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A Short History of Judicial Diversity

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Abstract Judicial diversity is a priority without priority. While few would argue, openly at least, against a more diverse judiciary in principle, there is still some way to go to make it a reality. And yet, despite the slow rate of progress, reigniting conversations about diversity may seem unwise in the current political moment, raising the question of whether those seeking to achieve a truly diverse judiciary have anywhere (new) to go. We seem to have reached an impasse. This article brings the insights of feminist legal history to bear on arguments for judicial diversity. Drawing on original archival research, it focuses on the establishment of the Industrial Court in 1919 and tells, for the first time, how there came to be statutory requirement for women's presence on the court. It argues that the quality argument for diversity—that a court is stronger and its decision-making better for the inclusion of women among its members—was central to this success. It goes on to argue that in unsettling deep-seat assumptions particularly around arguments for the imposition of quotas, the history of the Industrial Court, and feminist legal history more generally, offers a way out of the impasse and a reason to keep talking about judicial diversity. This is important. For it is only by doing so that we have any chance of securing a judiciary that is truly diverse.

Key words: feminist legal history; industrial court; Industrial Courts Act 1919; judicial diversity; quotas; women judges

1. *Prologue*

The Little Mermaid, written by Hans Christian Andersen, is the story of six sisters who live far out in the ocean with their father, the Sea-King, and their grandmother. Their grandmother is 'very wise' and encourages

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her grand-daughters to explore the wonder and beauty of the 'lands above the sea'.[1] As they each turn 15 the princesses journey to the surface of the sea, returning to tell their sisters what they saw. For most of the sisters the novelty soon wears off and they are happy to stay beneath the sea. However, this is not the case for the youngest sister, known as 'the little mermaid'. She has a reason to want to continue to visit the new lands: she has fallen in love. When she finally tells her sisters, it is they who find out where the prince lives so that the little mermaid can watch him from afar. When she decides to sell her voice so that she can meet the prince, in the hope that he will fall in love with her, it is her sisters who keep her company, visiting each night. And, when it is clear that the little mermaid's gamble has failed to pay off and the prince is about to marry someone else, it is her sisters who sell their hair to the sea-witch to offer her a way out—a knife with which to kill the prince.[2]

Just over 20 years ago, when judicial appointments were still in the hands of the Lord Chancellor and his trusted group of (male) colleagues, before Lady Hale had become the first woman in its 600-year history to be appointed Lord Appeal in Ordinary and when women in the senior judiciary were outnumbered around 17:1, I wrote an article in which I suggested an analogy between the little mermaid and the woman judge.[3] I argued that, like the little mermaid, the woman judge was an outsider and, to fit in, she too had to give up what made her distinctive. Over the years, the image of the woman judge as the little mermaid has caught the imagination of women judges, academics, journalists and artists alike.[4] However, two decades later, the story of the woman judge has moved on.

[1] All references to *The Little Mermaid* in this article are taken from 'The Little Mermaid' in L W Kingsland (trs), *Hans Andersen's Fairy Tales: A Section* (Oxford University Press 1959) 76–106.

[2] The little mermaid refuses. The story ends with her throwing herself back into the sea—only to find herself cast into 300-year purgatory as a 'daughter of the air'.

[3] Erika Rackley, 'Representations of the (Woman) Judge: Hercules, the Little Mermaid, and the Vain and Naked Emperor' (2002) 22(4) *Legal Studies* 602.

[4] Most recently in Carey Young's video exhibition 'Appearance' (Modern Art Oxford 2023). See also Brenda Hale, 'Equality and the Judiciary: Why Should We Want More Women Judges?' (2001) *Public Law* 489, 496–98; Justice Susan Glazebrook, 'Chapman Tripp – Women in Law Event', November 2007; Mrs Justice Dobbs, 'Diversity in the Judiciary' (Queen Mary, University of London, October 2007); Justice McMurdo AC, 'Women at the Bar: Speech Night Celebrations, Report Cards and Doing Better Next Year', 'Address to the Women Barristers Association Annual Celebratory Dinner', September 2010; Anne Perkins, 'Thank You Lady Hale, for Shifting the Supreme Court's View on Marriage' *The Guardian* (8 February 2017); Tom Hickey, 'Hercules as a Feminist Judge? Revisiting Rackley's *Little Mermaid* in the Wake of the Feminist Judgments Projects' (2020) *Legal Studies* 494; Loveday Hodson, 'Gender and the International Judge: Towards a Transformative Equality Approach' (2022) *Leiden Journal of International Law* 1.

There are now many more examples of women judges who are emphatically not the little mermaid, or at least not the voice-selling, self-denying version found in Andersen's tale—not least Lady Hale.[5] Understandings of the judge and judging have developed too, in large part as the result of women judges' presence in, and impact on, the judiciary as well as academic endeavours including the various 'Feminist Judgments Projects'.[6] Women and other non-traditional judges are not only able, but willing, to speak in a multiplicity of voices. And happily so.

My thinking about the little mermaid and her story has also moved on. Published the year Queen Victoria ascended to the throne, *The Little Mermaid* is at its heart a story about sisters and sisterhood. It is a coming-of-age tale about the relationship and distance between two-worlds where neither fully understands the other. Were I to write my paper today, I would write about *all* Andersen's sea-princesses: the little mermaid, but also her sisters, and their grandmother. I'd start not with Carl Jacobsen's 1913 sculpture of the little mermaid sitting alone, but with the striking illustrations of Miraphora Lima and Eduardo Lima published in 2018 in which the mermaid sisters are depicted together, arm in arm.[7] And, vitally, I'd start not with the silencing of the little mermaid's voice, but with the distinctiveness of all the mermaids' voices: individual, other-worldly and, sadly, unintelligible to the sailors.

[5] Lady Hale was the first and only woman appointed to the Appellate Committee of the House of Lords in 2004. In 2009, she was the first woman appointed to the UK Supreme Court, becoming its Deputy President in 2013 and President in 2017—the first, and to date only, woman to do so. In 2005 Lady Hale concluded a lecture at Queen's University Belfast, with the assertion that she had 'absolutely no intention of turning into the little mermaid' (Lady Hale, 'Making a Difference? Why We Need a More Diverse Judiciary' (2005) *Northern Ireland Legal Quarterly* 281, 292). She remained true to this throughout her judicial career. For examples, see Erika Rackley, 'Difference in the House of Lords' (2006) 15(2) *Social and Legal Studies* 163; Erika Rackley, *Women Judging and the Judiciary: From Difference to Diversity* (Routledge 2013) chs 5 and 6 and Rosemary Hunter and Erika Rackley (eds), *Justice for Everyone: The Jurisprudence and Legal Lives of Brenda Hale* (Cambridge University Press 2022).

[6] The 'Feminist Judgments Projects' (FJP) involve feminist academics, activists and legal practitioners writing alternative feminist judgments to key legal cases. The feminist judgments provide a practical demonstration of how, with a differently constituted judiciary, judgments could have been written and cases could have been decided differently. Beginning with the Women's Court of Canada in 2006, there are, or have been, FJPs in the UK, Northern/Ireland, Scotland, Australia, New Zealand, the USA, India, Brazil, in Central and Eastern Europe as well as projects focusing on international law, the International Criminal Court and African case law. See further https://criticaljudgments.com.

[7] See Hans Christian Andersen, *The Little Mermaid and Other Tales* (Harper Design 2018) 18, 40.

> Many an evening the five sisters would take one another by the arm and swim in a row up to the surface of the water. They had lovely voices, more beautiful voices than any human voice, and when the wind was blowing up a gale and they thought ships might be lost, they would swim in front of the ships and sing so beautifully how lovely it was on the bottom of the sea and bid the sailors not to be afraid of coming down there. But the men could not understand their words: they thought it was the gale they heard.[8]

I'd suggest that *this* too often has been fate of women judges. It is not that they have sold their distinctive voices, but rather that they have inhabited a world where, in the words of Lady Hale, their male colleagues have 'meant well' but 'simply [did] not know what to do with us or how to interpret what we say'.[9] I would point out that, like the 'pretty little children' in Andersen's tale 'who swim in the water, even though they … [do not have] fish's tails', the sailors and mermaids have more in common that we might think. I would point out that while each woman judge, like the little mermaid, may have her distinct voice, this is no less true of everyone else. We are all distinctive. Like all the characters in Andersen's tale, we are all shaped by our experiences and background. That all judges, whatever their gender, bring their distinctive voices and insights to their judging and that these are informed by who they are, where they've visited, what they've seen, who they've talked with, as well as their intersecting identity characteristics. And I would argue that the judicial product is better for it.[10]

I'd go on to warn against focusing on individual heroines—mermaid or human, fictional or otherwise.[11] I'd suggest that allowing our heroines to be seen as lone voices instead of representatives of a mass movement, as people who are exceptional and personally courageous rather than carried along by a host of supporters, is to fall into the trap history has set for us. I would write about how reducing the struggle for justice to the success (or failure) of an individual's effort risks discouraging later generations from forming alliances which would more effectively challenge the status quo, as well as creating a lighting-rod for

[8] Andersen (n 1) 83.

[9] Brenda Hale, 'Equality in the Judiciary: A Tale of Two Continents', 10th Pilgrim Fathers' Lecture, 2003.

[10] See further Rackley (2013) n 5, ch 6.

