

BENTHAM CLUB LECTURE 2005
The Rt Hon Lady Hale of Richmond

CONFESSIONS OF A LADY LAW LORD

Mr Bentham, I am delighted to have this opportunity of making your acquaintance and speaking in your honour, for I believe you to be a person after my own heart. Did you not write, as long ago as the 1820s, of the female claim to the right to vote (*Constitutional Code*, Works XI, p 108):

“On the ground of the greatest happiness principle, the claim of this sex is, if not still better, at least, altogether as good as that of the other. The happiness and interest of a person of the female sex, constitutes as large a portion of the universal happiness and interest, as does that of a person of the male sex.”

But you knew what you were up against (*ibid*):

“Why exclude the whole female sex from all participation in the constitutive power? Because the prepossession against their admission is at present too general, and too intense, to afford any chance in favour of a proposal for their admission.”

So it seems an opportune moment to ask how far we have come since your enlightened time in recognizing women’s rights to participate in the constitutive power. Closer to home, am I really a Law Lord?

The thought was prompted by what happened when I was introduced to the House of Lords in January last year. A great roar of laughter went up on all sides of the House when my letters patent were read out. These recite that I hold office as a Lord of Appeal in Ordinary ‘so long as she shall well behave herself therein’. Lord Triesman, who was sworn in just after me, has no such obligation. Some of my guests wondered whether this is because I am a woman but it is not. This is the traditional guarantee of the independence of the judiciary – that they hold office *quamdiu se bene gesserint* rather than at Her Majesty’s pleasure and can only be removed by an address from both Houses of Parliament. It was carried forward into section 6 of the Appellate Jurisdiction Act 1876. This enables Her Majesty by letters patent to appoint ‘qualified persons’ to be Lords of Appeal in Ordinary. The qualifications are, essentially, 2 years as a High Court judge or above or 15 years as a barrister or, in some circumstances, solicitor. But that Act was passed when women could not join either branch of the legal profession let alone become judges. So am I really a law lord?

Women had a hard enough time gaining entry to public life in the United States, even though they had a written constitution guaranteeing fundamental rights. They tried first to rely upon the 14th amendment, one of three passed after the civil war to prevent the southern states discriminating against the emancipated slaves:

‘No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the US; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.’

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Women had always been citizens and ‘persons’ usually includes women as well as men. But in *Bradwell v Illinois* (1873) 16 Wall 130, the US Supreme Court decided that ‘the privileges and immunities of citizens’ did not include the right to practise law and in *Minor v Happersett* (1875) 21 Wall 162 that they did not include the right to vote. The Supreme Court had an easy get out in Myra Bradwell’s case because it had just decided (in the Slaughterhouse Cases, 1873) that each state had power to regulate the right to enter particular employments or professions and that this was not a privilege or immunity of citizenship. But Justice Joseph P Bradley (joined by Justices Stephen J Field and Noah H Swayne) voiced more general views on the status of women:

‘Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organisation, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.’

Even if this was not always the case, particularly for unmarried women,

‘The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society civil law must be adapted to the general constitution of things, and cannot be based upon exceptional cases.’

You, Mr Bentham, would have had none of this so-called ‘law of the Creator’. To you, the oppression and exclusion of women had been brought about by the laws and prejudices of the stronger sex (marginalia in *Table of the Springs of Action*, 1815, University College Collection, CLVIII, 118):

“For the benefit of the ruling few . . . the minds of all women are castrated. Pretended ignorance and insincerity forced in them . . .”

After *Minor v Happersett* (1875) 21 Wall. 162, the US suffragists decided to pursue reform by legislation rather than the Supreme Court and eventually succeeded in the 19th amendment, passed in 1919 and ratified by three fourths of the states in 1920. The equal protection clause in the 14th amendment was meanwhile extended to distinctions other than race, but it was not until *Reed v Reed* (1971) 404 US that it was used to strike down a state law on the ground that it discriminated against women (in that case as administrators of their deceased children’s estates).

