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'Out of extraordinary love and affection'- Gender, spousal wills and the conjugal strategy of commercial households in sixteenth-century Antwerp

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This article sets out familial structures and strategies in sixteenth-century Antwerp, the leading commercial metropolis of its time. Using notarial spousal wills and urban law, it reflects on the balance of power between the conjugal pair and the extended family. In doing so, it explores the larger question of women's access to property. The starting point is the fact that traditional (legal) historiography assumes a shift towards increasing patriarchal and lineage tendencies during the fifteenth and sixteenth centuries. As a result, the scope of women's legal and economic action would have narrowed. However, this article presents significant evidence for a re-evaluation. A detailed analysis of notarial wills of married men and women in sixteenth-century Antwerp has shown that many spouses used a will to favour the interests of the conjugal pair over those of the extended family. In other words, the conjugal strategy increased and prevailed. This preference of married couples for a will was gradually formalised by urban law. This seems to indicate that the couple, viewed as a legal-economic partnership played a central role in the rise of the early modern market economy and capitalism.

I. Introduction

On 18 May 1519, Cornelie Scesters and her husband armor maker Wijnant Bosch made their way to notary Jacob de Platea in Antwerp, as these spouses decided to make a spousal will.[1] This will, preserved in the State Archive in Antwerp, states that the couple entrusted each other their entire estate in full ownership. In other words, this couple gave the surviving spouse, whether Wijnant or Cornelie, more than urban law would do. Only two relatives were granted a bequest. Cornelie provided her cousin a cloth, Wijnant gave

[1] This article is mainly based on chapter 3 of my unpublished doctoral thesis: Cappelle, De strijd (Vrije Universiteit Brussel). This study was funded by a Research Foundation Flanders (FWO) project entitled: 'Marriage as Partnership: The Legal Position of Married Women in the Sixteenth-Century Southern Low Countries'. I would like to thank my supervisor Dave De ruysscher (Tilburg University, Vrije Universiteit Brussel), Catherine Dal, the members of the jury, my colleagues and the two anonymous referees for their constructive suggestions and comments. The notarial will of Cornelie and Wijnant used in the introduction can be found in: SAA, N, no. 522, 18 May 1519, fol. 40r-41v. The title of this article is based on a citation of this will ('deur sunderlinge liefde ende affectie'). Unless otherwise noted, all translations are the author's.

his mother a sum of money. However, such a will could create tensions between the married couple and their heirs, as it would clearly disadvantage the latter. Their family members could contest the will, even more so because this spousal will was not valid from a strictly legal point of view. Therefore, it is hardly surprising that Cornelie and Wijnant wanted to clarify their 'right' to make these arrangements. They emphasized their 'extraordinary love and affection that one has for the other'.[2] In addition, the spouses also stressed that they had acquired 'their goods together with their hard work and labour', 'for the reason that they did not have many resources when they got married'.[3] The spouses wanted to reward each other because they had provided for their own living during their marriage, without the help of family members. For this reason, this couple clearly preferred a will over urban law in order to create a solid material basis for the care of the surviving spouse.

II. The patrilineal strategy: safeguarding property along the kinship

Even though Cornelie and Wijnant formed a conjugal pair, we may not forget that they originally came from two different families. This fact brings us to the central theme of this article: the tensions between the conjugal pair (or broader: the nuclear family) on the one hand, and the extended family on the other. In other words, this article takes a closer look at the balance of power between two spouses (or broader: the conjugal pair and their (minor) children), and their respective natal families (extended family, lineage or kinship).

Based on the spousal will of Cornelie and Wijnant, we can assume the working mechanism of their marriage was a kind of partnership. This conjugal pair did not consider their marital estate as a temporary constellation of property coming from different extended families, but as a unit of own production, consumption and reproduction. However, (legal) historians generally approach marriages during the fifteenth and sixteenth centuries as a matter of family strategies. According to them, a shift towards patrilineal interests occurred during this period, focussing on the extended family to the detriment of the surviving spouse. Patrilineal strategies prevailed over conjugal interests. For the natal kin, preserving and transmitting family wealth became their main concern. The relatives protected their interests as much as possible, in order to keep property within the family. To this end, inheritance law was on their side. Patrimonial family law was thus characterized by the preservation of lineal assets within the male line.[4]

2 'Sunderlinge liefde ende affectie diese d'eene totten ande(ren) draghen'.

