"Women in the Law: the story so far… now read on"

By Lady Rose of Colmworth DBE

A talk to mark International Women's Day
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Chaired by
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1. The idea for this lecture[1] came last summer when I was touring Upstate New York. One of the places I visited made a strong impression on me. It was the Wesleyan Chapel in the town of Seneca Falls in New York State, just south of Lake Ontario. This was the site of the Women's Rights Convention held there over two days in July 1848 – a meeting convened to discuss the parlous position of women in society. The site is now the Women's Rights National Historical Park and on a wall nearby is engraved the Declaration of Sentiments that was adopted at the end of the Convention. The demands of the women there were, we might think, modest to modern eyes. But they were revolutionary at the time.

2. The Declaration of Sentiments adapted the wording of the American Declaration of Independence. The first revision made was to the opening, well-known statement. The Declaration says: "We hold these truths to be self-evident: that all men *and women* are created equal". Going on, the Declaration of Independence said: "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States." The Declaration of Sentiments said instead that: "The history of *mankind* is a history of repeated injuries and usurpations on the part of *man toward woman*, having in direct object the establishment of an absolute tyranny *over her*".

3. Among the examples given of this tyranny were that "He has monopolized nearly all the profitable employments, and from those she is permitted to follow, she receives but a scanty remuneration. He closes against her all the avenues to wealth and distinction, which he considers most honourable to himself. As a teacher of theology, medicine, or law, she is not known. He has denied her the facilities for obtaining a thorough education—all colleges being closed against her."

4. One of the many things I learned from my visit was the strong links between this early women's rights movement, and the movement for the abolition of slavery in America. Frederick Douglass, who was by that time a national leader of the abolitionist movement

[1] I am grateful to my judicial assistant Joseph Kelen for his help in preparing this talk.

attended the conference in Seneca Falls and is credited with encouraging the delegates to include a call for the right to vote among the Sentiments.

5. Indeed, one of the catalysts for the Convention was the experience of women from the United States who came to London in 1840 to attend the first World Anti-Slavery Convention organised by the British and Foreign Anti-Slavery Society. Much of the first day of the Anti-Slavery Convention here was taken up with the discussion of whether women should be admitted as delegates and allowed to participate. Many women, particularly from the US, had made the journey to London because they were very active in the abolitionist movement. But the decision went against them so although the women were graciously allowed to watch and listen from the spectators gallery they were not allowed to take part. This incident finds its way into Zadie Smith's recent novel *The Fraud* which I recommend for that and other reasons.[2]

6. So why is it that men who had gathered together in London intent on fighting for the equality and dignity of other races were still so resistant to the idea of the participation of women in their deliberations? The answer seems to be this. By that time the idea that there is nothing inherently different about the physical and mental abilities of people of different races such as to make them more or less able to fulfil every role in society had fully taken hold - at least among liberal minded people. But that did not translate across to an acceptance that there was nothing inherently different about the physical and mental abilities of women which make them unable to fulfil the roles that men fill.

7. The idea of this talk is to explore that trajectory of which the example of women in the law is emblematic. That is the movement, broadly speaking, from a view that women were inherently unsuited by reason of their mental and physical abilities to be lawyers (amongst other things) to a view that there was nothing at all different about the capabilities of women so that they could and should be treated exactly like men; to a view which we may arrive at which is that women may well be different from men but not in a way which makes them less fit to occupy any particular role. Rather, I hope we are moving towards a recognition that women's difference means that they have something positive to bring to the professions which should be recognised and valued, rather than either belittled or oppressed. I should say that I am focusing on women in this talk as we are gathered here to celebrate International Women's Day. But much of what I say may well read across to attitudes to minority ethnic people or people belonging to other historically discriminated against groups.

8. In thinking about this subject, I have also drawn on the book – *Sisters in Law: How Sandra Day O'Connor and Ruth Bader Ginsburg went to the Supreme Court and Changed the World* by Linda Hirshman.[3] She describes the very different early lives and backgrounds of the first two women on SCOTUS. She also emphasises the links between race and sex discrimination in the legal battles fought by Ruth Bader Ginsburg both when an advocate and later as a Justice.

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[2] *The Fraud* published by Penguin books September 2023.

