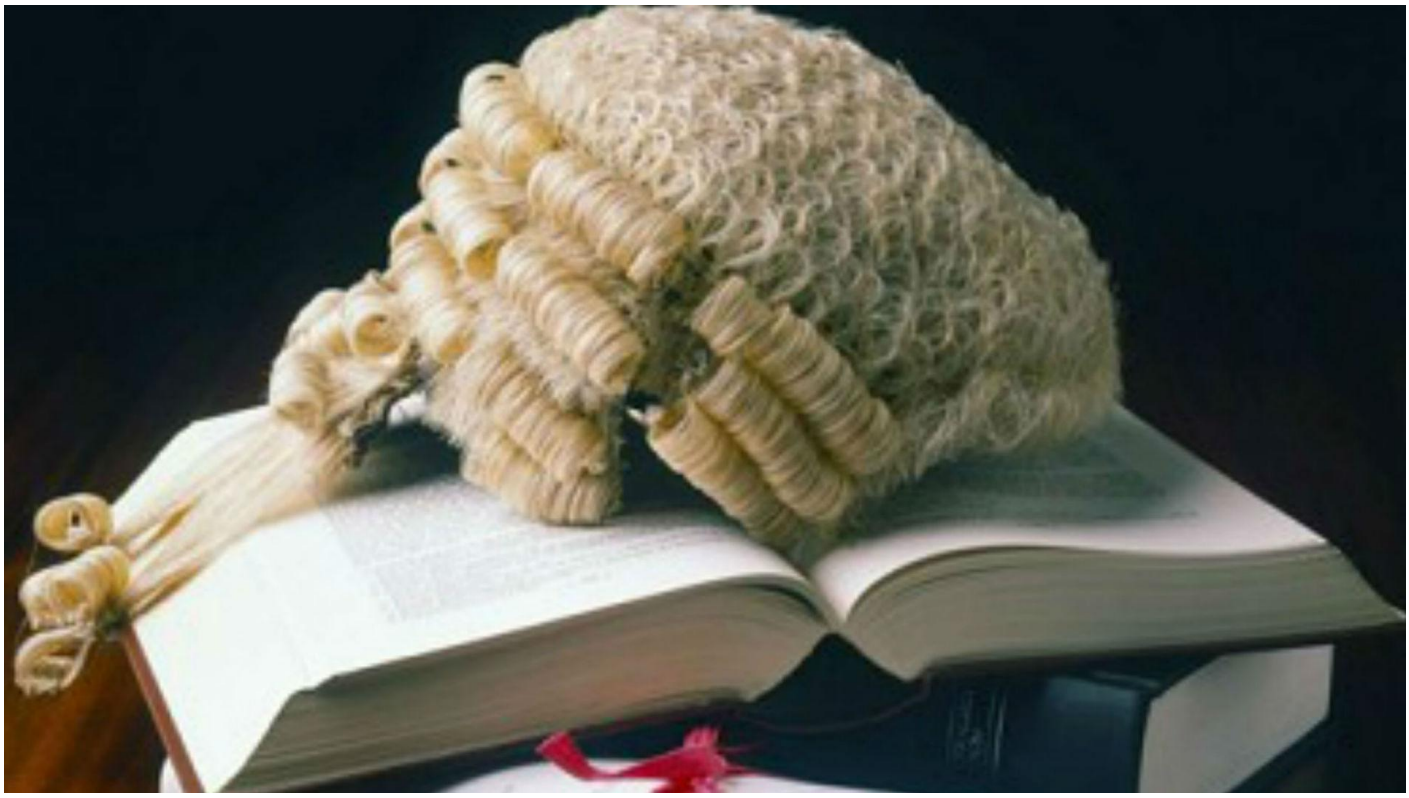
GRESHAM COLLEGE

Founded 1597

Sisters-in-Law: The Irresistible Rise of Women in Wigs
Transcript

Date: Thursday, 25 June 2009 - 12:00AM



The Gray's Inn Reading 2009

Sisters-in-Law: The Irresistible Rise of Women in Wigs

by The Hon Michael Beloff QC

Treasurer, Provost, my Lords, Ladies and Gentlemen,

In an unauthorized biography of Cherie Booth[i][1] there appears the unmemorable line 'Michael Beloff likes women'. The author does not, I hasten to add, mean to hint that I have a reputation as a serial lover - Blackstone Chambers' answer to Silvio Berlusconi. I have been happily married for almost 4 decades to the same woman - as the late Sir Clement Freud would put it - to my first wife, and - as I would add - to my last - and even my best friends would say that I resemble Don Quixote more than Don Juan.

But, no doubt because I experienced single sex education until the age of 18, and had no sisters, I came late in the day into regular contact with '*the females of the species*'. And while a career at the bar has left me with a capacity, not necessarily admirable, to see several sides of every question, I have never hidden my belief that women, given the chance, do most things better than men.

When up at Oxford, I successfully moved the admission of women to full membership of the Oxford Union. I was a willing participant in a successful campaign to ensure that the Reform Club opened its doors to women members - the first London club to do so. I did not have to follow the example of a distinguished colleague and old friend, who in a blaze of publicity resigned from the Garrick on the grounds that it discriminated against women, having apparently during his prolonged membership not previously noticed that it was a single-sex establishment. I wrote the first commentary on the Sex Discrimination Act 1975, and in 1991 I received the first - and as, alas, it proved the last ' award made by the Women's Defence League, from the hands of Barbara Castle for my contribution to women's rights. This was specifically for my work in the case brought by Ms Marshall in the European Court of Justice which established that it was unlawful under community law to compel women to retire earlier than men[2]. My real triumph was to persuade the Equal Opportunities Commission to fund the litigation, that body having been earlier advised by eminent leading counsel that the claim had no reasonable prospect of success. But as I get older I wonder against which sex the compulsory retirement rule actually discriminated!