3 "t Samen met hue(re)n zwairen arbeijd ende industrien gecregen ende verovert', 'want al zoe zij vercleerden luttel oft nijet veele aen malcande(re)n te huwelijcke en brachten'.

4 Several authors referred to this transition, see for example: Dumolyn, 'Patriarchaal patrimonialisme', 14-15; Godding, Le droit privé, 7; Howell, The marriage exchange, 13.

The most detailed research on family strategies in the Southern Netherlands examined the situation in late medieval Douai.[5] Jacob and Howell stated that this Flemish town experienced an important legal change to the advantage of the extended family during the fourteenth and fifteenth centuries. Patrilineal interests gained the upper hand over those of the longest-living spouse. While urban law gave the widow initially full control over the estate after the death of her husband, marriage contracts, wills and mutual donations gradually restricted her share to the life use of specified assets. This commonly used practice was eventually countered by a new marital property regime. According to Howell, this legal reform had important gender-related consequences, as women lost their autonomy. Instead of 'creators of wealth' or capable co-managers of the household, daughters, wives and widows' status got reduced to what Howell called 'carriers of property'. While women were originally actively involved in the household and managed property, they were eventually denied control of these goods and thus lost their economical significance. At best, women could passively enjoy these assets. This way, the extended family ensured that important family goods remained in the hands of the next (male) generations.[6]

The overall picture of a gradual repositioning of (married) women as a result of a transition from conjugal to patrilineal strategies does not fit our leading lady Cornelie Scesters. Instead of limited rights over certain goods, she had full ownership of the marital estate, just like her husband had. Given the little comparative research that has been conducted so far, this article wants to further examine the changing balance of power between the conjugal pair and the extended family in the fifteenth and sixteenth centuries. To what extent did the married couple have bargaining power within the extended family?

Although the patrilineal strategy and the repositioning of women to passive guardians of property is widely accepted, my thesis is that the specific economic and legal situation of cities in the Low Countries have frequently been overlooked. To support my thesis, I chose a city with a totally different economic situation than late medieval Douai, more specifically sixteenth-century Antwerp. This city headed in opposite economic direction. While Douai was affected by a shrinking textile market in the late Middle Ages, sixteenth-century Antwerp became the most important trading hub of Western Europe.

In essence, this article will document how this growing commercial metropolis made a reverse movement, as it demonstrates the primacy of the couple over the kinship. These results for sixteenth-century Antwerp, which do not correspond to the prevailing theory of Jacob and Howell, invite a reconsideration of this paradigm. By sharing my findings, I hope to provide a useful jumping-off point for further research on the role of women in economic development. To set the context for this article, section 3 provides the sources and methodology, and is followed by an overview of the family patrimonial law in Antwerp. Section 5 is to shed light on who made a notarial will. Using spousal wills, the following section will examine the patrimonial arrangements, which will confirm the equal

5 Jacob, Les époux; Howell, The marriage exchange.

6 Howell, The marriage exchange, 233-234.

treatment of husband and wife and the marital economy. We will then focus on the bigger picture of this case study: the conjugal strategy of commercial households. Finally, specific attention will be given to the conflicting interests of the kin and the children.

III. Sources and methodology

To collect data on family structures and strategies in sixteenth-century Antwerp, primary sources included urban law on the one hand, and notarial wills on the other. First, the legislative framework is considered, more specifically: 'Keurboeck' (early fourteenth century-early fifteenth century), 'Gulden Boeck' (circa 1510-circa 1537), 'Antwerps Rechtsboek' (circa 1541-1545) and the compilations of urban law of 1548, 1570, 1582 and 1608.[7] I also analysed fifteenth- and sixteenth-century 'turben', which were a selection of binding advices given by legal experts to concrete legal questions.[8] Those different normative sources offer insight into legal modifications, demonstrating how Antwerp urban law developed and changed over time.

