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The interests of women in Bentham's late constitutional thought¹

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In *Constitutional Code, Volume 1*, Bentham proposed 'virtual universality' of suffrage, giving the right to vote to 'the whole body of the inhabitants, who, on the several days respectively appointed for the several Elections, ... are resident on the territory of the state, deduction made of certain classes.' Among the 'classes thus deducted', alongside minors and non-readers, stood '[F]emales'.² Women were thus excluded from the 'constitutive authority', the founding authority in the State. Unlike other provisions of the code deemed to require explanation, this 'enactive' law was not justified by any corresponding 'ratiocinative' text. This cursory exclusion would have passed unnoticed in the context of nineteenth-century dismissals of women's political rights, had it not contradicted other statements in which Bentham openly justified female suffrage. For instance, as late as 1822, at the time he was working on *Constitutional Code*, he lamented in manuscripts that 'the gentler half of the species stand as yet excluded [from the suffrage] by tyranny and prejudice'.³

As Bentham scholars have noted, the position expressed in his manuscripts is consistent with the universalist principles on which utilitarianism rests. Since sensitivity to pleasure and pain were universal, Bentham argued that each individual was the best judge of his - and her - interests. Moreover, Bentham's early case for democracy was built precisely on this anthropological foundation: equal political rights were justified by the fact that 'everyone has an equality of right to happiness, an equality of capacity for happiness, and equality of desire for happiness', in Philip Schofield's words.⁴ This commitment to making interests the foundation for suffrage is the linchpin of his later theory of political representation. In *Securities against Misrule* he repeated it and made its implications for the political status of women clear:

As to persons of the female sex, if the only proper mode of receiving the declaration of a person's will, namely that of *secret suffrage openly delivered*, be employed, no reason consistent with the principle of general utility as above can be assigned why they or any of them, being of relatively mature age, should stand [excluded].⁵

The link between interests and political rights were thus a defining feature of Bentham's ideas concerning women. In his 1824 article 'On Government' for the *Supplement to Encyclopedia Britannica*, James Mill on the other hand argued against including female voters in the electorate on the grounds that their interests were to be thought of as included within men's, a position strongly opposed by Anna Wheeler and William Thompson and later by John Stuart Mill. In his *Autobiography* John Stuart Mill noted that 'it is pleasant to be able to say that Mr. Bentham, on this important point, was wholly on our side'.⁶

¹ Emmanuelle de Champs thanks Monica Biberson for translating part of this text.

² J. Bentham, *Constitutional Code : vol. 1* (Oxford: Clarendon Press, 1983), 29.

³ 'Securities against Misrule', in J. Bentham, *Securities Against Misrule and other Constitutional Writings for Tripoli and Greece* (Oxford: Clarendon Press, 1990), 58.

⁴ P. Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (Oxford: Oxford University Press, 2006), 149–50.

⁵ 'Constitutional Code, matter occasioned by Greece', in Bentham, *Securities Against Misrule (CW)*, 260 For similar arguments, see Bowring IX, 108.

⁶ J. S. Mill, *Autobiography and Literary Essays* (Toronto: University of Toronto Press, 1981), 107.

The extract from *Securities against Misrule* quoted above, however, ends with the following caveat: ‘But no prepossession, however adverse to the principle of general utility, can on the sudden be eradicated: and it would be idle to propose to all that to which acceptance it is certain would not be given by any one’⁷. With this statement, Bentham provisionally closed the debate: though female suffrage was in the greatest interest of the greatest number, advocating it would ultimately be self-defeating. Similar statements can be found in Bentham’s writings from the time he made his commitment to radical reform public in 1817. The cursory exclusion of women from the electorate in *Constitutional Code*, written from 1822 and published in 1830 therefore followed naturally.

Bentham’s retreat has played a part in scholarly assessments of his feminism. In 1975 Miriam Williford explained that he was in favour of ‘an almost total emancipation’ of women.⁸ Drawing on published texts and manuscripts, she stressed the innovative nature of his ideas on gender equality in three areas where the issue of equality was at stake: politics (the right to vote), legal rights (equality in civil and penal law) and sexuality (marriage and procreation). She also highlighted the pages in which Bentham attacked the preconceptions of his time and denounced the clichés about women’s supposed psychological and intellectual inferiority. These analyses were taken further by Lea Campos Boralevi who mined manuscript sources and convincingly showed that Bentham’s stance on women’s emancipation was consistent with his utilitarianism and culturally ahead of their time.⁹ This view was shared by Annie Cot for whom Bentham’s writings ‘demonstrate[e] that, aside from some physical differences, the situation of inferiority of women is socially constructed and determined’ and the situation should be remedied.¹⁰ More recently, in 1994, Nicola Lacey called Bentham a ‘proto-feminist’; like Annie Cot, she was careful about attributing a ‘feminist’ label which appears largely anachronistic, but insisted on the way in which Bentham’s utilitarian arguments could help structure a critical reflection on women’s rights.¹¹ Conversely, in a series of articles published in the 1980s written in order to defend James Mill’s position, Terence Ball argued that Bentham ‘almost certainly was not a feminist’¹². According to him, Bentham’s ultimate exclusion of women from the suffrage had its root not only in tactical choices, but in assumption of what he considered to be women’s inferiority.¹³

All scholars involved in this debate however agree that there is a close connection between the anthropological foundations of utilitarianism and the treatment of women’s rights. In order to understand how women’s interests were taken into account in Bentham’s later constitutional thought – a period starting with his radical writings of the late 1810s – this chapter takes a longer view and examines the foundations on which his anthropological view of gender rests. Indeed, as far as the status of women and of their rights is concerned, Bentham’s position remained remarkably consistent throughout his career. Another thread is provided by his interest in the ways the law frames sexual relations between men and women, especially through the institution of marriage. Bentham’s utilitarianism made possible a

⁷ ‘Constitutional Code, matter occasioned by Greece’, in Bentham, *Securities Against Misrule (CW)*, 260.

