

Women and Men in Legal Proceedings: A European Historical Perspectives

Grethe Jacobsen

Introduction

Focusing on 'Gender in the legal profession' implies to me a focus on the legal professional with a gendered view, that is, looking at the lawmaker, the lawyer and the judge as a professional with a gender, which will influence the perceptions and actions of that professional. My perspective as a historian is that all known societies were gendered but - equally important - gender was not a constant. What was male and what was female has been determined by what any given society perceived as the proper roles and behavior of women and men.

In the following, I will give a brief, gendered overview of European legal history during the past two millennia, with a special focus on the Middle Ages (500-1500) and Early Modern Period (1500-1800) with the aim of providing a historical background for developments in Western law and the legal profession in the 20th century. My research as a feminist historian has dealt with social, economic and legal history from a gendered perspective, analyzing the sources to determine what was considered male and female at a given point and place in time and how these perceptions changed. My main focus has been on women, analyzing the norms, roles and rights governing women's lives especially during the late medieval and early modern period (roughly 1300-1600) as this part of legal history has been the least known and certainly has been the least explored.¹ We should not, however, forget that men also have gender, and in the following I shall deal with both sexes in European legal history.

The Legal Professional

The history of the male legal professional is rather short. For most of the last two thousand years of Western history, laws and courts were staffed by people, who had no formal legal training but whose qualifications rested with their sex (male), civil status (married) and economic position (head of household, taxpaying citizen). The earliest institution to employ jurists, trained at the universities, was the Catholic Church, and the canon lawyer emerged during the 11th and 12th centuries. The study of secular law entered the university curriculum during the early modern period (16th - 18th centuries) and a group of male legal professionals appeared².

¹ The second wave women's movement, which began in the 1960's, has also produced a sizeable literature on women's history and gender history. I shall here limit myself to recent works by three historians, who has influenced my own research: Gerda Lerner, *Why History Matters: Life and Thought* (New York, Oxford University Press, 1997), Judith Bennett, *History Matters* (Philadelphia, PA: University of Pennsylvania Press, 2006) and Merry E. Wiesner-Hanks, *Gender in History - Global Perspectives*, 2nd ed. (Oxford, Blackwell, 2011)

² My general remarks are based on readings over the years in legal history. Some basic works are James A. Brundage, *Law, sex and Christian society in medieval Europe* (Chicago, Chicago University Press, 1987); James A. Brundage, *The medieval origins of the legal profession: canonists, civilians, and courts* (Chicago, University of Chicago Press, 2008); Ute Gerhard (ed.), *Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart*. (Munich, C.H. Beck, 1997)

The history of female legal professional in the Western World is even shorter, encompassing at most a century. Prior to the admission of women to legal studies at the university or other certified institutions for lawyers and to the bar afterwards in the late nineteenth and early twentieth century, only members of the male sex staffed the judges' benches, the advocates' chair, the lawyers' offices and the law professors' dais. We may find literary exceptions to this rule, such as Deborah, who is mentioned as a leader of the people of Israel in the Book of Judges of The Old Testament. In the English translation, Deborah is referred to as one of the judges; however, the word 'judge' in this context means 'ruler', and Deborah is described as being a "prophetess".³ Another famous literary judge is, of course, Portia in Shakespeare's play, *The Merchant of Venice*. Portia could be a literary version of the many learned women, who emerged during the Renaissance,⁴ but she is not an educated lawyer, even though her verdict, given when she, in male disguise, appears as a judge in a Venetian court, is considered valid. While none of these women in reality could be called a legal professional, their appearance, never-the-less, point to another story, namely that of gender in law and the legal profession, and that story is long, in fact as long as law itself.

Lawmaking and Gender

The legal professional, whether trained or not, had to make decisions according to rules agreed on by the community or issued by the authorities in power. The rules that were to govern a community were most often formulated exclusively by men, primarily certain privileged groups of men. Examples are laws for villages and towns, issued usually by those men who were head of households and owned property of a certain size. Their laws were aimed at solving conflicts, punish perpetrators of rules for behavior and expressing norms of a society that was organized with a gender hierarchy and divided into classes or estates, each with their special privileges and rights. The so-called democratic assemblies prior to the 20th century rarely, if ever, included women. Even when the idea of universal democracy in the Western world was proclaimed in the French Revolution in 1789, this did not include women. The last word in the battle cry of the Revolution: liberty, equality and brotherhood, was to be taken literally. The radical new idea was that all men, regardless of class and birth, should partake of liberty, equality and brotherhood.

Far less radical, but to a certain extent new, was the fact that all women, regardless of class and birth, should not. Many women publicly protested this and organized to get women a place in the revolution and the new society that was to emerge from it, and one, Olympe de Gouges, drafted a Declaration of the Rights of Women in 1791 as a gendered correction to the first declaration of 1789, but her declaration was dismissed, and she was guillotined in 1793.⁵ The century following the French Revolution saw a development towards a society in which gender became the

³ Judges 4,4

⁴ Sarah Gwyneth Ross, *The Birth of Feminism: Women as Intellect in Renaissance Italy and England* (Cambridge, MA, Harvard University Press, 2009)

⁵ Darlene Gay Levy and Harriet B. Applewhite, "A Political Revolution for Women? The Case of Paris," in: Bridenthal, Renate, Susan Mosher Stuard, Merry E. Wiesner (eds.) *Becoming Visible: Women in European History*, 3rd ed. (Boston, Houghton Mifflin, 1998)

determining factor overruling class, and many women lost even more of the legal competences they had hitherto enjoyed due to their class. The century also saw the emergence of a broad women's movement that, among other results, opened the university to women, paving the way for the female legal professional of the twentieth century.