In addition to this legislation, the main information source of this article are wills. In sixteenth-century Antwerp, a will could be registered by a notary and two witnesses, a pastor and two witnesses or the aldermen and a secretary. For this article, I limited myself to the wills that were recorded in notarial acts. While the Antwerp City archive and State archives have a comprehensive collection of notarial registers, it was impossible to examine all notarial wills within the time frame. These notarial registers are extremely labour-intensive to access for systematic research, because an index is usually missing. The (legal) historian therefore has to analyse every page in order to find specific transactions. I decided to select two sample periods reflecting the socio-economic history of Antwerp. Even then, the scope of the notaries was enormous, so a total of six notaries will play the leading role.

The first research period is set between 1525 and 1545. At that time, Antwerp experienced a booming international trade as the centre of a commercial revolution, which was reflected in a growing supply and demand of credit and cash. This so-called golden age was characterised by a spectacular population growth, which was the result of massive immigration due to the strong economic boom. By the 1560s, Antwerp even had about 100.000 inhabitants.[9] Approximately 40 notaries were active between 1521 and 1530, a decade later (1531-1540) 24 notaries.[10] For the period 1525-1545, I scrutinized the notar-

7 'Keurboeck' in: De Longé (ed.), Coutumes, I, 2-89; 'Gulden Boeck' in: De ruysscher, 'De ontwikkeling', 112-183; 'Antwerps rechtsboek' in: De ruysscher, 'De ontwikkeling', 241-301; 'Costuymen 1548' in: De Longé (ed.), Coutumes, I, 91-378; 'Costuymen 1570' in: De Longé (ed.), Coutumes, I, 429-705; 'Costuymen 1582' in De Longé (ed.), Coutumes, II, 1-688; 'Costuymen 1608' in: G. De Longé (ed.), Coutumes, III and IV.

8 See De ruysscher, 'De ontwikkeling', 71-73.

9 Marnef, Antwerpen, 25; Puttevils, Merchants, 15-17; Soly, Urbanisme, 103, 451; van der Wee, The growth, II, 213-220.

10 Oosterbosch, Het openbare notariaat, I, 485; Oosterbosch, "Van groote abuysen", 94.

ial acts of three notaries in search of wills: Jacobus de Platea,[11] Willem Stryt[12] and Zeger Adriaan Sr. 's Hertoghen.[13]

These results were compared to those obtained for the period between 1575 and 1590. During this sample period, the city lost its dominant position. Religious strife and following war ravaged the city. As a consequence, Antwerp experienced an economic recession and rising taxation, which severely affected business and put an end to the city's commercial hegemony. This new situation had significant demographic consequences: within a few decades, half of Antwerp's population emigrated. Most people fled to Amsterdam, which displaced Antwerp as metropolis.[14] There were 105 notaries for about 55.000 inhabitants in July 1582.[15] For my research for this period 1575-1590, I opted for three notaries: Nicolaes Claeys,[16] Jan Nicolai[17] and Dierick van den Bossche.[18] In total, the two sample periods resulted in 521 notarial wills (252 wills between 1525-1545; 269 wills between 1575-1590). In order to examine these wills, I constructed a hugely extensive Access database.

IV. The rules of the game: family patrimonial law in sixteenth-century Antwerp

Before we can take a closer look at the use of wills of married men and women, we must first examine the rules of the game: namely those of Antwerp family patrimonial law in the course of the sixteenth century.[19] Like other regions, the metropolis had general existing rules worked out by urban law for the property relations of spouses during marriage and after the dissolution of marriage (marital property law) and the transfer of property of a deceased to one or more living persons (inheritance law). In Antwerp, this legal framework developed strongly in the course of time, but the situation differed greatly from one city or region to another.