⁸ M. Williford, ‘Bentham on the Rights of Women’ *Journal of the History of Ideas* **36** (1975), 167.

⁹ L. Campos Boralevi, ‘In Defense of a Myth’ *Bentham Newsletter* **4** (1980) 33–44; L. Campos Boralevi, *Bentham and the Oppressed* (Berlin: W. de Gruyter, 1984).

¹⁰ A. Cot, ‘“Let there be no distinction between the sexes”: Jeremy Bentham on the status of women’ in R. W. Dimand, C. Nyland (eds.), *The Status of Women in Classical Economic Thought*, (Cheltenham: Edward Elgar, 2003), 165–89, 165.

¹¹ N. Lacey, ‘Bentham as proto-feminist? Or an ahistorical fantasy on “anarchical fallacies”’ *Current Legal Problems* **51** (1998), 441–66.

¹² T. Ball, ‘Was Bentham a Feminist?’ *The Bentham Newsletter* **4** (1980), 25–31.

¹³ T. Ball, ‘Utilitarianism, Feminism and the Franchise: James Mill and his Critics’ *History of Political Thought* **1** (1980).

unified approach to women as legal and political subjects and agents. If their exclusion from the suffrage can indeed be ascribed to precautionary reasons in the polemical context of British radicalism, Bentham took care to establish other mechanisms to vindicate women's interests as individuals in the political community.

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Bentham opened *An Introduction to the Principles of Morals and Legislation* with the statement that '[n]ature has placed mankind under the governance of two sovereign masters, pain and pleasure.' The equal ability of individuals to feel pleasure and pain meant that legislators had to pay equal attention to all of them as sentient beings: 'each person', he wrote in French in 1789, 'has an equal right to all the happiness one's nature is capable of'.¹⁴ Thus, the starting point of Bentham's philosophy of interest was the individual as a sentient being apt to experience pleasure and pain. To what extent was this individual gendered? This question has been posed by the feminist critique of the political philosophy of the Enlightenment in general. Indeed, the phrase 'false universal' has been used to denounce the use of the generic masculine which prohibits conceiving female specificity and obliterates it from political discourses. As Joan Wallach Scott has pointed out, in classical political thought [t]he political individual... was taken to be both universal and male; the female was not an individual, both because she was nonidentical with the human prototype and because she was the other who confirmed the (male's) individual individuality.¹⁵

It is true that Bentham frequently uses the masculine to refer to both men and women, especially as subjects of penal and civil law. In *A View of the Hard Labour Bill*, published in 1778, he takes care to make it clear:

In regard to *sex*, I make, in general, no separate mention of the *female*; that being understood (unless where the contrary is specified) to be included under the expression used to denote the *male*.¹⁶

It can however be argued that Bentham did not consider this an obvious move and took care to consider gender differences. Throughout *An Introduction to the Principles of Morals and Legislation*, he used the neutral terms 'mankind', 'individual', 'person', or 'human creature' much more readily than the generic 'man'. The biological distinction between the sexes came up in the sixth chapter of *Introduction* under the title of 'circumstances influencing sensibility'. It ranked 25th after other characteristics such as '1. Health. 2. Strength. 3. Hardiness. 4. Bodily imperfection. 5. Quantity and quality of knowledge. 6. Strength of intellectual powers... 10. Moral sensibility... 12. Religious sensibility... 19. Habitual occupations. 20. Pecuniary circumstances...'.¹⁷ Whilst it was not one of the first determinants of sensibility, the gender criterion was nevertheless far from ineffective:

¹⁴ 'Composition des États-Généraux', in J. Bentham, *Rights, Representation, and Reform : Nonsense upon Stilts and other Writings on the French Revolution* (Oxford: Oxford University Press, 2002), 68; on this subject, see also M. E. L. Guidi, "'Everybody to count for one, nobody for more than one". The Principle of Equal Consideration of Interests from Bentham to Pigou' *Revue d'études benthamiennes* 4 (2008) [online].

¹⁵ J. W. Scott, *Only Paradoxes to Offer* (Cambridge, Mass: Harvard University Press, 1997) 8; H. L. Smith, *All Men and Both Sexes: Gender, Politics, and the False Universal in England, 1640–1832* (University Park: Penn State University Press, 2002).

¹⁶ 'Advertisement', in J. Bentham, *View of the Hard-Labour Bill; being an abstract of a pamphlet intituled 'Draught of a bill, to punish by imprisonment and hard labour, certain offenders; and to establish proper places for their reception'. Interspersed with observations relative to the subject of the above draught in particular, and to jurisprudence in general* (London: T. Payne, 1778).

