

The Marriage Legislation in the French and Dutch Civil Code

Emese von Bóné

Erasmus University Rotterdam, Netherlands

Contact e-mail: vonbone@law.eur.nl

Abstract:

This paper focuses on the historical backgrounds of the marital power in the marriage legislation in the French Civil Code via the works of Robert Joseph Pothier. The legal status of the husband and wife and their mutual relationship as regulated by the first Dutch Civil Code of 1838, which was inspired by the French Civil Code, is also discussed. In the final part of this paper the latest reforms of the marriage legislation are analysed.

Keywords: marital power; marriage legislation; feminist period; codification; French Civil Code; Dutch Civil Code

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Early modern marriage legislation

In the late Middle Ages, we see a development in family law in the so called “Hausgemeinschaft”, where families live together.¹ The wife was fully integrated, through marriage, into her new family. She was totally subordinate to the power of her husband and had to obey him. Her husband managed all her properties. When her husband died, she could then manage the properties of the family. Children were under the authority of their father for as long as they lived with their parents. They were ruled by their father, and he could punish them. According to customary law, the wife was legally submitted to her husband, and she was incapable of acting in matrimonial property law matters. The husband represented his wife in court and he had the capacity to act in her name in legal matters.² From the 16th until the 18th century the marital power had been extended to protect incapacity of the married woman. This means that for all legal actions she needed an assistance of the court in case her husband was legally incapable.

¹ MONBALLYU, J. *Geschiedenis van het familierecht, van de late middeleeuwen tot heden*. Leuven: Acco Uitgeverij 2006, p. 22.

² *Ibidem*, p. 56.

In the 18th century the marital power of the husband is further developed in the famous work of Robert Joseph Pothier. In Pothier's work "Traité de la puissance du mari sur la personne et les biens de la femme" we read that the man is a "chef" of the marriage. He has marital power over his wife and her matrimonial goods: "Le mariage, en formant une société entre le mari et la femme, dont le mari est le chef, donne au mari, en la qualité qu'il a de chef de cette société, un droit de puissance sur la personne de la femme, qui s'étend aussi sur ses biens."³

In Pothier's other work, "Traité du contrat de mariage" we read: "Le projet de Code définissait le mariage: un contrat dont la durée est dans l'intention des époux."⁴ We see that marriage is a lifetime contract according to this Pothier's work. This article might have inspired the French codifiers to implement it into the French Civil Code: "Le Code civil ne considère le mariage que sous les rapports civils. Le projet de Code définissait le mariage: un contrat dont la durée est dans l'intention des époux, celle de la vie de l'un d'eux ce contrat peut néanmoins être résolu avant la mort de l'un des époux dans les cas et pour les causes déterminées par la loi." As shown, in France it was considered very important to uphold marriage. Within marriage the husband had marital power. An illustration of marital power in marriage in the 18th century is shown in Mozarts opera *La Nozze di Figaro*. In this opera a husband – the character of the Count of Almaviva as a representative of the transition from the *Ancien Régime* to the *Nouveau Régime* – is persistently trying to exercise his *droit de seigneur* – his right to bed – towards his servant girl on her wedding night (which is Figaro's bride-to-be Susanna). The *droit du seigneur*, also known as *jus primae noctis* ("right of the first night"), is a supposed legal right since medieval times in Europe. Montesquieu referred to the practice already in 1748 in *The Spirit of the Laws* (1748), saying that it had been enforced in France over three nights. Voltaire, the first person to use the term *droit du seigneur*, mentioned the practice in his *Dictionnaire philosophique* (published in 1764) and in his comedy *Le droit du seigneur or L'écueil du sage* (in 1762), in which the term *droit du seigneur* was used.

Marriage Legislation in the French Civil Code

With the introduction of the French Civil Code (FCC) in 1804, the legal position of the woman didn't change in neither the marriage legislation nor in the regime of the matrimonial goods. In the FCC, it was constituted that the man is head of the family and that the wife is subordinated to her husband. In Art. 213 of FCC we read: "la femme doit obéissance à son mari" which means that the wife has to obey her husband.⁵ In Art. 214 of the French Civil Code we read: "La femme est obligé d'habiter avec le mari, et de le suivre partout où il juge à propos de reside", which means that the wife had to live with

³ POTHIER, R. J. *Oeuvres de Pothier, Traité de la communauté auquel on a joint un traité de la puissance du mari sur le personne et les biens de la femme*, par l'auteur du Traité des Obligations, nouvelle édition, tome 1. Paris, 1806, p. 1.

