Married Women and the Law in England since the Eighteenth Century

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In England the core rules determining married women's rights traditionally came not from Parliament, but from the Common Law, a national system of customary law applied in the courtroom and shaped by the legal decisions and comments of generations of judges. However the overall system was made complicated by the inconsistent application of those rules and by the existence of rival sources of law – in particular equity, ecclesiastical law, local and borough custom and parliamentary statute – whose rules were not always compatible. To make sense of these complexities it is best to consider the most important legal jurisdictions separately, before tracing the path of reform and considering competing theories about change over time.

English Common Law

The Common Law term for a married woman's legal condition was 'coverture', and in the law French favoured by English Common Lawyers, marriage transformed a 'feme sole' into a 'feme covert'[1]. Central to coverture was the doctrine of 'unity of person', the legal fiction that husband and wife shared a single legal identity. Just as the Bible declared husband and wife to be one flesh, so the Common Law regarded them to be one person, with the husband's legal personality covering or eclipsing the wife's for many, although not all, purposes.

The effects of coverture were wide ranging, especially where property was concerned. On marriage a woman's personal or movable property (her money and goods, future inheritances and any wages she might earn) became her husband's. Only if her husband

1 For details see John Hamilton Baker, Introduction to English Legal History, London 2002⁴, especially chapter 27; William Searle Holdsworth, A History of English Law, London 1923, volume III; Lee Holcombe, Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England, Toronto/Buffalo/London 1983, 18–36; Teresa Michals, 'That sole and despotic dominion': Slaves, wives, and game in Blackstone's Commentaries, in: Eighteenth Century Studies, 27, 2 (1993–1994), 195–216.

failed to sell or alienate this property before his death, and died without writing a will, would any of it return to her.[2] In theory a husband could not even give his wife a gift, for under the fiction of unity of person he would be giving the gift to himself, which was a legal impossibility. Real property (land) remained hers, but control of such property passed to her husband for the duration of the marriage. A husband could not sell or alienate his wife's land without her express permission (confirmed in private before a judge), however his control extended to the ability to lease her land to a stranger for extended periods. In this situation a wife had no power to end such arrangements and recover her land after her husband died, just a right to claim the rents for the remaining term of the lease.[3] The lack of an independent legal identity, and of the ability to own separate property, meant that a wife could not enter into contracts in her own name.[4] She also could not write a will without her husband's approval, and even if he gave this approval he could withdraw it again at any time right up until her will was proved.

With this transfer of privileges and property rights came certain obligations. A husband was held liable for his wife's debts and even for certain of her crimes, if she committed them in his presence.[5] He was also expected to maintain his wife at a level fitting his, and her, social status. The problem here was that the Common Law provided no positive means of enforcing this obligation. A wife could not sue or be sued in a Common Law court without her husband, and this meant she could not sue her husband, making it difficult for her to seek relief if he failed to maintain her. Her only option was to purchase necessaries on credit and he would be liable for the resulting debt.[6] This was a clumsy legal remedy, one that could be difficult to pursue in practice, but one which an increasing number of neglected or estranged wives took advantage of in the eighteenth and nineteenth centuries.[7]

The Common Law identified a husband as 'baron' or lord over his 'feme' and the resulting power imbalance within marriage could be severe.[8] A husband decided where the couple was to live and could use reasonable force to constrain his wife at home. If a wife's friends or relatives helped her flee his custody, he could seek a writ of habeas corpus against them to have her returned.[9] Husbands also possessed the right to use 'moderate' or 'reasonable' force to correct their wives, although the theoretical limits of this

2 If a husband did write a will, his widow had the right to claim paraphernalia, her personal clothes and jewels, regardless of whether he had left these things to her.

3 If a husband tried to sell his wife's lands she had few means of stopping him, just a right to claim them back after his death.

