have German nationality and therefore cannot be identified in the statistics. A few of our German respondents had the impression that by no means all of them completed their studies, took the first *Staatsexamen* and embarked on the *Referendar* training programme. Nonetheless, the number of advocates of Turkish origin seems to be growing rapidly. There are said to be fairly large concentrations of these in the Ruhrgebiet in particular, in cities such as Cologne and Duisburg, and we did indeed find more than 80 Turkish – and somewhat fewer Arabic – names on a list of advocates from the Cologne Bar association¹⁸ out of a total of 4,820 names (under 2%). All in all there must be a few hundred ethnic Turkish advocates in the whole of Germany, amounting to a few tenths of a percent of all advocates. The proportion of people of Turkish origin in the German population is much higher, at just under 3%.

About one in six lawyers in Germany is a judge. If this were true of lawyers of Turkish origin, there would be a few dozen ethnic Turkish judges; in reality there are far fewer. The general impression is that Turks and other immigrant communities are scarcely represented at all in the judiciary. On a list of names of the German judiciary¹⁹ we found a total of seven Turkish names, five judges (three women and two men) and two public prosecutors (one woman and one man). Most of them were appointed after 1999, and two of them were still on probation. They work in Nordrhein-Westfalen (two judges), Baden-Württemberg (one judge and one prosecutor), Berlin (one judge), Brandenburg (one judge) and Bavaria (one prosecutor).

In France the law does not seem to be particularly popular with students of North African or African origin. A few respondents offered the explanation that the democratization of higher education has been less effective in law faculties than in most other subjects. Young people from the elites of the former colonies do come to study law in France – a tradition that began in the colonial era – but most of them return to their countries of origin once they have completed their studies. Nonetheless, the number of advocates of North African

and African origin seems to be growing rapidly. On a list of advocates registered with the Paris Bar²⁰ (totalling 18,205) we counted over 600 with both forenames and surnames that were non-European. Names that looked North African were most common, but we also found a few dozen names from the rest of Africa, as well as a few dozen Chinese and Vietnamese names, and smaller numbers of Turkish, Persian and Japanese names. The figure of 600 amounts to more than 3% of all Paris advocates, half the proportion of persons of African origin in the French population as a whole. This is not particularly low, however, given the level of education of the first North African generation in particular.

Advocacy does not constitute a route to the judiciary to any substantial extent in France, with only a handful of advocates a year entering it. Most of our respondents considered that the French judiciary still has very few members of North African or African origin.

3.3 The Netherlands

Again there are no figures available on the representation of minorities in the judiciary and advocacy in the Netherlands, although there are data on law students and trainee judicial officers (RAIOs).

Intake of law students

Law studies are very appealing to young people of 'non-Western' origin (see Table 3.2), with 427 youngsters of Surinamese, 336 of Turkish, 259 of Moroccan and 154 of Antillean origin embarking upon them during the 1997-2001 period. Together they made up 8% of the total intake of law students, almost twice as high as the proportion of first-year students in these four groups in the total university intake (4.3%). Their proportion in law studies was also relatively high in relation to the proportion of the four groups in the Dutch population as a whole, which was 6.2% in 2000.

¹⁸ Rechtsanwaltskammer Köln, Anwaltsverzeichnis, www.rak-koeln.de, downloaded on 28 April 2005.

¹⁹ Deutscher Richterbund, 2004.

²⁰ Conseil National des Barreaux, <http://www.cnb.avocat.fr/>, downloaded on 13 June 2005.

Table 3.2 Proportion of the four largest minority groups in the intake to law studies (1997-2001), the total university intake (1997-2001) and the Dutch population as a whole (2000)

	Number of law students	% of total intake of law students	% of total university intake	% of total Dutch population
Surinamese	427	3,0 %	1,7 %	1,9 %
Turks	336	2,3 %	1,0 %	1,9 %
Moroccans	259	1,8 %	0,8 %	1,7 %
Antilleans	154	1,1 %	0,7 %	0,7 %
Total of four groups	1.176	8,2 %	4,3 %	6,2 %

Source: Crul & Wolff, 2002

The proportion of the total intake of first-year students accounted for by law students was 13%; the respective figures for Turkish and Moroccan first-years were 29% and 28%, and 23% and 19% for Surinamese and Antilleans.²¹ The drop-out rates for students from 'non-Western' backgrounds were not much higher than for their indigenous fellow students, and those for Turkish and Moroccan law students were even below the average for all law students.²²

Intake into the judiciary

During the period from October 2000 to the end of April 2005 1,318 indigenous and 87 non-indigenous lawyers applied for RAIO places (see Table 3.3), of which 267 and 11 respectively were admitted to the training programme. Lawyers from migrant backgrounds made up about 6% of the total candidates and 4% of the candidates admitted. In relation to the proportion of minority students in the intake to law faculties in previous years (the four largest groups alone made up 8% of the total intake in the 1997-2001 period) these percentages were on the low side. As Table 3.3 shows, the analytical test is the biggest stumbling block: whereas more than half the indigenous candidates passed it, less than a quarter of the non-indigenous ones did.

21 Crul & Wolff, 2002.

22 Crul & Wolff, 2002; Wolff & Crul, 2003.

Table 3.3 Intake into the RAIO programme, 2000-2005 (total intake, with non-indigenous intake in brackets)

Year ¹	Total enrolments	Passed analytical test	Passed preliminary interview	Passed assessment	Admitted to the programme
2000 ²	127 (6)	60 (1)	49 (1)	40 (1)	26 (1)
2001	252 (14)	128 (3)	104 (2)	82 (1)	56 (2)
2002	232 (14)	118 (5)	94 (4)	79 (2)	52 (2)
2003	259 (12)	131 (4)	112 (4)	103 (3)	65 (4)
2004	357 (21)	195 (3)	139 (1)	106 (1)	55 (1)
2005 ³	178 (19)	99 (3)	75 (2)	46 (1)	24 (1)
Total	1405 (87)	731 (19)	573 (14)	456 (9)	278 (11)

1 Based on the numbers on each course. Two courses begin each year, in April and October.

2 October 2000 course

3 April 2005 course

Source: Council for the Judiciary

A large proportion of the judiciary (72%), however, is made up of people who have previously worked as lawyers, so the intake into the judiciary is influenced by the proportion of ethnic minorities in the legal profession. According to an estimate made in 2002, about a hundred lawyers from migrant backgrounds were working as advocates – less than 1% of the total number of advocates. The majority were said to be working in medium-sized practices, and a small number to have started their own practices. No more than 16 non-indigenous lawyers were said to be working in the ten largest law firms – which together account for 1,800 advocates.²³ In order to estimate the number of advocates of Turkish origin we investigated for ourselves how many advocates with Turkish names were registered with the Bar. At the beginning of 2004 we counted 43 advocates with Turkish names, amounting to 0.3-0.4% of all advocates, whereas the proportion of people of Turkish origin in the Dutch population is just under 2%. The first of these advocates was registered as early as 1987. A substantial majority (26 out of the 43) were registered in 2001 or later, so were still trainees. About ten advocates with Turkish names had six years' experience as advocates in 2004 and could therefore in theory be considered for appointment as judges.

23 'Blanke bastions', NRC Handelsblad, 29 January 2003.

In none of the other five countries were ethnic minorities represented proportionately (in relation to their proportion in the population as a whole) in the judiciary, so the Netherlands is no exception here. We made inquiries at seven courts to see whether they had judges from migrant backgrounds. Four of them (two district courts and two appeal courts) told us they had none; one district court said it had two, one of them of Antillean extraction, and another district court also said it had two, one of Chinese and one of Antillean extraction. Another court said it had two minority judges. We can conclude from these data that ethnic minorities are still badly underrepresented in the Dutch judiciary, numbering only a few judges.