[3] Published by Harper Collins 2015. My copy was a gift from my former judicial assistant Nigel M Patel to whom I am glad to express my thanks.

9. In particular she explains that the battleground in which they fought the good fight was the application of the 14th Amendment to the US Constitution. The 14th Amendment, adopted in 1868 a few years after the end of the Civil War confers equal protection under the law on all persons born or naturalised in the US. State laws which are inconsistent with rights protected by the Constitution are, as we know, struck down. But a lot depends on the test that you apply to decide whether the law being challenged is incompatible.

10. When the court conducts a judicial review of a particular law, most laws are assessed for compliance with the 14th Amendment on the rational basis scrutiny. When a court applies the rational basis test, the state seeking to uphold the law can defend it on the basis of any plausible and legitimate reason for the discrimination. It is only if there is no plausible and no legitimate reason for having the discriminatory law that it can be declared to be unconstitutional. That was the standard adopted by the Supreme Court in *Reed v Reed* 404 US 71 in 1971, the case in which the Supreme Court extended the application of the 14th Amendment to protect women from sex discrimination. The Court held that there was no rational basis for a law which preferred the father over the mother in deciding which of them would be designated the administrator of their deceased son's estate. After that case, hundreds of laws that discriminated against women for no rational reason had to be changed.

11. But at that time the courts applied a much stricter test if the state was trying to defend a law which discriminated against people on the basis of their race or ethnicity. That was because where the law under challenge differentiated between people on the basis of what was called a "suspect classification" it had to be subject to heightened scrutiny. It was clear, following the Civil War, that the characteristic of race was a suspect classification. When that was the test to be applied, the government had to have important and compelling reasons to justify the discrimination. That, of course, had the effect of making it more difficult for the state to justify a law which differentiated between different races.

12. The question was whether sex would ever become a suspect classification so that laws would have to meet that higher test in order to be justified. Ruth Bader Ginsburg was at the forefront of this battle first as an advocate and then as a justice. She presented the oral argument in favour of making gender a suspect classification before the Supreme Court in January 1973 in the case of *Frontiero v Richardson*.[4] That case concerned a rule that military personnel could claim housing and medical benefits for their dependents – but the rule assumed that the wives of servicemen were dependent on their husbands, but servicewomen had to prove that their husbands were dependent on them before they could receive the benefits. Ruth Bader Ginsburg presented her argument on behalf of the American Civil Liberties Union which had an amicus brief. She argued that this rule failed to meet even the rational basis test for compatibility. But she argued further that sex should be a suspect classification. She said:

> "Sex, like race, is a visible, immutable characteristic bearing no necessary relationship to ability. Sex, like race, has been made the basis for unjustified or at least unproved

[4] *Frontiero v Richardson* 411 US 677 (1973).

assumptions, concerning an individual's potential to perform or to contribute to society".

13. She referred to two arguments that were put forward against the recognition of sex as a suspect criterion. First that women were a majority of the population and second that legislative classification by sex does not, it was asserted, imply the inferiority of women. She said in respect of the numbers argument that despite being the majority of the population, women were denied even the right to vote until 1920. And they faced discrimination in employment as pervasive and more subtle than that encountered by minority groups. Moreover, these differences did imply a judgment of inferiority. Sex classifications do stigmatise when they exclude women from an occupation thought more appropriate to men.

14. The Supreme Court in that case held that the rule failed even to meet the rational basis test and so did not need to decide whether sex was a suspect classification.

15. Nevertheless, Bader Ginsburg did convince the Court to adopt an intermediate scrutiny standard for sex discrimination in 1976 in *Craig v Boren*.[5] That applied a test according to which the state must prove the existence of specific important governmental objectives, and the law must be substantially related to the achievement of those objectives. That case also exhibited a feature of the cases in which Bader Ginsburg often chose to push the law forward, namely that it was men who were disadvantaged by the rule being challenged. In the *Craig v Boren* case, the age for drinking a certain kind of beer was 21 for men and 18 for women.