¹⁷ J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1996), 52.

Among such of the primitive modifications of the corporeal frame as may appear to influence the quantum and bias of sensibility, the most obvious and conspicuous are those which constitute the *sex*. In point of quantity, the sensibility of the female sex appears in general to be greater than that of the male. The health of the female is more delicate than that of the male: in point of strength and hardiness of body, in point of quantity and quality of knowledge, in point of strength of intellectual powers, and firmness of mind, she is commonly inferior: moral, religious, sympathetic, and antipathetic sensibility are commonly stronger in her than in the male.¹⁸

Bentham's approach indeed gave centre ground to physical, intellectual, and moral characteristics without ever making gender the sole criterion.

However, the move from physical to moral characteristics had significant consequences: 'the female is rather more inclined than the male to superstition', Bentham wrote, and '[h]er sympathetic biases are in many respects different' since '[h]er affections are apt to be less enlarged seldom expanding themselves so much as to take in the welfare of her country in general... unless it be in virtue of her sympathy for some particular individuals that belong to it'.¹⁹ The different imprint of sympathy in women – which is important because it conditions the hypotheses they made to calculate maximum utility – was not due to any structural biological difference, nor to the experience of motherhood; Bentham discarded these arguments and indicated that the disparities were due to 'some deficiency in point of knowledge, discernment, and comprehension'.²⁰ It was the result, he explained, of the political, social, and moral situation to which women were confined in a world ruled by men and for men's interests: 'legislators seem all to have been of the male sex, down to the days of Catherine [of Russia]'.²¹

In certain nations, women, whether married or not, have been placed in a state of perpetual wardship: this has been evidently founded on the notion of a decided inferiority in point of intellects on the part of the female sex, analogous to that which is the result of infancy or insanity on the part of the male. This is not the only instance in which tyranny has taken advantage of its own wrong, alleging as a reason for the domination it exercises, an imbecility, which, as far as it has been real, has been produced by the abuse of that very power which it is brought to justify.²²

These ideas are not in themselves utilitarian, nor were they specific to Bentham. A strand of the Enlightenment saw women's moral deficiencies as the product of their education, socialisation, and laws made by men. Helvétius for instance pointed out that 'it is unreasonable to reproach women for insincerity, when decency and laws combine to force them to embrace it; and that effects cannot change as long as the causes subsist', while Voltaire cursorily pointed out that 'none other than men have made the laws'.²³

Specific to Bentham's utilitarianism however is the intellectual and legal approach to groups and categories, which helps us understand why he did not essentialise gender characteristics, or at least no more than any other characteristic. According to a distinction

¹⁸ Bentham, *IPML (CW)*, 64.

¹⁹ *Ibid.*, 65.

²⁰ *Ibid.*

²¹ *Ibid.*, 238n.

²² *Ibid.*, 245n.

²³ 'Je dis seulement qu'on ne peut raisonnablement reprocher aux femmes une fausseté dont la décence et les lois leur font, pour ainsi dire, une nécessité ; et qu'enfin l'on ne change point les effets, en laissant subsister les causes.' C.-A. Helvétius, *De l'esprit* (Paris: Fayard, 1988), 149; 'Ce sont les hommes qui ont fait les lois' Voltaire, *Prix de la justice et de l'humanité* (Oxford: Voltaire Foundation, 2008), 148.

made in his earliest writings, the power of legislators was twofold: they commanded *and* named the individuals to whom their laws applied. Naming and specifying individuals endowed those individuals with rights and duties.²⁴ Whilst some categories may coincide with observable characteristics ('women', or 'men aged over 21', for example), most of them were artificial, created by legislators for their own ends and subject to change depending on their objectives. This focus on the power of naming structured Bentham's legal thinking. By treating gender alongside other types of categories, many of them socially, legally and politically constructed, Bentham paved the way for de-essentialising gender. Thus, among the circumstances that affect sensibility, gender could be taken into account but alongside other specifications, such as 'the primary circumstances of bodily imperfection,²⁵ and insanity... the secondary circumstance of sex; perhaps... that of age; at any rate... those of rank, of climate, of lineage, and of religious profession'.²⁶ This refusal to essentialise natural characteristics is consistent with Bentham's deconstruction project: the principle of utility served as a tool for questioning existing categories, particularly where morality was concerned.

Defined early on in Bentham's writings, this approach to individuals and categories remained operative in his late constitutional thought, which relied on a complex system through which individuals were invested with powers depending on their legal status or situation. In *Constitutional Code*, Bentham paid close attention to the way in which categories of the population are made assignable, or, to put it another way, defined as legal subjects²⁷ He often made a deliberate effort to take an inclusive view of political communities, mentioning, for instance, that 'every person, elector, inhabitant, or foreigner ... every individual of the human species' was a member of the Public Opinion Tribunal.²⁸ This was not general, of course, and he continued to use 'man' to mean 'persons of both sexes' in many articles of the *Code*.²⁹

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The artificiality of the categories constructed by the legislator concerned the private sphere ruled by civil law. In a collection of texts from the 1770s in preparation for a project for a utilitarian code, Bentham insisted on the fact that, like all other legal powers, domestic powers were all created by legislators and could not be considered natural:

Relations stiled Natural are also constituted by the Powers called Civil. For they are constituted by Powers given by the State.

