

Bending the *Code Civil*: Married Women, their Capacity to Engage in Contracts and the Partnership between Spouses (Belgium, 1804–c. 1865)

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Introduction

It is a surprising fact that the contractual incapacity and the general position of married women in private law in nineteenth-century Belgium and France has not often been studied, even though it is a recurrent theme in generalizing publications of legal history.¹ The respective contents of the 1804 French (Napoleonic) Civil code, which was imposed on the Southern Netherlands (that is today's Belgium) by French occupants and which remained in force in Belgium throughout the 1800s, are often presented without much consideration for their detail and full legal implications. Moreover, the interpretation of the rigid 1804 Civil code in Belgian legal practice of the nineteenth century is still largely a black box.² The legal context is nonetheless important for assessments of the role of women in nineteenth-century society, and for the history of the

¹ Traditional and generalizing views on these matters can be found in the secondary literature cited in footnote 10, and in most course handbooks of continental legal history. An exception in this regard is David Deroussin, *Histoire du droit privé (XVIIe–XXIe siècle)* (Paris, 2010), pp. 196–204. The history of the sections of the 1804 Civil code regarding married women has been detailed by Jean Gay, 'Capacité de la femme mariée et puissance maritale dans l'élaboration du Code civil', *Revue de l'Institut Napoléon*, 161 (1993/2): pp. 33–65, 162 (1994/1): pp. 51–64, and 163 (1994/2): pp. 19–43. A summarized version of this chapter has been published in *Mémoires de la Société pour l'histoire du droit et des institutions des anciens pays bourguignons, comtois et romands* (1993), pp. 129–45.

² This is so for many themes of nineteenth-century Belgian private law. See: Dirk Heirbaut, 'Les juges belges face au Code civil aux 19ième et 20ième siècles: l'exemple des troubles de voisinage', in Barbara Dölemeyer, Heinz Mohnhaupt and Alessandro Somma (ed.), *Richterliche Anwendung des Code civil in seinen europäischen Geltungsbereichen außerhalb Frankreichs* (Frankfurt am Main, 2006), pp. 257–8.

family of this period. Historians and sociologists have recently underscored that in the course of the nineteenth century, in Belgium and elsewhere, there was a progressive trend towards reappraisal of the mother, which came along with a modest, egalitarian approach within marriage.³ Legal history may help further nuancing such views.

In this chapter, it is argued that already in the early nineteenth century Belgian legal practice went some way in acknowledging contractual rights of married women. Both in the French and in the France-orientated Belgian legal scenes, for this issue legal scholars and judges made use of the few escape routes that were found within the 1804 Civil code in order to juristically acknowledge the part a wife could have in running the family estate and in managing her property. However, in spite of some softening approaches, in Belgium over the whole period of the nineteenth century legal discrimination of married women did not decrease substantially. In legal practice some of the harsh provisions of the law were mitigated, but gender equality as such was not a goal. Belgian judges, together with French legal authors, reacted against some of the Civil code's inconsistencies, but they did not want a fundamental revision of the Civil articles regarding the position of married women.

The 1804 Civil code was clearly discriminatory, and it is remarkable that many of its biased sections continued to be applied even in the twentieth century. It was only in the first decades of the 1900s that political will, albeit slowly, made a thorough change of the law possible. The philosophy behind the articles of the original 1804 Civil code required a woman's submission to her husband following marriage. Exceptions to this underlying principle mostly resulted from situations in which the husband was unable to administer the household, or from his cooperation. The agreement between spouses as to the community of property, which is foremost found in the marriage contract, was for a large part irrelevant for the legal position of the wife, and even contractual separation of assets did not always revive the wife's rights. It has been pointed out that these strict rules, as well as other provisions of law that were issued under the French Consulate and Empire of Napoleon, purported to prevent illegitimate births and to stimulate family unity and parental responsibility.⁴ Such articles of law did not correspond with the rules that had applied in the Belgian regions before the French occupation in 1795, and the tempering responses of Belgian jurists after 1804 were also inspired by these older legal solutions.

³ Koen Mattheijs, 'Changing Patterns of Familial Sociability: Family Members as Witnesses to (Re)Marriage in Nineteenth-Century Flanders', *Journal of Family History*, 31 (2006): pp. 115–43; Bart Van de Putte et al., 'The Rise of Age Homogamy in 19th Century Western Europe', *Journal of Marriage and Family*, 71 (2009): pp. 1234–53.

⁴ June K. Burton, *Napoleon and the Women Question: Discourses of the Other Sex in French Education, Medicine and Medical Law, 1799–1815* (Austin, 2007), pp. 201–2; Suzanne Desan, *The Family on Trial in Revolutionary France* (Berkeley, 2004), pp. 283–310.

In this contribution, judgements and legal literature for the period between 1804 and until around 1865 are analysed.⁵ The geographical focus is on the kingdom of Belgium, and mostly on the province of Brabant and its main legal centre, Brussels. Yet, since the intertwining between French and Belgian legal science remained very strong even after the end of Napoleon's power over the Belgian provinces in 1814,⁶ the interactions between French legal literature and Belgian legal practice are also considered. As in France, Belgian jurists remained generally conservative throughout the nineteenth century, even though in both countries some exceptions to the general sexist legal principles were gradually broadened. The end date of 1865 marks the first feminist protests against the Civil code in France.⁷ The *Principes de droit civil* (1870) and the proposed reforms of the (Belgian) Civil code (1879–82), which were drafted by the Belgian jurist and law professor François Laurent and which incorporated the mentioned interpretations of legal practice too, conclude this period. In order to illustrate the stickiness of the 1804 legal regime regarding married women, however, the final paragraph goes into the legislative initiatives

⁵ The studied judgements were all published in legal journals such as *Pastorie belge* (hereinafter *Pastorie*, sometimes specified with (*Arrêts des Cours d'appel*) when two volumes were published in a same year, one for judgements of the Cassation Courts and one containing judgements of Courts of Appeal) and *La Belgique Judiciaire*. The first journal printed the complete text of remarkable judgements of Belgian and French Courts of Appeal and of the Cassation Courts of both countries since 1832. The second one was started in 1842, and contains (Belgian and French) verdicts that were pronounced by Courts of Appeal and the Cassation Courts, but also some that were issued by other tribunals. Both journals published the arguments of the claimant and defendant as summarized in the judgement. For a general overview of nineteenth-century Belgian law journals, see: Dirk Heirbaut, 'Law Reviews in Belgium (1763–2004): Instruments of Legal Practice and Linguistic Conflicts', in Michael Stolleis and Thomas Simon (ed.), *Juristische Zeitschriften in Europa* (Frankfurt am Main, 2006), pp. 343–67. In principle, no exhaustive conclusions can be drawn from such published judgements, since for diverse reasons many nineteenth-century judicial decisions remained unpublished. See, in this respect: Régine Beauthier, 'Le juge et le lit conjugal au XIX^e siècle', in Marie-Thérèse Coenen (ed.), *Corps de femmes: sexualité et contrôle social* (Brussels, 2002), pp. 40–41. This notwithstanding, the consistency between legal doctrine and the judgements analysed hereafter allows for an assessment of crucial developments.