By getting married in Antwerp, a marital estate was recorded, based on three parts: the common property, the husband's personal property and the wife's personal property (the restricted community of property). The common property included the movable goods as well as the acquisitions. Moreover, the spouses each had their personal proper-

11 SAA, N, no. 522, 523 (1525-1526, 1531-1532).

12 CAA, N, no. 3132, 3133 (1535, 1540).

13 CAA, N, no. 2070, 2071, 2072 (1534-1539, 1540-1543, 1544-1545).

14 On this issue, see Gelderblom, 'From Antwerp'.

15 Oosterbosch, "Van groote abuysen", 98; Nève, Schets, 80.

16 CAA, N, no. 524, 525, 526, 527, 528, 529, 530 (1575, 1576-1578, 1581-1582, 1583-1585, 1586-1587, 1588-1589 and 1590).

17 CAA, N, no. 2702, 2703 (1579-1583, 1585-1590).

18 CAA, N, no. 3637, 3638, 3639, 3640, 3641, 3642, 3643 (1575, 1576-1577, 1578-1579, 1580-1581, 1582-1583, 1584-1585 and 1586).

19 See chapter 1 of Cappelle, De strijd for a more detailed discussion of family patrimonial law of sixteenth-century Antwerp.

ty, which was not considered to be common property. These goods did not merge with each other in marriage and were reserved for the individual spouse and their kinship.

The death of one of the spouses led to the dissolution of the marital estate. On the one hand, the community was equally divided in two parts. One half was given to the longest-living spouse, whether widow or widower. In other words, spouses took equal shares of common property. The other half went to the children from the marriage, with daughters and sons having equal rights to the property. In the absence of children, these goods went to close kin of the deceased spouse. The personal property, on the other hand, was not divided. The personal property of the deceased spouse returned to the heirs, while that of the widowed spouse remained in his or her hands. Furthermore, before this split, the remaining spouse was entitled to a so-called 'urban advantage' ('stadt voordeel'). This meant that the surviving spouse was allowed to take certain valuable personal belongings from the community in advance. Because the widowed spouse was given these preproclaimed goods before the division in two parts, the urban advantage thus provided an important benefit to the longest-living spouse.

In contrary to the patrilineal strategy aimed at preserving important family patrimony, Antwerp distinguished itself from other cities by a reverse movement. This commercial city was characterised by a conjugal strategy that specifically aimed to maintain the economically viable family unit. Over time, Antwerp urban law did not reduce but significantly enlarged the common property and the urban advantage. By gradually increasing the common property and the urban advantage at the expense of the spouses' personal property, urban law therefore accorded more weight to the interests of the surviving spouse than to those of the extended family of the first-dying spouse. More property was marked as common, which meant that it would not automatically pass to the kinship of the deceased spouse but had to be split in half. In other words, important family goods ended up in the community instead of being transferred from one (male) generation to another. This was an asset for the widowed spouse who had contributed least to the common property. As a result of this expansion during the sixteenth century, the restricted community of property in Antwerp evolved into a near-universal community of property whereby most goods brought to a marriage or acquired during marriage were shared between the spouses.

Although most people's estate passed by these rules, some married men and women wanted to decide for themselves what would happen to their property. In addition to making a marriage contract and a gift, the couple could deviate from this set of rules by making a will. However, as in other regions, (married) men and women were not allowed to freely dispose their goods. This ban needs to be seen in the light of conservation of family property, because this rule prevented the alienation of family property to outsiders, in particular the longest-living spouse.

As a consequence of this ban, a couple living in Antwerp during the first half of the sixteenth century, had only limited possibilities to pursue family estate planning in order to favour the surviving spouse. Initially, couples could not make a will in order to advantage

the surviving spouse more than he or she would have been benefited by urban law. There was only one exception to this ban: during the course of the marriage, spouses were allowed to gift each other 245 grams (one 'mark') of silver in movable goods and the lifelong use ('tocht') of the common house in which they lived.[20] However, from 1545 onwards, Antwerp urban law changed: spouses were officially allowed to favour each other by will without taking in account the mentioned restriction. Couples with no communal legal children or children from a previous marriage were allowed to bequeath each other 'as much of their goods as they pleased'.[21] It may be clear that the absolute prohibition of making a mutual will had gradually shifted towards more options. Antwerp urban law was therefore advantageous for the couple.