A Man and Woman copulate: in this the State, indeed, has no part: but this does not render them Husband and Wife. It does not give to either any of those powers which alone make the relation an object of notice.³⁰

²⁴ H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), 200–206; G. Tusseau, 'Jeremy Bentham on Power-Conferring Laws' **3** (2007) *Revue d'études benthamiennes* [online]; E. de Champs, 'La déontologie politique' ou *La pensée constitutionnelle de Jeremy Bentham* (Geneva: Droz, 2008), 150–55.

²⁵ E. de Champs, 'Propriété et statut personnel chez Jeremy Bentham' in B. Bachofen (ed.), *Le libéralisme au miroir du droit. L'Etat, la personne et la propriété*, (Paris: ENS éditions, 2008), 117–43.

²⁶ Bentham, *IPML (CW)*, 69.

²⁷ 'First Lines of a Proposed Code of Law', in J. Bentham, *Legislator of the World: Writings on Codification, Law, and Education* (Oxford: Clarendon Press, 1998), 191–92.

²⁸ Bentham, *Constitutional Code (CW)*, 39.

²⁹ Unlike Blackstone, who made a point to state 'Under the word homo also, though a name common to both sexes, the female is however excluded, propter defectum sexus.' S. W. Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1975), IV, 362, n.66.

³⁰ J. Bentham, *Preparatory Principles* (Oxford: Oxford University Press, 2016), 67.

The statuses of husband and wife, of child and ward, did not pre-exist the law. In this, as the editors of *Preparatory Principles* noted, Bentham broke with Blackstone and the natural law tradition which deemed these statuses to have been initially natural and only subsequently sanctioned by legislators. For Bentham, domestic powers were above all artificial and had to be defined on the basis of utility. In this regard he took a particular interest in the situation of women within the family (mainly in their role as wives rather than householders). Marriage was the point where the state created the status of each spouse within marriage and defined their respective powers:

What makes the Man and Woman Husband and Wife is *powers* given by Law, in consequence of the contract of their Marriage. Powers given to the Wife over the possessions of the Husband. Powers given to the Husband over the possessions and person of the Wife. 'Tis punishment creates those powers.³¹

Bentham's insistence on the contractual character of marriage has been studied by Mary Sokol.³² This idea was familiar to Enlightenment readers: Pufendorf had insisted on it, followed by Montesquieu and Voltaire. In 1791 the French Revolution recognised marriage as a civil contract, which was confirmed by Napoleon's Civil Code a decade later. In his later constitutional writings, Bentham insisted on the purely civil nature of this contract and sought to exclude the undue meddling of religion. He provided the bureaucratic structure that allowed the conformity of this contract to utilitarian ideals under the administrative authority of the 'Local Registrar' who was placed in charge of the 'recordation ... , as they occur, of all marriages celebrated within his territory'. In this section of *Constitutional Code* published only after his death by John Bowring, Bentham seized on the opportunity to quip at the undue influence of the Church and at its monopoly on marriage, christenings and burials.³³

A few years later, in his examination of James Humphreys's proposal for a new property code, Bentham examined the marriage contract with a clear focus on the bride's interests: intelligibility, especially that of the economic implications of the marriage settlement, was key to her expressing informed consent:

Miss Campbell [the fictitious bride in Humphreys's draught of a marriage contract] is the chief object of my care. And why? Even because – whatsoever is either not understood or misunderstood, is in proportion mischievous; mischievous, in the joint proportion of the importance of the matter, and the number of persons interested, from whose minds the true import is in either way excluded. For, from nonunderstoodness or misunderstoodness comes oppositeness to expectation; from oppositeness to expectation, disappointment; from disappointment, suffering, in proportion to the importance of the consequences.³⁴

Consent, therefore, appears as a key theme in Bentham's writings on marriage – in his early as well as in his later texts. Beyond the marriage contract, consent was also the main term around which sexual relations hinged. This notion is central in understanding Bentham's writings on sexual relations that occupied the second half of the 1810s. Indeed, within his utilitarian system, he attributed an intrinsic value to sexual pleasure, with significant

³¹ *Ibid.*, 67.

³² M. Sokol, *Bentham, Law and Marriage: a Utilitarian Code of Law in Historical Contexts* (London: Continuum, 2011).

³³ 'Constitutional Code', Bowring IX, 629. Bowring considered that Bentham had inspired the Registration system which came in force in England in 1841, see 625n.