16. Another area where Bader Ginsburg as an advocate pushed for equality was in the removal of legislation which purported to protect women on the basis of their inherent weakness. At the turn of the 20th century there was legislation in place which limited the number of hours which women could work. In *Muller v Oregon*[6] in 1908 the Supreme Court had upheld a law in Oregon providing that no female shall work in an establishment, including a laundry for more than 10 hours a day. The judgment of the Supreme Court in 1908 said:

> "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical wellbeing of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race. …"

17. Advocate Bader Ginsburg argued that what such rules in fact "protected" women from was actually competing in the work place for extra pay, higher paying jobs and promotion. The legislation, like the legislation which excused women from the obligation to serve on a jury,

[5] *Craig v Boren* 429 US 190 (1976).
[6] *Muller v Oregon* 208 US 412.

was based on the assumption that all women are preoccupied with home and children. These distinctions had, she argued, the effect of keeping women in their place, a place inferior to that occupied by men in our society.

18. Similar views were expressed in UK courts in the 19th century and beyond. The need to protect women from physical and moral peril was one of the reasons given by the Scottish court in *Jex-Blake v Senatus of the University of Edinburgh*.[7] In that case, the Court of Session in Scotland held that a change to the statutes of Edinburgh University which allowed women to study medicine was ultra vires. The University had decided to admit women but the women struggled to study the subjects that they needed to graduate because they were not allowed to attend lessons with men. Many of the professors refused to provide separate classes for the women. The women therefore sought to argue that they should be able to attend classes with men. 13 judges gave their opinions, six were in favour of the women but seven were against them.

19. One judge said:

> "I fully and respectfully recognise the high qualities, capacities, and vocation of women. I recognise especially the fact that the elevation of women in domestic and social position is one of the blessed fruits of Christianity. There are few, indeed, who hold intelligent and virtuous women in higher estimation than I do. It is very much for their own sake, and on account of the respect which I entertain for them, that on this particular point I feel it my duty to state my decided opinion that the promiscuous attendance of men and women in mixed classes of medical study, such as anatomy, surgery, and obstetric science, with concomitant participation in dissection, demonstration, and clinical exposition, is a thing so unbecoming and so shocking - so perilous to the delicacy and purity of the female sex - to the very crown and charm of womanhood … that the law and constitution of the University, bound to promote, and seeking to promote, the advancement of morality as well as knowledge, cannot sanction or accept such attendance."

20. Women as lawyers did not fare much better. I am sure everyone here knows the fate of Gwyneth Bebb who, in December 1912, filled in and sent to the Law Society a notice of her intention to present herself at their examinations with a view to being admitted as a solicitor. She was refused entry on the basis that being a woman she could not be admitted as a solicitor. She brought her claim seeking a declaration that she was a "person" within the meaning of the Solicitors Act 1843. Lord Robert Cecil KC argued the case on her behalf before the Court of Appeal. He noted that women have filled many public offices. There have been Queens of England and women have been regents. A woman could be a Marshal and a Great Chamberlain. He argued that there is no reason in the nature of things why women should not practice and the plaintiff was a particularly capable person.

21. The decision went against Ms Bebb[8] but not it appeared because of any perceived natural impediment. In fact, the Master of the Rolls, Cozens-Hardy, was prepared to assent that in

[7] *Jex-Blake v Senatus of the University of Edinburgh* (1873) 11 M 784.
[8] *Bebb v The Law Society* [1914] 1 Ch 286.

point of intelligence and education and competency women – and in particular the applicant who was a distinguished Oxford student - were at least equal to a great many and probably far better than many of the candidates who would come up for examination. But that was, he said, beside the point. The effect in England of long continued usage through centuries without any departure in a single instance shows what the law is and has been. Given that there had never previously been a woman solicitor, it was for Parliament to change that if they saw fit.

22. Eventually Parliament did see fit in the Sex (Disqualification Removal) Act 1919 which in fact covered all sorts of roles as well as solicitors and barristers. But when they came to the provision about solicitors, they had to overcome a particular problem, namely that the professions required practitioners to have a university degree. Although women were at that time allowed to attend University and even sit the exams, they were not allowed to graduate. Section 2 of the Act has the side heading "Provision as to women who have qualified for degrees at universities not admitting women to degrees". This provided broadly that if the woman would have graduated had she been a man, then she is treated as having a degree and so able to qualify as a solicitor.