Despite married men and women enjoyed flexibility to make a will from the second half of the examined century onwards, Antwerp urban law did not give spouses a total freedom in disposing of their goods. Married men and women still had to take into account certain restrictions. First of all, it was forbidden to harm the rights of the children. The so-called 'legitimate portion' was one third of the goods if there were up to four children. If there were more than four, the legitimate portion was half. Parents were thus entitled to bequeath up to two-thirds of the property if there were four or fewer children, or half if there were more than four children.[22] Secondly, the will should not prejudice the rights of the creditors.[23] Thirdly, the testator could only bequeath fiefs with the consent of the lord.[24] Finally, couples were not allowed to disadvantage each other. It was forbidden to entrust each other less than was stipulated in urban law.[25]

V. Who made a notarial will in Antwerp?

This section looks at the notarial wills themselves: could every man and woman in theory make one, and who actually made a will? The first question can be answered positive for sixteenth-century Antwerp. From a certain age, everyone could make a will,

20 'Turbe' from 24 February 1494 (Meijers, Het West-Brabantsche erfrecht, annex, 203); Gulden Boeck, s. 20 (p. 119). Antwerp sources use the term 'tocht'. In this article, this term will be used to refer to 'use', and not to 'usufruct'. 'Usufruct' is a concept derived from Roman law ('ususfructus'), which did not entirely correspond to the Brabant terminology. See De ruysscher, 'Balancing interests', 53-54.

21 'Soo vele van henne goeden laeten, geven ende gunnen als het hun gelieft'. Costuymen 1548, ch. 11, s. 28 (p. 314), ch. 13, s. 4 (p. 334); Costuymen 1582, ch. 41, s. 57 (p. 254); Costuymen 1608, II, ch. 1, s. 97 (p. 116-117). Also see Meijers, Het West-Brabantsche erfrecht, 85.

22 Costuymen 1548, ch. 12, s. 3 (p. 324); Costuymen 1570, ch. 33 (p. 660); Costuymen 1582, ch. 41, s. 57-59 (p. 254-256); Costuymen 1608, II, ch. 1, s. 97-105 (p. 88); III, ch. 12, s. 26 (p. 520-522). Also see Stevens, Revolutie, 232 (footnote 36)

23 Gulden Boeck, s. [105] (p. 150); Costuymen 1548, ch. 12, s. 21 (p. 330); Costuymen 1608, II, ch. 1, s. 5 (p. 84-86), s. 97 (p. 116-118).

24 Costuymen 1548, ch. 12, s. 5 (p. 326); Costuymen 1570, ch. 34 (p. 674); Costuymen 1582, ch. 46, s. 9 (p. 342); Costuymen 1608, III, ch. 13, s. 21, (p. 518). Also see Godding, Le droit privé, 393 (no. 703); Godding, 'Dans quelle mesure', 284 (footnote 24).

25 Gulden Boeck, s. [109] and s. [114] (p. 151-152); Costuymen 1548, ch. 12, s. 2 (p. 324); Costuymen 1570, ch. 33 (p. 656); Costuymen 1582, ch. 41, s. 7 (p. 236); Costuymen 1608, II, ch. 1, s. 96 (p. 116).

regardless of their gender or marital status.[26] Once they reached that age, will-makers, whether male or female, did not need the assistance or permission of a (male) guardian. That women did not need permission, was common practice in most regions of the Low Countries.[27] To put it another way, a married woman could make a will without the consent of her husband or a male relative, such as a father, uncle, or brother. Antwerp urban law therefore did not limit the ability of married woman to make a will, despite the unequal position of men and women. The testamentary practice in Antwerp confirmed this: women made use of the opportunity to make a will, without the involvement of a male guardian.