Meanwhile women were losing the same battles to be ‘persons’ here. These reached the House of Lords in *Nairn v University of St Andrews* [1909] AC 147. By section 27 of the Representation of the People (Scotland) Act 1868, ‘every person’ who was on the general council of one of the four Scottish universities, and not subject to any legal incapacity, was entitled to vote in the election of the university Members of Parliament. Membership of the general council was open to ‘all persons’ with certain degrees. When the 1868 Act was passed, the Scottish universities did not admit

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women to degrees: see *Jex-Blake v Senatus of the University of Edinburgh* (1873) 11 M 784. But under the Universities (Scotland) Act 1889, commissioners were empowered to make ordinances enabling each or any university to admit women to graduation. This they did in 1892 and the five appellants were graduates and members of the council of the University of Edinburgh. They applied to vote in the 1906 election but were refused voting papers by the registrar. Lord Loreburn LC agreed that the word 'persons' would prima facie include women; but Lord Robertson neatly turned this against the appellants by pointing out that the use of the neutral word 'person' was less significant since Lord Brougham's Act in 1850 had provided that 'male' should include 'female'. Parliament could not have taken such a roundabout way of conferring the franchise on women, even for University seats, devolving on University Commissioners the power to do so for women in one or all Universities or for women with some or all degrees: 'it is difficult to ascribe such proceedings to parliament and at the same time to retain the conventional respect for our Legislature.' He preferred to decide the case for that reason rather than for the simple reason that the 1868 Act was limited to persons 'not subject to any legal incapacity', thus excluding women, peers and others who were 'disabled' from voting.

As in the United States, this had eventually to be remedied by legislation. The Representation of the People Act 1918 (7 & 8 Geo 5, c 64) gave some women aged 30 the right to vote. In the following session the Parliament (Qualification of Women) Act 1918 (8 & 9 Geo 5, c 47) gave them the right to sit and vote in the House of Commons. But the former Act expressly provided (in s 9(5)) that 'any incapacity of a peer to vote at an election arising from the status of a peer shall not apply to peeresses in their own right'. Then the Sex Disqualification (Removal) Act 1919 provided that a person was

'not to be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation, or from admission to any incorporated society, . . .'

The 1919 Act was soon put to the test in *Viscountess Rhondda's claim* [1922] 2 AC 339. Her father, then the Baron Rhondda, was created first Viscount Rhondda by letters patent dated 19 June 1918. He died less than a month later on 3 July, without male heirs. Obviously contemplating his imminent demise, the letters patent granted to him the 'name, state, degree, style, dignity, title and honour of Viscount Rhondda' for himself and the heirs male of his body lawfully begotten, and in default of such issue to his daughter Margaret Haig Mackworth, and after her death to the heirs male of her body lawfully begotten'. In the standard language of the time, the monarch professed himself willing that Viscount Rhondda, his male heirs and his daughter's male heirs 'may have, hold and possess a seat, voice and vote in the Parliaments public assemblies and council of us, our heirs and successors within the United Kingdom' and that all of them might enjoy and use the title and all the rights and privileges associated with a peerage.

Margaret Haig Mackworth was a remarkable woman and eminently well qualified to be the first woman to take her seat in the House of Lords. The only child of a Liberal

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MP and industrialist, she had discovered the woman's suffrage movement very soon after her marriage to a country landowner: she wrote that 'militant suffrage was the very salt of life . . . it had come like a draught of fresh air to our padded, stifled lives.' She ran the gamut of WSPU activities, being pelted with herrings and tomatoes when addressing the Liberal Club in her father's constituency, and spending five days in gaol for setting fire to a post box. But she was also a fine business woman, taken on as her father's right hand man and becoming director of many companies – where she tried to fit in by wearing dark business suits and smoking excessively in meetings. Between the wars, she was 'arguably Britain's leading feminist', establishing and financing the magazine *Time and Tide* to fight its cause.

So it was characteristic that, after the 1919 Act had come into force, she would petition for a writ of summons to the House of Lords. She was denied by what the Oxford DNB describes as a 'remarkable piece of skulduggery' by FE Smith, Lord Birkenhead. Her petition was first heard by the Committee of Privileges in March 1922. Lloyd George's post war coalition government was still in power. The then attorney general, Sir Gordon Hewart KC, did not oppose it. But when the Committee reported in favour of the claim, the conservative Lord Chancellor, Lord Birkenhead, moved that it be referred back to the Committee. It was reheard in May. This time it was opposed by the new attorney-general, Sir Ernest Pollock. He argued that 'the reason why peeresses did not sit in Parliament was that there was a personal incapacity. It was not a mere question of disqualification.' Some of us might find this distinction between a permanent incapacity and a disqualification somewhat too nice to comprehend. But this time, the Committee voted by 22 to 4 to reject the petition.

The Lord Chancellor gave the leading speech in typically trenchant terms. A peeress in her own right could not receive a writ, not because she was disqualified from receiving one, but because she had no right to one in the first place because a woman had never had such a right: a minor could grow up, a felon be pardoned and a bankrupt achieve his discharge,

'but a person who is a female must remain a female till she dies. Apart from a change in the law, she could not before 1919 both be women and participate in the legislative proceedings of the House of Lords. By her sex she is not – except in a wholly loose and colloquial sense – disqualified from the exercise of this right. In respect of her dignity she is a subject of rights which *ex vi terminis* cannot include this right.'

Moreover, Parliament could not possibly have intended to make such a momentous change in our constitutional arrangements in the 1919 Act by 'words as vague and general as can be found in any Act of Parliament'.

The four dissenters included Lord Haldane, an evangelical Scot with academic credentials in both philosophy and law, who had served as Secretary of State for War and then Lord Chancellor in the Asquith liberal government, was soon to serve as Lord Chancellor in the first Labour Government, and who had been since 1912 the Chancellor of the University of Bristol, which from the first admitted women on equal terms with men. He pointed out that the letters patent were in entirely conventional

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form reflecting the position when they were granted. In any case they were a red herring as it had long been established that the monarch could not refuse to summon qualified peers to Parliament or cut down the incidents of a peerage. That was why an earlier attempt to create a life peer to strengthen the appellate committee had failed: see the *Wensleydale Peerage Case* (1856) 5 HLC 958. Lord Haldane could not see how the lack of a right to a writ came from anything other than ‘the disability the common law of this country imposed on all women to exercise even public functions which they would, but for their sex, have had a title to perform’, in other words, the very disqualification removed by the 1919 Act. Lord Wrenbury also could see no difference between a minor who attained his majority and a woman disqualified by sex whose disqualification was removed by statute. He also argued (at p 396) that when the House was sitting judicially, no-one could dispute that it was exercising a public function, so ‘when the House rises at 3.45 from the exercise of its judicial function, and resumes at 4.15 for legislative business, is it possible to contend that it has ceased to exercise a function, or that its function is not public?’ So what would they have thought of a lady Law lord?

Although the speeches are couched in very black letter legal reasoning, it is hard to believe that they were not strongly influenced by the differing political views of the two Lord Chancellors, both of whom were very active politicians as well as lawyers. There matters stood until 1958, the year that Viscountess Rhondda died, when the Life Peerages Act provided, ‘without prejudice to Her Majesty’s powers as to the appointment of Lords of Appeal in Ordinary’, for both men and women to be granted peerages for life. This was followed by the Peerages Act 1963, section 6 of which provided that hereditary peeresses in their own right should have the same right to sit and vote in the House of Lords, but be subject to the same disqualifications from voting for and membership of the House of Commons as a man holding the same peerage.

Meanwhile, of course, the 1919 Act had removed the disqualification of women from being admitted solicitors (see *Bebb v Law Society* [1914] 1 Ch 286) or called to the Bar or holding judicial office. So what would have happened if, once someone had gained the necessary 15 years’ seniority, a radical Government had wanted to appoint a woman Law Lord? (We need not consider the judicial qualification, because it was not until 1953 that a woman first sat as a professional judge and not until 1965 that she was appointed to the High Court.) The 1958 Act does not answer the question, because life peers under that Act are appointed on different terms from Law Lords, although it would have provided a way round the problem. The 1963 Act does not answer the question because it only applies to women holders of hereditary peerages.

So is it possible that my own appointment under the 1876 Act is invalid? After all, Parliament thought it necessary to legislate for peeresses in their own right and expressly to provide in section 1(3) the 1958 Act that a life peerage could be conferred on a woman. But by then the courts might have taken a very different view of the word ‘persons’. Only 21 years after *Nairn v University of St Andrews* and eight years after *Viscountess Rhondda’s claim*, the Privy Council decided *Edwards v Attorney General for Canada* [1930] AC 124. This was during the second Labour government and the committee was chaired by the Lord Chancellor, Lord Sankey, a

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judge rather than a politician, but one who had endeared himself to the Labour party by recommending the nationalisation of the coal mines.

Edwards concerned section 24 of the British North America Act 1867, which provided that the Governor-General of Canada should from time to time summon 'qualified persons' to the Senate. Section 23 dealt with the qualifications – citizenship, residence and property. In 1927, the Governor-General referred to the Supreme Court of Canada the question whether the word 'persons' included women. The Supreme Court answered 'no' but the Privy Council answered 'yes'. They considered both the contemporaneous 'external evidence' derived from extraneous circumstances such as previous legislation and decided cases and the 'internal evidence' derived from the Act itself. Under the former, they went through the constitutional history of Canada, noting that the various legislative assemblies consisted of 'persons' but that women were expressly excluded from the vote. They found that the appeal to history was 'not conclusive'. 'Persons' was ambiguous but several centuries ago it would have been understood that the word referred to male. This was not because 'person' could not include females but because at common law a woman was incapable of serving a public office. But that was not of great weight because custom would have prevented the claim being made or the point being contested. 'Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.' Over and above this, they

'did not think it right to apply rigidly to Canada of today the decisions and the reasons therefore which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries in different stages of development . . . their lordships think that the appeal to Roman law and to early English decisions is not of itself a secure foundation on which to build the interpretation of the British North America Act 1867.'

Thus were the earlier UK decisions blithely swept aside – not only *Nairn* and *Viscountess Rhondda*, but also *Chorlton v Lings* (1968) LR 4 CP 374, which had decided that Lord Brougham's Act did not mean that 'man' in the Representation of the People Act 1861 included a woman with the same qualifications, and *Beresford-Hope v Sandhurst* (1889) 23 QB 79, which decided that although women had the right to vote in county council elections they were not eligible to sit as councillors.

Under the internal evidence, the word 'persons' was clearly intended to include women elsewhere in the 1867 Act and unlike *Nairn* there was no reference to incapacity, only to the required qualifications, which a woman might have just as much as a man. The British North America Act 'planted in Canada a living tree capable of growth and expansion within its natural limits' and their lordships did not wish 'to cut down its provisions by a narrow and technical construction but rather to give it a large and liberal interpretation so that the Dominion to great extent . . . may be mistress in her own house.' So in the name of letting Canada decide for herself the Privy Council overturned the decision which the Supreme Court of Canada had made. Despite all the historical learning deployed, this looks more like political than black letter reasoning.

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Would my colleagues be prepared to take such a robust view of the word ‘persons’ in a nineteenth century statute today? Some of them might be disposed to do so. The other incident of citizenship which has come before them in recent years is jury service (a delicate matter amongst the judiciary at present). In this they have been much influenced by United States Supreme Court decisions. The 6th amendment to the US constitution provides that ‘In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .’ The 7th amendment preserves the right of trial by jury in civil actions above a certain value. The Supreme Court declared that, to satisfy this guarantee, jury pools must reflect a ‘fair cross section of the community’. In *Ballard v United States* (1946) 329 US 187 it had held that the exclusion of women from federal jury panels was impermissible.

However, as late as 1961, in *Hoyt v Florida* 368 US 57, the Supreme Court upheld a Florida statute under which women had to register for jury service with the circuit court, whereas men were registered automatically. In practice very few women registered. Gwendolyn Hoyt challenged her conviction by a six man jury for murdering her abusive husband. The SC was unanimously against her. Women were not excluded from jury service, but spared the obligation in recognition of their place ‘at the center of home and family life’:

‘We cannot see that it is constitutionally impermissible for a state, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civil duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.’

Hence the Florida statute did not deny due process or equal protection, being based on a reasonable classification, even though it applied to all women, whether or not they had such domestic responsibilities. Betty Friedan’s *The Feminine Mystique*, which set off the modern feminist movement, was published in 1963. But you, Mr Bentham, were long ahead of her: as early as 1789 (unpublished manuscript, University College Collection, CLXX, 145) of the claim that women’s participation in political activity would ‘call them off from the exercise of their domestic duties’, you wrote:

“The men have their domestic duties as well as the women: it will not call the one sex more than the other. It is not more necessary that women should cook the victuals, clean the house and nurse the children than it is that the greater part of the male sex should employ an equal share of their time in the labours of the workshop [or] the field.”