⁴ POTHIER, R. J. *Traité du contrat de mariage*, avec notes indicatives des changements introduits par la nouvelle législation et par la nouvelle jurisprudence, par l'auteur du Traité des Obligations, tome premier. Paris, 1813, p. IX.

⁵ POTHIER, R. J. *Oeuvres de Pothier, Traité du contrat de mariage*, cinquième partie. Paris, 1818, p. 273. See also an earlier edition of 1768 of the *Traité du contrat de mariage* par l'auteur du *Traité des Obligations*, part 1.

her husband and follow him wherever he goes. This article was inspired on Pothier's work "Traité du contrat de mariage".

In the Netherlands, the French marriage legislation was introduced in 1811, when the Netherlands were annexed to the French Empire.⁶ The legal position of a mother in patrimonial affairs was peculiar. The FCC provided that the man was the head of the household, and that his wife was subordinated to him in matters of family life. This was the influence of Napoleon who, as president of the *Conseil d'État*, led the deliberation and the discussions on the marriage legislation. The rules on marriage should be inserted into the FCC. Napoleon's opinion was that nature had made women the slaves of men, and that women's soul and body belonged to men. According to the FCC, spouses were held to keep mutual fidelity, help and assistance. The husband had to protect his wife, whereas the wife was obliged to obey her husband.

In the text of the FCC, the subordinate position of the wife was clearly expressed. It was, for example, not tolerated that a wife had the liberty to raise her children according to her insights. Only the father was given the legal power to decide in such matters. Regarding the guardianship, women were also underrepresented in the family council.⁷ Only mothers and grandmothers were allowed to have a seat. Other female relatives, such as sisters, were excluded. In case the mother was the surviving spouse and if she wanted to remarry, the family council had to decide if she could continue the guardianship over her minor children and the authorisation of the family council was a condition for continuation of this guardianship (Art. 395 FCC). If the family council confirmed this authority, the new husband was appointed as conjoint guardian. As a result of the marriage, the mother resorted under the marital power of her new husband, and she could not act without his consent. As conjoint guardian, the husband was liable for the acts of his wife. If the mother had not convoked the family council, she risked losing the guardianship over her minor children.

By contrast, for a father it was not required to obtain authority from the family council while he planned a new marriage. Another discriminating rule was that a father could decide according to his will, for example, that the mother should be assisted by a special advisor in guardian matters (Art. 395 FCC). The father as a guardian did not need a special advisor.

Divorce was not always an option for women to escape their unhappy marriage. Divorce became extremely difficult for women according to the FCC: they had to prove their husband's adultery with his mistress in the house performing the act (Art. 229–232 FCC)! For men this was not requested. After the period of the Restoration divorce in France was forbidden until 1884, when the divorce law of Alfred Naquet has been introduced making divorce possible again.⁸

⁶ VAN DAPPEREN, H. J. M. *De vrederechter in Nederland 1811–1838*. Rotterdam: Erasmus University, 1991.

⁷ VON BÓNÉ, E. *De familieraad in Nederland 1811–1838*. Rotterdam: Erasmus University, 1992.

⁸ VON BÓNÉ, E. Der Einfluss des französischen Scheidungsrecht im Vereinigten Königreich der Niederlande (1815–1830). In: SCHULTZE, R. (hrsg.). *Rheinisches Recht und Europäische Rechtsgeschichte*. Berlin: Ducker&Humboldt, 1998, pp. 267–276.

Marriage legislation in the Dutch Civil Code 1838

Since the introduction of the Dutch Civil Code of 1838, the subordination of women could be clearly seen. Title 15 of the Dutch Civil Code mentioned the *patria potestas*. According to Article 388 of the Dutch Civil Code of 1838, only ascendants and relatives could assemble in a family council. This was new style of the composition of the Dutch family council, which dealt with different matters than the French family council, under the presidency of the justice of the peace. The aim of the Dutch family council was to inform the district judge. This judge had the capacity to appoint a guardian and to make decisions. Women were totally excluded as participants of the Dutch family council. In one of the codification projects before 1838, the Dutch legislator wanted to exclude the authority of women regarding the education of their children. This codification project has never been realized. The Dutch legislator only recognised women in their role as housekeepers.⁹

In the Netherlands, the subordinated position of women was described by one of the first female lawyers, Betsy Bakker-Nort (1874–1946)¹⁰ who lived during the first feminist period, just like Aletta Jacobs,¹¹ her mentor. B. Bakker-Nort was born in Groningen on 8th May 1874. She died in Utrecht on 23rd May 1946. She was a lawyer and politician. B. Bakker-Nort grew up as the youngest of four sisters in a non-orthodox Jewish family in Groningen. Her father died when she was six years old. By then, B. Bakker-Nort lived in a “women’s-family”, which had impact on the decisions she made in her life. She was witness to the position of women in her inner circle. Regarding her mother’s legal restrictions in life, in her youth B. Bakker-Nort stated: “dat mijn flinke zelfstandige moeder niet mocht stemmen voor de gemeenteraad, en elke nog zoo domme man wel”, which means she was completely shocked that her very independent smart mother was not able to participate in elections and a less intelligent man got this possibility. After high school she spent some time in Denmark and Sweden study their languages.