⁶ Dirk Heirbaut, 'The Belgian Legal Tradition: Does it Exist?', in Hubert Bocken and Walter De Bondt (ed.), *Introduction to Belgian Law* (Brussels, 2000), pp. 10–13.

⁷ In the 1860s, Léon Richer and Maria Deraismes started lobbying for a change of legal status of married women in France. In 1868, Richer founded the journal *Droit des femmes*. In Belgium, the feminist movement was launched only in the later 1880s. See: Eliane Gubin, 'Du politique au politique: parcours du féminisme belge (1830–1914)', in Hans Moors (ed.), *Fabrics of Feminism: Comparative Analysis of Nineteenth-Century Gender Discourse in Belgium and the Netherlands* [*Revue belge de philologie et d'histoire*, 77 (1999)] (Brussels, 1999), pp. 370–82.

of the later nineteenth century and of the twentieth century on this subject and into their protracted results.

The 1804 Civil Code, the Double Standard and the Conjugal Bond

The French Civil code of 1804 contained several detailed rules regarding the rights of married women in contractual and private law affairs, and with regard to their place within the household. In many respects, this codification enshrined the double standard. A striking example concerns the authorization of parents as to a marriage of their children. According to the Civil code, both the mother and father had to consent. However, it was also provided that, if the parents disagreed between themselves, the father had the deciding opinion.⁸ Another example relates to the unequal freedom of choice of domicile. A married woman was held to follow her husband and live together with him. Only the husband had the right to decide where the household would be established, and not the wife.⁹

With regard to the position of married women in contractual affairs, the compilers of the Civil code designed a strict regime. According to the Civil code, marriage reduced the wife to incapacity, which could only be remedied by the cooperation of her husband. A married woman was considered to be on the same level as minors and as persons being incapable because of 'idiocy, insanity, or madness' (sections 489 and 1124). Most compilers of the Civil code, and jurists commenting on its articles, stressed that the – then commonly accepted – *faiblesse de sexe* of women was not the prime motive for these rules, but rather the fact that marriage entailed a partnership between husband and wife (*société conjugale*, conjugal partnership). The husband was deemed to be the only *chef et organe* of this association.¹⁰ The fact that he was considered to

⁸ Section 148 Civil code.

⁹ Sections 213–14 Civil code. Section 213 explicitly provided that the wife owed obedience to her husband.

¹⁰ *Discours préliminaire*, in Pierre-Antoine Fenet, *Recueil complet des travaux préparatoires du Code civil* (15 vols, Paris, 1827–28), vol. 1, p. 486. Doctrinal views along these lines can be found in: André Jean Simon Nougarede de Fayet, *Lois du mariage et du divorce, depuis leur origine dans le droit romain* (Paris, 1816), pp. 353–4; Carl Salomé Zachariae, *Le droit civil français (avec des annotations de G. Massé et CH. Vergé)* (5 vols, Paris, 1854–60), vol. 1, p. 231. See also: Michèle Bordeaux, 'Le maître et l'infidèle. Des relations personnelles entre mari et femme de l'ancien droit au Code civil', in Irène Théry and Christian Biet (ed.), *La famille, la loi, l'état de la Révolution au Code civil* (Paris, 1989), pp. 432–5; Philippe Godding, 'La femme sous puissance maritale (1804–1958)', in Luc Courtois, Jean Pirotte and Françoise Rosart (ed.), *Femmes et pouvoirs. Flux et reflux de l'émancipation féminine depuis un siècle* (Louvain-la-Neuve, 1992), pp. 19–20; Gabriel Lepointe, 'La femme au XIXe siècle

be the director of the partnership existing between the spouses is clear in the paragraphs of the Civil code imposing authorization for most property-related and contractual acts of the wife. Section 217, for example, stipulated that a married woman could not give, alienate, pledge or acquire by free or chargeable title without the concurrence of her husband in the act or without his consent in writing. As *organe* of the matrimonial partnership, the husband was supposed to organize and oversee the household. He represented the matrimonial community of property, and as a result, he always had to be summoned to court for debts involving this community. Only exceptionally – when the husband was incapable, absent or detained – could his wife act independently.¹¹

The incapacity of wives that had been laid down in the Civil code was, and particularly when being compared with the rules that had applied in the Old Regime, extreme. In the seventeenth and eighteenth centuries, many localities in France and the Southern Netherlands had allowed married women to acquire assets and to incur obligations when the contracts signed were beneficial for the matrimonial community or for the husband. These rules were often combined with a right to retreat. If a married woman had signed a contract that proved detrimental afterwards, she could have the contract annulled. In many places this was not accepted if the contract had been reciprocal (ie if the benefits of the agreement compensated the contractual duties), or if some other profit for the community property could be demonstrated. As a result, a profitable contract signed by a married woman, even without the prescribed assistance or authorization of her husband, was nonetheless valid.¹² A second difference

en France et dans le monde de l'Europe occidentale', in *La Femme* [Recueils de la Société Jean Bodin pour l'histoire comparative des institutions, 12] (Brussels, 1962), p. 504. Even though these authors refer to the eighteenth-century views of Pothier, who had underscored a natural weakness of women, and to comparable remarks made by compiler Portalis, other authors of the Civil code and most commentators did not support such considerations. Most of them remarked on the inconsistency with the legal position of unmarried women. Because the latter were capable of signing contracts, incapacity for married women could not be based on the argument of 'natural' characteristics pertaining to sex. See: Régine Beauthier, 'Construction du divorce et des relations entre époux dans les travaux préparatoires du Code Napoléon', in Anne Devillé and Olivier Paye (ed.), *Les femmes et le droit. Constructions idéologiques et pratiques sociales* (Brussels, 1999), pp. 80–83.

