

# We need a more diverse supreme court

All eight appointments to the bench since that of Lady Hale in 2004 have been white men



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Lady Hale, the only woman justice of the UK supreme court. Photograph: Dan Kitwood/Getty Images

Just two weeks after it was reported that women in the legal professions are still finding it difficult to break through the glass ceiling, here comes another setback. Though an official announcement has yet to be made, it seems that the next two appointments to the supreme court will be men.

Sir Nicholas Wilson and Jonathan Sumption QC were said to be in the running when Sir John Dyson was appointed in March 2010. This time they've made it to the finish line. Of course there is much to be said about Sumption's "leapfrogging" from the bar straight into the top level of the judiciary. But what about the most obvious characteristic they both share with all but one of their new colleagues? What of the fact that, Baroness Hale excepted, the supreme court is populated by white men?

When it comes to the diversity of its members, the supreme court continues to lag far behind its overseas counterparts. Since Lady Hale's elevation to the then House of Lords in 2004, all of the subsequent eight appointments to the supreme court have been men. In contrast, four of the nine members of the Canadian supreme court, three of the nine justices on the US supreme court, three of the seven judges of the high court of Australia and 19 out of the 47 judges on the European court of human rights are women. Furthermore, none of the members of the UK supreme court (or the court of appeal for that matter) has a black or minority ethnic background.

Nor is there the diversity in sexual orientation found on the South African constitutional court and, until recently, Australia's high court.

This lack of diversity should give us pause for thought. Indeed, if the recent exchange between Lady Kennedy (incidentally the only woman on the government's bill of rights commission) and Lord McNally in the House of Lords is anything to go by, questions are already being asked.

After all, assuming that judicial qualities are, on the whole, evenly distributed between men and women, appointment on merit should lead to (more or less) equal numbers of male and female judges, precisely because women are just as likely as men to possess the attributes of good judges. However, the reality is that this will happen only if the pool from which appointments are made is itself gender-balanced.

We don't know how many women applied in the latest round of appointments (though none made it on to the all-male shortlist). But what we do know is that as long as we continue to select only from legal professions in which women continue to find it difficult to progress, appointment "on merit" will do little more than replicate this imbalance. If this is the case, then appointment on merit and progress to a more diverse judiciary truly are opposed. Something has to give.

So what are the options? The answer need not be simply to parachute women into the shortlist through the use of quotas or targets. Nor should we abandon the search for "the best", the goal of appointment on merit. The way forward lies in recognising that, all other things being equal, a more diverse judiciary is a better judiciary.

Appointment on merit requires us to look for merit wherever and however it is to be found. This requires, first, that we acknowledge – with Hale – that a judiciary is enriched by the diversity of its members, by incorporating a broader pool of experiences, insights and attributes.

For it is on this experience, insight and expertise that all judges will, on occasion, need to rely when applying and developing the law. Second, it means we must be alive to the risk that our quest for the best appointments may be thrown off track by misplaced assumptions as to how and where these are to be found. Should the rumours prove true, what the latest round of appointments shows is that there is a danger that we end up associating judicial quality with the attributes possessed by those who have traditionally held such positions, the result being that we see merit only in its familiar guises.

Direct appointments to the supreme court bench may yet prove to be an effective way of addressing some of these problems. However, if the government is truly committed to a more diverse judiciary, then it needs to do more to ensure that the highly qualified women, who are out there and are eligible for judicial appointment, are promoted to the supreme court bench. After all, when it is suggested that the appointment of yet another white, male barrister – albeit one who has not previously held a judicial appointment – might be welcomed for the "diversity" it brings, then something is amiss.

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