In 1895, at the age of 20, she was member of the Society of Women’s suffrage “Vereniging voor Vrouwenkiesrecht (VVVK)” in her domicile, Groningen. Together with A. Jacobs (who was twenty years older) she was encouraging women in Groningen to join the Society of Women’s suffrage. B. Bakker-Nort was one of the leading women in the electoral competition. As the battle for equal rights needed a proper knowledge of the law, B. Bakker-Nort decided to study this field.

Regarding the then status of women, in 1901, they were not equal to their husbands because if woman wanted to remarry, the second husband became co-guardian to his wife and had the responsibility for the guardianship of his wife.¹² If a man wanted to remarry, his second wife was not appointed as co-guardian.

In 1908, at the age of 34 B. Bakker-Nort started her law studies at the University of Groningen. On the 11th of March 1912 she got her doctoral degree. Her dissertation dealt with a comparative study of the position of married woman in Germany, Switzerland,

⁹ BRAUN, M. *De prijs van de liefde*. Amsterdam: Spinhuis, 1992, pp. 29–30.

¹⁰ See her biography: <https://atria.nl/nieuws-publicaties/vrouwen-in-de-politiek/betsy-bakker-nort-biografie/>.

¹¹ JACOBS, A. *Herinneringen*. Amsterdam: Van Holkema & Warendorf, 1924, herdruk Nijmegen: Socialistische Uitgeverij Nijmegen, 1978.

¹² LIMBURG, J. Het familierecht van het Burgerlijk Wetboek in zijn karakteristieke eigenschappen tegenover het recht van thans. In: SCHOLTEN, P. – MEIJERS, E. M. (eds.). *Gedenkboek Burgerlijk Wetboek 1838–1938*. Zwolle: W. E. J. Tjeenk Willink, 1938, p. 358.

England, France, and the Netherlands. In 1914, two years after her doctoral degree, she defended her dissertation on the legal position of the married woman at the University of Groningen.¹³ She battled together with the Society of Women's suffrage to force the legislator to change the marriage legislation. In her dissertation B. Bakker-Nort concluded that of all the countries in Europe, the Netherlands had the most unfavorable marriage legislation. In the Dutch Civil Code of 1838 we find in Art. 161, almost a literal translation of Art. 213 of the FCC: "de vrouw is haren man gehoorzaamheid verschuldigd", which means that a woman has to obey her husband. According to B. Bakker-Nort the Dutch marriage legislation was interpreted much more strictly compared to the freer interpretation in France and Belgium. B. Bakker-Nort showed in her dissertation, that in France fathers were repeatedly accused of abusing their power in case they refused mothers to perform the right to deal with the education of their children or to interact with their children. In the FCC the authority of the father over his children was stated but the interpretation was free. Although this issue was in the Dutch Civil Code regulated in the same way, the law was applied more strictly.

B. Bakker-Nort described, 115 years after the introduction of the FCC, the subordinated position of women in the marriage legislation and in matrimonial property law. In 1926, her contribution about women against the Code Napoleon (*De vrouwen tegen den Code Napoléon*) appeared.¹⁴ B. Bakker-Nort advocated from 1914–1930, and between 1922 and 1940 she worked as a MP for the Free Democratic Bond (de Vrijzinnig Democratische Bond). She wrote an above-mentioned article about "Women against the Code Napoleon", after having visited the Conference for women's suffrage which was held in June 1926 in Paris. During this Parisian conference on women's suffrage, the marriage legislation of different countries was also discussed. *Les Femmes contre le Code Napoléon* – this title sounds like a battle cry and shows the intention of the conference. The speeches during this conference were a protest against the inferior position of married women in the FCC. It was such a pity that Napoleon, who had such a great influence on the FCC, showed so much contempt towards women.

It is possible to identify in the Dutch Civil Code of 1838 in Art. 161 Book I the text of Art. 213 of the FCC: "la femme doit obéissance à son mari",¹⁵ and Art. 214 of the FCC: "la femme est obligé d'habiter avec le mari, et de le suivre partout où il juge à propos de résider".