So when I was invited to give the Barnard's Inn reading tonight it was predictable that I would wish to reflect on a topic which was dear to my heart, not least because Grays Inn can claim credit for electing the first woman Treasurer of any Inn of Court, the late Master Rose Heilbron, and the first woman Law Lord and member of the Supreme Court to be, Master Hale. But as I shall show, if our Inn can claim to be a late coming pioneer, if that is not a contradiction in terms, it was not ever thus.

In 1903 Bertha Cave brought a test application on behalf of herself including, inter alias, Christobel Pankhurst, the celebrated suffragette, seeking admission to Grays Inn. The Benchers refused to call her, so she appealed to a Tribunal consisting of the Lord Chancellor, the Lord Chief Justice and five other Judges. In the issue of the New York Times of December 5th 1903, in among a mixed bag of items, a correspondent described her efforts on appeal in the following way.

Headline

'*TOPICS OF THE WEEK IN THE BRITISH CAPITAL; Century-Old Reign of the 'Igh 'At' at Last Ended - Miss Bertha Cave's Attempt to Become a Barrister - political Meetings the Warmest Places in London - Chamberlain Gaining Support Every Day.'*

Text

'Britons are not averse to progress, provided it does not come straight at them headed by a brass band.

The trouble with Miss Bertha Cave, the would-be woman barrister, was that in her campaign of progress she had to have a brass band. She could not sneak into Gray's Inn Court. If she could have slipped in through the cellar window, and little by little assumed the prerogatives attaching to a barrister, she might in course of time, say when she had reached her eightieth year, have found herself in the traditional wig, eating the traditional dinners, and smoking the traditional pipe.

O Tempora - I interpolate - O Mores*!'*

She had to go to work in another way and appear before the tribunal of Judges sitting in the House of Lords. Clad in a navy blue walking suit with a bolero of the same material trimmed in white, and balancing a rather piquant black hat on her head, she carried her comely self into the presence of the august Judges. She deposited a purse and a package that looked like corsets on the table, and then pleaded her case. There was no question of ability raised, it was solely a matter of sex. So she told the Judges what other countries were doing for women who desired to practice law.

The Judges listened smilingly, and when Miss Cave was through promptly advised her that there was no precedent for admitting women students at any of the Inns of Court, and that they did not feel justified in creating one. 'I wish your lordships good morning.' said the little woman frigidly, and picking up her purse and her corsets she quitted the judicial presence and went out in the cold, cold world.'

The issue as to whether women could be admitted to the professions as solicitors[3], barristers, or doctors, or could enjoy the franchise[4] or access to public office[5] was often couched in terms of whether women were 'persons' within the relevant legislation; the cases indeed came to be called 'persons' cases[6]. It is one of the little ironies of history that the feminists of the mid to late twentieth century regarded the description of women as 'persons' as being a victory for emancipation when the same nomenclature had been earlier used in the Courts to deny them their natural rights. The writings of Coke were frequently prayed in aid to support rejection of the women's claims. Coke is, of course, a legendary figure in English law. His wife wrote after his death '*We shall never see his like again*? ' an ambiguous pronouncement clarified only by the succeeding words '*Praise be to God*'.

In Ireland an issue which arose for judicial determination was whether a woman could become a clerk to the petty sessions[7]. Ronan LJ painstakingly listed the reasons why at common law women were previously held not qualified to perform public functions: *1 subordination of sex, 2 inferiority of body , 3 mental inferiority due to course of education and training, 4 decency and decorum*.[8]. But the Court ultimately upheld the disqualification as a matter of statute, not common law, adding: *'the reason for the modern decisions disqualifying women from public office has not been inferiority of intellect or discretion, which few people would now have the likelihood to allege, it has rather rested upon considerations of decorum and upon the unfitness of certain painful and exacting duties in relation to the finer qualities of women*'.[9]

It was not until 1929 in a case involving eligibility for election to the Senate in Canada that the Privy Council decided that a 'person' could include a woman[10].

Lord Sankey LC said: *'the exclusion of women from all public office is a relic of days more barbarous than our own'*, and casting around for a plausible explanation, delved dubiously into prehistory *'such exclusion is probably due to the fact that the deliberative assemblies of the early tribes were attended by men under arms and women did not bear arms*'[11].

He also said more pertinently

custom is apt to develop into traditions which are stronger than law and remain unaltered long after the reason for them has disappeared'[12].

No lesser a champion of women's rights than Master Hale has commented

Despite the historical learning deployed, this looks more like political than black letter reasoning.[13],

I agree and have nothing to add.

In consequence Master Hale teasingly suggested that the validity of her own appointment as Law Lord under Section 6 of the Appellate Jurisdiction Act 1876 which refers to *'qualified persons'* might be doubtful[14].

I disagree, and would add a great deal if the point were ever taken. Indeed a thousand swords would surely leap from their scabbards in her support.

The Courts in the Empire were no more responsive to women's claims for admission to the legal profession.

In Canada Mabel French brought two test cases. She was unsuccessful in her attempt to be admitted to legal practice in New Brunswick[15]. Her later application to be admitted to the Bar of British Colombia, also failed. The Chief Justice said

'*that there may be cogent reasons for change based upon changes in the legal status of women, and the enlarged activities of modern life may be admitted, but this is a matter for the legislature, not the Court to resolve'*.

Judges in the francophone regions were no more tolerant and held that

'*women could be admitted neither to the study of law nor to the legal profession in Quebec*'[16]

In the Transvaal a woman failed to become an attorney in a case brought before the very same Supreme Court which had been robust in overruling the Law Society's objection to admission of an indigenous African. In the Court's view the word 'person' included a black man but not a white woman.[17]

Madeline Wookey's attempt to be admitted as an article clerk was rejected by the South African Appeal Court[18], Mr Justice de Villiers conceding (necessarily) that the word 'person' was, in its ordinary and natural meaning, wide enough to include women nonetheless was not prepared to hold that the legislature intended it to be so construed.

'*We cannot*'

he said with a scholarly flourish:

'*ignore the fact that from the time Carfania vexed the soul of some too nervous praetor with her pleading down to their our day the profession of attorney has been exercised exclusively by men, and this applied not only in Holland....*

- a genuflection to the Roman Dutch origins of South African law ...

but also in England.'