3.4 Comparison with the proportion of women

In the common law countries the proportion of women in the judiciary lags behind the percentage of women advocates. The discrepancy is biggest in England & Wales, where the proportion of women among newly appointed judges is still lower than their proportion in the legal profession (see Table 2.3). Compared with the slow progress being made by women, the proportions of minority judges in the three common law countries are in fact going up fairly rapidly. In Canada and the United States the proportion of minorities in the judiciary corresponds approximately to their proportion in the profession. In England & Wales the number and percentage of minority judges began to increase later, but the proportion of minorities among new appointments has been relatively high in recent years.

In France, the Netherlands and Germany the percentage of women judges has gone up faster – following a slow start – than in the three common law countries, and it has increased faster than their proportion in advocacy (see Table 2.3). There are no precise figures available on the intake of minorities in these countries, but there does not seem to be a rapid increase taking place at the moment.

3.5 Women from minority backgrounds

In relation to their proportion in the population as a whole, ethnic minorities are generally underrepresented in the legal profession and the judiciary, and women are generally not represented proportionately. This raises the question of what the situation is regarding the representation of minority women.

As Table 3.4 shows, the percentage of women among judges and lawyers from minority groups is generally above average. In England & Wales, for example, one in six judges is

a woman, but among minority judges one in four is a woman. The percentage of women among solicitors from ethnic minorities is also well above average: women made up 41% of all solicitors in 2004. Among solicitors of Asian ethnicity the proportion of women was 51%, 54% among those of African ethnicity, 61% among those of Chinese ethnicity and 67% among those of Afro-Caribbean ethnicity. In the United States too the percentage of women among minority judges and lawyers is above average, and this is the case with lawyers in Canada.

Table 3.4 Proportion of women among minority judges/lawyers, around 2000 (percentages)

	Proportion of women among minority judges/lawyers	Average number of women among judges/lawyers
England & Wales: judges	25% ¹	16%
England & Wales: solicitors	51-67% ¹	41%
Canada (Ontario): lawyers	49% ²	35%
United States: judges	± 30% ³	± 20%
United States: lawyers	44% ³	29%

1 Ethnic minorities

2 Aboriginal groups and visible minorities

3 African Americans, Hispanic and Asian Americans

Figures of this kind are not available for France, Germany or the Netherlands, but we found indications that there too the percentage of women under minority judges and lawyers is relatively high. In Germany there is a clear majority of women among advocates of Turkish origin. In the Netherlands there are equal numbers of female and male advocates of Turkish origin. In France we estimate the proportion of women among advocates with 'non-Western' names at over 40%, about the same as the French average (45%).

Minorities entering the legal profession and the judiciary is a relatively recent phenomenon, and the relatively high proportion of women is probably related to this: it was during the period when the most minority judges and lawyers were entering the profession or the judiciary that increasing numbers of women were coming in.

4 The debate and policies

Another question the study set out to answer was to what extent the composition of the judiciary in the countries under consideration has been the subject of public and political debate, and whether this has resulted in diversity policies or affirmative action. Here too we found differences between the two Anglo-Saxon countries and Canada on the one hand, and Germany and France on the other. In England & Wales, Canada and the United States discussion of the position of minorities in the legal profession and – to a lesser extent – the judiciary has been going on for some time. In Germany and France the ethnic diversity of the judiciary or the various branches of the profession is not an issue.

4.1 England & Wales

A commission asked to advise on the reform of the profession in England & Wales noted as early as 1979 that barristers from ethnic minorities stood less chance of gaining a place in chambers. In response the Bar Council, the barristers' professional body, set up a commission of seven white and seven black barristers to investigate discrimination in the Bar and make recommendations on how to combat it. In a report published in 1984 the commission was particularly concerned about the segregation of chambers: it discovered that most ethnic minority barristers were working in a small number of chambers. It concluded 'what is needed is to heighten the awareness of the Bar as a whole not only of the existence of the problem but also of the fact that the remedy lies in the hands of established white chambers'.²⁴ Soon afterwards the Bar Council adopted a number of resolutions urging, among other things, that the award of scholarships, pupillages and tenancies to black students and lawyers be monitored. At the time the Law Society, the solicitors' professional body, was less willing to acknowledge that there was discrimination in the profession: a working party of the Society concluded from the absence of official complaints that there were no indications of racial discrimination and measures were not needed.²⁵

Nowadays equality and diversity are matters discussed at length on the professional bodies' web sites, in their annual reports etc. The Law Society's web site, for example, states that the Society 'is committed to playing a leading role in the elimination of discrimination and the promotion of equality of opportunity and diversity in all its activities as a regulator, a representative body and an employer.' Recording and monitoring the ethnicity of members, staff etc. now seems to be broadly accepted. It also seems to be taken for granted that members of ethnic minorities are organizing themselves within the profession: there is a

Society for Black Lawyers, a Society of Asian Lawyers and an Association of Muslim Lawyers.

Diversity – or lack of diversity – in the judiciary is also an important issue in the debate on the appointment system. Almost everyone seems to agree that the pool of potential candidates for the judiciary needs to be enlarged, and the debate is not only about ethnicity but also sex and disability. Three common arguments in favour of a more diverse judiciary are the legitimacy of the judicial process, equal opportunities and the quality of justice. As regards the first point, the legitimacy of the judicial process, it is often claimed that public confidence in the judiciary is jeopardized if the judiciary is unrepresentative. It is sometimes argued that this is even more important now that judges, partly as a result of the Human Rights Act 1999, have to take more politically sensitive decisions. Another common argument – perhaps the most common – in the debate in England & Wales is equality of opportunity: it is often argued that demands are made in practice that cause indirect discrimination. The third argument is that current recruitment practice excludes large numbers of people who possess the qualities to be good judges. It is partly as a result of the lack of diversity in the judiciary, so it is said, that the quality of court decisions in particular areas, e.g. discrimination cases, leaves something to be desired.

For a few years now the Lord Chancellor has been trying to promote diversity in the judiciary. The policy mainly involves encouraging ethnic minority, female and disabled lawyers to apply for posts. A 'work shadowing scheme' has also been created: this enables lawyers interested in switching to the judiciary to observe how a Circuit Judge or District Judge works. This opportunity has above all been brought to the attention of lawyers from ethnic minorities (and their organizations). Also, lay persons are now better represented on the committees that interview applicants; moreover, more of these lay interviewers are from minority backgrounds. In the old pool of lay interviewers the proportion of ethnic minorities was only 5%, as against 15% in the new pool recruited in 2003. Lastly, the aim is to offer barristers and solicitors entering the lower echelons of the judiciary – after a relatively short career as barristers or solicitors – career prospects in the judiciary, as judges who have entered at a particular level tend to remain at that level at present.²⁶

²⁴ Annual statement of the Four Inns of Court, as cited by Goulbourne, 1985, p. 11.

²⁵ Goulbourne, 1985, p. 13.

²⁶ Department for Constitutional Affairs, 2005.

4.2 Canada

The diversity of the judiciary and other parts of the legal system has been an issue in Canada for some time too. The federal Department of Justice commissioned an overview in 1994 of all the reports (over thirty of them) that had been published on multiculturalism and the law in the preceding years. The author of the overview noted that ‘recommendations to increase the representation of racial and ethnic minorities as justice system actors at every level are numerous.’²⁷ As in other countries, the first recommendations of this kind concerned the police, with the aim of improving relations with ethnic minorities. In the 1980s the case of Donald Marshall Jr., an aboriginal wrongly sentenced to life imprisonment for murder, attracted a good deal of attention. One of the recommendations of the commission that investigated what had gone wrong was that members of aboriginal groups and visible minorities should be appointed as judges.²⁸

Canada has a highly developed infrastructure for promoting employment equity for both ethnic minorities and women. The federal Department of Justice, for example, has employment equity coordinators, an Employment Equity Steering Committee, employment equity champions and four advisory committees on equity (one for each of the four target groups in the Employment Equity Act). The Canadian Bar Association (CBA) has had a Standing Committee on Equity since 1993, whose remit includes raising awareness of equity issues in the profession. On top of this a Racial Equality Implementation Committee was set up in 2000. The CBA adopted several resolutions in the 1990s, including a recommendation that the federal Minister of Justice and the governments of the provinces should follow Ontario’s example and apply a policy of affirmative action when appointing judges.²⁹

The Province of Ontario has had a Judicial Appointments Advisory Committee in operation since 1988, one of the main reasons for whose creation was to improve the diversity of the judiciary. One of its first acts was to write a letter to all 1,200 senior women lawyers in the Province, asking them to consider applying for the post of judge. The response was so great that over 40% of judges appointed between 1990 and 1992 were women.³⁰ The Committee also encourages people from other underrepresented groups to apply. Every job advertisement specifically encourages applications from members of minority groups. Notifications of vacancies are sent out to a large number of bodies, including organizations of visible minority lawyers. Members of the Committee also attend conferences and meetings of various organizations by invitation, where they provide information on the appointment process.