While rules, formulated by a smaller community, thus had a male origin, rules issued by authorities in power over larger communities could be formulated both by men and by women, as women could and did hold power as queens regnant and female regents in Europe during the Middle Ages (500-1500) and Early Modern Periods (1500-1800).⁶ In the Holy Roman Empire, abbesses for the major convents could also create legislation for the lands and town, they controlled.⁷

Do we find special women-oriented legislation issued by women? Generally, we do not. One of the few exceptions is an ordinance issued in 1396 by the Danish Queen Margrete (1353-1412), in which she proclaimed that everybody should respect and enforce peace towards the Church, houses, farms, legal assemblies, workers in the fields – and women, expressed in the word “kvindefred”.⁸ In other words, these institutions, persons and buildings should not be attacked. The idea of protecting certain institutions, people and buildings was an older idea, most forcefully expressed during the twelfth century as ‘the Peace of God’, but to my knowledge the ordinance of Margrete is the only which specify women as a group to be sheltered from attack.

Women and men appear together in all types of laws throughout western history, women first and foremost characterized by civil status, that is, as daughters, wives, mothers and widows, but also as female traders and workers, men first and foremost characterized by their economic or social status, as knights, soldiers, traders, craftsmen, with a rank or an occupation, but also as sons, husbands, fathers and widowers. A general feature for all western law is that the norm is male, usually qualified to the

⁶ For the latest research and literature on queenship see Liz Oakley-Brown and Louise J. Wilkinson, “Introduction,” in: Oakley-Brown, Liz & Louise J. Wilkinson (eds.) *The ritual and rhetoric of queenship: medieval to early modern*, (Dublin, Four Courts Press, 2009); for female rulers in the Holy Roman Empire see Heide Wunder, “Regierende Fürstinnen des 16. Jahrhunderts im Heiligen Römischen Reich Deutscher Nation: Teilhabe an Herrschaft, Konfessionsbildung und Wissenschaften,” in: *Herzogin Elisabeth von Braunschweig-Lüneburg (1510-1558): Herrschaft – Konfession – Kultur. Beiträge des wissenschaftlichen Symposiums der Klosterkammer Hannover vom 24.-26. Februar 2010 im Historischen Museum Hannover*, Quellen und Darstellungen zur Geschichte Niedersachsens 132 (Hannover, Hahnsche Buchhandlung, 2011) p. 35-55; for Spanish history see Earenfight, Theresa (ed.), *Queenship and Political Power in Medieval and Early Modern Spain*, (Aldershot, Ashgate, 2005), esp. Theresa Earenfight, “Partners in Politics,” p. xiii-xxviii (2005a)

⁷ Merry Wiesner-Hanks, “Ideology meets the Empire: reformed convents and the Reformation”, in: Merry Wiesner-Hanks, *Gender, Church, and State in Early Modern Germany. Essays by Merry E. Wiesner*, (London and New York, Longman, 1998), p. 47-62, Merry Wiesner-Hanks, “Gender and Power in Early Modern Europe: The Empire Strikes Back”, in: Bohnert, Christiane and Lynne Tatlock, *The Graph of Sex and the German Text. Gendered Culture in Early Modern Germany 1500-1700*, Chloe, vol. 19 (Amsterdam, Rodopi, 1994), p. 201-223

⁸ Kroman, Erik (ed.) *Den danske rigslovgivning indtil 1400*, (Copenhagen, Munksgaard, 1971), p. 335, 340. This is the only text containing the word “kvindefred” in medieval Danish legislation.

adult, propertied male.⁹ All legal rules, decisions and settlements were permeated by the issue of gender. Gender coupled with age and civil status determined who could be active in court, either as plaintiff, defendant or as witness, who could inherit and control property and how much one could inherit and control, and who could engage in trade and craft production and on what conditions. In my own work on Danish town laws and guild statutes during the later Middle Ages, I was looking for paragraphs explicitly prohibiting women from being active citizens, craftsmen or traders. I found none. Outright discrimination was not the issue; instead the laws expressed a gendered view of how a society, in this case Danish urban society, functioned. By defining who could be a citizen, a craftsman and a trader, gender roles was reinforced and increasingly during the 16th century these definition came to fit only male heads of household.¹⁰ This did not prevent women from being active outside their homes, but their work was not regulated and therefore not visible and not upsetting the existing gender order.

There were essentially two opposing gender models in Medieval and Early Modern Europe: the two-gender model that posited men and women as two opposing sexes, and the one-gender model, according to which there was only one sex and that sex was male, and the female was seen as a more or less imperfect man. It has been argued that during the Early Middle Ages (400-1000) the former dominated, while the latter was introduced into male theological and scientific discourse during the High Middle Ages (100-1300).¹¹ From a legal point of view the former meant, that women would have different rights than men – or no rights at all – while the latter meant that women were not completely excluded from legal rights and privileges and that the more 'male', a women had to act, the more rights she would enjoy without the basic perception of society's gender roles being questioned. This would partially explain the general independent position that widows enjoyed throughout the Middle Ages and the Early Modern Period in the Western World.¹² It should be stressed, that these models were primarily found in academic discussions, and while they serve as a useful tool of analysis for the historian, their influence on and relation to the actual lives and conditions of men and women, including the laws and the legal systems, is difficult to uncover.