Let us now look at the second question: who actually made a will in the thriving metropolis? During the investigated periods, 784 will-makers (379 men; 405 women) set up a will (table 1). In addition, 29 men and 38 women made a codicil on their will.[28] In other words, more women than men made a will. Of these will-makers, the vast majority was married. A total of 310 husbands (82%) and 301 wives (74%) made a will.[29] In this sample, 40 husbands and 31 wives preferred to make their own personal will. Couples also had the possibility to make a will together. Most married men and women chose the latter option: a total of 270 couples made a joint will, of which 156 between 1525 and 1545 and 114 between 1575 and 1590 (table 2).[30]

	1525-1545		1575-1590		Total	
	Men	Women	Men	Women	Men	Women
n						
Unmarried	4	1	3	4	7	5
Married	175	170	135	131	310	301
Widowed	0	21	0	44	0	65
Unknown	34	11	28	23	62	34
Total	213	203	166	202	379	405
%						
Unmarried	2	0	2	2	2	1
Married	82	84	81	65	82	74
Widowed	0	10	0	22	0	16
Unknown	16	5	17	11	16	8

Table 1. Number of will-makers by marital status in sixteenth-century Antwerp
Source: database Wills Kaat Cappelle

26 Costuymen 1548, ch. 11, s. 29 (p. 314), ch. 12, s. 1 (p. 324); Costuymen 1570, ch. 34 (p. 650, 674-676); Costuymen 1582, ch. 41, s. 25 (p. 242), ch. 46, s. 6 (p. 342); Costuymen 1608, III, ch. 13, s. 16-21 (p. 518).

27 Gilissen, 'Le statut', 299-300; Godding, Le droit privé, 80-81 (no. 65). Outside the Low Countries, married women more often needed the consent of their husbands. For example: Staples, Daughters, 33-69.

28 For example: CAA, N, no. 2071, 15 May 1540, fol. 95v-96v; CAA, N, no. 3642, without date 1585, fol. 16v.

29 In total five wills between 1525-1545 (four spousal wills and one will of a married woman) were incomplete.

30 A joint will could also be made by unmarried people. In the investigated notarial wills, two widows made a will together twice (CAA, N, no. 3642, 16 November 1584, fol. 65r-65v; CAA, N, no. 3642, 15 February 1585, fol. 16r-16v).

	1525-1545	1575-1590	Total
Separate will	33	38	71
Married men	19	21	40
Married women	14	17	31
Joint will	156	114	270
Total	189	152	341

Table 2. Number of separate and joint wills of married men and women in sixteenth-century Antwerp
Source: database Wills Kaat Cappelle

Because notarial wills themselves provide little insight into how financially wealthy the will-makers were, it was not possible to define a general social stratification.[31] However, the examined sources usually contained the profession of the man who made a will.[32] A look at table 3 makes it clear that a large part of the married will-makers were active in trade.[33] According to Van Roey, these men were among the richest inhabitants of Antwerp, and were mainly merchants without specialization and textile traders.[34] Next to this select group of wealthy merchants who accounted for most of the urban wealth, there was a large group of well-to-do middle class of merchants and entrepreneurs.[35] The registration of women's profession was, however, far less common, as has been shown in other studies.[36] The Antwerp notary rarely mentioned the occupation of the female testator. In the few exceptions found, all women were active in trade or textile companies.[37] Van Aert stressed that most women were employed in the trade and at the same time were the ones who earned the most.[38] While these findings do not give a systematic overview of the social groups that represent these wills, the range of occupations demonstrates that will-makers belonged to the wealthier group, but were not limited to the

31 Other authors also pointed out this problem, see for example: Ågren, 'Caring', 61-62; Overlaet, Familiaal kapitaal, 76-77. Better sources to verify this are probate inventories. For example: Deneweth, 'A fine balance'.

32 Although these professions give an idea of the social stratification, it should be viewed with a certain amount of vigilance. The notary was not the only one who could make wills. Therefore, he was able to attract certain occupational categories more than others. These professions may be determined by this and related to the notarial activities.