27 Etherington, 1994, p. 11.

28 Ibid., p. 35. The Report of the Royal Commission on the Donald Marshall Jr. Prosecution was published in 1988.

29 CBA, Resolution 95-06-A: Equality, www.cba.org/CBA/Equality/Pdf/95-06-A.PDF, downloaded on 18 August 2005.

30 Malleson, 2004, p. 5.

The Committee’s affirmative action policy, then, seems to consist mainly in encouragement; it does not have quotas or targets. A similar policy is applied in British Columbia.

4.3 The United States

The legal profession in the United States has also been considering matters related to its diversity for some time, and it too has developed an extensive infrastructure for improving the position of members from minority backgrounds. The American Bar Association (ABA), which until 1943 excluded blacks from membership, has a Commission on Racial and Ethnic Diversity in the Profession and a Commission on Women in the Profession. It commissions a good deal of research, including investigations into the Association itself.

Local professional bodies are also working to improve the position of minority lawyers. The Association of the Bar of the City of New York, for example, announced in 2003 that, in collaboration with a large number of law firms, it intended to set up an Office of Diversity, which would monitor the progress being made by the firms involved in diversifying their staff.³¹ External pressure on law firms in the United States to do something about the position of women and minorities is also increasing: more and more large clients are asking their law firms to state how many of the hours charged have been worked by minority lawyers.

The profession in the United States has a large number of minority organizations: black lawyers set up the National Bar Association as early as 1925, and nowadays there is also a Hispanic National Bar Association, a National Asian Pacific American Bar Association and a National Native American Bar Association, as well as dozens of organizations limited to particular states.³²

These various commissions and organizations are concerned with the profession as a whole, not the judiciary in particular. Diversity in the judiciary is mainly an issue in the debate on the pros and cons of various selection procedures. Supporters of merit selection, including the ABA, claim that this procedure results in better representation of women and minorities in the judiciary than elections. Supporters of elections, on the other hand, claim that these result in greater diversity, and some minority Bar associations also favour elections.

31 Association of the Bar of the City of New York, www.abcnyc.org/Diversity/, downloaded on 19 August 2005.

32 ABA, www.abanet.org/minorities/links/minoritybars.html, downloaded on 18 August 2005.

At present, however, most judges in the United States are elected. It is difficult to conceive of measures that would increase the diversity of the judiciary under this selection system. The situation is different where judges are appointed by the Governor or – in the case of federal judges – the President. President Carter (1977-80) worked to diversify the federal judiciary in terms of sex and ethnicity, as did Clinton (1993-99), and both of them appointed relatively large numbers of women and minorities. A few Governors have implemented policies of this kind. It is also conceivable that attempts can be made to increase diversity where selection committees are used. Supporters of this system claim that this procedure results in better representation of women and minorities in the judiciary. During our study we did not come across any examples of committees that had explicit diversity policies, but the diversity of the judiciary is probably an issue for some of them. According to the National Center for State Courts, more women and members of minorities are appointed as judges where the committee itself is diversified.³³

4.4 France and Germany

The ethnic diversity of the judiciary is not an issue in Germany or France. In France in particular this is related to the national integration model. Both countries have been considering the position of women in the judiciary for some time, but so far this has not resulted in any work on the position of other ‘newcomers’ in the various branches of the legal profession. The desirability of increasing the number of officials from minority backgrounds is a topic of discussion in both countries, however.

Insofar as there is any debate in France on the ‘ethnic’ structure of the judiciary, this is about justice in the overseas *départements* and territories, known as DOM-TOM (*départements et territoires d’outre-mer*), not about continental France. The French Council for the Judiciary (CSM) has repeatedly expressed concern about justice in the DOM-TOM in recent years. Most judges there are from continental France, and this is not conducive to public acceptance of court decisions. The CSM would like to appoint more overseas judges in these *départements* and territories. In its 2001 annual report it considered measures such as special information for law students in the DOM-TOM, awarding scholarships and opening special centres to prepare students for the competitive examinations for the judicial training programme.³⁴

33 National Center for State Courts, www.ncsconline.org/WC/FAQs/JudSelfFAQ.htm, downloaded on 11 August 2005.

34 Conseil Supérieur de la Magistrature, 2002.

The debate in Germany seems to be confined to the lay magistrature.³⁵ In Hessen a bill to abolish the nationality requirement for lay magistrates was drafted in the 1990s, the main aim being to offer immigrants who have lived in Germany for a long time the opportunity to participate in the administration of justice. This, it was said, would also enrich the justice system, as it would strengthen the lay element. The input of specific immigrant experience into the judicial decision-making process would also serve the interests of ‘citizen-oriented, contemporary and welfare state-based justice’.³⁶ The draft bill was never submitted to parliament, however, because of substantial opposition to the idea. Lay magistrates are involved in exercising the authority of the state, and this should remain the province of German nationals. The government of Rheinland-Pfalz recently submitted a bill to enable persons with insufficient command of German to be excluded from the post of *Schöffe*,³⁷ based on a problem with a Romanian *Aussiedler* who had been selected by lot for inclusion on the list of *Schöffen* but was found not to have sufficient command of German.

In France there has recently been an open debate on whether there should be affirmative action to facilitate the integration of North African or Islamic immigrants and their descendants, in particular on making access to civil service jobs easier. A report was published recently, for instance, urging special recruitment campaigns for the police,³⁸ and another report cautiously explored ways of increasing the proportion of French citizens from migrant backgrounds in civil service posts.³⁹ In the coming years this debate may widen to cover the judiciary, but this is not happening at the moment.

Some German Länder have had policies of recruiting more police officers of foreign extraction for some time now, the main argument being that the police need staff who understand ethnic minority languages, cultures and customs. A few of our respondents in Germany said they could imagine that a migrant background could be a positive factor in selection procedures for judges as well. It would be good, they thought, if judges had a better knowledge of immigrants’ cultural backgrounds.

35 In addition to professional judges, lay persons are also involved in criminal (and civil) justice in Germany. Nordrhein-Westfalen alone employs some 23,000 lay magistrates, including 12,500 lay criminal magistrates (Schöffen). Any German between the age of 25 and 70 can be appointed as a Schöffe. The way Schöffen are selected varies from one municipality to another. See Tak & Fiselier, 2002, p. 75.

36 From the explanatory notes by the Hessian Minister of Justice on the Entwurf eines Gesetzes über die Zulassung von nichtdeutschen Bürgern als ehrenamtliche Richter. We obtained the text from a respondent who was working as a civil servant at the Hessian Ministry of Justice at the time, in 1996, and had drafted the bill.

37 Schöffen are lay magistrates employed in criminal cases. The bill was to be submitted to the Bundesrat on 17 June 2005. See ‘Schöffen sollen Deutsch können. Gestzesentwurf’. Spiegel On-line, 1 June 2005, <http://www.spiegel.de/politik/deutschland/0.1518.358435.00.html>, downloaded on 8 August 2005.

