Terrorism Trials and the Judiciary: Does Diversity Matter?

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ABSTRACT

The events of September 11, 2001, have caused many people to believe that terrorism is one of the most serious threats of our time; precipitating massive anti-terrorism measures. There has been much discussion and focus on counter-terrorism measures undertaken; from intelligence and law enforcement, to new laws and special procedures. There has not been much discussion of the vital role of the judiciary in addressing the challenges presented by terrorism.

This paper examines a lack of diversity within the judiciary; whether that poses challenges as to the ability and capacity of the courts to properly determine questions of the guilt or innocence of terror suspects who, invariably, are visible or religious minorities. This has profound implications for minorities and state obligations within international human rights law.

The examination considers the judiciaries of three liberal democracies – Canada, United Kingdom and the United States – which often claim to be leaders in respecting human rights – and states which are increasingly multicultural, with substantial minorities. The author's experience and knowledge of the Canadian legal and judicial system informs more of the analysis. It is beyond the scope of this paper to examine the competing views and scholarship as to why there is a lack of diversity in the judiciary. Instead, the author directly examines the impact - of a lack of diversity in the judiciary.

The paper looks at the international law and principles, of equality and non-discrimination, and the question of racism within the judicial system. It, then, examines the issue by looking at the example of one terrorism trial - the Air India trial - prosecuted in Canada.

The dissertation concludes diversity within the judiciary is an essential ingredient and a qualitative aspect of justice in the modern context of addressing global terrorism and international human rights law.

- *The author is a Canadian lawyer, former judge, and member of Kellogg College, University of Oxford.*

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Introduction

1.0 Introduction

The scourge of terrorism has become global. In Western countries, the movement of peoples has resulted in the emergence of diverse multicultural and multiethnic societies. These developments present profound challenges to our courts which have been slow to make changes demanded by the principles of international human rights law.

One area that has received little attention is the question of diversity within the judiciary and its relevance to the protection of human rights. This paper contends diversity within the judiciary is an important, and often overlooked, piece of the puzzle of addressing terrorism and ensuring compliance with international human rights law.

By itself, diversity within the judiciary will not be a guarantee that justice will be done and be seen to be done in terrorism trials. A lot more goes into judging and getting it right than diversity, but it is an important ingredient. This is especially important in terrorism trials that invariably involve suspects (and often witnesses) from minority communities - people who seem different.

Respect for equality and right to a fair trial does not mean only a Muslim judge should hear a case involving a Muslim suspect or an Asian judge for Asian suspects. There is something inherently offensive in such a notion. What it does mean is that increased judicial diversity will improve the quality of justice. The lack of diversity within the judiciary is a matter of

proper concern for international human rights law. And yet, efforts to improve diversity within the judiciary are not easily accepted and generate controversy.

This work examines the reality that the courts particularly those of Canada, the U.K. and the U.S.A. are still bastions of whiteness and asserts that fairness and the principles of international human rights law demand change.

2.0 The Controversy around Diversity

In June 2009, U.S. President Barack Obama announced Sonia Sotomayor as his first nominee for Justice of the U.S. Supreme Court. Within days his nominee was attacked for a speech she gave in 2001 in which she said:

> I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.

Newt Gingrich, former Republican House speaker twittered:

> New racism is no better than old racism. A white man racist nominee would be forced to withdraw. Latina woman racist should also withdraw.[1]

Ms. Sotomayor was the first Hispanic-American nominee in the history of the U.S. Supreme Court. Obviously, her ethnic origin and cultural background mattered to her and it mattered to Mr. Gingrich.[2] America remains deeply divided on racial lines - in all its complexity and array of beliefs.

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[1] John Ibbotson, Globe & Mail, Toronto, June 3, 2009 (both quotes: Sotomayor and Gingrich).

[2] The definition of "racial discrimination" is broadly worded in The International Convention on the Elimination of All Forms of Racial Discrimination, Article 1, (see p. 8 herein), and includes descent and ethnic origin.

The President's judicial nomination was a powerful statement about the need for a wider representation of American society in courts dominated by white judges. Gingrich's statement outwardly expressed the view that race ought not to matter. Justice Sotomayor's speech contended that her background could not realistically be separated from her race and culture and would improve the quality of judicial decision-making.

The nomination controversy drew attention to the question of diversity within the judiciary and the difficulties encountered in the appointments of minority judges. Talking about race, or religious, ethnic and cultural differences generates discomfort - if not resentment. Questions about the composition and inclusiveness of the judiciary are fair questions. Judges exercise power and make decisions that hugely affect people.

In advanced liberal democracies, a prevailing narrative is that racism is a product of a by-gone era and occurrences are dismissed as aberrations and rare exceptions. To even allege racism is viewed as a social infraction. Complaints of racism are, often, dismissed as lacking merit, the voice of radicals or an overdose of political correctness.[3] These views fail to recognize that racist discrimination has changed - it is still with us, but is now masked by persons who have become sophisticated in attempting to hide their beliefs and unrecognized by persons whose racism, while real, is unconscious.

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[3] Paraphrasing Frances Henry and Carol Tator, The Colour of Democracy: Racism in Canadian Society, 3rd edition, Thomson-Nelson 2006, p. 352. The authors explore the changing face of racism and the dynamics of democratic racism. Using case studies, the interconnectedness of institutions such as policing, justice and systems of governance is examined. They also explore the ways in which racism has affected Muslim, Arab, and other Canadians of minority backgrounds since 9/11. Democratic racism refers to an ideology of the "myth of equality" and discourse of denial, in which the principle assumption is that racism simply does not exist in a democratic society. The assumption here is that because Canada is a society that upholds the ideals of a liberal democracy, it could not possibly be racist.

3.0 The Impact of 9/11 on Human Rights

Since 9/11, liberal democracies increasingly face the difficult question of how to "balance" human rights and security. Invariably and into the foreseeable future, anti-terrorism measures, including charges and trials, implicate minorities - foreigners and certain racial, religious or ethnic groups. How judges approach and decide these cases has profound implications for the human rights.

The Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights commissioned by the International Commission of Jurists (ICJ), observed:

> …some individuals are put outside of the UDHR's [Universal Declaration of Human Rights] basic tenet that "all human beings are born free and equal in dignity and rights." This exclusionary process has led to the rights of minority groups coming under attack and whole communities being rendered suspect...history is indeed repeating itself…members of minority groups (most particularly Muslims in countries with a non-Muslim majority) reported that they have become the target (intended or not) of many of the counter-terrorism measures. This targeting has led to grievous individual abuses and has meant that communities live in fear of their treatment by the wider society... the space for public debate and dialogue appears ...to be narrowing.[4]

The Panel concluded that counter-terrorism measures could only be successful over the long-term with the support of an informed public. Instead, it concluded, most of the measures had encouraged an "us and them" approach, often alienating the very communities whose support and confidence is essential for successful counter-terrorism action.

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[4] The Eminent Jurists Panel on Terrorism, Counter-terrorism and Human rights was an independent body commissioned by the ICJ to conduct a global inquiry on the impact of counter-terrorism. The final report in February 2009 entitled "Assessing Damage, Urging Action" was based on 16 public hearings covering 40 countries world-wide. Website: http;//www.icj.org Introduction, p. 8.

And yet, many reasonable people feel very threatened by words such as the following:

> Our words are dead until we give them life with our blood…I and thousands like me are forsaking everything for what we believe. Our driving motivation doesn't come from tangible commodities that this world has to offer...Your democratically elected governments continuously perpetuate atrocities against my people all over the world. And your support of them makes you directly responsible, just as I am directly responsible for protecting and avenging my Muslim brothers and sisters. Until we feel security, you will be our targets. And until you stop the bombing, imprisonment and torture of my people we will not stop this fight. We are at war and I am a soldier. Now you too will taste the reality of this situation.[5]

These words were spoken and recorded by Mohammed Sidique Khan of Yorkshire before his suicide which caused the deaths of innocent civilians in the Edgware Road Circle Line bombing of July 7, 2005, in London. Such words and acts quite understandably engender "us and them" thoughts and reactions.

The events of 9/11 have brought a profound shift in our discourse. Some have resorted to the "Clash of Civilizations" paradigm of Samuel Huntington.[6] Many have come to believe that terrorism poses one of the most serious and grave threats of our time. This, in turn, has raised questions about the place and priority of human rights. The man who seeks to become the next Prime Minister of Canada, Michael Ignatieff, has stated, "Since the end of the cold war, human rights have become the dominant vocabulary in foreign affairs. The question after September 11 is whether the era of human rights has come and gone."[7] And yet, others

[5] Reproduced from BBC: http://news.bbc.co.uk/2/hi/uk_news/4206800.stm

[6] S.P. Huntington, The Clash of Civilizations and the Remaking of World Order, Simon & Schuster, 1997, New York.

[7] Micheal Ignatieff, New York Times, February 5, 2002. (Mr. Ignatieff has since retracted or changed his viewpoint).

contend that counter-terrorism or the "war on terror" is itself the grave threat to human rights and of our time.

The climate of "terrorism" challenges and threatens human rights: there are competing notions of security and thus the paradigm of "us and them." Conor Gearty contends:

> …the discourse of terrorism challenges universality and by positing a version of the world rooted in good and evil makes possible the kinds of subversions…In this way the "human" is taken out of "human rights"…[8]

The courts are a powerful institution and play a vital role in the determination of questions surrounding terrorism. If the most important factor in the outcome of any proceeding or trial is the values that underlie the adjudication; the question must be asked - whose values? Terror suspects are coming from minority communities and the judges are almost all white. Minorities lack confidence in the judiciary. They believe the lack of diversity in the judiciary impairs fair trials; that justice is prejudiced by stereotypes and discrimination.

4.0 Overview

In Chapter One, the author will examine the human right to non-discrimination. This will include key legal instruments and treaties, definitions of discrimination, and a General Comment by the U.N. Committee on the Elimination of Racial Discrimination.

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[8] Conor Gearty, The Hamlyn Lectures 2005, Can Human Rights Survive? Cambridge University Press, 2006, pp. 130,132.

Chapter Two will examine the lack of diversity within the judicial systems of three liberal democracies (Canada, United Kingdom, U.S.A) and various studies, legal articles and jurisprudence on issues of representation, minorities and how judges decide. This includes the intersection of diversity with key international human rights such as non-discrimination, the right to a fair trial and equality before the law.

Chapter three involves a critical examination of the findings of a Canadian trial judge in the ***Air India*** terrorism trial. This is a controversial and complex subject. The writer attempts to pierce the judicial veil and analyze the trial judge's assessment of the credibility of the key witness for the prosecution. The analysis will include an examination of how stereotyping and the judge's background affected the crucial aspect of judicial fact-finding and credibility assessments involving minority witnesses and communities and the consequences for justice.

Chapter Four postulates that a lack of diversity in the judiciary poses significant risks of getting it wrong and of discrimination. This examination will demonstrate why diversity matters, the true extent of the problem and it's implications for international human rights law within the crucial context of terrorism.

Chapter One: Non-Discrimination in International Human Rights Law

1.0 The Right to Non-Discrimination

Equality is "the most important principle imbuing and inspiring the concept of human rights."[9] The core UN human rights treaties contain provisions on equality and non-discrimination. The International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) is solely dedicated to racial discrimination. Article 1 defines "racial discrimination" to mean:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The judiciary is an important element in the delivery of services, part of the state apparatus and bound, inter alia, by Article 2 of ICERD under "public authorities and public institutions." If there is evidence of disproportionate exclusion, this is discriminatory, and according to Article 2.2 a programme of special measures is mandatory if circumstances warrant it, for the purpose of guaranteeing full and equal enjoyment of human rights and fundamental freedoms.

The theme of equality and non-discrimination is broadly applied in the International Covenant on Civil and Political Rights (ICCPR). Article 2(1) of the Covenant reads:

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[9] Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary, Kehl, Engel, 1993, 458.

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR guarantees equality before the law, equal protection of the law and the duty to protect from discrimination. "The formal claim of equality before the law requires equality in the application and enforcement of the law: legal administrators - judges, administrative officials - are not to apply legislation in a discriminatory manner."[10]

The Statute of the International Court of Justice (ICJ) is annexed to the Charter of the United Nations, of which it forms an integral part. Article 9 implicitly recognizes diversity by stipulating the composition of the ICJ, "[possess] as a whole the representation of the main forms of civilization and of the principal legal systems of the world." The principle of diversity is reflected in the statutes of most international tribunals, in particular human rights bodies, in which diverse representation is intended to preclude domination by any state, group or ideology. Diversity is mandated and reflected in international bodies containing multiple judge panels. It is implicit and a norm.