If we compare the Dutch Civil Code of 1838 with the FCC, considering the marital power, we can see that in both more respect is given to the father than to the mother in the marriage legislation. The introduction of the Dutch Civil Code excluded women from being guardian by which the Dutch Civil Code of 1838 made the position of women worse. In Art. 163 of the Dutch Civil Code of 1838 (which is Art. 217 of the FCC) the incapacity of the married woman towards the matrimonial property law is maintained. Even if a wom-

¹³ BAKKER-NORT, B. *Schets van de rechts-positie der getrouwde vrouw in Duitschland, Zwitserland, Engeland, Frankrijk en Nederland*. Groningen, 1914.

¹⁴ BAKKER-NORT, B. *De vrouwen tegen den Code Napoléon, naklanken van het congres te Parijs. Het Nieuwe Leven*, 1926, 12e jaargang, aflevering 4/5, augustus/september, pp. 97–109.

¹⁵ In the *Traité du contrat de mariage* of Robert Pothier we see this article which inspired the French codifiers to include it in the FCC. See POTHIER, *Oeuvres de Pothier*, cinquième partie, p. 273. Compare the edition of 1768 *Traité du contrat de mariage* par l'auteur du *Traité des Obligations*, 1.

an is married outside community of goods, or separated, she is not allowed to act without the consent of her husband.¹⁶

Epilogue

According to B. Bakker-Nort the marital power of the man should be abolished. The humiliating incapacity to act, that the woman had been bestowed on the day of her marriage under marriage law, should be forbidden. B. Bakker-Nort published an article in 1920 about a more modern marriage legislation. She concluded that the married woman, who is trapped in the legal fetters of the marital power, should be provided by the space of movement and freedom. She pleaded to abolish the obsolete principle of marital power and the subordinated position of women and the incapacity for work, so that she can perform legal acts as freely and independently as before marriage.¹⁷ According to B. Bakker-Nort the provisions on parental authority and matrimonial property law must be also modified.¹⁸ In 1930, she published an important reform bill. It criticised the draft by the Dutch Minister of Justice, Jan Donner, and the Staatscommissie-Limburg, to maintain the position of authority of the man and the marital power. In her publication, she compared the Dutch marriage legislation with that in other European countries. B. Bakker-Nort concluded that the resistance against abolition of the marital authority was based on tradition.¹⁹ Only in 1948, the unequal arrangement between mother-guardian and father-guardian was abolished.²⁰ In the Netherlands, woman were given full legal capacity²¹ in 1956, and became legally independent of their husbands.²² To conclude, it took a long time to change the marriage legislation. Nowadays the Netherlands is one of the most modern countries concerning marriage legislation, as marriage is also possible for homosexual couples. A new legislation is just now waiting in Parliament in which it is approved that a child of homosexuals parents can have four parents.²³ On 14th November 2019, the Committee on Justice and Security spoke about the reassessment of parenthood. For this purpose, the Minister for Legal Protection came to the House of Representatives. On December 7th, 2016, the State Commission on Recalibrating Parenthood, presented the report “Child and Parent in the 21st Century”. This State Commission advised the government on whether it is desirable to change existing regulations on the creation of legal parenthood. In addition, the Commission investigated the introduction of a legal regulation for multi-parenthood (situation in which a child has more than two legal parents and situation in which more than two persons exercise some form of authority over a child), and surrogacy.

¹⁶ BAKKER-NORT, De vrouwen tegen den Code Napoléon.

¹⁷ BAKKER-NORT, B. *Hoofdlijnen voor een moderne huwelijkswetgeving*. Amsterdam: Vereniging van Staatsburgeressen, 1920, pp. 1–12.

¹⁸ Ibidem, p. 6.

¹⁹ BAKKER-NORT, B. *Moet de maritale macht in onze huwelijkswetgeving behouden blijven of worden afgeschaft?* [s.l.], 1931, pp. 1–16.

²⁰ Wet van 10 juli 1947 (staatsblad 1947, H. 232). DOEK, J. E. – DREWES, H. *Jeugdrecht en Jeugdbescherming in Nederland*, Deventer: Kluwer, 1984, p. 22.

²¹ Handelingen der Staten-Generaal. Bijlagen 1949–1950, 1430, 1–2, over de opheffing van de handelingsonbekwaamheid van de gehuwde vrouw.

²² De wet tot opheffing van de handelingsonbekwaamheid van de gehuwde vrouw van 14 juni 1956 (Staatsblad 1956, 343).

²³ See: https://www.tweedekamer.nl/debat_en_vergadering/uitgelicht/herijking-ouderschap.