Hoyt was overturned in *Taylor v Louisiana* (1975) 419 US 522. The Louisiana law at the time was similar to the Florida law in *Hoyt*, requiring a prior opt-in before a woman could be summoned for jury duty. The appeal was entirely unmeritorious. The appellant had abducted a woman at knife point, raped and robbed her, while her daughter and baby grandson were in the backseat of the car. The majority in the Supreme Court found that the greatly increased participation of women in the labour force ‘put to rest the suggestion that all women should be exempt from jury service based solely on their sex and the presumed role in the home’. Dissenting Justice

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Rehnquist thought it might be fair to conclude that the Louisiana system was anachronistic, but thought it improper for the Supreme Court to enforce 'this court's perception of modern life' against the states.

A similar reluctance to impose modern British perceptions throughout the Commonwealth guided the Privy Council's decision in *Poongavanam v The Queen*, 6 April 1992. The appellant was another male murderer convicted by an all male jury. The Privy Council upheld a Mauritius law which actually excluded women from serving on juries at the time. Section 16 of the Constitution of Mauritius prohibited discriminatory laws, but this did not apply, because 'discriminatory' only meant different treatment attributable to race, caste, place of origin, political opinions, colour or creed, and not sex. Section 3 declared the fundamental rights and freedoms which existed without discrimination on grounds of sex as well as these grounds, but the fundamental rights and freedoms declared did not include the right to serve on a jury. The Board (in an opinion delivered by Lord Goff) discussed but did not decide whether the United States' 'fair cross section on the jury panel' approach should be applied to the requirement of a 'fair hearing within a reasonable time by an independent and impartial court' under section 10 of the Constitution, which mirrored Article 6 of the European Convention on Human Rights. But they were obviously sceptical because it was directed at the panel rather than the actual jury selected, whereas an 'impartial tribunal' is usually taken to refer to the actual tribunal trying the case. However, they found that the exclusion of women could be objectively justified under the social conditions prevailing in Mauritius. They based this on these observations in the Mauritius Court of Criminal Appeal:

'. . . the Mauritian woman's status, her place and role in the home and family, and social conditions prevailing in this country are incompatible with a service which, as our law has stood and still stands, may require that they be kept away from home for sometimes long periods, sleeping in hotels, and unable to move about except under the vigilant eyes of court ushers. It seems unquestionable to us that such an obligation would cause much distress to many Mauritian women, and arouse a deep resentment among many of their male relatives.'

Another local case had held that that the emancipation of Mauritian women on a sizeable scale was a relatively recent phenomenon. So the Privy Council decided that even if the American principle were applicable it would be 'quite wrong' for them to hold that there was no longer any objective justification for the rule by 1987 when the appellant was convicted.

This sensitivity to local conditions in different parts of a diverse Commonwealth may be understandable. But you, Mr Bentham, would surely have had none of it. You would have regarded this as an example of the 'tyranny of the stronger sex'. Evidence of the local social and cultural conditions should be taken from *all* sections of the community, especially those apparently excluded from it, rather than from the dominant sections which are perpetuating the exclusion. What can be achieved when the House does look at extrinsic evidence of discrimination is well demonstrated by the *Shah* and *Islam* cases: *Islam v Secretary of State for the Home Department*; *R v*

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Immigration Appeal Tribunal, ex parte Shah [1999] 2 AC 629. This, it will be recalled, decided that because women in Pakistan were discriminated against as a group in matters of fundamental human rights and the state gave them no effective protection, they constituted a ‘particular social group’ under the refugee convention. In asylum cases the courts do not take the word of the state from which the asylum seeker has fled as to what the conditions are there. It looks to the objective evidence gathered by Amnesty International, the US State Department and our own Government sources.

So perhaps the climate had changed a little by 2003 when the Privy Council next considered jury service. In *Rojas v Berliaque (AG for Gibraltar intervening)* [2004] 1 WLR 201, by a majority of 3 to 2, the Privy Council struck down a Gibraltar law, very similar to those in *Hoyt v Florida* and *Taylor v Louisiana*, requiring women to opt in to jury duty. This was a civil claim for damages for assault and false imprisonment brought by a woman against the man with whom she used to live. Section 8 of the Constitution of Gibraltar was in similar terms to article 6 of the ECHR. This time, the Government did not try to argue that there was an objective justification for the discrimination; it argued that a representative jury panel was not part of the natural and ordinary meaning of an ‘impartial tribunal’: a fair minded and informed observer would not conclude, under the test established in *Porter v Magill* [2002] 2 AC 357, that there was a real possibility that the actual jury, even if all men, was biased. Of course, the Board could not accept that a fair minded observer would think there was a real risk of bias just because a tribunal consisted wholly of men or indeed of women; very few Court of Appeal, House of Lords or Privy Council decisions could stand if that were the case. Instead the majority (Lord Nicholls of Birkenhead, Lord Millett and Lord Walker of Gestingthorpe) focussed on the requirement of a fair trial under section 8 and article 6. If the trial was to be by jury, the method by which the jury was selected must be one which affords the citizen a fair trial. They quoted the US ‘fair cross section’ cases. In the absence of cogent objective justification, the Gibraltar position was ‘an unacceptable discriminatory practice undermining confidence in any system of law which still maintains it’. The remedy was to construe the position applicable to men in the relevant Gibraltar legislation as if it also applied to women and ignore the discriminatory post-script.

The minority (Lord Hobhouse of Woodborough and Lord Rodger of Earlsferry) applied the impartiality of the actual tribunal test. The issue was whether an objective Gibraltarian observer would have a reasonable basis for saying that in Gibraltar juries are not impartial and do not deliver fair verdicts. He would have none (the claimant had conceded that if a representative pool had nevertheless resulted in an all male jury she would have had no complaint). Thus there was no basis for saying that the claimant, or any other class of litigant, was discriminated against by the system. The US cases dealt with the constitutional right in the US to a jury trial; and in the context of ‘the democratic imperative which underlies the whole of the Constitution and the political ethic of the society of the United States – the full involvement of the people in all aspects of Government.’ (para 46). The minority also commented that such provisions should not be too readily dismissed as unacceptable - cultural and practical factors might provide perfectly adequate justification for what the legislature had done (para 40).

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Neither opinion referred to the later US case of *JEB v Alabama ex rel TB* (1994) 511 US 127, which relied on equal protection rather than the right to jury trial – holding that the equal protection clause guaranteed the rights of women and men not to be discriminated against in jury selection. Even if representative participation is not as deeply embedded on our public life as it is in the US, the concept of equal protection is becoming more familiar to us since the advent of the Human Rights Act and article 14. (I am not entirely sure what you would make of our compromise, Mr Bentham, as it protects fundamental rights while preserving Parliamentary sovereignty.)

Jury service is an excellent paradigm of what these arguments for equal treatment are all about. Few people actually want to do jury service but it is an essential component of participation in our democratic institutions. The so-called ‘privilege’ of letting women off has always been based either on doubts about their competence (referred to by Justice Scalia in *JEB*) or on their special role in the home and the need to protect them from exposure to the wickedness of the outside world. Once again, Mr Bentham, you were way ahead of the game. Of women’s supposed intellectual inferiority, you said, in that same 1978 manuscript, first:

“The fact is dubious: but, were it ever so certain, it would be nothing to the purpose, unless in the best endowed of one sex they were inferior to what they are in the worst endowed of the other.”

But secondly:

“Supposing the inferiority of faculties: the greater it is, the less their capacity of abusing the power in question. If they belong to the class of idiots, at least they do not to the class of mischievous idiots.”

The US Supreme Court also thought that having women on juries might make a difference. This was vividly put in *Ballard v US* (1946) 329 US 187:

‘The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men – personality, background, economic status – and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But if the shoe were truly on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may or may not in a given cause make an iota of difference. Yet a flavour, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.’

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So, supposing for the time being that most of my colleagues accepted such arguments and were disposed to hold that my appointment under the 1876 Act was valid, what technique might they use to do so? Four possibilities occur to me:

- (1) They could simply say that *Viscountess Rhondda's claim* misconstrued the 1919 Act and was wrongly decided. There is no conceptual difference between incapacity and a disqualification. What worked for all other public functions and professions must also work for the right to sit and vote in the House of Lords. Section 6 of the Peerage Act 1963 was unnecessary.
- (2) They could distinguish *Viscountess Rhondda's claim* on the facts, on the basis that the reference to a judicial post in the 1919 Act must have included the office of Lord of Appeal in Ordinary, so that whatever the position for hereditary peerages, women could validly be appointed under the 1876 Act. Women who were qualified to be appointed Law Lords were surely qualified to sit and vote in the House of Lords.
- (3) They might consider that, whatever was meant by 'qualified persons' in 1876, those words had now to be construed in the light of the changed constitutional and social context. We are now much more familiar with the concept of a statute that is 'always speaking': see Lord Steyn in *R v Ireland, R v Burstow* [1998] AC 147, at 158; [1997] 4 All ER 225, at 233:

