Civil Law, a Tool of Masculine Domination?

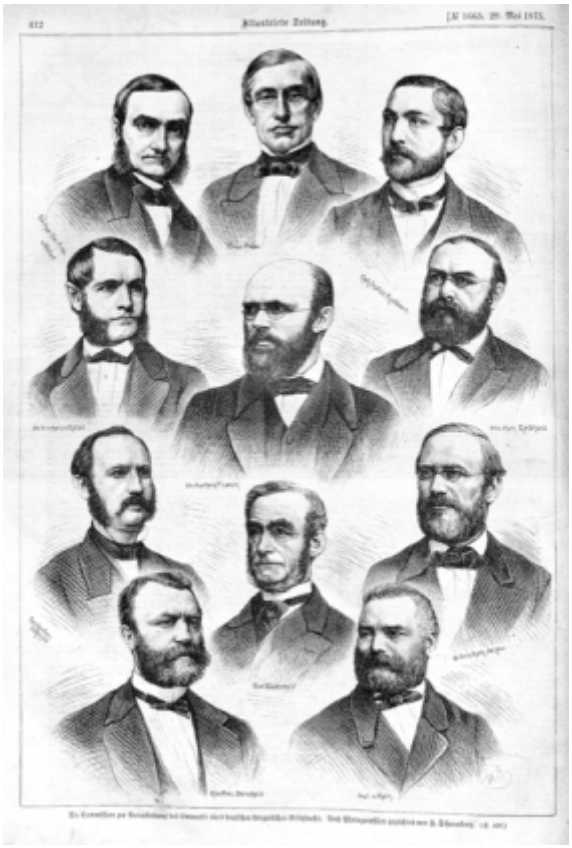
Ute GERHARD

ABSTRACT

The French Civil Code (1804), Europe's first liberal and bourgeois code and a model of modern legislation, has had a lasting influence in numerous countries. Yet compared to other European codifications and to the customary law of its time, its conjugal and familial provisions were particularly rigid and served to consolidate masculine domination, as demonstrated by Prussian, Austrian, English, and Scandinavian law as well. These aspects of civil law had and continue to have a considerable impact on the lives of women. Despite protest from feminist movements from the early 1900s, it was only after the two World Wars and obtaining the right to vote that they succeeded in extending equal rights to private law. In the wake of the social and cultural transformations in relations between the sexes, the European Union has acted against gender discrimination as well as other factors of exclusion. Through its jurisprudence, the EU has made gender equality one of the European Community's primary objectives and has defined common standards of equity for all Europeans beyond the differences in history and legal culture specific to each country.

Engraving by Paul Gavarni (1804-1866), « Les époux se doivent mutuellement fidélité, secours, assistance », *Selected Works*, 1857.
Source : expocujas.univ-paris1.fr

« Ladies! Ladies! », *Fun*, No 252, March 12 1870. Illustration published at the time of the vote on the Women's Property Act. Source : Collections Librairies Indiana.



Engraving depicting the members of the first commission responsible for unifying the German Civil Code (BGB), published in the *Illustrirte Zeitung*, May 29th 1875. Source : Wikimedia Commons.

The fall of the First French Empire, which had imposed the French Civil Code (Cc, 1804) on conquered territories, along with the recomposition of Europe's political landscape at the Congress of Vienna (1815), rendered more complex the geography of civil rights, which combined the Napoleonic legacy, custom as transmitted in the form of common law (*ius commune*), local statutes and national civil law, for instance in the Prussian Code of 1794 (ALR) or the General Civil Code of the Austrian Empire of 1811 (ABGB). The primary legal systems at the heart of this mosaic (French, Prussian, Austrian, English, and Scandinavian law) institutionalized the difference between the sexes, notably by defining the legal status of wives (marriage, divorce, spousal relations, parental authority, widowhood, etc.) as well as that of the unmarried mother and her children.