4 If she did sign a contract the law assumed she did so as her husband's agent.

5 A husband was liable for his wife's torts, but not for serious crimes such as murder or treason.

6 See Holcombe, wifes, wie Anm. 1, 27f.

7 See Margot Finn, Consumption and coverture in England, 1760–1860, in: The Historical Journal, 39 (1996), 703–722; Margot Finn, Working-class women and the contest for consumer control in Victorian County courts, in: Past and Present, 161 (1998), 116–154.

8 As an illustration of the lordly authority of husbands, until 1828 a wife convicted of killing her husband was guilty not simply of murder, but of petty treason.

9 See Elizabeth Foyster, At the limits of liberty: married women and confinement in eighteenth-century England, in: Continuity and Change, 17, 1 (2002), 39–62. Courts continued to enforce a husband's right to keep his wife at home against her will right up until 1891.

power were much debated.[10] In theory wives could complain about their violent husbands to a justice of the peace or a judge, who could order the offending husband to be 'bound over to keep the peace'. However, it could be difficult for a woman to make a public complaint against her violent husband when the law expected her to continue living in the family home, and many wives suffered in silence. In an even greater affront to justice, a husband's entitlement to exercise his 'conjugal rights' amounted to a licence to have marital intercourse at will, with or without his wife's consent: only in 1991 did English courts recognize rape in marriage to be a crime.

Against this bleak catalogue of legal disabilities, the only clearly positive right a married woman enjoyed was the right to dower if she outlived her husband. Regardless of whether or not she had brought a dowry or portion to the marriage, a married woman had a right to a life interest in one third of her husband's freehold lands if she survived him. The Common Law position represents a damning expression of the patriarchal values of English society, but coverture managed to persist for so long because it was so flexible. Husbands who felt the need could apply coverture's rules ruthlessly, but most rules were discretionary, and many couples lived their lives without ever expressly invoking them. In fact large numbers of ordinary men and women had an incomplete knowledge of these rules, and were unaware of the fiction of 'unity of person' that underpinned them. Wives provisioned the house, bought and sold goods and felt they owned their personal possessions. Aspects of coverture were also subject to exceptions. Local custom in a number of cities, for example, permitted married women engaged in certain business activities to enjoy the legal status of single women as 'feme sole traders'.[11] The practical as well as the psychological effects of coverture should not be underestimated, but neither should the Common Law be blamed for all of the restrictions married women endured. The right of dower, for example, was considered so generous by the majority of English husbands that most sought to avoid it, usually by creating jointures for their wives, written agreements that guaranteed women a designated income during their widowhood that was considerably less than the income from a third of their real property.[12]

Marriage, Divorce and the Church Courts

Coverture gained much of its restrictive power from the strength of marriage bonds, which were virtually impossible to break. Legal divorce allowing remarriage was unavailable in England until 1857, except by private act of Parliament, a process that was

10 A myth still circulates that under the 'rule of thumb' a husband could beat his wife with a stick as long as its diameter was no thicker than his thumb, but no such rule was ever an accepted part of the common law: Henry Kelly, Rule of thumb and the folklaw of the husband's stick, in: Journal of Legal Education, 44 (1994), 341–365; and see below note 28.

11 See Amy Louise Erickson, Women and Property in Early Modern England, London/New York 1995, 30.

12 Women who preferred jointures did so for practical reasons, because dower only applied to freehold lands (and most lands in the eighteenth and nineteenth centuries were entailed or otherwise encumbered) and because it could be time consuming to claim.