33 The professions are classified according to occupational categories and the two research periods. The used classification method is Historical International Standard Classifications of Occupations (HISCO). See van Leeuwen, Maas and Miles, Hisco. The division is based on the dataset collected as part of the EURYI-VIDI research project 'The Evolution of Financial Markets in Pre-Industrial Europe (1500-1800): a comparative analysis', managed by Gelderblom and Jonker (https://doi.org/10.24416/UU01-7UC5BL). I classified the occupation myself, if it could not be subdivided according to this approach. The professions of all married men who made an (incomplete) will or codicil have been taken into account. In addition, this table contains the occupations of the husbands of the married women who made a will or a codicil alone.

34 Van Roey, De sociale structuur, 173.

35 Marnef, Antwerpen, 33-34.

36 For example: Schmidt, Overleven, 121-122; Staples, Daughters, 42-43.

37 For example: CAA, N, no. 2071, 21 Mars 1542, fol. 69r-71r.

38 Van Aert, 'Van appelen', 90.

high elite.[39] The middling sort also proceeded to draw up a will, which is in line with the findings of other studies.[40]

	1525-1545	1575-1590	Total (n)	Total (%)
Artisans and masters	59	63	122	51%
Merchants and bourgeois	38	31	69	29%
Military personnel	1	3	4	2%
Professions and services	27	16	43	18%
Total	125	113	238	100%

Table 3. Occupational categories of married men in the testamentary practice of sixteenth-century Antwerp Source: database Wills Kaat Cappelle

VI. Patrimonial arrangements in Antwerp spousal wills: who gets what?

This article introduced us to Cornelie and Wijnant, a married couple in Antwerp, who were very generous to each other. With their spousal will, they bequeathed all their goods to the surviving spouse. The question can be asked if their choices were representative for that of other couples in Antwerp. The records show that most Antwerp joint wills were mutual or reciprocal, whereby the spouses entrusted each other all or parts of their estate. Furthermore, most mutual wills designated the surviving spouse as the sole heir to the general bequest. Although Antwerp urban law gradually adapted more to the aspirations of married couples, it was still considered inadequate. Spouses primarily cared for the well-being of the remaining spouse rather than that of the generations that followed. In other words, the main motive was the protection and amelioration of the surviving spouse's interests, an objective that is reflected in various ways in Antwerp wills.

Firstly, what exactly was given to the surviving spouse played a major role in whether or not tensions arise between the couple on the one hand, and the extended family on the other. The fact that one spouse bequeathed valuable inherited goods to the other, disadvantaged the (direct) relatives. If one of the spouses entrusted the other real estate or financial assets, there is no doubt that the absence of relatives in these wills indicates the predominance of the conjugal pair, and not the family. Most Antwerp spouses named each other heir to all their goods, but usually limited themselves to short and incomplete descriptions of their estate in their wills. The conjugal pair usually did not list the individual pieces of property, nor the economic value of the property. The bequest was usually described as 'all our (movable and immovable) goods left in the estate, after paying all

39 Making a notarial will entailed a considerable cost. Hence, it partly explained the social profile of willmakers. Oosterbosch stated that an Antwerp notarial act was moderately expensive. See Oosterbosch, 'Het notariaat', 70-71.

40 See for example: Ågren, 'Caring', 62; Howell, The marriage exchange, 75-85; Schmidt, Overleven, 84; Staples, Daughters, 40.

bequests, costs of the funeral and debts'.[41] More detailed descriptions were therefore less common, but could occur. Some will-makers specifically referred for example to 'life annuities' and 'houses'.[42] Antwerp wills thus provide us an incomplete picture of the couple's finances. However, in order to estimate the significance of a spousal will in relation to the extended family, it is not necessary to know how rich the couple was. There is a strong suspicion that (at least in certain cases) important family assets that they had brought into the marriage or inherited, were included under 'all their goods'. To take a concrete example, the will of silk maker Carel Menneys and his wife convincingly demonstrates that all goods, even explicitly his and her own movable and immovable goods, belonged to a general bequest.[43] Compare this to the will of Thielman Simonszone and Marie de Beau, who explicitly referred to the goods they brought in their marriage, inherited and acquired during marriage.[44] Melchior Christoffels and Marie Claessen even made it clear that important fiefs would pass on in full ownership to the surviving spouse.[45] What these examples clearly illustrate is that some married will-makers attached little importance to the origin of their goods.

