Part I

Introduction

1 'Feminism' and the history of women's rights

In June 1870 the former MP for Cambridge, Andrew Steuart, found himself in court trying to piece together a version of his life that would somehow explain his behaviour. In his deposition he explained that he 'was an only child, much brought forward when young, of a warm and somewhat vehement temperament, and above the average as regards intelligence and especially memory'.[1] He had studied at the universities of Glasgow and Cambridge where he took 'often the highest, and always high places' in the class lists. This success had sadly come at a high price, because his mental exertions had 'told most seriously on his health, both mental and bodily'. Indeed, in 1852, his condition had produced 'a temporary deprivation of reason, requiring curative treatment in the Royal Asylum at Perth', where he resided for about eighteen months. Because 'his nervous system was considerably impaired ... unusual labour or family troubles were calculated to excite or harass him', and 'this appears not to have been sufficiently kept in view by his family'. In other words, he thought that it was his wife's fault that he found himself before the court: after twenty-two years of marriage she ought to have known better than to provoke him.

Steuart's predicament stemmed from the latest in a long line of arguments about what he perceived as his wife Elizabeth's extravagant expenditure on servants. Tempers had become frayed and, in front of one of the maids and two of the couple's eight children, she had told him that she thought he was mad. That had been too much for his 'somewhat vehement temperament' to take. Later that afternoon he wrote to Elizabeth's brother explaining that in view of her 'shameful conduct ... I corrected her by giving her three or four slaps in the face'. He was lying: the Lord Ordinary found that Steuart 'inflicted serious injury by repeated blows with his clenched fist'. Now his wife demanded both a divorce and custody of her children.

[1] All of the quotations from this case are taken from *Steuart* v. *Steuart*, 8 Macph. 821 (1870).

Fortunately for Elizabeth Steuart the judges in the case included Lord Kinloch, who had no doubt that her husband's 'notions as to marital rights of chastisement receive no countenance whatever from the law of the country'. Perhaps matters might have been different if the assault had been provoked, but instead the court was more struck by the fact that Mrs Steuart's 'conduct throughout appears to have been unimpeachable'. Moreover, it was clear from the nature of Andrew's defence that his wife 'might expect a repetition of the same treatment in the event of her coming back to live with him'. The court found that for several years prior to the assault Steuart's behaviour towards his wife had been 'often very violent and unreasonable', involving 'oaths, and profane language' as well as threats of physical violence. Lord Deas said that, 'although a wife must unquestionably take the risk of having a good deal to bear from her husband', he was 'not prepared to say that she must submit to treatment such as [Mrs Steuart] has experienced'. The court granted a divorce without hesitation, but they would not give Elizabeth custody of her four-year-old daughter and eleven-year-old son.

The basis for this decision was very clear: Lord Ardmillan explained that 'the interest of the child in life, health, or morals, must be to some extent endangered before the Court can interfere with the father's right of custody'. Because in this case Andrew had only been violent towards his wife, not the children, the judges decided that he had done nothing to justify taking his children from him. In a passage that was to become notorious Ardmillan said that to 'leave his little child in his house is, or may well be, to introduce a soothing influence to cheer the darkness, and mitigate the bitterness of his lot, and bring out the better part of his nature'. The distress that this decision would cause to a mother who had already suffered grievous wrongs at the hands of her husband, let alone the potential danger that the children might be exposed to, were simply not matters for the consideration of the court.

This is just one example of the many ways in which women in the nineteenth century were oppressed by laws that systematically and deliberately served the interests of men. In the middle of the nineteenth century a married woman could not own property of any kind in her own name and she had no legal right to the custody of her children. In fact married women had no independent legal identity in the eyes of the law: husband and wife were deemed to be one person, and that person was the husband. This gave tremendous power to men like Andrew Steuart, who warned his brother-in-law that he would permit Elizabeth to live with him only 'under such regulations entirely as the law puts in my power, without any reference to her wishes or crotchets'. Although the courts could grant divorces in Scotland, which had its own separate legal

system, in the rest of the kingdom a woman had no way of divorcing an abusive or adulterous husband short of obtaining a private Act of Parliament, and between 1670 and 1857 only four women managed to do this.[2] The extent to which the law subordinated women is clearly visible from the terms of the Contagious Diseases Acts which, in the 1860s, enacted that any woman merely suspected of being a prostitute could be subjected to a forcible medical examination and confined to a hospital for treatment against her will. One of the great achievements of women's history in the past generation has been to show how women in the past manipulated and resisted the legal structures that sought to regulate and control their lives, but even so there can be little doubt that these laws caused enormous hardship and suffering.[3] Underpinning this oppressive legal regime of course was the exclusion of women from the judiciary, parliament and the franchise. Women could not make or enforce laws, and they were not directly represented in the legislature because they were not allowed to become members of parliament or to vote.