The males, who acted as legal professionals, whether or not they were formally trained, acted in a context that was highly gendered and this influenced decisions as

⁹ One recent study with a gender analysis of medieval laws is Christine Ekholst, *För varje brottsling ett straf: Foreställningar om kön i de svenska medeltidslagarna* (Stockholm, Stockholm University, 2009), with an English summary, p. 280-293 and with references to literature.

¹⁰ Grethe Jacobsen, *Kvinder, køn og købstadslovgivning 1400-1600: Lovfaste mænd og ærlige kvinder*, Danish Humanists Texts and Studies, 11 (Copenhagen, Det Kongelige Bibliotek, Museum Tusulanum, 1995)

¹¹ Susan Mosher Stuard, "The Dominion of Gender or How Women Fared in the High Middle Ages," in: Bridenthal, Renate, Susan Mosher Stuard, Merry E. Wiesner (eds.) *Becoming Visible: Women in European History*, 3rd ed. (Boston : Houghton Mifflin, 1998), p. 129-180

¹² Jack Goody, "Inheritance, Property and Women: Some Comparative Considerations," in: Goody, Jack, Joan Thirsk, E.P. Thompson (eds.) *Family and Inheritance: Rural Society in Western Europe, 1200-1800* (Cambridge, Cambridge University Press, 1976), 10-36; Sandra Cavallo and Lyndan Warner, *Widowhood in Medieval and Early Modern Europe*, (Harlow, Longman, 1999)

well as legal procedures. The male legal professionals were not necessarily acting as "partisan" for their own sex, but through their status as heads of a household and as marriage partners, they were deeply enmeshed in contemporary gender relations and had an interest in protecting the rights of the women in their household, especially their wives. To show the relationship between gender hierarchy, gender norms and the legal systems, I will focus on three issues in Western legal history, that has a bearing upon the legal profession as well as the general population: The actions of women and men in court, the connection between property, patriarchy and demographic reality, and the legal system, including the legal professional, as a crucial instrument in keeping up the 'patriarchal equilibrium'.

Women and Men in Court:

In Medieval Europe (500-1500) a plurality of law existed: customary law, royal statutes, town laws, Canon law and Roman law and with each set of laws followed particular legal procedures. While the occupants of the lawyers' and judges' benches before the twentieth century have been male, both men and women filled the courtroom as plaintiffs, as defendants, as witness and as audiences, and the cases that was heard by the legal professionals would involved both men and women as far back as legal records for Western legal history is extant. In general, adult males who were not mentally or physically handicapped could act in court. For women the situation is more complex and changing over the centuries and with many local variations from permitting women to act on their own to demanding that they exclusively be represented by husbands, male relatives or advocates.

Local laws and legal procedures was something that women as well as men should – and did – know about as we can tell from the writings of one medieval women Christine de Pisan (1365-1430?). Christine was a highly educated woman who was widowed at the age of 25 with three small children and an elderly mother to provide for. She was able to do so by writing on a wide variety of topics for the French king and queen, who paid her for her work. Among her many works is a handbook for women, *Le Livre des Trois Vertus*, or *Le Trésor de la Cité des Dames*, completed in 1405.¹³ In the book she gives advice on how to survive as a woman in a society that does not treat women as well as it should, especially not widows. She enumerates the dangers facing widows one of which is being sued for debt, property or services, and then gives advice on how to tackle the dangers. As for being sued, a widow should avoid this if at all possible because "she does not know all the ins and outs and is naïve in such matters,"¹⁴ because people will cheat her if they see an opportunity, and because a widow cannot spend all day in court (due to her domestic duties) as a man can. If she cannot avoid being sued, she should try to obtain a settlement out of court, taking great care to examine all claims against her, and if she has to sue herself, "she should pursue her claims courteously and see whether she can get them by some other means." If she has to go to court, she needs good counsel by lawyers and clerks who are very knowledgeable in law and legal proceedings, she has to be careful and diligent in pursuing her case and she has to have enough money to go through with the case.

¹³ I have used the English translation here: Christine de Pisan, *The Treasure of the City of Ladies or The Book of the Three Virtues*, tr. Sarah Lawson (Harmondsworth : Penguin Books, 1985)

¹⁴ de Pisan, *The Treasure*, p.157

Finally, it is necessary to “adopt a man’s heart (in other words, constant, strong and wise)” and not “collapse like a simple woman into tears and sobs without putting up a fight”.¹⁵ While proclaiming that women in general is ignorant of the law, Christine de Pizan also reveals a practical knowledge of the legal system and suggests ways to use it to one’s advantage.¹⁶ However, as it is also implied in Christine’s text, gender roles with its implicit and explicit rules for male and female behavior, defined the actions and strategies that each gender employed in court. This was found also in the early modern period.¹⁷