³⁴ 'Commentary on Humphreys's real property code', Bowring, V, 405. In his later works, Bentham had more consideration for married women's property than in his early manuscripts, in which he did not frontally oppose Blackstone's statement that the husband was the only legal owner of property in a married couple (see *Preparatory Principles* [CW], 68).

consequences for morals as well as for legislation. The goal of utilitarian legislators was to maximise pleasure, whatever its source:

The pleasure that comes from the union of the sexes is a form of pleasure; leaving aside the evils, if any, that may result from the same source, that is [enough?] for a legislator to do whatever is in his power to ensure that there is the greatest possible quantity of it in society.³⁵

In order to assess whether or not an act created pleasure, legislators in effect had to examine the sum total of the pleasure produced. If one's pleasure was obtained at the expense of another's pain, then the sum total of pleasure was zero or less. More broadly, from a civil and criminal point of view, Bentham made consent the criterion for the legality of any act that had an impact on another. In *An Introduction to the Principles of Morals and Legislation* it was the first criterion for determining whether or not an act should be punished. Or rather, punishment was unfounded when the act was consensual:

[t]his consent, provided it be free, and fairly obtained, is the best proof that can be produced, that, to the person who gives it, no mischief, at least no immediate mischief, upon the whole, is done. For no man can be so good a judge as the man himself, what it gives him pleasure or displeasure.³⁶

If the principles were laid out early on in Bentham's career, their implications in the field of sexual morality were only fully worked out in the 1810s, with his attack on the domination of ascetic principles in morals and legislation, especially in the third, unpublished volume of *Not Paul, but Jesus*.³⁷ Consent and pleasure were intrinsically linked. The importance given to consent guided all of Bentham's proposals in sexual matters, particularly the decriminalisation of homosexuality and adultery 'on one side or other'³⁸.

In these later writings, though his main object was to lift the moral stigma and legal penalties attached to male homosexual acts, Bentham showed explicit awareness of the issues associated with consent on the part of women. He reflected on the conditions in which it could be considered to have been given (excluding inebriation, force, insanity or age) and provided a long list of '[e]vils to the female' attached to sexual gratification which took both physical and verbal harm into account, as well as injuries to reputation.³⁹ Though Bentham noted that all these evils could also be imposed on men, women were specifically considered in this respect. Rape, tellingly, was described as 'the sort of war thus waged against one half of the species'⁴⁰. Conversely, consent could lead individuals to enter into sexual relations outside marriage, or in open marriages, or in temporary marriages.⁴¹

It must be said that Bentham's later constitutional writings did not go so far as to provide the legal framework that would have made such sexual freedom possible, except perhaps for the casual remark that it was also the function of the Local Registrar to record divorces.⁴² Making divorce an everyday administrative matter was consistent with his calls for the simplification of divorce proceedings. Bentham's position on divorce was recurrently framed in the 1810s and 1820s in terms of interests, as when he discussed Jesus's prohibition of the repudiation of his wife by her husband:

³⁵ UC 32, f. 103.

³⁶ Bentham, *IPML (CW)*, 159.

³⁷ J. Bentham, *Not Paul, but Jesus. Vol. III. Doctrine* (London: University College London, 2013).

³⁸ 'Of Sexual Irregularities', in J. Bentham, *Of Sexual Irregularities, and Other Writings on Sexual Morality* (Oxford: Oxford University Press, 2014), 3.

³⁹ 'General Idea of ... Not Paul, but Jesus', in Bentham, *Of Sexual Irregularities*, 138–39.

⁴⁰ 'Sextus', in Bentham, *Of Sexual Irregularities*, 67.

⁴¹ Or, to take up Bentham's words, « sexual intercourse without cohabitation »; « cohabitation without marriage »; « marriage polygamous on both sides » Bentham, *Not Paul, but Jesus (CW)*, 57.

⁴² Bowring, IX, 629.

The will of the male alone would have in this case for its source the interest of the male alone: the interest of the strongest, to which the interest of the weakest of the parties would thus be sacrificed: thus saith the law of utility: thus saith the law of Jesus.⁴³

Bentham's utilitarian logic, guided by the notions of interest and consent, was innovative in so far as he rigorously examined the interests of women in the civil relations that united them to men. The current provisions of English law and Christian morality were repeatedly indicted as "tyranny": tyranny on the part of the legislator for the criminalisation of sexual acts considered harmless or pleasurable by the persons involved,⁴⁴ but also tyranny on the part of the male sex upon the female, as in the extracts quoted above.

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The aim of Bentham's constitutional architecture is to check the operation of sinister interests, an objective which is often equated with a fight against 'tyranny', a theme common to radical writing of the early nineteenth century.⁴⁵ In Bentham's political vocabulary, only the proper recognition of the interests of the greatest number can act as a check against the tyranny of the few. The centrality of interests to politics is stated in Bentham's early writings, for instance in *An Introduction to the Principles of Morals and Legislation* where he explained the conditions under which one might logically move from individual to group interests:

The interest of the community is one of the most general expressions that can occur in the phraseology of morals... When it has a meaning, it is this. The community is a fictitious *body*, composed of the individual persons who are considered as constituting as it were its *members*. The interest of the community then is, what? – the sum of the interests of the several members who compose it.⁴⁶

However, it was only after 1789 and in view of the events unfolding in France, that the democratic conclusions of such a definition of the political community were worked out. As with civil matters, he made consent the mark of the public expression of a political interest. Thus:

The purpose of the constitutional branch of law, as of all other branches, must be general utility, that is, the greatest possible happiness for the members of the community in question. The surest sign, the most evident proof of general utility is general consent.⁴⁷

In 1789 Bentham developed a theory of democracy based on the representation of interests.⁴⁸ The role of the ballot in declaring interests was but one of the mechanisms that he put forward: in his constitutional plans, voting was done by secret ballot, the electoral mandate was short (one year). A system for publishing the Assembly's debates allowed for democratic control and petitions gave voters the opportunity to remove their representatives before the end of their annual term.⁴⁹ Interests, consent and representation were therefore inseparable.