Under these circumstances the remarkable changes in women's legal and political status that took place in the second half of the nineteenth century seem little short of revolutionary. Married women were given the right to own property in two instalments in 1870 and 1882 and the law relating to child custody was changed in women's favour in 1873 and 1886. An English divorce court was created in 1857 and a string of reforms followed giving women greater legal redress against violent husbands and helping them to obtain maintenance from negligent or abusive spouses. The Contagious Diseases Acts were suspended in 1883 and repealed in 1886. Women still could not vote in parliamentary elections by 1900, but they had been given the right to vote in a range of local elections and to sit on a number of elected local government bodies. In the space of little more than thirty years legal and political privileges that had underpinned male power for centuries were either swept away or substantially undermined. How did this happen?

A vital part of any explanation must be the emergence of an organised women's movement in Britain in the 1850s that fought tenaciously for improvements to women's rights. The second half of the nineteenth century saw campaigns to give married women property rights, to

[2] Roderick Phillips, *Untying the knot: a short history of divorce* (Cambridge, 1991), p. 66.
[3] On female agency see Olive Anderson, 'The state, civil society and separation in Victorian marriage', *Past and Present* 163 (1998), pp. 161–201; Margot C. Finn, 'Working class women and the contest for consumer control in Victorian county courts', *Past and Present* 161 (1996), pp. 116–54; Ginger Frost, *Promises broken: courtship, class and gender in Victorian England* (Charlottesville, 1995).

improve employment and educational opportunities for women, to allow women to train and qualify as doctors, to repeal the Contagious Diseases Acts, to give mothers the same child custody rights as fathers and, of course, to give women the vote. The words 'feminist' and 'feminism' did not come into common usage until the early twentieth century[4] but accurately convey the passionate concern that these early campaigners had with a range of issues that had in common women's enforced subordination. There is now an impressive body of literature that has revealed the story of the personal networks and organisational structures that constituted the women's movement, and the many personal, political and ideological battles that took place within it.[5] Nevertheless, the history of the women's movement can provide only a partial explanation for the dramatic changes to women's rights that took place in the nineteenth century because, ultimately, the power to change the law did not rest with the 'feminists' but with parliament.

The willingness of parliament to make sweeping changes to the legal position of women is remarkable when we consider that, until Nancy Astor took her seat in the House of Commons in 1919, the British parliament was an exclusively male legislature. All 'feminist' demands had to be filtered through a complex web of male beliefs, assumptions and aspirations if the law were to be changed, yet the implications of this process have yet to be fully explored. How is it that male politicians were willing to undermine the legal order that sustained men's patriarchal authority? It is simply not enough to suggest that politicians gave way to the pressure exerted by the women's movement, although the lobbying was often intense.[6] British history is littered with well-organised and popular political campaigns that have failed to achieve their aims because – no matter how vociferous the protests – parliament could not be persuaded to make concessions. At no point in the Victorian era was the state under so much pressure from the women's movement that change can be seen as in any sense inevitable, so the history of

[4] Due to the anachronism these words will appear in inverted commas in the text.

[5] Foremost among the many studies of the Victorian women's movement are Sandra Stanley Holton, *Suffrage days: stories from the women's suffrage movement* (1996); Barbara Caine, *Victorian feminists* (Oxford, 1992); Elizabeth Crawford, *The women's suffrage movement: a reference guide, 1866–1928* (1999); Lee Holcombe, *Wives and property: reform of the married women's property law in nineteenth century England* (Toronto, 1983); and Paul McHugh, *Prostitution and Victorian social reform* (1980).

[6] The best guides to the lobbying activities of the women's movement remain Helen Blackburn, *Women's suffrage: a record of the women's suffrage movement in the British Isles with biographical sketches of Miss Becker* (1902); Constance Rover, *Women's suffrage and party politics in Britain* (1967); and McHugh, *Prostitution*, ch. 9.

extra-parliamentary campaigning cannot by itself explain the dramatic legal reforms of the nineteenth century.

