

Lady Hale gives the Fiona Woolf Lecture for the Women Lawyers' Division of the Law Society

Women in the Judiciary

27 June 2014

We are here to celebrate the achievements of Fiona Woolf, the second woman President of The Law Society and the second woman to be Lord Mayor of London. As the second woman Lord Justice of Appeal, I know that we have a lot in common. For instance, we both share Madeleine Albright's view that 'there is a special place in Hell for women who don't help other women'. Pioneering women must champion the cause of women generally, otherwise the world will slip back into its complacent old masculo-centric ways. One of the four charities which Fiona is supporting as Lord Mayor is 'Working Chance', a charity which transforms the lives of women ex-offenders by finding them jobs with quality employers. This chimes with the theme of 'women in prison' which we in the United Kingdom Association of Women Judges have chosen to mark our tenth anniversary year. But it is only part of the wider agenda which Fiona has set for her year, under the heading of 'The Power of Diversity'. This is a programme of events 'designed to share best practice and experience amongst senior and mid-level managers across City organisations in a collaborative effort to improve people management and widen the UK

business talent pool'. As she sees it, there has always been a moral case for inclusion, but she wants the City to understand that there is also a clear business case for diversity – based on 'fresh perspectives, originality and innovation'.

I have similar goals for the judiciary, but I am not sure that 'fresh perspectives, originality and innovation' are as valued there as they are in business. Could it be that we still have a vision of the judge and judging which is intrinsically male, so much so that the notion of a woman judge can seem like a contradiction in terms? Professor Erika Rackley has put the suggestion this way:¹

'Maybe . . . a belief in the superhero judge who comes with a built in programme, a game plan to ensure a coherent and certain outcome consistent with the values and premises of the particular political tradition he is there to serve and preserve is intrinsic to our notion of judging. . . The merest glimmer of recognition that judges may be political actors with substantial power and opportunity to enact their personal political preferences surely threatens to render unstable the whole edifice of the law . . . Hence the importance of preserving the

¹ 'Representations of the (woman) judge: Hercules, the little mermaid, and the vain and naked Emperor' (2002) 22 *Legal Studies* 602, 616.

mythological dimension of the adjudicative process, ensuring its distance from the concerns of mere mortals. We can imagine the judge in no other way. He has to be seen as ‘supra’ human. We even make him dress up in his own kind of cape and mask – well wig – his own “superhero” outfit.’

Note, of course, that the wig in question is a man’s wig. The very idea of a judge as a real human being with a life of her own will threaten this superhero image. Just as Henry Cecil said that we should not be able to imagine a judge having a bath, we should not be able to imagine her doing the washing up (I wish). Rackley goes on to compare the woman judge with Andersen’s little mermaid – who, like the water nymph Rusalka in Dvorak’s opera, traded her beautiful voice for legs so that she could join her handsome prince on dry land and then found that he was no longer interested in her:

‘She [the woman judge] too remains cast as a mermaid. Her physical appearance threatens to upset aesthetic norms; her presence is an inescapable irritant, simultaneously confirming and disrupting the established masculinity of the bench. As such, the woman judge is almost a contradiction in terms. She is *so* deviant that she is inevitably subject to an irrepressible desire to conform. Like Andersen’s mermaid, she is induced to

deny herself and sell her voice; her dangerous siren call is silenced and in the silence difference is lost.’

I am determined not to be that mermaid. I take the view that ‘difference’ is important in judging and that gender diversity, along with many other dimensions of diversity, is a good, indeed a necessary, thing. However, the principal reason for this is not our different voice, but democratic legitimacy. In a democracy governed by the people and not by an absolute monarch or even an aristocratic ruling class, the judiciary should reflect the whole community, not just a small section of it. The public should be able to feel that the courts are their courts; that their cases are being decided and the law is being made by people like them, and not by some alien beings from another planet. In the modern world, where social deference has largely disappeared, this should enhance rather than undermine the public’s confidence in the law and the legal system.