He conceded that restrictions based on race or religion (he mentioned Jews) or disability (he mentioned the blind) were obsolete, but denied expressly that the same applied to restrictions based on sex. The South African Law Journal to its credit declined to accept the logic of the difference[19], although its liberal record, if not its commitment to free speech, was somewhat blemished when five years later another contributor argued that:

?*for women to practice law would be to revolt against nature*'[20].

How stood matters in the New World'[21] The mosaic constitutional pattern of the United States ensured that for aspirant women attorneys practice varied from state to state. In colonial times for *force majeure*reasonswomen were often attorneys in fact if not attorneys in law. But later there was a retreat from that position. Post civil war judges were astute to ban women from the legal profession, relying Scalia-like, on the originalist construction of the intentions of those who drafted the statutes for admission to the bar[22], and rejecting the approach of a Steyn that statutes are always speaking[23].

Arabell Mansfield[24] was the first woman to be admitted to the practice of law in the USA in the state of Iowa, whose contemporary fame rests more upon the crucial role it plays in the selection of party Presidential nominees. The Iowa code of 1861 limited admission to the bar to *'any white male person'*. In an ingenious exercise of interpretation the Iowa Supreme Court ruled that

'*the affirmative is not any implied denial of the rights of females*'. The Latin precept *inclusio unius exclusio alterius* was once described by Lord Diplock as being victim of a '*misunderstanding' that is regrettably common.**[25]**.* Whether misunderstood or not, the precept had apparently not penetrated the jurisprudence of the mid west at all. The Iowa State Code of 1873 blue pencilled the potentially offending words; but it was not until the 1920s that states started routinely admitting women to the Bar, although not in great numbers, Delaware and Rhode Island being the last to capitulate, and it was not until 1957 that the Supreme Court disallowed sexist state restrictions on admissions.[26]

In 1870 the distinctively named Lemma Barkaloo became the first woman to try a case in the American courts. She had earlier been denied entry to Columbia Law School, a member of whose Board of Trustees stated '*I think that the clack of these possible Portias will never be heard in Dwights Moot Courts*...[27]. He was an obstacle, but not, it would seem, an oracle. Another who sought to hold back the tide Chief Justice Ryan of the Wisconsin Supreme Court in 1875 carried his brethren with him when regarding it as inappropriate *that women should be permitted to mix professionally with all the nastiness of the world that finds its way into the Courts of Justice.**[28]***, but his triumph was only temporary. Four years later he was the sole dissenter when the earlier judgment was reversed[29].

In *Bradwell v Ilinois*[30] Myra Bradwell, successful in the Illinois Bar Exam found herself disqualified by reason of her marriage, even though her husband was a Judge. The record of proceedings mercifully does not suggest that it was because of his office.

In the Supreme Court Justice Bradley insisted that, as Blackstone had opined - I speak of the jurist not the Chambers which bears his name - women had no legal existence separate from that of their husbands. The Appellant's citation of the 14th Amendment was to no avail; the privileges and immunities to which the famous equal protection clause attached did not apparently include the right to practice law. She was, paradoxically a citizen, but not a person. Her story has a happier ending. In 1892, she was admitted in practice before the Supreme Court, although she never availed herself of the right[31].

Even when sex was added as a prohibited ground for discrimination into the Civil Rights Act 1964, whose inspiration was the need to combat racial discrimination, it is unclear whether this was done to impede or to improve the bill[32].

The conclusion of Albie Sachs writing in 1978 was that whether under a system where the judges had to respect parliamentary sovereignty or one where the judges saw themselves as guardians of a paramount constitution

...*'the judges in the two countries almost invariably arrived at the same conclusions at almost precisely the same times, quite irrespective of the constitutional routes they followed*?'[33].

A variety of reasons for what, with the benefit of hindsight, seems an indefensible discrimination can be distilled from the jurisprudence.

First the response chivalrous - that to allow women to practice law would destroy '*man's reverence for womanhood and faith in women'**[34]***.

Second, the response delicate - that for women to practice law offended against decorum.

Third the response chauvinist - that women were simply unsuited to the demands of the profession physically, intellectually and emotionally.

Fourth the response obstinate - that the legal profession was already overcrowded.

Fifth the response protectionist - that professional standards would be affected.

Sixth the response pragmatic - that admission would be wasteful since women is more likely than men to withdraw from the practice.

Seventh, that the response religious - that in one judge's words '*The paramount destiny and mission of women is to fulfil the noble and benign offices of wife and mother, the law of the creator*'.[35]

Eighth the response traditionalist - that since the profession had always been all male, so it should remain.

As the late Eric Morecambe would have put it, there's no answer to that.

It was on the basis of this last reason that it was held in 1914 that women could not be admitted by the Law Society to qualify as solicitors under the Solicitors Act 1843[36]. Cozens Hardy MR relying on: *'long uniform and uninterrupted usage*' said a reform was a matter for Parliament, while he conceded that *'in point of intelligence and education and competency women'are at least the equal to a great many, and probably far better than many of the candidates who will come up for*

examination...'[37]especially he added, the applicant *...'a distinguished Oxfordstudent*...'[38]; Swinfen Eady LJ, however, commented that the inability of married women freely to make contracts would impede them from entering into articles, musing that : *'every woman can be married at some time in her life,'*[39]a more cautious statement than that of Lord Birkenhead LC in the famous *Viscountess Rhonda's claim**[40]*** who opined '*a female must remain a female until she dies'* being oblivious to the possibilities of gender reassignment or transexuality.

The dismantling of the barriers in Great Britain was engineered by the Sex Disqualification Removal Act 1919 which provided that no person should be disqualified by sex or marriage from the exercising of any public function.

The prohibition allowed no scope for construing 'person' as other than applying to both sexes.

In supporting the Bill Lord Sumner[41]a diehard Tory rejected a flood gates argument

'*that it was a stepping stone to higher things, the Bar, the vote, the Woolsack, I know not what*.[42]'

Two out of three of those events have, of course, come to pass: only the woolsack remains unclimbed - at any rate by a Lady Lord Chancellor. Please note the gulf even in that extra - curial *obiter dictum*, thought then to exist between the two branches of the legal profession. Women solicitors maybe; women barristers never! But Lord Sumner was not only the sceptic of his time.