38 Begag, 2004.

39 Calvès, 2005, p. 17.

4.5 The Netherlands

Considerations of diversity have been involved in appointing the members of the highest court in the Netherlands since the beginning of the nineteenth century. These related initially to regional origin, then later on to judges' religious and professional backgrounds.

So although there has long been talk of a judiciary that is representative of the population, initially in terms of region, then religion, profession, social background, political affiliation and sex, it is only recently that attention has been paid explicitly to judges' ethnicity. This was not considered in the debate, literature, surveys or studies in the 1990s.⁴⁰ Like many other employers, the judiciary as a whole failed to keep records of the origin of staff as required by the employment equity legislation which was in force from 1994 to 2003, although some courts have supplied figures on this. This attitude changed around 2000, and the 2000-2001 collective agreement for the judiciary specifically considered minority groups, stating as follows: 'The NVvR [Dutch Association for the Judiciary] and the Minister of Justice consider it very important that the Judiciary Sector should also contribute to overcoming the disadvantaged positions of the disabled, non-indigenes and women. A. Disabled [...] B. Non-indigenes. The intake of Dutch persons of non-indigenous origin into the judiciary is low. The Parties wish to create conditions to facilitate the entry of this group into the judiciary. A more proactive recruitment policy is needed in this context. C. Women [...]'

The chairman of the Council for the Judiciary has repeatedly expressed concern about the low numbers of judges from minority backgrounds in recent years, saying in 2001, for instance, that entry to the judiciary needs to be made easier for non-indigenes, as 'one of the shortcomings of the judiciary is its unrepresentative structure'. In his view the judiciary ought to reflect the diversity in society.⁴¹ The 2002-2005 strategic agenda for the judiciary included 'multicultural society' as one of the topics that need to be the subject of broad discussion and deliberation. A spokesman for the Council reported in the NRC Handelsblad that special efforts would be made to find qualified non-indigenous judges in the coming years.⁴²

Concern about the low numbers of judges from minority backgrounds seems to be widespread in the judiciary. A large proportion of judges recognise the desirability of having more minority judges: in a recent survey 57% said they agreed with the statement 'we need more judges of non-indigenous origin'. Everyone we interviewed (trainee judicial officers, students, lawyers and judges) considered that the judiciary ought to reflect the diversity in society as far as possible.

The Council for the Judiciary has already taken some steps in recent years. Candidates for the RAIO programme whose mother tongue is not Dutch are given the opportunity to take a specially adapted test. The selection committees have appointed a number of judges from minority backgrounds in recent years. The Council is also commissioning research, including the present study, into ease of entry to the judiciary for lawyers from minority backgrounds.

40 Vrij Nederland Enquête, 1991; De Groot-van Leeuwen, 1991; De Groot-van Leeuwen, Van Rossum & Schuyt, 1996.

41 Van Delden in Het Parool, 27 June 2001.

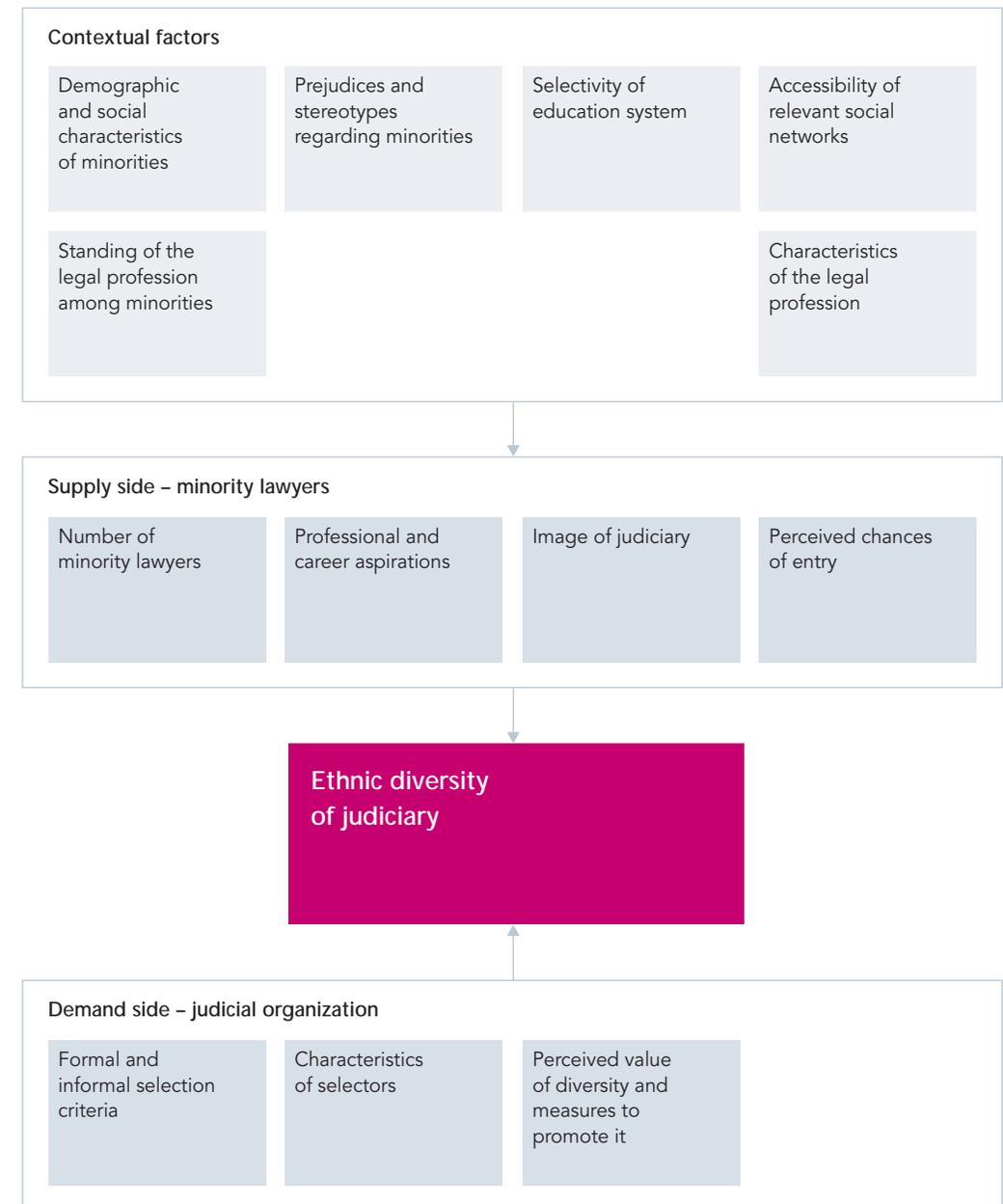
42 NRC Handelsblad, 'Blanke bastions'. Vol. 11, No. 6, p. 5, 29 January 2003.

5 Obstacles and incentives to 'newcomers' entering the judiciary

The proportion of minorities in the judiciary is a function of the interaction of a host of factors that impede or foster 'newcomers' entering the judiciary. Fig. 1 provides an overview of the factors we found in our study. These can be divided into three categories, demand-side, supply-side and contextual factors. The first category comprises factors related to the selection procedures for the judiciary. The second category comprises factors on the part of lawyers from the particular immigrant or minority groups themselves. Contextual factors affect the intake of newcomers to the judiciary more indirectly, for example the level of education of the immigrant or minority populations, the image these communities have, and the standing of the legal profession within these groups.

The differences between the three types of factors are mainly analytical. In practice there are all sorts of interactions taking place. We know from the literature on women in the legal profession, for instance, that women lawyers' professional and career aspirations depend partly on the opportunities the profession offers them. Thus changes in demand-side factors can produce changes on the supply side.