The press seem to get this point. After a press conference held by Lord Neuberger and me to mark the beginning of the fifth year of the Supreme Court last October, Richard Cornes calculated that 75% of the press coverage headlined, not the interesting cases which we had to decide or the impact of legal aid changes on access to the Court, but our lack of gender diversity. Cornes commented that our 11-1 ratio is clearly of interest to a

goodish cross-section of the mainstream press and we should be worried about this. He called it our Achilles' heel.²

Another reason for greater diversity on the bench is that justice, fairness and equality are the underlying principles of laws we swear to uphold. We judges swear a very moving oath, 'to do right to all manner of people, after the laws and usages of this realm, without fear or favour, affection or ill-will.' These are the underlying values of a democratic society: a democracy which values each person equally even if the majority do not. If the people in charge of the justice system are overwhelmingly from one section of society, then the justice system does not reflect the very values it is there to uphold. As was said at a conference entitled '*Le Juge est Une Femme*' in Brussels recently, the absence of women from the bench is even more important than our presence, in the message it sends out. (The absence of BME judges is even more eloquent.)

There is another reason, akin to Fiona Woolf's business case for more women in the City: that different judges might actually make a difference to the judgments reached. But that is much more controversial and I'll come back to it.

If judicial diversity is such a good thing why do we have so little of it?³

According to the figures as at 1 April last year, under a quarter (24.3%) of the judges in the ordinary courts in England and Wales were women. It only

² Richard Cornes, '11-1 gender ratio court's Achilles' heel', *UKSC Blog*, 18 October 2013.

³ Things may have improved since 1 April 2013, the latest figures available, which can be found at www.judiciary.gov.uk/resources/JCO/Documents/Stats/courts-diversity-stats-2012-13.xls and [/tribunal-diversity-breakdown-2012-13.xls](http://tribunal-diversity-breakdown-2012-13.xls).

gets as high as that by including the large number of fee-paid part-timers -
Recorders and deputies - many of whom will never become full time judges.
Two fifths (40.1%) of tribunal judges were women. But this includes an
even higher percentage of fee-paid part-timers. The figures get worse the
higher you get up the system. Only 27.9% of the upper tribunal judiciary
were women (though up on the previous year). Only 16.7% of High Court
judges, and 11.4% of Court of Appeal judges in England and Wales were
women. However, things have improved over the last year, with 21 out of
107 High Court judges now being women, and seven out of the 43 Lord
Justices of Appeal and Heads of Division. But there has only ever been one
female Head of Division and in the Supreme Court there is still only me. It
speaks volumes that we have to celebrate such a low proportion of senior
women judges.

We are out of step with the rest of the world. The average across the
judiciaries of the countries in the Council of Europe is 52% men and 48%
women. In 2010, England and Wales was fourth from the bottom, followed
only by Azerbaijan, Scotland and Armenia.⁴ It is fair to say, however, that,
across the whole of Europe, the gender balance gets worse the higher the
court.

⁴ European Commission for the Efficiency of Justice (cepej), *European Judicial Systems*, Edition 2012 (2010 date), fig 11.30.

Professor Alan Paterson at Strathclyde University has compared the proportion of women in the top courts of the 34 countries in the OECD. At 8.0%, we were at rock bottom, albeit closely followed by Turkey. Even the other common law countries are currently much better than us: three out of the nine in the Supreme Court of the United States; three out of the nine in the Supreme Court of Canada; three out of the seven in the High Court of Australia; two out of five in the Supreme Court of New Zealand. Of course, not too much can be made of this when the numbers are so small but against this picture one out of twelve does not look good. It looks even worse when you realise that there have been thirteen appointments since I was appointed ten and a half years ago, and all of them are men.

Not only that, the male Supreme Court Justices mostly fit the stereotypical pattern of boys' boarding school, Oxbridge college and the Inns of Court. All but two went to independent fee-paying schools. All went to single sex boys' schools, all but three to boys' boarding schools. All were very successful barristers in private practice before going on the bench, although two did other things first. Most specialised in commercial, property or planning law rather than what Helena Kennedy calls 'poor folks' law'. All but two have a degree from Oxford or Cambridge (which is the only thing I do have in common with them).