In a lecture in Cambridge in 1924, His Honour Judge Edward Parry made it clear that he considered that the key virtues of barristers were unevenly distributed between the sexes.

'*Honesty and courage women have: but industry crushes them: wit they admire but do not possess. Eloquence they neglect: judgment they lack: fellowship is alien to them'*.[43]

And Henry Dickson KC wrote only a decade later:

'*As to whether women are likely to make a real success in the profession in the future, it is rather too early to judge. I have had some experience of their worth in the Central Criminal Court of late years: but I prefer to withhold my judgment on such a* ***very delicate*** *question at the present time.'*[44]

Yet as his reference to his experience shows, once a breach was made in the fortifications of the profession, a few female pioneers were quick to profit from it.

Margaret Henderson Kidd was the first female member of the Faculty of Advocates although from 1923 to 1948 she remained the only female advocate. Then and till much later the ladies robing room was situated off a lower corridor in Parliament House opposite the condemned cell, and hot water was only put in after the second world war.

The first woman to be called to the English bar was Ivy Williams a Middle Templar[45] - in 1921 - six months after Frances Kyle had been called to the Irish bar.

The changing attitude of the legal establishment to her ascent can be illustrated by the characterisation by The Law Journal of her threat in 1904 to set up a third branch of the legal profession if Law Society and Benchers did not yield in their opposition as *'a futile attempt of a persistent lady to gain admission to the Bar**[46]***', while later serenading her call as *'one of the most memorable days in the annals of the English legal profession',* although adding waspishly that *'the admission was never likely to be justified by any success they will achieve in the field of advocacy'**[47]***'. Ivy Williams herself eschewed advocacy in favour of scholarship and teaching.

Not so the silver medalist in the female race to be called, Helena Normanton[48], also a Middle Templar - the first woman to obtain a divorce for a client, the first to lead for the prosecution in murder, the first to plead in the High Court, the Old Bailey and the London Sessions, and in 1949 with Master Rose Heilbron the joint first English King's Counsel. By reason of the attention paid to her gender she was wrongly accused of advertising, and suspect because of her feminist activities. She argued in favour of equal pay for equal work as early as 1914 and for women to retain her individual identity after marriage. She was the first women to be issued with a passport in her maiden name, and was an advocate of divorce law reform.

The first woman member of the Bar Council was Hannah Wright (née Cross) who died only last year.

A PPE convert, she aspired to a Chancery Practice. Her obituary in the Times[49] records.

'*There was no official method of getting pupillage or a seat in chambers and she had great difficulty in finding a place. She looked for an opening in a great number of chambers and applied for five or six, where she was given a welcoming hearing by the Head of Chambers, but was told to return next day when he would have discussed the matter with the Clerk. Then, the invariable answer was 'so sorry, but there is no lavatory for you'. Eventually she reapplied promising always to use the*

public lavatories in Lincoln's Inn Fields, and was accepted by the Chambers in 1 New Square. She was called to the Bar in 1931 by Lincolns Inn.

..

Several solicitors said they would like to send her work but then added that their clients would not even consider employing a woman. One client said, 'What, are there no men at the Bar anymore?'

She did not feel that judges were prejudiced against her. But in one case involving an affiliation order the magistrates took her to be the client.'

Now for some statistics. In 1921 there were 20 women listed as called to the Bar; in 1929 67; by 1955 there was a decline to 64, by 1965 the figure was 99: 1970 it was 147, 1976 it was 313. [50] The pace of any advance was pitifully slow. It is instructive that in his 1962 Hamlyn Lectures *'Lawyer and Litigant in England*', Sir Robert Megarry had a section on 'Lawyers as professional men'[51], a heading not, I think, redeemed by the benevolent precept of the Interpretation Acts that for statutory purposes men include women.

What were the causes?

Let me call 3 witnesses for the prosecution.

First Dame Elizabeth Lane's whose memoir 'Hear the Other Side"[52]provides a somewhat arch, but nonetheless revealing account of the career of the first woman High Court Judge. Her path was encumbered by hurdles both external and internal to her.

She was initially refused a place in chambers because of opposition of a senior - and traditionally Jurassic - my adjective, not hers - clerk as - I hasten to add - clerks then were![53] But once within the sanctum, finding herself on being briefed in an indecent assault, she burst into tears, threw the instructions in the waste paper basket, and muttered to herself that :*'she would not take part in such a filthy case*' [54].

Like Hannah Wright she encountered more prejudice among litigants than among solicitors, one calling her: *'a cauliflower headed bitch*"[55]. Nonetheless her practice burgeoned. She defended, in a case arising out of a fracas between overseas soldiers stationed in this country, a private soldier who assaulted with a broom an officer whom, he believed, was making advances to his wife. She claims to have opened her defence: *'this is case of a Pole who hit a Pole with a pole*'[56], and

speculates that this plea in mitigation resulted in a lower sentence than might otherwise have been the case, though I surmise that *it might*, certainly **ought** to, have resulted in a higher one.

When elevated to the bench, she heard her clerk being congratulated by another clerk on his , not her - achievement. But even from that pinnacle she noted the prejudice against women.

'One bold female who asked whether she could not be a judge's marshal was firmly told that it was impossible because if the judges were unmarried they might feel they would be compromised and if they were married their wives would not allow it'[57].

I turn secondly to Master Helena Kennedy[58] and her autobiographical chapter 'Playing Portia'[59]. She describes both the lack of expectation in what we nowadays term euphemistically non-traditional backgrounds and the problems encountered by those who transcended such perceived limits. She records that:

'*When some of my relatives were told that I had joined Grays Inn and was studying for the Bar, they imagined I had gone in for hotel management and catering*[60]', and adds, that once admitted '*I stepped from the equivalent of a comprehensive school in no mean city into the pages of an Evelyn Waugh novel*.'[61]

She describes in pungent detail the perils of being Master Junior, the problems with dress code, the casual sexism of the male students - all this but thirty years ago. Mercifully nous avons changé tout cela, although, interestingly, the blokish atmosphere of some chambers, reminiscent of that reputed to exist in Gordon Brown's inner circle, still persists.