Court records show that women were regularly present in the courts, at least in local courts. Two examples from medieval and early modern Denmark will demonstrate this. In 1500, a document issued by a local court concerning court procedures proclaimed that victims of violence, including theft, should raise the case at the court 'whether man or women, young man or maiden'.¹⁸ The document also gives the wording of the oath to be used by male and female witnesses, who should be trustworthy people and the expression for these witnesses are gendered but equal by using the designation "sandemand" (lit. truthful man) and "sandekvinde" (lit. truthful women) about the witnesses who were qualified to swear an oath (to the truth of the accusation). In a document from 1587, women and men are both mentioned as qualified witnesses in court procedures, but with two different designations: men are called 'law firm' ("lovfaste"), women are called 'honest' ("ærlige").¹⁹ A firm chronological development cannot be deduced from these two examples, but they reveal that a gender hierarchy and gender roles undercut attempts to create fixed rules as well as names for those who could appear in local courts. When it came to appellate courts or ecclesiastical court situated further away, the tendency was for women to be represented by advocates and/or designated guardians, but this was true for some men as well, and in the Papal courts in Rome, both men and women had lawyers as laymen and laywomen rarely knew of the rules and procedures of Canon Law.

The Early Modern period (1500-1800) saw a trend in continental Europe toward modernizing the law and the procedures, making Roman law the ideal, along with a professionalization of judges and advocates.²⁰ This in general led to restrictions for women in court, either excluding them from proceedings or – more often – demanding that they be represented by a lawyer. In England, a plurality of law (ecclesiastical law, based on Roman and Canon law, customary (local) law, common law, equity law,

¹⁵ de Pisan, *The Treasure*, p.158

¹⁶ One study that has attempted to ascertain women's knowledge concluded that women appear have known enough about law and courts to have been able to utilize the legal system to obtain their goals: Emma Hawkes, "[S]he will...protect and defend her rights boldly by law and reason..."Women's Knowledge of Common Law and Equity Courts in Late-Medieval England", in: Noël James Menuge (ed.) *Medieval Women and the Law*, (Woodbridge, The Boydell Press, 2000), p.145-61

¹⁷ Tim Stretton, *Women Waging Law in Elizabethan England* (Cambridge, Cambridge University Press, 1998), p. 226.

¹⁸ Jacobsen (1995), p. 222.

¹⁹ *Ibid.* p. 232-33

²⁰ Merry E. Wiesner-Hanks, *Women and Gender in Early Modern Europe*, 3rd ed. (Cambridge, Cambridge University Press, 2008), p. 42-49.

chancery law) remained.²¹ In the Mediterranean area a plurality of laws similarly reigned both during the Middle Ages and the Early Modern Period. The existence of Muslim, Jewish and Christian laws and courts meant that women and men could 'shop around' for the best place to settle conflicts which in turn influenced behavior of legal professional.²²

Recent studies of litigation, primarily during the Early Modern Period, has shown how women used the courts to challenge or to exploit the legal restraints, they encountered, in order to protect their property, their livelihood and their families, especially their children.²³ They could also exploit the restrictions by using laws to avoid responsibility for debt, for paying taxes etc. which threw the authorities into a quandary having to choose between unpleasant economic consequences in order to uphold patriarchal ideology or pick the economic most sensible solution but risk upsetting the gender balance. One such case is found in the Danish town of Ribe in 1555. A poor widow was sued for debt that she and her husband had incurred. The court asked if she had a law guardian who could offer surety for the payment. She answered that no one could be found who would guarantee payment of the debt. The decision handed down by the court is really not a decision but an appeal to her to pay. Obviously, the court did not want to give her the full rights to handle her own case, but neither did they want to impose payment of the debt upon a man, and so they settled for the hope that somehow she would be able to pay or find someone who did.²⁴ Such deliberations made up the daily caseload of the legal professionals and forced them to act in a gendered frame even though they were not conscious of it.

Conversely, some of the learned juridical disputations in academe may not have had any bearing in real life. One example of this is the Roman law concept, 'Senatus Consultum Velleianum', according to which women were exempted from responsibility for claims upon their property because of female weakness which made women susceptible to bad advice and flattery. This was much debated especially by Early Modern jurists in the wake of the rising influence of Roman law, as the concept had been unknown in medieval law. Because of the academic discussion the concept has also loomed large in legal history and was presumed to have had an important role in legal practice. However, contemporary court cases from a Saxon court (in Germany) show that it had absolutely no influence on the court proceedings and decisions.²⁵ It did have some importance when it came to female rulers and regents (women who acted as guardians for a minor king or prince, usually their son) in areas where Roman law

²¹ Susan Staves, *Married Women's Separate Property in England, 1660-1833* (Cambridge, MA, Harvard University Press, 1990), p. 18-25

²² For examples of this see the articles in Jutta Gisela Sperling and Shona Kelly Wray (eds.) *Across the Religious Divide: Women, Property, and Law in the Wider Mediterranean (ca. 1300-1800)*, (New York, Routledge, 2010)

²³ See e.g. Stretton (1998)

²⁴ The case is discussed in Jacobsen (1995) p. 189

²⁵ Hendrikje Carius, "Strategien vor Gericht? Die 'velleianischen Freyheiten' im sächsischen Recht (1648-1806)", in: Grethe Jacobsen, Helle Vogt, Inger Dübeck, Heide Wunder (eds.) *Less Favored – More Favored: Proceedings from a Conference on Gender in European Legal History, 12th – 19th Centuries, September 2004 / Benachteiligt – begünstigt: Tagungsbericht einer Konferenz über Geschlecht in der Europäischen Rechtsgeschichte, 12. – 19. Jahrhundert, September 2004* (Copenhagen, Det Kongelige Bibliotek, 2005) http://www.kb.dk/export/sites/kb_dk/da/publikationer/online/fund_og_forskning/download/A07_Carius.pdf

dominated, in that such a ruler had to issue a written waiver of the 'Senatus Consultum Veilleianum' in order to issue valid legislation.²⁶