This is not a criticism of them. They cannot be blamed for their good fortune. However great your initial advantages in life, you have to have the brains, the energy, the determination and the good luck to make the most of them. This combination of educational establishments turns out some of the best-educated people in the country. But it also brings advantages in other ways, in who you know as well as what you know, and this can smooth your path and open doors which might remain closed to others who do not have the same contacts. It can also bring with it the expectation that this will happen, almost a sense of entitlement, which people from more modest educational backgrounds simply do not have.

On the other hand, our present unrepresentative judiciary are, apparently, very widely admired not only here but in the outside world. The Russian oligarchs want to litigate here because of their intelligence, their industry, their independence, their integrity and their incorruptibility. Could this be because of the kind of background the judges have? Or could it be because they are better paid than almost any judiciary in Europe?⁵ If you assume that you are going to recruit your top judges from your top practitioners, then you have to pay them enough to make it worth their while. And it is not only the top judges. At all levels, people come into the judiciary having

⁵ *European Judicial Systems, op cit.*

already achieved something in their professional lives. The rewards have to bear some relationship to the rewards of their other careers.

The status and pay of judges in countries where there are far more women judges tend to be much lower than they are here.⁶ Is this chicken or egg? Are the status and pay lower because so many of them are women or are so many of them women because the status and pay are lower? I incline to think that the latter is the correct explanation, for two main reasons: first, because many of the countries in which there are now so many women judges are civil law countries where there are many more judges anyway and that is one reason why they do not pay them so much; they also recruit by examination and young women are notoriously better at certain kinds of examination than young men; and second, because some of them are former eastern bloc countries where one would not expect the status of judges to be particularly high.

But all this leads some people to fear that, if we changed the system so radically that the composition of our higher judiciary also changed radically, we might not like what we saw. Would a radical increase in the numbers of women judges lead in time to lower pay, lower status and ultimately to a less

⁶ *Ibid.*

able judiciary? Might we be wrong to think that improving the diversity of the judiciary will also improve the public's confidence in us?

Despite that, one of the biggest changes I have seen over the past two decades is that more and more influential people – not just the press - have come to recognise that we do have a problem. One (but possibly not the principal) reason for setting up the Judicial Appointments Commission in the Constitutional Reform Act 2005 was to increase the diversity of the bench at all levels. The Joint Committee on Human Rights actually proposed that there should be a duty, akin to the one there then was in Northern Ireland,⁷ to appoint a judiciary reflective of the community it serves.⁸ But many in Parliament thought that merit and diversity are competing rather than complementary values. So instead there is a duty to 'have regard to the need to encourage diversity in the range of persons available for selection' (s 64(1)). But this is expressly subject to section 63(2), which provides that selection must be 'solely on merit'. So it is not enough to get the appointments process right. We have to get the definition and assessment of merit right too and that is much harder.

⁷ Justice (Northern Ireland) Act 2004, s 3; since replaced with a provision more in line with both England and Wales and Scotland.

⁸ Joint Committee on Human Rights, 23rd Report of Session 2003-2004, *Scrutiny of Bills: Final Progress Report*, para 1.83.

Eight years from implementation on there has undoubtedly been progress. More women candidates are applying and being appointed. The recent statistics from the Judicial Appointments Commission show that the success rate of the women who do apply is higher than that of the men.⁹ Under the old ‘tap on the shoulder’ system for the higher appointments the Lord Chancellor’s Department depended almost entirely upon the information supplied by the judges in order to find out whose shoulder to tap. They may not have set out to ‘clone’ themselves,¹⁰ but, as my colleague Lord Sumption (who has been a member of the Commission) has acknowledged, ‘it would be foolish to pretend that they were not occasionally influenced by unconscious stereotyping and by perceptions of ability moulded by their own personal experiences’.¹¹ I would merely drop the ‘occasionally’. And of course they would only know the people who regularly appeared in their courts. Less conventional candidates rarely became visible enough to be considered.

Now, the great majority of appointments at all levels are based on applications (or at least expressions of interest) rather than taps on the shoulder. The qualities thought to comprise merit have been made public. More refined assessment processes have been introduced. The Commission

⁹ Judicial Appointments Commission, *Judicial Selection and Recommendations for Appointment Statistics, October 2013 to March 2014*, June 2014.

