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HEARING THE VOICE OF THE WOMAN JUDGE: DIVERSITY, EQUALITY, AND PARTICIPATION

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ABSTRACT

The UK has not achieved the judicial diversity of other common law jurisdictions. Whilst there is some success in the lower courts, few women judges have ever sat on the UK Supreme Court Bench. It has long been argued that diversity enhances decision making, and the presence of women judges enhance the decision-making process. But this can only occur if women are appointed to the bench and supported to participate fully. Drawing on the theoretical framework developed by Fredman and the UK equality legislation, this Article explores how the structures and processes of the Supreme Court limit substantive equality on the bench. Analysis of the processes of appointments to the UK Supreme Court highlights the structural barriers to effective participation of women. Substantial procedural changes will be required if equality is ever to be achieved on the UK Supreme Court bench.

I INTRODUCTION

It is vital that the public have confidence in our judiciary. One aspect of ensuring that confidence is a more diverse judiciary that more fully reflects the wider population. That even by 2011 only 5 percent of judges were from minority groups and only 22 percent were women suggest there is still work to be done in this area.¹

In 2012, the Chair of the House of Lords Constitution Committee, Baroness Jay, recognised the importance of a diverse judiciary as a key aspect of ensuring public confidence in the courts. Whilst the creation of a Judicial Appointments Commission (JAC) has made progress in changing the demographic profile of the tribunals and lower courts, little progress has been made in the superior courts. Appointments to the Supreme Court are outside the JAC system.² In 2012, the UK Supreme Court, which opened in 2009, had only a single woman justice on the 12-member bench. Despite a brief high point of three women on the bench, in 2023 the UK Supreme Court still only has one woman and no visible member from an ethnic minority background.³

When other common law countries have had some success in developing superior courts that are more reflective of the communities they serve, why has the UK failed? This Article starts to explore the lack of diversity on the Supreme Court bench through the lens of equality,

¹ HOUSE OF LORDS CONSTITUTION COMMITTEE, A MORE DIVERSE JUDICIARY WOULD INCREASE CONFIDENCE IN THE JUSTICE SYSTEM SAY LORDS CONSTITUTION COMMITTEE, 2012–13, HL (U.K.), <https://bit.ly/3JfAWRs> (last visited Jan. 21, 2023).

² See Constitutional Reform Act 2005, c. 4 (U.K.), <https://bit.ly/3Z0m132> (providing for the appointment of judges to the Supreme Court via an independent selection commission which convenes only for selecting Supreme Court judges and then adjourns once the selection is complete); see also Constitutional Reform Act 2005, c. 4 (U.K.), <https://bit.ly/3n33hmm>.

³ *Why We No Longer Use the Term 'Bame' in Government*, EQUAL HUB (Apr. 7, 2022), <https://bit.ly/NOBAME> (explaining the use of “ethnic minority background” in the main body text as opposed to “BAME”).

noting that substantive equality requires both presence and effective participation. The Article takes as a starting point Fredman's theoretical four-dimensional framework of substantive equality for those who suffer disadvantage.⁴ It is recognised that those privileged few who aspire to the high-status and high-profile role on the Supreme Court bench are not the focus of Fredman's work, and it is not suggested that women who aspire to the Supreme Court are members of those groups most marginalised in society. But, in a society where women form a substantial proportion of the legal profession, their notable absence from senior judicial positions suggests unequal structures may play a role.

Fredman's approach is used to illuminate the multi-faceted nature of inequality and as an analytical framework to interrogate and evaluate the structures and process of appointments and participation in the UK Supreme Court. The analysis draws attention to the structures that support an appointments process that perpetuates and amplifies the male voice, which in turn has the potential to limit the appointment of women. Significant structural change is required if equality is to be achieved. The provisions of the UK Equality Act 2010 provide a limited statutory framework to promote equality of opportunity through proactive action by public authorities, and draw attention to the central importance of participation.⁵ Whilst it has been argued that the provisions are weak and simply provide a defence to positive discrimination,⁶ this article highlights the symbolic importance of the Equality Act 2010 and

⁴ Sandra Fredman, *Substantive Equality Revisited*, 14 INT'L J. CONST. L. 712, 713 (2016).

⁵ See e.g., UK Equality Act, c. 15, 2010 (U.K.), <https://bit.ly/3JQjeoR> (contrasting the Act's positive provisions against much of its legislative framework which is framed negatively). "A barrister (A) must *not* discriminate against a person" *Id.* (emphasis added).

⁶ Lizzie Barmes, *Equality Law and Experimentation*, 68 CAMBRIDGE L. J. 623, 627 (2009) ("UK equality law has . . . prohibited . . . measures targeted at correcting systemic inequality . . . Secondly, the conceptual intolerance of positive action has given rise to a notion of indirect discrimination that incoherently restricts what organisations may do."). But see Chantal Davies et al., *Bridging the Gap: An Exploration of the Use and Impact of Positive Action in the United Kingdom*, 16 INT'L J. OF DISCRIMINATION & THE L. 83, 85 (2016) ("Whilst

the overt statutory recognition of the importance of diversity. But despite significant interventions to encourage women to consider a role on the Supreme Court bench, this Article demonstrates that substantive equality will not be achieved until women are both present and effective participants in the appointments process. Until such time as there is substantive equality in appointments, the court will never achieve its ambition to be reflective of society.

II IMPORTANCE OF GENDER DIVERSITY AND PARTICIPATION ON THE JUDICIAL BENCH

It is now common ground that judicial diversity is an important element of the administration of justice. Whilst there is increasing recognition of the many facets of diversity, the majority of empirical and theoretical research in the field has focussed on gender diversity.⁷ The arguments for gender diversity on the judicial bench are well rehearsed elsewhere, but for the purposes of this Article it is important to note that these discussions are founded on two key principles, representation and substantive difference, which reflect the essential elements of equality: equality of access and participation.

The representation arguments centre on the importance of “being seen” and the democratic legitimacy of a judiciary which visibly “reflects the society it serves.”⁸ The presence of female

sections 158 and 159 are permissive rather than mandatory, arguably the Public Sector Equality Duty under section 149 of the Equality Act 2010 places an onus on the public sector to have due regard to the need to redress disadvantage via the positive action provisions.”).

⁷ It is important to recognise these facets of diversity may intersect, but the studies to date have typically adopted a binary approach to diversity. In this paper, we are following this approach but recognise it does not capture the nuance of diversity or the individual.

⁸ See generally, *DEBATING JUDICIAL APPOINTMENTS IN AN AGE OF DIVERSITY* (Graham Gee & Erika Rackley eds., 2018); e.g., Anver Levin & Asher Alkoby, *Shouldn't the Bench Be a Mirror? The Diversity of the Canadian Judiciary*, 7 Oñati Socio-Legal Series 717, 720 (2017) (citing C.J. Beverly McLachlin, Sup. Ct. of Canada, Address at the Judicial Studies Committee Inaugural Annual Lecture at Edinburgh: Judging: The Challenges of Diversity (2012), <https://bit.ly/3Fo4c7g>); Anne Richardson Oakes & Haydn Davies, *Justice Must be Seen to be Done: A*

judges on the bench also serves as overt evidence of equality of opportunity and may serve as inspiration to others from underrepresented or traditionally disadvantaged populations.⁹ In countries where there are equal proportions of men and women in the population and in legal education, a diverse judiciary demonstrates that the appointments process is “fair, meritocratic, and non-discriminatory”.¹⁰ As such, an appointments process that values equality seeks to achieve a bench that visibly reflects the society it serves.

Contextual Reappraisal, 37 ADEL. L. REV. 461, 463 (2016) (“[T]he appearance of justice is better promoted by judges who are reflective of the community they are appointed to serve”); Kate Malleson, *Justifying Gender Equality on the Bench: Why Difference Won't Do*, 11 FEMINIST LEGAL STUD. 1, 18 (2003) (“As an unelected body the basis for [the judiciary’s] legitimacy has traditionally been cited as the quality of its decision-making; the demonstration of fair and impartial justice which is the rationale for judicial independence. But another means increasingly, as with all institutions of power, is through its composition.”); ERIKA RACKLEY, WOMEN, JUDGING AND THE JUDICIARY: FROM DIFFERENCE TO DIVERSITY 87 (2012); Erika Rackley, *What a Difference Difference Makes: Gendered Harms and Judicial Diversity*, 15 INT’L J. OF THE LEGAL PRO. 37, 37–38 (2008).

