



'The Big Boys' Club: Why We Need a More Diverse Judiciary

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Leicester Student Law Review
Autumn 2017

Judicial diversity has been a major concern of the legal world for the past few decades. Although general improvements have been made over the years, the issue of diversity remains unresolved. Traditionally, the bench was known for its similarity, with individuals from specific demographic groups being favoured over others. This resulted in an air of homogeneity which failed to represent the needs of society. Although the recent implementation of legislation in this area has encouraged a shift, it is evident that the lack of representation still exists today. By using the deficit model and trickle up theory, this article illustrates the problems in this field and the steps that need to be taken in the future.

The judiciary is not only one of the central features of the constitution; it is also primarily responsible for interpreting laws and upholding justice in society. Over the years, the composition of England's judiciary has been a topic of interest for academics and policy-makers alike. Historically, the judiciary was quite homogenous, with its members all sharing similar characteristics.¹ In recent times, however, there has been a push for more diversity, based on the belief that it will not only lead to a more representative body of justice, but also one that is reflective of society.² This debate has been challenged by the importance of merit, thus causing a strain between the two. Advocates for the principle of appointment on merit have argued that the criteria for appointing judges should primarily be concerned with capability rather than heterogeneity. This article aims to explore the tension between the need for a diverse judiciary and the importance of the principle of merit. By examining the thoughts of academics and policy-makers on the issue, this article will uncover the theories that have sought to explain the differences, while suggesting possible ways in which the gap may be filled in coming years.

Traditionally, the judiciary was appointed from elite barristers' chambers.³ This was problematic because such chambers typically consisted of white males who came from backgrounds of extreme privilege.⁴ As a result,

the majority of appointed judges came from similar socioeconomic backgrounds, attended elite schools and universities, and went on to become partners at leading chambers.⁵ Moreover, they shared similar views on social and legal issues, thus creating an air of homogeneity that failed to represent and cater to the needs of broader society.

This method of judicial appointment also played a considerable role in maintaining the privilege and elitism that had been pre-established. Initially, judges were appointed through an opaque system that consisted of methods such as 'secret soundings' and the 'tap on the shoulder' process, which essentially meant that the judiciary was chosen internally from the ranks of top barristers. This restrictive process meant that the possibility of diversifying the bench was essentially eliminated.⁶ The Constitutional Reform Act of 2005 addressed this issue by establishing a Judicial Appointments Commission (JAC) that would serve to resolve the issue of non-representation and non-diversity.⁷ For the first time in British history, the requirements for judicial office were adjusted to make way for a clear, comprehensive set of qualities. This included intellectual capacity and merit as well as personal characteristics such as sound judgement and objectivity.⁸ Although the creation of the JAC opened up

¹ Alisdair Gillespie, *The English Legal System* (6th edition, OUP 2017) 226.

² *ibid.*

³ *ibid.*

⁴ *ibid.*

⁵ Phillip Kirby, 'Leading People 2016' (Sutton Trust, February 2016)

<http://www.suttontrust.com/wp-content/uploads/2016/02/Leading-People_Feb16.pdf> accessed 13 Nov 2016.

⁶ Alisdair Gillespie (n 1).

⁷ *ibid.*

⁸ Sir Geoffrey Bindham QC and Karon Monaghan QC, 'Judicial Diversity: Accelerating Change' (*Judicial Appointments Commission*, 12 Nov 2014)

<https://jac.judiciary.gov.uk/sites/default/files/sync/news/accelerating_change_finalrev_0.pdf> 5.

opportunities for underrepresented individuals with great merit, the English judiciary still lacks diversity today. This pattern has been studied by academics, but few explanations have emerged over the years.

There are two main theories that attempt to explain the lack of diversity within the English judiciary: the deficit model and the trickle up theory.⁹ The former argues that the reason behind the judiciary's non-diverse nature is the idea that underrepresented groups tend not to apply for judicial office. This presents the argument that the appointment committee has no choice but to select from the available candidates, most of whom are of the white, male demographic that has existed within the judiciary for many decades.¹⁰ The latter theory focuses on the idea that because the inclusion of underrepresented groups such as women and ethnic minorities is a fairly recent advancement within the legal field, there simply aren't enough individuals that can be considered eligible for judicial positions yet.¹¹ Trickle up theory, as opposed to the deficit model, argues that the growth in numbers of women and ethnic minorities within the legal sector will gradually give way to a more representative judiciary with time.¹²

While both theories bring forth reasonable explanations, they are not without their flaws. Although the deficit model recognises that not enough underrepresented groups are applying for judicial roles, it fails to explain the reasons behind this trend.¹³ In addition, it overlooks the reasons behind individuals' hesitation to apply for such roles and rather than holding the pre-established system and its traditions accountable for the lack of diversity, it challenges underrepresented individuals instead. Similarly, trickle up theory does its best to explain the lack of diversity in the judiciary, but does not outline alternative options. Rather, it relies on the passage of time to eliminate the crucial issue at hand and ignores the fact that it may take decades before the judiciary becomes more representative of society.

Nonetheless, academic scholars are not the only ones who have attempted to explain the lack of judicial diversity in the English legal system; policy-makers have also made considerable efforts. In recent years, the Crime and Courts Act (CCA) has emerged, seeking to increase the appointment of underrepresented individuals *inter alia* (among other things).¹⁴ The reasoning behind this legislation is the idea that a diversified judiciary invites public confidence.¹⁵ Although diversity is one of the main tenets of the statute, the more critical requirement is merit. It is imperative that all members of the bench demonstrate good merit and a high level of expertise in their chosen field.¹⁶ The CCA is different from other pieces of legislation in that it allows the appointment committee to positively discriminate between candidates of equal merit.¹⁷ In other words, if there is a white male

who holds the same merit as another individual belonging to an underrepresented group, the committee is encouraged to choose the latter to increase the chances of a representative judiciary.¹⁸ The Crime and Courts Act thus proposes a suitable union between merit and diversity, two crucial factors that play a hand in the success of the judiciary.

Overall, it is evident that the judiciary remains noticeably unrepresentative to this day. While efforts have been made to encourage women and ethnic minorities to apply for judicial roles, the gap still remains. Theories such as the deficit and trickle up models have attempted to explain this void. However, they have failed to offer practical solutions to the problem. Statutes such as the CCA have also attempted to find the balance between the age-old debate of merit and diversity, and although they have proven to be more successful than scholarly efforts, there is still much to be changed. It thus appears that the problem is not recognising the lack of diversity, but rather taking the necessary actions to rectify it. In order to reassure underrepresented groups they have a chance at judicial appointment, it is crucial to provide them with opportunities for professional development. The legal system needs to encourage candidates from the aforementioned groups to come forward. This can be done through workshops where such candidates can gain a better idea of how to present themselves in the most effective way possible. Not only will this inspire accomplished individuals to come forward and apply for judicial office, but it will serve to support their success every step of the way; after all, they are our system's biggest assets.

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⁹ Justice Committee, The Work of the Judicial Appointments Commission – Oral Evidence, 2014, H.C. 1132 (U.K.).

¹⁰ *ibid.*

¹¹ *ibid.* 163.

¹² *ibid.* 123.

¹³ *ibid.* 165.

¹⁴ Crime and Courts Act 2013, s 9.

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ *ibid.*

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