¹¹ Section 222 Civil code.

¹² See: Dave De ruysscher, 'The Capacity of Married Women to Engage in Contracts: Emancipation Through *Ius Commune* in the Southern Netherlands (12th–18th Centuries)', in Grethe Jacobsen and Heide Wunder (ed.), *East Meets West: A Gendered View of Legal Tradition* (forthcoming). For France, see: Pierre Petot and André Vandenbossche, 'La femme dans les pays coutumiers français', in *La Femme* [Recueils de la Société Jean Bodin pour l'histoire comparative des institutions, 12] (Brussels, 1962), pp. 246–7 and p. 249, footnote 7. When academic doctrine (*ius commune*) became more accepted in France in the fifteenth and sixteenth centuries, the concept of nullity was projected onto older rules.

with the older legislation concerned the property regime during marriage. In the Civil code, the type of marriage contract that had been chosen by the spouses had virtually no impact on the legal position of the wife. Even when a matrimonial community had been excluded and the spouses were completely separate in property, the wife could not alienate her privately owned immovable assets without her husband's consent (sections 217 and 1449). This had not been the case in many legal systems of the Old Regime.¹³

Limited Legal Possibilities for Household Management by Married Women

These provisions within the Civil code have led many authors to present the incapacity of married women in nineteenth-century France and Belgium, with regard to private law (contracts, matrimonial property, land law), as absolute.¹⁴ However, within the Civil code some exceptions to the mentioned articles of law were acknowledged as well. The rule that was most far-reaching in this respect provided that only the husband, the wife and their heirs could raise the nullity of a contract that had been signed by the wife without her husband's consent (section 225). This nullity was relative, and not absolute. This meant that such a contract could be declared invalid, but only if the mentioned parties objected to the contract. The agreement was not null and void by law, but voidable. If the contracting woman and her husband acknowledged its contents, or refrained from a complaint, the contract was and remained lawful. The number of persons who could apply for annulment was limited. The parties who had signed a contract with a married woman could not challenge the validity of such a contract for the reason of absence of marital consent. This was so even when the woman with whom they had negotiated had been married but had not mentioned the fact, or when she had pretended to act with the consent of her husband.¹⁵ Creditors could neither prevent nor reverse a nullity that was sought

The *Coutumes* of Paris of 1580 (section 223), for example, imposed nullity of the act that had been performed by a married woman without her husband's authorization. However, this was a relative nullity, which could only be invoked by the husband, the wife and their heirs. This section served as an example for section 225 of the Civil code. See: Perot and Vandenbossche, 'La femme', p. 247, footnote 3.

¹³ Ibid., p. 249.

¹⁴ Gustaaf Baeteman and Jean-Pierre Lauwers, 'Le statut de la femme dans le droit belge depuis le Code civil', in *La Femme* [Recueils de la Société Jean Bodin pour l'histoire comparative des institutions, 12] (Brussels, 1962), p. 581; Godding, 'La femme sous puissance maritale (1804-1958)', pp. 26-7; Lepointe, 'La femme', p. 504.

¹⁵ Charles-Bonaventure-Marie Toullier, *Le droit civil français, suivant l'ordre du Code civil ...* (13 vols, Paris, 1824-28), vol. 2, 17 (nos 622-3); Jean Viaud, *De la puissance maritale considérée sous les rapports historique, philosophique et juridique ...* (Paris, 1855), p. 377.

by the husband.¹⁶ In short, the relative nullity rule allowed a wife to convince her husband after she had signed a contract, even when the other contracting parties had not been aware of the woman's marital status. An informal endorsement by the husband was sufficient, even though the husband could let the parties to the contract know that he would not seek annulment.¹⁷

The rule of relative nullity had important disadvantages for those who had signed a contract with a married woman that was afterwards rejected by her husband. Sections of the Civil code provided that creditors of contested contracts could not expropriate assets of the common fund of marriage or those properties belonging privately to the husband. Debts within such contracts were considered to be the wife's, and only her property served as collateral for them (section 1426). This was often disadvantageous because the personal property of the wife was usually less valuable than the communal assets or those owned by the husband. Moreover, when expropriation of the wife's property was sought, even when it concerned her personal debts, the husband had to be summoned to court together with his wife. If he refused to grant authorization to his wife to appear in court for this purpose, a separate proceeding had to be started in order to obtain judicial authorization (section 2208). Furthermore, because expropriation against the personal assets of a married woman was thought to be potentially dangerous for the household, the judge weighed the interests of the family and the household against those of the creditors. If the wife's private property was used for the family, the claimants could be required to postpone expropriation against such assets until dissolution of the marriage (by death of a spouse or following divorce). They could not obtain separation of communal property between the spouses before the end of marriage (section 1446). Because of all this, those who intended to enter an agreement with a woman needed to have an idea of her marital status or her financial situation. If the negotiating parties knew that she was married, they surely asked her to submit proof of her husband's consent if the woman had not done so herself. It seems that, in early nineteenth-century France, delivery upon a sale agreed with a married woman was often postponed until evidence of her husband's authorization was presented.¹⁸

However, regardless of the legal disadvantages for creditors, the mentioned relative nullity rule made it possible that a wife, with the consent of her husband, led the household and managed the assets of the community property. A married woman could in principle only sign contracts, sell belongings or

However, in those circumstances, the contracting party could still attack the contract on the basis of fraud (*dol*) if he had contracted because of the stratagems of the woman (section 1116 Civil code).

¹⁶ Zachariae, *Le droit civil français*, vol. 1, p. 244.

¹⁷ Toullier, *Le droit civil français*, vol. 2, p. 27.

¹⁸ Viaud, *De la puissance maritale*, pp. 373-4.

engage in hypothecs, with communal property, following the express and detailed authorization of her man; but if the latter generally agreed with his wife's actions, it was impossible to have such actions annulled. The Civil code prescribed a specific (silent or express) authority for such actions (section 223), but if the husband had decided to not question the contracts of his wife, this rule had no consequences.