This book focuses on the ideas and behaviour of those male politicians who supported or opposed women's rights in the nineteenth century. In doing so, the extra-parliamentary activities of the women's movement will receive relatively little attention, not because they were not important but simply because, thanks to several generations of feminist historians, their contribution to the process of change is well known. It is also necessary to recognise the autonomy of parliament as an institution: 'feminist' campaigners could hold meetings, write articles and organise petitions, but once the issue entered the parliamentary arena control passed to the politicians. The movement's parliamentary champions seem to have been largely responsible for decisions about tactics inside parliament and were often responsible for drafting the bills that they introduced.[7] One of the recurring motifs of the history of 'feminism' is the frustration that this occasioned, as when William Forsyth took it upon himself to rewrite the women's suffrage bill of 1874 in such a way as to exclude married women from the franchise. The frustration must have been immense when a woman like Elizabeth Wolstenholme Elmy found herself having to complain about the provisions of a bill that was largely the result of her own efforts.[8] The extent to which parliamentary supporters were independent of the leaders of the movement is dramatically symbolised by the fact that Lydia Becker, the parliamentary secretary of the suffrage societies, was not allowed to attend the meetings of suffragist MPs when they met to discuss tactics in the late 1880s![9]

In focusing on male politicians this book does not seek to marginalise women from the story of their own emancipation, but rather it aims to delineate, with new clarity, the political and ideological structures that oppressed women and within which 'feminist' protest had to operate. It is profoundly important that in the nineteenth century the political system was dominated by men: what is needed now is a study of *how* it mattered – a detailed examination of how the gendered identities of politicians shaped particular legislative outcomes in a specific historical

[7] The 1886 Parliamentary Franchise (Extension to Women) Bill seems to have been drafted by Charles Hopwood in consultation with the bill's sponsor, William Woodall, and only indirectly in consultation with Lydia Becker. Charles Hopwood to William Woodall, 4 Jan. 1886, Woodall papers.

[8] Elizabeth Wolstenholme Elmy, *The Infants Bill 1884* (Manchester, 1884), p. 5.

[9] Blackburn, *Women's suffrage*, p. 174. The difficulties that the Women's Franchise League had in finding parliamentary champions are revealed in a letter from Elizabeth Wolstenholme Elmy to Harriet McIlquham on 26 May 1889, Elmy papers, British Library Add. MSS 47449.

context. This will complement important work by sociologists and political scientists which has established that it will no longer do to treat the state as a monolithic entity that represents 'male' interests; rather, it should be seen as a series of sites in which gendered interests are both constructed and contested.[10] This book is therefore intended as a contribution towards an anatomy of a patriarchal state: a case study of how gender influenced parliamentary politics and, consequently, the legal system that regulated gender relations throughout the country.

The remainder of the introduction will describe the ways in which the law was reformed in the nineteenth century before demonstrating that the existing historical literature cannot satisfactorily explain the way in which politicians responded to the women's movement. It will then argue that this failure is due to problems with the way in which historians have conceptualised the struggle between 'feminists' and 'anti-feminists'. Two problems in particular will emerge from the study of parliamentary behaviour. The first is that the intellectual history of 'feminism' has been constrained in important ways by treating 'feminism' as though it were a body of thought concerned solely with ideas about femininity and the proper place of women. 'Feminism' was fundamentally concerned with both of those things, but it was also concerned with describing, explaining and changing the behaviour of men. This debate about masculinity was just as important as beliefs about women in shaping male politicians' responses to demands for women's rights.

The second problem with the existing literature is the tendency to treat 'the woman question' as though it were hermetically sealed from its broader intellectual and political context. Recent developments in the history of liberalism and conservatism have transformed our understanding of Victorian political thought and require a fundamental revision of established narratives in the history of 'feminism'. In particular, this book argues that the Victorian debates on women's rights were inextricably intertwined with a set of changing ideas about the nature of the constitution, evolving religious beliefs and bodies of professional knowledge, especially legal knowledge. It will be argued that, by abstracting debates on women's rights from this context, the existing literature has produced a seriously distorted account of nineteenth-century gender politics. A new political and intellectual

[10] S. Franzway, D. Court and R. W. Connell, *Staking a claim: feminism, bureaucracy and the state* (Cambridge, 1989), pp. 42–3, 52; R. W. Connell, 'The state, gender and sexual politics: theory and appraisal', *Theory and Society* 19 (1990), pp. 507–44; Nickie Charles, *Feminism, the state and social policy* (2000), pp. 24–5; Davina Cooper, *Power in struggle: feminism, sexuality and the state* (Milton Keynes, 1995), p. 65.

history of the struggle for sexual equality is needed if we are to understand the crucial transformations that took place during the reign of Victoria.