Fig. 1 Obstacles and incentives to entering the judiciary



5.1 Demand-side factors

The literature on women in the legal profession often refers to the difference between countries with common law and civil law traditions. In common law countries judges are recruited from a limited group of experienced advocates or lawyers. This places women at a disadvantage, as they are less well represented in the recruitment pool. In England & Wales the co-option system has meant that even women who have worked as solicitors or barristers for a long time have stood less chance of being invited to apply or, where they are able to apply themselves, passing the selection procedure. In countries with a civil law tradition the judiciary is usually made up of career judges, and the selection of candidates is often based on study performance or test results. In France, for example, most candidates for the judicial training programme are selected by competitive examinations, in which women achieve high marks. The fact that these marks are decisive thus places women at an advantage. The intake of women into the French judiciary has gone up rapidly in recent decades. 'Women have found it easiest to enter those branches of the legal profession for which the selection process is based on academic merit. [...] Couched in more general terms: it is the outsiders, those who have neither the personal contacts nor the capital traditionally needed to enter a particular profession, who have something to gain from this mode of recruitment.'⁴³ In the Netherlands women candidates likewise achieve good results in the selection process for the judicial training programme.

In England & Wales the appointment system clearly disadvantages lawyers from minority backgrounds, as the proportion of minority judges is far below that of minorities in the legal profession. In Canada and the United States the system does not seem to disadvantage minorities so much, as the proportion of minority judges is approximately the same as that of minorities in the profession. There are big differences between states in the United States, however: in some of them minorities are relatively well represented in the judiciary, in others relatively poorly. What part the different selection procedures for the judiciary play here is not entirely clear.

In France and Germany the strong emphasis on examination results seems – unlike in the case of women – to disadvantage rather than advantage minority candidates. In the Netherlands too, candidates from minority backgrounds do relatively badly in the admission tests for the RAIO programme, and this is due partly to cultural bias in the tests themselves. Most judges in the Netherlands, however, are recruited via the 'outsiders' route, and this is yet another factor in the low intake hitherto of minority lawyers into the Dutch judiciary, as most of them do not meet the requirement of six years' experience in the legal profession.

⁴³ Boigeol, 2003, pp. 405-6.

Nevertheless, in comparison with the other countries under consideration the Netherlands seems to have fairly favourable conditions, as lawyers in the other countries cannot choose from a number of routes as they can in the Netherlands. On top of this, the common law countries, which only have the 'outsiders' route, also require far more years of experience.

In all three common law countries attempts have been or are being made to increase the diversity of the judiciary. Figures on appointments of federal judges in the United States show that it makes a big difference whether the President has undertaken to work towards a more diverse judiciary. In the Canadian Province of Ontario the creation of an appointments committee that encouraged underrepresented groups to apply also made a big difference, and we are now seeing the same thing happening in England & Wales. In all three countries the intake of 'newcomers' has gone up thanks to relatively simple measures.

5.2 Supply-side factors

The literature on women in the legal profession often refers to women's professional and career aspirations, which are said to be a factor in the high percentage of women judges in countries such as France, Germany and the Netherlands. Women lawyers are attracted by the terms of employment offered by the judiciary, the state employer. The option of working part-time, entitlement to parental leave and other fringe benefits enable them to combine work and family. Advocacy does not provide such good opportunities. Women lawyers generally seem to attach less importance to remuneration, which is sometimes put forward as an explanation for the high percentage of women judges in France (where judges are relatively low paid).

To what extent minority lawyers entertain particular professional and career aspirations is not entirely clear. In most of the countries under consideration they seem to favour a career in advocacy rather than the judiciary, but this also applies to white or 'indigenous' lawyers: advocacy appeals to a broader spectrum of lawyers than the judiciary. Whatever the case, however, if few minority lawyers aspire to a career in the judiciary this is an obstacle that affects intake.

It may be that some minority lawyers have a particularly strong preference for advocacy, or special reasons for that preference. Lawyers of Turkish origin in Germany, for instance, are said not to be particularly interested in a career in the judiciary, preferring to become advocates. This is motivated not only by the greater independence and higher income that advocates have – considerations which are important to other lawyers as well – our

respondents also pointed to the prestige that the advocacy profession enjoys in Turkish circles. One respondent, herself an advocate of Turkish origin, said she could also imagine that Turkish youngsters would be less keen on a career in the judiciary because they do not identify so much with the German state. Various other respondents pointed out that many young Turks in Germany wished to keep their Turkish nationality, whereas German nationality is required to enter the judiciary. Advocacy, on the other hand, is open to non-Germans.

In France it appears that law graduates from the DOM-TOM prefer advocacy to the judiciary, which is why measures to recruit more lawyers from the DOM-TOM for the judiciary have not had much effect so far. One respondent explained the preference of overseas law students for advocacy by the fact that they are often very attached to their families and friends: 'Judges are [...] obliged to demonstrate career mobility. Overseas students, who are often very attached to their regions, do not want to be appointed in the north of France for a number of years before they can return home to where they have their families and friends.' This latter motive may also play a part in the career choices of law students of North African origin.

In addition to professional and career aspirations, the perceived chances of entry are also a factor. In England & Wales there is certainly a fear that good potential candidates are underrating their chances. A recent study, however, showed that barristers and solicitors from ethnic minorities are just as likely to apply for posts in the judiciary as their white colleagues; indeed, ethnic minority solicitors are even more likely to apply. Women barristers and solicitors, on the other hand, are relatively unlikely to apply: they tend to underestimate their chances more than minority lawyers.⁴⁴

In the case of the Netherlands we have data from a limited number of interviews with law students and young lawyers from migrant backgrounds. Here the nationality requirement does not seem to be much of a barrier to entering the judiciary. Most of the respondents already had Dutch nationality, and many of them were under the impression that this was the case with virtually all the young people in their communities. A few respondents who had become naturalized while retaining their original nationalities said that they would have found it difficult to relinquish their original nationalities: 'It's an emotional thing. If the rule had been that you can only have one nationality I would have needed more time to think about it. But I would have done it in the end.'

44 Malleon & Banda, 2000.

A more important factor seems to be the image people have of the judiciary. Some associations respondents have:

- 'A formal organization, but it probably couldn't be any other way.'
- 'I get the impression you'd be in something of a straitjacket. It doesn't seem to me that there's much room for an individual approach to solving legal problems.'
- 'The advocacy profession is associated more with success and earning money. The judiciary has a more stuffy image.'
- 'The judiciary might be nice, but you need to be mentally equipped for it. It's a completely different kind of practice [from advocacy]. We do our own cases. We create our own cases. I think a judge operates very differently, he's dependent on what the litigants bring into the case.'

In a group interview with a few trainee judicial officers from migrant backgrounds we noted that minority law students may be put off by the lack of ethnic diversity in the judiciary: 'Application may be a bigger step for non-indigenes. [...] You find yourself in a court culture where the vast majority are indigenous. It's different from what you've been used to during your student days, in your family, your circle of friends and so on. That's scary.' According to these respondents, this is why many minority law students are more likely to go into advocacy. The large law firms, however, suffer from the same problem as the judiciary. The group interview also revealed that a traineeship in the provinces can be tough on trainee judicial officers from minority backgrounds who are used to a more multicultural environment.

The chances (or perceived chances) of entry may also be a factor. The interviews showed that minority law students and lawyers generally rated their chances of being admitted to the RAIO programme as low. One lawyer said that if he wanted to be a judge he would therefore probably do it after having first practised as a lawyer. A woman lawyer remembered that students had the idea 'you need super high marks to be selected, you need to be very motivated and you have to put an awful lot of time into studying and relevant activities to get through the RAIO selection process'. A student similarly said she had heard that the selection procedure was very tough. 'I believe the application procedure takes three months and involves taking an IQ test, a psychological test and an analytical test. I know other people who have done it, at least they applied but were rejected – people who I know had higher marks than me and more work experience. That surprised me. [...] Compared with them I rate my own chances as low.'