[11] See, eg, Rosemary Auchmuty and Erika Rackley, 'Feminist Legal Biography: A Model for All Legal Life Stories' (2020) 41(2) *Journal of Legal History* 186, 205–10; Caroline Derry, 'Ethel Bright Ashford: More and Less Than a Role Model' (2020) 29(4) *Women's History Review* 615–35.

our disappointments. I would point out that, like Andersen's mermaids, women judges rarely (if ever) act alone—even when they're the only woman on a given bench.[12] I would write about how from the outset women judges have relied on and worked together within networks of family, friends and political allies. About how for every Rose Heilbron,[13] Nina Lowry,[14] and Lady Hale there are many others who are less familiar, or not known at all. Women who came at the same time, or too early, or too late. I would write about how women's progress into the legal profession and onto the bench followed decades of resistance, of small steps forward and bigger steps backwards.[15] I'd write about how hard-won gains are easily lost as momentum and focus shifts elsewhere and about how advances were often followed by a backlash, as men attempted to re-assert the control they had formerly enjoyed.[16] I'd write about how this isn't unique to the judiciary or law but is mirrored in many walks of life. And I'd argue that, for these reasons, the endeavour of a (feminist) legal history is more important than ever.[17]

And in doing all this, I would imagine the grandmother's story. I would tell how she came to know so much about the lands above the sea and make clear the importance of acknowledge and celebrating the many women and feminists who we stand alongside and on whose shoulders we stand. I'd begin by exploring the traditional accounts of judicial diversity. Tales in which progress—if it is made at all—ebbs and flows and where echoes of earlier versions belie Whiggish assumptions of inevitable advancement. I would explore why the absence of diversity matters. And I would go on to make the arguments for judicial diversity, making it clear where these arguments converge and, vitally, where they depart. I would say why this is important. I would hunt out examples of

[12] See, eg, Laura Cox, 'Brenda Hale: Supporting and Inspiring Women Judges' in Hunter and Rackley (n 5) 107.

[13] Rose Heilbron was the first woman to hold regular judicial office in England and Wales. She was appointed Recorder of Burnley in 1964, having been one of the first two women barristers (with Helena Normanton) to be appointed King's Counsel in England and Wales (Hilary Heilbron, *Rose QC: The Remarkable Story of Rose Heilbron: Trailblazer and Legal Icon* (Hart Publishing 2019)).

[14] In 1967 Nina Lowry became the first woman to sit as a permanent judge at the Old Bailey (James Morton, 'Nina Lowry obituary' *The Guardian* (23 April 2017)).

[15] Rosemary Auchmuty, 'Whatever Happened to Miss Bebb? *Bebb v Law Society* and Women's Legal History' (2012) 31 *Legal Studies* 199.

[16] Erika Rackley and Rosemary Auchmuty, 'Introduction' in Erika Rackley and Rosemary Auchmuty (eds), *Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland* (Hart 2019) 1–22 and chapters therein.

[17] Erika Rackley and Rosemary Auchmuty, 'The Case for Feminist Legal History' (2020) *Oxford Journal of Legal Studies* 878.

these arguments in practice. I would visit archives and wander the stacks in the basements of libraries so that, in the fourth section, I might tell for the first time the story of how there came to be a statutory requirement for women's presence on the Industrial Court, a little known English court established over 100 years ago, and the role played by feminist and women's organisations and networks and leading political figures in making this happen. I would ask what lessons we might learn from this example and would argue that these lessons, like all good feminist legal history, 'disrupt the certainties of the present',[18] particularly in relation to assumptions around arguments for the imposition of quotas when appointing judges. I'd make the case for the quality argument for quotas on the basis that, if a diverse judicially really is a better judiciary, and if we want the best possible judiciary, a judiciary that is best able to do its job, then quotas, far from pulling against merit, are integral to this.[19] And I'd end by suggesting that, as the grandmother knew, this is the promise of feminist legal history: that feminist legal history offers a glimpse into alternative worlds and, vitally, the opportunity to refuel and reignite conversations about judicial diversity. I would argue that this is important. For it is only by continuing to talk about who our judges are and why it matters that we have any chance of securing a judiciary that is truly diverse. And, I would call it 'a short history of diversity'.

This is her story.

2. *Where Progress Ebbs and Flows*

Judicial diversity is a priority without priority. Over the last decade, judicial appointments—and diversity thereof—have slipped down successive UK governments' agendas, while those with the levers to effect change appear to have surrendered, in practice if not in rhetoric, to the glacially slow pace of progress. And while successive Lord Chancellors

[18] Joan Wallach Scott, *The Fantasy of Feminist History* (Duke University Press 2011) 34.

[19] In so doing, I would build on the argument of Kate Malleson who has argued that, on the basis that judicial abilities are spread evenly across all identify characteristics, in preventing the over-representation of any given group, quotas ensure the quality of those appointed (Kate Malleson, 'The Disruptive Potential of Ceiling Quotas' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge 2018) 259–82, 272).

and Lord Chief Justices now know better than to make predictions,[20] the messaging for well over two decades now has been largely optimistic. Change is coming, we are told, not as fast as we might like, but coming nonetheless.[21]

And in the interim gains have been lost. The appointments of Lord Richards and Lord Lloyd-Jones to the UK Supreme Court in August 2022, and lone presence of Lady Rose, highlight not only how far we've fallen from the giddy-heights of 2018–2020, but also (and as we consistently see in feminist law reform campaigns) how easily hard-fought gains slip away.[22] And that is in places where gains had been made. This is not always the case. The Supreme Court has been operational for best part of one and half decades during which time none of the 33 appointments has been of a Justice from a minoritised ethnic background. And even if a Justice from a minoritised ethic background is appointed in the latest recruitment round, announced in April 2023—and this is by no means guaranteed—diverse representation on the Supreme Court will still be somewhat short of the 'reasonable and achievable target' set by JUSTICE in 2017 'of at least 2 non-white Justices and a maximum of seven white men by 2026'.[23] At the same time, there's a danger that debates about what to do about judicial diversity and why it is important have gone stale, stymied by a mix of familiarity and neglect.[24]

[20] See, eg, Lord Taylor's prediction in 1992 that a 'substantial number' of women and minorised ethic judges would be appointed within the next 5 years (Lord Taylor, *The Judiciary in the Nineties* The Richard Dimbleby Lecture, 1992). In fact, the 'bidding process' around women's progression in the judiciary had begun much earlier when, in July 1930, Lord Dickinson, a Labour Peer and women's suffrage supporter, optimistically asserted that women would join the bench 'before long' (Hansard, 'Membership of the House: Position of Women' HL Deb 16 July 1930, vol 78, col 515). It would be another 15 years until Sybil Campbell's ground-breaking appointment as a Stipendiary Magistrate at Bow Court (Patrick Polden, 'The Lady of Tower Bridge: Sybil Campbell, England's First Woman Judge' (1999) 8(3) *Women's History Review* 505–26). Campbell remained the only full-time woman judge in England and Wales until Rose Helibron's appointment as Recorder of Burnley over a decade later—some 26 years after Dickinson's prediction.

[21] See, eg, Monidipa Founzder, 'Judicial Diversity Progress "Better Than People Might Think", Says Lord Chief Justice' *Law Society Gazette* (18 May 2022).

[22] Between October 2018 and January 2020, there were three women Justices of the Supreme Court: Lady Hale (President), Lady Arden and Lady Black.

[23] JUSTICE *Increasing Judicial Diversity* (2017) [3.22].

[24] There was, eg, no mention of diversity in the Lord Chancellor's swearing in speech, delivered at the Royal Courts of Justice in London on 24 May 2023, in which he listed his four priorities: managing and reducing court and tribunal case load thereby speeding up access to justice for litigants and victims; progressing the Victims and Prisoners Bill; 'operationalising' the Government's 'immigration legislation' and; promoting access to justice.

Moreover, reigniting conversations about judicial *diversity* in the current climate might seem somewhat misplaced given deepening crisis across the criminal justice and justice system more broadly in England and Wales, with decades of inadequate resourcing, court backlogs, industrial action, low morale, and unfilled judicial vacancies.[25]

That said, however, it is beginning to seem like judicial diversity might be beginning to creep back onto the wider political agenda.[26] Growing and sustained evidence of discrimination within the judicial appointments process and criminal justice system more broadly has given rise to a renewed sense of urgency.[27] While there continues to be improvement in relation to the appointment of women judges below the Supreme Court, progress in relation to candidates from minoritised ethnic backgrounds has stagnated. According to Ministry of Justice statistics, in 2022 Black judges made up just 1 per cent of the judiciary in England and Wales,[28] a proportion which has remained unchanged since 2014.[29] Law Society estimates suggest it will take another 126 years for Black judges to achieve representation within the judiciary in England and Wales in proportion to the make-up of the general population.[30]

For many, the fault lies with the appointments process overseen and run by the Judicial Appointments Commission (JAC), a product of New Labour's constitutional reforms.[31] The JAC has spent much of its

[25] See, eg, Haroon Siddique, 'From Crime to the Courts: The Biggest Issues the UK's New PM Will Face' *The Guardian* (28 August 2022); HM Crown Prosecution Service Inspectorate, *The Impact of the Covid-19 Pandemic on the Criminal Justice System - A Progress Report* (May 2022); Cheryl Thomas, *2020 UK Judicial Attitude Survey: Report of Findings Covering Salaried Judges in England & Wales Courts and UK Tribunals* (4 February 2021); Adrian Jack, 'The Recruitment Crisis Is Damaging Every Level of the Judiciary' *The Times* (8 March 2018).