extremely expensive and effectively open only to men.[13] The church courts had jurisdiction over marriage prior to that date and provided unhappy couples with only two options, seeking an annulment on the grounds that the marriage was invalid for technical reasons, or seeking a separation from bed and board (a mensa et thoro). Acceptable grounds for separation included adultery, cruelty, bigamy, incest or sodomy, and in practice the sexual double standard held sway. Proof of adultery was sufficient for a man to gain a separation, but not for a woman, who had to prove cruelty or other grounds as well. Married women could sue their husbands in the church courts because those courts acknowledged them to be separate persons. However, a separation was not a divorce, and in the eyes of the Common Law separated couples remained legally married. Therefore any monies a separated woman earned or inherited technically belonged to her husband. A greedy or vindictive husband could steal money from his estranged wife, safe in the knowledge that she was unable to enter a complaint against him at Common Law. Alternatively, he could run up debts until his creditors sued him, and then use the resulting court orders to dispossess his wife of her assets (on the grounds that under coverture they belonged to him). The church courts could order a husband to pay maintenance to his separated wife, but once again married women faced difficulty in trying to enforce such an order if their husband refused to comply, and usually they had to rely on third parties to sue on their behalf.

Equity

Operating alongside the Common Law was equity, the alternative brand of law developed in courts such as Chancery that employed civil law, not common law, procedure.[14] Equity courts proved willing to regard married women as separate persons for property matters, and to support legal innovations designed to protect their property interests. The most common of these was the marriage settlement, in which husbands agreed before marriage that specified property would be kept to their wives' 'separate use'.[15] Alternatively, a woman or her relatives could create a trust for her benefit before marriage by transferring property (with her future husband's knowledge) to a third party to hold for her separate use. Trusts operated by separating ownership of property from the enjoyment of property. A wife could give up legal ownership of property by transferring it to trustees, leaving her with nothing that could pass to her husband, but retain an equitable right to receive income from the property. During marriage, if a married woman's relatives or supporters wanted to give her gifts or leave her legacies, they could write terms in deeds or wills ensuring that such property would be retained to her separate use. If a marriage disintegra-

13 An unknown number of couples divorced by the illegal custom of 'wife sale' see E.P. Thompson, Customs in Common: Studies in Traditional Popular Culture, London 1991; Samuel Menfee, Wives for Sale: An Ethnographic Study of British Popular Divorce, Oxford 1981.

14 For details see Holcombe, Wives, wie Anm. 1, 37–47; Susan Staves, Married Women's Separate Property in England, 1660–1833, Cambridge Mass./London 1990.

15 To prevent husbands from pressuring their wives into relinquishing interests, many settlements from the late eighteenth century onwards included a 'restraint on anticipation' clause that made it impossible for married women to sell or alienate their separate property, even if they wanted to.

ted, a couple could agree to separate according to the terms of a contract that guaranteed the husband would pay separate maintenance to his wife.[16] The Lord Chancellor and the other justices in Chancery proved willing to enforce these and other methods for evading the rules of coverture, all of which went against the spirit of the basic principles of the Common Law.

The possibilities equity opened up to married women could be extremely beneficial. Clauses in marriage settlements, for example, could reserve to wives the right to make a will of their separate property or to ensure that their daughters from a former marriage received portions or dowries.[17] Nevertheless, it is misleading to see equity as the saviour of married women in the face of the tyranny of coverture. Many landowners used equitable devices not to extend married women's legal entitlements, but to limit or reduce them in their efforts to preserve control over the patrimony. Under the Common Law rules of inheritance by primogeniture, for example, women should have inherited in around 25 per cent of cases, when marriages produced no sons. However, thanks to equitable devices such as strict settlements, or to the terms in wills, in elite families women inherited the family estate in only eight per cent of cases.[18] Jointures were often enforced in Chancery, and as has already been noted, jointures were usually far less generous than the provisions of dower.[19] Of greater concern is the fact that marriage settlements and trusts had to be created in advance with the assistance of lawyers, and over time they became increasingly expensive, both to draw up and to enforce in court, narrowing the range of women with the resources and the knowledge necessary to benefit from them.