It may be that students with migrant backgrounds are more inclined to underrate their chances because, compared with indigenous students, they know fewer people who are already working in the judiciary. A student said it was only after she had been encouraged by a lecturer who was also a judge that she decided to apply for a place on the RAIO programme. 'I kept thinking, even if I wanted to, I wouldn't... Maybe it's a bit too ambitious, maybe I won't make it. But I spoke to a judge not so long ago, and he encouraged me to go ahead. He said, you're from an ethnic minority, there is diversity in the judiciary, why shouldn't you be able to make it?'

A few of the lawyers interviewed, on the other hand, did say they might want to switch to the judiciary when they were older. A few quotations:

- 'Working in the judiciary is something I should like to do, but not at the moment. I notice the more you specialize and the more you delve into the subject matter, the more you feel the need not just to look at cases from one side but to look at them as a judge and only then to reach a decision.'
- 'A judge needs to have experience of life. [...] You shouldn't become a judge too soon. It's no trifling matter, you make decisions that affect people's lives.'

5.3 Contextual factors

The literature on women in the legal profession often refers to the – more or less subtle – prejudices that women lawyers face in their professional careers. 'A longstanding obstacle to equal opportunity involves the mismatch between characteristics associated with women and those associated with professional success, such as assertiveness and competitiveness,' notes an American overview.⁴⁵ Another factor – mentioned particularly in the Anglo-Saxon literature – is lack of access to informal networks, which hampers women lawyers in their careers: 'They aren't given enough challenging, high visibility assignments. They aren't included in social events that yield professional opportunities. And they aren't helped to acquire the legal and marketing skills that are central to advancement.'⁴⁶ The third factor that is often mentioned is the 'culture' in law firms: long working days and resistance to flexitime and part-time work make it particularly difficult for women to combine work and family. 'The result is that those with the greatest family commitments rarely achieve positions with the greatest influence over workplace policies. By contrast, many lawyers who do reach those positions have made substantial personal sacrifices and resist accommodating colleagues with different priorities. [...] If women want to be "players", the message is that they have to play by the existing rules.'⁴⁷

45 Rhode, 2003, p. 11.

46 Ibid., p. 11.

47 Ibid., p. 18.

Minority lawyers – also 'newcomers' in the profession – are faced with similar obstacles: they too do not enjoy 'the same presumption of competence as their male white colleagues'. 'For some racial minorities, longstanding myths of intellectual inferiority, coupled with lower average grades and test scores, make these stereotypes particularly difficult to remove', notes an American study.⁴⁸ Subtle mechanisms of this kind are more difficult to identify for those who are not disadvantaged by them, hence they are less inclined to regard them as real. According to the Anglo-Saxon literature, minority lawyers' careers are also hampered by the importance of social capital: as 'newcomers' in the profession, they do not inherit the networks that can help to advance a career. It is difficult for minority advocates, for instance, to build up relationships with white clients and gain access to mentoring and training in the firm. 'I think they like mentoring people who look like them. It's not intentional. In the elevators you can always get greeted, but as to whether you truly get looked after... [that] is a totally different question', notes a respondent in a survey of minority advocates in the United States.⁴⁹ In the literature on England & Wales the importance of social capital in the selection procedure for the judiciary is seen as a major obstacle to minority lawyers entering it.

These factors similarly emerged from the interviews with lawyers and law students with migrant backgrounds in the Netherlands. A number of respondents pointed to 'cultural differences'. The most common examples mentioned were lunchtime humour and the drinks culture. A quotation: 'You may not entirely conform with the kind of behaviour that is socially desirable. [...] Let me give you a specific example, drinks parties. I'm not so keen on them. I go along, but I'm a Muslim and a teetotaler, so I don't feel comfortable there. People don't like that. Does it mean I'm not up to scratch? This needs to be acknowledged more.' Hardly any of the lawyers and law students we interviewed knew anyone already working in the judiciary. Many of the lawyers we interviewed only had native-Dutch colleagues. Many respondents noticed during their studies that many of their Dutch fellow students had lawyers in their families to whom they could turn for advice, whereas they did not have that opportunity. Some respondents, however, were trying to act as role models or trailblazers for young people in their communities.

These factors – cultural differences, prejudices and stereotypes and the importance of social capital – are not confined to the judiciary or the legal profession; they hamper the intake of women and minorities into higher-level jobs in general.

48 Ibid., p. 11.

49 Cited in Chambliss, 2004, p. 84.

In the case of minorities there are some other structural factors that make it difficult to enter higher education (including law studies) and high-level jobs (including the legal profession). The first factor is certain characteristics of the minority population, e.g. the proportion of first-generation immigrants. Access to higher education and the professions in the immigration country is generally less easy for immigrants born and raised elsewhere than for their descendants born and raised in that country, and this applies even more to immigrants who have a different mother tongue. The level of education of the minority or immigrant population is also important. Although there are differences between the countries under consideration, and between the ethnic groups in each country, the average educational level of the minority or 'non-indigenous' population is generally lower than that of the white or 'indigenous' population. Canada is an exception: the proportion of highly educated people among visible minorities there is higher than among white Canadians. The ethnic minority population in the Netherlands is made up of people who have immigrated relatively recently (the proportion of first-generation immigrants is high) and who moreover have a low level of education on average. Surinamese and Antilleans start from a better position (they are more likely to have Dutch as their mother tongue, and there has been a tradition of young people from the elites coming to study in the Netherlands) than the other groups.

The second factor is the selectivity of the education system. In many countries children whose parents have a low level of education do less well at school than children of highly-educated parents. As a result the educational disadvantage of first-generation immigrants is often passed on to the next generation. In Germany children of immigrants are underrepresented in the types of school that provide access to university education. In France many children of North African immigrants pass their *Baccalauréat*, but courses that provide access to senior civil service posts remain more or less closed to them. In the United States African American and Hispanic youngsters are still underrepresented in higher education. In the Netherlands too the second generation is underrepresented in pre-university and higher education, especially young people from a Turkish or Moroccan background. The interviews with law students and lawyers from migrant backgrounds showed that some of them had been advised at the end of primary school to go on to a level of education that was too low for them (junior general secondary (MAVO) or senior general secondary (HAVO) school); they had all eventually successfully completed pre-university school, though in some cases by a circuitous route.

The third factor which specifically impedes entry to the legal profession is its 'local' nature. In Canada and the United States minorities are less well represented in the legal

profession than other professions. A report by the professional body in Ontario offers the explanation that 'the legal profession is more "local" than, say, medicine, engineering or university teaching. Potential immigrants who are already lawyers, especially from countries with dissimilar legal structures, might be deterred by barriers to accreditation.' Even in the case of immigrants (and their descendants) who have enjoyed their entire schooling in Canada the profession is said to be less accessible, as 'having less familiarity with Canada may be a liability in occupations, such as the law, that are closely connected to national culture.'⁵⁰ In the United States, however, even African Americans who have lived in the country for many generations are less well represented than in the other professions. Evidently there are other factors involved than just the 'local' nature of the profession. We do not have comparable figures for the Netherlands and other European countries in our study. Here too the legal profession is probably also less accessible than other professions to first-generation immigrants who have received their education abroad. Whether this also applies to the second generation is unclear.

In Canada and the United States, though, and in England & Wales, the profession is taking the position of minorities in it seriously. The professional bodies in all three countries have had research carried out into discrimination in the profession, adopted resolutions urging that discrimination be combated, and have themselves taken steps – of a more or less specific nature – to combat it themselves. This would seem to be a positive factor – albeit representatives of minorities in the profession are often sceptical about the actual results. In France and Germany, and also the Netherlands, the position of minorities is not a concern or issue for the professional bodies; it is only in the Dutch judiciary that we are seeing the beginnings of a debate.