[26] Not that it ever really went away. Since 2006, when the Judicial Appointments Commission started work, there have been just under 30 parliamentary, official, judicial, academic and/or third sector reports addressing the ongoing lack of representation in the judiciary and/or setting out strategies for reform.

[27] See, eg, Keir Monteith *et al.*, *Racial Bias and the Bench: A Response to the Judicial Diversity and Inclusion Strategy (2020-2025*) (November 2022); Catherine Baksi, 'Lack of Judge Diversity Is "Scandalous"' *The Times* (21 July 2022); David Lammy, *The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System* (2017).

[28] Ministry of Justice, 'Diversity of the Judiciary: Legal Professions, New Appointments and Current Post-holders - 2022 Statistics' (14 July 2022).

[29] Monteith (n 27) 8.

[30] Haroon Siddique, 'Black Judges Will Be Under-represented in Judiciary Until 2149, Says Law Society' *The Guardian* (27 October 2022).

[31] The idea of an appointments committee to support the Lord Chancellor in making judicial appointments was first mooted by JUSTICE in 1972 (JUSTICE, *The Judiciary: The Report of a JUSTICE Sub-Committee* (Stevens & Sons Ltd 1972)).

existence under siege—unable or, perhaps at times, unwilling to make use of its limited levers to secure effective change.[32] In recent years, there have been repeated calls for varying levels of reform from JUSTICE and Policy Exchange as well as from the leaders of the Bar Council and Law Society.[33] Political pressure is growing too.[34] In 2021 David Lammy MP, then shadow Lord Chancellor and Secretary of State for Justice, suggested

> [while the JAC] talks a good game when it comes to improving diversity, [their words] have proved to be hollow … we are seeing less diversity than we would have seen under the old system. If we had it, things would be better than they are now.[35]

In 2022, Maria Eagle MP during the pre-appointment hearing with Helen Pitcher, now Chair of the JAC, described progress towards diversity as 'glacial'.[36]

Of course, we've been here before. We can hear the echoes of the Law Society's 1999 boycott of 'secret soundings' in I Stephanie Boyce's call in 2022 for the abolition of statutory consultation.[37] We can recognise elements of the Hansard Society's 1990 *Women at the Top* report in Baroness Chakrabarti's calls for 'time-limited affirmative action' in 2021.[38] We can see Helena Kennedy's criticism of the 'potential for

[32] Graham Gee and Erika Rackley, 'Introduction' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge 2018) 1–21 and papers therein.

[33] See, eg, JUSTICE, *Increasing Judicial Diversity: An Update* (January 2020); Richard Ekins and Graham Gee, *Reforming the Lord Chancellor's Role in Senior Judicial Appointments* (Policy Exchange 2021); Bar Council. 'Worrying Pattern on Judicial Diversity Shows More Action Is Needed, Says Bar Council' (14 July 2022); Law Society, 'Judicial Appointments Process Locks Out Diversity Undermining Public Trust' (30 March 2022).

[34] Since January 2020, judicial diversity has been raised in parliament on 12 occasions by MPs from the Conservative and Labour Parties and Conservative, Labour, Liberal-Democrat and Crossbench peers. This compares to just four times in the 5 years prior to this.

[35] Neil Rose, 'Lammy Hits out at "Absolute Scandal" of Judicial Diversity' *Legal Futures* (16 July 2021); Dan Bindman, 'Lammy: "Tap on the Shoulder" Better for Judicial Diversity Than JAC' *Legal Futures* (21 September 2021).

[36] House of Commons Justice Committee, Oral evidence: Pre-appointment hearing: Chair of the Judicial Appointments Commission, HC 925, Q29 (6 December 2022).

[37] Robert Verkaik, 'Law Society to Boycott Secret Selection of Judges' *The Independent* (28 September 1999); Law Society (n 33); Law Society, 'Diversity in the Judiciary: Statutory Consultation' (28 June 2022).

[38] Hansard Society, *The Report of the Hansard Society Commission on Women at the Top* 1990; Monidipa Fouzder 'Labour Conference: Quotas Needed to Improve Judicial Diversity' *Law Society Gazette* (25 September 2019).

cloning' in the pre-2006 appointments system mirrored in the unattributed description (reported in *The Times* in 2022) of the JAC as a 'judicial "sausage factory" … churn[ing] out identical judges generation after generation, who help to ensure that others in their own image are appointed'.[39] At other times, the familiarity chastens: compare, for example, Labour MP, Brian Sedgemore's criticism back in 1989 of 'institutional racism' within the judiciary[40] with the findings of the hugely important Monteith Report on *Racial Bias and the Bench*, published in October 2022.[41] Thirty-four years after Sedgemore's comment, Black representation in the High Court and above in England and Wales remains the same: zero.[42]

However, in so doing we risk presenting ourselves as stuck in some Sisyphean nightmare, destined to repeat the same cycle of reports, dismay, reform, and regress. This is unfortunate. Not least because Sisyphus was the one at fault—hence the punishment with the boulder. It also robs us of agency and suggests that there is something natural and inevitable about the 'mountain' we have to climb in order to achieve equity or parity, rather than it being the result of decades of privilege and discrimination. It's time to re-set the narrative: to return to—and remake—the arguments for judicial diversity.

3. *Why Quality Will Do*

Arguments for judicial diversity—usually coalescing around the 'big three' of legitimacy, equity and quality—have been notably and largely absent from recent policy discussions. Where they are mentioned, usually in an opening paragraph of one or two sentences, the focus has been almost exclusively on arguments of equity of opportunity, and legitimacy and public confidence. In fact, it's been this way for some time. And understandably so. After all, surely the argument for diversity has

[39] Helena Kennedy, *Eve Was Framed: Women and British Justice* (Chatto & Windus Ltd 1992) 267; Baksi (n 27).

[40] Hansard, 'Judges' HC Deb 21 December 1989, vol 164, cols 665–66.

[41] In which, by way of example, 95 per cent of legal professionals who responded said that racial bias plays 'some role in the processes and/or outcomes of the justice system'. The report's first recommendation is that the LCJ and leadership judges should 'acknowledge institutional racism in the justice system' (Monteith (n 27) 6, 7).

[42] Ministry of Justice (n 28).

been won? We're all agreed that a diverse judiciary—all things being equal, of course—is 'A Good (maybe even a Very Good) Thing'.[43]

However, beneath the veneer of agreement there continues to be substantial disagreement about almost everything else, including how we might get a diverse judiciary, how long it should take, what it might look like, and why we want it in the first place.[44] It is this final point—disagreement over the arguments for diversity—that matters. It matters because some arguments are stronger than others. Some have greater purchase with different audiences than others. And it matters because, in the end, different arguments for diversity take us in different directions.[45] Indeed, one consequence of the focus since the late 1990s on the process by which judges are appointed is a concomitant focus on arguments for diversity grounded in equity (that is, the ability of individuals to access and navigate the process of becoming a judge) and/or legitimacy (that is, the role of diversity in ensuring the status of, and public confidence in, the judiciary as a whole).[46]

The quality argument is different. It focuses not on how individuals access the institution, or the status or legitimacy of the institution itself, but on what we might call the judicial 'output', on what judges do once they get there. We can see an example of this in Helena Normanton's argument, writing in *The Daily Mail* in 1937 under the headline 'Women Judges NOW'. She asks why Great Britain continues to 'so callously … ignore the latent and patent talent of her legally trained women', pointing to the presence of women judges across Europe, the USA and China. Going on to answer her own question as to the 'difference' women judges would make, she continues:

[43] A point noted by Kate Malleson almost 25 years ago (*The New Judiciary: The Effect of Expansion and Activism* (Ashgate 1999) 106).

[44] Gee and Rackley (n 32) 1.

[45] For a fuller version of this argument, see Erika Rackley and Charlie Webb, 'Three Models of Judicial Diversity' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge 2018) 283–98.

[46] See, eg, Leonard Peach, *An Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel* (1999); Law Society, *Broadening the Bench: Law Society Proposals for Reforming the Way Judges Are Appointed* (October 2000); Thomas Legg, 'Judges for the New Century' [2000] *Public Law* 62; Department for Constitutional Affairs, *Constitutional Reform: A New Way of Appointing Judges* CP10/03 2003; Kate Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (2003) *Feminist Legal Studies* 1; Department for Constitutional Affairs, *Increasing Diversity in the Judiciary* CP25/04 2004; House of Lords Select Committee on the Constitution, *Inquiry into Judicial Appointments Process* (2011).

> [Women judges] will bring that wider variegation of personality which interprets the law and applies its remedies and penalties to suit the persons before them. This will be especially valuable in dealing with women and young people and in applying the modern social and more humane type of legislation such as the new Matrimonial Causes Act … There is a whole field of legal remedies in which the knowledge of life of women would be particularly valuable.[47]

She was not alone. Mrs Swanwick, described in the newspaper report as 'a social worker in the Manchester district' (though likely to be Helena Swanwick, a prominent suffrage and peace campaigner) had called for women judges, alongside women jurors, magistrates and lawyers, back in 1910.[48] In 1922 Sir Alfred Davies MP, who had practised as a solicitor in Liverpool, had asked whether women could be judges in a written question to the recently appointed Attorney-General, Sir Ernest Pollock.[49] In fact, articles making the case for women's appointment as judges, as well as calls for the appointment of women judges from various women's societies and organisations, appeared in the press relatively frequently throughout the 1920s and 1930s.[50] After all, as Miss F A Underwood, secretary of the Women's Freedom League noted in 1935 'women have been practising as barristers for so many years it is surely possible to find some whose qualifications fit them for a judgeship'.[51]

Almost 100 years later, the *quality* argument for diversity—that diversity improves the quality of the judicial output, that judicial diversity makes for better judging—is by and large underplayed or indeed simply

[47] Helena Normanton, 'Helena Normanton, Senior Woman Barrister, demands – Women Judges NOW' *The Daily Mail* (2 December 1937). On 24 December 1919, Normanton was the first woman to be admitted to an Inn of Court. With Rose Heilbron, she was one of the two first women King's Counsel in England and Wales. She was a prolific writer and speaker on feminist issues, including *Everyday Law for Women* (1932) and *Oliver Quendon's First Case*, a romantic detective novel, in 1927 under the pseudonym Cowdray Browne (Joanne Workman, 'Normanton, Helena Florence' *Oxford Dictionary of National Biography* (23 September 2004, revised 22 September 2011)).

