

Judicial Diversity in the Supreme Court – Does it matter?



Dr Rachel O'Cahill-Callaghan discusses the need for demographic diversity in the Supreme Court and also the need for diversity of background, experience and values.

Last week the Supreme Court released three judgments in which the court was divided on the final outcome. The first was a long awaited **decision on the Welfare Reform Act 2012** and whether the benefit cap had an unjustifiable discriminatory impact on women. The majority, Lords Reed, Hughes and Carnwarth held that the benefit cap was a proportionate means of meeting legitimate aims. Lady Hale and Lord Kerr strongly disagreed.

The second involved a **chief engineer on an oil tanker who went missing in the middle of the night while at sea**. The company he worked for decided that the most likely explanation was suicide and as a result his widow did not receive death benefits. The widow was challenging the decision process. The majority Lady Hale and Lords Hodge and Kerr found in favour of the widow. Two other Supreme Court Justices, Lord Neuberger and Lord Wilson disagreed. The third was a case brought by **trail riders who wished to maintain their rights of way across the Dorset countryside**. Again the court was divided on the outcome.

In each of these three cases, the outcome was decided by the smallest margin, a single Supreme Court Justice, yet the impact of the decision will be far reaching. The Supreme Court only hears cases of the greatest public and constitutional importance. Many would argue that this form of division is wrong. It highlights disagreement and may create uncertainty in the law. But division also highlights difference and this must be important. It must be important that the Supreme Court Justices, who are deciding cases which will impact a diverse multicultural population, are different and represent and are reflective of, the population they serve.

Yet despite the ever changing demographics of the United Kingdom, the Supreme Court has remained the domain of the white, public school educated males. Indeed, of the twenty Supreme Court Justices who have had a full time appointment to the bench, Lady Hale, is the only female. No black minority ethnic judge or judge with an overt disability has ever sat on the Supreme Court bench. This lack of diversity is not new nor is it limited to the UK, however the UK has the lowest proportion of women sitting on the bench in the highest court compared to other common law countries. Academics, practitioners and politicians have recognised the **importance of judicial diversity** and agree that the judicial bench should reflect the society it serves, yet have chosen to reject positive

discrimination to redress the balance. Indeed, despite two decades of intervention and numerous appointments, the overt lack of diversity of the Supreme Court bench has not changed.

But the division in the Supreme Court reveals something else, we are more than our covers, we are more than overt demographics such as gender and ethnicity. Every case heard in the Supreme Court is framed and constrained by the law, in reaching a decision in these close-call cases the judge is called upon to exercise discretion, to choose between two equally valid yet opposing positions. Recent studies have demonstrated an association between personal values and decision making in these close-call cases, with Supreme Court Justices who espouse similar values reaching a similar decision. Values are the principles we live by. They are formed through life experiences. Overt characteristics such as gender and ethnicity will play a role in value formation, but values are not limited to these simple demographic experiences.

The Supreme Court hears cases of the utmost public importance. Who makes these decisions is critical to us all now and in the future. We need overt demographic diversity, diversity of gender, ethnicity, disability on the bench, not simply because the judiciary will reflect the population they serve but because increased demographic diversity will be reflected in personal values. But we need more than overt diversity, we need Supreme Court Justices from a variety of backgrounds with a wide range of life experiences, we need diversity of values. In reaching decisions that will impact us all, the Supreme Court bench needs to reflect not only what we look like but how we view life, the principles we live by.



Dr Rachel Cahill-O'Callaghan is a lecturer in Cardiff School of Law and Politics. Her work draws on the psychological theories and techniques of decision making to understand decision making in the UK Supreme Court. Her work examines the influence of personal values on judicial decisions and the impact this has on debates surrounding judicial diversity and judicial selection.

This article gives the views of the author, and not the position of ConstitutionUK, nor of the London School of Economics.

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