Discrimination Against Women Lawyers in England and Wales: An Overview

By Alexandrine Guyard-Nedelec, University Paris Diderot, France

Traditionally, the legal profession has been a white male profession; women's and ethnic minorities' entry is quite recent. Despite the opening up of the profession, white males still account for the vast majority of senior positions, even though women have been present long enough to be part of the selection pools when vacancies for senior positions arise. One may infer from this observation that discrimination does take place in the legal profession in spite of the anti-discrimination legislation which has been implemented since the 1970s. What is at stake is a cultural legacy that disregards women and creates a glass ceiling preventing them from reaching the upper rungs of the ladder. In order to give an overview of discrimination against women lawyers in England and Wales, the author first presents the legislative and historical background, then focuses on various manifestations of sex discrimination in the legal profession (the pay gap, the glass ceiling and maternity leave), and lastly illustrates these issues with a case study.

> I want women to have their rights. In the courts women have no right, no voice; nobody speaks for them. I wish woman to have her voice there among the pettifoggers. If it is not a fit place for women, it is unfit for men to be there. (Sojourner Truth, 1867)

1 A lawyer once made this humorous remark about my research topic: "discrimination against women in the legal profession? — there is none: there are no women!" Such a witty remark could be an appropriate starting point to introduce the issue of discrimination against women lawyers in England and Wales. One would expect the institutions defending people's rights to be "naturally" willing to promote equality, fairness and justice, as it seems to be what lawyers and judges are supposed to fight for, all their career long. One can thus wonder why they would be reluctant to enforce anti-discrimination measures and laws. Unfortunately, the reality is a long way to this idealistic view of the justice system. Traditionally, the legal profession has been a white male profession, and women and ethnic minorities' entry is quite recent. Despite the opening up of the profession, white males still account for the vast majority of senior positions, even though women have been present long enough to be part of the selection pools when vacancies for senior positions arise. One may infer from this observation that discrimination does take place in the legal profession in spite of the legislation which has been implemented since the 1970s to fight against this attitude. Women make up half the population and should play a part in public life and in key sectors such as justice. Indeed, they can hardly trust a system that is predominantly male, and expect such a system to advise, treat and judge them fairly. Even at the early stages of my research, I understood from my readings and interviews that the discrimination women encounter is quite

subtle and subjective in the sense that the formal barriers have been abolished and that protective legislation has been enacted. What is at stake, and more difficult to tackle, is a cultural legacy, the permanence of a "philosophy" which disregards women and creates a glass ceiling preventing them from reaching the upper rungs of the ladder. In order to give an overview of discrimination against women lawyers in England and Wales, I first present the legislative and historical background, and then focus on various manifestations of sex discrimination in the legal profession, i.e., the pay gap, the glass ceiling and maternity leave. Lastly, I illustrate these issues with a case study.

Legislative and historical background

Legislation

2 Discrimination mainly started to be fought against in the United Kingdom in the 1970s, with the enforcement of two key acts: the Sex Discrimination Act 1975 (SDA) and the Race Relations Act 1976 (RRA, amended in 2000), which had been preceded by the Equal Pay Act 1970. Anti-discrimination law only applies to education, employment, and the provision of services; therefore discrimination outside those specific areas is not outlawed by the statutes (Fredman 83). The expansion of the legislation was largely influenced by European developments, like the Treaty of Rome (Article 119), which in 1973 had introduced into UK law the concept of unfair sex discrimination. Indeed, since the introduction of the European Communities Act 1972, European legislation has prevailed over British legislation, and the impact has been significant in terms of labour law and Human Rights, all the more since the constitution of the UK is uncodified. The Human Rights Act 1998 (HRA), directly inspired by the European Convention on Human Rights, has provided a greater visibility to the issues of Human Rights and discrimination, and has contributed to the creation of a kind of "Human Rights culture". Article 14 of the European Convention on Human Rights (ECHR) on the prohibition of discrimination reads "the enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." However, the protection provided by this Article is not complete because discrimination does not necessarily involve breech of one (or more) of the rights protected by the convention. Even though the protection of the HRA is only vertical (it only applies to the relations between the State and the individuals, not to the relations between individuals), and therefore has a limited impact, the fact that judges have to

comply with the HRA widens the horizontal scope of the legislation and helps protecting Human Rights. The Equality Act 2006 further encouraged the "Human Rights culture" and the fight against discrimination as it involves the creation of an umbrella body, the Commission for Equality and Human Rights (CEHR). In terms of sex discrimination, Part 4 of the Equality Act goes further than the SDA and states, "it is unlawful for a public authority exercising a function to do any act which constitutes discrimination or harassment." This provision applies to judges, whose function is of a public nature, but not directly to lawyers, whose function is of a private nature. In the legal field, the Constitutional Reform Act 2005 played a major role in the fight against discrimination thanks to the introduction of an in-depth reform of the appointment process of judges in order to increase equality and diversity in the judiciary. Though it was not part of the legislation, a similar reform was proposed simultaneously for the appointment of Queen's Counsels (QCs, senior lawyers), in order to increase equality and diversity among lawyers.