Harry Mount's slimmest of slim volumes. 'My Brief Career'[62], a recollection of a misspent pupillage a few years back recalled the single female tenant as an unique figure among the members of Chambers who,*'had all the good manners and delivered all the pleasantries that I was used to in the outside world*.'[63]. **That** observation may have the ring of truth, but otherwise the book shows that it is not only, as Shakepeare's Henry V put it, old men who forget, but young men too.

I have taken a tactical decision not to rely on my third witness, who penned reminiscences under the nom de plume Venisha. Her title '*Missy you've dropped your briefs'* is based on a joke whose humorous potential, never particularly impressive, was probably exhausted by five minutes after Ivy Williams' call[64]. This justifiably little known work can nonetheless still be found on the shelves of

the Bodelian law library in Oxford cheek by jowl with *Chitty on Contract* and *de Smith*'s *Judicial Review*. It is illustrated by drawings of a red headed barrister, possibly, of the writer herself. Overall it subtracts from the sum total of human knowledge[65].

It is of course dangerous to generalise; but certain themes emerge from a study of such authors and the essays on those - still relatively few - women lawyers which have achieved the accolade of an entry in the Dictionary of National Biography; the advantage in terms of time available of singleton status or childless marriage; the interruptions caused by child rearing; the stereotyping of women as best suited to family law.

But by the last decades of the century the rhythm of change accelerated. In 2001 the tipping point was reached: more than half of those called to the Bar were women, as at December 2008 out of a cohort of self employed barristers numbering 12136' 30.9% were women.

One reason for the great leap forward in women entering the profession in the 1970s and after was the expansion of university education in the 1960s[66]. The Bar became a graduate profession and universities were gender blind in their admissions processes. In the 1970s and 80s as previously all male colleges at both the ancient universities became mixed, any Oxbridge bias at the bar profited both sexes.

Another was the impact of a progressive law. The Courts and Legal Services Act 1990 introduced an amendment Section 35A, in whose drafting I played a modest - or may be more accurately - a minor part, prohibiting discrimination on grounds of sex by barristers, barristers' clerks and those who seek to instruct the Bar.

A third was the initiative of the professional body - the Bar Council.

The 1992 Report 'Without Prejudice' on sex equality at the bar and in the judiciary commissioned by the LCD and Bar Council by Holland and Spencer disclosed substantial inequality of treatment in the profession especially in the early years.

This energised the commitment of the Bar Council to the cause; appointing an equal opportunity officer for women, and publishing in 1995 a Code of practice in 1995, which outstripped in ambit and detail the law of the land. As a by-product, whereas Shapland and Sorsby's report on Work and Training at the Junior Bar in (1994) reported that no less than 40% of women pupils and barristers had experienced sexual harassment and 8% such harassment of a serious nature, on revisiting the

issue in 1997 they found the former figure had fallen to 25%, and the latter by an even greater amount.

The problem mutated from one of admission to one of opportunity to practice, of retention in practice, and of promotion.

As to the opportunity to practice of the evenly balanced group called in 2000 74% of those who obtained tenancies were men and only 26% women[67].

Master Kennedy wrote more than a decade ago *'Maternity has replaced delicacy as the major justification for keeping women out of the profession'*[68]and the observation retains at least a partial plausibility.

As to retention the Electoral Reform Society's Survey of Barristers Changing Practice Status, prepared for the Bar Council in November 2008 was generated by concerns about relative number of female compared with male barristers who leave the profession, and it confirmed that, of those who left the practising profession, half were women even though women make up only a third.

The main factors were predictable; financial concerns especially in the publicly funded areas; desire - in a phrase made famous by dismissed ministers: *'to spend more time with their families*' dislike of long hours and constant travel; and a small percentage because of harassment. The solutions proposed were equally conventional; more créches, childcare facilities, flexible working arrangements; enhanced maternity and paternity leave.

As to promotion in a charming custom, inaugurated by Eleanor Platt QC, head of a specialist family law chambers, newly appointed women silks receive letters telling them of their placement in the list of those who have achieved that distinction: but the double century was only scored in 2008[69]: and the latest reliable to statistics of December 2008 show that out of 1273 QCs 9.5% were women. Only one woman is ranked by both the Legal 500 and Chambers Directory - those dedicated followers of fashion - as in the top 50 of commercial silks - our own Master Dohmann. One young barrister (a male) in a recent book designed to strip the mystery from call to the Bar, bluntly echoed Master Helena Kennedy's explanation : *The reason why only some 10% of women are in silk is simple; babies'****[70]***.

Indeed the bar is not a family friendly profession: the unpredictability of the workload in terms of volume, location, timing fits awkwardly with the equal unpredictability of parental life. The need to

nurture a practice not only by talent, but by - in the modern legal culture - constant self selling - oh for the days when one left that sort of thing to the clerks! - does not sit well with career breaks for child rearing, although the more far sighted chambers have progressive maternity policies.

But certainly the Bar Council ensures that no barrister, female or otherwise, is short of advice. There is Guidance on Career breaks. 'things to think about', warning the reader that without what is described as nomination of a chambers buddy :*'you may come back to discover the head of chambers and senior clerk have changed and the set has moved to a new address*' - an alarming prospect indeed, at any rate as far as the change in location is concerned. There is guidance on maternity, paternity and parental leave. There is even an annual returners course.

There is a Bar Nursery Association, an Equality and Diversity Committee, and Retention Sub-group, not to speak of the autonomous, Association of Women Barristers (as well as still more recently a United Kingdom Association of Women Judges).