Women's rights in various legal systems

Determining whether "women are human beings," the enlightened conclusion of Poullain de La Barre (1647-1725) in his famous essay *De l'égalité des deux sexes* (1673), was a scholarly debate going back to the fifteenth century, known as *the woman question.* This became an undeniable fact starting with the late eighteenth century and the upheavals brought about by the French Revolution. Moreover, the "general" or introductory sections of codes respected the universality of rights: the ALR inscribed the "equality of the sexes" (I, § 24), and the Civil Code affirmed "All French (men and women) will enjoy civil rights" (art. 8 Cc). Yet this equality before the law did not apply to women in the field of family law. Separate treatment discriminated against wives, referring them to the right to decide and the authority of their husband (*cura maritalis*, or *Ehevogtei* in Germanic law). For example, in private law, the field of family law clearly reflected the nineteenth-century gender order of European society. Although the system of private law that underpinned industrial society, with its guarantee of liberty and property, had at its origin the fiction of equality between all parties involved, family law in fact created a law of exception for married women; this "enclave of unequal law," to quote Dieter Grimm's phrase from 1987, presided over women until the mid-twentieth century.

The French Civil Code of 1804

The Napoleonic Civil Code is unanimously considered, in the words of Ernst Holthöfer in 1982, as a "masterpiece of liberal legislative art" and a "document of national scope." By radically abolishing the privileges of orders and eliminating ecclesiastical authority in civil law, the code and its fundamental liberal principles guaranteeing liberty and property offered an appropriate legal framework for the coming of a market-based society founded on property. However, in conjugal and matrimonial law, it created a status for women as legal minors. It institutionalized the patriarchal reaction that had been at work since 1793-1795, which excluded women from the public sphere, and silenced all female and even feminist demands that had recently been expressed during the revolution.

The paragraph expounding on the complete absence of rights for married women (art. 213 Cc), which was in effect until 1938, proclaimed that "The husband owes his wife protection, and the wife obedience to her husband." Women were consequently placed beneath marital power in all respects: they were not considered an autonomous legal person and had to obtain their spouse's authorization for all legal acts regardless of the matter, from managing her household to practicing an independent commercial activity. Nor could women start legal proceedings or enter into a contract (art. 214-226 Cc). They could own property, but could not acquire, manage, or enjoy income from their own activity. Even when the spouses lived under the separation of property regime, the wife could not manage her own property without her husband's consent (art. 217 Cc). In fact, marital power extended to both the person and the property of women, and it was impossible to change this situation by contract (art. 1388 Cc). Only *public merchants* could contract obligations without marital authorization (art. 220 Cc). Paternal power (art. 373 sq.) limited the mother's rights over her child, as the father had disciplinary means at his disposal and could have him imprisoned (art. 375/377 Cc). The conditions for divorce, which was authorized until 1816 and then banned until 1884, were also unequal. Marital adultery represented grounds for a divorce only on the condition that the husband had "kept his concubine in the matrimonial home." In contrast, a husband whose wife was unfaithful could get a divorce for any instance of adultery and could even be excused for killing his unfaithful wife if he caught her in the act (art. 324 of the penal code). Jean-Étienne Portalis (1746-1807), the father of the Civil Code's family law, for a long time justified the logic of subjecting women in a republican system by basing himself on Rousseau:

“It is not […] our injustice, but natural temperament that subjects women to stricter obligations for their own benefit and the well-being of society […]. Marital power and paternal power are republican institutions.”