[48] Anon, 'The Law of Divorce' *The Times* (30 June 1910).

[49] Hansard, 'Judicial Appointments (Women)' HC Deb 18 May 1922, vol 154, col 567W. See also Anon, 'Women Judges. Equal Opportunities with Men' *The Daily Mail* (19 May 1922).

[50] See, eg, Anon, 'Can Women Argue?' *The Daily Mail* (1 June 1923); Lillie Ross Clyne, 'We Need Women Judges' *The Derby Daily Telegraph* (8 November 1929); Percy Cater, 'Bishop Calls for Women Divorce Judges' *The Daily Mail* (29 June 1937); Edgar Middleton, 'Why Shouldn't Women Be Judges?' *The Daily Mail* (1 February 1939).

[51] Anon, 'Why Not Women Judges?' *The Nottingham Evening Post* (4 January 1935).

absent in political and policy debates.[52] One reason for this is that by the late 1990s, the quality argument for diversity—re-branded and truncated as an argument grounded in 'difference'—had begun to fall out of favour.[53] The shift from 'quality' to 'difference' was more than semantic. In the process the argument's vital second stage (that women judges' distinctive experiences and insights *improve* the quality of the judicial output) gave way to an almost exclusive focus on the existence and composition of women judges' 'difference'.[54] A focus that in 1991 Sandra Day O'Connor, then a US Supreme Court Justice, rightly rejected as 'dangerous and answerable'.[55] In 2001 Lady Hale, in a lecture asking 'why should we want more women judges', declared herself to be 'a little worried and more than a little sceptical about arguments based upon the individual judge's ability or even willingness to make a difference, even a difference that I would like to see made', arguing that the expectation put 'too much of a burden upon the few women judges'.[56] Devoid of its 'quality' roots, the difference argument had become, Kate Malleson

[52] The Fawcett Society's report on *Women and the Criminal Justice System* published in 2004, Geoffrey Bindman and Karon Monaghan's 2014 *Accelerating Diversity* report, and many of Lady Hale's speeches are notable exceptions.

[53] Throughout the 1970–80s, calls for more women judges were regularly made both inside and outside parliament, usually on the basis that it would ensure greater public confidence in the judiciary especially in areas impacting women in particular. See, eg, Evidence submitted by the Equal Opportunities Commission to the Royal Commission on Legal Services (1979) included as Appendix I in *Without Prejudice? Sex Equality at the Bar and in the Judiciary* (November 1992); Baroness Stewart, Hansard, 'Maximum Number of Judges Order 1975', HL Deb 15 July 1975, vol 362, col 1226; David Pannick 'Agenda (Out of Court): Why Criticism Should Not Make m'lud Flip His Wig' *The Guardian* (6 August 1984). In 1987 Claire Short MP, responding to sentencing remarks made by the Old Bailey Judge, John Leonard, in the so-called 'Ealing vicarage rape case' that the trauma suffered by a victim-survivor of rape was 'not so very great' a few years earlier made the case for more women judges: 'The enraging thing … was the comments of the judge – which are typical of the comments that are made over and over again by our judiciary – that rape is easily overcome, that the woman had done well to get over it so rapidly and that now the victim was OK … We need to re-educate the judiciary. The judiciary should undergo a compulsory course that includes a session with women working in rape crisis centres before being allowed to hear more rape cases. We need more women judges' (Hansard 'Women in the Community' HC Deb 17 February 1987, vol 110, col 858). Harry Greenway MP went further and called for rape cases to be heard only by women judges (Martin Wainwright, 'Victims Attack "Soft" Rape Terms' *The Guardian* (4 February 1987)).

[54] For the most part the content and existence of gender differences between female and male judges was assumed. This was no bad thing. The empirical evidence was at best inconclusive and at worst, contradictory and unsophisticated (Malleson (n 46) 5–8).

[55] Sandra Day O'Connor, 'Portia's Progress' (1991) 66 *New York University Law Review* 1546, 1557.

[56] Hale (n 4) 499.

argued, 'theoretically weak, empirically questionable and strategically dangerous'.[57] And she was right: difference won't do.

But quality does. Unlike difference-based arguments which stall at the point of identifying difference, the quality argument for diversity impels change. It demands something is done. It requires the judiciary to be diverse. Once we accept who the judge is matters—and this is relatively uncontroversial—then it matters who our judges are. Lady Hale, speaking in 2014 agreed. Making what she calls 'the business case for diversity' she continued:

> diverse courts are better courts. I too used to be sceptical about the argument that women judges were bound to make a difference … but I have come to agree with those great women judges who think that sometimes, on occasions, we may make a difference.[58]

In fact, despite Lady Hale's understandable resistance to the suggestion that women judges were, simply by virtue of being women, inevitably and irrevocably 'different' to their male colleagues, she has always been more open to the *possibility* that women judges may, at times, judge differently. This is evident in her pathbreaking book, *Women and the Law*, co-authored with Susan Atkins in the early 1980s. With the familiar caveat of rarity, they suggested it was possible to find 'instances' where women judges 'seem to have taken a slightly different, though no less technical, approach to a case',[59] pointing to the judgment of Heilbron J in *Bergin v Bergin* [1983] as a case in point.[60] The case concerned the test to be adopted in adjudicating upon a complaint of unreasonable behaviour in the context of divorce proceedings. The lower courts had refused to make a

[57] Malleson (n 46) 1.

[58] Lady Hale, 'Women in the Judiciary' Fiona Woolf Lecture, 27 June 2014. See, eg, Rosalie Arbella, 'The Dynamic Nature of Equality' in Shelia Martin and Kathleen Mahoney (eds), *Equality and Judicial Neutrality* (Carswell 1987) 3; Bertha Wilson, 'Will Women Judges Really Make a Difference?' (1990) 28(3) *Osgoode Hall Law Journal* 507; Sonia Sotomayor, 'A Latina Judge's Voice' (2002) *Berkeley La Raza Law Journal* 87; Beverley McLachlin, 'Promoting Gender Equality in the Judiciary', Seminar to the Association of Women Barristers, House of Commons, 2 July 2003; Joan Biskupiz, 'Ginsburg: Court Needs Another Woman' *USA Today* (10 May 2009); Patricia M Wald, 'Women on International Courts: Some Lessons Learned' (2011) 11 *International Criminal Law Review* 401, 403–4.

[59] Susan Atkins and Brenda Hogett, *Women and the* Law (Basil Blackwell 1984; reprint IALS 2018) 243.

[60] Rose Heilbron was finally appointed to the High Court bench in 1974. See further Joan Bevan, 'Modern Portias' (1952) 45(4) *Britannia and Eve* 40, 41; Rhona Churchill, 'It's No Holds Barred When Rose QC Pleads: But at Home She's Just the Doctor's Wife' *Daily Mail* (13 September 1955); Heilbron (n 13).

financial provision order against Mr Bergin (who had been violent towards his wife), under the Domestic Proceedings and Magistrates' Courts Act 1978, on the basis that Mrs Bergin could reasonably be expected to live with him. Allowing the appeal, Heilbron J continued:

> Certain matters may have given the justices the idea that this lady was exaggerating, because although they clearly found that she received these injuries, she did not seek medical attention (no doubt she thought that she could look after a black eye equally well herself) and she did not go to the police. It is not for every assault that a wife would wish to go to the police and get her husband into trouble … The wife appears to have covered up for her husband, and to have invented a reason for their having occurred which was not due to her husband's violence. It is noteworthy that on one occasion she mentioned to [a friend] that one of these injuries had been caused by walking into the garage door, and [the friend] pointed out that this lady did not have a garage. It is now quite clear that she was merely, trying to make life tolerable; she was trying to make the marriage work and for about 12 months she put up with this violence from her husband. … It seems to me that that particular finding of the justices "We do not find that the wife was in fear" is a perverse one.[61]

Of course, Lady Hale's and others' point is not exclusively tied to gender. Nor is the recognition that a judge's decision-making is, on occasion, shaped and informed by the intersection of their gender, race, ethnicity, class, professional background, politics, sexuality and so on itself an argument for judicial diversity. At most, it identifies one consequence of a more diverse judiciary—namely diversity in the style and substance of decision-making. It does, however, allow us to see how such an argument could be made. For judges (particularly at the highest level) are often called on to make decisions where the existing legal rules provide no clear answer—where the judge must turn to her or his own sense of justice to decide the case. And when they do so they will sometimes have no choice but to fall back on their own values, experiences and perspectives. In the words of former Justice of the Supreme Court of Canada, Rosalie Abella, '[e]very decisionmaker who walks into a courtroom to hear a case is armed not only with the relevant texts, but with a set of values, experiences and assumptions that are thoroughly embedded'.[62] It follows that *who* the judge is matters. Insofar as the experiences and background of any one judge will be limited, so

[61] [1983] 1 WLR 279, 284. Helibron's judgment is an early example of a real-life feminist judgment.