In spite of the 'local' nature of the legal profession, law studies are relatively popular with young people from minority or immigrant backgrounds in various countries, and this is a positive factor. In England & Wales, for example, the rise in the numbers of ethnic minority law students has been reflected fairly quickly in growing numbers of ethnic minority barristers and solicitors. In Germany the law faculties are producing increasing numbers of lawyers of Turkish origin. The relative popularity of law studies is not something that can be taken for granted, however. In France the law seems to be less popular, in fact, with students of North African or African origin. In other countries there are sometimes striking differences between groups: in England & Wales, for instance, students of Chinese origin are more likely to opt for other subjects. In Canada (Ontario), on the other hand, students of both Arab and Chinese origin are particularly well represented in the law faculties. It is not the

50 Ornstein, 2004, pp. 14-18.

case, then, that 'the same' minorities display the same preferences everywhere. Nor is it always clear why law studies are popular. In Germany respondents gave various explanations for this in the case of ethnic Turkish law students: the study of law is a general education; it has the reputation of enabling graduates to practise a wide range of professions that provide a good income and enjoy high social standing; and there is no *numerus clausus* (limit on the number of students) in law, unlike medicine. The same motives probably also lead many native German students to opt for law. In the case of students of Turkish origin – in particular young Turkish women – another important factor could be that they do not need to move house to study law: they can remain living at home with their families, which also keeps the cost down. This is one of the reasons why a lot of young people study law in cities such as Cologne and Duisburg, which have substantial Turkish populations.

In the Netherlands too the law faculties are producing increasing numbers of lawyers from minority backgrounds: relatively large numbers of young people of Turkish, Moroccan and Surinamese origin in particular are opting to study law. The interviews with law students and young lawyers showed that they are often encouraged to do so by their parents, among whom the legal profession enjoys a high standing. A few quotations:

- 'That's the way it is with us, the daughter or son has to study either medicine or law.'
- 'The way Turks see things, there are really only two occupations that really enjoy a high standing, either you're a doctor or you're a lawyer, judge or prosecutor. [...] Those are the two most important things in life, health and justice!'
- 'Law studies have a high standing, even among the illiterate. They've all had something to do with the law at some time or other, many have been involved in legal proceedings, engaged a lawyer, for example to obtain a residence permit. That's why the law is seen as useful.'

6 Lessons for the Netherlands

6.1 Prospects based on experience elsewhere

Figures on trends in the numbers of 'newcomers' in the judiciary were only available for the three common law countries. The trend in the intake in England & Wales may be the one that has the most predictive value for the Netherlands, as the relative size of the minority population there is about the same as here (9-10% of the population as a whole); ethnic minorities make up a far larger proportion of the population in the United States and Canada. In other respects, however, the situation in England & Wales differs from that in the Netherlands: the judiciary there has fewer members, relatively speaking, than the Dutch one, and minorities there are more than proportionately represented – in relation to their proportion in the population as a whole – among lawyers, which is far from being the case in the Netherlands. All in all, then, it will probably take longer for ethnic minorities to be represented proportionately in the judiciary in the Netherlands than in England & Wales.⁵¹

A positive factor in the Netherlands is that more and more young people from minority groups are studying law. In England & Wales the increase in the number of ethnic minority lawyers was reflected fairly quickly in a rise in the number of ethnic minority barristers and solicitors. It took much longer, however, for these lawyers to enter the judiciary there, owing mainly to the selection system. In this respect the circumstances in the Netherlands are more favourable: anyone not wishing to apply for a place on the RAIO programme immediately after graduating from law studies can still opt to join the judiciary after six years' experience in another branch of the legal profession. At present there are few minority lawyers with at least six years' experience, but the numbers are set to rise rapidly in the coming years.

To answer the question of whether diversity is just a question of time or can also be influenced by policy, it is best to look at experience in the three common law countries – where the most statistics are available. In all three countries the intake of 'newcomers' into the judiciary has not come about entirely 'by itself'. In England & Wales, where it was long assumed that a more diverse judiciary was 'just a matter of time', it is only in recent years that the intake of women and minorities has visibly increased. Nor has the increase in the numbers of minority lawyers automatically resulted in a more diverse judiciary in Canada or the United States. Evidently the barriers to newcomers are too great.

⁵¹ There are over 9,000 ethnic minority solicitors and barristers in England & Wales, whereas proportionate representation would be achieved with as few as 300 ethnic minority judges (full-time and part-time). In the Netherlands proportionate representation would be achieved with more than 200 judges. Law graduates of 'non-Western non-indigenous' origin here number no more than a few thousand. How many of them work in the legal profession is not known.

6.2 Opportunities for policy-makers

The diversity of the judiciary in a country is a function of the interaction of various factors (see Fig. 1). Our study does not enable us to establish the precise weight of each individual factor (or group of factors). It is clear, however, that certain characteristics of the minority population in the Netherlands are a major factor in the current underrepresentation of the groups concerned in the Dutch judiciary. The fact that these are groups who have immigrated relatively recently, and on top of this have a low level of education on average, means that they number relatively few lawyers in their ranks, and this contextual factor exerts more influence than (a) characteristics of these minority lawyers (e.g. their professional and career aspirations) and (b) characteristics of the selection procedures for the judiciary (e.g. cultural bias in psychological tests). The numbers of minority law students and law graduates have been going up rapidly in recent years, however, and if this trend continues, demand-side and supply-side factors will become increasingly important in the years to come.

Factors can be more or less influential, but policy-makers are particularly interested in those factors that can be influenced by policy. Minority socio-economic deprivation is not something that can be eliminated at a stroke. Nor can policy-makers in the judicial organization do much to change the selectivity of the education system or the general image of minorities. They will find their main opportunities for influencing the situation in their selection procedures.

If we are really to achieve more minority representation in the judiciary, a really diverse judiciary, it is important e.g. that the members of the Committee for the Recruitment of Members of the Judiciary (CALRM), and those who are responsible for careers and promotion, e.g. the presiding judges of courts, commit to working towards greater diversity. Their attention needs to be drawn to the general inclination to underestimate the ability of minority lawyers, from which they themselves are not exempt. It is also important that they actively look out for potential minority candidates for all three entry routes.

Minority lawyers can be encouraged to apply. In England & Wales, for example, talks are given to organizations of ethnic minority lawyers. Organizations of minority law students could be contacted in the Netherlands. It is at least as important, however, that representatives of the judicial organization deliberately try to address minority lawyers and law students in all their public education and recruitment work. Inspiration may perhaps be found in another measure in England & Wales, where lawyers interested in switching to the judiciary are given

the opportunity to ‘shadow’ an experienced judge. Relatively large numbers of ethnic minority lawyers – many of whom have no contacts yet in the judiciary – are availing themselves of this opportunity.

If subtle mechanisms of prejudice and exclusion are to be broken down, it is also important for minority groups to be properly represented in the CALRM. Indeed, minority judges occupying senior positions in the judiciary, sitting on committees or editorial boards, or otherwise frequently making their presence felt, can have the same positive effect. If they are seen in high-profile positions of this kind it will help to overcome the idea that posts in the judiciary are not open to minority lawyers.

An effective diversity policy probably also requires some kind of record to be kept of the ethnicity of staff, as this is the only way of gaining information on the degree of representation (or underrepresentation) of ethnic minorities at various levels in the judicial organization. It is also the only way of monitoring the intake of minorities, the advancement of staff from a minority or immigrant background within the organization, and outflow from the profession. Diversity should be an explicit issue not only when appointing judges but also in their subsequent career development.

Experience of similar, relatively simple measures taken elsewhere is encouraging. In all three common law countries the intake of underrepresented groups went up as soon as the diversity of the judiciary was addressed in the appointment procedure. The policy mainly involved examining the selection procedures, encouraging minority lawyers to apply, deliberately seeking out potential candidates, ensuring that minority groups were properly represented among the people carrying out the selection, and ensuring that potential candidates could come into contact with experienced judges if they so desired. Measures of this kind in England & Wales during the past few years have resulted in relatively large numbers of minority judges being appointed. An important factor was undoubtedly that a broad consensus had developed in the country about the need for a more diverse judiciary: this will have encouraged lawyers from the target groups to apply and not to think that they didn’t stand a chance right from the start. Members of selection committees will have been increasingly aware of the importance of considering the diversity of the judiciary – in addition to other important considerations. Once a process of this kind is under way and being kept alive, more drastic measures – which would command less public support – may well not be necessary.