Also in some other respects the Civil code allowed wives to act autonomously. In the Civil code and in French legal doctrine it was acknowledged that they could perform *actes d'administration* (administrative acts) with respect to their private assets (movable and immovable) if separation of property or a general authorization of administration had been provided in the marriage contract (sections 223, 1449 and 1536). Such acts comprised the sale of movables, maintenance of buildings, and the enjoyment of rewards and revenues. Sums that were periodically due, for example those stemming from rent contracts or loans, could lawfully be cashed.¹⁹ However, the *actes d'administration* did not encompass alienations of immovable property, as was expressly provided in the Civil code (section 1449 *in fine*). For such actions, cooperation of the husband was required as a principle.

Another type of operation that was – according to French legal writers commenting on the Civil code – lawful for a wife, even without her husband's agreement, was *actes conservatoires* (conservatory acts). *Actes conservatoires* were deemed necessary because of an immediate threat against the wife's property, and swift action was required in order to prevent (further) damage. Because of the urgency, the wife could perform acts of importance such as *inter alia* seizure of assets, engagement in hypothecs and sending of protests.²⁰ Furthermore, with regard to some decisions concerning children (even communal children), the wife could act alone. She could, for example, accept a donation that was made to them.²¹

A further and well-known exception to the legal principle of incapacity of married women related to the so-called *mandat domestique*. This entailed a silent and presumed mandate of the husband to the wife allowing her to buy and sell to the extent that such operations concerned necessary supplies and provisions for the household. If the wife transgressed this mandate, by making excessive costs or by selling goods under value, the contracts that she had signed could not embarrass the husband or the matrimonial community.²² In French doctrine

¹⁹ Charles Demolombe, *Cours de code civil* (15 vols, Brussels, 1847–82), vol. 2, pp. 275–6 (no. 154).

²⁰ *Ibid.*, pp. 270–71 (nos 131–3); Zachariae, *Le droit civil français*, vol. 1, p. 236, footnote 34.

²¹ Toullier, *Le droit civil français*, vol. 2, p. 19 (no. 630); Zachariae, *Le droit civil français*, vol. 1, p. 236.

²² Zachariae, *Le droit civil français*, vol. 1, p. 241, footnote 51.

that was written in comment on the Civil code, the difference between *mandat* and *autorisation* was underscored. The wife was presumed to have a *mandat domestique*, whereas she was not presumed to have authorization. Therefore, she was held to present or mention the authority of her husband to the parties with whom she negotiated a contract, but she did not have to evidence her mandate for those contracts that concerned foodstuffs and clothing. The contracting parties were supposed to be aware of the silent 'domestic mandate', and they were certain as to their recourse against the matrimonial community.²³ After a while, the theoretical difference between mandate and authorization allowed reducing the negative effects of the black-letter law of other provisions in the Civil code (see hereafter).²⁴

The husband had many powers regarding his consent or authorization. He could easily refuse. The wife could thereupon contest this decision before a tribunal and the judge had to consider the interests of both spouses when deciding on the grounds of the refusal.²⁵ If the judge regarded the lack of cooperation from the husband as unfounded, he could decide that the wife was allowed to perform the act under question. The verdict then served as authorization. However, such an appeal to the judiciary was often a mere theoretical remedy because, even when the judgement granted authority to the wife, the married woman could in principle only engage her own assets and not the matrimonial community (section 1426).²⁶ As mentioned before, in that case the claims of her creditors could be reduced in the interest of the family, and they could not ask for separation of communal property (section 1446).

The mentioned legal exceptions as to the Civil code's principle of authorization by the husband were, all in all, limited. Married women could not preside over the sale of their immovable property, not even when it was strictly personal. Their legally acknowledged powers concerned the preservation and maintenance of private assets rather than a full capacity to acquire and transfer. The husband directed the matrimonial community, and the role of the wife was in this respect even more restricted than with regard to her private estate. The

²³ Désiré Dalloz, *Répertoire méthodique et alphabétique de législation, doctrine et jurisprudence* (Paris, 1852), p. 220 (no. 1007) and p. 384 (no. 1857).

²⁴ Another difference between *mandat* and *autorisation* was procedural. As to the *mandat domestique*, the husband could simply point to the excessiveness of the costs incurred by his wife when refusing payment or delivery. The other contracting party then had to take the initiative of bringing suit on the matter. Under the regime of authorization, a complaint of the husband was required in order to annul a contract that been signed without his consent.

²⁵ Zachariae, *Le droit civil français*, vol. 1, p. 239, footnote 44.

²⁶ Section 1427 of the Civil code provided some very minimal exceptions to section 1426. These exceptions comprised judicially confirmed agreements that had been made in order to liberate a woman's husband from prison, or for the 'establishment' of the children.

rule of relative nullity meant that women were met with distrust when acting in public and that they negotiated on their own behalf when their husband did not support their actions. Those who engaged in contracts with a woman had to be absolutely sure that she was either single or – if she was married – that her husband consented to what she was doing. However, benevolent judges and jurists could bend some of these rules, and especially the one regarding relative nullity, to the advantage of married women, even though such interpretations mostly served the interests of creditors. They were not so much equality driven.

French Doctrine and Belgian Judgements Circumventing the Civil Code (1804–c. 1865)

In some respects, French doctrine of the early 1800s had walked away from the strict provisions of the Civil code, and Belgian tribunals followed its lead. An example of this is clear in the views of the Court of Appeal of Brussels regarding the relation between *autorisation* and *mandat/procuration*, which it developed in close relation with the relative nullity rule of the Civil code. In this latter respect, the judges in Brussels attempted to revive some of the Brabant law that had applied before the French occupation. They were original with regard to other legal problems as well.

Contemporary French commentators emphasized that the more lenient mandate could replace the strict requirements of authorization. The picky rules applying to the latter did not hinder the former. A mandate could be broad and general, whereas an authorization had to be precise and had to be linked to one operation only (section 223). A husband could empower his wife to 'do all things necessary' to 'administer a business'. Such descriptions were deemed sufficient to have the legal effect of a mandate, also for precise operations and even for those acts for which according to the Civil code a specific and detailed authorization was required. A general mandate could be conferred on the wife, allowing her to buy and sell for the benefit of the matrimonial community or in the interest of the husband.²⁷