¹⁰ Helena Kennedy, *Eve was Framed*, p 267.

¹¹ *Home Truths about Judicial Diversity*, Bar Council Law Reform Lecture 2012.

has also taken many more active steps to encourage under-represented groups to consider a judicial career. They do indeed have something of a success story to tell. But the main problem standing in the way of swifter progress is that the process of choosing the best candidates is only part of the story.

Either side of the JAC there sit stages along the way which tend to disadvantage non-standard candidates. It begins with our education system, which, as Lord Sumption puts it ‘tends to perpetuate disadvantage’. Students from independent schools are more likely to go to Oxbridge and other top universities than are state school students with the same grades – not necessarily because the universities are discriminating but because the state school students are not applying.¹² Recruitment to law jobs, whether as barristers or solicitors, is left to the market. The market tends to take the easy route in an over-crowded field of favouring a small number of top universities. An Oxbridge graduate with a non-law or lower class law degree is more likely to be recruited than a post-1992 university graduate with a first class law degree.

¹² Sutton Trust, *The Missing 3000*, State School Students under-represented at leading Universities, 2004; Sutton Trust, *State School Admissions to our Leading Universities, An update to ‘The Missing 3000’*, March 2005; Sutton Trust, *Sutton Trust Submission to Sir Martin Harris: Widening Access to Selective Universities*, January 2010.

Then there are what Lord Sumption calls ‘the patterns of working in the ancient professions’. For the Bar, this means all the reasons why many able but sensible women choose either to go into another branch of the profession or to leave the Bar after giving it a go for a few years. Even in 2012, only 12% of practising silks in England and Wales were women.¹³ Last year, only 18% of the successful applicants for silk were women, so things are not going to get much better quickly. But there are a great many able women in the Government Legal Service, the Crown Prosecution Service, in commerce and industry, as well as the solicitors’ profession and academia.

For solicitors, the patterns of work may be rather different, but the pressures of ‘presenteeism’ in the top City firms are very hard to combine with a normal family life. The client wants the document now, not when you get back into the office a few days later. Globalisation merely adds to the pressures, as the client may be anywhere in the world in a completely different time zone. Another very real problem is that many solicitors’ firms do not value judicial appointments in the way that the Bar traditionally has done. When I started at the Bar 45 years ago, many successful barristers regarded a judicial appointment as their pension scheme, so they were prepared to spend time as fee-paid part-timers. The bench was sympathetic if they or their clerks pleaded ‘public duties’ as a reason for an adjournment

¹³ General Council of the Bar, *Bar Barometer: Trends in the Profile of the Bar*, March 2014, fig 45.

or a convenient listing. Solicitors' firms are not as keen for their partners to take the part time fee-paid appointments, but these are now regarded as an essential stepping stone to full time salaried appointment. There are, of course, many different kinds of solicitors' practices and not all of them are affected by these pressures in the same way.

However, our divided legal profession is one of the principal differences between the UK and most of the rest of the common law world and one of the main reasons for the continuing lack of diversity in the higher judiciary. There are enduring stereotypes about who gets what sort of judicial job. The top silks qualify for the High Court bench. Successful senior juniors, and some silks, qualify for the Circuit Bench, as do some solicitors. Solicitors, and a few barristers, become district judges in the county and magistrates' courts. A much wider variety of professional lawyers, including quite a few who practise as law teachers and academics, become tribunal judges. The percentage of 'non-barristers' listed against each judicial post in the official statistics bears out the traditional assumptions: they are less than 2% of High Court judges, less than 11% of circuit judges, but getting on for 90% of District Judges in the county courts and 69% of tribunal judges.

Of course it is possible to argue that only the top barristers become the top judges because they are the best qualified for the job. But I am simply not

prepared to make that assumption. It is not made in other common law countries where the judiciary is also highly respected, such as Canada and Israel. It feels both self-seeking and implausible – self-seeking because it reserves the top jobs for the top barristers and implausible because any University teacher can list many able graduates who could have made excellent judges but who went into a different legal career. As Sir Stephen Sedley has memorably put it,¹⁴ the greatest of the arts of advocacy is ‘reasoning from a given conclusion’ – which is the reverse of what judges should do (tempting though it often is).