2.0 The Definition of Discrimination

There is not a common universal definition of discrimination or equality, nor is it contained as a common definition in the seven core UN human rights treaties. ICERD has a specific

[10] Wouter Vandenhole, Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies, Intersentia 2005, Antwerpen-Oxford, p. 18.

definition of discrimination based on race and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) has a definition based on gender. A remedial definition used by the European Court of Human Rights has become widely used and accepted, which states a "differentiation has an objective and reasonable justification if it pursues a legitimate aim, and if there is proportionality between the means used and the aim sought to be realized." [11]

Discrimination and equality are further delineated by concepts such as de jure and de facto, intentional and non-intentional, direct and indirect, systemic or structural, institutional and private. De jure or legal discrimination refers to laws or policies and is non-existent or rare in the modern liberal democracies. De facto discrimination is discrimination in practice and relates to equality of results. ICERD permits departure from equality as acceptable to alleviate or improve the situation of disadvantaged groups in order to achieve equality. Measures taken such as "affirmative action" or "positive discrimination" to ensure equality in exercise of human rights by all "shall not be deemed racial discrimination." Article 2.2 provides such measures, however, must not lead to the "maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

Discrimination does not require intent. It can occur on purpose or as an unintended outcome or effect. ICERD refers to "with purpose or effect" of discrimination. Indirect discrimination, as opposed to direct discrimination, "occurs when a neutral measure is having

[11] *Belgian Linguistics Case*, E.Ct.H.R., 23 July 1968, Series A, No. 6, para. 10.

a disparate and discriminatory effect on different groups of people, and cannot be justified by reasonable and objective criteria. In the case of indirect discrimination, treating unequals equally leads to unequal results which can have the effect of fostering inequality. Indirect discrimination deals with institutional and structural biases."[12]

Systemic discrimination or racism consists of:

> policies and practices, entrenched in established institutions, that result in the exclusion or advancement of specific groups of people. It manifests itself in two ways: (1) institutional racism: racial discrimination that derives from individuals carrying out the dictates of others who are prejudiced or of a prejudiced society; and (2) structural racism: inequalities rooted in the system-wide operation of a society that exclude substantial numbers of members of particular groups from significant participation in major social institutions.[13]

Systemic discrimination or inequality occurs due to the influence of dominant societal values or prevalent race, religion, language or ethnicity.

The Committee on the Elimination of Racial Discrimination ("CERD") has explicitly confirmed that indirect discrimination, which is "discriminatory in fact and effect," is forbidden. Indirect discrimination is properly assessed by considering the particular context and circumstances, "as by definition indirect discrimination can only be demonstrated circumstantially."[14]

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[12] Wouter Vandenhole, supra. 10, p. 35.

[13] Henry and Tator, supra. 3, p. 352.
See also R. v. Gladue, [1999] 1 S.C.R. 688, in which Canadian Supreme Court addressed the serious problem of overrepresentation of aboriginal people in prison. Judges may take judicial notice of the broad systemic and background factors in sentencing aboriginal offenders.

[14] UN Doc. CERD/C/66/D/31/2003, Communication 31/3003, LR. v. Slovakia, para. 10.4, reproduced in Wouter Vandenhole, supra, 10, p. 42.

CERD has also "encouraged states to provide de facto access to the courts to all persons, including members of minority and ethnic groups."[15] The writer contends that true equality before the law requires that the state appoint persons to be judges with due regard for the increasingly diverse nature of our societies: the judges themselves are central to upholding of the state's obligations, including equality.

3.0 CERD: General Recommendation XXXI

CERD addressed the prevention of racial discrimination in the administration and functioning of the criminal justice system in General Recommendation 31. [16] In the Preamble:

> Convinced that, even though the system of justice may be regarded as impartial and not affected by racism, racial discrimination or xenophobia, when racial or ethnic discrimination does exist in the administration and functioning of the system of justice, it constitutes a particularly serious violation of the rule of law, the principle of equality before the law, the principle of fair trial and the right to an independent and impartial tribunal, through its direct effect on persons belonging to groups which it is the very role of justice to protect,
>
> Considering that no country is free from racial discrimination in the administration and functioning of the criminal justice system, regardless of the type of law applied or the judicial system in force, whether accusatorial, inquisitorial or mixed,
>
> Considering that the risks of discrimination in the administration and functioning of the criminal justice system have increased in recent years, partly as a result of the rise in immigration and population movements, which have prompted prejudice and feelings of xenophobia or intolerance among certain sections of the population and certain law enforcement

[15] UN Doc. CERD/C/60/CO/3, para. 17 (Costa Rica). in Wouter Vandenhole, supra. 10, p. 39.
[16] UN Doc. CERD/A/60/18, pp. 98-108.

> officials, and partly as a result of the security policies and anti-terrorism measures[17] adopted by many States, which among other things have encouraged the emergence of anti-Arab or anti-Muslim feelings, or, as a reaction, anti-Semitic feelings, in a number of countries.

CERD recommended general steps to better gauge the existence and extent of racial discrimination in the administration and functioning of the justice system, the search for indicators attesting to such discrimination, strategies and steps to be taken to prevent racial discrimination with regard to victims of racism.

CERD observed that the absence of or the existence of only a small number of complaints relating to racial discrimination should not be viewed positively, instead revealing "inadequate information, fear of social censure or reprisals, cost and complexity of the judicial process, or that there is a lack of trust in police and judicial authorities, or that the authorities are insufficiently alert to or aware of offences involving racism."[18] CERD pointed to the handing down by the courts of harsher or inappropriate sentences against persons belonging to those groups and the insufficient representation of persons belonging to those groups in the system of justice, including the judiciary. It urged proper representation of racial and ethnic groups in the system of justice, including plans of action aimed at the elimination of structural racial discrimination, involving recruitment and promotion in the judicial system of persons belonging to various racial or ethnic groups, and independent national institutions to monitor, measure and identify undetected manifestations of racial discrimination.

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[17] The writer's own emphasis (by underlining).

[18] General recommendation XXXI, supra 16, I., 1(b).

Integral to access to law and justice is the guarantee of an effective remedy and just reparation for the material and moral harm suffered as a result of racial discrimination in accordance with Article 6. CERD stated the system of justice should "treat the victims of racial discrimination without discrimination or prejudice, while respecting their dignity, through...necessary sensitivity as far as racism is concerned."[19] Access to an independent and impartial tribunal is a fundamental right. States "should strive firmly to ensure a lack of any racial or xenophobic prejudice on the part of judges, jury members and other judicial personnel."[20]

CERD took account of the Bangalore Principles of Judicial Conduct[21] adopted in 2002, which recommend in particular that judges:

- should be aware of diversity in society and differences linked with background, in particular racial origins;
- they should not, by words or conduct, manifest bias towards persons or groups on grounds of racial or other origin;
- they should carry out their duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and their colleagues, without unjustified differentiation; and
- they should oppose the manifestation of prejudice by the persons under their direction and by lawyers or their adoption of discriminatory behavior towards a person or group on the basis of their colour, racial, national, religious or sexual origin, or on other irrelevant grounds.

The result has been a steady progression of international standards applicable to the judiciary on matters of discrimination. And yet, in some of the most "advanced" liberal democracies,

[19] supra 16, II, D., 19 (b).
[20] supra 16, III, C., 3
[21] E/CN.4/2003/65, annex; and reproduced from CERD, supra 16.

including those that profess the highest respect for human rights and judicial standards – the judiciary remains considerably lacking in diversity, which has implications for equality and compliance with international human rights law.

Chapter Two: Racism and the Judicial System

1.0 Introduction

> "*How come your people always lie?*"
> "*Why do your men beat their wives?*"
> "*These days you can't get appointed (to the bench) unless you have tits and a tan.*"

I am a Canadian-born Sikh, brown-skinned and a former judge of the Provincial Court of British Columbia.[22] I experienced these comments in judicial chambers. Does the fact they were made by members of the Canadian judiciary change their characterization and what do they have to do with terrorism and fair trials? What do they signify, one might ask?

The make-up of the modern judiciary - supposedly, the "best and brightest," the wise, the educated and those we entrust to render justice and protect our human rights - says a great deal about our fragile freedoms. Discrimination can be hard to prove. Prejudiced people have become more adept and sophisticated in matters of race - much remains hidden and unspoken. That racism and discrimination exist ought not to be in question. And yet, those who express concern or ask questions, as I eventually did, are all too often placed on the defensive and dismissed.

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[22] The author was a Judge of the Provincial Court of British Columbia 1996-2007 and only the second Indo-Canadian appointee in the history of the Provincial Court of British Columbia.
My own experiences are not dissimilar to those related by Justice Chen, *see* footnote 67, p. 37.
In 2005, I wrote the then in-coming Chief Judge expressing concerns regarding an overall lack of diversity and a complete absence of diversity appointments to the court for several years. He responded to my letter by describing it as being "provocative."

2.0 Canada

Canada is held up as a model of racial harmony and tolerance. Multiculturalism is enshrined in the Canadian constitution. Her largest cities are among the most diverse in the world, fast approaching 50% non-white residents, and public statements by her leaders appear to reflect pride in Canada's multicultural society. Racial minorities occupy some important positions. The Governor-General is a person of colour born in Haiti. There are some non-white members of federal, provincial, and territorial cabinets. There are even a few non-white judges occupying the benches of her courts. Canadians believe they are not racist and, indeed, more egalitarian than the British and Americans. So, what's the problem? "I am not a racist and this is not a racist institution," Canadian judges might respond if challenged.

These kinds of statements have become mantras. They fly in the face of historical and contemporary evidence of racism within Canadian society. They allow Canadians to ignore the harsh reality of racism and inequality that divides society. "Racist beliefs and practices, although widespread and persistent, are frequently invisible to everyone but those who suffer from them. White Canadians tend to dismiss evidence of their racial prejudice and their differential treatment of minorities."[23] Canadians are prone to self-righteously pointing to

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[23] Henry and Tator, supra. 3, p. 1.
Evidence of racism against aboriginal persons has been found in Canadian legal procedings:
See the 1989 Royal Commission on Donald Marshall Jr. Prosecution,
http://www.gov.ns.ca/just/marshall_inquiry/default.sap A Mi'kmaq "Indian" wrongly convicted of murder, he served 11 years of a life sentence. The case raised disturbing questions about the fairness of the Canadian justice system and racism, especially given Marshall was Aboriginal. The Nova Scotia Court of Appeal overturned Marshall's conviction but nevertheless blamed him for his misfortunes because he had not been entirely cooperative and truthful with the police. This was a total failure to understand young Aboriginals, including those in conflict with the law, who had mistrustful and negative experiences dealing with police. The Royal Commission of Inquiry viewed the appellate judge's finding as a "serious and fundamental error" and said, "it also inexplicably chose to blame Marshall for wrongful conviction." The Commission concluded "the criminal justice system (needed) to ensure more equitable treatment of Blacks and Natives" and that "racism

the USA, with its legacy of slavery and Jim Crow, and the absence of such in Canadian history as evidence of a more racially progressive and just society. They also point to British colonial history and riots such as Brixton as proof of racism in the U.K. "Not us" they proclaim - "we're not perfect, but we have come a long way" or "things are better here, than there."

Canadians like to hold up their country as a model of how people of many different backgrounds can get along and live in harmony. This myth does not accord with reality. In a national poll conducted in the spring of 2009 for Maclean's magazine, less than one-third of Canadians view Islam or Sikhism in a favourable light. The authors write, "Diversity? Canadians may embrace it in theory, but most say they would find it unacceptable if one of their kids came home engaged to a Muslim, Hindu or Sikh. Understanding? There's not enough to prevent media images of war and terrorism from convincing almost half of Canadians that mainstream Islam encourages violence."[24] Fully 45% believe Islam encourages violence and 26% saw Sikhism as doing the same. In British Columbia, with the oldest and largest Sikh community in the country, 30% said Sikhism encourages violence and only 28% reported a favourable impression of Sikhism. Familiarity does not seem to have fostered tolerance or understanding. Nationally, 89% report having Christian friends,

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played a part in wrongful conviction." Similar experiences were addressed by the Report of the Aboriginal Justice Inquiry of Manitoba 1999, http://www.ajic.mb.ca/volume.html Judge Murray Sinclair, of the Manitoba Provincial Court, and an Aboriginal Canadian, was a Co-Commissioner. The Report of the Royal Commission on Aboriginal Peoples, 1999, http://www.parl.gc.ca/information/library/PRBpubs/prb9924-e.htm involved a wider examination of the Canadian relationships with aboriginal peoples.
Also, *Delgamuukw v. British Columbia, [1997] 3. S.C.R. 1075,* involved a claim of aboriginal land rights. The trial judge did not accept the aboriginal evidence of oral history of attachment to the land. He described Aboriginal life as "nasty, brutish and short" (Hobbes) prior to European contact. The comments were perceived by some as racist. The Canadian Supreme Court allowed the Aboriginal point of view on issues as important as aboriginal rights, including oral testimony in the absence of traditional written language or history.