⁹ See e.g., Sonia Lawrence, *Reflections: On Judicial Diversity and Judicial Independence*, in JUDICIAL INDEPENDENCE IN CONTEXT 193 (A. Dodek & L. Sossin eds., 2010); see also Kate Malleson, *Diversity in the Judiciary: The Case for Positive Action*, 36 J. OF L. & SOC’Y 376, 382 (2009); Rachel Davis & George Williams, *Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia*, 27 MELB. REV. 819, 846 (2003) (“Where a section of society feels that its . . . needs are not being adequately taken into account by the judiciary—due . . . to the fact . . . that the judiciary does not reflect their presence within society—this can result in a lessening in regard for . . . judicial decision-making”); Brenda Hale, *Equality and the Judiciary: Why Should we Want More Women Judges?* PUB. L. 489 (2001); Sheldon Goldman & Matthew D. Saronson, *Clinton’s Non-traditional Judges: Creating a More Representative Bench*, 78 JUDICATURE 68, 73 (1994) (“As the judiciary becomes more representative of the American people, it can be expected to increase confidence in the judicial system among women and minorities.”).

¹⁰ Rosemary Hunter, *More Than just a Different Face? Judicial Diversity and Decision-making*, 68 CURRENT LEGAL PROBS. 119, 123 (2015).

The second strand of arguments tend to be grounded in empirical data and centre on the substantive difference gender diversity makes to the decision-making process and, in many studies, the outcome.¹¹ These arguments centre the importance of the effective participation of female judges in the decision-making process. There are two strands to these studies. The first considers individual difference and argues that individual female and male judges reach different decisions. Whilst there is some evidence that this is true in a small subset of cases that involve “gendered issues,” there is little evidence that the outcome of the cases is different based on gender.¹² Similar findings have been found when women are sitting with men on a panel. In the vast majority of cases, the presence of a female judge on the panel does not make an appreciable difference on the decision reached; however, as *Boyd et. al* suggest:

The results of this exercise are now reasonably clear: the presence of women in the federal appellate judiciary rarely has an appreciable empirical effect on judicial outcomes. *Rarely, though, is not never.*¹³

¹¹ See e.g., Ethan D. Boldt et al., *The Effects of Judge Race and Sex on Pretrial Detention Decisions*, 42 JUST. SYS. J., 341, 342 (2021); Christina L. Boyd & Adam G. Rutkowski, *Judicial Behaviour in Disability Cases: Do Judge Sex and Race Matter?* 8 POLS., GRPS., & IDENTITIES 834, 836–38 (2020); Shane A. Gleason et al., *The Role of Gender Norms in Judicial Decision-making at the US Supreme Court: The Case of Male and Female Justices*, 47 AM. POLS. RSCH., 494, 496–97 (2019); Christina L. Boyd, *Representation on the Courts? The Effects of Trial Judges’ Sex and Race*, 69 POL. RSCH. Q. 788, 789–90 (2016); see generally Hunter, *supra* note 10 (providing an excellent review of the relevant literature).

¹² See e.g., Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596 (1985); John Gruhl et al., *Women as Policy-Makers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308, 314 (1981); Sarah Westergren, *Gender Effects in the Courts of Appeals Revisited: The Data Since 1994*, 92 GEO. L.J. 689, 695–99 (2004); Susan W. Johnson & Donald R. Songer, *Judge Gender and the Voting Behaviour of Justices on Two North American Supreme Court*, 30 JUST. SYS. J. 265, 271–72 (2009). But see Donald R. Songer & Kelley A. Crews-Meyer, *Does Judge Matter? Decision Making in State Supreme Courts*, 81 SOC. SCI. Q. 750, 759 (2000); Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decision Making in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1778 (2004); Fred O. Smith, Jr., *Gendered Justice: Do Male and Female Judges Rules Differently on Questions of Gay Rights?*, 57 STAN. L. REV. 2087, 2099 (2005).

¹³ Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. OF POL. SCI. 389, 406 (2010)

Whilst the effect was clearer in cases that centred on a gendered issue, it was not limited to those cases.¹⁴ The influence of a female judge on a panel is more nuanced than a different position on the outcome, and there is some evidence that the presence of a female judge on a three-member panel influences the decision making of their male counterparts. For example, Peresie *et al.* demonstrated that the presence of a female judge significantly increased the probability that a male judge would support the plaintiff in the cases analysed.¹⁵ This was confirmed by Boyd *et al.* in an analysis of approximately 8,000 cases heard in the United States Court of Appeals for the Federal Circuit. The authors demonstrated that the presence of a female judge on a panel would lead to significantly more rulings in favour of the party alleging discrimination in cases of sexual discrimination. The presence of a female judge on a panel influenced the male decision as Boyd *et al.* noted:

[W]e observe consistent and statistically significant individual and panel effects in sex discrimination disputes: not only do males and females bring distinct approaches to these cases, but the presence of a female on a panel actually *causes* male judges to vote in a way they otherwise would not—in favour of plaintiffs.¹⁶

These studies demonstrate that the presence of a female judge on a decision-making panel alters the decision-making process of their male colleagues, and in some cases (which centre on gendered issues), this can result in a different outcome. The former Supreme Court Justice Sandra Day O'Connor would suggest that whether female justices decide cases differently is not only unanswerable, it is also a “dangerous” question, which suggests a difference that may undermine the impartiality of the judge.¹⁷ However, this Article suggests that this is the

¹⁴ See, e.g., Susan Maloney Smith, *Diversifying the Judiciary: The Influence of Gender and Race on Judging*, 28 U. RICH. L. REV. 179, 186 (1994).

¹⁵ See Peresie, *supra* note 12, at 1768–69.

¹⁶ See Boyd *et al.*, *supra*, note 13, at 406; see also Christina L. Boyd, *She'll Settle It?*, 1 J.L. & CTS. 193, 193–12 (2013).

¹⁷ See Sandra Day O'Connor, *Portia's Progress* (Oct. 29, 1991), in 66 N.Y.U. L. REV. 1991, at 1546.

wrong question. The question is not whether female justices judge differently and have a different position on the outcome but rather, in panel decision making, whether a female justice brings an element of difference to the decision-making process that would help refine and improve the decision-making process and encourage the male justices to think differently. The data from the judicial panel decision-making studies provide evidence for this assertion and the researchers have proposed reasons for this more nuanced influence associated with gender.

Several authors contended that the influence of a single woman on a panel was related to informational effects.¹⁸ It was argued that male judges recognised that female judges possessed information that male judges perceived as more credible and persuasive than their own knowledge on gendered issues. In doing so, female judges either directly or indirectly influenced the choices of their male colleagues. Indeed, this theory was supported by Farhang and Wawro, who analysed evidence from sexual harassment cases in the U.S. Court of Appeals for the Federal Circuit.¹⁹ The authors demonstrated that female judges influence the panel through the exchange of ideas and information, rather than male counterparts making concessions to women to achieve unanimity. The study suggests that when the issue at hand is considered a “gender issue,” the influence of women judges is enhanced in the decision-making process as they are seen to have “specialist knowledge.”

One of the key limitations of comparison studies is that there is an assumption that this “specialist knowledge” is based on all female judges having the same views and positions on

¹⁸ See, e.g., Boyd, *supra* note 11, at 788–99; see also Peresie, *supra* note 12, at 1768–69.

¹⁹ See Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision-making*, 20 J. L. ECON. & ORG. 299, 320–26 (2004).

the disposition of the case. But there is some evidence that, whilst they may not share the “same views,” there may be gendered perspectives which serve to underpin the difference seen in “gendered cases.” A commonly cited example is the position of Justice Bertha Wilson, the first female Justice on the Supreme Court of Canada, who drew on Gilligan’s work to argue that women bring different perspectives from men to the decision-making process.²⁰ Lady Hale, the first female Supreme Court Justice in the UK, also suggested a different perspective shared by women in her judgment in *Radmacher v Granatino* when she wrote: “[i]n short, there is a gender dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman.”²¹

She refined her position, in a speech in 2013, in which she stated:

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 do so.²²

This perspective is not limited to the most senior female justices, or those who were “firsts,” or the only female in a male-dominated space. It is a view shared by female judges in the United States and New Zealand. Indeed, one study in New Zealand found that 70 percent of female judges and 39 percent of male judges agreed with the statement that “judges judge by what they think is right and proper and that necessarily involves a particular set of values and standards which are influenced by gender.”²³ Judicial interviewees in a study by Songer *et al.* also noted that female judges on the Canadian Court of Appeal bring a different “angle

²⁰ See Madame Justice Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 OSGOODE HALL L. J. 507, 519–22 (1990).

²¹ See *Radmacher (formerly Granatino) v. Granatino* [2010] UKSC 42, [137] (Judgment).

²² Lady Brenda Hale, Kuttan Menon Memorial Lecture: Equality in the Judiciary (Feb. 21, 2013).