The absence of rights for unmarried mothers and their children in French civil law was without equal in any of the legal systems of the time. The foundation of this injustice resided in the ban on establishing paternity for natural children; as a result, non-married women could not demand an allowance or child support for their child. The rule stating that “establishing paternity is forbidden” (art. 340 Cc), which was invented by revolutionary legislators (decree of 2.11.1793), was unknown in both the written and customary law of the Ancien Régime. The single mother and child had no rights and received no public assistance. In order to limit the abortions and infanticide resulting from the destitution in which unmarried mothers were left, a system of secret births slowly emerged, with the creation of foundling wheels and the foundling hospitals that welcomed abandoned children. It took a long-term struggle on the part of the feminist movement for art. 340 of the Civil Code to be amended: finally, in 1912, establishing paternity was admitted in five specific cases (abduction or rape, promise of marriage, written admission of the father, manifest cohabitation, father’s participation in supporting and educating the child). The ban on paternity investigation was fully lifted only in 1972, making it possible for mothers to contest her husband’s presumption of paternity under certain conditions.

Article 213 Cc, which sealed the legal incapacity of women and was opposed by the feminist movement with such tenacity, was finally amended in 1938. Of course, the husband remained the head of the family, and “exercised this function in the common interest of the household and its children” (Cc of 1942). The woman’s duty to obey gradually gave way to an egalitarian sharing of rights: from 1965, married women could practice a profession without the authorization of their husband. In 1970, parental authority replaced paternal power. In 1971, spouses jointly carried out the family’s moral and material management, and in 1975, the law allowed divorce by mutual consent. Natural children obtained full legal equality only between 2003 and 2005.

The Prussian Code of 1794 (ALR)

The German Civil Code was not unified until 1900, due to the sovereignty of states within the German Confederation and the late unification of Germany in 1871, when the *Bürgerliches Gesetzbuch* (BGB) took effect. Its codification was based on the Prussian Code of 1794 (*Preußisches Allgemeines Landrecht*, ALR), which appeared during a period of transition towards the modern state. A mix of enlightened absolutism, state intervention, and paternalistic benevolence, it took an intermediary position between civil law and the society of orders. Rich in detail and highly complex, it was initially boycotted and decried *en masse* by legal practitioners. It was, for that matter, strikingly favourable to women and their rights. This is why commentators feared, even before it was adopted, that this code would quickly turn “Prussia into a genuine paradise for women,” in the words of the legal expert and civil servant Johann Georg Schlosser (1739-1799).

It is true that despite the explicitly announced equality of the sexes (§ 24 I.1. ALR), the man is the “head of the conjugal community.” He makes decisions regarding the home, name, and condition of the couple, as well as manages and serves as the sole usufructuary of their common property (§§ 184sq. II.1. ALR). However, a woman could partially enter into contracts, and was considered an independent legal person if her husband faced an impediment. She could moreover possess her own property when it was “reserved” to her by contract. She had the domestic mandate or the “power of the keys” (*Schlüsselgewalt*), which allowed her to resolve everyday matters connected to managing the household, but hardly beyond that (§§ 205, 208 II.1. ALR).

Like the Civil Code, the ALR defined marriage as a civil contract, thereby rejecting not only the canon law conception of marriage, which considered it to be a sacrament, but also ecclesiastical jurisdiction. The separation of Church and State in Prussia made it possible to establish a particularly liberal right of divorce: aside from the usual grounds (adultery, premeditated abandonment, breach of conjugal duties, etc.), “the incompatible humour” of one of the spouses was recognized as grounds for divorce (§§ 668sq. II.1. ALR).

It was especially the rights granted to unmarried mothers and their children—with regard to their fathers or, failing that, their paternal grandparents—that made the ALR a code that was benevolent and favourable towards women. It granted them delivery expenses and alimony, and in cases of breach of a marriage promise, the equivalent compensation that would be due to a divorced woman who had won her case (§§ 1028-9, 1049 II.1. and 592sq. II.2. ALR).

These rules sparked anxiety from the moment they were enacted and were deemed to be “lax” and “frivolous” by both conservatives and the Prussian clergy, on the grounds that illegitimate relations would endanger the fundamental order of bourgeois society and its central pillar, the family. After the failure of the Revolution of 1848, members of the Prussian House of Lords adopted a law which considerably curtailed the rights of single mothers, in an explicit reference to the directives of the French Civil Code. In particular, this law authorized the *plurium concubentium* exception—a case in which it is stated that the mother had relations with other men—and eliminated the responsibility of grandparents. Moreover, property rights for married women were limited in practice (due to the presupposition that they were not the owner of the conjugal property).