⁴³ Bentham, *Not Paul, but Jesus (CW)*, 67.

⁴⁴ 'Sextus', in Bentham, *Of Sexual Irregularities*, 53, 56, 64, 68, 75.

⁴⁵ This theme has recently received attention in T. Y. Koh, 'Bentham on asceticism and tyranny' *History of European Ideas* 45 (2019), 1–14.

⁴⁶ Bentham, *IPML (CW)*, 12.

⁴⁷ UC 176, f. 3. See also de Champs, '*La déontologie politique*' ou *La pensée constitutionnelle de Jeremy Bentham*, 183–91.

⁴⁸ Schofield, *Utility and Democracy*, 98–99; E. de Champs, *Enlightenment and Utility. Bentham in France / Bentham in French* (Cambridge: Cambridge University Press, 2015), 115–19.

⁴⁹ 'Considérations d'un Anglois' and 'Projet of a Constitutional Code for France', in Bentham, *Rights, Representation and Reform (CW)*, 142–45, 248.

In *Projet of a Constitutional Code* written for France in the autumn of 1789 Bentham wrote: ‘The Right of election shall be in every French citizen, male or female, being of full age, of sound mind, and able to read.’⁵⁰ Not only could women vote, they could also be elected: ‘from the capacity of being elected no human creature whatsoever can be excluded’.⁵¹ In these manuscripts Bentham did not dispense with justifications for supporting women’s vote. The universalist argument was repeated: ‘there is no a priori reason which justifies the fact that [the right to vote] should be denied to some or others’: the only ones who could be legitimately excluded were those who were unable to use it ‘for their own benefit or that of others’, that is, those who were not sound of mind or were too young. The illiterate were the final category to be excluded, as they were deemed unable to ‘form a rational judgement’ by accessing printed information independently.⁵² Did any of these criteria justify the exclusion of women from the suffrage, Bentham asked, reversing the burden of proof? His conclusion was unambiguous:

As to the usage which has prevailed so generally to the disadvantage of the softer sex, it has tyranny for its efficient cause and prejudice for its sole justification.⁵³

In a short passage he rebutted common arguments: the supposed inferiority of women’s intellectual faculties (‘the fact is dubious’); they should not be taken away from their domestic tasks (‘the men have their domestic duties as well as the women’); and, finally, that the idea itself of giving women the vote was intrinsically ridiculous (‘not so truly as that of excluding them from it’).⁵⁴ Though they were deeply consistent with Bentham’s system and with the utilitarian rationale for democracy, these plans remained unpublished.

In 1817, when Bentham publicly came out in support of radical reform and published *Plan of Parliamentary Reform*, he again grounded the right to vote on the equality of sensibility to pain and pleasure, from which equality of interests derives.⁵⁵ Thus, the greatest happiness of the greatest number required universal suffrage and exceptions needed to be justified. Here, he proposed the exclusion of minors, criminals and idiots on the same ground as in his earlier writings for France.⁵⁶ In discussing the place of women in the body of electors, he noted the difficulty there was in grounding their exclusion on any utilitarian reasoning:

The great leading considerations above brought to view – viz. the universal-interest-comprehension principle, the quality of appropriate probity and appropriate intellectual aptitude – these guides to decision, if they apply not with propriety to both sexes, it seems not easy to say with what propriety they can be applicable to either.⁵⁷

His manuscripts were even more explicit: the principle of utility made it impossible to justify the exclusion of women from the suffrage.⁵⁸ Only by presuming or assuming that women’s interests were comprised in those of men might such a move be justified, which Bentham rejected.

Upon experience and examination, should it ever be established that an adequately strong connection of interests has not place, and that for want of it, more evil is

⁵⁰ ‘The Right of election shall be in every French citizen, male or female, being of full age, of sound mind, and able to read.’ *Ibid.*, 231.

⁵¹ *Ibid.*

⁵² *Ibid.*, 246–49.

⁵³ *Ibid.*, 247.

⁵⁴ *Ibid.*, 247–48.

⁵⁵ ‘Plan of Parliamentary Reform’, Bowring, III, 439.

⁵⁶ *Ibid.*, 450.

⁵⁷ *Ibid.*, 463.

⁵⁸ UC 127, f. 261.

produced by injury done by the exclusion to the interests of the female sex than is atoned for by the exclusion of the mass of Election evil abovementioned, the propriety of abolishing this exclusion, and accordingly giving admission to the votes of females will have been established.⁵⁹

In *Plan of Parliamentary Reform*, including women in the electorate was, however, characterised as ‘premature’ and as something which would cast ‘scorn’ upon the entire reform proposal.⁶⁰ Six years later, Bentham still believed this to be the case. In a manuscript dated March 16, 1823, he justified his choice:

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.⁶¹

Putting forward such a measure would be bound to fail and risked derailing the demand for the considerable extension of the suffrage to ‘virtually universal’ suffrage. Interestingly, Bentham himself provided evidence of such disparaging comments by quoting Charles Fox in a footnote to *Plan of Parliamentary Reform*.⁶²