In February 1818, the Brussels Court of Appeal heard an appeal that had been brought against a judgement of the Commercial Court of Brussels. The latter had condemned a certain Mr Coché, a merchant living in Brussels, to pay out four letters obligatory that had been drawn on him and his wife for a sale of movables, and which had been signed for acceptance by his wife alone, with the added note of hers that she had acted '*par procuration de son mari*' (on the basis of a mandate of her husband). The strategy of Mr Coché during the proceedings before the Commercial Court suggests that his wife regularly undertook commercial activities, together with him or with his consent. Mr Coché's advocates indeed did not bring up the incapacity of Madame Coché as a married woman, but merely referred to the fact that she had not been given a specific mandate (*procuration*) for the acceptance of the bills obligatory under question. On 19 June 1817, the Brussels Commercial Court had produced a provisional judgement inviting the claimant to produce evidence of a mandate by Mr Coché, or as to the legal status of Madame Coché. If the latter had been conducting business as an independent tradeswoman at the time of the acceptance of the bills, and if the bills were related to this separate trade, according to the court the acceptance of the bills should be considered valid. In that case, the claimant could prosecute his claim against the assets of the community property, as was provided in the Civil code. Wives with separate businesses, authorized by their husband, could bind the matrimonial community property (section 1426). The point of the separate trade by Madame Coché was proven, and thereupon Mr Coché was convicted. In response, the latter lodged an appeal against this judgement. The Brussels Court of Appeal untangled the many legal questions that had been raised. It rightly stated that either Madame Coché had had a separate trade, or that her husband was liable because of a given or presumed mandate for the acceptance of the bills. Because it was believed that the bills obligatory had not been drawn for the purpose of a separate trade of Madame Coché (she had accepted them on behalf of her husband), the Brussels Court of Appeal did not follow the reasoning of the first instance Commercial Court, which had accepted the relation between the bills and Madame Coché's separate business.

Instead, and rather surprisingly, the Brussels Court of Appeal judged that even when no express mandate by the husband could be demonstrated, the creditors of the bills could bring suit against Mr Coché on the basis of an action *de in rem verso*, if the deliveries following the sale had been made to him. In that case, he had profited from the contract, and therefore he should respond to the debts stemming from that contract. This action *de in rem verso* was, according to the late medieval and early modern legal doctrine in which it had been developed, related to the profits that had been made. It was a remedy against

²⁷ Demolombe, *Cours de code civil*, vol. 2, p. 284 (no. 170); Alexandre Duranton, *Cours de droit civil suivant le code français ...* (12 vols, Brussels, 1841), vol. 1, pp. 350–51 (no. 1035); Demolombe, *Cours de code civil*, vol. 2, p. 284 (no. 170); Toullier, *Le droit civil français*, vol. 2, p. 25 (no. 644). This same insight was also mentioned in the first edition of Duranton's commentary, dating from 1825. See: Alexandre Duranton, *Cours de droit français suivant le code civil ...* (21 vols, Paris, 1825–37), vol. 2, p. 417 (no. 448). Demolombe's treatise dates from 1847. Toullier's was published in 1824 and it most certainly was a source for Duranton's remarks. After Toullier's death, Duranton completed and edited the unfinished fifth edition of Toullier's *Le droit civil français*.

unjustified enrichment.²⁸ The Brussels Court of Appeal nonetheless suggested that the claim could be brought for the totality of merchandise that had been delivered, and not only for the gains that had been made out of it.²⁹ In this regard, the judgement was important. It clearly derogated from contemporary French legal doctrine, which allowed this action *de in rem verso* only for the surplus acquired by the defendant, that is the actual profit.³⁰ If – in the cited example – Mr Coché had received and sold the deliveries, the classical action *de in rem verso* could only regard the difference between the selling and buying price. The creditors of the bills obligatory, who had delivered the goods bought, could accordingly recover their debts to the maximum of this difference, which was always smaller than the total billing cost. However, in the interpretation of the Brussels Court of Appeal, the full debt for the deliveries could be claimed from Mr Coché.

In the Coché case, the Brussels Court of Appeal used the French doctrinal distinction between *mandat* and *autorisation* by explicitly not requiring that the rules of *autorisation* apply in case of *mandat/procuration*. Moreover, the Brussels Court of Appeal linked these opinions to the Brabant law of the Old Regime, and blended the latter with the *actio de in rem verso*. This *actio* was broadened for the hypothesis of reciprocity in the contractual relation between the wife and her contracting parties, and in this respect the Brussels Court of Appeal went considerably further than French doctrine. Before 1789, it had been a common rule in Brabant that when the matrimonial community or the husband benefited from a profitable but unauthorized agreement, the latter should be fulfilled. The importance of this innovative legal interpretation was that it permitted bringing a substantial claim against the husband for contracts against payment that had been made by his wife. Also, from another legal viewpoint, this solution was no less than revolutionary. According to the letter of the Civil code, a person falsely presenting himself as an agent of another person should be considered liable for damages and compensation out of the contracts which he signed with such pretensions, and no claim could be raised against the falsely represented (section 1998). Thus, according to the black-letter provisions of the Civil code, when these rules had been applied, and because the mandate remained unproven, Madam Coché had to be held responsible for the bills. That would have meant

that the creditors could not seek payment for their debt against the assets of the community property (section 1426). The legal understanding proposed by the Brussels Court of Appeal must therefore foremost be evaluated as a measure tackling such inadequacies, which under the circumstances of the case went against the good faith of the creditor of the bills obligatory. It is clear that the Brussels Court of Appeal circumvented the gender-biased rules of law, mostly to protect the economic interests of the third parties involved.

Other judgements of the Brussels Court of Appeal explored the legal elements that had been set out in the former case. An interesting example, dating from 1860, related the mentioned new views to the rule of relative nullity. Madam Laureys and her son had signed *billets à ordre* (promissory notes), which they had not paid afterwards. The beneficiary of those notes was Madam Verbeemen. The latter summoned Madam Laureys and her son in payment before the Commercial Court of Mechelen. Madam Laureys was married at the time of the signing of the *billets*, and in court she mentioned that she had acted without the *autorisation* of her husband, who was not present in the courtroom. Only later, before the Brussels Court of Appeal, it appeared that her husband had left her some 20 years before. Madam Laureys insisted in appeal that the promissory notes were null and void because she had signed them without permission of her husband. The advocate-general emphasized the principle that a contract signed by a wife without her husband's authority should be honoured if it contributed to the matrimonial community. He stressed that the right to revoke such a contract was subject to the condition that the contract had not been reciprocal. Also, the advocate-general's conclusion was that, in principle, the action *de in rem verso* should be limited to the profits that had been made. However, he suggested that because the husband of Madam Laureys had left, he had to be considered legally absent. Therefore, Madam Laureys had to be qualified as the director of the household at the time of the signing of the notes, and the full amount of the debt had to be compensated. Also, the advocate-general interpreted the *mandat domestique* very broadly, in the sense of a mandate for the benefit of the matrimonial community and not only for buying groceries and clothes. The Brussels Court of Appeal followed the advocate-general's advice, which thus set forth an exception to the relative nullity rule for profitable contracts.³¹ In this