These were so many deteriorations which also appeared in the unified German Civil Code (BGB) of 1900, despite massive and repeated protest by the fast-growing German feminist movement. The BGB consolidated the status of the husband as the head of the family: he made the final decision in all conjugal matters (§ 1354 BGB), notably with respect to the education of children, and this despite the use of the term parental authority (§ 1626 BGB). Once married, a woman could at least own the income coming from her own paid activity. The husband nevertheless reserved the right to cancel his wife’s work contract if he felt that her activity caused her to neglect her domestic tasks. With regard to the rights of single mothers and their children, the BGB retained unchanged the stricter arrangements from 1850. Equality of rights between the sexes is of course inscribed in article 3 of the German Constitution (FRG), called the Basic Law (1949), although reform of conjugal and familial rights did not take place until 1957, followed by a deeper reform in 1977 which introduced the formal equality of rights between men and women in the family.

The General Civil Code of the Austrian Empire of 1811 (ABGB)

The *Allgemeines Bürgerliches Gesetzbuch* (ABGB) was also the product of enlightened absolutism, which sought to combine the various legal sources in the Austrian Empire, a multi-ethnic state stretching from Hungary to Galicia and Northern Italy (Lombardy and Venezia). It also aspired to overcome, as Maria Theresa of Austria (1717-1780) said in 1750, “the ‘bad’ traditions carried along by the society of feudal orders,” in accordance with the human rights principle of equality. The Austrian Civil Code offered women a certain independence (§§ 91 sq. ABGB) as compared to other major civil codifications. For instance, it proclaimed that wives and single women could take legal action and enter into contracts. In Austrian law, the man was also the “head of the family,” without for all that possessing “marital power” over his wife: it simply fell to him to “manage the household.” Yet here as elsewhere, the notion of the so-called natural difference between the sexes gradually imposed itself in the commentaries of legal experts, and tacitly transformed into a rule. For example, despite the separation of property established by the law—and therefore of property rights granted to women (§§ 1237-8)—the presumption gradually took hold that married women transferred the administration of their property to their husbands by way of a tacit agreement.

Unlike its French and German counterparts, the ABGB left competence over matrimonial matters to the clergy. Divorce remained banned for Catholics (§ 111 ABGB) but was possible for “non-Catholic Christians and Jews” (§§ 115, 123 ABGB). The continued existence of canon law, which treated unions concluded without parental agreement, known as a “clandestine marriage,” in the same manner as marriages, made the Austrian code benevolent towards illegitimate children and their mothers (§§ 161-171. ABGB). It provided for appropriate support and education for the mother and child, with the latter nevertheless being excluded from the inheritance and the paternal line.

English Common Law

In medieval English law, unmarried women were subjects with independent rights, but upon marrying they lost the capacity to exercise these rights, notably the right to contract and to take legal action. Until the nineteenth century, marriage for women was therefore synonymous with “civic death.” The English husband possessed rights over his wife’s body, acquisitions, and property, known as *coverture*, which entailed the loss of legal personality. Furthermore, parental power fell solely to the father. Marriage remained under the authority of the Church of England (except for Jews and Quakers), while divorce was authorized only through individual request and an Act of Parliament.