The legal position of women

The core of the book is an examination of parliamentary debates about matrimonial property law, child custody law and women's suffrage in the final third of the nineteenth century. This list by no means exhausts the list of issues that prompted 'feminist' action, but they were the issues that received the most parliamentary discussion, with the exception of the Contagious Diseases Acts, which have already been the subject of several excellent studies in recent years.[11] It is therefore necessary, before going any further, briefly to explain the nature of the legal disabilities imposed on women in the nineteenth century.

At the heart of Victorian gender politics lay the legal doctrine of coverture, which held that married women had no independent legal identity. The classic definition of coverture was given by William Blackstone in his famous *Commentaries on the laws of England:*

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection and cover she performs every thing ... and her condition during her marriage is called her *coverture*.[12]

This meant that married women could not make contracts and that all of a woman's personal property passed to her husband when she married, as did any property she subsequently acquired. Her husband also gained a life interest in any freehold land that she possessed. Matters were complicated by the fact that there were two separate bodies of law enforced in English courts: common law and equity. The law of equity was administered by the Court of Chancery and had developed over the preceding centuries to mitigate the harshness of the common law tradition. Equity allowed property to be placed in the hands of trustees for the separate use of a woman; although technically the property was owned by trustees the married woman in question had the use of it.

[11] Judith Walkowitz, *Prostitution and Victorian society: women, class and the state* (Cambridge, 1980); McHugh, *Prostitution*; F. B. Smith, 'The Contagious Diseases Acts reconsidered', *Social History of Medicine* 3, 2 (1990), pp. 197–215; Deborah Dunsford, 'Principle versus expediency: a rejoinder to F. B. Smith' and F. B. Smith, '"Unprincipled expediency": a comment on Deborah Dunsford's paper', *Social History of Medicine* 5, 3 (1992), pp. 205–16; Lawrence Goldman, *Science, reform, and politics in Victorian Britain: the Social Science Association 1857–1886* (Cambridge, 2002), ch. 4.

[12] William Blackstone, *Commentaries on the laws of England*, vol. I (5th edn 1773), p. 442.

However, this procedure was not available to all. The cost of setting up a trust was extremely high and trusts worked best where there was a large body of capital generating an income, rather than a small body of capital which had to be constantly liquidated. In practice, trusts were only available to the rich.[13]

Another consequence of coverture was that married women had no right to the custody of their children. A married mother had no say in which school her child went to, or in which religion it would be brought up. The father could take the child away from her at any time and she had no right to see it again.[14] The full rigour of the law is revealed by the fate of Andrew and Elizabeth Steuart's children. A father also had the right to appoint guardians for his child after his death, and there was no requirement for the child's mother to be a guardian. Even if she were made a guardian, she could not appoint guardians to act after her death and she had to raise the child according to the father's instructions.

These laws left women at the mercy of brutal and unscrupulous husbands who could deprive their wives of the custody of their children or leave them without the means to pay for food or shelter. Some relief was provided by the 1857 Divorce Act, which created judicial separations for husbands or wives on the grounds of either physical cruelty, desertion without cause for two years, adultery or sodomy. This gave the separated individuals some autonomy but did not allow them to remarry. Further instalments of reform in 1878 and 1895 increased the availability of these separation orders to women who found themselves married to violent or negligent husbands. Access to divorce was more restricted. In the case of adultery by a wife a husband could petition for a full divorce, but a wife could sue for divorce only if her husband were guilty of adultery combined with incest, bigamy, cruelty or desertion, or of rape on a third party, sodomy or bestiality. The 1857 Act also allowed a woman who had been deserted by her husband to apply to a magistrate for a protection order which gave her the same property rights as an unmarried woman and allowed her to sue anyone who took her property, even her husband. These orders were far more popular than either divorce or judicial separations: in 1859–60 there were only six petitions for judicial separation on the grounds of desertion, but 1,367 deserted wives applied for protection orders.[15]

[13] Holcombe, *Wives and property*, chs. 2–3.
[14] Mothers of illegitimate children were entitled to the custody of their children up to the age of seven.
[15] Anderson, 'The state, civil society and separation', p. 172.