All these initiatives and institutions are bound to affect the concerning statistics in the not too distant future. Out of those under 15 years call in my own set, 35 in number, 16 are women, and I assure you that we have found no need to adopt policies of affirmative action to achieve that near parity between the sexes. Interviews between the journalist son of the late George Carman QC published in The Times last year with a quartet of women who have not merely penetrated, but seemingly bypassed entirely any glass ceiling to exude a sense of optimism that, to borrow a phrase not wholly tarnished by its association with New Labour '*Things can only get better*'.[71] And two nights ago the Barrister of the Year Award at the Annual dinner hosted by the journal The Lawyer - the legal equivalent of Hollywood's Oscar ceremony - went to Dinah Rose QC, a member of this Inn - the first time a woman has won it, but I am confident, not the last.

I turn to the Judiciary - in 1970 out of 20 Law Lords and Lord Justices there were no women, there were 2 High Court Judges out of 220[72]. That is not of itself surprising. Judges do not spring like Botticelli's Venus full grown from a standing start. As Michael Zander observed in 1988:

'*The fact is that until now there have been very few women eligible for appointment to the bench simply because there are few women at that level of seniority in the profession, the issue of sex discrimination in regard to judicial appointments will not really be put to the test until the next generation*'[73].

Women still gravitate towards, or more accurately, may be steered towards family law, which itself has resonances of a caring profession, or criminal law, where, in both instances, the financial rewards are less and the construction of a C.V, which will lead to the senior judicial ranks more difficult. Indeed all the problems I have identified are links in a single chain: fewer tenants: fewer silks: fewer judges.

The domestic body on Equality and Human Rights Commission suggested in 2008 that the number of women in powerful jobs is actually diminishing instancing that only 9% of senior judiciary were female.

In the same year the international body The Human Rights Commission in its audit of UKs compliance with its obligations under the ICCPR said somewhat severely:

'*State Party should reconsider with a view to strengthening its efforts to encourage increased representation of the women and ethnic minorities in the judiciary. The state party should maintain progress in this regard*.'

One solution to accelerate progress may be to make judging more compatible with family life, for example by increase of the opportunities for part-time judging[74]. Lord Falconer's proposals for judges to be able to resume their practices after retirement from the bench, a change which he believed would encourage more applications from women has however been resisted by the judiciary[78]. We need not only more women on the bench, but more mothers too.

A second solution - already implemented - was a departure from a system of promotions dependent on secret soundings among the senior judiciary and the Lord Chancellor's say so, an archaic reliance on word of mouth recommendation within a small legal elite.

Beverley McLachlin, Chief Justice of Canada has said that human beings have a tendency to see merit only in those who exhibit the same qualities as they possess. Senior lawyers she observed are no exception so, when they look for merit, they tend to look for someone like themselves, or as Master Helena Kennedy put it more succinctly there is '*the potential for cloning'*[75].

The creation of a Judicial Appointments Commission has at least introduced a measure of transparency into the system, although it has the disadvantages, doubtless to be overcome in time that it acts as a deterrent to the modest or indeed to those who wonder whether the protracted process without guarantee of success may to a game not worth the candle. It may not achieve all

that those who inserted the obligation to promote diversity into the JAC's mission in the Constitutional Reform Act 2005[76] may have hoped for.

An astute observer Kate Malleson has written.

'taken together the collective experience of those countries which have established commissions does suggest that their use can increase the representativeness of the bench though such effect is not automatic nor necessarily significant. An important variable would appear to be the extent to which the commission engages in active attempts to recruit under-represented groups.'[77]

Removal still would be enlargement of the pool of those eligible for appointment beyond the ranks of the practising profession.

Master Hale has written:

'*We seem to be almost the only country in the world where only lawyers who are thought fit to serve in our highest courts are those who have excelled as advocates in our Courts'*[79].

It might even be worth considering the construction of a distinct career judiciary as exists in many civilian countries.

Does all this matter? I have no hesitation in agreeing with those who say that it does.

Cogent reasons have been articulated, again by the Chief Justice of Canada, why there is need for more women on the bench; to increase in public confidence; as a symbol of fairness which the Judiciary are expected to promote; as a sound use of human resources to which Master Hale has added to promote equality of opportunity and democratic accountability: [80] Both share the view that women on the Bench would make a difference in terms of the outcome of trials or appeals.

The scope for making that difference is surely accelerated by the change in the diet of cases in the High Court and above over the last half century. It is doubtful whether a woman would construe a charterparty in a commercial dispute differently to a man: and certain that she could not differently direct as to a jury as to burden and standard of proof in a criminal trial. But the salient feature of our contemporary legal system is the replacement of private law by public law as the most important dish on the judicial menu. The birth or rebirth of judicial review; the accession to the Treaty of Rome and its offspring; the incorporation of the European Convention on Human Rights by the HRA 1998 have moved the law away from the conventional areas of commerce, trusts and taxation into

new realms infused with policy consideration. Whether legislative or administrative acts pass the tests of legitimate aim and proportionality, allows for a variety of potential responses.

For my part I had always recognised that in the assessment of fact, or the exercise of discretion, a judge's gender might well be influential in a decision; What I had not appreciated, until we had our first female member of our highest tribunal is that gender could also influence the shape of legal principle and precedent.

True it is that Master Hale has written*:*

*'the great majority of the judgments I have written could just as easily have been written or spoken by a man'**[81]***.

As an exception to such general rule, she instanced that '*speaking as a reasonable but comparatively weak and fearful grandmother'* she would, unlike her male colleagues, have extended the defence of duress to exculpate the battered wife forced to handle stolen goods. [82]

I venture to think that when legal historians look back at her career as an appellate judge they will suggest that she has brought a female prospective more frequently than she acknowledges - not least, but not only, by looking at the number of her own dissenting speeches.

Diversity of experience for appellate judges, especially when sitting as one of a group as well as for trial judges, must be prized. While the first woman on the US Supreme Court Sandra Day O'Connor echoed the words of Justice Jeanne Coyne, formerly of the Minnesota Supreme Court that '*a wise old man and a wise old women would reach the same conclusion*'[83], Judge Sotomayor, President Obama's nominee for the current Supreme Court vacancy, in a now much quoted speech she gave in 2001 said '*it would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life';* certainly, we should all agree, different, if not necessarily always better.