Our study does not enable conclusions to be drawn on whether a consensus of this kind exists in the Netherlands, though everyone we interviewed (students, lawyers, trainee judicial officers and judges) considered that the judiciary ought to reflect the diversity in society as far as possible. Many of them immediately connected this with confidence in justice. One lawyer said he thought that the judiciary ought to reflect society more than it does at present ‘because the judiciary is part of society. There is a danger in the long run that society will feel less of a bond with the judiciary and have less confidence in it.’ A woman student said: ‘The legislature and the executive are elected, but not the judiciary. They need to be as close as possible to the people as well.’ A woman student of Turkish origin said: ‘Yes, it would be good if we had our people there. That would immediately overcome the image that people with no confidence in the judiciary have; our people are there too, so it can’t be that bad.’ A trainee judicial officer said: ‘The structure of society is changing. We ought to see that reflected in all government bodies, including the judiciary. People should obey the law. But then they need to see themselves reflected in the courts. It shouldn’t be the case that the only people you see in court are ones you have nothing to do with otherwise.’ A President of a District Court said: ‘I do think it’s important for there to be more non-indigenous judges. That leaves its mark on the face of the judiciary. We need to do our level best to lower the threshold, I think that would be good.’

Some respondents argued that greater diversity would not result in different justice, but above all it would affect the image that people involved in court proceedings have. Others pointed out that greater diversity would reduce the risk of a biased view of society, resulting in biased judicial decisions, or that it could enhance the quality of justice: ‘Sometimes I know from experience that what people are saying is not true. You bring knowledge along with you that can sometimes be useful. [...] Above all I see the added value. It doesn’t decide cases, but it can sometimes be useful.’

The equal opportunity argument – often mentioned in England – was not mentioned by our respondents. None of them were in favour of positive discrimination as a way of achieving greater diversity. They made an exception when it came to encouraging minority lawyers to apply. A trainee judicial officer said: ‘Application may be a bigger step for people from ethnic minorities. Once you’ve applied, though, you shouldn’t be given preferential treatment.’ Another respondent thought that courts could be more active in recruiting judges from among the minority lawyers they already employ: ‘First look and see what kind of people you have in your organization, people in legal posts with the ability to become judges.’

6.3 Final remarks

One question we have not yet considered is what level of ethnic diversity is sufficient. What should the target of any efforts to work towards greater diversity be? So far we have tacitly assumed that minorities should ideally be represented proportionately in the judiciary – this is the yardstick that was applied in equal opportunities policy for women. One of the specific targets for 2010 laid down in 2004 was that women should make up 50% of the Government, Parliament, the European Parliament and the provincial assemblies, and of the judiciary. Targets of 20-45% were set for other managerial and decision-making posts in the private and public sector.⁵² Ethnic minorities make up a much smaller proportion of the population than women, however, currently 10% of the Dutch population. This raises the question of how ‘visible’ the ethnic diversity of the judiciary would be even if this section of the population were represented proportionately.

Would litigants and the public have a different image of the judiciary if 10% of judges were from a minority ethnic background? Probability theory indicates that this might well be the case. Let us take criminal justice as an example. It is particularly in this area that there is a fear that lack of diversity eventually goes at the expense of loss of public confidence, hence the legitimacy of court decisions. In a single-judge court the defendants see two members of the judiciary before them, one judge and one public prosecutor. The probability of at least one of them being from a minority background would be just under one in five. In a full-bench court the defendants see four members of the judiciary before them, three judges and one public prosecutor. The probability of at least one of them being from a minority background then rises to more than one in three. These calculations are based on the assumption of ethnic minorities making up 10% of both judges and public prosecutors – which is far from being the case at present. If the proportion is 5%, the chances of a defendant encountering a judge or prosecutor from a minority background are 10% and 19% respectively. By way of comparison, with the current proportion of women in the judiciary (47%) the probability of a defendant encountering a woman judge and/or prosecutor is over 70% in a single-judge court and over 90% in a full-bench court.

A completely different question is whether a judiciary where ethnic minorities are better represented would also be more heterogeneous in other respects. According to some authors this is unlikely to be the case, as elites have a preference for ‘cultural clones’ when selecting new members.⁵³ Moreover, if they are to hold their own among established members, newcomers will need to display conformity and loyalty. A limited degree of ethnic

⁵² Tweede Kamer [House of Representatives], 2003-2004, 27061, No. 30.

⁵³ The term ‘cultural clone’ is from Essed, who applied it to doctors (Essed, 2005) and professors (Essed, 2004), among other professions.

(or gender) diversification would therefore have little if any effect on cultural homogeneity. These authors are probably right. This is illustrated by the fact that most of the minority lawyers and law students we interviewed thought it was permissible to ask a judge to take off her headscarf. A few quotations:

- ‘In many posts it doesn’t matter, but in the case of judges I need to have the feeling that they are genuinely independent, neutral and impartial, so a judge should not want to wear a headscarf. A good judge ought to be able to take her headscarf off when the court is in session.’
- ‘I take the view that judges should not be allowed to wear headscarves, any more than skull caps or crosses that are visible outside clothing. [...] I also think that if you decide to become a judge you just have to comply with certain rules. Something is required of you and you have to make a sacrifice.’
- ‘I think distinguishing features of that kind do not belong in a courtroom. Especially since the constitutional state stands for independent justice, impartial justice, and once you start showing in that way that religion occupies such an important position I think you are also showing that it could play a part in the way you deal with the case, and that’s not acceptable. It gives the appearance of partiality, which is precisely what you don’t want in the judicial process.’

While the authors may be right about the phenomenon of ‘cloning’, there are two comments we should like to make. The first is that newcomers from underrepresented groups will bring different knowledge and experience with them, and not just of ethnic minority language, culture, religion and customs: many lawyers from a migrant background also come from lower social classes than indigenous lawyers, for instance. This kind of knowledge and experience – as our respondents pointed out – is rarely likely to result in a different decision in a case. Nor is it desirable that we should expect minority judges to have specific knowledge of the minority in question. Nevertheless, the diversity of knowledge and experience that ‘newcomers’ bring with them would enrich the judiciary and justice.

The second comment is that even if it makes no difference to the actual administration of justice, the representation of minorities in the judiciary can have a symbolic significance. To say that something is merely symbolic often has pejorative connotations, but the word can also have a positive meaning. Pitkin, in *The Concept of Representation*, regarded as a standard work on the subject, identified four meanings or dimensions of the concept.⁵⁴ She used the term ‘formal representation’ to refer to the institutional rules and procedures by which representatives are chosen. Descriptive representation (standing for) is when

representatives reflect the represented, the population. Substantial representation (acting for) is when representatives’ actions are in accordance with the interests of their constituents. Symbolic representation, lastly, is the term Pitkin used when the represented feel they are being represented fairly and adequately. In the case of the legislature (which Pitkin was writing about) all four dimensions are important, especially (in Pitkin’s view) substantial representation. In the case of the judiciary symbolic representation is likely to be seen as the main aim.⁵⁵ This will probably require a certain degree of descriptive representation, though, as the various dimensions are not isolated. A recently published study of the representation of women in the legislature showed that where there is descriptive representation (i.e. where women are represented more or less proportionately in the legislature) there is also a greater likelihood of symbolic representation. Interestingly, men as well as women were found to have more confidence in the legislature when women were represented more or less proportionately.⁵⁶

The presence of minorities in the judiciary is important because of what they symbolize – the fact that justice is not the prerogative of a particular ethnic group. As already stated, this will not make much difference to the actual administration of justice, but all the more to public confidence in it.

54 Pitkin 1967; see also Sloot, 2004.

55 Cf. Kenney, 2002 on women in the judiciary.

56 Schwandt-Bayer & Mishler, 2005. The researchers based their findings on data from 31 countries.

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