Aside from the divided legal profession, other common law countries do not have our system of fee-paid part-time judges. These days, you are most unlikely to get a salaried appointment in England and Wales unless you have previously sat as a fee-paid part-timer at the same level. The good thing is that people can be tried out in the job, and people can try out the job, before either side is committed to an appointment from which judicial independence means that, in reality, they cannot be sacked. This ought to give a boost to diversity, the courage to make slightly bolder appointments. The bad thing is that you have to get on the particular ladder. You have to get the part time appointment and you have to get authorised to sit in the court to which you want to be appointed to a full time post. Not only that,

¹⁴ ‘Declining the Brief’, in *Ashes and Sparks* (CUP, 2011).

the Courts Service want people who can ‘hit the ground running’ rather than having time to work themselves in. This puts pressure on the JAC to choose ‘safe’ candidates in preference to those with less experience who may have greater potential.

Finally, there is the lack of a proper judicial career structure which enables those who do have a salaried judicial appointment to make progress through the ranks. We have four separate grades of judge (High Court, Circuit, District and Tribunal – tempting to think of them as the officers, the warrant officers, the NCOs and the privates, but of course that would be wrong), with direct entry, after a period of part time service, at every level. Those hoping for promotion from one level to another have to compete with the direct entry candidates. The Crime and Courts Act 2013 has provided some flexibility to deploy some tribunal judges in the ordinary courts¹⁵ but that is not a permanent solution to a more systemic problem. The principal recommendation of Baroness Neuberger’s panel on judicial diversity was that ‘There should be a fundamental shift of approach from a focus on individual judicial appointments to the concept of a judicial career. A judicial career should be able to span roles in the courts and tribunals as one unified judiciary.’¹⁶

¹⁵ S 21 and Schedule 14, para 1.

¹⁶ *Report of the Advisory Panel on Judicial Diversity*, chaired by Baroness Neuberger, February 2010, p 4, accessible at www.equality-ne.co.uk, recommendation 1, p 7.

My own solution would be to try and attack each of these obstacles to appointing women as judges: widening recruitment to the legal profession; broadening the pool from which candidates at all levels are recruited, including employed lawyers of all kinds; abandoning traditional stereotypes about who gets what sort of job; recruiting for legal ability, personal qualities and potential, rather than current experience; actively encouraging and supporting able but unusual candidates to apply; and creating a proper judicial career structure which enables judges with the potential to move onwards and upwards to be identified, mentored, given the right opportunities to show and develop their qualities and to be transferred or promoted. We judges could set a good example by offering ourselves as mentors to those wondering about a judicial appointment. This would all amount to affirmative action but not to positive discrimination. Tackling each of these would, I think, make a considerable difference if it were done with the right amount of enthusiasm. Some of them are already being tackled. Ironically perhaps, the Supreme Court's decision in *O'Brien v Ministry of Justice*,¹⁷ that judges are 'workers' and that discrimination between fee-paid and full-time judges cannot be justified, may prompt some radical thoughts about the whole structure of the judiciary.

¹⁷ [2013] UKSC 6, [2013] 1 WLR 522.

But some think that this will not be enough to bring about real change and so we have to think about positive discrimination and targets or even quotas. Section 159(2) of the Equality Act 2010 allows preference to be given to a member of an under-represented group to when there are two or more candidates of equal merit. In 2012, the House of Lords Committee on the Constitution¹⁸ recommended that this should apply to judicial appointments. This, they thought, would ‘send out a strong signal that diversity in judicial appointments is important, without undermining the merit principle’.¹⁹ Hence the Crime and Courts Act 2013 amended section 63 of the Constitutional Reform Act 2005 to make it clear that the duty to recommend appointments ‘solely on merit’ does not prevent the JAC from choosing a candidate in order to improve diversity where there are two or more candidates of equal merit.²⁰

Views differ about whether this will make a difference. Some think that it might do so in the larger selection exercises for the lower ranks of the judiciary, where it could be very difficult to rank all of the candidates in strict order or merit. But for individual appointments at the higher levels, some doubt whether two candidates are ever truly equal, if you drill deep

¹⁸ House of Lords, Select Committee on the Constitution, 25th Report of Session 2010-2012, *Judicial Appointments*, HL Paper 272, para 84.