23. In case you thought that ideas of the inability of women to perform the role of lawyer died with the passing of the 1919 Act, unfortunately I must tell you that is not the case. When I set my heart on becoming a barrister in the 1970s someone recommended me to read the book *Learning the Law* by Glanville Williams, then Rouse Ball Professor of English law at Cambridge Universeity. The edition I had was the 9th published in 1973. It was first published in 1945 and it is now in its 17th edition.[9]

24. The book gives a brief outline of the kinds of law there are, and of legal procedure and then describes the mechanism of scholarship – the layout of a law library, how to read cases and case law technique. Chapter 13 is called "From learning to earning" – practice at the Bar. There is a section, one page long, headed "Women" which of course I read with interest.

25. To describe that section as "discouraging" would be an understatement. He said that a woman's trouble starts when she tries to arrange pupillage and a seat in chambers. Chambers would always prefer to give a vacant place to a man and the clerk will prefer to build up a man. Then this:

> "It is not easy for a young man to get up and face the court: many women find it harder still. An advocate's task is essentially combative, whereas women are not generally prepared to give battle unless they are annoyed."

26. Well, I remember very clearly as an 18 year old, would-be woman lawyer reading that sentence and really being very annoyed by it. In fact, I can say that if Professor Williams had been nearby at that point I would have been very prepared to be combative.

27. Inevitably Professor Williams' advice to women was to become solicitors. Equally inevitably he went on to say of course that women have a special qualification in matters of divorce since married women frequently prefer to confide the details of their married life

[9] *Learning the Law* Glanville Williams (edited by A T H Smith) Sweet & Maxwell.

to a member of their own sex. Some women solicitors he commented "are said to be far more aggressive than their male rivals in cross-examining men as to their sex life!" Quite how he squared that with his earlier comment I am not sure, unless he thought that women were inevitably "annoyed" and hence "combative" at the mere thought of men's sex lives.

28. The big question raised by women stepping into the roles that were previously exclusively reserved for men was: who is going to cook supper? The question of housework and the sharing thereof has always been a vexed one.

29. There was in fact another impressive place that I visited last summer in New York State. It was another National Park Service site in Hyde Park near the town of Rhinebeck. Hyde Park is the site of the former home and now Presidential Library and archive of Franklin and Eleanor Roosevelt. Eleanor Roosevelt was an indefatigable champion of women's rights chairing the Presidential Commission on the Status of Women set up by John F Kennedy. She also has a place in the Supreme Court where I work – the engraving on the glass partition at the back of Court 2 "Justice cannot be for one side alone, but must be for both", is a quotation from her autobiography.

30. Hyde Park houses a wonderful museum that deals extensively with Mrs Roosevelt's life after the President's death in 1945. As an aside, I could mention that one of the exhibits hanging on the wall is a framed display of the contents of her wallet when she died. Some items in her wallet are what one might expect: a membership card for the National Federation of Press Women and a Metropolitan Museum of Art membership card. Others are items that many people would have in their own wallets: credit cards, a Blue Cross insurance card, an eye bank donor card, hotel and airline courtesy cards, bits of paper containing words of inspiration or favourite poems. One unexpected item is her permit to carry a pistol, issued by Dutchess County, New York. It certainly sent me scurrying to clear out the sections of my wallet in case I was suddenly run over by a bus.

31. Mrs Roosevelt had a daily readers advice column in *The Ladies Home Journal* and later in the journal *McCalls* for more than 20 years. Those were two very popular women's magazines in the USA. Readers sent in their questions and she answered them on topics ranging from how to achieve world peace, to what she fed her dog, to whether being a millionaire was a help or a hindrance in political life.

32. Here's one question from January 1945:

> Question "I love and admire my wife, but there is one subject on which we can never agree. She thinks I should help with the dishes. Do you think this is a husband's work?"

33. Mrs Roosevelt's answer was as follows:

> "I think anything connected with the home is as much the husband's work as the wife's. This silly idea that there is a division in housework seems to me foolish, when very often the wife earns money outside the home as well as the husband. Certainly if there are children, the wife has two jobs—the one of being a mother and the other of being a wife. The kind of man who thinks that helping with the dishes is beneath him will also think that helping with the baby is beneath him, and then he certainly is not going to be a very successful father."