The legal professional also had to deal with property cases outside the courts, in those cases that involved no litigation but disposal of property through wills and contracts, involving women as well as men, and which had to be formulated according to the laws to be valid. As each case was unique this would involve an estimate of the rights of the parties involved.²⁷

Property and Patriarchy and the Demographic Reality

Both men and women could own property but the right dispose of property depended upon gender, civil status and the type of property law of local society. During the Middle Ages the plurality of laws meant a great variation in the rights of owning and controlling property both for men and women.²⁸ Very generally stated, for men their status was dependent on their being the head of a household or at least independent, while for women their status was dependent on being single, married or widowed. The latter would also confer the status as head of household upon a woman.²⁹

During the Early Modern period, a study has shown how the one-gender model was found in Early Modern Sweden and how it may explain the varying rights women enjoyed (or not) to control their property, also revealing the important role that civil status played in determining the rights concerning property given a woman. The model fitted well with the social and economic conditions of Early Modern Sweden, as it was flexible enough to handle property issues within a marriage by accommodating the reigning marriage model in which the husband was the head of the household and represented it in court as a rule but a wife could be given a larger or smaller share of his rights when needed.³⁰ As it is aptly expressed: 'women owned property and passed it to the next generation, while men owned property, passed it to the next generation AND disposed of it as head of households'.³¹ During the nineteenth century the two-gender model emerged more clearly, and the issue was now, how to give equal rights to two different sexes and at the same time uphold the marriage as a social and economic unit?³²

²⁶ Pauline Poppel, *Die Regentin: vormundschaftliche Herrschaft in Hessen 1500-1700* (Frankfurt/New York, Campus Verlag, 2004), p. 88

²⁷ For further discussion of the issue of the various rights of women and men within a Roman law frame see Thomas Kuehn, *Law, Family, & Women: Towards a Legal Anthropology of Renaissance Italy* (Chicago, The University of Chicago Press, 1991)

²⁸ The international research network 'Gender Difference in the History of European Legal Cultures' has since 2000 held regular conferences using a comparative approach to gender and legal cultures across Europe from Antiquity to the 20th century. See <http://www.gendered-legal-cultures.de/index.html>

²⁹ For a discussion of this issue with references see Cordelia Beattie, "A Room of One's Own? The Legal Evidence for the Residential Arrangements of Women Without Husbands in Late-Fourteenth- and Early-Fifteenth-Century York," in: Noël James Menuge (ed.) *Medieval Women and the Law*, (Woodbridge, The Boydell Press, 2000) p. 41-56.

³⁰ Maria Sjöberg, *Kvinnors jord, manlig rätt. Äktenskap, egendom och makt i äldre tid* (Hedemora, Gidlund, 2001) spec. P. 82-86

³¹ Sjöberg (2001) p.86

³² Sjöberg(2001) p.169-194.

Property relations between the husband and wife in the Western world has ranged from total communion of property, governed singly by the husband or jointly by the couple, to a total separation of property with each spouse governing her or his own property, along with a myriad of variations in between. Sometimes these two extremes could be found within a relatively small geographical area, as for example in present-day Southwestern Austria. A study of marital property in this area during the Early Modern period show how each model had its benefits and restriction for the wife as well as for the husband, and not the least for widows and how each model developed with own gendered dynamic and logic,³³ which, of course, a legal professional would have to deal with.

It must also be considered that property would never be a static entity but would be changing during the course of a marriage, partly as a result of the couple's work partly as a result of negotiations during the marriage with a view to the common benefit of the household,³⁴ which in turn meant that the legal professional also had to be attuned to the social and economic as well as the gendered context in those cases where these negotiations ended in court.

Rules for inheritance play a dominant role in all Western laws. Owning property gave power and the more land, one owned, the more power. Transferring property though inheritance meant assuring that one's accumulated property and power went to one's offspring. The ideal process in a patriarchal society would be for a couple to marry, produce a son who would grow up to inherit the couple's property and a daughter who would get a share as a dowry that enabled her to make an advantageous marriage, whereupon both spouse would die at the same time. Such an orderly transfer of property was, of course, extremely rare. For one, not every marriage produced children and fewer marriages produced sons. Before reliable methods of birth control and modern fertility technology only about 60% of marriages produced at least one son, 20 % produced daughters but no son and 20% of all married couples remained childless.³⁵ For another, spouses rarely died at the same time, leaving a widow or a widower who could remarry and establish a household with children of previous marriages as well as common children and with each child in the household having different claims on the property.