[24] Maclean's, Volume 122, Number 16, May 4, 2009, p. 20.

whereas only 32% said they had Muslim friends and 16% as having Sikh friends.

The judicial benches of Canada and other Western countries are occupied by "baby boomers" - the generation that experienced the civil rights protests of the 1960's. They believe they are not racist and that the judiciary is not discriminatory. This attitude perpetuates and permits discrimination to occur and affect legal outcomes.[25]

We expect our judges to step out of their own experiences and to rise above our human tendency to use our own cultural spectacles and inclination to see only what we want to see - and not to see that which we do not want to see. Are they able to put themselves in the shoes of a person of different colour or a person who might wear the articles of her or his faith differently? Are they able to make informed and reasonable assessments of culture, emotion (or lack of it), nuance and translation of language and the meanings so intertwined in context, place and history - an "Enlargement of the Mind,"[26] as it has been called?

2.1 Modern Racism

In *Against Race*[27], the follow up to his 1987 book *There Ain't No Black in the Union Jack*, Paul Gilroy observed that opposition to racism is almost universal, but nevertheless racism has not gone away. He noted that, "race is likely to be taken too seriously while racism is not taken seriously enough."[28] For those living in Canada, UK or USA - despite differences in

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[25] There are none so blind as they (that) won't" see." Jonathon Swift, 1738, Polite Conversation III, 191.
[26] Phrase was adopted by the Supreme Court of Canada, in *R.D.S. v. Her Majesty the Queen [1997] 3 S.C. R. 484, para. 42,* from Jennifer Nedelsky, "Embodied Diversity and the Challenges to Law" (1997), 42 McGill L.J. 91, at 107.
[27] Paul Gilroy, Against Race, Cambridge, Mass.: Harvard University Press, 2000.
[28] ibid, p. 41.

history and some variations in degree of inequality - the phenomenon of modern racism is not so different between them. Living in societies that believe in democracy, most persons are aware that racist attitudes are socially unacceptable. While wrapping themselves in the cloak of democratic ideals, they have developed the "ideology of democratic racism - a set of justificatory arguments and mechanisms that permit these contradictory ideologies to exist."[29] The overt racism is rare and easy to recognize and denounce. The more common form in society, one that permits it to survive and infiltrate, is manifested as fairness and equality - even with a social conscience - with the appearance of a positive racial attitude. This attitude is superficial; prejudice and racism are hidden below the surface.

Marks and Clapham write, "the emergence of new, more subtle forms of racism, in connection with the embrace of official anti-racism, has made charges of racism more difficult to prove than was previously the case. When racism co-opts anti-racism, the line between the two begins to blur, and separating them comes to depend on refocusing attention on the lived experience of racism and its social impacts for those affected…not only has racism not disappeared; in some respects it is actually being aggravated in contemporary conditions."[30] If this exists in society, and judges are drawn from society, is it unrealistic to think the judiciary is immune?

Henry and Tator describe the prevalence of institutional and systemic discrimination as:

> …impeded by the invisible but deeply embedded ideology of democratic racism. Resistance to changes in the status-quo is reflected in the discourses of denial, deflection, and

[29] Henry and Tator, supra. 3, p. 19.
[30] Susan Marks and Andrew Clapham, International Human Rights Lexicon, Oxford University Press, 2005, p. 293.

> disparagement. The resistance manifests itself in myriad other discourses of democratic racism such as 'colour-blindness', 'blame the victim', reverse racism, moral panic, and 'otherness.'
>
> The principle assumption is that racism simply does not exist (or, that it exists elsewhere) in a democratic society...the assumption is that because [Canada] is a society that upholds the ideals of a liberal democracy, it cannot possibly be racist. The denial of racism is so habitual...that to even make the allegation of bias and discrimination and raise the possibility of its influence on social outcomes becomes a serious social infraction, incurring...wrath and ridicule. This discourse has become a central rhetorical strategy. It functions as an expression of resistance to forms of social change. Demands of marginalized minorities...are discredited as an 'overdose of political correctness.' [31]

An Ontario Commission,[32] chaired by Stephen Lewis, examined racism in a Canadian judicial system. The Commission closely questioned the notion that judicial racism no longer exists in a modern multicultural society. The Commission found only 7% of General Division (federal) judges' perceived systemic discrimination to be a serious problem and 76% expressly said it was not a serious problem. A strong majority of Provincial Division judges did not believe it to be a serious problem with longer serving judges feeling particularly strongly about this issue. The Commission reported denial and defensiveness in some responses to its surveys. Nonetheless, significant proportions of the public - people who differed by age, income, gender and race - perceived that there is racial discrimination in the courts. Respondents from each "racial group" were more likely to perceive differential treatment than white people.

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[31] Henry and Tator, supra. 3, p. 22-29.

[32] Report of the Ontario Commission on Systemic Racism in the Ontario Criminal Justice System, 1995, Toronto: Queen's Printer, Introduction, p. 4.

The law gives judges broad discretion over what happens in court. Most lawyers and judges are white, but large proportions of accused persons and other court users are not. This contrast presents a stark image. "A system that is unable to persuade its users that it rejects racialization, risks being perceived as endorsing it."[33]

The Ontario Commission quoted comments made a few years earlier by Mr. Justice Henry Brooke of the UK who referred to the injustices that may result from lack of awareness, thoughtlessness and stereotypical assumptions as the "three great risks of ignorance":

> The risk of creating offence and hurt through ignorance of important things which are very personal to people. The risk of doing injustice, of getting things badly wrong, through ignorance of important things about people's cultures, or about body language, or about the danger of other communications breakdowns. And the risk of doing injustice through ignorance of the potency of subconscious discrimination.[34]

The commission observed that these risks exist when a system's operating norms do not treat racial equality as a priority, if decision-makers lack clear ideas as to how to eliminate systemic racism, and the operating norms do not encourage development of the necessary expertise. The result is that evidence of racism is simply overlooked.

The Commission further observed that "perceptions of exclusion and injustice that racialized people may have as a result of how they are treated are crucial to recognizing racist impact" and that "experiences of racialized groups provide important insights into racism and say

[33] ibid, p. 52.
[34] supra 32, Chapter 3, Racism in Justice: Understanding Systemic Racism, p. 57.

much about the impact of systemic practices. As such, they are a valuable tool in recognizing racism. Like other methods, however, experience has limits." As with one oral submission:

> Contrary to what some people think, racialized people are often reluctant to relate their experiences of racism. Few enjoy publicly recounting incidents in which they felt humiliated, and the impact of racism is for many among the more degrading, if only too common, experiences of their lives.
>
> People tell their stories at great risk, at great emotional pain, at great cost. There has to be sensitivity to that. Part of [sensitivity] is believing the stories that are told.[35]

Skeptical responses or lack of appreciation of the experiences, motives, and testimony of racial minorities risk misapprehension and injustice. Access to experience is difficult. It risks unequal justice.

Beliefs about injustice in courts are sustained by how individuals experience the court system and how they report their experiences to others. It is formed by perceptions and anecdote. Although these may appear to lack scientific standing, they are not necessarily invalid. That they exist at all is noteworthy. The fact that white judges have virtually exclusive domination of the courts of justice stands in stark contrast to the actual composition of society and this is a statistical reality.[36] It is an image of justice as a white institution to the exclusion of racial persons and minorities. It calls into question the legitimacy of legal and justice processes. Terrorism by its very acute, fearful, conflicted nature raises the emotional quotient and risks of "outsiders" - "us" and "them." It prompts adverse reaction to the individual who may be perceived as different and unequal to a "real," "proper," "ordinary" or

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[35] ibid, all quotes at p. 57.
[36] *See* page 29, footnotes 47 & 48.

"white" Canadian, British or American.

We live with stereotypes. They help us reduce complex and rapidly changing realities into simple concepts to help us understand. They are part of our human reality. They also come with danger. Madam Justice Beverly McLachlin, the Chief Justice of Canada, has said: "A judge who judges another human being through the occlusion of the stereotype risks seeing but a partial picture of the person and events at issue. He risks seeing what he expects to see, not what is really there…a judge may unwittingly interpret evidence in a way that fulfills stereotypes, rather than in a way that reflects what truly happened and what, in justice, the consequences should be."[37]

2.2 The R.D.S. Case

The Canadian Supreme Court was presented with the opportunity of addressing the experience of racism and the judiciary, in ***R. v. R.D.S.***[38] The court's decision considerably involved Judge Corrine Sparks, the first black woman to be appointed a judge in Nova Scotia. She acquitted a black youth charged with assaulting a white police officer during the arrest of his cousin. She held that the Crown's case had not been proved beyond reasonable doubt. She also commented upon the relationship of black youth and the police; a history of strained relations and occasional police overreactions with black youth. The Nova Scotia Court of Appeal agreed that a new trial was required because, they said, it appeared that Judge Sparks was biased. This was a particularly harsh ruling that provided cannon-fodder

[37] Madam Justice Beverley McLachlin, Supreme Court of Canada, The Judicial Vision: From Partiality to Impartiality, Supreme Court of British Columbia Education Seminar, Judging in a Diverse Society, February 19-21, 1998, Vancouver, Canada, p. 6.

[38] [1997] 3 S.C.R. 484.

to those critics who said words to the effect that "this is what happens when affirmative action or political correctness occurs and those people are appointed." (Canada does not have affirmative action or employment equity programmes for judicial recruitment, but that does not stop prejudiced critics from using the terms).

The ***R.D.S.*** case examined questions about the standard of judicial neutrality and impartiality required by judges, including their ability to refer to common knowledge about racism. The Supreme Court of Canada in a 6-3 ruling restored Judge Sparks decision. The decision of the majority has become the leading authority in Canada for the requirement of social context in formulating judicial decisions about fact and credibility findings involving the testimony of racial or ethnic minorities.

The majority wrote:

> There is more to a case than who did what to whom, and the questions of fact and law to be determined in any given case do not arise in a vacuum. Rather, they are the consequence of numerous factors, influenced by the innumerable forces which impact on them in a particular context. Judges, acting as finders of fact, must inquire into these forces. In short, they must be aware of the context in which the alleged crime occurred. [41]
>
> …an understanding of the context or background essential to judging may be gained...from the judges personal understanding and experience in the society in which the judge lives and works. The process of enlargement is not only consistent with impartiality; it may also be seen as its essential precondition. [44]
>
> The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the Charter's equality provisions. [46]

> We conclude that the reasonable person contemplated and endorsed by Canadian courts is a person who approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case.[39] [48]

And writing on the duty to be impartial, the Court, quoting a 1991 publication by the Canadian Judicial Council, said:

> There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet...Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave...be free to entertain and act upon different points of view with an open mind. [119]
>
> The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging.[40] [119]

The majority concluded that the trial judge's decision must be "read in the context of the whole proceeding and an awareness of all the circumstances a reasonable observer would be deemed to know." As well, the Court stated,

> the assessment of the credibility of a witness is more of an 'art than a science'...It is the highly individualistic nature of a determination of credibility, and its dependence on intangibles such as demeanor and the manner of testifying, that leads to the well-established principle that appellate courts will generally defer to the trial judge's factual findings, particularly those pertaining to credibility...that requires the judge, as trier of fact, to be particularly careful to be and appear to be neutral.[41] [128,129]

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[39] *R v. R.D.S.,* ibid 38.

[40] ibid 38. The underlined words are the writer's emphasis.

[41] ibid 38.

The Court found “bias must be demonstrated, and that a mere suspicion is not enough.”[42] The standard for finding judicial bias is very high, gives enormous deference to trial court decisions, including the core function of a determination of facts and credibility.[43]

More than a decade after the judgment was rendered, the impact of ***R.D.S.*** is threefold: first, Canada’s highest court has elucidated principles of equality, including the requirement of social context in judicial determinations; second, human rights advocates can arm themselves and point to these principles and jurisprudence in rights cases; third, the judiciary which continues to be virtually the exclusive domain of “whites” has become adept at knowing what to say and not to say - being granted considerable deference in review - and proving bias or discrimination in decisions has become nearly impossible. If anything, offence is taken at the mere assertion.

The case highlights the powerful role played by the judiciary, their understanding of racism, and their supposed impartiality. A central question is how does one prove in a systemic or evidentiary manner the relationship or point at which race and the interpretive process, integral to fact-finding and decision-making, meet? It is nearly impossible. Pomerant described the problem of proof and identification:

> Minority persons and groups often allege that discrimination is

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[42] ibid, para 112.