34. How true those words are even today.

35. In the book about the two female justices of the US Supreme Court, the author contrasts their approach to this. As to the division of labour in their households the book records that when Marty Ginsburg had his first experience of his new bride Ruth Bader's cooking, he realised he would have to spend some time mastering the art. He began making every dish in the Escoffier cookbook And after he died the Supreme Court published a cookbook in his memory called "Chef Supreme". By contrast when Sandra Day O'Connor was president of the Junior league of Phoenix Arizona, a powerful voluntary organisation in the southern states, she decided to cook something different for her husband every single night for 365 nights.

36. For many years women had to shoulder the burden of managing the household invisibly. Women never mentioned the fact that they may have things to do other than work. You got by because you and everyone else in the work place simply ignored the fact that you were a woman, that you might have children or you might be trying to run a household as well as holding down a full time job. There was a change in this attitude during the 1980s. I remember a barrister friend of mine commenting that when she appeared in court clearly heavily pregnant with her first child, no one mentioned the fact. Certainly no one thought she could expect or was entitled to any concession because of her state. But by the time she appeared in court pregnant with her third child, the judge did invite her to make her submissions sitting down if that was better for her and not to hesitate to say if she needed comfort breaks more often during the hearing.

37. This change was reflected in a recent episode of the US TV series "Matlock" which I am very much enjoying. It stars Kathy Bates as Matty Matlock an elderly lawyer who comes out of retirement to join a ritzy New York City law firm. In case you want to watch the series I won't give any plot spoilers but there was an incident in one of the episodes which I am sure will strike a chord with people here. Matty wanted to go to her grandson's school concert one weekday afternoon. So she marked herself out in the office diary as having a medical appointment at that time. When her female boss needed her that afternoon and told her to change her medical appointment, she ditched the concert and went to the meeting. Later it came out what had happened, and her boss told her that if she had known the real reason for the appointment of course she would have let her to go to the concert. Matty said that that was the opposite of what used to happen when she was a junior lawyer in a firm many decades before. It would have been professional death to say you wanted to take time off for a reason related to your children. You had to pretend it was a medical reason. She had not adjusted to the change in attitude which regarded it as more legitimate for her to say she wanted to attend her grandson's concert than to say she was visiting the doctor.

38. Well, yes and no. There is still a great resistance in practice to recognising that people – both men and women – may have things to do other than work. I fear that this may be getting worse rather than better, and there are people in the room who have more experience of this than I do. I often speak at events with young women lawyers and I hear the same complaint. That their firms and employers are resistant to actually enabling men or women to perform the juggling act in which many of them are engaged. I remember one female

associate at a big firm saying to me: "The firm is falling over itself to host lovely events with canapes and glasses of wine for women to network but still, at the end of a meeting with the client finishing at 5 pm or 5:30, the partner will say to the client 'Of course, you'll have that letter/revised draft/advice by tomorrow morning'. That is the case whether or not the letter or draft or advice is at all urgent. They don't consider that I may have other things I need to do that evening or weekend."

39. In my own small way I have always tried to resist setting time tables which assume that counsel – whether men or women - are available to work every evening or weekend or vacation. Sometimes things are urgent but not everything is. The partner may respond that the clients expect that kind of service. But clients are also pushing for greater diversity in the legal teams that represent them and I would hope that they would also recognise the importance of this. My plea to those present who may be able to do something about this is: don't treat every piece of work as super urgent and don't assume that people should be ready to drop whatever other responsibilities they have to work all night. And don't assume that because you are paying people a large salary, that means they are not entitled to have a life outside work.

40. So let's move forward to happier times or partly happier times. Is there a growing recognition not only that women are as capable as men in filling these roles but also that they may have something in particular to bring to the table?

41. I think there are two factors at play here. The first is a realisation that *everyone* has a lifetime of experiences and views which they inevitably bring to bear on what they do. Beverley McLachlin the Chief Justice of Canada famously said: "We lead women's lives, we have no choice". But a man could equally say that men have no choice but to lead men's lives.