³³ Gertrude Langer-Ostrawsky & Margareth Lanzinger, "More Favored – Less Favored: Women and Men in Different Marital Property Right Systems: A Comparative study of Marital Property Rights in the Habsburg Empire during the 18th Century/Begünstigt – benachteiligt? Frauen und Männer im Ehegüterrecht. Ein Vergleich auf der Grundlage von Heiratskontrakten aus zwei Herrschaften der Habsburgermonarchie im 18. Jahrhundert," in: Grethe Jacobsen, Helle Vogt, Inger Dübeck, Heide Wunder (eds.) *Less Favored – More Favored: Proceedings from a Conference on Gender in European Legal History, 12th – 19th Centuries, September 2004 / Benachteiligt – begünstigt: Tagungsbericht einer Konferenz über Geschlecht in der Europäischen Rechtsgeschichte, 12. – 19. Jahrhundert, September 2004* (Copenhagen, Det Kongelige Bibliotek, 2005)

http://www.kb.dk/export/sites/kb_dk/da/publikationer/online/fund_og_forskning/download/A04A_Langer-Lanzinger-ENG.pdf

http://www.kb.dk/export/sites/kb_dk/da/publikationer/online/fund_og_forskning/download/A04B_Langer-Lanzinger-GER.pdf

³⁴ Maria Ågren and Amy Louise Erickson (eds.) *The Marital Economy in Scandinavia and Britain 1400-1900* (Aldershot, Ashgate, 2005)

³⁵ Amy Louise Erickson, *Women and Property in Early Modern England* (London, Routledge, 1993), p.5

Inheritance rights in the Western world reflected the many ways to deal with demographic reality. One system, and the one which became common during the Middle Ages, allowed all children to inherit after their parents. In areas following Roman law all children received an equal share. In other areas, as for example the Nordic countries, sons received a share that was twice as large as their sisters. Another system was to favor one child (usually oldest son) or only male children. For those propertied men and women who died without children, the rules were just as varied. Complicating the transfer of property from one generation to the next was also the rights of kin in cases involving land that was designated as family land and belonging not just to one person but to a group of kinsmen and kinswomen. Women's rights in relation to the kin group reflected both a patriarchal society but also what was considered optimal for the kin group and the community at large. All of this gave rise to much litigation, rarely with any clear-cut answers for the legal professional.

Keeping up the 'Patriarchal Equilibrium' through the Court

The American historian, Judith Bennett, or rather one of her students, first formulated the idea of the 'patriarchal equilibrium', and she has used this to support her hypothesis that no major transformation really happened in Western women's history for the past 2.000 years, while the many changes, for better or for worse, that historians have noted, especially during the last decades of renewed interest in the history of women, have served one purpose, namely to keep up the equilibrium.³⁶ The legal system (laws, courts and legal professionals) have contributed to preserving the equilibrium. Two legal historians have revealed how underlying patriarchal structures have been maintained and preserved through apparent great changes in law and legal discourse on Early Modern Europe through neither of them actually used the phrase 'patriarchal equilibrium'. Susanna Burghartz looked at marriage and sexuality during the 16th and 17th centuries, as reflected in the cases at the marital court of Basel, and Susan Staves took on married women's property in England from 1660 to 1833.

According to Susanna Burghartz the Protestant reformation meant that marriage no longer was a sacrament and therefore could be dissolved - at least in Protestant areas. On the other hand, marriage was so central to social organization and gender hierarchy that too much upheaval would undermine social order. In addition, the frames for purity discourse changed. During the Middle Ages this discourse had dealt with celibate as well as noncelibate men and women, most of them living outside a marriage: monks, nuns, priests, secular virgins, widows and widowers, while celibacy in marriage was a smaller part of this discourse. With the abolishment of religious orders and the endorsement of marriages for priests in reformed areas, purity discourse now had to take place within marriage. The court cases in Basel demonstrate that, over time, the marital court changed from being an institution for conflict solutions to an institution of oppression, determining what was right and what was wrong in sexual relations between the sexes thereby restoring and upholding the deeper lying structures governing gender relations.³⁷

³⁶ Bennett (2006), esp. chap. 4: "Patriarchal Equilibrium"

³⁷ Susanna Burghartz, *Zeiten der Reinheit – Orte der Unzucht: Ehe und Sexualität in Basel während der Frühen Neuzeit* (Paderborn, Schöningh, 1999)

Susan Staves analyzed the modernization of the property law in England from the late 17th to the early 19th century which aimed at making property transfers more flexible than under Common Law in order to accommodate changing economic conditions and the demands of a new capitalistic society made up of enterprising individuals with property and capital. As married women could own property and capital, they could in theory become active in this emerging society, but that would undermine existing social order with its gender hierarchy and its legal system that had erased the legal *persona* of the wife, subsuming it in the person of the husband. This was not considered desirable by a patriarchal society, and the changes in rules concerning married women's property were all formulated so the old gender (im)balance was retained and the new active, capitalist citizen remained purely male in spite of the need for capital and agents during the changing economic conditions. An additional point is made by Susan Staves: the rules, which during the recent centuries have been labeled "private law" were formulated in public by jurists and legislators, applied by publicly appointed judges and enforced by public courts and institutions.³⁸

A similar cross-cultural pattern is revealed in a recent comparison between England, France and Ottoman Empire (Cairo) during the eighteenth century. Mary Ann Fay shows that Muslim women in fact had more property rights than contemporary women in France and England, and that marriage played no role for Muslim women's property rights, unlike the situation in Europe where women's civil status determined their property rights. Still, they were also living in a patriarchal society, so "Islam, while expanding the legal and property rights of women, did not overturn the patriarchal order set in place by its emergence in seventh-century Arabia".³⁹

Upholding the patriarchal equilibrium during the many day-to-day cases in court means that lawyers, judges, jurists and legislators had to incorporate in their decisions the norms of a society with an embedded gender hierarchy: male on top, female on bottom, even though the laws may appear neutral.