²³ See Helena Barwick *et al.*, *GENDER EQUITY IN THE NEW ZEALAND JUDICIAL SYSTEM: JUDGES’ PERCEPTIONS OF GENDER ISSUES*, REPORT PREPARED FOR THE JUDICIAL WORKING GROUP ON GENDER EQUITY 32 (1996).

to the vision.”²⁴ It is perhaps that the “specialist knowledge” is a more nuanced and subtle perspective that brings a “gendered sensibility” to the decision-making process.²⁵ This sensibility may or may not influence the final outcome, but it presents a different perspective in the decision-making room.²⁶

It is this presence of a different perspective which has been found in both management and decision-making psychology studies to enhance decision making. Indeed, there is extensive work in decision psychology that demonstrates that differences in views and perspectives refine decision making. These studies suggest that in the context of any panel decision, those in the majority think more divergently and adopt a more flexible approach when different perspectives are expressed.²⁷ Indeed, a different perspective may not even be required, as Phillips *et al.* suggest that “surface level” diversity is sufficient to trigger expectations of informational difference, creating space for group members to raise and discuss unique information.²⁸ Even surface level diversity disrupts the presumption of a shared knowledge and understanding, creating an expectation of difference.²⁹ These studies suggest that a female judge does not have to possess a uniquely female perspective; rather, the presence of a female judge encourages discussion of difference.

²⁴ See Donald R. Songer et al., *Gender Diversity in the Intermediate Appellate Courts of Canada*, 37 JUST. SYS. J. 4, 9 (2016).

²⁵ See Hunter, *supra* note 10, at 124.

²⁶ See Dermot Feenan, *Women Judges: Gendering Judging, Justifying Diversity*, 35 J.L. & SOC'Y 490, 490 (2008).

²⁷ See generally Charlan Nemeth & Brendan Nemeth-Brown, *Better than Individuals? The Potential Benefits of Dissent and Diversity for Group Creativity*, in GROUP CREATIVITY: INNOVATION THROUGH COLLABORATION 4, 63–84 (2003); Charlan Jeanne Nemeth et al., *Improving Decision Making by Means of Dissent*, 31 J. OF APPLIED SOC. PSYCH. 1, 48–58 (2001).

²⁸ Katherine Phillips et al., *Surface-level Diversity and Decision-making in Groups: When does Deep-level Similarity Help?*, 9 GRP. PROCESSES & INTERGROUP RELATIONS 4, 467 (2006).

²⁹ Katherine W. Phillips & Denise Lewin Loyd, *When Surface and Deep-level Diversity Collide: The Effects on Dissenting Group Members*, 99 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 143, 151 (2006); Anthony Lising Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 PSYCH. SCI. 507, 509 (2004).

But diversity may also bring division and interpersonal conflict, which can limit engagement with informational differences and limit group performance.³⁰ As such, whilst diversity brings with it opportunity to enhance decision making, this is only possible where difference is valued and there is equal participation in the decision-making process. These studies suggest that the positive impact of difference will only be effective in the UK Supreme Court if the systems of the Court encourage and support the effective participation of women in all of the decision-making processes.

These studies of decision making highlight the significant importance of a female voice in the decision-making process. Indeed, these studies suggest that the presence of a women may play a role, albeit in a small number of cases, on the final disposition of the case. This is an important reason to ensure that women are equally represented on the Supreme Court bench. But judges also play a significant decision-making role in the appointments to the Supreme Court. These appointment decisions are taken by a panel of five and, albeit not considered judicial, there is little to suggest that the influences of women on the panel are different. Indeed, these decisions must be also subject to the duties of impartiality and equality that guide the judicial role. Whilst there is very little known about decision making in the appointments panel context, there is little to suggest that the patterns of decision making identified in the judicial decision-making studies do not apply, and the data suggests that active participation of a woman in panel decision making can refine the decision-making

³⁰ See Ashli Carter & Katherine Phillips, *The Double-edged Sword of Diversity: Toward a Dual Pathway Model*, 11 SOC. & PERSONALITY PSYCH. COMPASS 1, 4 (2017); Elizabeth Mannix & Margaret Neale, *What Differences Make a Difference? The Promise and Reality of Diverse Teams in Organizations*, 6 PSYCH. SCI. IN THE PUB. INT. 2, 31–55 (2005); Adam Galinsky et al., *Maximizing the Gains and Minimizing the Pains of Diversity: A Policy Perspective*, 10 PERSP. ON PSYCH. SCI. 742, 742–48 (2015).

process and encourage male decision makers to think differently. This is particularly true when the decision is considered a gendered decision. Therefore, to achieve the maximum benefit of diversity on the UK Supreme Court bench, the studies suggest that women should be both present on the bench and effectively participate in all decision-making processes. But the UK systematically fails to appoint women judges to the UKSC bench.

III UNDERREPRESENTATION OF THE FEMALE VOICE IN THE UKSC

The UK Supreme Court opened its doors in October 2009 and replaced the Appellate Committee of the House of Lords as the superior court of the United Kingdom. Since then, 30 judges have sat on the bench as full-time justices.¹⁹ Of these justices, only four have been women, and there has never been a visible justice from an ethnic minority background or disabled justice.

Lady Hale was the first woman on the UK Supreme Court, joining the first bench from the House of Lords, and was one of the longest serving members of the Court. She also played significant leadership roles on the Court. Lady Hale was appointed the Deputy President of the Supreme Court in June 2013 and she succeeded Lord Neuberger as President in September 2017. She achieved the mandatory retirement age and retired on the first of January, 2020, after serving just over ten years on the bench.

Only three women have been appointed to the Court. Lady Black joined the Court shortly after Lady Hale's appointment as President in October 2017, and she served on the Court until January 2021, for just over three years. Lady Arden joined the Court in October 2018. She, too, had a short tenure, achieving the mandatory retirement age in January 2022, and again

remaining on the court for just over three years. Lady Rose joined the Court in April 2021, and she is now the only woman on the 12-member Supreme Court bench. The short tenure of Lady Arden and Lady Rose is remarkable. The average tenure of a male Supreme Court Justice is almost twice that of a woman Justice, at over six years, with a range from three-and-a-half years to nine years. As women Justices are appointed to the Supreme Court later in their career, and thus have a shorter tenure, a woman justice hears substantially fewer cases than a male judge during their tenure. In short, women are unrepresented both on the court and in the decision making of the court.

But it is not simply on the full-time bench that women are underrepresented in the Court's decision making. Unlike many other common law superior courts, senior judges, who are not members of the Supreme Court bench, have been invited to hear cases with the Supreme Court justices. This was formalised in 2021 to provide an official supplementary panel. Ten judges, all male, have joined the Supreme Court to hear single or multiple cases, and Lady Black, who joined the panel on her retirement from the Court, is the only female justice to ever serve as a supplementary judge.

The notable lack of women on the Supreme Court bench and in the decision making of the highest court means that the female voice is underrepresented in this space. Fredman, when considering substantive equality, developed a framework to 'enhance voice and participation' in spaces where populations are underrepresented.³¹ It should be noted that Fredman's

³¹ It is important to note, that Fredman's framework was developed for those who are significantly disadvantaged in society (explaining that the four aims of the concept are to "redress disadvantage; to address stigma, stereotyping, prejudice and violence; to enhance voice and participation; and to accommodate difference and achieve structural change"). See Fredman, *supra* note 4, at 748.

theoretical framework reflects a particular concern with those who are disadvantaged, humiliated, excluded from power, or ignored. Female judges who are appointed to the Supreme Court (or who are potential appointees) would most likely be regarded as in a “position of relative power” and not necessarily disadvantaged or socially excluded. In other words, their voice might not be the voice which is the first to come to mind in relation to Fredman’s theory.³² But any space which does not represent the diversity of the society, and indeed limits the participation of populations of society, could be viewed as a space in which inequality can be manifested and amplified. Fredman provides a framework to both challenge and interrogate the systems and structures of power that may perpetuate that inequality.

IV SUBSTANTIVE EQUALITY, DIVERSITY AND THE FEMALE VOICE

Fredman’s four-dimensional concept of substantive equality provides a tool with which to assess a law, measure, or institution, in order to determine the extent to which they restrict or advance the right to equality and to consider changes that could improve the outcomes.³³ As such, it provides the ideal tool to interrogate the statutory and structural frameworks that support the UK Supreme Court as an institution and the potential inequality that the lack of diversity on the bench perpetuates.

Fredman explains the aims of substantive equality as follows:

Firstly, the right to substantive equality should aim to redress disadvantage. Second, it should counter prejudice, stigma, stereotyping, humiliation and violence based on a protected characteristic. Third, it should enhance voice and participation,

³² Fredman, *supra* note 4, at 748.