As Master Hale herself observed:

'*Women lead different lives from men largely because they have visibly different bodies from men.'*[84]

and this must, and properly, feed into their perceptions of what is just, fair and reasonable - the primary targets of the law.

And as she has argued a feminist can be a judge as long as the point of view she brings

'*is consistent with the fundamental principles of law one is sworn to apply and secondly that it is carefully and cautiously applied to the issues in the case'*[86].

She can in short have in short an approach if not an agenda.

The US Supreme Court holding that a jury panel composed predominantly of men was not lawful perceptively said: *'the truth is that the two sexes are not fungible*'[85].

The possibility of different views based on gender was brought into focus in a recent case before the Supreme Court concerning the constitutionality of a strip search of a teenage girl at school on suspicion of possession of ibruprofen pills. The divergence of attitude between Judge Ruth Bader Ginsburg and her male colleagues was exposed by an unusual interview that she felt compelled to give to USA Today while the case was *still* pending[87].

And I suggest that it is not only in how cases are decided but how cases are handled that the increase in the female judiciary will have a benign impact.

Henry Cecil wrote '*One shouldn't be able to imagine a judge having a bath'* to make the point that judges authority stems in part at least from being seen as a sphinx, disengaged and impartial. When he wrote it there were no women judges but I would imagine that he would express the same sentiments in respect of them, if not only for the same reason.

But authority is not the other side of the coin of remoteness and justice can not only be done but can be seen to be done without macho posturing by those who dispense it.

As to how soon the changes both work I have noted and those I have floated will work their way through the system, there is a debate between the gradualists and the radicals.

The gradualists believe that it is only a question of time when the larger numbers of women being admitted to the bar will be proportionately reflected in silk and judiciary, and who believe that affirmative action, designed to erase the consequences of past discrimination, will in fact reinforce rather than destroy the concept of equality. A strong candidate for the post of Lord Chief Justice during the last decade was popularly believed to have impaired his chances by his dangerous suggestion that certain women had been elevated to the bench otherwise than on merit.

The radicals believe that whether the benign outcome envisaged by the gradualists is reality or mirage, women should not wait so long to enter into the promised land. Master Hale has said:

'most of us do not believe that sooner or later the increasing numbers of women entering the profession will trickle up to the top[88].'

I am neither a gradualist nor a radical but an optimist for the upward trend is unmistakable. There is one Lord of Appeal in Ordinary 3 Lady Justices of Appeal, 7 women in QBD, 7 in the Family Division and one in Chancery, figures originally taken from Wikipedia, but - it may be remarkably - at one with the MoJ's own list. Milestones have already been passed - in the higher judiciary. Master Ebsworth was the first woman to be appointed to the Queen's Bench Division in 1992; Dames Mary Arden was the first to the Chancery Division in 1993; Baroness Butler Sloss, as she now is, the first woman to head a Division in 1966. Dame Elizabeth Gloster the first woman appointed to the Commercial Court in 2006. Dame Laura Cox and Elizabeth Slade are experts in employment law and sit in the Employment Appeal Tribunal. Dame Victoria Sharp, an expert in libel, will deal with the jury list. Master Dobbs is a former Chair of the Criminal Bar Association, and Dame Heather Hallet a former Chairman of the Bar Council. Dame Janet Smith is preeminent in personal injury litigation. Dame Rosalyn Higgins has recently retired as President of the International Court of Justice. No longer are women simply corralled into the pastures of family law; green shoots are visible outside those traditional fields. There has been a woman attorney-general, Baroness Scotland, and two woman solicitors general-the first Harriet Harman, an honorary bencher of this Inn and aptly from the purely linguistic perspective, the first solicitor to hold that office. The somewhat patronising slogan of the cigarette manufacturers Virginia Slims in their sponsorship of the women's tennis circuit.*'you've come a long way baby*.' does not have as its compulsory corollary you've got a long way to go.

I believe the momentum for change is already irresistible and will continue to be fuelled by the dramatic changes in university entry. Research by HEPI the Higher Education Policy Institute shows that almost 50% of women now enter university compared with only 38% of men; and female entrants achieve better degrees, albeit more narrowly, when they leave[89]. During my decade as President of Trinity College Oxford we produced candidates who scored the top mark in the university in law finals in tort, administrative, company and public international law, and, the year after I left, the top candidate in law overall. The candidates had one feature in common - besides the fact that I taught none of them. They were all women, although, alas, only one has so far chosen to come to the Bar.

I see no reason why in my lifetime we should not see a woman as Lord or Lady Chief Justice to complement Beverley McLachlin in Canada, Sian Elias in New Zealand and Dorit Beinisch in Israel, or a female Master or Mistress of the Rolls.

Before reaching my conclusion, let me briefly praise some famous women, and the Inn which begat them.

Myrella Cohen, the longest serving woman circuit judge - 23 years in all - but helped liberalise Jewish divorce laws.

Pam Barker, called at the age of 49, and rejected for a tenancy from the all male set where she did her pupillage not just - she believed - because she was a woman, but because she was a grandmother, who returned to Hong Kong to become the pre-eminent defender of the Vietnamese boat people[90].

Master Angelica Mitchell - another circuit judge - cut down by cancer in the prime of whom Master Helena Kennedy wrote

'*certain upper class priorities and affiliations memorably collided with her egalitarian instincts*'

describing her penchant as a student for taking '*taxis to see the bank manager at Coutts about her overdraft*' while being at the same '*the mistress of the well-placed four letter word*'.

Jane Wynham-Kaye - General Secretary to the Health Visitors Association.

Ellice Eadie, the first woman parliamentary counsel, who drafted, among other legislation the Matrimonial Homes Act 1967, the Divorce Reform Act 1969 and the Family Law Reform Act of the same year.

Betty Johnson, Chairman of the Girls Public Day School Trust and Standing Counsel to the General Synod of the Church of England.

Master Marion Simmons, deputy chairman of the Competition Appeal Tribunal and pioneer in advocacy training.