Conclusion:

While the Western legal professional prior to ca. 1900 was always a male, he continuously and daily had to deal with gender in courts and lawmaking assemblies. Because the laws took male as the norm, they regulated male activities primarily, in which case the legal professional "merely" had to look up in the law books to solve conflicts. As women were equally active in social and economic life which regularly brought them into courts, checking the law books were not enough in those cases as regulations made for the male subjects didn't always fit the female subjects. Such a simple thing as coming of age was always determined for men but rarely for women, and if determined, contingent upon her civil status as well as age.⁴⁰ Thus, the decisions

³⁸ Staves (1990) p.197

³⁹ Mary Ann Fay; "Counting on Kin: Women and Property in Eighteenth-Century Cairo," in: Jutta Gisela Sperling and Shona Kelly Wray (eds.) *Across the Religious Divide: Women, Property, and Law in the Wider Mediterranean (ca. 1300-1800)*, (New York, Routledge, 2010), p. 207-23, citation p. 213

⁴⁰ The issue of women's coming of age was especially important in connection with guardianship, see Puppel (2004) p. 82-84

made by the judge, or the argument proposed by the advocates, the plaintiffs and defendants themselves were created in a mental environment with gender roles and norms.

Considering that the question posed by this special issue is “Has this changed with the advent of the female professional?” I will, as a historian with specialty in the medieval and Early Modern period, leave the answering to others with the remark, that the one major difference – from a historical perspective – is that now gender has become visible also in the lawyers’ chairs and judges’ benches and this should lead to a conscious discourse on gender and law.

References

Beattie, Cordelia (2000) "A Room of One's Own? The Legal Evidence for the Residential Arrangements of Women Without Husbands in Late-Fourteenth- and Early-Fifteenth-Century York," in: Menuge, Noël James (ed.) *Medieval Women and the Law*, Woodbridge: The Boydell Press, p. 41-56.

Bennett, Judith (2006) *History Matters*. Philadelphia, PA: University of Pennsylvania Press.

Brundage, James A. (2008) *The medieval origins of the legal profession: canonists, civilians, and courts*. Chicago, University of Chicago Press.

Brundage, James A. (1987) *Law, sex and Christian society in medieval Europe*. Chicago: Chicago University Press.

Burghartz, Susanna (1999) *Zeiten der Reinheit – Orte der Unzucht: Ehe und Sexualität in Basel während der Frühen Neuzeit*. Paderborn: Schöningh.

Cavallo, Sandra and Lyndan Warner (eds.) (1999) *Widowhood in Medieval and Early Modern Europe*. Harlow: Longman.

Earenfight, Theresa (ed.) (2005) *Queenship and Political Power in Medieval and Early Modern Spain*. Aldershot: Ashgate.

Earenfight, Theresa (2005a), “Partners in Politics,” in: Earenfight, Theresa (ed.) *Queenship and Political Power in Medieval and Early Modern Spain*. Aldershot: Ashgate.

Ekholst, Christine (2009) *För varje brottsling ett straff: Foreställningar om kön i de svenska medeltidslagarne*. Stockholm: Stockholm University.

Erickson, Amy Louise (1993) *Women and Property in Early Modern England*. London: Routledge.

Fay, Mary Ann (2010) "Counting on Kin: Women and Property in Eighteenth-Century Cairo," in: Sperling, Jutta Gisela and Shona Kelly Wray (eds.) (2010) *Across the Religious Divide: Women, Property, and Law in the Wider Mediterranean (ca. 1300-1800)*. New York: Routledge, p. 207-23.

Gerhard, Ute (ed.) (1997) *Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart*. Munich: C.H. Beck.

Goody, Jack (1976) "Inheritance, Property and Women: Some Comparative Considerations," in: Goody Jack, Joan Thirsk, E.P. Thompson (eds.) *Family and Inheritance: Rural Society in Western Europe, 1200-1800*. Cambridge, Cambridge University Press, p. 10-36.

Hawkes, Emma (2000) "Women's Knowledge of Common Law and Equity Courts in Late-Medieval England", in: Menuge, Noël James (ed.), *Medieval Women and the Law*. Woodbridge: The Boydell Press, p. 145-61

Hendrikje Carius (2005) "Strategien vor Gericht? Die 'velleianischen Freyheiten' im sächsischen Recht (1648-1806)", in: Jacobsen, Grethe, Helle Vogt, Inger Dübeck, Heide Wunder (eds.) *Less Favored – More Favored: Proceedings from a Conference on Gender in European Legal History, 12th – 19th Centuries, September 2004 / Benachteiligt – begünstigt: Tagungsbericht einer Konferenz über Geschlecht in der Europäischen Rechtsgeschichte, 12. – 19. Jahrhundert, September 2004*. Copenhagen: Det Kongelige Bibliotek.

http://www.kb.dk/export/sites/kb_dk/da/publikationer/online/fund_og_forskning/download/A07_Carius.pdf

Jacobsen, Grethe (1995) *Kvinder, køn og købstadslovgivning 1400-1600: Lovfaste mænd og ærlige kvinder*. Copenhagen, Det Kongelige Bibliotek, Museum Tusulanum.

Kroman, Erik ed. (1971) *Den danske rigslovgivning indtil 1400*. Copenhagen, Munksgaard.