³³ *Id.* at 747–51. This paper draws on Fredman’s second iteration of the concept, as such, the numbers of the dimensions used here refer to those used in the 2016 iteration and not those in the Sandra Fredman, *DISCRIMINATION LAW* (2011).

countering both political and social exclusion. Finally, it should accommodate difference and achieve structural change.³⁴

Fredman does not expect each dimension always to be of equal importance in the analysis of a particular law or process. Indeed, she notes there may be both tensions and overlap between the dimensions, but she delineates the different aspects located in each dimension.³⁵ This section focuses on the first, third and fourth dimensions, which are particularly relevant to the discussion of structural processes such as the judicial appointments system, unlike the second dimension, “recognition,” which focuses on how individuals interact and relate to each other. In the context of the UK Supreme Court, the daily interactions and decision making of the court remain hidden from view. As such, with the exception of brief insights in interviews and biographies, little is known about the individual interactions, and the second dimension remains behind closed doors.³⁶

In the first dimension of Fredman’s thesis, “disadvantage” is clearly focussed on socio-economic disadvantage, which includes underrepresentation in jobs. To a limited extent, this element of “disadvantage” is relevant in determining the impact of the judicial appointments process in terms of representation. However, it is Fredman’s reference to “the constraints which power structures impose on individuals because of their status” that is most pertinent to the second aspect of this Article’s assessment, namely the effectiveness of participation in decision-making.³⁷ As such, when considering Fredman’s first dimension in the context of the UK Supreme Court, it is necessary to examine the factors that may serve to “disadvantage”

³⁴ See Fredman, *supra* note 4, at 727.

³⁵ See Fredman, *supra* note 32, at 750.

³⁶ See, e.g., generally Lady Brenda Hale, SPIDER WOMAN (2021); Lord Hope, UK SUPREME COURT . . . AND AFTERWARDS: 2009–2015 (2019).

³⁷ SANDRA FREDMAN, DISCRIMINATION LAW 27 (2011).

the woman judge on two levels: the factors that may limit appointment to the bench and those that affect participation at every stage.

The third and fourth dimensions are also relevant to the discussion in relation to judicial diversity and effective participation. The third dimension identifies the significance of participation and voice and the fourth dimension highlights the need to accommodate difference and enable structural change or transformation.³⁸ Fredman identifies the close connection between the third and fourth dimensions, noting, “The need to accommodate difference and bring about structural change should also synchronize with the third dimension, participation and voice.” Two aspects are identified in relation to participation: political participation and active involvement within the community. Fredman compares the latter with Collins’s focus on social inclusion as the aim of substantive equality.³⁹ Thus, the second aspect, as with disadvantage, is more concerned with socio-economic exclusion. But the first element—political participation—is relevant to determining the impact of structures and processes on limiting or supporting effective participation on the bench.⁴⁰ As Fredman notes, the participative dimension is important because it invites the question, what counts as participation in order to achieve substantive equality?⁴¹ This Article will draw on these understandings to explore how effective participation is constructed in the UK Supreme Court and the barriers and structures that may limit such participation, focusing on the appointments process.

³⁸ See Fredman, *supra* note 32, at 748.

³⁹ See *id.*; Hugh Collins, *Discrimination, Equality and Social Inclusion*, 66 MOD. L. REV. 16, 16 (2003).

⁴⁰ In the context of the U.K. Supreme Court, the focus is on participation rather than the political element highlighted by Fredman. Unlike the U.S. Supreme Court, party politics does not play a role in the appointments of Supreme Court Justices and the political position of the Justice is not publicly known.

⁴¹ Fredman, *supra* note 4, at 735.

Finally, turning to the fourth dimension of Fredman's concept of equality, there is a clear link with the arguments in support of hearing the voice of women justices. Fredman refers to this dimension of substantive equality as "transformative," noting the "problem is not so much difference per se, but the detriment which is attached to difference," and thus, one of the central aims of substantive equality should be to accommodate difference by dealing with the harm linked to that difference. Fredman says this means that existing social structures must be changed to accommodate difference, rather than requiring members of out-groups to conform to the dominant norm.⁴² Fredman provides examples of structures which should be changed in order to accommodate difference, such as working time. In relation to this dimension, Fredman has suggested that different groups might face pressure to assimilate.⁴³ One question is thus: in the UK Supreme Court, are there structures in place to ensure that women justices, who consistently remain in the minority, are supported to express difference? For the purposes of this Article, the focus is on the structures of the appointments process.

In summary, in order to achieve Fredman's four-dimensional substantive equality, the Supreme Court should have structures and processes in place to redress disadvantage and should enhance voice and participation by putting structures in place to ensure that those who are different can express that difference.⁴⁴ The structures and process must act at two levels. The first is the appointments process, which should both encourage and support

⁴² Fredman, *supra* note 4, at 735.

⁴³ *Id.* at 733; Sandra Fredman, *Substantive Equality Revisited: A Rejoinder to Catharine MacKinnon*, 14 INT'L J. OF CONST. L. 747, 747–48; SANDRA FREDMAN, DISCRIMINATION LAW 278 (2011).

⁴⁴ See Fredman, *supra* note 4, at 727.

women into appointment, but should also ensure that women actively participate in the appointments process. The second requires that, once appointed, women justices have the structures and processes to effectively participate and ensure their voices are heard.

V APPOINTMENTS TO THE SUPREME COURT BENCH - WHERE IS THE FEMALE VOICE?

The UK enshrined the importance of judicial diversity in 2005 when it established the Judicial Appointments Commission (JAC) under the Constitutional Reform Act. Whilst judicial selection remains “solely on merit,”⁴⁵ the Act does impose a very limited duty on the public authority to “have regard to the need to encourage diversity in the range of persons available for judicial selection.”⁴⁶ The constitution of the commissioners is set out in the Act and, whilst the profession has a majority role in the appointment of judges, the commission has a lay chair, who is joined by five lay members. Of the 15 members of the commission, only 7 are members of the judiciary—a stark move away from the tap-on-the-shoulder approach that dominated before the JAC. Women also play an equal role on the commission, with an equal number of women drawn from both lay, judicial, and professional backgrounds.

Despite the very limited duty to encourage diversity, the JAC has had significant success in changing the demographics of the tribunals and lower courts.⁴⁷ In 2022, 52 percent of all tribunal judges were female, as were 40 percent of district judges. But the JAC has not had the same success in the higher courts, with only 27 percent of the High Court and Court of Appeal female. It is also notable that only one in five of the senior judicial roles was occupied

⁴⁵ Const. Reform Act 2005, c. 2, § 63 (2) (U.K.).

⁴⁶ Const. Reform Act 2005, c. 2, § 64 (1) (U.K.).

⁴⁷ The JAC established a targeted outreach time to encourage applications from less represented groups in 2020. The effect of this has yet to be assessed.

by a female judge.⁴⁸ This has more significance when one considers the appointments process to the UK Supreme Court.

The Constitutional Reform Act 2005 also established the UK Supreme Court and set out the framework for appointments.⁴⁹ Unlike other judicial appointments, the recommendation of the candidate for the appointment of a Supreme Court Justice is decided by an *ad hoc* selection commission.⁵⁰ The commission is chaired by the President of the UK Supreme Court.⁵¹ Following changes introduced by the Crime and Courts Act 2013, the Deputy UK Supreme President is no longer a member of a selection commission. Instead, the President nominates a senior judge to join the panel with a representative of each of the three JACs (England & Wales, Scotland, and Northern Ireland). Only one member of the commission must be a lay person.

⁴⁸ UK Ministry of Just., *Diversity of the judiciary: Legal professions, new appointments and current post-holders - 2022 Statistics* (2022), <https://bit.ly/41OyEkC>.

⁴⁹ Const. Reform Act 2005, c. 4, pt. 3 (U.K.).

⁵⁰ Const. Reform Act 2005, c. 4, §§ 26, 27, 27A, 27B, Sch. 8 (U.K.).

⁵¹ Unless it is a commission to select the President.

Table 1 details the *ad hoc* appointment commissions public advertisements and the memberships of the commissions from 2010 until 2022. Since the opening of the UK Supreme Court, there have been nine published appointment commissions which were constituted to recruit new members of the UK Supreme Court bench.⁵² These commissions appointed 20 members of the UK Supreme Court bench, 2 of whom were women. The failure to appoint women to the Supreme Court bench could happen at two procedural levels: application and selection. In short, women may not apply for the role, and, if they do apply, they may not be appointed. There is no publicly available data on the demographics of those who applied for and were short-listed for the UK Supreme Court.