Parliamentary Reform

Over the centuries, Common Lawyers found new ways to justify the restrictions of coverture, relying less and less on biblical and feudal ideas about innate male superiority and more and more on the fiction of 'unity of person' and on the supposed practical need for husbands to be responsible for, and to have control over, their wives.[20] However, while justifications changed considerably, the restrictions they supported changed little. Positive, lasting reform did not come until the nineteenth century, when Parliament began enacting statutes concerned with matters such as child custody, divorce and married women's property rights, that slowly cut away the most significant restrictions of coverture.[21] One of the first of these statutes was the Infant Custody Act of 1839 that allowed Chancery to award mothers temporary custody of their children under age of seven and to have access to children under 16. This was a small gain, but it marked a

16 See Staves, property, wie Anm. 14, 162–195.

17 See Erickson, Women, wie Anm. 11, 104.

18 Eileen Spring, Law, and Family: Aristocratic Inheritance in England 1300–1800, Chapel Hill/London 1993, 9–38.

19 See? Staves, property, wie Anm. 14, 27–37.

20 Maeve E. Doggett, Marriage, Wife-Beating and the Law in Victorian England, Columbia 1993, 146.

21 For details see Holcombe, Wives, wie Anm. 1; Mary Lyndon Shanley, Feminism, Marriage, and the Law in Victorian England, 1850–1895, Princeton 1989.

breach in the total monopoly of power husbands then enjoyed over matters relating to their children.[22]

Reform of marriage began in earnest in 1837 when Parliament encroached on the church's jurisdiction and created mechanisms for civil marriages.[23] Later, the Matrimonial Causes Act of 1857 saw the state assume jurisdiction over marital breakdown and introduced full divorce allowing remarriage. This was a dramatic change, however the law entrenched the distinction of different grounds for divorce for men and women. Husbands needed only to show evidence of adultery, but wives had to prove cruelty, incest, desertion, bigamy, bestiality or sodomy in addition to adultery.[24] Only in 1923, with the passing of a new Matrimonial Causes Act, could wives sue for divorce on the same terms as husbands. A 1937 act permitted divorce for grounds other than adultery and then in 1969 Parliament moved from divorce based on fault to one based on irretrievable breakdown. These and subsequent changes increased the legal equality of husbands and wives, but have failed to alleviate the effects of the economic imbalance that within most marriages operates in men's favour.[25]

The most fundamental reforms concerning married women's rights came in the area of property law. The Married Women's Property Acts of 1870 and 1882 undid the most limiting restrictions of coverture by allowing married women to own and control property separately from their husbands and to write wills. Critically, though, these statutes did not give married women the same rights over property that single women enjoyed, as feminist reformers had requested, but merely recognized married women's rights to a 'separate estate' in property. In other words, Parliament chose a conservative rather than a radical approach by taking the existing concept of 'separate estate' that equity courts had long used to offer autonomy to wealthy women, and extending it to all married women. Nevertheless, allowing married women to own property was an important precursor to their participation in the political process.[26] Full rights for married women to own property as if they were single came in the twentieth century, in the wake of the Law of Property Act of 1925.

In the past, historians viewed these landmarks of statutory reform as marking a slow but straightforward march to equality and enlightenment – a triumph of liberal thought after centuries of unchanging inequality. Optimists believed that early feminists persuaded Parliament to reform property laws, while pessimists believed it was angry shopkeepers demanding that wives be made liable for their own debts, but both sides assumed a ge-

22 Further Acts in 1873 and 1886 extended mother's rights, but still left fathers as sole legal guardians of their natural and step children.

23 In the previous century, Lord Hardwicke's Marriage Act of 1753 sought to clamp down on clandestine or irregular marriages, but it left the church's jurisdiction intact. See Brian Outhwaite, Clandestine Marriage in England 1500–1850, London/Rio Grande 1995, 75–97.

24 The Act also provided deserted wives with the means to protect their property interests.

25 In the move to no-fault divorce, for example, private maintenance or alimony provisions have been removed without adequate thought to their replacement: See Carol Smart, The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations, London 1984, 113–116, 220–240; Dorothy M. Stetson, A Woman's Issue: the Politics of Family Law Reform in England, Westport 1982, 5–10.

