

# THE RIGHTS OF WOMEN

THE  
RIGHTS OF WOMEN

**A Comparative Study in History and Legislation**

BY  
M. OSTROGORSKI

*TRANSLATED UNDER THE AUTHOR'S SUPERVISION*



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PUBLISHER'S  
PREFACE TO THE ENGLISH EDITION

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THE increased importance attaching to the Woman's Rights question throughout the civilised world is no longer a matter of opinion. It could not perhaps be more strongly attested than by the circumstances which gave rise to the publication of this monograph.

The Paris Faculté de Droit opened an international competition for the best essay on the subject, and after the examination of all the works submitted to it, the jury awarded the first prize to M. Ostrogorski, the author of the present volume.

The opinion of the jury was expressed as follows:—  
" Il est supérieur à tous les autres. . . . Son œuvre porte l'empreinte d'un esprit robuste qui saisit avec justesse les faits et leurs nuances, et dégage avec une sage modération la signification qu'il faut y attacher pour la marche générale des idées réformatrices. Il expose le sujet sans omettre aucun détail, dans une dissertation vigoureuse, exempte de hors d'œuvre. . . . Le plan n'est pas un instant perdu de vue; la méthode est excellente. . . . Le livre récompensé est un livre

distingué, profondément réfléchi, d'une lecture attachante."

Since the publication of the work in Paris it has been carefully revised and brought up to date by the author, who has rewritten the concluding chapter and added two important Appendices for the English edition.

In examining the part assigned to women in the different elective bodies and public offices, the author has thought it would assist the reader to supply him with the necessary information concerning the character and organisation of each institution. In the opinion of the Publishers this lends an additional value to the monograph, and they do not think any apology is needed for leaving this information exactly as it stands, including that which relates to English-speaking countries. If the ordinary English citizen knows the institutions of his own country, he is, as a rule, imperfectly acquainted with Colonial and American institutions.

The volume is believed to be a unique attempt to collect, and to reduce to a system, all the available information on the subject with which it deals.

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## INTRODUCTION.

FROM the very beginning of history woman appears everywhere in a state of complete subordination. Law, which comes to regulate by fixed rules the relations of men in society, sanctions the subjection of woman. At Rome, legislating for the universe, this tenet is formulated in the harshest terms. Christianity, though bringing with it a refining influence, does little to alter woman's position; the Canon Law cannot forgive her the seduction of Adam. "Adam per Evam deceptus est, non Eva per Adam. Quem vocavit ad culpam mulier justum est ut eum gubernatorem assumat ne iterum feminea facilitate labatur."<sup>1</sup> The barbarian society, which rises in the place of the Greco-Roman world, founded as it was on force, shows no greater willingness to recognise the personality of woman; her legal *status* here is one of perpetual tutelage. As social and economic conditions develop and differentiate in the course of the Middle Ages, the unmarried woman gradually liberates herself from the legal restric-

<sup>1</sup> "Adam was beguiled by Eve, not Eve by Adam. It is just that woman should take as her ruler him whom she incited to sin, that he may not fall a second time through female levity." (St. Ambrose quoted in the Decretal; Decret. ii., p. 23, c. 17.)



tions embarrassing her everyday life, that is, in the domain of private law. Then, since the feudal system attaches political power to the patrimonial ownership of the soil, the woman of noble birth, by her ability to inherit, gains access to that power. Before long, however, the territorial sovereignty thus parcelled out becomes reunited and concentrated, with all the political power associated with it, in the hands of the monarch; the confusion between public and private law begins to clear away; and through this double process, *viz.*, in the existing order of things and in men's ideas, woman is in a fair way to be consigned for ever to the region of private law, to the corner left there for her occupation.