VI SUBSTANTIVE EQUALITY – HEARING THE FEMALE VOICE

If substantive equality is to be achieved, Fredman’s work suggests that the structures, processes, and policies should ensure that women effectively participate in every stage of the appointments process. As with many other common law superior courts, the appointment of the Supreme Court justice is “strictly on merit,” with very little guidance as to what constitutes merit. It has long been recognised that an appointments system that is not grounded in standardised tests is susceptible to the instinct of those who appoint and their conception of what constitutes merit. Indeed, debates surrounding the appointment of judges have argued that this “instinct” is grounded in a masculine understanding of merit.⁵³ Rather than rehearse these debates here, this Article recognises that this construction is a “barrier” to the

⁵² The nine reflect the appointment commissions available on the Supreme Court website. It may be that other commissions were constituted but the record is no longer publicly available.

⁵³ John Morison, *Beyond Merit: The New Challenge for Judicial Appointments*, in *DEBATING JUDICIAL APPOINTMENTS IN AN AGE OF DIVERSITY* 223–39 (Graham Gee & Ericka Rackley eds., 2018); see also MERILEE S. GRINDLE, *JOBS FOR THE BOYS* 1–2 (2012); Kate Maleson, *Rethinking the Merit Principle in Judicial Selection*, 33 *J.L. & Soc’y* 126, 133 (2006); see also Margaret Thornton, *‘Otherness’ on the Bench: How Merit is Gendered*, 29 *SYDNEY L. REV.* 391, 411 (2007).

appointment of women, particularly perhaps when appointments decisions are dominated by the male perspective. Indeed, there is little to suggest that the early psychology studies of Oliphant and Elmore which recognised that the gender of the appointer influenced their perception of merit, has changed.⁵⁴ Without specific encouragement towards diversity, or a structured interview process, studies have demonstrated that women are rated less favourably in interviews, particularly in when applying for roles perceived as masculine.⁵⁵ Whilst there is little psychological evidence available to understand the effect of women as members on the panels that appoint judges, studies in large companies suggest that “diversity begets diversity.”⁵⁶ Perhaps in the same way that women judges bring a different perspective, a diversity of gender on an appointments panel would moderate the gendered expectations of “merit” attributed to prospective UK Supreme Court justices. But it is not sufficient that women are present on the appointments panel. The women must also be afforded positions of equal participation.

Each *ad hoc* appointments commission determines its own decision-making process.⁵⁷ Whilst again there are few psychological studies that explore the role of power, prestige, and expert knowledge in the decision making of an appointments panel, there is some evidence that, in

⁵⁴ See Van N. Oliphant & Elmore R. Alexander III, *Reactions to Resumes as a Function of Resume Determinateness, Applicant Characteristics, and Sex of Raters*, 35 PERS. PSYCH. 829, 841 (1982); MICHAEL W. KRAMER, ORGANIZATIONAL SOCIALIZATION: JOINING AND LEAVING ORGANIZATIONS 56 (2010).

⁵⁵ For perceptions of gender difference and various interventions that may limit gender bias, see e.g., Ekaterina Pogrebtsova et al., *Selection of Gender-incongruent Applicants: No Gender Bias with Structured Interviews*, 28 INT’L J. OF SELECTION & ASSESSMENT 117, 121 (2020); Carol Isaac et al., *Interventions that Affect Gender Bias in Hiring: A Systematic Review*, 84 ACAD. MED. 1440, 1441 (2009); Judith L. Juodvalkis et al., *The effects of job stereotype, applicant gender, and communication style on ratings in screening interviews*, 11 INT’L J. OF ORG. ANALYSIS 67, 67 (2003).

⁵⁶ Siri Terjesen et al., *Women Directors on Corporate Boards: A Review and Research Agenda*, 17 CORP. GOVERNANCE 320, 320–37 (2009); Dominique A. Potvin et al., *Diversity begets diversity: A global perspective on gender equality in scientific society leadership*, 13 PLOS ONE 1, 1–14 (2018).

⁵⁷ Const. Reform Act 2005, c. 4 § 27 (U.K.).

the absence of clear processes, expert knowledge and social power can influence the final outcome.⁵⁸ In the context of an *ad hoc* panel, specialist knowledge would be judicial knowledge. Little is known how this knowledge and social power impacts decision making in the room, but evidence from medical decision making suggests that, without clear structures and processes, in a shared decision-making setting, perceptions of expert knowledge and power influence the outcome.⁵⁹ It is therefore not inconceivable, despite the power and social stature of those appointed to an *ad hoc* appointments commission, that the perspectives of the President who chairs the appointment panel and those with judicial expertise may prevail, in the absence of clearly structured decision-making processes that facilitate shared decision making. Thus, it could be argued that, to achieve Fredman's substantive gender equality in this context, where the exercise of discretion, power, and expert knowledge plays an important role, as a counterbalance the *ad hoc* appointments panel should consist of, at a minimum, a majority of women, when the UK Supreme Court President is male. Further, these women should be drawn from the senior judiciary to ensure effective participation and equality of power. But the appointments commissions do not achieve either standard.

⁵⁸ See generally Camille Limoges, *Expert Knowledge and Decision-Making in Controversy Contexts*, 2 PUB. UNDERSTANDING OF SCI. 417 (1993).

⁵⁹ See Andrej Michalsen et al., *Interprofessional Shared Decision-Making in the ICU: a Systematic Review and Recommendations from an Expert Panel*, 47 CRITICAL CARE MED. 1258, 1260 (2019).

Of the nine panels publicly available, despite the gender equality of each of the relevant JAC commissions from which the panel members were drawn, only one female member was present in each *ad hoc* commission, with the exception of one panel chaired by Lord Neuberger where two were nominated. The female member from the JAC was consistently a lay member. As a result, the male judicial voice dominated the appointment panel. Men constituted the majority of every *ad hoc* commission appointment panel, with only one third of panels having two women members. In two of these, the second woman was Lady Hale, the President of the UK Supreme Court at the time; when Lady Hale was not President, the judicial voice represented on the panels was male. Perhaps it is only a coincidence and indeed the numbers are too low to draw any inference, but two of the three female judicial appointments to the UKSC were made by panels with more than one woman.⁶⁰ The single voice of minority may have little influence on the final decision making. Indeed, critical mass theory suggests that until women working in a predominantly male environment increase beyond “token status,” they will largely conform to the characteristics of the dominant male group. The limited impact of a single female voice is further compounded by the “consultation” process that happens before the final appointment.

⁶⁰ There is extensive data on the effective participation of the minority requires more than one voice but there is insufficient data here to make any such argument.

The process of consultation determined by the statute requires that all “senior judges” are consulted.⁶¹ To date, only one in five of these senior roles are occupied by women, and once again the male voice dominates the decision-making process. This is further compounded by a duty to consult the members of the Supreme Court. At every stage of the appointments process, the dominant voice is that of the traditional white male judge; it is perhaps unsurprising the UK Supreme Court has failed to achieve any consistent shift in diversity demographics since its opening in 2009. This does not mean that the Court has not made attempts to enhance the diversity of the Court and encourage equal participation, but that the attempts that have been made are insufficient to achieve substantive equality.

VII THE EQUALITY ACT: AN IMPETUS FOR CHANGE

An opportunity to treat women more favourably arose in 2011 when, against the backdrop of increasing social pressure to ensure that public bodies were representative of the populations they serve, the government extended the scope for taking positive action under the UK equality legislation.⁶² The change enabled public employers to treat those from social minorities more favourably in the appointments process, albeit in very limited circumstances. To some extent, the strengthening of the equality legal framework provides a statutory foundation to amplify Fredman’s four dimensions of substantive equality and encourage positive action to support equal participation.⁶³

⁶¹ Constitutional Reform Act 2005 § 27A (2005) (U.K.).

⁶² Equality Act 2010 § 159 (2010) (U.K.). Section 159 of the Equality Act 2010 allows an employer to treat an applicant or employee with a protected characteristic (for example, race, sex or age) more favourably in connection with recruitment or promotion than someone without that characteristic who is as qualified for the role, provided certain conditions are satisfied. *Id.*

⁶³ See Government Equalities Office, *Framework for a Fairer Future: The Equality Bill 2008*, GOV.UK (June 26, 2008), <https://bit.ly/3Yo68TV>.