³¹ Court of Appeal Brussels 9 May 1860, *Pasicrisie (Arrêts des Cours d'Appel)*, 1860, pp. 158–62. The latter interpretation of *mandat domestique* refined decisions of the same Court of Appeal. See, for example, Court of Appeal Brussels 8 January 1851, *Pasicrisie (Arrêts des Cours d'Appel)*, 1851, p. 327–8, at p. 327 (the *mandat domestique* 'concern[e] les objets nécessaires à l'alimentation et à l'entretien de la famille' [relates to objects that are necessary for the feeding and maintenance of the family]). See, for a decision comparable with the verdict of 9 May 1860, Court of Appeal Brussels 7 November 1840, *Pasicrisie (Arrêts des Cours d'Appel)*, 1841, pp. 13–14.

²⁸ Daniel Visser, 'Das Recht der ungerechtfertigten Bereicherung', in Robert Feenstra and Reinhard Zimmermann (ed.), *Das römisch-holländische Recht. Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (Berlin, 1992), pp. 369–428.

²⁹ Court of Appeal Brussels 10 February 1818, *Pasicrisie*, 1818 [published in 1843], pp. 29–31.

³⁰ Duranton, *Cours de droit civil*, vol. 1, p. 365 (no. 1095); Philippe Antoine Merlin, *Répertoire universel et raisonné de jurisprudence* (17 vols, Paris, 1812), vol. 1, p. 519 (no. 8); Claude-Etienne Delvincourt, *Cours de code civil* (3 vols, Paris, 1819), vol. 3, p. 36; Zachariae, *Le droit civil français*, vol. 1, p. 342, footnotes 10 and 42.

latter respect, the Brussels Court of Appeal further endorsed the older legal rules with regard to the contractual capacity of married women.

The Brussels Court of Appeal was, also with regard to other legal questions, innovative. In the 1850s, it decided for example that a silent authorization from the husband could be deduced from the insertion into an official deed of the expression *dûment autorisée par son mari* (duly authorized by her husband).³² At around that same time, it again stated – with reference being made to the mentioned Coché verdict – that the fact that an unauthorized contract was profitable for the husband brought about his liability.³³ The position of the Brussels Court of Appeal was, when being compared with other Courts of Appeal, quite progressive. Many of the mentioned judgements concerned commerce, which was important not only in the city of Brussels but also in Mechelen and Antwerp. The latter cities resorted under the jurisdiction of the Brussels Court of Appeal and before 1795 they had known rules based on cooperation between spouses.³⁴ In other Belgian Courts of Appeal, for example in Ghent and Liège, decisions were stricter and they remained closer to the provisions of the Civil code, most probably because they did not so much concern trade. Differences in decisions between the Court of Appeal of Brussels and other Courts of Appeal, for example, concerned the specific or general authorization for commerce,³⁵ and whether a silent authorization of the husband could be deduced from circumstances or customs.³⁶ In verdicts of the

³² Court of Appeal Brussels 15 May 1855, *Pasicrisie (Arrêts des Cours d'Appel)*, 1855, pp. 394–9.

³³ Court of Appeal Brussels 1 June 1857, *Pasicrisie (Arrêts des Cours d'Appel)*, 1857, pp. 272–4.

³⁴ For Antwerp, see: De ruysscher, 'The Capacity of Married Women.' For Mechelen, see: Guillaume De Longé (ed.), *Coutumes de la seigneurie de Malines. Coutumes de la ville de Malines* (Brussels, 1879), p. 64 (ch. 9, section 9).

³⁵ See, for an overview of judgements between 1870 and 1900 regarding the requirement of a specific authorization for trade, François Laurent, *Supplément aux principes de droit civil* (8 vols, Paris, 1898–1903), vol. 1, p. 378 (no. 575). In Ghent and Liège, specific authorizations were imposed, whereas in Brussels a more lenient interpretation prevailed.

³⁶ Compare Court of Appeal Ghent 6 August 1862, *Pasicrisie (Arrêts des Cours d'Appel)*, 1863, pp. 54–9 (an authorization cannot be silent and must be express) with Court of Appeal Brussels 25 February 1852, *Pasicrisie (Arrêts des Cours d'Appel)*, 1852, pp. 340–42, at p. 340 ('le consentement tacite du mari constitue une autorisation suffisante' [the silent consent of the husband is sufficient as an authorization]). See also: Court of Appeal Brussels, *Pasicrisie (Arrêts des Cours d'Appel)*, 1860, pp. 240–41, at p. 240 ('l'autorisation peut résulter des circonstances' [the authorization can result from circumstances]). A similarity in judgements, which was beneficial to women, concerned the interpretation of the 1851 law regarding hypothecs. This law was explained in the sense that women could still register the silent hypothec for their dowry after a judgement had declared their husband to be bankrupt.

Brussels Court on such themes, the link with economic benefits and the rights of creditors was evident.

Minimal and Unachieved Projects for Reform (c. 1870–c. 1960)

The mentioned developments in Belgian legal practice and French doctrine had some impact on Belgian legislation. In December 1872, for example, a legislative change was made to the Belgian *Code de commerce* (Commercial code), in the sense that a woman with a trade separate from her husband's was henceforth allowed to sell her private immovable property, and that she could lawfully use it as collateral (*hypothèque*) if that served the purpose of her business.³⁷

Some years later, a more general change of the existing legislation was proposed. In August 1879, the liberal Belgian government had entrusted law professor François Laurent with the project of writing a revised version of the Civil code, the original text of which had remained in force in Belgium without much change up until that time. In 1882, Laurent published a draft code (*avant-projet*), containing 2,241 sections, and which listed fundamentally new provisions with regard to the legal capacity of married women. The contemporary feminist agitation, especially in France, probably stimulated Laurent's liberal and progressive views, and most certainly he built on what was going on in the Belgian tribunals of his time. Laurent proposed the right to sell personal immovable property for both husband and wife; but he also acknowledged restrictions in the interest of the matrimonial bond. He thus took the partnership between spouses as the benchmark for the actions of both husband and wife, even with regard to their privately owned assets. Because he considered the spouses to be partners (*associés*), in his view they should restrict operations in light of their common undertakings.³⁸ A wife privately owning assets could thus choose to sell them, but the husband could prevent this if the sale would ruin the marriage or household.³⁹

Laurent regarded the interest of the family as the crucial criterion for the validity of alienations of communal assets as well. He extended the right to oppose such transactions for both spouses. Laurent gave the management of the community property to husband and wife. Both were, according to Laurent's proposal, required to consent in how the community was run, even if the concrete act of administration was in practice only done by one of them.