[43] Recently, in *R. v. R.E.M., [2008] 3 S.C.R*., para. 32, Supreme Court of Canada quoted Charron J. from *R.v. Dinardo, [2008] 1 S.C.R. 788*, para. 26, “where credibility is a determinative issue, deference is in order and intervention will be rare,” and para. 28, *R. v. Gagnon, [2006] 1 S.C.R. 621*, para. 20, that “Assessing credibility is not a science…in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.”

> regularly encountered by them in their contacts with the [Canadian] criminal process. Unfortunately, its incidence is difficult to objectively verify…A court can readily justify matters such as credibility findings, detention orders and harsh sentences by articulation of "legitimate factors." [44]

Judges are invariably called upon to make findings of credibility and there is little understanding of the relationship between judicial discourse, determinations of fact and the intent of witnesses or parties in court.[45] The traditional view is the law is purely objective and many judges have expressed the belief that the task of judges is simply to "find the law." The personal experiences or complaints of those who are subjected to racism are often given little weight or credibility, in the absence of empirical proof.

Henry and Tator write, "the lack of representation of racial minorities in the justice system contributes to the perpetuation of racial stereotypes in the system. It leads racial minorities accused of committing a crime to perceive that justice will not be done as the system itself does not understand them...The number of racial-minority judges in all provinces, however, is still small. In fact, their relative absence in higher courts such as provincial appeal courts and especially the Supreme Court of Canada has recently been worsened." [46]

2.3 Who are the Judges?

Canada has approximately 2100 trial and appellate judges. Less than 3% of the judges of

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[44] D. Pomerant, Jury Selection and Multicultural Issues, Ottawa: Law Reform Commission of Canada, 1992, p. 6.

[45] In "How We Decide", Jonah Lehrer, (Houghton Mifflin Harcourt, New York, 2009), studied the process and question of how human beings make decisions. He does not specifically examine how judges make decisions, but theorizes that persons make decisions based on their experience and emotions. This challenges the traditional legal view that "judges just apply the law" and make totally rational decisions.

[46] Henry & Tator, supra. 3, p. 133.

Canada are from visible minority communities.[47] And yet, nearly one in five Canadians is a member of a visible minority.[48] Appointments are made federally to the provincial and territorial superior trial courts, the provincial appellate courts and to the Supreme Court of Canada. The provinces and territories make appointments to the lower trial courts. The nine judges of the Supreme Court of Canada are white.[49] The judges of the ten provincial and three territorial appeal courts are almost exclusively white.

A 2007 study commissioned by the Netherlands Council of Judiciary examined the extent of ethnic minority representation within the judiciary of several European countries, Canada and the USA.[50] The authors commented, "immigration lies particularly at the heart of the national self-image of the United States, and Canada prides itself on having 'invented' multiculturalism."[5] The study relied on data only from the Province of Ontario, and not nationally, in analyzing minority representation within the judiciary for "Canada." It appears the authors of the study were unable to locate any statistics on ethnic or racial minorities in

[47] There were 1099 Federal Judges as of October 1, 2010 and approximately 1000 on the provincial and territorial courts (From the Office of the Commissioner for Federal Judicial Affairs Canada and the Canadian Association of Provincial Court Judges). The author inquired with the National Judicial Institute (Canada); Statistics Canada, and examined the website of the courts for each province and territory and conducted judicial interviews (numbers compiled from examination and contacts with judicial representatives of some provinces, since no official statistics on judicial diversity are kept by Department of Justice Canada, Statistics Canada or the Judiciary on a national basis. The 3% percent figure is a close estimate: the writer's inquiries have satisfied him that there are between 50-60 visible minority judges in all the judiciaries of Canada.

[48] According to the 2006 Census, one in every five Canadians was born in another country. Visible minorities have grown from 4.7% of overall population in 1981 to 16.2% as reported in 2006. Visible minorities are increasing at a much faster pace than the total population and will reach 20% before 2017. South Asians are the largest visible minority group in Canada. http://www.statcan.gc.ca/daily-quotidien/080402/dq080402a-eng.htm.

[49] It should be noted, however, four of the Canadian Supreme Court justices are women, including the chief justice, and at least three of the justices of the Court are Jewish.

[50] A. Bocker and L. de Groot-van Leeuwen, The Judicial Quarterly 2007, Ethnic minority representation in the judiciary: diversity among judges in old and new countries of immigration, de Rechtspraak, www.rechtspraak.nl/…/RVR_RECHSTREEKS_ENGELS_BW3.pdf . The study found minority representation to be 7% of the Ontario judiciary (captioned "Canada 2001") and visible minorities to be 14% and aboriginals to be 3% of the general population of Ontario. The figures were based on "self-identification: censuses."

the judiciary on a national basis for Canada; as I similarly experienced - they are simply not compiled.

The Netherlands study found minorities are underrepresented in the judiciary in all three countries, Canada, U.K. (England and Wales), and the United States and in proportion to minorities in the population as a whole. "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."[25]

It is beyond the scope of this dissertation to examine the various and competing views or reasons suggested for the lack of minority representation in the judiciary. There have many studies of the question, including the Netherlands study. It is noteworthy, that the Dutch authors refute the theory that a diverse judiciary was "just a matter of time." They further concluded, "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." [55]

2.4 British Columbia: "Canada's Most Asian Province"

The Province of British Columbia has had Asian immigration for well over 100 years and 40% of the population of Vancouver is visible minority. Three visible minority judges of the Supreme Court of British Columbia were appointed more than a quarter century ago and

have either retired or semi-retired.[51] Of the current 104 judges, only four are members of visible minorities.[52] The Provincial Court of British Columbia is a lower court of trial jurisdiction with conduct of most criminal matters. It did have number of appointments of visible minorities in the 1990's. In the period 1991-2001, there were approximately a dozen appointments of members of visible minorities, to a trial court comprised of at least 130 judges. This reflected a determined commitment to equality and diversity by the provincial government and the leadership of the Chief Judges of the time.

For a decade, the light shone in and the Provincial Court of British Columbia was a national leader on judicial diversity appointments; that ended quietly and suddenly in 2001 when a new provincial government was elected. Resentments and backlash were reflected in "corrective action." The Chief Judge terminated the Court's "Equality and Diversity Committee" and no minority appointments were made between 2001 and 2008 a period in which 40 new appointments were announced.[53] From 1996 to the present, the Court's education programmes (the judges are required statutorily to engage in five education days annually) have had little or no social context or non-discrimination education. The backlash appeared to be reflected also in the appointment of the new Chief Judge and two associate chief judges of the court in 2005, all of whom were white and male – prompting the description of a return to "The Seventies Show."

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[51] Justices Oppal, Wong and Singh.

[52] Justices Loo, Masuhara, Romilly and Dley. Verification with Justice S. Romilly (supernumary) of British Columbia Supreme Court, and website: http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/judges_and_masters_of_the_supreme_court.aspx

[53] From "New Judges," in the Advocate, Volumes 59-66 (2001-2008), published by Vancouver Bar Association; the Provincial Court Judges Seniority List; and website: http://www.provincialcourt.bc.ca/judicialofficers/judgesofthecourt/judgesbydistrict.html
The period covered is February 20, 2001-March 6, 2008. Of the 40 appointments (2001-08) only 11 were women.

It was not until 2008 that visible minority appointments resumed. There was no net gain with the two appointments, as two visible minorities had resigned in 2007.[54] In 2009, an additional minority appointment was made with a judge of African-Canadian descent.[55]

Some of the other provincial courts have made diversity appointments, but they remain exceedingly rare and do not reflect recognition of equality principles. Remarkably, these exceptional appointments are sometimes proclaimed as evidence of acceptance and tolerance.

The backlash against diversity policies, as modest and laissez-faire as they have been, has meant regression to what was already an inadequate slow pace. Although it might be said there is no hierarchy of exclusion and discrimination - white women have not always recognized or advocated minority representation when relating their own experience of exclusion and advocating their own rights. In a 2 ½ year span (2001-2004), no female appointments were made to the Provincial Court of British Columbia - only white males. This omission drew attention and organized response from many sitting female judges. The same intensity and awareness was lacking when it came to the absence and exclusion of diversity appointments. The silence of "sister judges" was deafening on this issue.

3.0 United Kingdom

Baroness Usha Prashar, Chair of the Judicial Appointments Commission (England and

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[54] Judges B.W. Sundhu (Indo-Canadian) and S. Point (Aboriginal) resigned. Judges R. Bowry and S. Dley (both Indo-Canadians) appointed, the Advocate , Volume 66, "New Judges." Judge Dley later resigned the Provincial Court (March 2010) to accept a judicial appointment with the Supreme Court of British Columbia.

[55] Judge David St. Pierre, appointed March 2009, the Advocate, Volume 67, "New Judges."

Wales) has stated diversity is crucial to the future of the judiciary. Perception, confidence and trust require it. She has said there are two reasons why diversity is so vitally important - fairness and excellence:

> Diversity is not an optional extra, but an everyday reality. Unfortunately diversity is often looked at...almost a sideshow, something to be accommodated or tolerated...diversity per se is not the issue. It is a given...we are wasting talent and not reaping the full benefits of diversity.
>
> It is we who set up barriers to keep ourselves apart from people who are different. We can argue about the definitions of reflection and representation, or we can simply agree that, the wider the range of views, and the wider the field of experience from which they are drawn, the more fully considered will be the decision.
>
> A modern, democratic society demands that its judges are chosen in a fair and open way - not just that they are the best available, but that they are seen to have been chosen in the fairest possible way, taking nothing into account other than the ability to do the job.
>
> Our institutions symbolize us. They symbolize our values, who we are as a nation. Courts and judges are part of those institutions. If the public is to remain confident in their justice system they must have confidence in those who deliver it.[56]

In her speech, she noted that over 11% of the practicing bar (England and Wales) was from visible minorities. Only 4% of the entire Judiciary of England and Wales are minority appointments. There are none among any of the highest levels of the appellate judiciary and only 3% amongst the High Court and Circuit Judges.[57] "A profession which is seen to be dominated by people from one background or gender will tend to deter people who don't

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[56] "Delivering Diversity in the Judiciary: Two Years of the JAC," Judicial Diversity: Strategies for Change Seminar, The Atrium, Law Library, Distillery Building, Church Street, Dublin 7, September 18, 2008, pp. 7-8.
[57] www.judiciary.gov.uk/key facts/statistics/diversity-stats-annual/2008.htm

match from even joining." [58]

Despite more than two decades of official action, the pace of change has not kept up with initial promises or expectations on increasing diversity in the judiciary. A 2008 report of the Equality and Human Rights Commission on "women in positions of power found that in a number of areas of public life, including the judiciary, the proportion of women in posts is static or has decreased since 2005. The report concluded that it will take 55 years at current rates of progress to reach gender equality in the judiciary; up from 40 years in 2005." [59] The progress of visible minorities is worse than that of women in the judiciary.

The lack of diversity, if not the narrow composition of the judiciary, has drawn the attention of analysts across jurisdictions and,

> developed a body of work articulating and analyzing the entrenched power relations and social practices which gave rise to the domination of the judiciary by a small group of elite, male, white lawyers… when many other institutions of power were starting to address the causes and possible solutions…the senior judiciary and the government generally held to the view the principle of judicial independence rendered such concerns both irrelevant and inappropriate for the judiciary.[60]

Professor Malleson notes that the Lord Chancellor and Minister of Justice, Jack Straw, admitted to the Justice Select Committee in June 2008 that expectations the "new judicial appointments process" would lead to greater diversity had not been met. She writes, "the

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[58] ibid, pp.5-6.

[59] Equality and Human Rights Commission (2008), Sex and Power 2008; noted that: "A snail could crawl around the M25 nine times in the 55 years it will take women to achieve equality in the judiciary. Reproduced from "Diversity in the Judiciary: The Case for Positive Action," Kate Malleson, Queen Mary, University of London, p. 6.