But the French Revolution bursts out, and henceforth everything in the State and society is doomed to change. The position of woman, it is true, is not altered at once by the Revolution. Nay, more, it is the French Revolution which puts the final touch to the separation of private from public law; but it does something more than this. It proclaims through the world the reign of "natural right." The sovereign authority of the latter confers on every human being the titles required to support any just claim. Availing oneself of that authority, one could meet, by raising the previous question, all opposition based on the past, on custom, on traditions consecrated by centuries. Then after the "declaration of the rights of man and of the citizen," the declaration of the rights of woman could not fail to come as a logical sequel. It comes and meets with a cold

welcome. But, inasmuch as natural right is of eternal validity, are not the claims based on it imprescriptible? So thought, indeed, the champions of woman's rights, and the demand for them is renewed; it crosses first the channel, then the ocean. The agitation in its favour goes on increasing, and by an ever louder clamour forces itself on the public ear. Statesmen and ministers pay it their attention; and the legislator himself begins to bow to it. In the politics of some countries the *rights of women* obtain, for the sake of party game, something like a negotiable value on 'Change, they are quoted, they are speculated upon, by some with hope, by others with dread of their coming before long to rule the market.

Is a change, then, about to pass over the face of the social order? Is political life about to enter on an untrodden path? No mind that busies itself with the future destinies of society can avoid asking itself these questions.

From the indistinct din of the thousand voices ringing in the lists of politics, it would be no easy task to bring out the true answer. We should merely, it is to be feared, catch the voice overpowering for the moment the rest. Opposite, however, to the political arena in which the various tendencies, striving to force themselves upon society, wage their struggle, there is an umpire, well placed for surveying what is going on. That arbiter is the Law. In its threefold aspect of legislation, judicial opinion, and legal doctrine, it watches the contest, marks the blows, but

records only such as tell. Prone as it may be to hasty impulses, or still oftener to fits, sometimes prolonged fits, of forgetfulness, it yet traces with much accuracy the salient and inward angles of the curve which the conscience of societies describes in its oscillations.

Then, by examining the laws of the different countries as to the position of woman, with regard to the exercise of political and public rights, one might be able to follow the *woman's rights* movement through its various phases in this and that land, and to perceive the limits provisionally assigned to it by the conscience of the civilised world.

It is this study in history and comparative legislation that I propose to undertake here. I intend to examine, with that special view, every class of political and public rights in turn, from the exercise of the highest power in the State, down to the humblest civic functions.

Several savants and publicists in Europe and in America have been so good as to assist me in my task. Miss Helen Blackburn, editor of the *Englishwoman's Review*, has graciously placed at my disposal her collection of American publications on the subject; M. Aschehong, professor in the University of Christiania; Mr. J. G. Bourinot, LL.D., clerk to the House of Commons in the Canadian Parliament; M. W. Chydenius of the University of Helsingfors; M. Gumplowicz, professor in the University of Graz; M. Hilty, professor in the University of Berne; Dr. Krsnjavi, head of the Public

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Worship and Education Department in Croatia; and M. Maurice Vauthier, professor in the University of Brussels, have kindly forwarded translations or analyses of texts, or in other ways supplied me with information as to the legislation of their respective countries; and lastly, Mr. Munroe Smith, professor to the Faculty of Political Science in Columbia College, New York, has done me the great favour of collating and completing my quotations from the legislative enactments on women's school suffrage, in the different States of the American Union. To all these persons I offer my sincerest thanks.

M. O.

## APPENDICES

## APPENDIX I.

### *The St. Simonians and Woman's Rôle.*

As is commonly known, the St. Simonians were the adherents of a school of social reform founded by the Count de St. Simon for the reconstruction of society, in a religious spirit, for the benefit of the suffering masses. One of their dogmas was equality of woman. They were brought round to it by the double path of sensualism, with which they invested moral order, and their peculiar conception of social order. Christianity, which used to exercise spiritual sway in the world, has lost its power, said the St. Simonians; it has committed the fatal error of confining itself to the spiritual side of things and in looking with disfavour on the material side of life. To direct society, religion ought to embrace the whole social life, and to combine the two elements of which it is composed—the spiritual and the material. The pleasures of the senses, the beauty of the person, ought to be regarded as instruments of moral influence and no longer as sources of evil and sin. This “rehabilitation of the flesh,” proclaimed by the St. Simonians, cancelled the condemnation passed by Christian asceticism on woman, who had been regarded as an inferior being, and as the source and cause of the lower passions.

beauty on the senses. Sometimes the priesthood (man and woman) would calm the inconsiderate ardour of the intellect or moderate irregular sensual desires; sometimes it would wake up the apathetic intellect or rekindle torpid desires. This doctrine was repudiated by one party in the school, and was not put into practice by those who remained faithful to *Enfantin*. But even before the doctrine was formulated, public rumour had imputed to the St. Simonians promiscuous intercourse of the sexes, or possession of women in common. The school explained its ideas relating to women in an address presented to the Chamber of Deputies in 1830.