See: Court of Appeal Brussels 4 August 1856, *La Belgique judiciaire*, 14 (1856), p. 1329; Court of Appeal Ghent 13 August 1856, *La Belgique judiciaire*, 16 (1858), p. 1284.

³⁷ Section 11 of the law of 15 December 1872, *Moniteur belge*, 22 December 1872.

³⁸ François Laurent, *Avant-projet de révision du Code civil* (6 vols, Brussels, 1882–85), vol. 1, p. 452 (no. 1).

³⁹ *Ibid.*, p. 446 (no. 6).

If a spouse did not agree, he or she could file complaint with the tribunal. The wife could thus, according to Laurent, oppose her husband's administration of the communal property. Any action of sale or hypothecation of immovable communal property should be done with authorization of both husband and wife; and in case one of them did not support the proposed act, he or she could resort to a judge. If the husband wanted to prevent the projects of his wife, he could only start proceedings and seek a judgement confirming his views. When exerting its control in such cases, the tribunal had to take the interests of the family into consideration.⁴⁰

Neither in his *avant-projet* nor in his many other publications did Laurent refer to judgements of the Brussels Court of Appeal that supported the mentioned views. It is nonetheless most certain that he knew the decisions summarized above, that he agreed with their contents and that they determined at least some of his convictions. However, notwithstanding its corroboration of legal practice at this point, in the end Laurent's project remained without results. This was due to political reasons. The text of Laurent, who was a member of the liberal party, was met with strong opposition from Catholic politicians, and when in 1884 the Catholic party won the elections, it formed a new government that swiftly put Laurent's work aside and appointed a commission of experts to write a new draft text. This commission was warned to stick to the existing Civil code as closely as possible. As a result, in decades thereafter, legislation was not substantially changed.⁴¹

In a first phase after 1884, only minor legal improvements were made. In France, laws of 9 April 1881 and of 6 February 1893 relaxed the strict rules for married women to a minimal extent. The first law allowed a wife to open a savings account and to make deposits without her husband's consent. The second one provided that factual separation, even without judicial acknowledgement, brought about the end of the incapacity of the wife and thus of the requirement of authorization by the husband.⁴² Some of these rules were copied into Belgian legislation. A Belgian law of 1900 granted married women the right to open a savings account irrespective of their husbands' views,⁴³ and another law of the

same year acknowledged a woman's right to sign a labour contract and to receive wages, even when she was married.⁴⁴

It was only in 1932 that, after long deliberations in parliament, fundamentally new rules were inserted into the Belgian Civil code. The limited suffrage, which in 1919 had been granted to war-struck women (predominantly widows and mothers of deceased soldiers), had engendered a *changement d'esprit*. After that time, many thought it inconsistent that married women, who were thenceforth citizens with voting rights, remained in many respects subjected to their husbands.⁴⁵ However, even in 1932 the regime of authorization by the husband did not end, even though many exceptions were acknowledged. A wife could, for example, dispose of earnings from labour without consent from her husband. It was, too, for the first time expressly provided that the revenues of the husband should compensate the debts of the household. If this obligation was violated, the wife could seek remedy in court in order to block and cash her husband's wages and rewards. The 1932 law also allowed general authorizations of husbands, for all acts.⁴⁶ However, these legal innovations were – generally speaking – limited, since the required consent of the husband was confirmed as a general principle. Still in the 1940–50s, legal scholars generally considered the husband to be 'the head of the household',⁴⁷ and it was only 10 years after general suffrage had been accorded to women in 1948 that the Belgian legislator formally abandoned the marital authority regime of the 1804 Civil code. Thereafter, it would take another 18 years, until 1976, before married women were given powers with regard to the administration of the matrimonial community property.⁴⁸

The mentioned legislative changes did not only respond to changes of thought within legal doctrine and practice, but foremost to women's demands. The two World Wars were catalyst events, also in this respect, as in their wake voting rights were extended to women. This was implicitly meant as a reward for their patriotism and as a form of compensation for losses suffered. Even so, the reform of the legal position of women was slow, and in private law even slower than for topics of public law, to which voting rights pertained. After World War I, a few members of the Belgian parliament, among them the liberal politician Emile Jennissen, advocated a thorough revision of the Civil code's articles regarding married women. Jennissen's 1925 proposal for

⁴⁴ Law of 10 March 1900, *Moniteur belge*, 14 March 1900.

⁴⁵ Belgian Senate, *Pièces parlementaires*, 1925–26, no. 18, p. 1 (see hereafter).

⁴⁶ Henri De Page, *Traité élémentaire de droit civil belge. Principes – doctrine – jurisprudence* (10 vols, Brussels, 1933–49), vol. 1, pp. 783–9.

⁴⁷ *Ibid.*, p. 781 (no. 712); René Dekkers, *Handboek van burgerlijk recht* (3 vols, Brussels, 1956–58), vol. 1, p. 169 (no. 250).

⁴⁸ Section 1415 Civil code, as changed by the law of 14 July 1976, *Moniteur belge*, 18 September 1976.

⁴⁰ *Ibid.*, pp. 445–6 (nos 4–5) and pp. 451–2 (no. 1). See also, with respect to the guiding principle of the interests of the family: François Laurent, *Cours élémentaire de droit civil* (4 vols, Brussels, 1878), vol. 1, pp. 275–6 (no. 213); François Laurent, *Principes de droit civil* (33 vols, Brussels, 1869–78), vol. 3, p. 163 (no. 126).

⁴¹ Dirk Heirbaut, 'L'émancipation tardive d'un pupille de la Nation française: l'histoire du droit belge aux 19^e et 20^e siècles', in Alain Wijffels (ed.), *Le Code civil entre ius commune et droit privé européen* (Brussels, 2005), pp. 614–15.