[62] Arbella (n 58) 8–9.

too will the insights their experiences and background might provide. To the extent that good judgment is informed by and so a product of such experiences and the insights and information they can provide, then a judiciary with a greater wealth of expertise and insights to draw on is better equipped and better informed—and hence is that much more likely to do their job well—than one with a narrower background or range of knowledge. The judiciary is stronger, and the justice dispensed better, the more varied the perspectives and experiences that are involved in its decision-making. In the words of former US Supreme Court Justice, Benjamin Cardozo, 'out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements'.[63] And on this view a diverse bench is not merely tangential to good judicial decision-making, but essential. Merit and diversity go hand in hand. If we want the judiciary to be the best it can be, diversity matters. If we want diversity, we need to keep making the quality argument for it. Not at some point in the future when the stars align, but right now. Which brings us to the establishment of the Industrial Court.

4. *Quality on the Industrial Court*

On the evening of 10 November 1919 around 194 MPs, just over a quarter of the House, were present for the second reading of the Coalition Liberal-Conservative Government's Industrial Courts Bill in the House of Commons. Arising out of a recommendation of the Whitley Committee, the Bill sought (among other things) to establish an Industrial Court.[64] The purpose of which, in the words of Sir Robert Horne, Minister for Labour introducing the Bill, was to establish 'a nucleus of permanent judges' with the experience and ability 'to bring a judicial mind to bear' on, and provide voluntary arbitration in, trade disputes.[65] The intention was to build on the success of two earlier ad hoc industrial arbitration bodies. There was a strong desire on all sides to continue with established practice and personnel—reflected in the fact

[63] B N Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921) 177.

[64] The Whitley Committee, named after its chair, J H Whitley MP, was a Government Committee established in 1916 to consider relations between employers and employees in light of the disturbances being caused by the Shop Stewards' Movement. The Committee produced five reports which were well received by employers and employees and its recommendation were adopted by the Government.

[65] Hansard, 'Industrial Courts Bill' HC Deb 10 November 1919, vol 121, col 134.

that 6 of the 13 first appointments to the Industrial Court, including its first President, Sir William Mackenzie, had served on one or both of the earlier bodies. So too had Lucy Deane Streatfeild, one of the first women factory inspectors overseeing over 4000 workshops in west London and a member of various trade boards. She would later become one of the first women magistrates.

However, despite women having been members of the forerunners to the Industrial Court there was no specific mention of women members in the original bill. One reason for this may have been that women's presence had become so integral to the operation of the earlier bodies that their inclusion was self-evident and did not need special demarcation. Their presence was not only assumed but assured. Or maybe, as was argued by Ernest Pollock MP, the then Solicitor General, the soon-to-be enacted Sex Disqualification (Removal) Bill 1919 (which was making its way through parliament at the same time as the Industrial Courts Bill) would render any such provision superfluous.[66] Certainly, there is nothing in the course of the parliamentary debates to suggest that the Court would not, when appropriate, positively welcome women's 'knowledge and experience' in its deliberations.[67] But nor was there anything to ensure that this would be the case, or—importantly—to secure their equal footing around the table when they did join.

Enter Alexander Shaw MP, a member of the Scottish Liberal Party. He introduced an amendment requiring the presence of one or more women on the Court. He argued:

> My own experience for some fourteen months as chairman of an Arbitration Tribunal with women as colleagues was that the experience of women in dealing with these women's cases was quite invaluable. I cannot imagine any Arbitration Tribunals dealing efficiently with cases in which women are concerned without the experience and guidance of women who have made a special study of these matters.[68]

Women members, he argued, through their 'experience and knowledge' would add to the 'strength' of the court and the 'weight' of its decisions, particularly in the context of women's wages.[69] In other words, if the court was to do its job well—if it was to be the best it could possibly

[66] ibid col 149. The Sex (Disqualification) Removal Act 1919 enabled women to join the legal and other professions, to sit as jurors and magistrates and, with some caveats, to enter the higher ranks of the Civil Service.
[67] See, eg, Horne MP ibid col 138.
[68] ibid col 137.
[69] ibid cols 140–41.

be—then women needed to be involved in its decision-making. The quality of the court depended on women's inclusion.

Members from both sides spoke in favour of the amendment. Major John (Jack) Hills, Conservative MP for Durham City, argued that there was a 'tremendous case' for the inclusion of women in order to harness the expertise they had gained through their participation in the adjudication of industrial disputes both during and since the war.[70] Women's representation on the Court, Hills suggested, was 'vital' to women's interests, their distinctive insights making them best placed to advise on 'women's cases', of which there were likely to be a considerable number.[71] It would be 'a great disaster', he continued, if women were shut out from the body which controlled and regulated their wages.[72] William Graham MP, a member of the Labour Party, went further, advocating for the inclusion of women on all cases, stating that 'there is no industrial dispute affecting men in which women are not directly or indirectly interested also'.[73]

Others deployed what we might now call equity and legitimacy arguments for women's inclusion. Echoing contemporary claims made by the Women's Freedom League and others in their arguments for women lawyers and magistrates,[74] Arthur Henderson MP, former chairman of the Parliamentary Labour party, pointed to the necessity of including women members to ensure the legitimacy of, and confidence in, the Court itself. Women's inclusion, Henderson suggested, was a matter of 'high principle and great practical importance' and should be included 'in the first Clause of the Bill'.[75] He repeated his point in a later debate, suggesting that 'it is not quite fair to leave all the cases affecting women to be arbitrated on by a Court upon which there is no woman representative'.[76] Shaw had made a similar point, after all this was the first election in which an albeit limited class of women

[70] ibid col 138.
[71] ibid cols 137–38.
[72] ibid col 138.
[73] ibid cols 141–42.
[74] The Women's Freedom League was openly sceptical about the fairness of the legal system arguing that without women solicitors, barristers and magistrates 'it is exceedingly difficult to have any confidence in the administration of British justice' (*The Vote* 5 September 1919). See further Anne Logan, 'In Search of Equal Citizenship: The Campaign for Women Magistrates in England and Wales, 1910–1939' (2007) 16(4) *Women's History Review* 501, 505–6.
[75] Hansard (n 65) col 142.
[76] Hansard, 'Industrial Courts Bill' HC Deb 17 November 1919, vol 121, col 668.

had been able to vote following the passing of the Representation of the People Act 1918. He 'seriously doubted' whether 'the thousands of working women in the country' would feel 'that they have been fairly treated by the Government for which they voted at the General Election' or 'really trust the tribunal' set-up 'without the element of experience which women can give'.[77]

However, despite cross-party agreement as to the value and necessity of women's presence on the Court, Shaw's amendment was resisted by the Minister for Labour. The membership of the Court was, Sir Robert argued, too small to guarantee a place for a woman member. Rather, he proposed that women be 'co-opted' onto the Court as necessary as assessors on an ad hoc basis—after all, as he pointed out, 'there is nothing in the Bill at present which in any way excludes the appointment of women or makes it incompetent to appoint them'.[78] Nevertheless, perhaps even he realised that this—to use the words of a journalist from *The Manchester Guardian* (which had been following the progress of the Bill closely)—'concession to women'[79] was not enough, as he also committed to giving the issue further consideration before the Report stage. Shaw was not convinced. Winning the argument for women's ad hoc representation was not enough. Political sympathies, promises or compromises were all very well, but without an explicit statutory provision ensuring women's presence on the Court, there were no guarantees it would happen. He pushed for a vote, where his amendment failed by 23 votes (Ayes 75; Noes 119).

But then, just 8 days later, the Minister for Labour changed his mind. On 18 November 1919 Sir Robert returned to the Chamber with an amendment ensuring the presence of one or more women on the Court 'with the prestige of full membership'.[80] It is not clear how this happened—though it may have been that he felt he had been out-manoeuvred by Shaw. When introducing his amendment, the Minister remarked on his disappointment with Shaw's decision to push the matter to a vote the previous week. Shaw's response was conciliatory.[81] The amendment was agreed to without debate. Women's participation, on an equal

[77] Hansard (n 65) cols 139–41.
[78] ibid cols 138–39.
[79] Anon, 'The Industrial Court: A Concession to Women' *The Manchester Guardian* (13 November 1919).
[80] Hansard, 'Industrial Courts Bill' HC Deb 18 November 1919, vol 121, col 460.
[81] ibid.

footing (albeit not in equal numbers) with their male colleagues, was embedded in the constitution of the Court.[82]

Two days later, on 20 November 1919, the Industrial Courts Act 1919 received its Royal Assent. Less than 2 weeks later, on 6 December 1919, the first appointments, including 2 women members—Cécile Matheson and Violet Markham—were announced in *The Times*.[83] Both women were well-known. Cécile Matheson was an author and Warden of the Birmingham Women's Settlement and a prominent member of the National Union of Women Workers, the International Council of Women, and the National Union of Women's Suffrage Societies.[84] She had worked with confectionery manufacturer, Edward Cadbury, and Labour Party member and academic, George Shann, on a large-scale research project on women's work and wages involving almost 6500 interviews.[85] She would later take up extra-mural posts at Cambridge and Oxford Universities, and at the London School of Economics and would be part of the Great British delegation to the 1925 International Council of Women in Washington, DC. Violet Markham, described in her obituary as 'one of the most interesting, and indeed remarkable, women in public life of her generation',[86] was well-known for her work as a leader of the anti-suffrage campaign.[87] She had also worked alongside Lucy Deane Streatfeild, Gertrude Tuckwell,[88] and Mary

[82] The Act also ensured that women be included as panel members on a Board of Arbitration (s 2(2)) and as ad hoc 'assessors' (s 3(1)). On the early operation of the court, see generally William Mackenzie, *The Industrial Court: Practice and Procedure* (Butterworth & Co 1923).