The Equality Act 2010 consolidated and reformed the incremental anti-discrimination legislation that had been introduced in the UK since the 1960s, including the Sex Discrimination Act 1975.⁶⁴ It retains the original focus on negative obligations: the duty not to discriminate, victimise, or harass in relation to sex and eight other protected characteristics. The legislation dictates that it is unlawful to discriminate on grounds of sex directly or indirectly in the employment context, which includes appointment to public office and applies to judicial appointment.⁶⁵ The concept of formal equality, equal treatment for all regardless of background, remains a key concept underpinning the Equality Act 2010. Thus, as noted by Barmes, any action that attempts to redress disadvantage or accommodate difference through preferring a candidate from an underrepresented group, referred to as positive action, must fall within one of the specific legislative exceptions (positive action provisions) in order to avoid being unlawful discrimination.⁶⁶

The 'Tiebreak' Section 159 of the Equality Act 2010

There are two positive action provisions: the “tiebreak” provision was first introduced in Section 159 of the Equality Act 2010, reflecting the influence of EU jurisprudence, while Section 158 builds upon the limited positive action measures found in the original anti-discrimination legislation.⁶⁷ In relation to a recruitment or promotion decision in the employment context, Section 159 permits the employer to treat an individual more

⁶⁴ See Equality Act (2010) (U.K.). The consolidated legislation included: Sex Discrimination Act 1975; Race Relations Act 1976; Disability Discrimination Act 1995; Employment Equality (Sexual Orientation) Regulations 2003; Employment Equality (Religion or Belief) Regulations 2003; Employment Equality (Age) Regulations 2006. *Id.*

⁶⁵ *Id.* §§ 50–51.

⁶⁶ Barmes, *supra* note 6, at 629.

⁶⁷ See Equality Act 2010 §§ 158–59 (2010) (U.K.). ‘Positive action’ is the term used in the Equality Act and is the term commonly used (though not exclusively) in UK and EU discussions. Christopher McCrudden, *Rethinking Positive Action*, *INDUS. L.J.* 219, 229 (1986); Lisa Waddington & Mark Bell, *Exploring the Boundaries of Positive Action Under EU Law: a Search for Conceptual Clarity*, 48 *COMMON MKT. L. REV.* 1503, 1504–07 (2011); Christopher McCrudden, *Resurrecting Positive Action*, 18 *INT’L J. OF CONST. L.* 429, 431 (2020).

favourably than another person because of the individual's protected characteristic (which includes sex). It provides a defence to a claim of direct discrimination. An employer can rely on Section 159 in very limited circumstances: when they reasonably think that either participation by those who share a particular protected characteristic is disproportionately low or persons sharing a protected characteristic suffer a disadvantage connected with the characteristic. The employer must not adopt a general policy of taking sex or race into account; thus, it must be only used in limited circumstances and act as a "tiebreak" or "tipping" provision. In other words, the employer can rely on Section 159 only where two candidates are "as qualified" as each other and where applying the tiebreak is a proportionate means of achieving the aim of either enabling greater participation or overcoming or minimising the disadvantage. As such, the adoption and application of the steps permitted in Section 159 is a small step towards redressing the disadvantage as required for substantive equality, but it does not achieve the substantive structural changes that Fredman would advocate. On its own, it does not facilitate participation or the accommodation of difference. Indeed, it is only effective in making a small incremental change in addressing disadvantage if it is used.

The "tie break" provision in Section 159 came into force in April 2011.⁶⁸ In the absence of any exception, it was possible, from this point, for the *ad hoc* appointments commission to rely on Section 159. A year later, albeit not explicitly in response to the change in the Equality Act, the Ministry for Justice released its proposals for change in "Appointments and Diversity: A judiciary for the 21st Century," in response to the public consultation on judicial diversity.⁶⁹

⁶⁸ Equality Act 2010 (Commencement No. 5), Order 2011 No. 96 (2011) (U.K.).

⁶⁹ *Appointments and Diversity: A Judiciary for the 21st Century*, MINISTRY OF JUST. (May 11, 2012), <https://bit.ly/3y1E5d2>.

The report recognised the lack of diversity in the higher courts and proposed two changes “that will support the aim of greater diversity”: part-time working in the higher courts including the Supreme Court and the introduction of a “tipping point” provision that allows positive action to promote diversity when two applicants to judicial office are of “equal merit.”⁷⁰ However, the subsequent 2013 amendments made it clear that Section 159 does not apply to appointment to the Supreme Court. Instead, when there are two candidates of equal merits, the appointing commission can choose one person over the other “for the purposes of increasing diversity.” The approach was subject to intense scrutiny, with concerns about legal challenges and the requirement that appointment to the Supreme Court be “on merit.” The outcome was the express disapplication of Section 159 in relation to the Supreme Court, but nevertheless a tiebreak option similar to the one applying to other judicial appointments was introduced. As a result, Section 27 of the Constitutional Reform Act makes explicit that when there are two candidates for appointment to the Supreme Court of “equal merit,” the appointing commission can prefer one person over the other “for the purposes of increasing diversity within the group of persons who are the judges of the Court.” It is very unlikely that the slightly different approach in Section 27 will be significant as its key similarity with Section 159 is the encouragement of the “tipping point” approach.⁷¹

The equal merit provisions, whether in Section 159 of the Equality Act or the CRA 2005, are permissive—the *ad hoc* appointment commission is not prevented from preferring one of the candidates who are equally meritorious, for the purposes of increasing diversity, but is under no obligation to do so. The adoption and incorporation of the equal merit provision thus

⁷⁰ *Id.*; *Appointments and Diversity ‘A Judiciary for the 21st Century’ Response to Public Consultation*, MINISTRY OF JUST. (May 11, 2012), <https://bit.ly/3JfHznY>.

⁷¹ Patrick O’Brien, *Changes to Judicial Appointments in the Crime and Courts Act 2013*, PUB. L. 179–88 (2014).

provided an opportunity to enhance diversity on the UK Supreme Court bench but only when two candidates were of “equal merit.” Indeed, the consistent lack of diversity on the bench suggests it is unlikely to have been applied. Even at the time of adoption, there was significant scepticism within the profession as to whether any two candidates are ever of “equal merit,” and it was doubted whether the equal merit provision available to the JAC would be utilised.⁷² But Section 159 is not toothless. Whilst there has been little success at the UK Supreme Court level, the JAC has had more success. Between 2014 and 2021, the equal merit policy was applied 286 times.⁷³ For the JAC, the equal merit provision is a tool to “drive diversity in the judiciary.”⁷⁴ This is notable, not simply because Section 159 was applied, but because the application of Section 159 draws attention to the structures and policies that encourage appointing panels to consider two candidates of equal merit. As discussed earlier, in the absence of clear procedures and measurable outcomes, the decision is likely to remain grounded in instinct, and in the absence of a clear mandate for change, decision makers may not overcome the “instinctive” understanding of the masculine judge and the judicial role. In stark contrast to the appointments process for the Supreme Court, the appointment of judges through the JAC is grounded in “objective, evidence-based assessment against competencies, skills and abilities . . .” using tools designed to these skills. This structured approach perhaps facilitates the increased finding of “equal merit” and thus the increased use of the equal merit provision.⁷⁵ As Fredman has argued, substantive equality requires systems and processes that redress disadvantage, and the addition of robust objective assessments appears to be a step in the right direction. But substantive equality requires that disadvantage not only be

⁷² See generally *id.*

⁷³ Evidence presented by Sarah Lee to the House of Commons on the 29th of June 2021.

⁷⁴ Oral evidence from Sarah Lee to the House of Lords on the 29th of June 2021.

⁷⁵ *Id.*

redressed in the selection processes but also that women are both encouraged and supported to participate as candidates in the appointments process.

Soft positive action – Section 158 of the Equality Act 2010

Whilst the equal merit provision can support, up to a point, steps taken to redress disadvantage of those who reach the final stages of a judicial appointment, does the Equality Act provide any further encouragement to remove structural barriers and ensure more women seek to participate on the bench? As Lord Pannick urged, the leadership needs “to identify ways of bringing to the fore those highly skilled women and members of ethnic minorities who are in the legal profession . . . so they can be considered for appointment on merit.”⁷⁶ Section 158 is the general provision which can be relied upon to pursue “soft” positive action in the recruitment process, such as outreach programmes. There are three circumstances in which it is permissible for organisations to take positive action: if the employer

- 1) reasonably believes that persons within a group either suffer a disadvantage connected to the characteristic;⁷⁷
- 2) have needs that are different from the those of persons who do not share the same characteristic as those within the group;⁷⁸ or
- 3) the employer reasonably believes that participation in an activity by persons who share a protected characteristic is disproportionately low.⁷⁹

⁷⁶ See 4 Dec. 2012, HL Rep (2012) col. 485 (U.K.).

⁷⁷ See Equality Act 2010, c. 15, § 159(1)(a) (U.K.).

⁷⁸ See Equality Act 2010, c. 15, § 159(1)(b) (U.K.).

⁷⁹ See Equality Act 2010, c. 15, § 158(1)(c) (U.K.).

Employers can take steps when reasonably believing one or more of these conditions exist. The measures must be proportionate, to meet one or more of the stated aims, which reflect each of the three conditions.⁸⁰ Whether the action is proportionate will depend upon the seriousness of the disadvantage or the extent to which there is very low participation. Lawful positive action would be restricted to “soft” action, such as providing training opportunities or mentoring and shadowing schemes.⁸¹ Section 158 clearly reflects Fredman’s aims of substantive equality that target improved participation in activities from members of underrepresented communities. This Section also seeks to redress disadvantage, and is broad enough to encourage structural change.⁸² Nevertheless, Section 158 has been described as a very limited exception to the general prohibition on taking account, whether affirmatively or negatively, of an individual’s sex or race in the hiring process, due to its voluntary nature and the remaining uncertainty as to what amounts to lawful positive action, as opposed to unlawful discrimination. Steps were introduced in 2017 to increase applications, including opportunities to sit with the Court, private discussions, and a tour for prospective candidates. But it was not until 2019 that applications from candidates that would enhance the diversity of the Court were overtly encouraged with the addition of the line:

Applications are sought from the widest range of candidates eligible to apply, including those who are not currently full-time judges, and particularly those who will increase the diversity of the court.

Section 158 facilitates the small steps the court has taken to encourage more diverse candidates to apply, but there was no evidence, in the published calls for applications, that

⁸⁰ See Equality Act 2010, c. 15, § 158(2) (U.K.).

⁸¹ See generally Equality and Human Rights Commission, *Equality Act of 2010 Statutory Code of Practice: Services, Public Functions and Associations*, Chapter 10, <https://bit.ly/3ZXgVp8> (last visited Mar. 19, 2023).

⁸² See generally Lisa Waddington & Mark Bell, *Exploring the Boundaries of Positive Action under EU law: a Search for Conceptual Clarity*, 48 COMMON MKT. L. REV. 1503 (2011).

any steps were taken to specifically encourage women or other members of less represented communities to apply. As will be seen below, that changed in the call for applicants in 2021.

Public Sector Duty - Equality Act 2010 Section 149

Beyond the two positive action provisions of the Equality Act 2010, there is one further provision which arguably most reflects Fredman's concept of substantive equality and has the potential for leading to structural change, resulting in effective participation. Section 149 imposes a positive obligation on public authorities to have due regard to the need to eliminate discrimination, to advance equality of opportunity, and to foster good relations between different groups.⁸³ Known as the public sector equality duty, Section 149 aims to integrate consideration of equality in the development of policies and delivery of services. Fredman has described Section 149 as a "distilled version of the four dimensions" of equality, noting that the second dimension is only implicit in the reference to fostering good relations.⁸⁴ But the requirement to have due regard to the need to advance equality of opportunity clearly reflects the other dimensions. One cautionary note: whilst Section 149 has been welcomed by advocates of substantive equality, it is important to recognise its limits. The duty is to have "due regard" to the need to advance equality of opportunity, not to achieve any particular outcomes, and it is viewed as a "procedural" standard.⁸⁵

It is notable that Section 149 explicitly provides that having due regard to the need to advance equality of opportunity includes positive action, mirroring the language found in Section

⁸³ See Equality Act 2010 c. 15, § 149 (U.K.).

⁸⁴ See SANDRA FREDMAN, DISCRIMINATION LAW 313–14 (2011).

⁸⁵ See *id.* at 307–10; see also Sandra Fredman, *The Public Sector Equality Duty*, INDUS. L. J. 405, 410–11 (2011).

158.⁸⁶ Thus, while section 158 on its own may be very limited, when understood as a means by which the Supreme Court can ensure compliance with its duty under Section 149, it may have more impact on structural change. Prior to the release in May 2021 of the UK Supreme Court's first Judicial Diversity and Inclusion Strategy 2021-2025,⁸⁷ the Court issued a notably different call for applications, taking an overt step towards redressing perceived disadvantage. It stated:

The selection commission welcomes applicants from the widest range of applicants eligible to apply, and particularly encourages applications from those who would increase diversity of the Court, bearing in mind that Lady Black's retirement will leave the Court with only one female Justice and without any black or Asian ethnic background.⁸⁸

This explicit request for diverse candidates, amplified the "gender issue," which resulted in the appointment of a woman Justice, Lady Rose.

This departure from the traditional approach was followed by the clear strategy which reflected the court's duty to have due regard to the need to advance equality of opportunity. Indeed, Lord Reed noted in his forward to the strategy that he wanted the "best qualified and most talented people to become justices of this Court, regardless of the gender or ethnicity," and stated that "equality and inclusiveness are fundamental to the success of the organisation."⁸⁹ This clear recognition of the need for diversity and equality was embedded in the strategy that was introduced to expressly fulfil the obligations of the Court under the

⁸⁶ See Equality Act 2010, c. 15, § 149(3) (U.K.).

⁸⁷ Judicial Diversity & Inclusion Strategy 2021–2025, at 3 (UKSC & the Jud. Comm. Of the PC), <https://bit.ly/3Jgf1up>.

⁸⁸ The Selection Comm. for the Appointment of a Sup. Ct. Just., see tbl. 1 (2021).

⁸⁹ Judicial Diversity & Inclusion Strategy 2021–2025, at 3 (UKSC & the Jud. Comm. of the PC), <https://bit.ly/3Jgf1up>.

Equality Act 2010 and was in line with its obligations under section 149.⁹⁰ The strategy had five aims:

1. To support and build an inclusive and respectful culture and working environment at the Court, where all Justices support the strategy and lead the way
2. To support the progression of underrepresented groups into judicial roles
3. To support an increase in the number of well-qualified applicants from underrepresented groups for the role of Justice
4. To proactively communicate the Court's support for diversity and inclusion to the legal profession and the public
5. To fulfil our obligations under the Equality Act 2010: as part of the Court's obligations under the Equality Act (2010) and the Public Sector Equality Duty (PSED)⁹¹

The first action of the strategy document, stated to achieve the second aim, was that justices should “publicly promot[e] greater diversity within the judiciary.”⁹² The 2021 call for applicants reflected that overt aim. The third aim centred on Section 158 and incorporated “soft” methods to encourage applications including mentoring and pipeline events. The overall strategy also recognised the need for “bias awareness” and diversity and inclusion training. This is perhaps the overt recognition of the potential for instinct to create inequality.

⁹⁰ In their analysis of the impact of the legislative reforms designed to increase diversity on the part played by the legal profession in the appointment of the judiciary, Barmes and Malleson note that the positive duties in the Equality Act 2010 “steer” the public sector organisations that are subject to the duties, “directly to address identity questions in distinctive ways.” Lizzie Barmes & Kate Malleson, *The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity*, 74 MOD. L. REV. 245, 262 (2011).

⁹¹ Judicial Diversity & Inclusion Strategy 2021–2025, at 7–8 (UKSC & the Jud. Comm. of the PC), <https://bit.ly/3Jgf1up>.

⁹² *Id.* at 7.

Each of these measures is a step on the path towards substantive equality and redressing the disadvantages (both conscious and less conscious) that limit the appointment and participation of women in the UK Supreme Court. Indeed, some progress has already been made.

In its 2022 annual report on the progress of the action taken to meet the objectives, in relation to the third objective, which sought to increase applications from underrepresented groups, the Court noted that it continued its “practice of regularly inviting senior judges from lower courts to sit on cases at the Supreme Court and the Judicial Committee of the Privy Council (JCPC).”⁹³ Of the 15 judges invited in 2021-22, 5 were women. This is a notable change as, prior to 2021, only male senior judges had sat with the Court.

The main action towards meeting the second objective, to support the progression of underrepresented groups into judicial roles, involved the Court’s first paid internship programme, which was the initiative of Bridging the Bar. Six of the eight internees were female.⁹⁴ There is a clear recognition of the diversity imperative, and a positive move which recognises the clear need for the female voice to be heard on the UK Supreme Court bench. Indeed, the significant presence of women in each of these diversity initiatives suggests that women want to join the court. There is a clear motivation to change, and there are women who wish to be part of that change, yet significant barriers to substantive equality remain.

VIII CONCLUSION: SUBSTANTIVE EQUALITY TO ACHIEVE DIVERSITY

⁹³ Judicial Diversity & Inclusion Strategy 2021 – 2025 Annual Update 2022, at 9 (UKSC & the Jud. Comm. of the PC), <https://bit.ly/3mPGv15>.

⁹⁴ *Id.* at 3.

A diverse judiciary that reflects the society which it serves is important to provide public confidence in the justice system. Whilst some progress has been made, particularly at lower levels of the judiciary, the diversity, most markedly at the level of the High Court and above, does not reflect wider society.⁹⁵

A report by the Judicial Diversity Taskforce published over ten years ago recognised the importance of judicial diversity and expressed concern about the lack of diversity in the superior courts. Since the publication of the report, significant progress has been made by the Judicial Appointment Commission (JAC) to increase judicial diversity, introducing a range of structures and policies to address the barriers to application and appointment. The Constitutional Reform Act 2005 created both the JAC and the Supreme Court. Since then, the JAC has operated a standardised system of appointment and has been focussed on the statutory duty to “have regard to the need to encourage diversity.” In contrast, the Supreme Court, exempt from the processes and duties of the JAC, has operated its own system of appointment which reflects the male judicial instinct. When the Court opened its doors in 2009, there was only 1 woman on the 12-member bench. In 2023, despite scrutiny, policy change, and intense debate, nothing has changed: Lady Rose is the sole female voice on the bench. This Article draws on Fredman’s theoretical framework of substantive equality, to identify the barriers and structures that limit the progress towards a diverse Supreme Court bench.

⁹⁵ Appointments and Diversity ‘A Judiciary for the 21st Century’ Response to Public Consultation. CP19/2011 ‘, at _5_ (May 2012), see [Appointments and Diversity ‘A Judiciary for the 21st Century’ response to consultation paper \(justice.gov.uk\)](https://www.justice.gov.uk/appointments-and-diversity)

Fredman's conception of "substantive equality" provides a tool to assess the extent to which institutional processes, policies, and structures may disadvantage and fail to redress existing disadvantage. It is recognised that women judges have significant power and social status and were not at the heart of Fredman's consideration, but whilst the UK Supreme Court remains dominated by the white male voice, women and other minorities are excluded from effective participation.

This Article has focussed on the processes and structures of appointment that have failed to consistently appoint women to the Supreme Court bench. In 2022, the JAC received almost equal numbers of applications for judicial appointment from women; little is known about the gender distribution of those who apply to the Supreme Court.⁹⁶ Indeed, the many recent steps the Court is taking to encourage applications from women would suggest that they may have been underrepresented in some of the calls.

It is therefore encouraging to see the steps the Court has recently taken to encourage those who have traditionally seen themselves as excluded to consider a place on the bench. The explicit call for a female judge in 2021 was a significant step and strong signal of potential change. It was an overt recognition of the need and desire for change, and the new initiatives are making some progress in changing the perception of the Court. The further steps to encourage and support women at earlier stages of their career may also encourage applications, but each step neglects the essential elements of substantive equality: both the presence and effective participation of women judges. Women, whilst encouraged to look-in

⁹⁶ *Diversity of the Judiciary: Legal professions, new appointments and current post-holders - 2022 Statistics*, MINISTRY OF JUST. (July 14, 2022), <https://bit.ly/3ZLGWIq>.

and aspire to the Court, still remain outside. As long as there remains only a single female voice both in the bench and on the *ad hoc* appointments panel, substantive equality will not be achieved.

At the start of this Article, attention was drawn to the importance of women on the bench in terms of both their presence and participation in the decision-making process. Both are required to achieve substantive equality. Throughout the lifespan of the Court, the majority of appointments have been carried out by a panel of four men and a single woman. It is recognised that the presence of even a single female voice on a decision-making panel is important and encourages consideration of difference, but a single female voice has not been sufficient for change.

It is notable that one of the aims of the JAC is:

to convene panels across every selection exercise that represent the diversity of our society and provide candidates with the reassurance that our processes are fair and free from bias. It is hoped that diverse panels lead to improved progression rates for our target group candidates.⁹⁷

This would accommodate difference and ensure diverse participation on selection panels, an important step towards substantive equality. Yet the Supreme Court has consistently been treated as an exception, with different selection processes. In 2012, three years after the opening of the Court, concern was expressed about the appointments process:

The current processes for both the Court of Appeal and the Supreme Court require the significant involvement of the serving judiciary. Given the concern expressed to the Panel that selection panels may subconsciously recruit in their own image, this involvement runs the risk that the process is perceived, rightly or wrongly, as unfair.⁹⁸

⁹⁷ *Priorities & Actions for 2023*, JUD. DIVERSITY F., at 12 (Dec. 21, 2022), <https://bit.ly/3JB0dVF>.

⁹⁸ *Improving Judicial Diversity: Progress towards Delivery of the 'Report of the Advisory Panel on Judicial Diversity 2010'*, JUD. DIVERSITY TASKFORCE, at 40 (Sept. 2012), <https://bit.ly/3LgV20d>.

A task force established in response by The Ministry of Justice led to changes at the Court of Appeal but the Recommendation number 43, detailed below, was never adopted:

Recommendation 43: The selection process to the Supreme Court for the United Kingdom should be reviewed to reduce the number of serving Justices involved and to ensure there is always a gender and, wherever possible, an ethnic mix on the selection panel.⁹⁹

The Equality Act 2010 has provided a framework for the Supreme Court to support positive action and implement this recommendation. Indeed, the Court itself has started to engage with its duties under the Equality Act 2010. But until the Court changes the structures, policies, and procedures that constitute and regulate the *ad hoc* appointments commissions and recognises the importance of both presence and participation of diverse voices to substantive equality, the Court will fail to achieve gender diversity on the UK Supreme Court bench.

⁹⁹ *Id.* at 42.

Table 1: Appointment Commissions - Attitudes to Equality and Diversity¹

Date of Commission	Language of Diversity	Equal Merit Policy (mirror of <u>Section 159</u>)	Enhancing access to specialist knowledge (encouraging applications <u>Section 158</u>)	Number of women on the selection panel President (P)	Appointed
Retiring Justice					
2022 Lady Arden; Lord Lloyd-Jones	"The Supreme Court's commitment to diversity and inclusion is deeply rooted in our values-.... We recognise that diversity brings richness to the judiciary <i>and helps us better understand and serve the public. We believe that attracting, developing and retaining a diverse judiciary is essential to the Court and the people that we serve.</i> "We support part-time and flexible working, subject to the needs of the Court." ²	Yes	Familiarisation conversations Podcasts Webinars Video Advice	One lay member Lord Reed (P)	Lord Lloyd-Jones (Re-appointed) Lord Richards
2021 Lady Black	"The selection commission welcomes applicants from the widest range of applicants eligible to apply, ...and particularly encourages applications from those who would increase diversity of the Court,... bearing in mind that Lady Black's retirement will leave the Court with only one female Justice and without any black or Asian ethnic background." ³	Yes	Familiarisation conversations Podcasts Webinars Video Advice	One lay member Lord Reed (P)	Lady Rose
2020 Lord Kerr	"Applications are sought from the widest range of candidates eligible to apply, including those who are not currently full-time judges, and particularly those who will increase the diversity of the court." ⁴	Yes	Familiarisation conversations Podcasts Webinar Video advice	One lay member Lord Reed (P)	Lord Stephens
2019 Lord Wilson Lord Carnwath Lady Hale	"Applications are sought from the widest range of candidates eligible to apply, including those who are not currently full-time judges, and particularly those who will increase the diversity of the court." ⁵	Yes	Familiarisation visits	Two women One lay member Lady Hale (P)	Lord Hamblen Lord Leggatt Prof. Andrew Burrows

2018 Lord Mance Lord Hughes Lord Sumption	Not available	Yes	Insight sessions	Two women One lay member Lady Hale (P)	Lady Arden Lord Kitchin Lord Sales
2017 Lord Toulson Lord Neuberger (P) Lord Clarke	Introduced flexible working; -applications for appointment as a justice are welcome from candidates looking to work on a more flexible basis.	Yes (not referenced)	Tours Opportunity to sit in court Private meeting	<u>Panel for President</u> One lay member Lord Mance (P) <u>Panel for Non-president</u> Two lay members Lord Neuberger (P)	Lady Black Lord Lloyd-Jones Lord Briggs
2012 Lord Dyson Lord Walker Lord Hope	"The ad hoc selection commission is committed to equality of opportunity for all who are eligible for judicial office and welcomes applications from women and men from all backgrounds and sections of the community." ⁶	No	No	One lay member Lord Neuberger (P)	Lord Hughes Lord Toulson Lord Hodge
2012 Lord Phillips	"In making its recommendation the selection commission will have regard to the requirements under section 27 of the Act that a selection must be on merit, and that the commission 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." ⁷	No	<u>No</u>	Not available	Lord Neuberger
2011 Lord Saville Lord Collins	None	No	No	None Lord Phillips (P)	Lord Wilson Lord Sumption
2010 Lord Rodger Lord Brown	None	No	No	None Lord Phillips (P)	Lord Reed Lord Carnwath

This is a table of the appointment commissions which recruited one or more member(s) to the Supreme Court bench based on the data available on the UK Supreme Court website at the time of publication. The appointments commissions are available on the UK Supreme Court website in the news archive. See [News archive - The Supreme Court](#).