However, the idea of female suffrage was being aired in radical circles at the time, especially after 1815.⁶³ In 1820 the trial of Queen Caroline provided a platform for radical female societies, which opposed the King in his behaviour both as a husband and a ruler – this occasioned a conservative backlash against the involvement of women in politics.⁶⁴ Bentham’s reluctance to bring up the topic might have been part of his campaign to make ‘radicalism not dangerous’, which involved rejecting accusations that radical reform would subvert private property and, more generally, the avoidance of association with the revolutionary branch of the reform movement.⁶⁵

Accordingly, Bentham’s Election Code, as published in *Radical Reform Bill* in 1819 did not contain any provision for women’s vote (though it continued to justify it on principle in a footnote). It explicitly rejected, however, the possibility for women to be elected, on the grounds of ‘the absurdity of the mixture betwixt sex and sex’⁶⁶, which sounded unlike the tone employed in the manuscripts. The Election Code provides a link between Bentham’s radical reform projects and the Constitutional Code: in 1830, when he had *Constitutional Code: Vol. I* printed, he omitted the sections on eligibility and the organisation of elections, referring readers to *Bentham’s Radical Reform Bill* published in 1819 for the details of each article.⁶⁷ Women were neither electors nor eligible for election in *Constitutional Code*, where their exclusion was not justified.

Nevertheless, in *Constitutional Code* Bentham provided compensatory mechanisms in order to accommodate women’s interests. Indeed, it rested on a double democratic mechanism for representing interests, of which suffrage was but one part. Bentham stressed that control of

⁵⁹ UC 127, f. 277, dated 25 November 1818.

⁶⁰ ‘Plan of Parliamentary Reform’, Bowring, III, 463.

⁶¹ UC 37, f. 120 dated 16 March 1823 and ‘Supreme Operative’, Bowring, IX, 108.

⁶² ‘Plan of Parliamentary Reform’, Bowring, III, 463n.

⁶³ A. Chernock, ‘Extending the “Right of Election”: Men’s Arguments for Women’s Political Representation in Late Enlightenment Britain’ in S. Knott, B. Taylor (eds.), *Women, Gender and Enlightenment*, (Basingstoke: Palgrave Macmillan, 2005), 587–609.

⁶⁴ L. Davidoff and C. Hall, *Family Fortunes: Men and Women of the English Middle-Class, 1780-1850* (London: Routledge, 1987), 149–55; A. Clark, *Scandal: the sexual politics of the British constitution* (Princeton: Princeton University Press, 2003), 177–207.

⁶⁵ ‘Radical Reform Bill’, Bowring, III, 559–622.

⁶⁶ *Ibid.*, 567n.

⁶⁷ Bentham, *Constitutional Code (CW)*, 48n.

political activity was a major counterweight for preventing the abuse of power and guiding votes. Thus, even though women were excluded from the category of voters, they were involved in the Public Opinion Tribunal to which Bentham ascribed a major constitutional role in controlling and directing political action.⁶⁸ The Public Opinion Tribunal was made up of ‘all individuals, of whom the Constitutive body of this state is composed’, and, he continued, of ‘[a]ll those classes, which under §1, article 3 stand excluded from all participation in such supreme power’. The Tribunal played a key part in this constitutional mechanism: ‘To the pernicious exercise of the power of government it is the only check; to the beneficial, an indispensable supplement.’⁶⁹

Whilst one might fear that the Public Opinion Tribunal would structurally attach less importance to what women rather than men had to say (an objection Bentham did not address), concrete suggestions were made for the inclusion of women in legal institutions, particularly when their interests as women were concerned. The ‘quasi-jury’, a key element in Bentham’s reform of the judiciary, was such an institution. Contrary to the traditional English jury, the quasi-jury was not responsible for giving a verdict: instead, acting as observers in court, the members of the quasi-jury assessed the conduct of the judge and reported on it. It therefore played a central role in the shaping of public opinion and increased the power of publicity over legal decisions. This institution, Bentham suggested, would include women when ‘those cases in which the interests of the two sexes antagonize’ were at stake. This measure was expressly presented as an opportunity for women to make their own interests heard:

On this occasion, it would be among the objects of consideration for the legislature, whether anything, and what, can be done for the alleviation of the tyranny hitherto, in a greater or less degree, so universally exercised over the weaker by the stronger sex. Suppose for this purpose, amongst other things, a modification of the Quasi-Jury. The number of the males (the total number being minimized as it has been) would scarcely, it would be thought, admit of retrenchment. If so, the next least number affording a certainty of a majority is five. Reserving in every case the predominance to the stronger sex, here then would be the foreman as before, a male erudite, ordinaries two males: of the female sex, erudite one, ordinary the other.⁷⁰

Bentham can be criticised for keeping men in the majority, allowing for three jurors as opposed to, at most, two female jurors – this however appears strikingly innovative, as women were not allowed to serve on juries in England until 1931. Such a proposal expanded significantly on an existing English institution, that of the ‘Jury of Matrons’, more precisely a group of women who were called upon by the judge in situations where a woman’s pregnancy needed to be asserted or disproved, either in the case of a woman sentenced to the death penalty or in cases relative to inheritance.⁷¹ Bentham’s proposal to reserve specific places for women on juries was also interesting because it supposed some community of interests