"Christianity," said the St. Simonians in this document, "has rescued women from slavery, but it has condemned them, nevertheless, to a subordinate position, and everywhere in Christian Europe we see them laid under a religious, political, and civil interdiction. The object of the St. Simonians is to announce their positive deliverance, their complete emancipation, but without meaning for that purpose to abolish the sacred law of marriage proclaimed by Christianity; they intend, on the contrary, to fulfil that law, to give it a new sanction, and to add to the force and inviolability of the union which it sanctifies; they require, as the Christians do, that a single man should be united to a single woman, but they teach that the wife should be the equal of the husband, and that in accordance with the particular favour which God has granted to her sex, she should be associated with him in the exercise of the triple function of worship, State, and family, so that the social individual, who up to the present moment has been the man only, should in

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find a *Mother*. The important post was offered to George Sand, the famous novelist, but she refused it. To spread the faith, the *Family* sent to different parts of France and even to foreign countries missionaries, who were also commissioned to find a *Mother*. But they could not find one. Soon the sect dispersed, its members returned to ordinary society, and not a few of them were destined to play an important part in politics, literature and business. The St. Simonians' ideas, especially on economics, have not failed to leave some deep traces on the minds of their generation. But their theories on the emancipation of women and on marriage have not germinated. They have been associated abroad with the doctrine of free love, and have thereby tended to throw into disrepute the cause of female emancipation generally, that is, the removal of women's disabilities both civil and political.



The case of the married woman is altogether different. Directly she marries she falls under the absolute power of her husband. The provisions of the Code which created this position for the woman were drawn up under the direct influence of Napoleon. As is well known, his views on the position of woman in society were those of an Oriental despot, for whom woman exists only as an ornament of his seraglio. In his capacity of a man of war, he added to the duties of woman that of furnishing soldiers to the army. A husband, said Napoleon, ought to have an absolute control over the actions of his wife. He has a right to say to her, "Madam, you shall not go out," "Madam, you shall not go to the theatre," "Madam, you shall not see this or that person," in other words, "Madam, you belong to me body and soul." The drawing up of the article providing that the "wife owes obedience to her husband" did not appear to Napoleon sufficiently striking. He asked that the mayor presiding at the marriage ceremony, when pronouncing the legal formularies in presence of the husband and wife, should be clothed in an imposing garb, that he should speak in solemn accents, and that the severe decoration of the hall, imparting the enunciation of that maxim with an awful authority, should impress it for ever on the bride.

The husband's power extends to the person as well as to the property of his wife. The wife is obliged to cohabit with the husband, and to follow him wherever he thinks proper to reside, even if it is at the antipodes. Husband and wife mutually owe fidelity to one another, but infidelity is not estimated by the Penal Code at the same value in the case of the wife as in the case of the

On account of her pecuniary interests, the married woman may be said to be under the perpetual tutelage of her husband, and this less for the purpose of increasing his importance than of protecting her against her own imprudence, for the legislator seems to have completely shared the ideas of the ancient jurists on "the imprudence, the frailty, and the imbecility" of woman. Accordingly, the law forbids her to dispose of her fortune or to defend her interests before the tribunals without her husband's approval. She cannot on her own authority bring an action or defend herself in a suit brought against her. Without her husband's consent the wife cannot make over, alienate, mortgage, or acquire any property. She cannot even receive gifts unless authorised by her husband, so that in strict accordance with the law, a letter of credit or a postal order cannot be delivered to a wife without her husband's leave. The husband's authority must be given for each occasion specially. He cannot give her a general authority once for all, either by the marriage contract or subsequently thereto, to alienate her realty; such an authority is null and void. Nor is of any value a consent given in ratification of an act done by the wife. Even the husband's decease will not prevent the act of the wife being null and void. In default of the husband's authority, the wife must obtain the leave of the court.

Thus, the married woman is absolutely precluded from disposing freely of her property for ever. So far as regards the management and enjoyment of her property, they only belong to her, in a greater or less degree, by virtue of an express stipulation in the marriage contract.

when the code was framed, because now very frequently the greater part of a fortune consists not of real property but of chattels, namely of funds. Though master of the common property, the husband is somewhat limited in his power of impoverishing it, to the detriment of his wife, *e.g.*, he may not dispose *inter vivos* gratuitously of the common real property, nor bequeath by will a larger part of the common property than his own portion. The husband can avail himself of the common property to meet his liabilities, or may spend it in any other way for his personal use, but in all such cases he becomes liable for the refund of that property, which is to be effected at the dissolution of the matrimonial partnership. This dissolution takes place on account of death, divorce, legal separation of the parties, etc. And then, each of the parties or their respective heirs receives back all the personal property that he or she brought in, whilst the common property, after deduction of the refunds and compensations which the parties may owe one another, is divided between them in halves, whatever may have been the share of each at the time of marriage.

Such is the *legal* system which is applied in the absence of a contract, or where the parties declare at the time of the marriage that they are marrying under the rule of community of property. But the parties are at liberty to modify these rules by special arrangements in the marriage contract; they can stipulate that community of property shall include only property acquired by the parties collectively or separately during the marriage; they can exclude the chattels either in whole or in part; they can establish a complete

established yet a fourth matrimonial arrangement, termed *dotal*. Under this system the real property brought in by the wife and "assigned as her dowry" cannot be alienated nor mortgaged by the wife or by the husband, even both agreeing thereto, unless the marriage contract authorised it. In the absence of such a general authority given in advance, the *dotal* property may be disposed of only in a few exceptional cases expressly provided by the law. The rule of the inalienability of the *dotal* real property is for the purpose of preserving intact the wife's fortune and of preventing such cases as those, in which the wife under her husband's influence might be induced to allow him to alienate her property and thus imperil the prospects of her family. The management of *dotal* property is vested in the husband. He receives also and spends at his discretion all the income of it. He has to defray the charges of the household with that income; but if he manages to save a part of it, it becomes his own; if he invests these savings in property, this property is his. However, it can be stipulated by the marriage contract that the wife should receive for her own use a certain portion of her income, singly on her receipt. The *dotal* system does not require that all the fortune should be settled as dower, that is, made inalienable; the wife who marries under the *dotal* rule can reserve a portion of her property as her *paraphernalia*, over which she has a right of property, management and enjoyment, just as under the rule of *separation of property*, that is to say, always without prejudice to the rule which subjects the wife to her husband's authority for the purpose of alienating the property or of suing in law on account of it. The wife

is still under her husband's thumb. The wife who is not separate in estate is not legally mistress of her earnings; they are regarded, like the rest of her income, as intended to defray the charges of the household, and are managed by the husband. The wife cannot carry on any trade unless authorised by him. If she has obtained his consent, she can bind herself, so far as concerns her trade, without the husband's authority; she can also, within that limit, pledge, mortgage or alienate her real property.

The recent law (of 1881) on Postal Savings Banks enlarged the civil capacity of married women, by authorising them, whatever might be the matrimonial arrangement, to deposit money in the banks and to take it out again without the assistance of their husbands, but in the latter case with the reserve that the husband may offer opposition if he thinks fit.

The married woman cannot obtain her emancipation otherwise than by the dissolution of the marriage; as soon as the marriage is dissolved, the woman, who up to that time was considered incapable of managing her own affairs, becomes suddenly capable of disposing of her property, suing in law, etc. Dissolution of marriage otherwise than by death of either husband or wife, or by condemnation to a penalty carrying with it civil death, was hardly possible before 1884. The law only allowed a *de facto* separation of husband and wife on his or her demand based on the grounds of adultery, cruelty, or serious injury inflicted by one on the other. This partial divorce, termed *separation of the body*, and obtained only by the way of legal proceedings, always involves separation of property. But

As soon as the divorced woman re-marries, she returns to the legal dependence that we have just considered. It is this dependence of the married woman which loudly calls for amendment. The account given of the laws in force for the time being is sufficient in itself to show the necessity and the justice of such a reform. Unfortunately, these laws have on their side the formidable protection of deeply-rooted social prejudices. Napoleon has said, "There is one thing that is not French, and that is, that a woman can do what she pleases." If at present, public opinion, I mean the public opinion of men, expresses itself on the subject less violently and less grittily, it is hardly less hostile to the extension of woman's rights and to the enlargement of her sphere of activity. Some timid attempts made in the French Parliament to do away with the restrictions on the civil capacity of women have come to nothing. A Bill, to grant women the right to be witnesses to deeds and to be guardians, though long since adopted by one of the two chambers, is still in abeyance. Other Bills, as, for example, proposals for doing away with the prohibition of the quest as to the fathership, have no chance of being adopted; there are too many lawyers in the French chambers, who have been brought up in a superstitious and blunt respect for the Code Napoleon.

However, the cause of women's legal and social elevation progresses, though slowly. In this respect is especially noteworthy the progress made in the organisation for women's education. The university courses, though open to women, as has been stated above (see page 179), are within the reach only of a very select circle, and hitherto very few females have made up their

the effects of which will be much further reaching than many people imagine. When a number of young girls, brought up in the *lycées*, enter society, its ideas will undergo an important, and, in my opinion, a beneficial change; the moral tone of women, and consequently of society in general, will be found to be elevated, and legislation itself will have to yield to the demand for modifications in favour of women. That this end will be obtained more quickly or obtained at all by the way of claiming for women political rights is hardly possible. The agitation for female suffrage, which, in France, has not yet passed out of the domain of the ridiculous, is likely, in the present state of French opinion, only to compromise the just claims of women in the sphere of civil law, and cannot but foster and strengthen the deplorable prejudices which exist in France against admitting woman to a place outside the alcove and the *salon*.

## § 2.

The French Civil Code, introduced, under Napoleon, into several other countries which were then under the supremacy of France, retained the force of law in those countries, with or without modifications. So in *Belgium* and *Holland*, the civil capacity of woman is still regulated by the French provisions, which we have just examined.

The *Italian* Code, on the contrary, has introduced into Napoleonic legislation some very important changes, namely in regard to the legal condition of the married woman. Whilst maintaining for the husband the management of the wife's property, and whilst forbid-

dower differs from the French in this, that the principle of the inalienability of dotal property is not absolute. It may be disposed of with the consent of the husband or the authority of the court, and in this way can be frequently obviated the inconvenience attached to the dotal system, which immobilizes the dowry, and narrows thereby the economical activity of the country, to which dotal fortunes might contribute. Lastly, after the dissolution of marriage, the dowry is liable for debts contracted by the wife during coverture, so that the dowry turns into an engine of credit for the woman, that is to say into a means of acting, of asserting her personality.

The *Spanish* laws regarding the civil capacity of women resemble very closely the provisions of the French Code. There have been, however, some more liberal provisions introduced into the former. Thus, the duty of the wife to follow her husband wherever he chooses to live is no longer absolute, as it is under the Code Napoleon; the Spanish courts can exempt the wife from this obligation if the husband settles beyond the seas or in foreign countries. The wife separated from her husband in estate need not, in order to dispose of her real property, first ask the consent of her husband, but may apply direct to the court; whilst in France, up to 1893, the woman separated from a husband even after legal proceedings, and being in consequence at warfare with her husband, was nevertheless obliged to apply to him first every time she wanted to exert her right to dispose of her property. But as divorce is not recognised in Spain any more than it is in Italy, the wife cannot recover her complete civil capacity during her husband's life-time. The only



times the sons are preferred to the daughters in the succession to real property, and sometimes maternal relatives competing for the inheritance with paternal relatives have to give way to them. The condition of married women is also determined differently by the different cantonal laws. The husband's authority over his wife's person is generally expressed in the severe language of the ancient codes, but it is no longer unqualified; thus the duty of a wife to follow her husband is not absolute. Even among the laws of the French-speaking group, which follow the Code Napoleon, the law of Fribourg, whilst asserting the duty of the wife to follow her husband, adds, "as long as she has no serious motive for refusing to do so." In several German cantons expatriation of the husband or considerations of health, are, according to the law, sufficient reasons for such refusal. Compelling the wife to reside under the same roof as her husband is no longer customary, although the laws of certain cantons contain penalties for the non-cohabitation of husband and wife.

The rule of matrimonial property in Switzerland is again far from favourable to the wife. In several cantons it is even less liberal than that of the Code Napoleon. Thus there is no liberty of matrimonial contracts; the legal system, which, under the French Code and the laws of the Swiss-French cantons, is only subsidiary, is in the other cantons the obligatory rule, and it is but little respectful of the wife's rights. In the single canton of Tessin the legal rule is *separation of property*; in the others it is sometimes based on the *union of property*, where the husband has the management and the use

to the Prussian provisions on the subject. The two principal matrimonial rules there are *union of property* and *community of property*. Under the first rule all the property brought in by the wife comes under the power of the husband. The husband works and leases the real property, and receives the interest derived from capital as well as the income from the trade or industry carried on by his wife. Any debt incurred by her is considered null and void. But, along with the property *brought* to the husband, the law allows woman to possess, in full proprietary right, certain property *reserved* for that purpose. The matrimonial contract can include in such *reserved* property every kind of property, realty or chattels, and the wife can dispose of it absolutely, mortgage, or even alienate it without her husband's consent. All the income accruing from such property, as well as the profits of industry or trade carried on by the woman by means of such property, are equally her own. If she makes a bad use of her income to such an extent that she becomes liable to the charge of extravagance, the husband can obtain from the proper court the appointment of a *curator*, as is done in the case of spendthrifts generally. Thus, under this only restriction, the wife may emancipate herself from the power of her husband by stipulating for *reserved* property. It is not impossible to do this even after marriage, for the law allows changes to be made in marriage contracts, and property *brought in* to be changed to property *reserved*, or *vice versa*.

Community of property, if not obligatory under

wife expressly and for ever entrusted the management to the husband, it can be withdrawn from him if there is reason to fear for the safety of her property. In the same way the husband can intervene in the case of his wife's bad management of her fortune, and get her declared a spendthrift. The dowry brought by the wife benefits the husband; if it is in money, it becomes his full property; but if it consists of land, the husband enjoys only the income. Community of property is not obligatory, but it can be stipulated for in the marriage contract. If the wife's fortune is endangered from being in the husband's hands, she may obtain a legal separation, which is open to all, while divorce is granted only to non-Catholics.

### § 5.

In the *Scandinavian* countries important changes have taken place in the legal condition of the wife during the last twenty years. Under the rule of the old Swedish Code of 1734, spinsters, though of age, always remained under tutelage unless they obtained a dispensation from the king. The law of 1884 declared every unmarried woman of twenty-one years to be of full age and capable of managing and disposing of her property herself. If she wishes to renounce the benefit of her majority, she must make a declaration before the court, which then places her under tutelage (as in Switzerland). In 1864 the same change was introduced into Finland, where the Swedish Code of 1734 remained in force, after it became a Russian dependency. The civil capacity

falls into the common fund. The husband is looked upon as guardian of his wife in respect of all her rights and acts. Even the unmarried woman, whatever her age may be, remains in a state of minority and tutelage.

§ 6.

Russia, on the contrary, whose political institutions are the least liberal in Europe, possesses most liberal laws as regards the civil capacity of women. Every woman of age, whether married or unmarried, enjoys in Russia full civil capacity. There is not in Russian law any legal system of matrimonial property arrangements. Marriage does not in any way change the rights of husband and wife over the fortunes they possess or may acquire; the husband has no legal power over his wife's fortune; she can acquire, alienate, bind herself or sue in law, just as any person of full age, without asking anyone's permission. This absolute *separation of property* is not always upheld in reality, for Russian husbands and wives generally live as under the rule of *community of property*, but it is so of their own free will, and they can always change. The husband's marital power consists solely in his right to require the wife to cohabit with him; but if, for example, the parties occupy a house belonging to the wife, there is nothing to prevent her legally evicting the husband, whilst he is free to compel her to follow him to his new domicile. The only disability to which women are subjected with respect to their civil capacity is in regard to their right

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