[60] Malleson, ibid., p. 2, and referring to for example, D. Wilkins and M. Gulati, "Why Are There So Few Black Lawyers in Corporate Firms?: An Institutional Analysis" 84 California Law Review 493 (1996), pp. 493-625.

notion of merit is not an objective standard neutrally applied, but is socially constructed to the advantage of a narrow group of white, male lawyers." [61]

The British Department for Constitutional Affairs (now Ministry of Justice) in "Increasing Diversity in the Judiciary" defines diversity as "The presence among a group of individuals of a wide variety of backgrounds, cultures, opinions, styles, perspectives, values and beliefs." [62] Erika Rackley contends diversity ought to mean more than the mere addition of women and minorities. This view critically engages the concepts of "diversity" and "difference" in the context of adjudication. "Put simply, diversity is not about letting people in but about letting go. It challenges the complacency and normative superiority of the status quo." [63] Rackley argues that a dynamic process of transformation occurs with judicial diversity, in which established preconceptions, cognitive processes and "rational thought" - are challenged and expanded. She asserts,

> In so doing, judicial difference acts as a major catalyst for disruption; impacting upon the legal monotony, destabilizing its taken-for-granted assumptions and uncovering alternative ways of seeing, understanding...difference provides us with an opportunity to test our assumptions about the judge and judging - to consider not only what is different to the judicial norm but the norm itself." [64]

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[61] Malleson, ibid, pp. 4-5, and referring to for example, M. Thornton, "Otherness on the Bench: How Merit is Gendered" Sydney Law Review, (2007) vol 16; R. Graycar, "Gender, Race, Bias and Perspective: OR how Otherness Colours your Judgment", International Journal of the Legal Profession, vol. 15 Issue 1 & 2 March 2008, pp. 73-86. (BME means black, minority, ethnic).

[62] DCA, 2004b, p, 57.

[63] Erika Rackley, What a difference difference makes: gendered harms and judicial diversity, International Journal of the Legal Profession, Vol. 15, Nos. 1-2, March-July 2008, 37-56, at p. 50.

[64] Rackley, ibid., pp's 38-39, 50. The author argues that Baroness Hale's "candid recognition and articulation of the gendered nature of the experiences and violence" in *Secretary of State for the Home Department v. K (FC) ; Fornah (FC) v. Secretary of State for the Home Department [2006] 83,* and "her easy identification of FGM (female genital mutilation) as a gendered harm at its outset" was integral in influencing the unanimous judgment of the Law Lords (hitherto "pale male judiciary"). Rackley writes, "a truly diverse judiciary is not

4.0 United States

The USA appears to have higher minority representation in the judiciary than Canada and the UK. According to the American Bar Association, 10.1% of all state judges are minorities.[65] The national percentage of minority judges by court is:

Court	Percentage
General Jurisdiction Trial Courts	9.0% (1,009)
Intermediate Appellate Courts	10.6% (102)
State Supreme Courts	9.7% (33)
Total	10.1% (1,144)

According to the U.S. Census Bureau (2008), by 2042 racial minorities will become the majority population in the United States.[66] The demographic shift is increasingly pronounced, but the paradigm remains substantially the same.

Judge Edward M. Chen, the first Asian American on the federal bench for Northern California, has described how his own life experiences inform his understanding and perceptions of the world as a judge, and especially as one who has experienced subtle and not so subtle discrimination. Referring to "having seen law enforcement excesses in his own life" and interactions with other judges:

> I am sensitive to the humiliating and demoralizing effects of discrimination and the importance of having those claims fully

simply apposite but rather essential if we are to realize the best we possibly can in terms of justice, judgments and judging. However, difference is not enough. What we need is more diversity."

[65] American Bar Association, www.abanet.org/judind/. National Database on Judicial Diversity in State Courts-National Report (2009).

[66] Source: Hua Hsu, The End of White America? The Atlantic, January/February 2009, Vol. 303, No. 1, p. 48.

> and fairly evaluated. In short, my understandings and perceptions, and perhaps my subconscious predilections, are fashioned to a significant extent by my life experiences…it is simply unrealistic to pretend that life experiences do not affect one's perceptions in the process of judging.
>
> Simply put, a judge's life experiences affect the willingness to credit testimony or understand the human impact of legal rules upon which the judge must decide…something that is not found in the case reports that line the walls of our chambers. Rather judges draw upon the breadth and depth of their own life experience…And inevitably, one's ethnic and racial background contributes to those life experiences.[67]

Justice Chen referred to unconscious racism and stereotypes; how they colour perceptions, borne out of our individual experiences and identities. He observed, "it is for this reason that the constitution protects the goal that juries reflect a fair cross-section of the community. Diversity can serve as an important structural safeguard against bias. It ensures a fuller, more thoughtful and balanced deliberation. For many of the same reasons, it is important that the judges who are called upon to pass judgment likewise reflect the broad human experiences that comprise all the communities we serve."[68]

Jerome Frank long ago observed, "the entire criminal and civil justice system, from trial to every appellate level, is predicated on the 'uncontrollable power [of trial judges] to choose the facts...to believe one witness rather than another.' In this fact-finding process, 'judges... function as representatives' and 'articulate, engage and affirm the [familiar] narratives...

[67] Edward M. Chen, The Judiciary, Diversity and Justice for All, California Law Review, Vol. 91, No. 4 (July 2003), pp. 1109-1124, at p. 1120. (My own experiences are not dissimilar to those related by Justice Chen, including within the judiciary. *See* footnote 22, p. 16).
[68] ibid, p. 1122.

[that] they share with their constituent communities." [69] Judges represent and articulate the values of their societies.

A 1997 USA study by Kevin Lyle revealed "eighty-three percent of Caucasian judges believed African-American litigants were treated fairly by the criminal justice system, whereas only eighteen percent of African-American judges held this same belief." [70] Judges are shaped by their experiences including that of race and an awareness borne out such experience. Diversity advances impartiality, the essential ingredient of judicial independence, by neutralizing the dominance of any one "viewpoint, perspective or set of values in legal decision making...[race, gender, and minority experience] makes a difference in how judges develop a sense of justice."[71]

Richard Posner writes, the process of judging ultimately is reducible to judicial choices and "different judges, each with his own idea of the community's needs and interests, will weigh consequences differently" and a diverse "judiciary is more representative, and its decisions will therefore command greater acceptance in a diverse society than would the decisions of a mandarin court."[72]

The experiences mentioned in this chapter are not unique to the Canada, U.K. or the United

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[69] Sherrilyn A. Ifill, Racial Diversity on the Bench: Beyond Role Models and Public confidence, 57 WASH & LEE L. REV. 405, p. 475, (quoting Jerome Frank, Law and the Modern Mind, at xiii (1949), reproduced from James Andrew Wynn Jr. and Eli Paul Mazur, Judicial Diversity: Where Independence and Accountability Meet, 67 Alb. L. Rev. (2004). 775, at p. 788.
[70] Kevin L. Lyle, The Gatekeepers: Federal District Courts in the Political Process 237 (1997), reproduced in James Andrew Wynn Jr. and Eli Paul Mazur, Judicial Diversity: Where Independence and Accountability Meet, ibid 69. p. 783.
[71] Ifill, supra. 69, p. 120.
[72] Richard Posner, Law, Pragmatism, and Democracy 71 (2003), p. 120.

States. Chief Justice Sian Ellis of New Zealand, eloquently described her own recollections and the failures of promises of change in the 1970's and 1980's:[73]

> We bought into the lie that advancement was...just a matter of time and numbers. And that merit would out...the insistence on 'merit' (which is self-reflective) and the blind faith (against the evidence) that self-correction is only a matter of time and numbers, must now be seen as denial.
>
> The experiences of male colleagues have not generally entailed the humiliations and set-backs all women practitioners will have experienced. Their practices have usually been less chaotic, more successful. The different experiences we have had shape women.[74]
>
> …women and minority judges are more likely to realize how often claimed objectivity is marred by unconscious biases.

As we can see, the issue of judicial diversity transcends borders. It is international in scope and because judges adjudicate rights and decide guilt or innocence, it is a matter of concern within the modern human rights framework. Terrorism engenders fear in persons everywhere and terrorism trials challenge our legal systems. The ability of judges to sensitively and fairly decide these cases and instill broad public confidence in multicultural societies is vitally important.

Canada is one of the most multicultural and diverse states in the world. Conversely, it significantly lacks diversity in its judges. Canada has recent experience in prosecuting a

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[73] Dame Sian Ellis, Women Lawyers in New Zealand, Address at the Australian Women Lawyers' Conference, Melbourne, June 2008, reproduced in Commonwealth Judicial Journal, Vol. 17, no. 4, December 2008, pp.3-8.

[74] Bertha Wilson, the first woman appointed to the Canadian Supreme Court (1982), in "Will Women Judges Really Make A Difference?" (1990), 28, O.H.L.J 507, expressed the hope that "if women judges through their differing perspectives on life can bring a new humanity to bear on the decision-making process, perhaps they will make a difference…play a major role in introducing judicial neutrality and impartiality into the justice system. Perhaps they will succeed," she said, " in infusing the law with an understanding of what it means to be fully human." REAL Women lodged a formal complaint with the Canadian Judicial Council alleging the speech made her unfit to sit as a judge and it's spokesperson wrote an op-ed "Feminism Has No Place in Supreme Court Decisions."

terrorist bombing and murder of hundreds of civilians on an Indian aircraft. The trial involved Sikhs, a highly visible minority community. This paper's endeavor to go behind the trial judge's assessment of credibility and fact-finding, involving the testimony of a member from that minority, is inevitably controversial and not without complexity. Nonetheless, it is a fair question and challenge.

The international human rights aspects of the Air India trial may not instantly appear obvious. It must be understood however, that while the conspiracy was birthed in Canada, those involved were motivated by events that had happened in India. Most of the victims were Canadian residents traveling to India to visit family and friends. They were traveling on a plane belonging to India's national airline. The theory of the Crown was that the terrorists intended to punish the government of India. The trial in British Columbia was closely followed in India and across Canada. There are, I suggest, good reasons to question the proposition that Canada was prepared to fulfill its obligations; that the principles of international human rights law demanded in this case.

Let us now look at the Canadian experience; the judgment in the Air India terrorism trial, the potential relevance of judicial diversity and how it impacts the core function of how judges decide.

Chapter Three: An Example - The Air India Terrorism Trial

1.0 Background

On June 23, 1985, Air India Flight 182 from Montreal to Delhi disappeared off the Irish coast. A bomb placed by Sikh militants, in luggage originating in Vancouver exploded mid-air killing 329 persons. Most of the victims were Canadian citizens of Indian origin. Simultaneously, a second bomb placed in a suitcase on a Canadian Pacific flight from Vancouver and intended for transfer to another Air India flight exploded at Narita airport in Japan killing two baggage handlers.

In the immediate aftermath, the Canadian Prime Minister, Brian Mulroney, was alleged to have placed a call to the Indian Prime Minister, Rajiv Gandhi, expressing the sympathy of the Canadian people to India, for the tragic loss - failing to understand that most of the victims on Air India flight 182 were Canadians - in the largest aviation mass-murder prior to September 11, 2001. Canada and her leaders did not recognize it as a Canadian tragedy. The years that followed and the response of Canada were years of incompetence and discrimination. It is a failure of the apparatus of the Canadian state, her capacity to protect Canada and her peoples, a failure of justice and equality. It is the story of hundreds of family survivors and friends, an entire generation scarred by callous incompetence and, underlying it - racism by official Canada.

For years leading up to the 1985 bombings, the Canadian authorities had been receiving

warnings from Indo-Canadians and the Indian government that elements within the Canadian Sikh community were planning attacks against India. This included the Babbar Khalsa, Lions of the True Faith, who claimed they were real defenders of the faith. They were a terrorist group whose members in India boasted killings against Indian leaders and perceived enemies of the faith. The Babbar Khalsa was formed in Canada by Talwinder Singh Parmar. Babbar Khalsa members were Sikhs who had immigrated to Canada, flirted with westernization, but then had been "born-again" and adopted an ultra-conservative version of Sikhism. They had been raised in the conservative, rural villages of Indian Punjab from where they had emigrated. Confronted by modernity they found refuge in a harsh, self-constructed version of their religion. Many Canadian Sikhs who did not agree with them were beaten, threatened and intimidated.[75] Sikh temples, prized for the revenue and the political legitimacy they provided in the eyes of the mainstream Canadian community, became the focus of battles. Canadian Sikhs who lived through the time have vivid memories of Taliban style intimidation - including at weddings and funerals - by the religious extremists.

Canadian authorities and security agencies showed remarkable ignorance and incompetence about the growing threat and many warnings. They were aware of the Babbar Khalsa and, indeed, in the days leading up to the bombings they had followed the bomb-maker and another man into woods where a bomb was tested. One may legitimately find it incredulous

[75] Ujjal Dosanjh, a lawyer and prominent politician who spoke out against religious intolerance and extremism was attacked and severely injured. Tara Singh Hayer a brave journalist was shot and paralyzed in 1988. And then, after it became publicly known that he would be a prosecution witness during the Air trial, he was murdered in 1998.

that the bombings still proceeded![76]

In 1992 one suspect, Inderjit Singh Reyat, was extradited from the UK and convicted of manslaughter in the deaths of the two baggage handlers at Narita. Investigators had traced the homemade bomb, placed in a stereo-tuner, to Reyat who had resided in British Columbia before fleeing to the UK after the bombing.