⁴² James F. McMillan, *France and Women, 1789–1914: Gender, Society and Politics* (London, 2000), p. 152.

⁴³ Law of 10 February 1900, *Moniteur belge*, 12–13 February 1900.

inter alia the abolishment of the first part of section 213, which provided that a married woman owed obedience to her husband,⁴⁹ was blocked early on. After World War II, the first female members of parliament reanimated the debate. In May 1946 and in December 1947, the liberal senator Georgette Ciselet⁵⁰ submitted proposals of law that aimed at introducing equal rights of husbands and wives as to matrimonial and private property.⁵¹ In March 1948 and in February 1949, a female member of the Chamber of Representatives, Isabelle Blume-Grégoire, made comparable proposals to abolish marital authority and to acknowledge full legal capacity of married women.⁵² None of these proposals made it to law, but they did give cause to the creation of a legislative committee that was to prepare a reform of the system of reciprocal duties and rights within marriage. The committee's proceedings ultimately resulted in the 1958 law, of which Ciselet had been one of the most active proponents.⁵³ Yet the slowness of legislative reform had been a clear indication of the reluctance of a predominantly male parliament towards the necessary legal changes.⁵⁴

⁴⁹ Belgian Senate, *Pièces parlementaires*, 1925–26, no. 18 (*proposition de loi tendant à libérer les femmes de certaines inégalités qui les frappent au point de vue civil et pénal* [proposition of law for the liberation of women of some inequalities in civil and penal law]).

⁵⁰ After World War II, Georgette Ciselet (1900–83) played an important role in opening the legal profession to women, and demanding immediate voting rights. In 1923, as the fourth woman in Belgium, she had taken the oath of advocate and she quickly specialized in divorce litigation. Based on her own experience, in the 1930s she published texts on the discrimination of married women and on the comparative study of the law relating thereto. In the meantime she became member of the women's section of the liberal party and chaired its legal commission after the war. She left Belgian politics when in 1963, as the first woman in Belgium, she was appointed to become judge in the *Conseil d'Etat*. Until then, Ciselet had tirelessly devoted herself to women's political, social and legal rights. She was also a member of the board of the National Women's Council and was active, there as well, in its legal commission. See: Georgette Ciselet, *La Femme: ses droits, ses devoirs et ses revendications* (Brussels, 1930); Eliane Gubin, Catherine Jacques, Valérie Piette and Jean Puissant (ed.), *Dictionnaire des femmes belges. XIXe et XXe siècles* (Brussels, 2006), pp. 100–103.

⁵¹ Belgian Senate, *Pièces parlementaires*, 1946 (Special Session), no. 38, and 1947–48, no. 73, in particular sections 16–23.

⁵² Belgian Chamber of Representatives, *Pièces parlementaires*, 1947–48, no. 299, and 1948–49, no. 207.

⁵³ Claude Renard, 'La réforme du statut de la femme mariée en Belgique', *Revue internationale de droit comparé*, 10/1 (1958): pp. 56–64.

⁵⁴ In the introduction to the 1958 law, it was said that the committee had worked 'cautiously, but in a determined fashion'. See: Belgian Senate, *Pièces parlementaires*, 1956–57, no. 69, p. 1 (*Exposé des motifs*). Between 1921 and 1950, only very few women had seats in the Belgian parliament. See: Eliane Gubin and Leen Van Molle, *Femmes et politique en Belgique* (Brussels, 1998), p. 67. On the whole, the socialist political party was not in favour

Conclusion

The regime of marital authority, which had been written into the Civil code, took the *puissance* of the husband and the obedience of his wife as starting points, rather than the conjugal partnership. The provisions of the Civil code were strict and more severe than legislation of previous periods, but they allowed some progressive interpretation. In France, legal scholars attempted to broaden some of the exceptions of the code's harsh rules. The distinction between *mandat/procuration* and *autorisation* was expanded. Judges of tribunals in the Belgian province of Brabant followed their lead. In the first half of the nineteenth century, the Brussels Court of Appeal copied ideas of French legal authors by acknowledging autonomous actions of married women, and it was in some respects more lenient than French doctrine. The solutions that were imposed on litigants, in particular the exception to the relative nullity rule for profitable contracts, closely resembled what had been known in Brabant during the Old Regime. The local laws of that province, dating from before 1789, had taken spousal cooperation as the basis for rules regarding the position of married women. The proposed reform by François Laurent breathed the spirit of this older legislation as well, since it was based on the mentioned legal interpretations that were common in contemporary court practice. However, these ideas did not take full root until after World War II. Gender equality in private law was not an important political issue – not in the early 1900s, and not before.

The mentioned moderate relaxation of the Civil code's articles, in legal practice and doctrine of the 1800s, should therefore not be overestimated. It is surprising but true that in the course of the nineteenth century a more softened interpretation of the stubborn provisions of the 1804 Civil code with regard to married women mostly served economic goals. The interests of creditors were considered as being paramount. It was the acknowledgement of their needs that had the indirect effect of raising the contractual capacity of wives. This is clear in the interpretation of the Civil code's rule of relative nullity by the Brussels Court of Appeal. The Civil code provided that contracts signed by a married woman were in principle illegitimate if the husband had not consented in them, but also that they remained legally valid until successful judicial contestation. It was a rule of the Old Regime that a beneficial and reciprocal contract could not be attacked, even if it had been signed by a married woman without her husband's cooperation. Early nineteenth-century French legal doctrine allowed compensation for the creditors, but only to the extent of the profits made by

of general suffrage for women, which it thought to be to the advantage of the Catholic party. The success of the socialist movement in the early 1900s thus seriously hampered the claims of Belgian feminism, which after 1895 had chosen voting rights as its main goal. See: *ibid.*, pp. 30–44.

the husband. In its judgements, the Brussels Court of Appeal went further and took the older rules as guiding principles. It decided that even without formal authorization a wife could bind the community property for contracts that were to the husband's advantage. Yet, such verdicts usually concerned cases that were situated in the sphere of business. The approach of the Brussels Court had indeed more to do with safeguarding the rights of those parties who had contracted with a woman than with a full recognition of married women's rights. Therefore, one must conclude that, all in all, the nineteenth-century changes in legal interpretation were not so much engendered by a cultural turn recognizing the role of the wife; and they were certainly not the result of a political sense of urgency as to equality between the sexes. In both the law and the legal practice, the gender bias within the Civil code remained unchallenged for the most part, and this well into the twentieth century.

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