42. The old view was that men were entirely neutral in the approach they took to all issues. Most of them would have been very indignant if it was suggested that they were influenced by their family, school or university background. Any divergence from that neutral approach was tantamount to bias and so unacceptable.

43. Some of the focus of the antipathy towards the idea that women may have something valuable to contribute is reflected, I think, in the "tie break provisions" in the statutory criteria for appointing judges. When the Judicial Appointments Commission – the JAC - was set up under the Constitutional Reform Act 2005, section 63 said that appointments made by the Commission must be solely on merit. Section 64 said that the Commission "must have regard to the need to encourage diversity in the range of persons *available for selection for appointment*. But this was expressly said to be subject to the merit test in section 63. The diversity duty was therefore limited to encouraging people to apply for and to make themselves available for selection. It played no role in the selection process itself.

44. That provision was amended by the Crime and Courts Act 2013 to introduce the tie break provision. The requirement that selection must be *solely* on merit was retained but subsection (4) now provides that the use of the word "solely" does not prevent the selecting body, where two persons are of equal merit, from preferring one of them over the other for

the purpose of increasing diversity within the group of people who hold the office for which the selection exercise is being held.

45. There is similar provision in relation to the Supreme Court in Part 3 of the 2005 Act. Section 27(5) says that selection must be on merit and subsection (5A) provides that where two persons are of equal merit, the Equality Act 2010 does not prevent the selection commission from preferring one of them over the other for the purpose of increasing diversity within the judges of the Court.

46. Critics of this provision have commented that this appears to assume that diversity of perspective is something different from "merit" and to assume therefore that there has to be a choice made between the two ideas - or a balance of them, treating them as competing goals. One can contrast this with the statutory provision that deals with making sure that there are Scottish and Northern Irish judges on the court. That is worded rather differently. Section 27(8) of the 2005 Act says that the selection commission *must ensure* that between them the judges have knowledge of and experience of practice in the law of each part of the United Kingdom. So there is no pre-condition that a preference for a Scottish Judge is only to be given when there are two candidates of equal merit – the fact that that candidate has that knowledge and experience of a different part of the UK seems in this instance to be bound up in the concept of "merit" rather than to be competing with it.

47. Fortunately, somehow women keep breaking through and there are several factors that are encouraging this. The first is that the pool of lawyers who are considered eligible for judicial posts is much wider than it was and the lawyers in those areas of the profession can be a more diverse pool. It is no accident that the two senior judges drawn from the Government Legal Service, myself and Dame Rowena Collins Rice, are women since women occupy many of the senior legal posts in the GLS.

48. And the signs in the judiciary are hopeful so far as gender is concerned. According to the Judicial Diversity Statistics published in December 2024, there was no disparity last year between the proportion of women applying and the proportion of women being appointed. So last year female candidates accounted for 52% of applications, 53% of those shortlisted and 53% of recommendations for appointment.

49. As you might expect the proportions of women are higher at the lower levels of the judiciary. But the growing development of judicial career progression is helpful given that women are better represented in the lower courts. Similarly, the ability of people like me who start their judicial careers in the tribunal service to make their way across to the senior courts is also helping to even things out. 53% of all tribunal judges are women – a higher proportion than the 38% of all court judges. So there are promising signs and it is important to recognise how far we have come even if we are sometimes frustrated by how far it seems we still have to go.

50. If you feel despondent sometimes, I recommend this. Go and stand in front of the statue of Millicent Garrett Fawcett on Parliament Square. She's the one holding the banner "Courage calls to Courage Everywhere". She was a suffragist leader and social campaigner and was the first monument to a woman in Parliament Square and the first sculpture by a woman

there, Gillian Wearing. She was also one of the founders of my old College, Newnham College at Cambridge. Around the plinth on which she stands are the names and images of 59 women and four men who supported the fight for women's suffrage. They include famous names – four Pankhursts and Emily Davison – but many less well-known names too.

51. They were all building on the earlier courage, hard work and perseverance of those previous generations of women who convened in the Wesleyan Chapel in Seneca Falls in 1848 and in the years after. And we are the beneficiaries of their work too. Let us celebrate their legacy – and the legacy of all the people I have talked about this evening – and resolve to help and foster the women who come after us.