It was not until October 2000, fifteen years after the bombing of Air India that arrests were made. In the intervening years, potential witnesses, informants, and journalists had been threatened, but the victims families had persisted in their long quest for justice and legal accountability. Inderjit Singh Reyat pleaded guilty in 2003 to manslaughter and was sentenced to five years imprisonment for his role in also manufacturing the bomb used to down Air India 182. Ripudaman Singh Malik and Ajaib Singh Bagri were the only two other suspects arrested and charged with murder and conspiracy to commit murder.

2.0 The Trial

The trial did not commence until April 2003. It was unprecedented - the longest, most complex and expensive trial in Canadian history. In the months leading up to the commencement of the trial, there was much discussion within the legal and judicial community about the logistics and capacity of the system to sustain a trial which could take up to three years. Almost immediately, one began to hear informally within and from certain members of the British Columbia judiciary that the accused would be acquitted and that it

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[76] The Canadian government announced a Royal Inquiry in the matter of Air India Flight 182, presided by retired Justice John Major, which commenced hearings in 2006. The final report was rendered June 17, 2010. For more on the Inquiry and its terms of reference see p. 54, Footnote 86.

was only a show trial - for cathartic purposes and to placate critics.[77] The authenticity of this view was impossible to quantify, but it was often expressed. The trial was heard by judge alone and took 16 months.

The judgment was rendered on March 16, 2005. Justice Bruce Josephson of the British Columbia Supreme Court found the two accused not guilty of all charges because the evidence was inadequate. In closing he said:

> I began by describing the horrific nature of these cruel acts of terrorism, acts which cry out for justice. Justice is not achieved, however, if persons are convicted on anything less than the requisite standard of proof beyond a reasonable doubt. Despite what appear to have been the best and most earnest of efforts by the police and the Crown, the evidence has fallen markedly short of that standard.[78]

One would not expect any less powerful and eloquent words from any jurist genuinely upholding the rule of law, ensuring a fair trial and protecting the rights of accused persons - particularly, in a high profile and unprecedented case in which the accused were members of a visible and, often, misunderstood minority.

Unpopular "acquittals are proof that democracies are willing to pay a price" to uphold the rule of law and human rights to ensure only the guilty are punished.[79]

This paper will nevertheless argue that Justice Josephson's decision was flawed and

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[77] Personal recollections of the author as a member of the British Columbia judiciary. These types of views were expressed in informal discussions by some judiciary.
[78] *Her Majesty the Queen v. Ripudaman Singh Malik and Ajaib Singh Bagri*, 2005 BCSC 350, para. 1345.
[79] Kent Roach, The Criminal Law Quarterly, Volume 50, Number 3, June 2005, p. 215.

discriminatory in assessing credibility. This author contends the judiciary has hitherto escaped lightly from examination and criticism, unlike the police, security agencies and the government - and that such an examination is overdue and revealing.

The Air India decision, although lengthy was not legally complex: it was founded upon the judge's assessment of the credibility of witnesses. There was a single key witness in the case against Mr. Malik.

3.0 The Theory of the Crown

The Crown theory was that Mr. Malik's role in the bombing plot was to organize and finance the operation. The Crown alleged Mr. Malik and his co-conspirators set out to destroy airplanes from the Indian national airline in revenge for Indian atrocities against the Sikh religious minority in that country with the hope of teaching the Indian government a lesson and furthering the cause of an independent Sikh state.

4.0 Who is Mr. Malik?

Mr. Malik was a wealthy, powerful, and charismatic businessman, the founding member of a credit union and a religious school - both controlled by him and used for the purpose of "advancing Sikhism." It was alleged he was an avowed separatist who supported an independent religious state called "Khalistan" for Sikhs to be carved out of India. Groups he was affiliated with had been involved in conflict with moderate segments of the Sikh community that had spilled into violence and contests over control of Sikh temples.
He was a frequent spokesperson for various causes purported to be in furtherance of Sikhism.

Mr. Malik was the personification of the Khalsa school and related institutions. He was the dominant authority and constant presence in the affairs of the school. Some might describe him as a fundamentalist Sikh.

5.0 Who is Justice Josephson?

Justice Josephson practiced law only briefly in British Columbia's West Kootenay region - a part of the province without an Indo-Canadian presence. He began his judicial career in 1976 at the young age of thirty.[80] His was a quick ascendancy to the cloistered world of the judiciary and the isolation and strictures that do accompany judicial life. Within the judiciary, the primary reason given for Justice Josephson being assigned to the Air India trial was that he was the only available judge with experience presiding at a lengthy criminal trial.

What kind of person makes a good judge? And, what kind of person is Justice Josephson? We are not supposed to go there. Why not? What may we learn about Justice Josephson or any of our judges that may cause us to question their suitability to make crucial decisions in cases of terrible importance? Our judges are appointed by government to serve the public and they are compensated out of the public purse. The judicial appointment process is little understood by the public. Why shouldn't we know what kind of people are to be appointed to such important positions where they will render decisions about our rights and freedoms, including which accused goes free and which goes to prison?

[80] Information from public sources, including the Advocate, Vol. 48, Part 1, January 1990, p. 117.

There is nothing in Justice Josephson's background or judicial career that suggests he was particularly suited to preside at the Air-India trial other than his experience presiding at one previous lengthy criminal trial and he was said to be respected in criminal law circles for his competence. But, he did not appear to have any experience, knowledge or background in the cultural, historical and religious issues that arose in the Air-India trial and their bearing when understanding and assessing the testimony of the Sikh witnesses. He is, of course, white.

Little is known publicly as to how judges are selected by the Chief Justice to preside at a particular trial. Prior to the commencement of the Air India trial, there were two Indo-Canadian justices on the B.C. Supreme Court,[81] three other justices of minority background, and a significant pool of female justices for potential assignment.[82] We do not know why one of these justices was not assigned to the Air India trial. Nor do we know if the Chief Justice really understood what this case was going to be all about.

6.0 Who was Ms. D?

[81] Justices W.T. Oppal (Sikh) and T.M. Singh (non-Sikh). Justices L. Loo and R. Wong (Chinese-Canadians), and S. Romilly (African-Canadian).

[82] There were approximately 30 women Justices on the British Columbia Supreme Court, in 2003, a large bench with very few minority judges.
http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/Judges_and_Masters_of_the_Supreme_Court.aspx.
If one of the minorities, particularly the two Indo-Canadian judges, had been assigned to the case, to some reasonable persons it might well have had the appearance of too selective an assignment. If there were more minority judges, credible in number, whose status might not have been so obvious, including some women, with a sufficient pool to draw from – then, it is realistic to think:

(a) if one of them had been assigned, he/she would not appear to have been so selectively chosen;
(b) if there had been that pool, even if the judge assigned was a traditional (white) judge, if there had been a fair number of female, Black, Chinese, Japanese, Indian, Sikh, Aboriginal, or Muslim judges, maybe that would also not be so obvious.

Ms. D was a young Indo-Canadian woman who was westernized - not like most of the Punjabi immigrants associated with the Khalsa School. She had never been to India, but was born to Sikh parents. She had not been immersed in Sikh culture. She testified that she sought the Khalsa School job to facilitate her reconnection with the Sikh community, its language, culture and religion. She felt the school would introduce her children to something she had missed.

7.0 What did Ms. D say when she testified?

Ms. D's testimony was, as Mr. Justice Josephson acknowledged, the heart of the Crown's case against Mr. Malik. If accepted, her testimony alone was sufficient to prove Mr. Malik's complicity in the plot. If her testimony was disbelieved, the Crown's case against Mr. Malik could not prevail. [228, 272, 701]

Ms. D began her employment at the Khalsa school in the fall of 1992. She was in charge of the pre-school children; it was she said, a wonderful job.

Ms. D testified that she had no special awareness of the Air India bombings before May 8, 1996 when she talked with Mr. Malik about the circumstances surrounding a student's attempted suicide. Mr. Malik was callous and indifferent she recalled and he remarked that many more persons had died "for Sikhism." She also testified that Mr. Malik had then said "We had Air India crashed" and that she made a note of that statement in her journal. [305-309, 342]

Mr. Justice Josephson termed the central part of Ms. D's testimony "The Newspaper Confession." Ms. D said that she became aware of a story published in the March 28, 1997 edition of a Punjabi newspaper; it was there suggested that Mr. Malik was one of six suspects soon to be arrested for the Air India bombings. She said that she had to learn the truth and therefore talked with Mr. Malik in his office late that afternoon. She testified that Mr. Malik had then acknowledged that he had sent Satwant Sandhu to Vancouver Island to help Mr. Reyat make bombs, that he had booked and paid for the bombers plane tickets, that he had instructed the person who picked up the tickets, and that he had overseen the men who took the bomb-laden suitcases to the airport. Ms. D testified that Mr. Malik told her that these things were all done in the name of Sikhism but that she, being from outside, would not easily understand. [285-304]

Ms. D testified that despite some real troubles with other trustees of the Khalsa school and some misgivings about Mr. Malik's financial dealings, a clandestine loving relationship had developed between herself and Mr. Malik. Her reaction to these revelations therefore was, she testified, to want to help and protect him. And at the trial she began her testimony by saying that she continued to love, respect, and miss Mr. Malik who she could never hate or take revenge against. She had said that she was a reluctant witness and that she considered her testimony to be a betrayal of Mr. Malik. [279 & 280]

8.0 What did Justice Josephson say about Ms. D's testimony?

Mr. Justice Josephson simply refused to believe any of Ms. D's incriminating testimony. He

found as a fact that she had “crafted a false confession” and attributed it to Mr. Malik. That evidence was, of course, “the core of her testimony” and since he discarded it, his following statement that it would be “wholly unsafe” to rely upon “her other evidence” is not itself surprising. [741, 777]

The essential reason that Mr. Justice Josephson rejected the entirety of Ms. D’s testimony was that he could not comprehend that an intelligent woman could continue to have loving emotions for a man who had acknowledged his roles in the Air India bombings and then, a few months later, cast her aside. [704]

With all possible respect, the credibility rulings of Mr. Justice Josephson reveal, I submit, a great deal about his failings as a judge in a country whose citizenry now comprise a multicultural society.

Justice Josephson wrote:

> Surprising were Ms. D’s adamant protestations of on-going love, respect and longing for Mr. Malik. A man whom she claims admitted his complicity in the senseless mass murder of hundreds of complete innocents…
>
> When one adds to that her evidence of his treatment of the student Cudail (who attempted suicide), his illegal activities and, ultimately, his cruel treatment and firing of her from a position that was a central part of her life, that surprise edges toward incredulity. [704 & 705]

Justice Josephson had received some evidence about extreme Sikhism from Dr. Paul Wallace, but commented only very briefly upon that evidence in five paragraphs of a

decision which ran to 1345 paragraphs. He failed to understand that Mr. Malik never admitted to having been complicit in the "senseless mass murders": rather, as Ms. D testified, he had said "It's all for Sikhism." [308, 298, 302]

Justice Josephson wrote:

> Either this mature, intelligent and strong-willed person has abandoned all she believes in because of overwhelming and unreasoning emotions of the heart, or she is misleading the Court by claiming to be his loving confidante in an attempt to blunt the inevitable credibility attack based on her animus… [706]

In her book, Loss of Faith, journalist Kim Bolan states that:

> Josephson seemed bewildered by the prospect of an attractive woman like Ms. D still claiming to love a man who had confessed his role in a mass murder to her. Many women, including some victims' relatives, found Josephson's logic sexist.[83]

Surely, Justice Josephson was not unaware of the fact that history records innumerable instances of women and men who formed and continued loving relationships with persons whose crimes were worse than those alleged against Mr. Malik. The lives of Hitler and Stalin provide well-known recent examples.

When she testified, in answer to a question posed by Mr. Malik's lead counsel, Ms. D said:

> You don't know, Mr. Crossin, how many times I have regretted ever knowing this information. Everything is lost, Mr. Crossin. I don't know how safe I am. I know one thing I can never come back and live here. I know one thing - that I lost my family, that I have to live on my own. I grew up very

[83] Kim Bolan, Loss of Faith: How the Air-India Bombers Got Away With Murder, McClelland & Stewart, Toronto, 2005, p. 353.

> protected, very loved by my family. There is nothing, nothing that can bring that back.[84]

Ms. D had become separated from her husband and a son due to the strain and safety concerns of being a witness; she had entered the witness protection program; she received no financial or other reward; and she was left to lead an anonymous life isolated from her religious community and having to change her identity.