Notwithstanding, uniform codification did not exist in England, and hence nor did family law. In the early nineteenth century, courts began to develop principles of equity (equity courts), which softened certain provisions,

notably with regard to property rights. For example, specific laws such as the *Dower Acts* (on dowries) or the *Divorce Matrimonial Causes Act* of 1857, granted property rights to women or authorized divorce for specific reasons. However, as English society transformed apace with rapid industrialization during the course of the nineteenth century, there was increasing criticism of the striking absence of rights for married women. The rise of the English feminist movement beginning in 1870, along with demands for the right to vote, which received the support of the Member of Parliament John Stuart Mill (1806-1873), culminated in the adoption of a series of *Married Women's Property Acts*. Adopted between 1870 and 1882, these laws protected the family property of married women but did not predicate legal equality, although this legal emancipation in matters of property created more favourable conditions for women, as the liberal theory of personal rights linked their liberty and capacity to own their own property. While in the area of civic rights English women over the age of thirty obtained the right to vote in 1918, a right that was extended to all women over the age of twenty-one in 1928, it took until the 1960s for family law to grant legal equality to married women.

The Scandinavian legal space

Historians of law and comparative law consider the Nordic countries as a specific legal space (Ditlev Tamm 1987), which distinguishes itself through pragmatic interpretations and concrete reforms. Cooperation among the commissions that had worked towards unifying legislation between the Nordic countries since the late nineteenth century initially unified business law and contract law. The unification of family law, which more than any other legal domain was tightly linked to the customs and values of the people, met with greater difficulty. In addition, guardianship over both single and married women (in other words their complete lack of personal rights) was not repealed in Nordic countries until the mid-nineteenth century. It was eliminated for unmarried women in Denmark in 1857, in Norway and Sweden in 1863, and in Finland in 1864. For married women, property rights and equality in matters of inheritance were granted relatively early, between 1845 and 1874 in Sweden, in 1888 in Norway, and in 1899 in Denmark. Obtaining the right to vote—between 1906 (Finland) and 1919 (Sweden)—surely accelerated the march towards equality in principle for women in private law, which is to say in marriage law and family law (1920 in Sweden, 1925 in Denmark, 1927 in Norway, 1929 in Finland). This specific evolution can especially be explained by the political context in which these legal victories took place, as well as by the transformation of agrarian societies into industrial societies, which called for legal reforms that had become inevitable. Feminists in Nordic countries especially, unlike in other European countries, were able to form alliances with the worker's movement and socialists, and to thereby limit the effects of the bourgeois patriarchy.

During the nineteenth century, feminists in every region of Europe vigorously protested the disgraceful and outmoded legal status of women and launched mass movements on both the national and transnational levels to demand more rights in the private and public spheres. Yet it was only after the two World Wars and a brief conservative phase in the 1950s that social movements across all industrialized Western countries, and particularly the feminist movement, gradually imposed new standards of equality. Once the universal right to vote had been won, one of the major objectives for both women and men was to inscribe this equality in the legislative texts governing private law. The transformation of family groups and models for private life, as well as the taking into account of the rights of children, led to a complete reform of family law across Europe in the late twentieth century. The most obvious manifestation of this evolution is the loss of importance of marriage as an institution. The latter is no longer the only legitimate qualification for starting a family, while rights to alimony, obligations to contribute to the support and education of children, and custody have been defined according to a multiplicity of existing forms recognized by law (even for the obligation to support children on the part of men and women in heterosexual cohabitation, the punishable nature of rape within marriage, and the same alimony and inheritance rights for children born out of wedlock, etc.). Since the late twentieth century, the gradual recognition of same-sex couples through marriage and civil unions in various European countries has broadened the conception of legitimate couples and families even further, and now calls for new reforms in civil law.

The European Union has supported and helped advance this movement towards gender equality by inscribing it in treaties and various directives on equal treatment, in addition to the EU's Charter of Fundamental Rights, which has been in effect since 2009. The European Court of Justice has played a considerable role in forming a European Community that is not just limited to an economic community, but that is also understood as a legal community. Through its constant jurisprudence since the 1970s, the court has rendered effective in legal practice the ban on discrimination based on gender, race, ethnicity, religion, and opinion, and more recently on handicap, age, or

sexual orientation. Yet equal rights have in many respects still not been won, for we do not possess rights as we do an object: they must always be negotiated, defended, and won anew in accordance with the new needs and requirements of the moment.

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