⁶⁸ Recent studies of Bentham’s late constitutional theory focus on the role given to public opinion G. J. Postema, ‘The Soul of Justice: Bentham on Publicity, Law and the Rule of Law’ in X. Zhai, M. Quinn (eds.), *Bentham’s Theory of Law and Public Opinion*, (Cambridge: Cambridge University Press, 2014), 40–62; D. Lieberman, ‘Declaring Rights: Bentham and the Rights of Man’ in I. Hunter, R. Whatmore (eds.), *Philosophy, Rights and Natural Law. Essays in Honour of Knud Haakonssen*, (Edinburgh: Edinburgh University Press, 2019), 306–37.

⁶⁹ Bentham, *Constitutional Code (CW)*, 36.

⁷⁰ ‘Constitutional Code’, Bowring, IX, 566–567.

⁷¹ For a presentation of Jury of Matrons in the eighteenth century, see J. M. Cornett, ‘Hoodwink’d by Custom: The Exclusion of Women from Juries in Eighteenth-Century English Law and Literature’ *William and Mary Journal of Race, Gender and Social Justice* 4 (1997), 2–89.

between women – something which was not necessarily implied by his writings on women in other contexts (see above).

Similarly, the ‘Local Headman’, whose role was to prevent a case from going to trial through the use of mediation, was encouraged to enlist the services of a female assistant.

Instructional. Art. 5. In the case of husband and wife, and in other cases, where the parties are of different sexes, he will do well to call in, as his assistant, a person of the female sex, wife or widow, and past the age of child-bearing.

Instructional. Art. 6. Where both, or all parties are of the female sex, at the desire of any one, he may do well to call in, or refer them from himself to some person of the female sex, circumstanced as per Art. 5.⁷²

The officers in charge of carrying out judicial measures also had to be female when the accused were women.⁷³ As before, Bentham did not immediately question the conditions of male dominance since judges were still men and women only their assistants; however, in the early-nineteenth-century political and legal context, the visibility he intended to give women in these albeit secondary judicial roles was significant – as was its connection to public morality.

In *Constitutional Code* Bentham displayed both pragmatism and consistency: accepting that including women as voters would damage his reform strategy, he put forward mechanisms which allowed their sensibility and interests to be taken into account and debated in the Public Opinion Tribunal. He thereby established mechanisms which, whilst they did not make up for women’s exclusion from the franchise, testified at least to the constant attention that their interests deserved.

Conclusion

Taken as a whole, Bentham’s writings provided a sustained and rigorous case for women’s political and legal rights, be it in private or in political matters. Starting from the equal consideration of interests and making consent an explicit sign of this interest, he exposed the inconsistency of contemporary laws regarding sexuality and marriage. As far as political rights were concerned, his vindication of women’s participation in politics through the vote was strikingly modern. Indeed, utility provided a unifying principle which operated in the private and in the public spheres and acted as a genuine alternative to right-based theories of gender equality, which often found it difficult to reconcile women’s biological inferiority in the family with claims to equal political rights. Bentham saw women’s political rights as making up for the domination from which they still suffered in the private sphere:

Again, in domestic concerns, males derive greater power from physical force: here, then, is a means of injury: for security against it, if in respect of political power, there be a difference, it should rather be in their favour than in the favour of males.⁷⁴

Whilst it would be anachronistic to see Bentham as a ‘feminist’ in any of the senses this word has had since the twentieth century, it seems important to acknowledge the fact that he systematically explored ways in which hedonistic individualism provided a foundation for the inclusion of women’s interests in the decisions of the legislator. Moreover, he tried to put

⁷² ‘Constitutional Code’, Bowring, IX, 620.

⁷³ See ‘Constitutional Code’, Bowring, IX, 639: "Where the proposed Prehended is of the female sex, the Judge will, if he thinks fit, make appointment of a person of that same sex, to act as attendant on the person of the proposed Prehended, whether she be a foreigner or a native: this, for the purpose of minimizing the annoyance to which a person of the female sex may unavoidably be subjected, by being in the mode in question placed under the power of a person of the male sex: of which annoyance the intensity will naturally be in proportion to the degree of affluence to which she has been habituated."

⁷⁴ *Ibid.*, 108.

forward a consistent analysis of the various statuses of women, who he always defined as rational individuals able to act in keeping with their interests and worthy of the legislators' protection, without this protection being based on an essentialisation of gender traits. The notion of consent was at the heart of his argument and sets the main methodological limit to Bentham's 'feminism' since the social and political conditions in which consent was expressed were not subject to a specific analysis in the case of women – even though Bentham noted the domination they suffered and put forward, in a work like *The Book of Fallacies*, a critical theory of power in discursive contexts.⁷⁵

Utilitarian arguments in favour of equal political rights for women were carried forward by the next generation, that of Anna Wheeler, William Thompson and John Stuart Mill. Bentham's deference to public opinion on the issue of women's suffrage probably contributed to delay the placing of the issue on the political agenda in Britain.

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⁷⁵ J. Bentham, *The Book of Fallacies* (Oxford: Clarendon Press, 2015).

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