26 Propertied married women could vote in municipal elections after 1894 and married women gained the right to vote in Parliamentary elections under the Equal Franchise Act of 1928.

neral long term shift towards egalitarianism. Recent scholarship confirms that this picture of change is too simplistic, for reforms affected different women in different ways, and the path of change was far from even.[27] For example, the limited rights of mothers to the custody of their children were arguably greater in 1600 than in 1700, and better in 1730 than in 1830.[28] Similar fluctuations seem to mark other areas of law, such as the history of 'reasonable' correction and spousal abuse,[29] and a significant minority of historians now argue that married women's rights had been declining, rather than improving or remaining the same, for hundreds of years prior to nineteenth century reform.[30] Similarly, it is no longer possible to claim with authority that single branches of English law have consistently helped or hurt married women. Parliaments have been guilty of diminishing as well as extending wives' rights, altering citizenship laws so that between 1870 and 1948, an English woman who married an alien automatically lost her British nationality.[31] The same was true of common law judges, who can rightly be blamed for perpetuating the disabilities of coverture for generations, but who should also be credited with ending husbands' rights to confine their wives in 1891 and with making marital rape a crime in 1991.

As recently as 1981 a lawyer for a married couple successfully defended his clients against an accusation of conspiracy to commit fraud by arguing that as husband and wife they were one person at law, and one person cannot be guilty of conspiracy. Lord Denning reversed this decision on policy grounds, and announced that coverture no longer had a place in English law.[32] Yet its legacy still haunts current legal thought and practice in England and in other Common Law countries.[33]

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27 For an analysis of the complex path of change in the eighteenth century see Staves, property, wie Anm. 14.

28 Prior to the seventeenth century, mothers had an automatic right to the custody of their children upon widowhood. In 1660 Parliament limited this right by allowing husbands to name guardians for their children in their wills. Danaya C. Wright, De Manneville v. De Manneville: Rethinking the birth of custody law under patriarchy, in: Law and History Review, 17,2 (1999), 247–307. And see Sarah Abramowicz, English child custody law, 1660–1839: the origins of judicial intervention in paternal custody, in: Columbia Law Review, 99, 5 (1999), 1344–1391.

29 Doggett, marriage, wie Anm. 20; Foyster, limits, wie Anm. 9; Anna Clark, Humanity or justice? Wifebeating and the law in the eighteenth and nineteenth centuries, in: Carol Smart Hg., Regulation Womanhood: Historical Essays on Marriage, Motherhood and Sexuality, London/New York 1992; James Hammerton, Victorian marriage and the law of matrimonial cruelty, in: Victorian Studies, 33 (1990), 269–292.

30 Spring, law, wie Anm. 18, 182–186; Wright, de Manneville, wie Anm. 28; Eileen Spring, Child custody and the decline of women's rights, in: Law and History Review, 17, 2 (1999), 315–318. Other historians who shy away from simple arguments about improving rights argue that change affected different classes of women in different ways, so some women gained from legal developments while others lost out. See Erickson, women, wie Anm. 11; Staves, property, wie Anm. 14; Hilda Smith, All Men and Both Sexes: Gender, Politics and the False Universal in England, 1640–1832, Pennsylvania 2002.

31 M. Page Baldwin, Subject to Empire: Married women and the British Nationality and Status of Aliens Act, in: Journal of British Studies, 40 (2001), 522–556.

32 Midland Bank Trust Co Ltd v. Green [1981] 3 All England Reports, 744.

33 American commentators have argued that American curts are reviving aspects of coverture. See Joan Williams, Is coverture dead? A new theory of alimony, in: Georgia Law Journal, 82 (1994), 2227, 2229; Amy D. Ronner, Husband and wife are one – him: Bennis v. Michigan as the resurrection of coverture, in: Michigan Journal of Gender and the Law, 4 (1996), 129–169.