When he wrote his lengthy decision, Mr. Justice Josephson paid only scant attention to this aspect of the case. He devoted only four sentences to it. [353] Many persons who enter witness protection programs do so because they are escaping prosecution themselves in return for their evidence given for the prosecution or because they were paid informants. Ms. D's reasons, as she testified, were different and in no sense self-serving. It is also be noted that although Mr. Justice Josephson heard evidence concerning the murder of one intended Crown witness and threats made to others he made no comment about these events when considering Ms. D's testimony.

Ms. D paid a very high price by choosing to testify for the prosecution. She is completely separated from the Indian community and any shared religious or cultural activity. As anyone familiar with the workings of the Indian diaspora must know, it is almost impossible for a person of Indian heritage to achieve anonymity anywhere in the world. Questions are inevitably asked and the answers to a surprisingly few questions reveal one's ancestral

[84] ibid, p. 303.

origins and identity to any knowledgeable questioner. She cannot hide unless she becomes a non-Indian and forsakes her heritage.

It is difficult in the extreme to comprehend why Ms. D would fabricate or mislead. Why would she falsely place herself in the vortex of the most important terrorism trial in Canada's history? She has been condemned to a lonely and fearful life. Is it reasonable to say that she did this only because she bore "animus" or was vindictive?

What was unspoken, but could not have escaped the judge's attention and thoughts, was that Ms. D was also a Sikh - after all much of the case was about Sikhism and its politics - the accused were Sikhs and the act of terrorism alleged to be motivated by Sikh cause. She was also a person of colour and at trial had cut her hair short [85] - an act of independence and forbidden according to fundamentalist Sikh beliefs, especially the Babbar Khalsa.

The judge described her as having strong-will and determination, intelligent, outgoing and of positive manner and demeanor. [703] Did he mean that a woman - let alone a Sikh woman in such a traditional and strict environment - displaying such characteristics was unlikely and for him unbelievably capable of loving and still respecting a man who admitted to and stood accused of such a horrific crime? Was he influenced by her appearance or a pre-existing belief that a Sikh woman could not or would not love such a man or demonstrate such strong will and outgoing nature in face of high-powered legal proceedings and lawyers? Worse yet

[85] Bolan, ibid, p. 293. Canadian journalist Kim Bolan had personally known Ms. D. for several years and made this observation when Ms. D. commenced her testimony in November 2003.

- did he personally believe most Sikhs lie?

Justice Josephson is not likely to tell us even in retirement. He did not say and therefore we cannot know: we can only surmise.

Justice Josephson's treatment of Ms. D's evidence is open to criticism as discriminatory based on sex and race. It is shallow and has an air of stereotyping. Some of his trial rulings defied common sense, at least from the perspective of those well informed with the context of the issues and background underlying Sikh politics, motives and psyche. These factors should not be discounted in judicial outcomes. The tragedy of Air India, in full context, includes a failure of the Canadian justice and judicial system.

The author believes that Mr. Justice Josephson's decision in the Air India case is also open to criticism for many other real and compelling reasons, but those reasons are beyond the scope of this paper.[86] The author submits that the general populace of British Columbia got it right: "Sixty-eight percent of those polled in British Columbia said they disagreed with Josephson.

[86] The enormity of the investigation and trial does not permit a critical examination of all the evidence and witnesses. A "Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182", presided by retired Justice, John Major Q.C. rendered a 2600-page final report June 17, 2010. The Commission was prohibited from expressing any conclusion or recommendation regarding the civil or criminal liability of any person or organization. The Commission, essentially, avoided the subject of racism and the potential impact of discrimination on the investigation, government and the justice system. In a scant one-half page overview, it found that the term " racism" is "not helpful", "because it ends up generating a great deal more heat than light." [Vol. 1: The Overview. p. 38, 1.9.2. "Racism"]. http://majorcomm.ca.

Note: In September 2010, the bomb-maker Inderjit Singh Reyat, was convicted by a British Columbia jury of perjury in relation to false testimony at the Air India trial. Justice Josephson had refused the prosecution application to cross-examine Mr. Reyat as a hostile witness in the Air India trial. However, in the final trial judgment, he described Mr. Reyat as an "unmitigated liar."

Many said his verdict had made them lose faith in the justice system." [87]

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[87] Bolan, supra 83, p. 349.

Also, in a recent survey (2008-09), only 44% of British Columbians told Statistics Canada they had a lot or great deal of confidence in the legal system. The survey seems to show fewer and fewer people think judges make the right decisions. The surveys show a trend of consistent decline of public confidence. Only 11% think courts are doing a good job. Only 1 in 4 people (26%) in the province think the courts are capable of determining guilt or innocence. Slightly fewer than half (49%) believes the courts will ensure a fair trial. (Source: the Vancouver Sun, September 8, 2009, p. 1). At the same time, the percentage of visible minorities of the overall population of British Columbia continues to rise.

Chapter Four: The Judges and Why Diversity Matters

1.0 Introduction

We are generally not permitted to pierce the judicial veil and look at the person occupying the trial bench and wearing the black robe.[88] The statue image of justice blindfolded and holding the scale of justice is made of stone - not blood and bone. Judges are people just like us. They are appointed or elected (some American states) presumably after a distinguished career in the practice of law, where they honed their knowledge of the law and of people - at least that is the theory. Other than very general biographical information provided to the public, we are not entitled to know personal information about the judge. We are to presume he or she is impartial, unbiased, wise and learned in the law and the human experience.

In a Handbook For Judges, compiled by the American Judicature Society, Maurice Rosenberg wrote:[89]

> Justice is an alloy of men and mechanisms in which, as Roscoe Pound remarked, 'men count more than machinery.' Assume the clearest rules, the most enlightened procedures, the most sophisticated court techniques; the key factor is still the judge. In the long run, 'There is no guarantee of justice except the personality of the judge.' The reason the judge makes or breaks the system of justice is that rules are not self-declaring

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[88] The author does not overlook candidates to the U.S. Supreme Court undergo extensive questioning.

[89] Maurice Rosenberg, The Qualities of a Judge, Handbook for Judges, An Anthology of Inspirational and Educational Readings, ed. G.H. Williams & K.M. Sampson, American Judicature Society, Library of Congress Card Catalog Number; 1984:072385, pp. 5 & 25.

> or self-applying. Even in a government of laws, men make the decisions.
>
> A judge's decisions are in large part the product of, first, what manner of man and lawyer he is when he ascends the bench and, secondly, what he absorbs once there.

And quoting William James,

> There is very little difference between one man and another; but what little there is, is very important.

This may be an outdated sexist statement by modern understanding for it's exclusion of women. It's wisdom lies in the heart of its message: that the type of person selected to wear the judicial robe is central to justice.

Judges are the product of their life experiences. They have prejudices, biases and values determined by their backgrounds and experience of the world. Abdullahi Ahmed An-Na'im has written:

> There is nothing that is culturally neutral. The way we think, the way we walk, the way we dress, the way we see the world, the way we see each other, the way we deal with the environment, whatever we do is culturally rooted. But we can't even see it as culturally rooted because our culture is the eye by which we see the world and it is the heart by which we feel things or the mind by which we think. So it is integral to our very being.[90]

2.0 Judging in Multicultural Societies

The task of judging is evermore complicated in increasingly diverse and multicultural

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[90] A.A. An-Na'im, "Human Rights, Religion, and the Contingency of Universalist Projects", Occasional Paper, no. 2. PARC, Maxwell School of Citizenship and Public Affairs, Syracuse University, September 2000, ppix-xiv, at p. 3., downloadable at http://www.law.emory.edu/aannaim/publications.html

societies. We are faced with the challenge of intercultural communication and decoding a message that is sent in the code of the other culture must account for the possibility that they do not share the same assumptions, beliefs and values - much like the Hollywood movie "Lost in Translation" - le monde a parte.

Establishing facts and assessing credibility is fundamental to adjudication and yet there is limited understanding of how judges do this. "The cultural basis of law deeply influences the behavior of persons participating in legal procedures...The cultural relativity of words, notions and concepts, and even more importantly, the lack of consciousness of these differences in perception, are major sources of misunderstandings in cross-cultural communication."[91] The manner in which one expresses him/herself, the interpreter, the cultural relativity of notions and concepts, different perceptions of time, concept of "common sense", and even the cultural relativity of the concepts of "lie" and "truth" may be obstacles to an undistorted understanding between the witness and trier of fact.[92]

International human rights law provides for a right of impartiality in courts and tribunals. Amartya Sen articulates a basic distinction between two very different ways of invoking impartiality. He calls them "open" and "closed" impartiality.[93] "Closed impartiality"

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[91] Walter Kalin, Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing, International Migration Review, Vol. 20, No. 2, Special Issue: Refugees: Issues and Directions (Summer 1986), pp. 230-41, at 230 & 234.

[92] ibid, p. 231, and at 234: Kalin writes, 'Too often officials assume that the way they think is also the way [asylum-seeker] thinks. Unaware of the fact that "we are all natives now, and everybody else not immediately one of us is an exotic" [Geertz, 1983:151] they neglect the task of what Geertz calls "cultural hermeneutics," namely of trying to find out how the meaning in the [asylum-seekers] system of expression can be translated into their own. This may result in serious misunderstandings…because …misinterprets their statements."

[93] Amartya Sen, The Idea of Justice, The Belknap Press of Harvard University Press, Cambridege, Massachusetts 2009, p. 123.

involves making judgments based on a concept of a specific community or group; it can include the making of a social contract; and it involves exclusion of outsiders. In this approach, Sen refers to the limitations of "exclusionary neglect" and calls for an open impartiality "embedded in a universalist approach." The converse is a "trap of parochialism" in which, "the apparent cogency of parochial values often turns on the lack of knowledge of what has proved feasible in the experiences of other people."[94] Sen's theory of "open impartiality" necessarily entails expanding the circle of inclusion. He advocates, human rights and democracy "has to be judged not just by the institutions that formally exist, but by the extent to which different voices from diverse sections can be actively heard." [95]

It might seem obvious to state that the judiciary, therefore, ought to be diverse in composition in order to reflect, incorporate and understand the diversity of human experience and population. The absence of such diversity increases the risk of judges getting it wrong. It also overlooks the legal conception of full equality before the courts and the right to a fair trial by a competent, independent and impartial tribunal as a requirement of international human rights law.

The framework of international human rights law is made for exceptional or urgent situations. Article 4 of the ICCPR permits derogation subject to preconditions. Discriminatory treatment based on certain grounds, including race and colour is strictly prohibited, and no derogation is legally permissible. In the context of terrorism, there are

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[94] ibid, p. 407.
[95] Sen, ibid 93, Preface. p. xiii.

risks, for example, not just from suspension of procedural protections in ordinary criminal law or use of investigative detentions passed in aftermath of 9/11, but from societal prejudices and fears. Try as we might, judges may even unconsciously not be immune.

The historical track record of the judiciary in protecting rights, especially that of minorities has not always been good. The courts have too often upheld discriminatory emergency legislation.[96] The "war on terror" has done damage to the integrity of human rights and the judiciary in some cases been less than confidence engendering.

Diversity alone is not a panacea, nor only relevant to terrorism; it is relevant to all adjudication and trials. This too is within the framework of international human rights law. However, with terrorism the stakes are high for the legal framework and operation of human rights. Greater judicial diversity is an important step in upholding the hard fought commitment to international human rights law borne out of the ashes and horrors of World War II, racism, colonialism, slavery, genocide and violent conflicts.

Sikhs have been in Canada for more than one hundred years. They have not always been treated well by Canada or its courts. In *R. v. Munshi Singh*, involving the Komagata Maru, a ship carrying Indian settlers denied passage and entry into Vancouver in 1914, a Court of Appeal justice said:

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[96] *Korematsu v. United States, 323 U.S. 214 (1944)* is today generally considered as a low watermark of the U.S. Supreme Court in the area of human rights. Canada similarly interned the Japanese during WW II, continued to deny fundamental rights to Asians and Aboriginals, and the courts upheld the War Measures Act in which thousands of Quebecers were detained on suspicion of sympathy with separatists in the 1970's.

> It is plain…the Hindu (sic) race…without disparagement to them, undesirables in Canada, where a very different civilization exists, the laws of this country are unsuited to them and their ways and ideas may well be a menace to the well-being of the Canadian people.
>
> …Better that peoples of non-assimilative, and by nature properly non-assimilative race should not come to Canada…"[97]

In Air India, Justice Josephson reflects the dominant gender and group that continues to occupy the benches in western countries to the virtual exclusion of racial minorities. In 1914 it was immigration and right of entry, now it is access to the institutions of power, justice and the judiciary. It is still exclusion.[98]

Many minorities believe they do not receive fair trials or hearings in Canadian courts or tribunals. Tator and Henry report that:

> If perceptions even moderately reflect the extent of the problem, it can be concluded that racism is a major problem in the system…the attitude appears not to entertain submissions on race…[99]

Judicial appointments, we are told, are made on merit. The executive branch has the final say and political affiliation and patronage still survives in the process of appointment to Canada's courts. For example, studies have shown that Liberal and Conservative

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[97] 1914 Carswell BC 255, 6 W.W.R. 1347, pp. 21-22.

[98] Canada passed Exclusion Acts restricting immigration and enacted discriminatory policies between the mid-19th and mid-20th century against Chinese, Japanee and "East Indians." The discriminatory policies enacted against those with origins in India, included denial of rights as "British subjects." *See* W. Peter Ward, White Canada Forever, Popular Attitudes and Public Policy Toward Orientals in British Columbia, 3rd edition, McGill-Queen's University Press (1978); Patricia E. Roy, The Oriental Question: Consolidating A White Man's Province, 1914-41, 2003, UBC Press, Vancouver; and, Hugh Johnston, Voyage of the Komagatu Maru: Sikh Challenge to Canada's Bar, Oxford University Press (Txt), May 1980.

[99] Tator and Henry, supra 3, p. 130-1.

governments appoint more of their own during their term in office. The appointment of persons affiliated to any of the smaller political parties is exceedingly rare in federal appointments to the courts. In a revealing speech to Conservatives, Prime-Minister Harper suggested that if the Liberals were still in power, they would be appointing more "left-wing ideologues" to the courts and government agencies.[100] His statement exposes the false pretense of a neutral judicial appointments process. Might it not suggest a hidden agenda that a Conservative government would appoint "right-wing ideologues" to the courts? Either way, Canadian governments, Liberal or Conservative appoint almost exclusively white judges.

The fact that judicial appointments remain almost exclusively white is not supported by the merit argument. Simple math ought to presumptively establish discrimination revealing an obvious systemic problem. Underlying the statistics are practices and attitudes common to systemic discrimination. They provide compelling evidence of the practice and result of discrimination. The structures of our "modern" judiciaries verge on a total whiteout.

3.0 The Potential of Change

Wider representation and diversity in judicial appointments has the potential for change within the judiciary itself - the interactions, discourse and culture of the judiciary. The presence of women judges has made a difference; so should the presence of greater racial and ethnic diversity. I suggest the very nature of discussions and discourse would invariably change.

[100] Globe & Mail, September 11, 2009.

Judges consult each other and seek the advice of their peers in determination of cases. They share their knowledge. The very participation of minorities will not only bring new and different perspectives to judicial discourse; it adds a layer of accountability when opinions and ideas are expressed as they invariably are in judicial chambers. Judges talk about all manner of things, they express values and experiences reflecting their class, background, religion and culture. More diverse judicial appointees will inevitably bring pressure to bear on the content of judicial education and training; judicial learning will be expanded. There will be momentum for change and reform.[101]

Justice Powell in *Regents of the University of California v. Bakke*, in reference to educational institutions wrote:

> A great deal of learning occurs informally…through interactions…perspectives; …to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world… "People do not learn very much when they are surrounded only by the likes of themselves." [102]

Judicial diversity is a complex issue. This complexity does not, however, obviate the need to

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[101] The British Ministry of Justice commissioned "The Report of the Advisory Panel on Judicial Diversity 2010." http://www.justice.gov.uk/publications/judicial-diversity-report.htm
It recommends a coherent package of reforms to increase diversity of the judiciary – a fundamental shift in approach, "in a democratic society the judiciary should reflect the diversity of society...Judges drawn from a wide range of backgrounds and life experiences will bring varying perspectives to bear on critical issues...will enhance public confidence." It recommends a comprehensive package of reform and a proactive campaign of "mythbusting." It includes the creation of a Judicial College for "Developing Judicial Skills." Similarly, this author submits momentum for change would envisage policy development with recommendations on judicial appointments, training, safeguards, redress, transparency, access, and a new form of engagement for comprehensive and responsive change, as the UK Panel states, "not only increase diversity but improve judicial performance."
[102] 438 U.S. 265 (1978), at p. 312, and therein quoting President William Bowen of Princeton University.

address it in furtherance of and upholding the international human rights law and norms in state obligations.

4.0 The Lessons of History: Marshall and MLK

Thurgood Marshall was the first African-American to sit on the U.S. Supreme Court. His biographer has written,

> He peeled back the cloak of stuffy arrogance under which our highest tribunal operates almost as free of public scrutiny and accountability…
>
> The Burger court, more than any in my time, has employed aloofness to nurture the myth that Supreme Court Justices are a nobler breed of men who have thrown aside bias, racial prejudice, social preference and individual idiosyncrasies so they can sit in imperial isolation and hand down pure justice.
>
> Marshall must have decided…'Hell, they psychoanalyze U.S. presidents; they search the past and pockets of our lawmakers; it's time the public got a chance to see the human side, the frailties, the mindsets, of the nine men whose judgments affect the lives of all Americans.' Marshall violated the 'old boy' rule that justices see no evil, hear no evil and surely speak no evil of each other.[103]

Marshall was painfully aware of the backlash in his latter years on the Supreme Court. He advocated; the only way to guarantee justice is to have African-Americans, women, and other diverse persons who represented the population, in the judicial system. He also understood that much remained to be done and challenged the complacency of the myth of equality in the post Civil Rights Era. In 1992, speaking from his wheelchair on his 84th birthday, he said:

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[103] Carl T. Rowan, Dream Makers, Dream Breakers – the World of Justice Thurgood Marshall, Welcome Rain, New York, 1993, pp. 394-395. (Marshall was a whistle-blower and unpopular with some of his white colleagues).

> The battle for racial and economic justice is not yet won; indeed, it has barely begun...I wish I could say that racism and prejudice were only distant memories…But as I look around, I see not a nation of unity but of division - Afro and white, indigenous and immigrant, rich and poor, educated and illiterate.
>
> We cannot play ostrich. The legal system can force open doors, and, sometimes, even knock down walls. But it cannot build bridges. That job belongs to you and me. We can run from each other, but we cannot escape each other.[104]

It needs to be recognized that Marshall was no soft-hearted romantic. He famously once said "that a black snake will bite you as fast as a white one." [105]

Society and the judiciary need to increase the chances of getting it right and decreasing the chances of getting it wrong. Getting it right can mean convicting the guilty and thereby advancing the protection and security of society. Getting it wrong can mean wrongful conviction or failing to hold the guilty accountable. A credible justice system must have public confidence, including that of minority communities in the integrity and competence of proceedings and visible operation of law. One may question the decision in the Air India trial...

We need to pull collectively in the same direction in which democracy, the rule of law, equality, justice and fairness need the skill sets, best people, knowledge and human experience widely available. Judicial diversity ought to increase the chances of advancing and protecting our collective security and interest, including from cynicism and extremism.

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[104] ibid, p. 453-54.
[105] Rowan, ibid, p. 441.

Getting it right means addressing the crucial aspect of fact-finding and credibility assessments and reducing the dangers of lack of confidence and alienation from the system of justice. If people see it work, they buy in. And, that strengthens our concepts of justice, security and human rights.

The complacency and indifference of the current ruling class and judiciary reflects a hidden backlash and exclusionary privilege. It operates under a myth of equality - induced by the sophistication and hidden nature of much of modern discrimination. It is this ideology and myth that poses the greatest danger of getting it wrong and perpetuating discrimination - including in the post 9/11 era - with heightened concern about terrorism. The reality is that it is Muslims, South Asians, coloured persons, aboriginals and other minorities who are most suspect and vulnerable. A more representative judiciary will be a better judiciary - better equipped to understand evidence, human motivations and characteristics - and better able to ensure that real justice is done. The stakes have rarely been higher. The protection of fundamental rights and human security demand more than yet has been delivered.

In Why We Can't Wait, Reverend Martin Luther King Jr., in his famous letter from the Birmingham Jail, warned of the real danger:

> I must make two honest confessions to you, my Christian and Jewish brothers. First, I must confess that over the past few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the [Negro's] great stumbling block in his stride toward freedom is not the white citizen's Councilor or the Ku Klux Klanner, but the white moderate, who is more devoted to 'order' than to justice; who prefers a negative peace which is the presence of justice; who constantly says: 'I agree with the goal you seek, but I cannot agree with your methods of direct

> action'; who paternalistically believes he can set the timetable for another man's freedom; who lives by a mythical concept of time and constantly advises [the negro] to wait for a 'more convenient season.'
>
> Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will. Lukewarm acceptance is much more bewildering than outright rejection.[106]

Kind words and platitudes about diversity and multiculturalism without meaningful action are hypocritical. The judiciary has been hitherto largely immune from scrutiny in the analysis of international human rights and the response to terrorism. It is a vital building block in the security and protection of fundamental human rights. Reducing disparity in the representation of our judges - increasing diversity on the benches - is integral to ensuring proper compliance with international human rights law. Diversity within the judiciary is an essential ingredient and a qualitative aspect of justice in the modern context of addressing global terrorism.

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[106] Martin Luther King Jr., Why We Can't Wait, A Signet Book, the New American Library, New York, 1963, pp. 84-5.

Conclusion

The attack on the nomination of Sonia Sotomayor, the first Hispanic-American, to the U.S. Supreme Court by America's first African-American President - was a poorly disguised demonstration of racism. It exposed the myth of a "post-racial" society. It also ignored the full content of Justice Sotomayer's speech in 2002, in which she said a lot more, including:

> …to understand takes time and effort, something not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Others simply do not care. Hence, one must accept the proposition that a difference there will be by the presence of women and people of color on the bench. Personal experiences affect the facts that judges choose to see. My hope is that I will take the good from my experiences and extrapolate them further into areas with I am unfamiliar. I simply do not know exactly what the difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.[107]

Gingrich pandered to prejudiced and narrow minds when he accused Justice Sotomayer of the very racism she had experienced. He deliberately isolated one sentence and ignored the content of her speech. In the same paragraph containing the phrase "wise Latina woman" she had mentioned that "gender and national origins may and will make a difference in our judging" and that "there can never be a universal definition of wise."[108] Gingrich had engaged in co-opting and exploited the insidious mutation of modern racism.

In 1914 the judiciary of British Columbia supporting the government, in the eyes of many, made the most perniciously racist decision ever to come out the courts of that province. In

[107] The New York Times, Lecture: "A Latina Judge's Voice", May 15, 2009.
http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html?_r=1&pagewanted=print
[108] ibid, NYT.

the wake of the decision, white mobs gathered on the shores and cheered as Canadian warships escorted the passengers of the Komagata Maru out of Vancouver harbour. Nearly a century later, the courts remain exclusionary - not by law but by practice. The ends of justice require full inclusion. We need to talk about it and "not fill too many gutters."[109]

Of all international human rights, equality is the foundation principle, and the judiciary is not immune. Racism is prejudice plus power. It is deeply embedded in society, including an unacknowledged set of assumptions and beliefs. The prevailing discourse is one of denial of racism, shifting the onus of racism and making it difficult to see one's own role in privilege and racism. Racism and discrimination exists in every society. The challenge is to be true to the values we profess - on which we claim our countries are predicated - and to ensure the courts reflect our ideal of equality. It is time the word became the deed - to end the hypocrisy.

In the words of Chief Justice Beverley McLachlin of the Supreme Court of Canada, "In a world where one of the primary functions of the judiciary is to promote equality and fairness, it would be anomalous if the very institution charged with that goal should exclude...from its ranks." [110] The judiciary and the executive need to take notice; and the ends of justice demand it. St. Augustine said, "Hope has two beautiful daughters. Their names are anger and courage; anger at the way things are, and courage to see that they do not remain the way they are." We need courage to deliver on the promise of equality, non-discrimination and the

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[109] *From* John Howard Griffin, Black Like Me, A Signet Book, New American Library, 1960, from Preface.

[110] Extracts from remarks delivered to International Association of Women Judges, Canadian Chapter, St. John's, Newfoundland, August 14, 2006.

international human rights obligations that we have undertaken, within the true heart of justice - in the men and women who occupy the benches of our courts. It is a test of our commitment to true equality and justice - in all of our countries.

Human rights are the idea of our time, "as a common standard of achievement for all peoples and all nations." [111] They are "universal, indivisible and interdependent and interrelated." [112] They do not derive from membership of any nation, state, race, gender, group or ideology. They are the entitlement of every human being. They are global and have come to our doorstep - they push open the doors and enter our courtrooms. They cause us to fix our gaze on the men and women who occupy our judicial benches and whom we entrust to render justice. What do we see? What are we given in return? Do we see ourselves - in the one and the many - in representations of justice? The setting for our future security is global; the heart of justice must become more all-encompassing, just like our human rights.

[111] Preamble of the Universal Declaration of Human Rights, 1948.
[112] Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), para. 5.

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