Kuehn, Thomas (1991) *Law, Family, & Women: Towards a Legal Anthropology of Renaissance Italy*. Chicago: The University of Chicago Press.

Langer-Ostrawsky, Gertrude & Margareth Lanzinger (2005) "More Favored – Less Favored: Women and Men in Different Marital Property Right Systems: A Comparative study of Marital Property Rights in the Habsburg Empire during the 18th Century/Begünstigt – benachteiligt? Frauen und Männer im Ehegüterrecht. Ein Vergleich auf der Grundlage von Heiratskontrakten aus zwei Herrschaften der Habsburgermonarchie im 18. Jahrhundert," in: Jacobsen, Grethe, Helle Vogt, Inger Dübeck, Heide Wunder (eds.) *Less Favored – More Favored: Proceedings from a Conference on Gender in European Legal History, 12th – 19th Centuries, September 2004 / Benachteiligt – begünstigt: Tagungsbericht einer Konferenz über Geschlecht in der Europäischen Rechtsgeschichte, 12. – 19. Jahrhundert, September 2004*. Copenhagen: Det Kongelige Bibliotek.

http://www.kb.dk/export/sites/kb_dk/da/publikationer/online/fund_og_forskning/download/A04A_Langer-Lanzinger-ENG.pdf

http://www.kb.dk/export/sites/kb_dk/da/publikationer/online/fund_og_forskning/download/A04B_Langer-Lanzinger-GER.pdf

Lerner, Gerda (1997) *Why History Matters: Life and Thought*. New York: Oxford University Press.

Levy, Darlene Gay and Harriet B. Applewhite (1998) "A Political Revolution for Women? The Case of Paris," in: Bridenthal, Renate, Susan Mosher Stuard, Merry E. Wiesner (eds.) *Becoming Visible: Women in European History*. 3rd ed. Boston: Houghton Mifflin.

Oakley-Brown, Liz and Louise J. Wilkinson, (2009) "Introduction," in: Oakley-Brown, Liz & Louise J. Wilkinson (eds.) *The ritual and rhetoric of queenship: medieval to early modern*. Dublin, Four Courts Press.

Pisan, Christine de (1985) *The Treasure of the City of Ladies or The Book of the Three Virtues*. Tr. Sarah Lawson. Harmondsworth : Penguin Books.

Puppel, Pauline (2004) *Die Regentin: vormundschaftliche Herrschaft in Hessen 1500-1700*. Frankfurt/New York: Campus Verlag.

Ross, Sarah Gwyneth (2009) *The Birth of Feminism: Women as Intellect in Renaissance Italy and England*. Cambridge, MA: Harvard University Press.

Sjöberg, Maria (2001) *Kvinnors jord, manlig rätt. Äktenskap, egendom och makt i äldre tid*. Hedemora: Gidlund.

Sperling, Jutta Gisela and Shona Kelly Wray (eds.) (2010) *Across the Religious Divide: Women, Property, and Law in the Wider Mediterranean (ca. 1300-1800)*. New York: Routledge.

Staves, Susan (1990) *Married Women's Separate Property in England, 1660-1833*. Cambridge, MA: Harvard University Press

Stretton, Tim (1998) *Women Waging Law in Elizabethan England*. Cambridge: Cambridge University Press.

Stuard, Susan Mosher (1998) "The Dominion of Gender or How Women Fared in the High Middle Ages," in: Bridenthal, Renate, Susan Mosher Stuard, Merry E. Wiesner (eds.) *Becoming Visible: Women in European History*. 3rd ed. Boston: Houghton Mifflin, p. 129-180

Wiesner-Hanks, Merry E. (2011) *Gender in History - Global Perspectives*. 2nd ed. Oxford: Blackwell.

Wiesner-Hanks, Merry E. (2008) *Women and Gender in Early Modern Europe*. 3rd ed. Cambridge: Cambridge University Press.

Wiesner-Hanks, Merry (1998) "Ideology meets the Empire: reformed convents and the Reformation", in: Merry Wiesner-Hanks, *Gender, Church, and State in Early Modern Germany. Essays by Merry E. Wiesner*. London and New York: Longman, p. 47-62,

Wiesner-Hanks, Merry (1994) "Gender and Power in Early Modern Europe: The Empire Strikes Back", in: Bohnert, Christiane and Lynne Tatlock (eds.) *The Graph of Sex and the German Text. Gendered Culture in Early Modern Germany 1500-1700*, Chloe, vol. 19. Amsterdam: Rodopi, p. 201-223

Wunder, Heide (2011) "Regierende Fürstinnen des 16. Jahrhunderts im Heiligen Römischen Reich Deutscher Nation: Teilhabe an Herrschaft, Konfessionsbildung und Wissenschaften," in: *Herzogin Elisabeth von Braunschweig-Lüneburg (1510-1558): Herrschaft – Konfession – Kultur. Beiträge des wissenschaftlichen Symposiums der Klosterkammer Hannover vom 24.-26. Februar 2010 im Historischen Museum Hannover*, Quellen und Darstellungen zur Geschichte Niedersachsens 132. Hannover, Hahnsche Buchhandlung, p. 35-55;

Ågren, Maria and Amy Louise Erickson (eds.) (2005) *The Marital Economy in Scandinavia and Britain 1400-1900*. Aldershot, Ashgate.