¹⁹ Para 101.

²⁰ 2005 Act, s 63(4), inserted by Crime and Courts Act 2013, Schedule 13, para 10.

enough.²¹ Others argue that the assessment of comparative merit is an inherently subjective exercise – how do you rate each candidate against each desirable quality and how do you rate each quality against the others? So you might well end up with candidates who were equally well-qualified but in slightly different ways.²² I take the latter view, because there is so much room for variation in choosing, assessing and then weighting the various parameters involved in merit. The JAC have recently published their policy: they will look at it only at the final stage of any selection exercise for a particular judicial office, when an order of merit has been agreed by the selection panel.²³

My colleague Lord Sumption has put forward two arguments against positive discrimination. The first is that it would dilute the quality of the bench. This is because he thinks that it would deter the best candidates from applying – that is, those who have conventionally been considered the best candidates (overwhelmingly white male barristers) would not apply if they thought that they would be discriminated against; and the top women would not apply because they want to be appointed on merit alone and not because of their gender. I tend to think that the judiciary would be better off without prima donnas who might not apply for such reasons. If women had been

²¹ Including Lord Sumption, JAC Chair Christopher Stephens, and Baroness Neuberger.

²² Including the then Lord Chancellor, Kenneth Clarke, Lord Neuberger, Lord Justice Goldring and Lady Justice Hallett.

²³ Judicial Appointments Commission, *Equal Merit Provision, JAC Policy*, April 2014.

put off applying for anything, either by the fear that they might be discriminated against or by the fear that some-one might discriminate in their favour, they would never have applied at all. Of course we all want to be appointed on our own merits and not to make up a quota. But no-one should apply for any job unless they think they are worth it. Having applied they should be happy to get it and give it their best shot irrespective of why they were appointed.

His second reason is that he does not agree that diverse courts are better courts, because they are able to draw upon a diversity of experience in reaching their decisions.²⁴ He thinks that this overstates the importance of personal as opposed to vicarious experience. Many of the advances in recognising the vulnerability of women or developing the anti-discrimination laws were made by courts composed of white males. That is, of course, true, if only because for the most part there were no other sorts of court. We women have always recognised with gratitude that we would never have got anywhere without some wonderful men who understood and sympathised with our situation. You do not have to be a woman to be a feminist and the reverse is also true.

²⁴ Erika Rackley, *Women, Judging and the Judiciary: from difference to diversity*, Routledge, 2013, argues that this is the argument which really matters, because it is the one which demands that something be done.

So this brings me to the business case for diversity – that diverse courts are better courts. I too used to be sceptical about the argument that women judges were bound to make a difference,²⁵ because women are as different from one another as men, and we should not be expected to look at things from a particularly female point of view, whatever that might be. But I have come to agree with those great women judges who think that sometimes, on occasions, we may make a difference.²⁶ That is the result of the lived experience of being a judge for twenty years now and a Law Lord or Supreme Court Justice for ten. I can think of a few judgments where my experience and perceptions of life made a difference to my view of the law, often but not always a view which my brethren were then persuaded (not necessarily by me) to share: the nature of the damage done to a woman by an unwanted pregnancy;²⁷ the definition of violence to include more than simply hitting people;²⁸ the importance of seeing children as individual human beings rather than adjuncts of their parents;²⁹ the realities of owning a family home jointly.³⁰ More objective evidence for difference lies in the *Feminist Judgments* project. This was an experiment in re-writing a variety of well-known judgments from a feminist perspective and seeing what a difference this can make, not only on typically ‘women’s issues’ but also on a

²⁵ ‘Equality and the judiciary: why should we want more women judges?’ [2001] *Public Law* 489.

²⁶ Beginning with Madam Justice Bertha Wilson, ‘Will women judges really make a difference?’ (1990) 28(3) *Osgoode Hall Law Journal* 507.

²⁷ *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2002] QB 266.

²⁸ *Yemshaw v Hounslow London Borough Council* [2011] UKSC 3, [2011] 1 WLR 43.

²⁹ *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166.

³⁰ *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432.

much broader range of legal topics.³¹ Women judges may think that some of the results are only common sense – which just shows how gendered a concept like common sense can be. Even if we do not persuade our colleagues to share our point of view, it is important that we articulate it.

So I agree with Professor Paterson, that what a person can ‘bring to the mix’ is an important component of his or her merit, at least in a collegiate court where decisions are made in panels.³² Everyone brings their own ‘inarticulate premises’ to the business of making the difficult choices inevitably involved in judging.³³ The great American judge, Benjamin Cardozo, said something similar as long ago as 1921: ‘out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component merits’.³⁴ The great Lord Bingham seems to have agreed. He pointed out that merit ‘is not self-defining’. It ‘directs attention to proven professional achievement as a necessary condition, but also enables account to be taken of wider considerations, including the virtue of gender and ethnic diversity’.³⁵

³¹ Rosemary Hunter, Clare McGlynn, Erika Rackley, *Feminist Judgments: From Theory to Practice*, Hart, 2010.

³² Alan Paterson and Chris Paterson, *Guarding the guardians? Towards an independent, accountable and diverse senior judiciary*, CentreForum, 2012.

³³ ‘Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World’ (2004) 24 *Legal Studies* 33.

³⁴ *The Nature of the Judicial Process*, Yale University Press, 1921, p 177.

³⁵ Tom Bingham, ‘The Law Lords: who has served’, in L Blom-Cooper, B Dickson and G Drewry (eds), *The Judicial House of Lords 1976-2009*, Oxford University Press, 2009, p 126.

In the Supreme Court we are required to have Justices with knowledge of, and experience of practice in, the law of each part of the United Kingdom.³⁶ No-one has suggested that the quality of the court has been compromised in any way by our having to have Justices from Scotland and Northern Ireland. Why should we not take it for granted that we need a court which is more diverse in other ways too? I do not see that as positive discrimination. Paradoxically, however, one of the perceived difficulties lies in the way in which our equality laws are constructed. These depend upon the proposition that race and sex are *not* relevant qualifications, or disqualifications, for any job save in very exceptional circumstances. They also depend upon the proposition that it is just as bad to discriminate against a member of the advantaged class as it is to discriminate against a member of the disadvantaged class. So we can appoint a Justice because he comes from the north of England or because he has a different professional background, because these characteristics are not protected by the Equality Act. But, 'equal merit' apart, it is said that we cannot even take into account the desirability of securing that a collegiate court is comprised of people with a wide range of backgrounds and experience. Yet without recognising that this is a relevant factor, it would be of little use to set targets: something which the House of Lords Constitution Committee suggested should be considered if there were not more tangible progress in the five years after

³⁶ Constitutional Reform Act 2005, s 27(9).

their 2012 report.³⁷ To be allowed to do this would fall far short of imposing the quotas which apply to judicial appointments in some courts³⁸ and which are among the options currently being examined by Sir Geoffrey Bindman and Karon Monaghan QC for the Labour party, but perhaps rightly described by ‘one Labour source’ as ‘the nuclear option’.³⁹ It was certainly one which the Constitution Committee rejected.⁴⁰

Recently, I had the pleasure of speaking to an audience of police officers and students at the headquarters of the Greater Manchester Police. When Sir Peter Fahy, the Chief Constable wrote to me, he said this:

‘When your house is burning down you are not interested in the ethnicity of the firefighter, but when it is a long term issue of youth alienation, countering extremism or dealing with complex matters such as female genital mutilation the ethnicity of the law enforcer makes a huge difference.’

He knew that he had a genuine operational need – a real business case - to recruit a more diverse workforce and wanted to be free to do it. Like Fiona Woolf, he was keen to change the prevailing culture, in more ways than one.

³⁷ *Op cit*, para 105. As it happens, there will be a clutch of vacancies in 2018.

³⁸ See, eg, Kate Maleson, ‘The case for gender quotas for appointments to the Supreme Court’, *UKSC blog*, 23 May 2014.

³⁹ ‘Plan for gender and race quotas for judges’, *The Guardian*, 21 April 2014, p 4.

⁴⁰ *Op cit*, para 102.