[83] Anon, 'Industrial Court Constituted: Two Women Members' *The Times* (6 December 1919).

[84] Georgina Brewis, 'Matheson, (Marie) Cécile' *Oxford Dictionary of National Biography* (9 August 2018).

[85] Edward Cadbury, M Cecile Matheson and George Shann, *Women's Works and Wages: A Phase of Life in an Industrial City* (University of Chicago Press 1907).

[86] Miss Violet Markham (obituary) *The Times* (3 February 1959).

[87] Though she later switched sides, 'unsuccessfully, and unenthusiastically' standing as an independent liberal in the 1918 general election (Helen Jones, 'Markham, Violet Rosa' *Oxford Dictionary of National Biography* (24 September 2004)).

[88] Gertrude Tuckwell was a member of the Women's Trade Union League, becoming President in 1905. She later became president of the National Federation of Women Workers (NFWW) where she played a key role in campaigns to protect women workers from industrial injuries, particularly lead poisoning and 'phossy jaw'. She was one of the first women magistrates and founders of the Magistrates' Association (Angela V John, 'Tuckwell, Gertrude May' *Oxford Dictionary of National Biography* (23 September 2004)).

MacArthur[89] and others on campaigns to improve the working conditions of the so-called 'sweated trades' and acted as Deputy, and later Director, of the Women's Section of the short-lived National Service Department, set up by Neville Chamberlain in 1916.[90] Described by suffrage and women's rights campaigner Mary Stocks as 'the best feminist I've ever known',[91] she was also a staunch imperialist.[92] She served on the court until 1946.

5. *Lessons from the Industrial Court*

We need, of course, to be careful with comparisons. While the Industrial Court, in the words of its first President, comprised 'a new Judiciary' and the 'reasons for its decisions … [were] stated with judicial preciseness', it was not an ordinary court of law.[93] The judge's role on the Industrial Court was closer to that of a modern-day arbitrator. Nor was women's presence in these types of roles unusual. By 1919 middle-class women had been performing important philanthropic—and often quasi-legal or judicial—roles in public and civic life, as local government councillors, factory inspectors and poor law guardians, for some time.[94] Within weeks, by virtue of the more familiar 1919 Act (the Sex Disqualification (Removal) Act 1919), women would be able to join the professions and civil service and the names of the first seven women magistrates would be announced. And by the end of the year, Ada Summers, by virtue of

[89] Mary MacArthur founded the National Federation of Women Workers (NFWW) in 1906 working closely with Gertrude Tuckwell, particularly on campaigns on behalf of sweated workers and for a legal minimum wage. A member of the Independent Labour Party, and then the Labour Party, in 1920, she became one of the first women magistrates. (Angela V John, 'Macarthur [*married name* Anderson] Mary Reid' *Oxford Dictionary of National Biography* (23 September 2004)).

[90] Where she likely oversaw the appointment as Commissioner for the West Midland division of Miss Bebb, latterly of *Bebb v Law Society* [1913] EWHC 1 (Auchmuty (n 15) 218).

[91] In discussion with Lady Asquith on 'Late Night Line-Up: The Suffragettes' chaired by Joan Bakewell and first broadcast on BBC Two on 1 February 1968.

[92] Eliza Riedi, 'Options for an Imperialist Woman: The Case of Violet Markham, 1899–1914' (2000) 31(1) *Albion: A Quarterly Journal Concerned with British Studies* 59–84. Though, as with the vote, she may also have had a change of heart in relation to this too. Her *Oxford Dictionary of National Biography* entry suggests that over time her views on the empire 'evolved' under the influence of Canadian politician, Mackenzie King (Jones (n 87)).

[93] Mackenzie (n 82) 25.

[94] June Hannam, 'Women and Politics' in June Purvis (ed), *Women's History: Britain, 1850–1945: An Introduction* (Routledge 1995) 217.

her role as Mayor of Stalybridge, would become (on New Year's Eve 1919) the first woman to preside in a magistrates' court. Nevertheless, there are three lessons we might draw out as relevant to current diversity debates.

A. *Political Will and Leadership*

First is the importance of political will and leadership. This has been identified as one of three most important levers, alongside the use of nominating commissions and a clearly delineated career path and progression, in securing change to the composition of the judiciary.[95] It is clear that without active and strategic leadership, as we are seeing, progress towards diversity will be slower, more fragile, and more risk adverse.[96] The debates leading up to the establishment of the Industrial Court are a case in point. Without the clear and deliberate leadership of Alexander Shaw in proposing the amendment and leading the debate, and his ability to bring leading figures from both sides of the political divide to speak in support of it, and Sir Robert Horne's willingness to reflect and respond to the points raised, the outcome would likely have been very different. Without their involvement, it is unlikely that any women would have been appointed ad hoc assessors, let alone there being a statutory requirement ensuring their presence as equal members of the Court.

B. *The Importance of Networks and Campaigns*

The second lesson relates to the importance of both established campaigns and networks. Many of those who spoke in the debates prior to the enactment of the Act were lawyers and/or involved in national and international campaigns for women's representation in the legal profession and beyond. Alexander Shaw, for example, was a lawyer and the son of Lord (Thomas) Shaw, a Lord Appeal in Ordinary. Shaw senior, at the time the Industrial Courts Act was being debated, was rendering valuable assistance in the formation of the League of Nations, Article 7 of which stated its Secretariat—in effect an international civil service—would be

[95] Cheryl Thomas, *Judicial Diversity in the United Kingdom and Other Jurisdictions: A Review of Research, Policies and Practices* (Commission for Judicial Appointments 2005) 114.

[96] Richard Ekins and Graham Gee, *Reforming the Lord Chancellor's Role in Senior Judicial Appointments* (Policy Exchange 2021) 23.

open to both women and men.[97] Similarly Jack Hills, a former solicitor, by the time of the Industrial Courts Bill was well-known as 'a champion of the woman's cause'.[98] At the time the bill was being debated he was playing a pivotal role in campaigns for women to enter the legal professions, having supported and/or introduced legislation to this effect on a number of occasions since 1912.[99] Sir Robert Horne, a 'son of the manse' and a barrister and KC, had less formal links to women and women's organisations.[100] His *Oxford Dictionary of National Biography* entry describes him 'urbane and affable' and as a 'favourite with political hostesses', suggesting he was the inspiration for the 1923 rhyme 'beaming Bert/ That incorrigible flirt/ Who loved to dance at all the Balls/ In London's noble marble Halls'.[101] That said, his involvement with women in a quasi-judicial capacity did not end with the Industrial Court. He went on to oversee the passing of the Underemployment Insurance Act 1920, the administration of which in the Court of Referees provided vital additional income for a number of early women barristers including Helena Normanton and Monica Geikie Cobb.[102]

These networks—involving both men and women—were vital to the genesis, motivation, formulation and passing of Shaw's amendment. The Industrial Court Bill was introduced, debated and passed in a little over 2 weeks. There was little time for lobbying on the specifics of the bill.[103] But this did not matter, perhaps because the arguments were already

[97] On Article 7, see further Aoife O'Donoghue, 'Article 7 of the Covenant of the League of Nations, 1919' in Erika Rackley and Rosemary Auchmuty (eds), *Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland* (Hart Publishing 2019) 125.

[98] Having been a 'close ally' of Violet Markham in the anti-suffrage movement before the war (Violet Markham, *Return Passage: The Autobiography of Violet Markham CH* (Oxford University Press 1953) 100).

[99] In 1920 Hills would chair a banquet, organised by the Committee to Obtain the Opening of the Legal Profession to Women, at the House of Commons to celebrate the admission of women to the legal profession (Auchmuty (n 15) 212, 218, 220, 224–25).

[100] Philip Williamson, 'Horne, Robert Stevenson, Viscount Horne of Slamannan' *Oxford Dictionary of National Biography* (23 September 2024, revised 6 January 2011).

[101] ibid.

[102] Caroline Derry, 'Monica Geikie Cobb' in Rosemary Auchmuty, Erika Rackley and Mari Takayanagi (eds), *Women's Legal Landmarks in the Interwar Years: Not for the Want of Trying* (Hart Publishing forthcoming).