'It is undoubtedly true that there are statutes where the correct approach is to construe the legislation 'as if one were interpreting it the day after it was passed' (see *The Longford* (1889) 14 PD 34 at 36) . . . Bearing in mind that statutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of statutes. Recognising the problem Lord Thring, the great Victorian draftsman of the second half of the last century, exhorted draftsmen to draft so that 'An Act of Parliament should be deemed to be always speaking' (see *Practical Legislation* (1902) p 83 . . .) In cases where the problem arises it is a matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to apply the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted. But the drafting technique of Lord Thring and his successors has brought about the situation that statutes will generally be found to be of the 'always speaking' variety.'

So although in 1861 the draftsman of the Offences against the Person Act would not have thought of psychiatric illness as a bodily injury, by 1997 causing psychiatric illness with the requisite mens rea could be ABH or GBH. And while in 1920 the draftsman of the Increase of Rent and Mortgage Interest (Restriction) Act 1920 would never have dreamt that a survivor of a homosexual relationship might be a member of the deceased tenant's 'family', by 1999 the type of relationship implied by that term could now apply to such

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a couple. Indeed, as Lord Clyde pointed out in *Fitzpatrick v Sterling Housing Association* [1999] 4 All ER 705, at p 726, it was not that the essential meaning of the word had changed; it was just that social habits and opinions could affect the way it was applied to new circumstances.

But there are limits. Lord Hutton and Lord Hobhouse dissented in *Fitzpatrick*. And the most often quoted exposition of the position is that of Lord Wilberforce in his dissenting opinion in *Royal College of Nursing v DHSS* [1981] AC 800, at p 822; [1981] 1 All ER 545, at p 565:

‘How liberally these principles may be applied must depend on the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the new subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take under the law of this country: they cannot fill gaps: they cannot by asking the question, ‘What would Parliament have done in this current case, not being one in contemplation, if the facts had been before it?’ attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself.’

In 1876, ‘qualified person’ could not have included a woman because no woman could become a lawyer let alone a judge. But the words were clearly capable of including a woman even then and once it became possible for a woman to obtain the necessary qualifications why should it not be applied to her too even without the express reference to judicial posts in the 1919 Act? On this basis the case is on all fours with *Edwards v Attorney General for Canada*.

- (4) They could apply contemporary human rights standards to either the 1876 or the 1919 Act or both. This would not be a problem if we had a true equal protection clause along the same lines as the 14th amendment. The US Supreme Court applies a varying standard of scrutiny according to the nature of the classification, but it always looks for a rational connection between the aims of the legislation and the distinction drawn. But one would hope that no-one could now find a rational connection between the aim of the 1876 Act – which was to strengthen the legal talents in the House of Lords so that it could retain its appellate jurisdiction - and the exclusion of otherwise qualified women lawyers. These days, one hopes that the reverse would be the case.

But we do not have a true equal protection clause. We only have article 14 of the ECHR. This does prohibit discrimination on grounds of sex but only in the enjoyment of the rights and freedoms set forth in the Convention. As with the right to serve on a jury in Mauritius or Gibraltar, the right to serve as a judge is not one of the rights and freedoms set forth in the Convention. The argument would have to be based on the rights of litigants to a fair trial by an

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independent and impartial tribunal under article 6. The reasons advanced by the US SC in *Ballard* for having women on the jury panel are very similar to those advanced by Chief Justice Beverley McLachlin among others for having women judges, perhaps particularly a final court of appeal with constitutional as well as ordinary appellate functions. The sexes are not entirely fungible. So would my colleagues be tempted to apply that reasoning here too? If they were, it might make acceptable a requirement to attempt recruit a diverse judiciary from amongst the equally meritorious pool.

So here is a parlour game for us all to enjoy. Imagine a court of at least nine Law Lords, not including myself, sitting on my case. Who would be for holding that I have not been validly appointed? Who would be for holding that I had and for what reasons? Which black letter solution would they each choose? Answers on a post card, please . . .