For all, whether be wigged or not, Grays Inn was their dummy and point of departure.

Of course the future of the headgear, the historic visible symbol of our profession, is less certain than the ascent of legal woman. My only prediction is that it will not be replaced, like the traditional judicial robes, with some pseudo-modernized equivalent, which, like the mule has neither the pride of ancestry nor the hope of posterity. There is incidentally a feminist perspective on wigs too. Master Hale has said '*My objection to wigs is - that they humanise us as men. They deny us our femaleness, let alone our femininity'* ***[91]***. So in our legal culture the wigs may go, but the women will remain.

---

[1] 'Cherie' The Perfect Life of Cherie Blair by Linda McDougall [ ]

[2] 1986 ECR 723

[3] *Bebb v Law Society* 1914 1 Ch 286

[4] *Nairn v University of St Andrews* 1909 AC 147

[5] *Beresford Hope v Sandhurst* 1889 23 QB 79

[6] Sexism and the Law, Albie Sachs and Joan Hoff Wilson, Martin Robertson & Co 1978 ('sachs'). See generally 'the First Women Lawyers' Mary Jane Mossman, Hart 2008 ('Mossman') Ch. 3 (on England) See too Master Hale 'the House of Lords and Women's Rights', Legal Studies: Vol 25 No.1 ('Hale. Legal Studies')

[7] *Frost v R* 1919 I IR [ ]

[8] p.103-4

[9] p.

[10] *Edwards v AG of Canada* 1930 AC 124

[11] at p129

[12] at p.134

[13] Hale at p.78

[14] ditto p.82

[15] Re *French* 1905

[16] *Langstaff v Bar of Quebec* 1915 Sachs p.35-36.Mossman Ch.2

[17] *Sclessin v Incorporated Law Society* 1909 Cf: *Magena v Law Society* 1810. Sachs p.36.

[18] *Incorporated Law Society v Wookey* 1912

[19] 1913 p.462

[20] 1918 p.290

[21] Mossman Ch.1

[22] Sachs 94-5

[23] *R v Ireland* 1998 AC 147

[24] 1873 16 Wall 130

[25] *Quazi vi Quazi* (1980 ac 744) at p807

[26] *Konigsberger v State Bar* I353 US 252 1957, *Schwarz v Board of Examiners* 353 US 232 1957.

[27] Sachs p.96

[28] In *Re Goodell* 48 Wisc 693 (1879)

[29] *State v Goodell* 39 Wisc 232 1875

[30] 88 US 130 (1873)

[31] Sachs p.96

[32] Sachs p.210

[33] Sachs p.225

[34] Chief Justice Ryan f.n. [ ]above

[35]

[36] *Bebb v Law Society* 1914 Ch 286

[37] p.294

[38] p.294

[39] p.299

[40] 1992 2 AC 339

[41] The Last Political Law Lord: Anthony Lentin (2008)

[42] 24 HL Deb 5s 270.

[43] Despite strenuous endeavours I cannot trace the source of this quotation. I recollect only that I faithfully transcribed it form a publication shelved in the library of the Oxford Union Society.

[44] The Recollections of Sir Henry Dickson KC Heineman 1934 p.133

[45] DNB: Hazel Fox

[46] The Law Journal (34, 1904, 1-2)

[47] Law Journal 57 1922, p.161

[48] DNB by Joanne Workmen

[49] 25th February 2008

[50] Sachs p.124

[51] p.72

[52] Butterworths 1985

[53] p.55

[54] p.59

[55] p.64

[56] p.66-7

[57] p.146

[58] 'Eve was Framed' Helena Kennedy Chatto and Winders 1996

[59] Ch 2

[60] (p.35)

[61] 49, p.37

[62] Short Books 2004

[63] p.( )

[64] *Wildy* 1971

[65] ditto

[66] 'Women in the Law' British-German Jurists Association, Birmingham Conference 2004 p.3 ('Hale WIL')

[67] Hale WIL

[68] 'Eve was Framed' p.267.

[69] '*Barristers are prima donnas in all sorts of different ways'* Dominic Carman. The Times July 17 2008.

[70] Adam Kramer '*Bewigged and bewildered*' a Guide to becoming a barrister in England and Wales (Hart 2007 p.23).

[71] *'Barristers are prima donnas in all sorts of different ways'* Dominic Carman. The Times July 17 2008

[72] Sachs p.175. There were also 5 circuit Judges of 269: 7 recorders out of 366: and 4 QC's out of 372

[73] 'A Matter of Justice Michael Zander: Oxford 1988 p.14

[74] [ ] Silvia de Bertadano: The Times: June 4th2009 but for suggestions that this may deter '*bright youngsters of talent from the profession'*. Letter Isabel Langdale QC: June 8th 2009

[78] 'Passing Judgment on the Judges'. Telegrap.co.uk. Joshua Rozenberg 22nd March 2007

[75] Eve was framed; women and British justice; Chatto and Windus London 1992 p.267

[76] **64 Encouragement of diversity**

(1) The Commission, in performing its functions under this Part, must have regard to the need to encourage diversity in the range of persons available for selection for appointments.

[77] The New Judiciary. Ashgate 1999, p.148

[79] Hale: NILQ p.282

[80] Equality and the Judiciary; why we should want more women judges. Public Law 2000. [ ]

[81] ditto

[82] *R v Hassan* 20052 AC 467 para 73, p.22

[83] Sandra Day O'Connor: The Majesty of the Law: Random House 2003 p.193

[84] B. Hale p.20

[86] '*A Minority Opinion'* M Hale: Maccabean Lecture in Jurisprudence 2007 p.26

[85] *Ballard v US* 1946 329 US 187

[87] '*Do Female Judges Really See Legal Issues Differently*" New York Herald Tribune, June 2009

[88] Women in the Law, B Hale British German Jurists Association 2004. 'Gender on the Agenda' How the Paucity of Women Judges became an issue'. The Journal of Politicians 2007 (70) 717-736

[89] (Sunday Times 7th June 2009)

[90] She instructed me in *Tan Te Lam* 1996 AC [ ]

[91] Hale