[103] Though this is not to suggest this did not happen at all. There was significant lobbying in relation to the representation of organised women on the Court following the passing of the Act and Gertrude Tuckwell (Chairman of the Women's Trade Union League), Susan Lawrence (secretary of the Working Women's Legal Advice Bureau), Violet Markham, National Federation of Women Workers and Sir Robert Horne were in regular contact. There is no reason to think that this was not also happening *before* the Act was passed. (Women's Library archives, MARKHAM 26/41).

being made in other contexts. Representation on the Industrial Court was seen and understood as an extension or application of wider arguments and campaigns for women's political representation and equal citizenship. It was part of a broader picture and movement. Many—maybe even all—of the MPs present would have been familiar with (though, of course, not necessarily supportive of) the arguments for equal citizenship, including those grounded in women's 'special skills', made during the long and protracted campaigns for franchise reform.[104] These arguments were still ongoing. Equal rights were not 'won' in 1918. And, in any event, as Anne Logan points out in her study on the early women magistrates, *political* rights were only one aspect of equal citizenship, which also included civic and social rights and duties:

> for women's suffrage campaigners the vote was not an end in itself, but a means to an end; in the words of Mrs Fawcett, 'the achievement of a nobler and truer relationship between the sexes'.[105]

So too with judicial diversity. A diverse judiciary is not as an end in itself (though this is important), nor is it simply means of securing better justice for society as a whole (though this too is important). Efforts to secure a representative judiciary are better understood as part of broader and ongoing campaigns for equal citizenship and justice.[106] As such, arguments for greater diversity on the bench are not special or distinct. But should rather be seen—and made—alongside those calling for greater representation in Westminster, in board rooms, in our public arts, schools and prize winners,[107] and as 'part of a wider political equality project which [seeks] to disrupt the over-representation of dominant identity groups'.[108]

[104] Martin Pugh estimates that two-thirds of candidates in the 1918 general election specifically addressed women voters in their promotional literature in order to actively court women voters (*Women and the Women's Movement in Britain* (Macmillan 2000) 119).

[105] Logan (n 74) 502.

[106] See, eg, Catherine Marren and Andrew Bazeley, *Sex and Power 2022* (Fawcett Society 2022).

[107] See, eg, Laura Snapes, 'Gender Inequality and Outdated Voting Metrics: Are the Brit Awards Still Hitting the Wrong Notes?' *The Guardian* (3 February 2023).

[108] Malleson (n 19) 272.

C. *Quotas Work*

The third lesson from the Industrial Court is this: quotas work.[109] They get the job done. Indeed we know this already. We see it every time a Justice from Northern Ireland or Scotland retires from the UK Supreme Court.[110] We see it too in section 1(1) of the Industrial Courts Act 1919, requiring the Minister for Labour to proactively seek woman to appoint to the court.[111] But there's a further point here. What we see in the debate leading up to the establishment of the Industrial Court is that *arguments* for the imposition of quotas matter. It matters which arguments for quotas are made. It matters because, just as with arguments for diversity, some arguments are more open—and others more resilient—to challenge than others. This is important. For there is a familiar sting in the tail of women's representation on the Industrial Court.

By the time Sir William Mackenzie published his account of the Industrial Court's early years, the recognition of the existence and value of women's 'special skills' had begun to wane. He notes in passing that '[i]t was apparently thought in 1919 (though the contention would not go unchallenged now) that a "woman's" point of view was something separate and distinct which required special representation'.[112] Fifty years later this view had hardened. By the time the composition of the Industrial Court came before Parliament again in 1971, the focus of

[109] This is not to suggest that quotas do—or should—work alone. Rather they need to be 'nestled' into what Sally Wheeler has described in the context of boardroom quotas as a 'basket of measures' addressing parental and care-giving responsibilities, progression, promotion and retention in the so-called 'pipeline', as well as effective mentoring and support so that there are sufficient women able and willing to take on the roles ('Company Law and Corporate Governance' in Rosemary Auchmuty (ed), *Great Debates in Gender Law* (Palgrave 2018) 133, 147).

[110] The description of the requirement contained in s 27(8) of the Constitutional Reform Act 2005 that 'In making selections for the appointment of judges' to the UK Supreme Court the selection committee 'must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom' has been widely described as de facto 'geographical quota'—see, eg, Lady Hale, 'Appointments to the Supreme Court' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge 2018), 305; Bindman and Monaghan (n 52) [8.6]; Malleson (n 19) 268.

[111] Indeed, Sir Robert Horne telegrammed Violet Markham in Germany seeking to nominate her to the court on the day after the Act was passed (Women's Library archives, MARKHAM 26/41).

[112] Lord Amulree, *Industrial Arbitration in Great Britain* (OUP 1929) 174. Mackenzie resigned as President of the Industrial Court in 1926. He received his peerage, becoming Lord Amulree, in 1929.

feminist campaigns had begun to shift from justice, citizenship and representation to issues relating to equality and autonomy.[113] So too in parliament where the language of equality and the spectre of 'appointment on merit', understood as attached exclusively to an individual, had entered the political fray. The so-called 'statutory woman'—that is a statutory requirement that one or more women be included in the membership of a given body—was one of its first casualties. During the Committee stage of the Industrial Relations Bill 1971 an amendment along the exact lines of Shaw's in 1919 was proposed by Labour Peer, Lord Diamond.[114]

> [i]t is quite absurd to think that justice can be felt to be done and seen to be done where a substantial proportion of those appearing before the court inevitably will be women if those making the decisions and serving justice will exclusively be men.[115]

Lord Janner, supporting the amendment, adopted the arguments of Hills MP, pointing to the 'considerable benefit' women's particular knowledge and experiences had, and would continue to have, on the deliberations of the court.[116]

However, the weight of opinion was firmly against the amendment. Members from both sides of the Chamber spoke against it, including for the first time—following the enactment of the Life Peerages Act 1968—a woman: Baroness Emmet, a Conservative Peer. The arguments will be familiar. Far from underpinning the Industrial Court's institutional integrity, and the ability of the Court to do the best job possible, the statutory requirement of representation was recast, in the words of former barrister Lord Conesford (a member of the Conservative Party and a long-term opponent of such measures) as 'insulting' to women.[117] (Though he was not averse to a compromise whereby the statutory woman was joined 'in the interests of sex equality' by 'a statutory man',

[113] The first Women's Liberation Movement Conference had been held in Oxford where the first of four demands had been discussed: equal pay, equal educational and job opportunities, free contraception and abortion on demand and free 24-hour nurseries. These were passed at the Skegness Conference the following year. See generally 'Women's Liberation: A National Movement' *British Library* (8 March 2013) <https://www.bl.uk/sisterhood/articles/womens-liberation-a-national-movement>.

[114] Hansard, 'Industrial Relations Bill' HL Deb 27 May 1971, vol 319, cols 1299–302.

[115] ibid col 1301.

[116] ibid col 1302.

[117] ibid cols 1307–8. The same word was used by the then Chief Justice, Lord Judge in 2012 when speaking to the House of Lords Select Committee on the Constitution inquiry on judicial appointments (Q188).

to counter the clearly non-existent risk that the Court become all female).[118] Labour Peer, Lord Bernstein also spoke against the amendment declaring 'the "women's lib" movement' left him 'unmoved in this matter'.[119] Baroness Emmet (who had herself on occasion been a statutory woman) argued that the practice, being neither an 'insult or complement' to women, was 'unnecessary', a relic of the past when officials simply 'forgot to put forward a woman's name'.[120] The Lord Chancellor, Lord Hailsham, agreed:

> the presence of a woman, or women, on this Court would be of the greatest possible value, but we must try to get away from the old conception of the statutory woman. In the old days, when there was a certain prejudice in these matters, and just after women's rights in 1919, we got into the frame of mind that there must be a statutory woman on every bench. The implication was that women could not get there on their merits. I hope that that is now a thing of the past and that we may expect, in any appointments there are, whether it be to a committee of inquiry or a bench of magistrates or a court, that it will be recognised that women are playing a full part … in our national life, and do not need special preference in order to get on committees.[121]

Nor, Hailsham continued, could women claim any 'advantage' by virtue of their experience or knowledge that required their presence.[122] They had no special skills or insights to bring to, or improve, the court's decision-making. And so it was that, after just 35 minutes of debate, Lord Diamond was persuaded 'that we need not continue' with what he now described as an 'indelicate and unattractive topic' and he withdrew his amendment.[123]

[118] ibid col 1309.
[119] ibid col 1307.
[120] ibid col 1309.
[121] ibid col 1304. The difficulty for Lord Hailsham was that they did. By the early 1970s, women had made little impact on the professions (Home Office, *Equality for Women* (Cmnd 5724, 1974)). In 1971, women made up 6.2 per cent of practising barristers and 1 per cent of QCs. Less than a third of chambers in London and just over a quarter of chambers elsewhere had two or more women. Women were outnumbered in the senior judiciary by 83:1. In 1972, just four women sat on the High Court and circuit benches combined. Overall, men made up just over 98 per cent of the judiciary (Equal Opportunities Commission, *Women in the Legal Services* (1978) 14, 16, 23).
[122] Hansard (n 114) col 1305.
[123] ibid cols 1311–12.

In the event, the absence of a quota in the 1971 Act made little difference to the composition of the Industrial Court, re-named the Industrial Arbitration Board.[124] In 1975, the *Sunday Times* reported that there were three women among the lay members of the court.[125] Shaw's amendment back in November 1919 had done its job. It had embedded women's presence in the DNA of the Court and, it seems, insulated their inclusion from the vagaries of politics and shifts in personnel.