Secondly, the extent to which property rights were given to the surviving spouse may be evidence of family politics. From the point of view of the family, entrusting the lifelong right of the goods to the surviving spouse was more interesting than full ownership, as it kept family goods together as long as possible. After the death of the longest-living spouse, the property could return 'undamaged' to the kinship, which assured the subsistence for the next generation. Nonetheless, most Antwerp couples entrusted each other full ownership of the estate. The surviving spouse, whether widow or widower, got equal disposal rights over the goods. For example, goldsmith and exchanger Peter Schatz and his wife Anna Deens entrusted each other their estate. They made sure that the surviving spouse remained the owner of these goods. Their will also emphasized that no distinction should be made as to whether the marriage would remain childless or not. The interests of the surviving spouse took precedence over those of the blood relatives. This example illustrates that most couples did not want family members to interfere in their affairs.[46]

41 For example: 'alle heurer beijder goederen, ruerende ende onruerende, haeffelijcke ende erfflicke, gereede ende ongereede, dier boven alle testamenten, costen van der vuijtvaert, wettige schulden ende andere vuijtleden den sterfhuijse van den eersten afflivigen aengaende bevonden zelen worden overschieten(de)' (CAA, N, no. 3133, 9 Mars 1540, fol. 66v-69v).

42 For example: 'allet huerer beijder goeden, rueren(de) ende onrueren(de), haeflijcke ende erflijck, lijftochtrenten ende andere egheene vutgescheijden' (SAA, N, no. 523, 2 February 1532, fol. 154r-155v); 'mitsgaders oock chijnsen, renten, pachten ende huijsen, egheene vutgescheijden' (CAA, N, no. 2070, 20 May 1539, fol. 446r-448r).

43 'Alle ende ijgelijcke des ierste aflijvige goeden, ruerende ende onruerende, haeflijcke ende erffelijcke rechten, actie ende crediten' (CAA, N, no. 2702, 17 September 1582, no. 177 and 181).

44 SAA, N, no. 523, 13 Mars 1532, fol. 173r-175r.

45 'Alle ende jegel(ijcke) de goeden ruerende ende onrueren(de), haeflicke ende erflicke, leengoeden, Uckelsche goeden, chijnsgoeden, eijgen goeden, coopmanschapen, actien, crediten, vutstaen(de) schulden ende alle andere gerechticheden, gout, silver, gemunt ende ongemunt' (CAA, N, no. 526, 13 May 1581, fol. 16r-19r).

46 CAA, N, no. 2070, 19 September 1535, fol. 86v-88r.

Thirdly, remarriage of the longest-living spouse could increase conflicts with the relatives of the first-dying spouse. Obviously, a new wedding of the widowed spouse could further complicate the patrimonial logic of the family. The widowed spouse could put the best interests of his or her new family before those of the children from the first marriage. In other words, the longest-living spouse could enrich himself or herself with the property of the deceased partner at the expense of the heirs of the first-dying spouse. In order to avoid such situations, a will may provide, for example, that the surviving spouse loses his or her share upon marriage. However, only seventeen percent of all Antwerp wills included this stipulation.[47] In addition, there were major differences between the two research periods I examined. Especially between 1525-1545, married testators anticipated a remarriage (26%). For the following research period (1575-1590) this percentage dropped to seven. In most cases, a remarriage had consequences for the surviving spouse, although some will-makers differentiated due to gender.

VII. The equal treatment of husband and wife

Contrary to what was established for late medieval Douai, gender hardly played a role in Antwerp testamentary practice. