

Rainbow Lecture 2014 on Diversity

Lord Neuberger

House of Commons, 12 March 2014

1. It is a great honour and a great pleasure to have been asked to talk about the progress and importance of minority representation across public and political life. Many people have talked about the need to improve diversity whether generally or in specific areas, many people have written about the need for inclusivity across the board, many people have produced figures about equality showing how things have got better in some areas but not in others, many people have pontificated about social mobility, and how things are changing or not changing. But, as we all know, and lawyers appreciate this as well as anyone, it is much, much easier to talk, write, compile statistics and pontificate about these important issues than it is actually to do something about them.
2. Well, let me start with a few general points, and then I will move on to the world of law.
3. First, what are diversity and minority representation? Minorities in this context are not simply those who are in a numerical minority like persons of colour or gay people. It includes those who are statistically in a majority, such as women (who outnumber men by a small margin) and those from less privileged social, educational and economic backgrounds. There are many more people from underprivileged backgrounds than there are privileged people; yet, like women, they are under-represented, in some areas, grossly under-represented, and this renders them a minority for present purposes. We are all aware of the deficit represented by the low proportion of women and ethnic minorities in many areas, but in general at any rate, things are improving. The problem in relation to

those from less privileged backgrounds is far more insidious, as it is reflective not merely of attitudes, but also of the whole way in which our society is structured.

4. Quite apart from this, we should not limit minorities to the well-known categories which I have mentioned. People with approaches, beliefs and mindsets which are not typical of a particular walk of life may well be wrongly under-represented in that walk of life. Of course, that does not mean that stupid or lazy people should be appointed to posts which require intelligence and hard work any more than inept footballers should be recruited by Premier League clubs. But sometimes we have too rigid and traditional a view of the qualities required for a particular job – and that may well apply particularly to those at the top. Nonetheless, we should not be too ready to condemn traditional views as fuddy-duddy: established requirements for particular roles often are based on experience.
5. Secondly, why are diversity and minority representation important? It instinctively seems right that we should be trying to move towards a more inclusive society which better reflects gender, ethnic, social, and other distribution at all levels, so that we aim for equal numbers of men and women, or appropriate representation of every ethnic minority, at all levels, and irrespective of background. However, it is worth considering why that is, in fact, so important. In my opinion, at least, there are two straightforward reasons, and one more subtle reason.
6. First, it is simply unjust and incompatible with elementary justice that people should have fewer opportunities in life because they are women, because they are not white, or because they come from a background which is socially or economically underprivileged. Liberal democracy does not mean the tyranny of the majority: it includes protection of the minorities and of the underprivileged. And, secondly, at least equally

importantly, if the most important jobs are, in practice, open to only a small proportion of the population, it is statistically inevitable that many of those top jobs do not go to the best people, which must be to the country's economic, cultural and social disadvantage. As so often is the case, economic interest and social justice, go hand-in-hand. A society which is fairer and economically more successful is a better and a happier society than one which is unfair and economically skewed.

7. The more subtle reason was impressively examined and explained in a recent book, *Why Nations Fail*, by two US academics, Professors Daron Acemoglu and James A. Robinson, who explained why some nations prosper while others do not. They contrast two types of political and economic institutions: inclusive and extractive, which they describe in the following terms:

'Extractive political institutions concentrate power in the hands of a narrow elite and place few constraints on the exercise of this power. Economic institutions are then often structured by this elite to extract resources from the rest of society (in other words, they exist in order to enrich the elite by ensuring the transfer of society's wealth into their hands, or overseas bank accounts). . . Inclusive political institutions, vesting power broadly (i.e., pluralistic institutions which encourage economic growth), would tend to uproot economic institutions that expropriate the resources of the many, erect entry barriers, and suppress the functioning of the markets so that only a few benefit. (in other words, they do not exist to enrich the elite at the expense of society).'

8. If everyone has a stake in society, we flourish. By contrast, the more we concentrate power and influence in the hands of a few, the greater the risk of alienation of the many. If, as a black person, you see very few black MPs and peers, no black High Court Judges, hardly any black FTSE 100 company directors, you are much less likely to feel that our society is your society, and you are likely to become disaffected and alienated. Acemoglu and Robinson convincingly attribute the rise of Britain to the top of the international order in the 180 years following the Glorious Revolution of 1688 to the increasing mobility and democracy in society.

9. This ties into my third general point, which is that we live at a particularly challenging time for improving diversity. In the quarter-century between 1983 and 2008, the economy grew pretty consistently, particularly in higher education and in the financial and other service industries. As a result, there was considerable expansion in University places and in relatively well paid and prestigious job opportunities. So the possibility of a relatively painless increase in diversity at the top was plain: there was a demand for more people. Yet, even in such relatively benign economic times, the challenge of creating a more diverse and representative society was difficult. Progress was made, but it was not particularly impressive by international standards.

10. Now that we have an economy that is expanding more slowly; consequently, improving diversity in the higher levels through increased social mobility is much more difficult, because the number of available jobs is hardly expanding. And increased social mobility is potentially much more painful, because, if the top echelon of jobs remains static, it is logically inevitable that the sons and daughters of those at the top will have to go down the snakes in order to enable those from less privileged backgrounds to go up the ladders. While globalisation and developments in IT appear to increase opportunities, they also seem to have the effect of concentrating wealth in the hands of relatively few very rich individuals, which I fear may have the effect of increasing social inequality, and thereby also stifling social mobility. As was suggested in the Economist magazine last week, "Inequality is driven by technology and globalisation".

11. My fourth general point is a warning that we should beware of statistics. At least according to mark twain, it was Benjamin Disraeli who famously said that there were lies, damned lies and statistics, and he had a point. An article or paper which is based on figures which comes to clear conclusions has a beguiling attraction. But any set of figures

is only as good as the assumptions and investigations by reference to which it was compiled, and the temptation for any journalist or academic is to come to clear conclusions. Mobility in society, whether past or present, is very, very difficult to measure, and it is unsurprising that there is so much disagreement on the topic. Even unchallengeable figures can give a distorted view. As Fiona Woolf, the Lord Mayor of London, has recently pointed out, there is much cheering at the news that there are now more than 20% women of FTSE 100 boards, but drill a little deeper and you find that over 92% of them are non-executives.

12. My fifth general point is that, when it comes to improving diversity in selection processes, there is a real problem about unconscious bias. You will find very few people who deny the need to improve diversity and minority representation, and I have no doubt that the great majority of people responsible for selecting candidates at Universities and for jobs genuinely mean it when they say they want to choose minority candidates if they properly can. But I worry about unconscious bias. And I worry about it in myself as much as in anyone else: because it is extremely hard to know if you suffer from it, and if so, in what way and what you can do about it. Selecting people in one's own image or according to the traditional image is a common example, but it is not the only one. Unconscious bias is particularly pernicious, because many people who worry about it may not suffer from it at all. I think the most important practical point about unconscious bias is that anyone involved in selection should receive training so as to become more self-aware in this connection, although training can only do so much.

13. My sixth general point is that a tendency appears to be growing in some quarters which is antithetical to diversity in a rather indirect and insidious way. As Phillip Larkin suggested in his famous poem, 1963 heralded a rather permissive period, partly no doubt in

reaction to the very conventional and straight-laced post-World War II outlook. Possibly as a counter-reaction to the permissive society, a combination of political correctness and moral reaction appears to be developing. While I have no wish to comment on, let alone criticise, this development, I fear that it may risk spilling over into a censoriousness about what views people can publicly air as to the merits of diversity or other issues which indirectly relate to diversity. As has been said on more than one occasion, freedom only to speak inoffensively is a freedom not worth having. The more that arguments and views are shut out as unacceptable the less diverse we risk becoming in terms of outlook. And the less diverse we become in terms of outlook, the more we risk not valuing diversity and the more we therefore risk losing diversity in practice.

14. The seventh general point I want to make concerns the responsibilities of groups such as universities or professions, or any other institutions. They undoubtedly have a duty both to the public and to the reputation and standing of their institution and its members to do their best to encourage and achieve as much diversity as possible. In 2009, a committee chaired by Alan Milburn (which I had the honour of being a representative of the legal professions) reported on diversity in the professions, and since then Mr Milburn has reported regularly as the Government's Independent Reviewer on Social Mobility and Child Poverty. The report rightly emphasised the duties of the professions in this connection, and rightly suggested that they should do more. However, I would warn against unthinking attacks on the professions and universities for not doing more to promote diversity. It is rather like blaming the media for what they choose to report. In each case, the problem is one which reflects the attitude of our society. If we wanted media which reported the news differently, then we wouldn't take newspapers or they would change their stance. So, too, our universities and professions try and pick the best people, and we should expect them to do so, and it is as much a reflection on the failing

of our society generally, including parents and schools as well as government, that we are as imbalanced as we are. Of course, that does not in any way cast doubt on, or reduce the extent of, the duty of professions, universities and other institutions to do their utmost to improve diversity and assist social mobility. Indeed, if anything, it reinforces that duty. Incidentally, 65 minority students have recently been the subject of a popular and instructive BuzzFeed article on their experiences of life at Oxford; the website is worth a visit.

15. My final general point concerns the importance of merit, a particularly vital quality when it comes to those responsible for the rule of law, the lawyers, and perhaps even more, the judges, and therefore a useful general point to start focussing on the legal world. The country must have the best judges possible, and merit is therefore a standard which cannot be undermined. Diversity is sometimes said to be the enemy of merit. I do not agree: provided that diversity is properly invoked, it is not merely consistent with merit: it reinforces merit. I have already explained that the more inclusiveness we have the bigger the pool of potential judges, and the bigger that pool the higher the quality of judges. In addition to that, a more diverse judiciary gives greater confidence in the judicial system. I am a bit sceptical about the notion that female, BAME or gay judges tend to think differently from male, white or straight judges, but they often undoubtedly have different experiences which bring valuable different perspectives to bear on problems.

16. But before I deal with the judiciary, I ought to start with the legal profession. In terms of access into the profession, the bar, solicitors and legal executives do very well for women. However, an increasingly glaring problem appears as you go up the ladder. At the beginning, more than 50% of new entrants are women. At the top about 11 or 12%

of QCs and partners in City firms of solicitors are women. Now this discrepancy can be partly explained by the fact that the top of the profession reflects the proportion of women entering the law 25 or more years ago. However, as an explanation that is wearing increasingly thin as time passes.

17. The truth is that the top law firms require a virtually 24/7 commitment from their employees and partners. That is partly, but only partly, attributable to the way that lawyers now charge out, namely by reference to an hourly rate. As a non-partner, your cost in terms of salary and overheads is fixed, and your value to the partners is ultimately down to the number of chargeable hours you clock up, rather than the quality of your work. I have inveighed against this on previous occasions, and I only mention it today because it explains why people with external commitments lose out. Solicitors with family responsibilities almost inevitably work fewer hours, and therefore do not carry the same heft as those sad people who have no life but their work. And, in our society, it is far more common for women to have the family responsibilities. As for barristers, the mentality of most chambers is very much skewed in favour of barristers who are available for solicitors all the time; indeed, as solicitors are expected to work 24/7, they presumably expect the barristers to do so too.

18. At least in some areas of legal practice the position on gender equality is improving, but not very fast. Thus, this week's Law Society Gazette records that less than 30% of private practice partners are women, and the proportion is, as I have mentioned, much lower among City solicitors. What is needed is a change of culture which is easy to say, but quite hard to achieve. The last thing we want to do is to undermine the effectiveness, or perceived effectiveness, of a profession which makes very considerable contributions to

the financial success and reputation of this country in global terms. I think that pressure from clients could prove very effective, if it could be encouraged or even orchestrated. In the USA, I believe that there are some big corporations who make it clear that they are reluctant, or even not prepared, to instruct law firms which are dominated by men. However, I fear that, when push comes to shove, many such corporations may decide that they want obsessive, testosterone-driven men rather than balanced, sensible women fighting their corner – even though it is often the balanced sensible women who will very often be more effective advisers and advocates.

19. So far as women in the judiciary are concerned, the bad news is that the situation has, unsurprisingly, tended to be reflective of the position in the legal profession, but the good news is that, over the past few years, things have been getting better. As to the senior judiciary, the High Court, which recruits almost exclusively from the legal profession, has recently moved to nearly 20% women, the Court of Appeal is around 17% and the Supreme Court, I fear, is at about 8%. There is real force in the point that the proportion of women in the High Court, well in excess of the proportion of women at the top of the legal profession, is a significant achievement. However, as Judge Karen Walden-Smith said only two days ago: I would not want it thought that I had been selected as a judge because I was a woman, any more than that I had been selected as a judge although I was a woman. Among the more junior, but equally very important Circuit and District Judges, and the tribunal Judges, the female representation is better, but it is still imbalanced. It is best in the Tribunals, where it is 40% which is pretty good. The other good news is that the proportion of women in the judiciary at all levels is significantly higher among recent appointments than among past appointments. Thus, of the recent appointments to the High Court and to the Court of Appeal 30% or more were women.

20. As for ethnic minorities, the position is poor in the senior judiciary, but, as with women, it is much better in the more junior judiciary. Thus, the proportion of BAME tribunal judges is 9%. Once again, the paucity of BAME judges among the more senior judiciary can, I believe, be seen as reflecting the relatively small proportion of BAME practitioners among the QCs and the senior partners of the larger solicitors firms. I would hope and expect that things will improve in that connection and indeed I believe that they are already getting better.

21. It is to the credit of the Judicial Appointments Commission that things are getting better, but we should obviously not leave it all to them. Nor do we. Serving judges should go out of their way to encourage women and BAME lawyers to consider becoming judges. This should be done on a one-to-one basis, as well as by means of a more generalised approach. Indeed, we do this already, although no doubt we could do more. Mentoring schemes are always talked about and could no doubt be used more. Furthermore, there is much to be said for looking outside the world of practising lawyers, for instance to academic lawyers. There are already a number of academic lawyers at all levels of the judiciary, but this is a relatively new development, which could be expanded. At the Supreme Court three months ago, we held a well-attended meeting to encourage academics to consider a judicial career. Further, I think that the judiciary's diversity potential is being increased by more part-time judges being appointed from among employed lawyers. Recent legislative changes have also improved the prospects of increasing diversity in the judiciary, namely the tipping point, or equal merit, provision and the enabling of part-time appointments at all levels, including, I am pleased to say, the Supreme Court.

22. I have not so far mentioned sexuality. I am unaware of any discrimination against gay and lesbian people in the legal world, although like in every other area of human endeavour, I fear there must be pockets of prejudice. I ought also have mentioned those who have disabilities. Designers of offices and court buildings and most people involved with legal practice and judging effectively take it for granted that lawyers and judges will not have disabilities. Such assumptions make it much harder, and sometimes impossible, for those with disabilities to practice law or even to sit as judges. We owe it to such people to cater for their needs. And, quite apart from the requirements of fairness and inclusivity, I believe that the challenges such people face, and overcome, often make them better lawyers and judges.

23. The biggest diversity deficit and the most difficult inclusivity problem for the legal profession, as for the judiciary, relates to those with a less privileged economic, social and educational background. In that connection, we face the problems created by the society in which we live, where many, indeed the majority of, people do not enjoy the advantages which the minority are lucky enough to enjoy. And it is that minority which provides, and has from time immemorial provided, the largest and most disproportionate number of our lawyers and judges. The problem is considerable, as, by the time that people from underprivileged backgrounds are thinking of applying to law firms or sets of chambers, it is very often too late: the opportunities that their more fortunate peers have been afforded over time places them at a considerable disadvantage. The net effect of this is that it can be hard to castigate the law firms or chambers for not taking them.

24. Nonetheless, it is indefensible simply to blame the class or educational system, and walk away from the problem. Whether barristers, solicitors, legal executives or judges, we owe

society more than that. And we do offer more, and no doubt should be offering even more.

25. The Chartered Institute of Legal Executives represents a very valuable way into the legal profession for those who cannot get to be solicitors or barristers, because for instance they have no university degree, or even for quite a few with a degree. It is a way to study and acquire qualifications while working as a lawyer. Legal executives have become district judges and I have no doubt that more will take that route. Those who have been running the Chartered Institute were until recently unsung heroes and heroines of diversity in the legal profession, but in the past three years I am glad to say that people have started to appreciate their contribution. However, there is a link with my warning against statistics here. There is a risk that having a high proportion of minority group in junior positions can mislead as to the extent to which there is real inclusiveness throughout an organisation.

26. Apart from that, judges and practising lawyers should be visiting schools and sixth form colleges, lawyers should be encouraging visits to law firms and chambers, and judges should be encouraging visit to courts. There should be placements in firms and chambers, and mentoring. This is going on; thus, we have many visits from schools and sixth form colleges to the Supreme Court – over 350 educational groups a year. Indeed we should be able to do more than arrange visits and talks; we have mock trials. As a result, teenagers, who may never have thought about it or who may have no idea how to go about it can be made aware of the possibility of a career in the law. Almost above all, there appears to be a depressing lack of high profile role models, and it is people who

have reached the top from underprivileged beginnings who are able to send a far more convincing and telling message than anyone else.

27. When it comes to selection, I think law firms and chambers should address the question whether they could do more to recruit those from less privileged backgrounds. There are chambers which reject anyone who has not got a first class degree; while I have my doubts about that approach (which would have ruled me out), it is understandable. But I am not here today to comment on the policy. One thing which such chambers (or law firms) might consider is the possibility of requiring applicants to state whether they had been to a state school (or even whether they had received free lunches) and, if they had, not rejecting them if they have a second class degree. I have neither the experience nor the evidence to justify positively recommending such a suggestion. It is simply an example of a possible way of encouraging and assisting those from a less fortunate background to enter the legal profession. It is indeed a suggestion which comes from one of our Supreme Court judicial assistants, whose parents are immigrants from Pakistan, who went to a comprehensive school, and who is at a magic circle City Firm.
28. The legal world is making strides to improve diversity. The latest report produced by Alan Milburn's committee in 2013 makes the point that "[t]he regulators of the legal sector ... have continued to be key advocates in driving progress by supporting and encouraging chambers and law firms to implement change quickly" and that a review body set up of the regulators "has now reported, providing a review of education and training requirements of legal services ... and making a series of recommendations in areas relevant to social mobility, such as entry routes to law". It also says that "[o]n school activity, lawyers continue to seek to raise the profile of the profession through a

wide range of activities with children who may not otherwise have access to the profession”. In addition, it refers to improvements in selection procedures generally, and a project on work experience, which “has continued to expand, with 80 law firms now signed up”, and “most firms taking part have been offering high-quality placements. It also praises work placement initiatives, but points out that these are much easier for people with money. Finally, the report points out that those from privileged educational and social backgrounds are still disproportionately represented in the legal profession.

29. It was said by a questioner that the cost of education and training was fast becoming prohibitive, if it was not so already, so that a legal career would only be open to those with money. It was said by another questioner that the decreasing amount of legal aid would rapidly result in only the exceptionally committed or determined, and the richest, being able to pursue a publicly funded legal career. While I cannot pretend to any recent close or first hand knowledge of embarking on a legal career, I can see that there may be real problems arising both from the increasing cost of legal training and legal aid cuts. These are problems of a general nature, in terms of getting good quality lawyers and judges, and of a more specific nature, in terms of increasing diversity. Indeed, I fear that these funding problems could lead to a weaker legal profession and judiciary, plus an increase in the diversity deficit.

30. A way of improving diversity in the judiciary, and by-passing the legal profession, was proposed by a perceptive questioner. The proposal is to appoint young lawyers as junior judges at an early age, with a view to their progressing up the judicial ladder. The notion of a career judiciary is opposed by many, and I am a great supporter of our common law practice of appointing judges from among the ranks of successful practitioners: it ensures

that we have a judiciary which is not too cloistered. However, that does not mean that we cannot have a mixture of career judges and ex-practitioner judges. Indeed, the notion of such a mix is conceptually consistent with diversity, as well as serving to promote diversity. At least on the basis of what I have heard, I would support such a proposal.

31. I referred at the beginning of this talk to the reasons why we needed diversity generally, unfairness, loss of quality and alienation. Those reasons apply particularly strongly to the legal profession and the judiciary. The sheer inequity which is reflected in a lack of diversity is particularly inappropriate in the world of law and justice which is, almost by definition, devoted to fairness. The reduction in excellence which results from a lack of diversity is particularly unfortunate in a profession and a judiciary which is so important for the rule of law and for UK plc. Further, the legal profession and the judiciary are a very visible emanation of the state, and the absence of diversity in the law is therefore peculiarly likely to lead to alienation among those who are under-represented in the legal world.

32. There is therefore a duty on those involved in the legal profession and the judiciary to do everything we can to carry on the improvements which have been made in our world. Successful lawyers and judges have a duty to improve inclusiveness in their world – just as there is a duty on those who have succeeded in all other walks of life to encourage inclusiveness in their worlds. We have made some real progress in the past few years, but we still have a long way to go.

David Neuberger

12 March 2014