However, the legacy of the debates in 1971 is still felt today. Versions of the arguments made by Baroness Emmet and Lords Conesford and Hailsham continue to shape and distort contemporary debates around the use of quotas. They can be seen in the now dominant framing of a statutory requirement of representation as a special or temporary 'remedial measure',[126] 'targeted at under-represented groups … for their benefit rather than for the benefit of society at large'.[127] And also in the suggestion that quotas fail both individuals they are seeking to 'help' and the institution of which they wish to be part. Fifty years later, just as with Baroness Emmett, '[t]he fact that arguments against quotas [are] often … put by women and BAME lawyers and judges' continues to carry 'particular weight' and 'understandably, [have] a chilling effect on proposals for their introduction'.[128] Quotas are consistently rejected as 'patronising'[129] and/or 'fatal' to the authority of judges who are 'known or thought to be "quota judges"'.[130] At other times they are the 'antithesis of appointment on merit',[131] threatening to 'dilute the quality of the judiciary'[132] and/or the harbinger of 'appalling consequences for the

[124] The Industrial Arbitration Board was replaced by the Central Arbitration Committee in 1975. Industrial Courts Act 1919 was repealed in July 1992 by sch 1 of the Trade Union and Labour Relations (Consolidation) Act 1992.

[125] More equal than others? *The Sunday Times* (4 May 1975).

[126] Malleson (n 19) 280.

[127] ibid 272.

[128] ibid.

[129] (Heather) Hallett LJ quoted in House of Lord Constitution Committee *Judicial Appointments* (March 2012) [102].

[130] Lord Burnett LCJ, 'A Changing Judiciary in a Modern Age' Treasurer's Lecture 2019, 18 February 2019. Though as Malleson notes 'a striking feature of the fear of stigmatization is that it does not appear to be shared by white, male barristers from affluent backgrounds appointed under the current system … despite the fact that they are the beneficiaries of a de facto quota system in their favour' (n 19, 271).

[131] Brian Leveson, 'Justice for the 21st Century' *Caroline Weatherill Lecture* (Isle of Man, 9 October 2015) 8. See also Burnett ibid.

[132] Cordella Bart-Stuart and Association of Women Barristers quoted in House of Lord Constitution Committee (n 129) [102].

quality of justice'.[133] Cast as the 'nuclear option',[134] those arguing for their imposition are left with little choice but to seek ways of minimising their use, arguing for their deployment as a time-limited necessity or a mechanism of last resort turned to when all else has failed.[135]

The debates prior to the establishment of the Industrial Court provide those arguing for the imposition of quotas with a different narrative—what we might call 'the quality argument for quotas'. This troubles current arguments for and against the imposition of quotas and upsets assumptions about their purpose and effect. For Shaw and others the imposition of a gender quota in the composition of the Industrial Court was not simply matter of fairness or a mechanism to ensure inclusion (though it did this quickly and efficiently), nor was it simply a matter of ensuring the legitimacy of, and confidence in, the institution (though it did this too). Rather, the requirement of one or more women in the membership of the court was a means of ensuring the *quality* of the institutional output—a way of ensuring the decision-making of the Court was the best it could possibly be. So understood, the quality argument for quotas avoids the pitfalls of, and challenges to, arguments grounded in the language and frameworks of positive action.[136] After all, if a diverse judiciary really is a better judiciary—if the more varied the perspectives and experiences that are involved in its decision-making, the better able the court is to do its job, to deliver justice—then, quotas framed as 'a ceiling designed to cap the over-representation of dominant identity

[133] As feared by Lord Sumption (reported in Martin Bentham, 'Rush for Gender Equality with Top Judges "Could Have Appalling Consequences for Justice"' *Evening Standard* (21 September 2015)). Lord Sumption made much the same point in his 'Home Truths' lecture in 2013 ('Home Truths about Judicial Diversity' Bar Council Law Reform Lecture, 15 November 2012). The irony of this coming from a judge who was himself 'fast-tracked' into the Supreme Court was not lost on many (Letters to the Editor, 'The Fast Tracking of Women into the Judiciary' *The Times* (26 September 2015)).

[134] Nicholas Watt, 'Labour Prepared to Introduce Judge Quotas to Achieve Balanced Judiciary' *The Guardian* (20 April 2014).

[135] As argued, eg, by David Lammy and Shami Chakrabarti (in Monidipa Fouzder, 'Labour Conference: Quotas Needed to Improve Judicial Diversity' *Law Society Gazette* (25 September 2019)) and by Linda Dobbs (Monidipa Fouzder, 'Former Senior Judge Urges Caution over Quotas' *Law Society Gazette* (24 March 2016)).

[136] See, eg, Kate Malleson, 'Diversity in the Judiciary: The Case for Positive Action' (2009) 36(3) *Journal of Law and Society* 376 and, for a rebuttal of potential legal changes to the imposition of quotas, see Bindman and Monaghan (n 52) [8.9]–[8.16] and Colm O'Cinneide and Kate Malleson, 'Are Quotas for Judicial Appointments Lawful under EU Law?' (*UK Constitutional Law Blog*, 12 November 2014) <http://ukconstitutionallaw.org>.

groups (who by the law of statistical averages will not all be as good as the best of those excluded)'[137] not only ensure the quality (or, if you like, the 'merit') of the *individuals* appointed, as Malleson has rightly argued, but, insofar as they require judges to be diverse as a collective, they ensure the quality of the *judiciary as a whole*. Quotas lead to *better* judging, to *better* judicial decision-making. So viewed, quotas are not simply 'an intrinsic, essential and ongoing requirement of a merit-based *appointments* system',[138] but vital to ensuring the judicial product is the best it can be, to achieving better justice and the best outcomes for society. Merit and quotas, just like quality and diversity, go hand in hand with the common aim of ensuring that our judiciary is the best it can be.

6. *The Promise of Feminist Legal History*

So where does this leave us?

Anchored in a commitment to disciplinary, social and political change, feminist legal history seeks not only to uncover new histories, but also to challenge, and ultimately transform, our understandings of the past, present and future. The Industrial Court is a case in point.

Of course, we'll never know exactly happened during the Industrial Court debates in November 1919. We don't know about conversations had in the lobby, or deals done elsewhere. Hansard and archival research can only tell us so much. But, in seeking out forgotten narratives, we do know the quality argument for diversity was made. Indeed we know that—in contrast to debates about judicial diversity today—the quality argument was key part of the debate for women's inclusion on the Court. Women's presence and the values, insights and experience they bring, were explicitly and deliberately tied directly to the Court's ability and success—to its quality or merit, if you like. We know that quality mattered. It mattered to Shaw and others who spoke, and to those ultimately responsible for the formation of the Court. And, moreover, we know that the quality argument worked: that the recognition of the value of diverse experience and expertise within the collective body provided a reason for women's inclusion as equal members.

[137] Malleson (n 19) 273.
[138] ibid 259 (my italics).

We also know that, as a result, at a time when women were unable to formally practise law, when prominent figures and institutions were still arguing *against* women's inclusion in the legal profession and ability as lawyers, when, at best, the Sex Disqualification (Removal) Act 1919 would simply *enable* women to join the professions, the Industrial Courts Act *positively required* women's presence. At a time before women could become judges or magistrates, the Industrial Courts Act 1919 provided statutory recognition and protection, in the form of a quota, of women's ability as judges—of their ability, in the words of Labour MP, J R Clynes as 'persons of experience, of known impartiality; judicially-minded and capable of estimating evidence and reaching a reasonable decision according to the revealed facts of the case'.[139] And that, as a result, a quarter of a century before Sybil Campbell's appointment as the first female full-time judge, and almost half a century before Elizabeth Lane's ground-breaking appointment to the High Court, the Industrial Courts Act ensured the appointment of not just 1 but 2 women to sit 'in the capacity of judges' on the most senior industrial tribunal in the land.[140] It would take just shy of a hundred years for the UK Supreme Court to do the same. And just over 4 years after that for it to slip away.[141]

For feminist legal history also teaches us that one success is rarely the end of the story. It shows that, as we are seeing, progress cannot be taken for granted and hard-won gains are easily lost as momentum and focus move elsewhere. The successes of feminist law reform are fragile and transitory and, even when the requirement of representation is carved into the text of the law, this can be chipped away. It exposes efforts of men (and it is usually men whose privileges being challenged) to find any number of ways to defuse and object, and to turn the tide. It reveals how arguments come in and out of fashion as intellectual trends shift. The arguments which carried the day at one point in time—arguments

[139] Hansard, 'Industrial Courts Bill' HC Deb 6 November 1919, vol 120, col 1724.

[140] The establishment of the Industrial Court was a significant political achievement. It was widely reported in the press (see, eg, 'First Industrial Court' *The Daily Mail* (6 December 1919); 'Standing Industrial Court' *The Manchester Guardian* (6 December 1919); 'Stores Strike Settled: First Case for New Industrial Court' *The Observer* (7 December 1919) and was mentioned in the King's speech to the House of Commons for the prorogation of Parliament in December 1919 (*The Times*, 24 December 1919).

[141] Lady Hale was appointed to the Appellate Committee of the House of Lords in 2004 and became the first woman Justice of the Supreme Court in 2009, she was joined by Lady Black in October 2017. Since January 2022, Lady Rose has been the only woman on the UK Supreme Court.

which remain good arguments today—can be lost sight of, and how the ordinary and uncontroversial can, though a lack of familiarity or changing political context, be recast as dangerous, as the most drastic or extreme response to a situation.

But feminist legal history also gives us a reason to continue talking about, and making the case for, judicial diversity. It teaches us that windows of opportunity may open only briefly; like the journeys of the mermaids to the surface of the sea, offering a glimpse on to new worlds. And when they do, as we have seen, the story of the little mermaid's grandmother tells us that we need to be ready to grasp the opportunities, ready to make and remake the arguments, to build on the commitment of those who have gone before. For it is only by continuing to make the case for diversity that we stand the best chance of securing a judiciary that is truly diverse.