3 Indeed, women lawyers can be the victims of either *direct* or *indirect* discrimination, which can translate into a variety of results, among them restricted access to chambers and law firms, sexual harassment, glass ceiling, pay gap, or confinement to certain areas of law. Direct discrimination is defined as "less favourable treatment on grounds of sex, race, religion, etc." Less favourable treatment is regarded as being on grounds of sex, race, etc., if but for that person's race or sex he or she would not have been subjected to the less favourable treatment (Equality and Diversity Code for the Bar 51). The problem is that the victim of discrimination has to find a comparator: "a *comparison* of the cases of different persons of different sex or marital status [. . .] must be such that the relevant circumstances in the one case are the same, or not materially different, in the other" (SDA, I, 5; emphasis added). This causes trouble both on a theoretical and a pragmatic level, since you have to compare yourself to the *norm*, while the norm, be it for sex or race discrimination, is the *white male*. Practically speaking, the problem arises from the difficulty of finding a comparator, since you need strictly equal circumstances, even though you can construct a hypothetical comparator, whose circumstances are the same but not materially different. Indirect discrimination differs from direct discrimination as it is defined as a neutral attitude in appearance, but which *in effect* disadvantages a certain group. This is a particularly important area as far as sex discrimination is concerned. The EC Directives 2000/43/EC ("the Race Directive") and 2002/73/EC ("the Revised Equal Treatment Directive") have initiated a more liberal approach to indirect discrimination and define it as follows: "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with

persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary." In spite of the protection offered by the legislation and by codes of conduct which are established both by the Bar Council and the Law Society (the two main regulatory bodies of the legal profession), women lawyers often abandon starting a law suit, notably for fear of victimisation, which happens when the victim of discrimination is disadvantaged because he/she has brought a claim to defend his/her rights. The Equality Code of the Bar mentions that "it is unlawful to victimise persons by treating them less favourably because they have brought proceedings under the Race Relations, Sex Discrimination or Disability Discrimination Acts, have given evidence or information relating to proceedings or have alleged that discrimination has occurred," but it is still extremely difficult for a lawyer to bring a claim for discrimination.

Women's entry to the legal profession

4 Having described the legislation and the kinds of discrimination women lawyers frequently have to face, I now retrace their entry into the profession. The legal profession in England and Wales is divided into two branches. Barristers are specialist legal advisers and courtroom advocates, whereas solicitors provide a wide range of legal services, from general legal advice, through preparing cases for court, to appearing as advocates (DCA). Solicitors work in law firms or in companies as legal advisers, and barristers work in sets of chambers which are not partnerships operating like a law firm. A set of chambers consists of individual barristers in independent practice, which acts as a unit for certain purposes only, like recruitment (COMBAR 4). All solicitors can appear as advocates in the lower courts and, since 1993, they have been able to seek to appear in the higher courts as well. Advocates are the lawyers who appear in court to argue a case before a judge or tribunal; barrister advocates are divided into junior and QC. The status of QC corresponds to a senior position and is crucial both in terms of prestige and income. Until 1996, only barristers were eligible for appointment, but the right was then extended to solicitors with rights to appear in the higher courts, and the appointment process was finally deeply modified in 2005 in order to increase diversity.

5 The first application by a woman to be admitted as a solicitor in the UK was in 1876 (McGlynn 141): before this date there is no record of a woman attempting to enter the legal profession. Her application was rejected and women had to wait until 1912 for a bill to be introduced in Parliament, which unfortunately did not get any support. Around the same time,

Gwyneth Bebb's application to be registered as a solicitor was rejected by the Law Society and her appeal was rejected similarly on the grounds that she was not a "person" within the terms of the Solicitors Act 1843. For Lord Justice Swinfen Eady, the very fact that women had never been solicitors meant that the law was that women *could not* be solicitors (Bebb v Law Society 1914). The fight continued thanks to the Committee for the Admission of Women to the Solicitors Profession. By 1919, the passing of the Sex Discrimination (Removal) Act achieved success, stating that women were persons and that they could hold public office. However, the persistence and resistance of traditions and customs remained very strong and this act did not mean that women were accepted into the legal profession. The first woman solicitor, Madge Easton Anderson, was admitted in Scotland in 1920; England and Wales followed with three women admitted in December 1922. They were only allowed to practise in restricted areas such as family law, matrimonial and probate work. Even today, women are often still confined to restricted areas of law, like family law. The number of women solicitors then hardly increased until the 1960s and 1970s: the numbers only tripled in 1973 with 222 women being admitted, which corresponded to 13% of the profession, thanks to a combination of factors. In 2006, 104,543 solicitors held practising certificates, and 44,393 of these were women, which amounts to 42.5%. Whereas since 1996 the total number of solicitors holding practising certificates has grown by 53.7%, the number of women holding practising certificates has more than doubled, having increased by 107.9% (Law Society statistics).

6 The situation is very similar as far as the bar is concerned; the pressure for change began in the 1870s when ninety-two women signed a petition demanding permission to attend lectures in Lincoln's Inn. The petition was rejected, and things only began to change in 1902 when Bertha Cave was accepted in the Grave's Inn, who soon reversed their decision stating that "males, and males alone, were to be admitted to practise at the bar." Thus women had to wait until the enactment of the Sex Discrimination (Removal) Act in 1919 to be admitted to the bar. Twenty women were practising in 1921 (0.7%) and by 1951, 151 women barristers amounted to the total of 5% of the Bar (McGlynn 144). Since barristers are not employees and chambers are not partnerships, the provisions of the SDA did not apply directly. Besides, at a meeting of Heads of Chambers in 1975 whose agenda was the oversupply of barristers, one Head of Chambers said: "Our prime concern must be for those young men in our chambers with wives and mortgages." In 1990, the situation changed, or at least the legal frame, with the Courts and Legal Services Act, which states for instance that "It is unlawful for a barrister or barrister's clerk, in relation to any offer of a pupillage or tenancy, to

discriminate against a woman" (64-1). Provision 64 therefore made the SDA applicable to chambers and barristers. Yet in the 1990s, it was estimated that no more than forty-five women were actually practising. As a result of the antidiscrimination legislation and a change in mentalities, the number of women being called to the bar rose sharply, from 8% in 1970 to 51.6% in 2006. Women now amount to 33.4% of the practising bar with 4,973 practising women barristers out of 14,890 practising barristers (Bar Statistics, December 2006).

7 The newly adopted reform of the QCs is also playing a part in the opening up of the legal profession. The reform was designed jointly by the Bar Council and the Law Society, together with the Department for Constitutional Affairs (DCA — Ministry of justice, ex Lord Chancellor's Department). The aim of the new selection process is to "serve the public interest by offering a fair and transparent means of identifying excellence in advocacy in the higher courts," as can be read on the QC application website. Such a reform should help remove the glass ceiling and as a consequence help reduce the pay gap, as the results are already encouraging.

Report of the QC Selection Panel for England and Wales 2005-06		
	Women applicants	Women appointed QC
2005-06	68	33 (48.5%)
1999-2000 (previous high)	53	12 (27.2%)

Fig. 1.

Nevertheless, efforts are still needed since 443 applications were received, of which 175, or 39.5%, were successful, which means that women only amounted to 15.3% of applicants and to 18.8% of appointed QCs.

8 Women's entry into the legal profession was recent and slow; if they now amount to a larger proportion of solicitors and barristers, the fact that fewer of them are appointed QC draws the attention to prevailing patriarchal patterns and the persistence of sex discrimination. Three symptoms of this sex discrimination are most striking: the pay gap, the glass ceiling, and the difficulties related to maternity leave.

Pay gap

9 When talking of pay gap and segregation, solicitors are the most straightforward example to deal with since they are submitted to the labour market in a more similar way to other occupations than barristers. Despite the fact that the number of women in the profession has increased dramatically since the 1950s, an important pay gap remains. The Women and Work Commission revealed in March 2006 that women lawyers are paid 21% less than men,

which is more than the national pay gap of 13% (Rose). These official statistics back up earlier Law Society findings and prompted a call for compulsory gender pay audits for all organisations employing female solicitors. Recent sociological research showed that there is no link between female work-rates and the degree of occupational segregation or the pay gap, which means that rising female employment does not lead to a reduction in occupational segregation and a reduction in the pay gap (Hakim[1]). This is noteworthy as far as the legal profession is concerned, where, thanks to legislation, there was a remarkable increase in the percentage of women: it rose from 4% in 1971 to 14% in 1981 and to 27% in 1990. Although they now amount to 50% of lawyers (all categories — judges, barristers, advocates and solicitors), there is still a differential in earnings, and female solicitors occasionally sue their employers in order to be paid as much as their male counterparts, or at least start a procedure, as illustrated by the sex discrimination case which took place within the Lewis Silkin City firm. The Employment Tribunal proceedings between Tarlo Lyons and Sarah Collins were settled in March 2004; although the full terms of settlement remained confidential, both parties confirmed that as part of this settlement Ms Collins unreservedly withdrew all her claims (notably a claim under the Equal Pay Act) before the Tribunal including her claims of sex discrimination against Tarlo Lyons, according to a press release of Lewis Silkin. Such claims will probably be more and more frequent since the level of awareness is slowly rising, unless firms actually observe the model policies designed by the Law Society and respect the Equal Pay Act 1970 (revised 1996).

10 The permanence of the pay gap in spite of the rising number of women in employment was precisely confirmed by the Commission for Women and Work, who said the gap was despite 'gender segregation' in the profession breaking down in the 1990s to a larger extent than in previous decades, meaning that nearly half the solicitors are now female. "A 2004 salary survey of 790 solicitors found that across private practice, men earned an average of £55,000, compared to £35,125 for women" (Rose). Even though the gap was far smaller for employed solicitors, it still existed. This pay gap is partially explained by the fact that female solicitors do more types of work, e.g., family work, which are less well paid. The very fact that they specialise in this type of work reveals that discrimination still occurs. To sum up, earnings' differentials might be affected by a number of intervening variables (Sommerlad and Sanderson 165) which can include the size or partnership structure of the employing firm, the specific area of law worked in, the number of billable hours credited, the extent of direct contact with the client base of a firm, or the region in which the firm is located. The notion of

[1] Referring to "Women's share of top jobs, 1971, 1981, 1990". Sources: 1971 and 1981 Census data and 1990 Spring Labour Force Survey data for Great Britain. Data for all persons in employment.

choice, though it is constrained by broad structural realities, is also to be taken into account. Women, on average, do not want to spend as much time in commuting as men do, often because of childcare. Therefore, they are confined to a smaller labour market, i.e., to local, smaller firms, who pay less. This is very true of women solicitors, who are more likely to work in 'High Street' firms than in City firms (Shiner 11-13). It is interesting to note that awareness of market conditions may have qualified many applicants' choices in that they might "only have applied to firms that they thought they had a realistic chance of getting a job with, rather than those they particularly wanted to work in" (Shiner 21). This issue of the relationship between knowledge and expectations of the market is also highly significant.

11 About 50% of the pay gap is attributable to feminine patterns and feminine history, which has a big impact on the fact that women tend to leave the labour market more often than men, for their maternity leave(s), in order to raise their children, etc. It is worth noticing that women are often better paid than men in their 20s, that there is a short gap in their 30s, which increases in their 40s, 50s and 60s (Hakim). This is mainly due to two factors, the first being that women tend to leave the labour market earlier than men, and the second that they are less often promoted to senior positions. This can be illustrated the disproportion between men and women partners among solicitors in private practice and holding a practising certificate (Law Society statistics, table below). Another factor to be taken into account for the pay gap is the fact that women are much less likely than men to ask for higher earnings, promotion, etc. (Babcock and Laschever Ch.1). Consequently, they do not get them as often as men.

Glass ceiling

12 The gender differential in earnings (pay gap) is paralleled by a differential in status. Though it is hard to speak of occupational segregation when only dealing with one kind of occupation, vertical segmentation or segregation, also referred to as the glass ceiling, is easily observed in the legal profession. The distribution of women between the vertical segments of the solicitors' profession is asymmetrical; for instance, when employed in City firms, women are more likely to work as assistant solicitors than as associates or partners, as illustrated by the table below.

Solicitors working in private practice – 2006 (Law Society statistics)		
	Partners	Assistants
Men	39.5%	23.8%
Women	17.6%	51.6%

Fig. 2.

Besides, in 2006, of those solicitors with 10-19 years' experience in private practice, 60% of men were partners or sole practitioners compared with only 40% of women. This demonstrates that of those apparently equally eligible for partnership, a man is more likely to succeed than a woman. Besides, a new mode of status has been created, that of the "support lawyer"; while this is being shown as an example of flexibility and capacity of response to women's domestic role, the consequences for women's career trajectory are obvious, and this status is reminiscent of the "salaried partner" status which was formerly in use to absorb ambitious women without integrating them into the ownership structure of firms (Sommerlad and Sanderson 173). A close look at several City firms' websites, notably at the Law Society's directory, allowed me to notice that in 2004, the proportion of women partners hardly ever went beyond 25%. Parity was far from being achieved, even more so when taking into account the fact that in most of those firms the proportion was between 5% and 15% only.[2]

13 Women barristers are also confronted to the glass ceiling, which is not restricted to solicitors. In this branch of the legal profession, there are two kinds of senior position; the first one is Queen's Counsel, and the second the judiciary, as in England and Wales the selection pool for judges consists of barristers. It lately opened to solicitors, who are nevertheless less inclined to regard becoming a judge as an interesting option because the work they do in law firms differs widely from the work done by judges in court. Until recently, the number of women awarded QC or entering the judiciary was very low, for several reasons, including the lack of role models and the secrecy of the selection process which largely depended on co-opting and being known in certain clubs. The 2005 reforms have transformed the selection process into a transparent one — introduction of clear criteria and guidelines, assessment centre, panel of selection and possibility of getting feedback -, thus the number of women coming up the ladder is expected to rise sharply.

14 A short parallel with the judiciary can be drawn: the vertical segmentation of solicitors and difficulty for women barristers to reach senior positions is mirrored by a glass ceiling *within* the judiciary, where the representation of women in senior positions is deeply discouraging. As Cherie Booth QC recalled in the opening address to the Conference on Women and the Criminal Justice System in 2004,

> [t]he statistics reveal a clear picture of gross and widespread under-representation; an under-representation that comes alarmingly close to near exclusion in certain sectors. Consider the following. Until late 2003, no woman had *ever* been appointed to the

[2] Examples taken from the Law Society directory, May 2004. Lewis Silkin: 43 partners, amongst whom 11 women (2 have just been appointed, in March 2004), which amounts to 25.58%. Salans: 30 partners, amongst whom 4 women, which amounts to 13,33%. Druces & Attler Solicitors: 15 partners, amongst whom 1 woman, which amounts to 6.66%. Elborne Mitchell Solicitors: 14 partners, amongst whom 3women, which amounts to 21.42%.

> House of Lords; now, following the appointment of Dame Brenda Hale, of the 12 judges in our highest court, only 1 is a woman. (4)

Her speech is confirmed by the table below [please click image to enlarge], which further shows that in order to retain its legitimacy, the legal profession does have to work on equal opportunities and to fight against the glass ceiling to accelerate the opening up of the profession and recruit from a wider pool of talents:

Women in the Judiciary – April 1st 2007 (DCA statistics – senior positions only)		
Lords of Appeal in Ordinary	Women	1 (9.09%)
	Total	11
Heads of Division (Lord Chancellor, Lord Chief Justice, Master of the Rolls, President of Family Division, Vice-Chancellor)	Woman	0 (0%)
	Total	5
Lord Justices of Appeal	Women	3 (8.11%)
	Total	37
High Court Judges	Women	10 (9.26%)
	Total	108

Fig. 3.

In addition, the glass ceiling also reduces the number of role models, who are extremely important for the attractiveness of the legal profession. Indeed, fear of discrimination seems to be one factor limiting women's choices of career, and recent research led by the Equal Opportunities Commission (EOC) has found that women prefer to work for employers where they see evidence that they will be welcome (EOC 40). The lack of role models, correlated to the glass ceiling and to the fear of isolation, prevents a number of female students from choosing the legal profession since the EOC study revealed that one quarter of white British boys and girls think there are certain jobs they cannot apply for because of their sex, compared with over half of Black Caribbean girls and nearly two-thirds of Pakistani and Bangladeshi girls who are ruling out jobs because of their sex, ethnicity or faith (EOC 40). Thus, removing the glass ceiling is not only important *per se* but also for attracting women, and in particular minority ethnic women, into the profession.

15 The "trickle-up" argument, i.e., the explanation of the small proportion of women and ethnic minorities at senior positions because of their gradual and much later admission into the legal profession, has often been often put forward to account for the small number of women in senior positions in the judiciary or awarded QC. Doubts about this hypothesis began to be voiced by the early 1990s, since the rate of change had been slower than anticipated (Malleson 180). The legal reform group JUSTICE noted in 1992 that the proportion of women and ethnic minority lawyers appointed to the first ranks of Assistant Recorder and Recorder was smaller than that of men, and similar claims were brought by the

Association of Women Barristers to the Home Affairs Select Committee in 1996. All the figures mentioned above, as well as the government's new awareness of the urgent need for a reform of the selection process, belie the reliability of this argument.

Maternity

16 The glass ceiling is often reinforced by maternity, since women tend to make career breaks more often than men do because of pregnancy and childcare. Maternity is quite a delicate point from a discrimination law perspective, mainly due to the question of the *male comparator*: pregnancy is the most important and obvious situation in which there is simply no comparator. In the 1980s, the result was to dismiss claims of sex discrimination on grounds of pregnancy. Then, pregnant women used to be compared to men off sick, which was undesirable since it meant that pregnancy was considered as a form of illness. At least, this comparison with the ill man gave pregnant women the possibility to claim protection from sex discrimination law, but it did so at some cost since pregnancy should not be stigmatised as unhealthy (Fredman 99). Moreover, this comparison assumes that the only dimension of pregnancy with which the legislation should be concerned is its effect on the employee's ability to work and thereby ignores the positive medical and social reasons for leave. Different jurisdictions have moved away from this inappropriate comparative approach and attempted to suggest another notion of equality. The influence of the European Court of Justice is paramount here, since the Court clearly stated that there is no need for a comparator of any sort since only women are pregnant: unequal treatment or any other form of discrimination when a woman is pregnant is then *automatically* sex discrimination. This move is sowing the seeds for a female rather than a male norm in regards to parental rights, and the approach promoted by the European Courts is based more on substantive equality than on formal equality. It is also possible to avoid the difficulties and technicalities of the SDA in interpreting its provisions according to the aim of the Act; in other words, the purposive approach seems to be much more desirable than the technical approach as regards maternity — and discrimination more broadly.

17 Pregnancy used to be a good opportunity for employers to dismiss women workers but is now automatically considered as unfair dismissal. More insidiously, pregnancy plays a major role in statistical discrimination: an employer will believe that a young woman, especially if she is married, will have children, go on maternity leave and afterwards be less involved in her job because of childcare. Undeniably,

> the employer [who has no distaste for hiring and working alongside blacks and women and] who seeks to maximise expected profit will discriminate against blacks or women

> if he believes them to be less qualified, *reliable, long-term*, etc. on the average than whites and males. (Phelps 659; emphasis added)

Statistical discrimination is all the more unfair since those assumptions are based on averages and prejudice, and do not take into account the fact that some women do not want to have children, and that their wish is made possible thanks to contraception. Consequently, women are discriminated against on the grounds of pregnancy even before being pregnant. Thirdly, and this is more specific to the legal profession, until recently, women barristers who were pregnant often had to pay their rent when on maternity leave whereas they did not generate any income during this period. It is also very difficult for them to keep their clients over this period of time (this is also true of solicitors), and when they come back from maternity leave they frequently feel marginalised:

> [The] first 6 months to 1 year back are the most stressful time as (i) the financial constraints of having no accrued debtors or income are exacerbated by having to find the child minder's salary or nursery fees up front, before any receipts start coming in; (ii) the children are tiny and at their most vulnerable and the pull of home is very strong; (iii) the return to chambers can be lonely and isolating as because of the way chambers works as a collection of self-employed people with no hierarchy of management, many members of chambers don't notice the practitioner has returned; and (iv) if work does not flow in quickly, the anxieties are exacerbated because the practitioner has no work and therefore has time to worry about (i) to (iii) above. (COMBAR 21)

18 To help mothers with these concerns, the Bar Council first published guidance on maternity policies in May 1992; the trigger for that guidance was Section 35a of the SDA, enacted by Section 64 of the Courts and Legal Services Act 1990, which made it unlawful for a barrister or barristers clerk (those who distribute work in a set of chambers) to discriminate against women pupils and tenants on grounds of sex. Since that guidance, it has become usual for sets of chambers to adopt maternity policies, but some have come to the idea quite late, and under pressure. The Bar Council has adopted a policy of "Mainstreaming" Equal Opportunities, i.e., introducing consideration of Equal Opportunities issues at each stage in the decision making process. As a matter of fact, equality of opportunity is not achieved just by affording access to a system of working practices that have been built up to suit the background and lifestyle of a particular group who have a traditional preponderance in the profession without taking into account the diversity of our society. The policies drafted by the Bar Council are used for three main purposes, namely fairness, compliance with the existing legislation and commercial advantage. In May 2004, they adopted a new maternity, paternity and flexible working policy to help barristers balance family life with practice at the Bar. Under the new guidelines, chambers should have written policies permitting members of

chambers to take career breaks, work flexible hours, part time or partly from home to enable them to manage their family responsibilities and remain in practice. Indeed, dealing with matters on an ad hoc basis is no substitute for a proper equal opportunities policy and creates an atmosphere of doubt and confusion, even though ad hoc arrangements can prove very generous. The new policy provides for a barrister's tenant seat in chambers to remain open for a minimum of one year while on maternity leave, six months of which should be free of rent and chambers expenses, where it used to be three months. Moreover, in order to allow flexibility, some of the period may be taken before the birth and a constructive approach to work during maternity leave is encouraged to allow women to "keep their hand in" (i.e., drafting and preparing advisory work from home, as they may be unable or unwilling to appear in Court). Partners with the responsibility for or share of the care of a child should be offered a minimum of one month's leave free of chambers rent and expenses. Jane McNeill QC who presented the new policy on behalf of the Bar Council said: "The Bar continues to reflect the diverse society it serves. With 1,502 called to the Bar last year [2003] of whom 51% were women it is important more than ever that family life is accommodated. Retention of women at the Bar is vital for the future of the profession and we hope that these new proposals go some way to address this." COMBAR, the Commercial Bar Association, echoed this statement, reaffirming that "the arrangements made for maternity leave are crucial in retaining women in the profession" (8). As they have assessed that returning from maternity leave can be difficult, they have designed guidelines which set out the practical steps that should be taken in respect of any member returning to work following maternity leave, and it is intended that chambers will assist any member returning to work after maternity leave in a practical way to get instructions and to re-establish her practice.

A case study: Siân Heard & Fellows v Sinclair Roche & Temperley [2004][3]

19 The issues related to sex discrimination in the legal profession discussed above — be it the pay gap, the glass ceiling or maternity leave, can be illustrated by a recent case (the originating applications date back to March 2002), Siân Heard & Fellows v Sinclair Roche & Temperley (a firm) and Others. The issues were agreed as being that each Respondent discriminated against each Applicant in the following ways: i) unlawful direct sex discrimination/discrimination on the grounds of marital/family status, ii) unlawful indirect sex discrimination, and iii) unlawful sex discrimination by way of victimisation (3). The Applicants' complaints fell under two main headings, namely their lack of progression within

[3] All the quotes and figures in the case study come from the case (case numbers 2201499/02 & 2201637/02. London Central Employment Tribunal. 2004).

the firm, which confirms the existence of a glass ceiling, and adverse treatment by the Respondents when the firm started to experience financial difficulties in mid-2001 and afterwards. The background of this case is highly interesting as it highlights the existence of a "discriminatory 'culture'" as the Tribunal itself phrases it (8). In July 2001, the firm Sinclair Roche & Temperley (SRT) comprised 36 partners of whom 30 were male and 6 female (4). Although the firm was established in 1934, only one woman in its entire history (some 70 years) reached the status of full equity partner (reclassified after 1999 as "senior equity partner"). At the lower level of salaried partner (reclassified after 1999 as "junior equity partner"), SRT has remained a predominantly male preserve: between 1995 and 1997, Siân Fellows was the only woman partner in London (the firm's offices were located in the City, Hong-Kong, Shanghai and Romania); between 1997 and 2000, Ms Fellows and Ms Heard were the only women partners in SRT (5). They both worked in the litigation department in London. The situation in this law firm is the epitome of the statistics mentioned earlier on the percentage of women achieving partnership and further details expose the mechanisms which prevent them from doing so, among which the persistence of "patronage" and the requirement of working full-time.

20 In 1995, the Commercial Lawyer Publication surveyed women partners in the top 50 London firms, and SRT was identified as one of the firms with the lowest percentages of women partners: by late 1995, more than a third of the assistant solicitors employed by the firm were women, but as 1st May 2002, out of 36 partners in total, only 6 were female. Of these, 5 were junior equity partners and one was a contract partner. Of these, only the Applicants and the contract partner had children (6). Moreover, at all relevant times, though the structure changed, the management and strategic direction of the firm was vested in male Managing Partners, male Senior Partners, and in the exclusively male Management and Strategic Committees. The PRE Committee, which dealt with the division of partnership profits, was also an all-male committee; which confirms once more that women are most of the time unlikely to be appointed to managerial positions. When in 1995 SRT introduced an equal opportunities policy modelled on the Law Society's Model Policy, neither the partner charged with day-to-day responsibilities for its implementation, nor the Senior Partner had *any* training in equal opportunities, and there was no annual monitoring of the policy to judge its effectiveness. The partner in charge even declared in cross-examination: "When I am seeking to increase profits, in a business context, equal opportunities is secondary" (6). This shows how little impact these policies can have, though they are designed to help employers implement measures in order to conform to the legislation. The lack of training, monitoring

and follow-up is fully disclosed here, and hints at the idea that legislation and codes of conduct are but one small step towards equality.

21 Besides, in 1998, allegations of sexual harassment were made against an equity partner, who had sexually harassed four junior female employees at the Christmas party (7). The accuracy of the complaints was not contested and there was pressure within the partnership for this to be dealt with firmly, but the Tribunal found out that it had been "swept under the carpet," which adds another stratum to the discriminatory "culture" of the firm. This discriminatory "culture" is exemplified by several declarations made by the Respondents: when defining the general profile for the candidate to be appointed as litigator to the Shanghai office in May 1994, it was agreed that he should be "preferably married, no children, white male," because "to some partners [. . .] it is inconceivable that a man will take instructions from a woman" (8). As regards achieving full equity partnership, the Tribunal was satisfied that neither of the applicants was given the same opportunity as their comparators to achieve high billing figures (i.e., the most important criteria) as neither had the client base to generate such income (16); furthermore, no adjustment was made for lack of billing over maternity leave period or for non financial contributions such as Ms Fellows' time as Legal Staff Partner (whereas the Managing partner was awarded a bonus for his no fee-earning work) (27). The Tribunal found that the process whereby applicants were made to partnership, in particular high level, lacked transparency, and that there was no system for apportioning or monitoring work within the partnership. On the contrary, "patronage" (17) was the rule and led to abuse: there was a lack of support concerning both Applicants, who "could not get beyond the lower stages of partnership — the glass ceiling — because they were not given the work that would permit them to achieve the desired level of billings" (35). Hence the three issues mentioned above, that of maternity leave, that of the confinement to certain areas of work and that of vertical segregation, are exemplified.

22 Furthermore, when the firm experienced financial difficulties, the Applicants were designated as the two Junior Equity Partners who would be "reclassified" (18). They were excluded from consideration for promotion without their knowledge or consent. In Ms Heard's case, it was due to the fact that most of her work was self-generated and therefore there was always a possibility of commercial conflict with the Respondent's existing clients; there was not always consistency in the way that her conflicts of interests and the conflicts of other partners were dealt with (28). Ms Fellows's exclusion was due to her expression of interest in working part-time, which also made her colleagues (the Respondents) overlook her when marketing opportunities arose (20). This despite the fact that there was sufficient

evidence before the Tribunal to conclude that both Applicants worked long hours when necessary, frequently late into the evening and at week-ends, and travelled extensively abroad when required, contrary to some of the Respondents' assumptions that they were unwilling to travel or to take on what might on occasion be uncomfortable and difficult foreign work (23). These assumptions form a relevant indicator of the sexist and macho culture which is at stake and highlight the necessity of clear *written* policies for part-time working and flexible hours. As far as merger negotiations with Stephenson Harwood were concerned, the Applicants' co-operation or inclusion was, at best, envisaged as marginal (24). Indeed, there was evidence of a difference in sex and a difference of treatment before the Applicants raised explicit sex discrimination complaints; they even made attempts to resolve the situation without alleging unlawful conduct on the part of the Respondents. Eventually, the Tribunal found that each Respondent indirectly discriminated against Siân Fellows by imposing a requirement or condition (pre 12 October 2001) or provision, criterion or practice (after 12 October 2001) that she work full time. They considered that this measure was disadvantaging women since "it is not disputed that by and large women have the greater responsibility for childcare in our society and that as a consequence, a considerably larger proportion of women than men are unable to commit themselves to full time working" (34). Siân Heard's complaint of sex discrimination was dismissed, and both Applicants' complaints of victimisation were dismissed (1). The unanimous decision of the Employment Tribunal was that the First Respondent (the firm) was ordered to pay Ms Fellows a compensatory award of £352,569 plus interest on past losses £18.49, and an award to injury to feelings of £25,000 plus interest of £6,807.19; and to pay Ms Heard a compensatory award of £475,597 gross, plus interest on past losses of £220.78, an award for injury to feelings of £20,000 plus interest of £5,445.75, and an award for aggravated damages of £3,000 plus interest of £169.10 (Remedy Decision of the Employment Tribunal 1). The decision shows that the sums awarded to victims of sex discrimination can be quite significant, a fact which reveals that sex discrimination is not regarded as trivial by the courts, and may help persuade employers to implement equal pay and equal treatment measures.

23 This case study, as well as the statistical and historical data presented above, unmistakably show that discrimination does take place in the legal profession. Even though it was quite recently, Parliament has enacted a series of Acts, most of them being relevant for all fields of employment, and some of them being specifically oriented towards the legal profession, like the Courts and Legal Services Act 1990 in order to promote equality and put an end to the previously described discriminatory practices — which are not endemic to the

legal profession but sadly enough much more broadly spread. Combined with the action led by the Law Society and the Bar Council, and the research undertaken by the Department for Constitutional Affairs, they should help put an end to the discriminatory culture of the legal profession.

Conclusion

24 It is expected that women will continue to make up just over half of new entrants to the profession within 20 or 25 years. The status and number of women within the profession will depend on the perceived levels of discrimination in the employment practices of solicitors' firms and sets of chambers, the opportunities for flexible working and eventually on women's view of the legal profession compared with other careers. Indeed, among forty recommendations to tackle the culture in schools and workplaces that create job segregation and leave women lagging behind men in the pay stakes, the Commission for Women and Work said the government should establish a UK-wide "quality part-time work change initiative" (Rose). This would support moves to achieve a culture change so that more senior jobs — particularly in the skilled occupations and the professions — are open to part-time and flexible working.

25 As legislation fighting discrimination has developed and is now truly comprehensive, and as the government has undertaken a reform of the judiciary deeply re-structuring the system, other means have to be found to combat sex discrimination. The development of techniques of enforcement and the adoption of a purposive approach to anti-discrimination legislation could be suggested as possibilities to help the promotion of equality and fairness. The measures taken to tackle equality and diversity, notably in the legal profession, seem to have identified the main hurdles, in particular thanks to the extensive consultation of organisations. However, the government's engagement in favour of a 'Human Rights culture' is not necessarily as strong as suggested by their rhetoric, as shown by the appointment of Ruth Kelly as Minister for Women and Equality in May 2006 while it is widely known that she is a member of the conservative Catholic sect *Opus Dei* and holds extremely traditional views, such as considering that homosexuality is a sin. Since 1997, when she became an MP, she has missed 12 votes on homosexuality, equal rights and related issues (Pierce). The situation of equality and diversity is therefore ambivalent, as the gap between speech and deeds seems to widen, but the efficiency of the Constitutional Reform Act 2005 and of the Queen's Counsel reform for the opening up of the legal profession should soon be measurable,

and the interest and activity surrounding equal opportunities allows a relative optimism for women's future in the legal profession.

Works Cited

Babcock, Linda, and Sarah Laschever. *Women Don't Ask: Negotiation and Gender Divide*. Princeton: Princeton UP, 2003.

"Bar Announces New Maternity, Paternity and Flexible Working Policy." The Bar Council. 31 May 2004. 3 May 2007. <http://www.barcouncil.org.uk/news/pressarchive/15.html>

Booth, Cherie QC. Address. Conf. on Women and the Criminal Justice System. London. 31 March 2004.

Constitutional Reform: The Future of Queen's Counsel. A Department for Constitutional Affairs (DCA) Consultation Paper. July 2003. 23 March 2006. <http://www.dca.gov.uk/consult/qcfuture/index.htm#curr>.

Equal Opportunities Commission (EOC). "Moving on up? Bangladeshi, Pakistani and Black Caribbean Women and Work: Early findings from the EOC's investigation in England." Manchester: EOC, 2006.

Equality and Diversity Code for the Bar. Bar Standards Board. 8 May 2007. <http://www.barstandardsboard.org.uk/standardsandguidance/eanddcode/>.

Fredman, Sandra. *Discrimination Law*. Oxford: Oxford UP, 2002.

Hakim, Catherine. "Occupational segregation and the sex differential in earnings." Sociology of Employment I: Social Relations at Work. Course led by Dr. Patrick McGovern. London School of Economics. Nov 2003.

Malleson, Kate. "The position of Women in the Judiciary in England and Wales." *Women in the World's Legal Profession*. Ed. Ulrike Schultz and Gisela Shaw. Oxford: Hart Publishing, 2003. 175-189.

McGlynn, Clare. "Strategies for Reforming the English Solicitors' Profession: An Analysis of the Business Case for Equality." *Women in the World's Legal Profession*. Ed. Ulrike Schultz and Gisela Shaw. Oxford: Hart Publishing, 2003. 159-174.

_____. "The Status of Women Lawyers in the United Kingdom." *Women in the World's Legal Profession*. Ed. Ulrike Schultz and Gisela Shaw. Oxford: Hart Publishing, 2003.139-158.

Phelps, Edmund. "The Statistical Theory of Sexism and Racism." *American Economic Review* 62,4 (1972): 659-661.

Pierce, Andrew. "Kelly Fails to Pass Equality Test, Say Gay Campaigners.". *The Times*. 9 May 2006. 14 July 2007 <http://www.timesonline.co.uk/tol/news/politics/article714729.ece>.

Pupillage, Maternity Leave and Pro Bono Work. A Survey Undertaken By the Commercial Bar Association (COMBAR). 2005. 14 December 2005. <http://www.combar.com>.

Report of the QC Selection Panel for England and Wales 2005-06. 4 May 2007. <http://www.qcapplications.org.uk/competition2005-06>.

Rose, Neil. "Women lawyers paid 21% less than men". *Law Society Gazette*. 2 March 2006. 14 July 2007. <http://www.lawgazette.co.uk/news/breaking/view=newsarticle.law?GAZETTENEWSID=270094>.

Rubenstein, Michael. *Equal Pay for Work of Equal Value*. London: Macmillan Press, 1984.

Schultz, Ulrike, and Gisela Shaw, eds. *Women in the World's Legal Profession*. Oxford: Hart Publishing, 2003.

Siân Heard & Fellows v Sinclair Roche & Temperley (a firm) and Others. Case numbers 2201499/02 & 2201637/02. London Central Employment Tribunal. 2004.

Shiner, Michael. *Entry into the Legal Professions*. The Law Student Cohort Study, Year 5. London: The Law Society, 1999.

Sommerlad, Hilary, and Peter Sanderson. "Professionalism, Discrimination, Difference and Choice in Women's Experience in Law Jobs." *Discriminating Lawyers*. Ed. Philip Thomas. London: Cavendish Publishing, 2000. 155-182.

The Bar Council Statistics. May 2007. Table 4. <http://www.barcouncil.org.uk/about/statistics/>.

Trends in the Solicitors' Profession: Key Statistics sheet. Annual Statistical Report 2006. The Law Society. 3 May 2007. <http://www.lawsociety.org.uk:80/aboutlawsociety/whatwedo/researchandtrends/researchpubs/view=researchpubsarticle.law?PUBLICATIONID=316092>.

Truth, Sojourner. Speech delivered at the First Annual Meeting of the American Equal Rights Association. New York City. 9 May 1867.

Women Judges in Post: Statistics. Judiciary of England and Wales. 1st April 2007. 3 May 2007. http://www.judiciary.gov.uk/keyfacts/statistics/women.htm>.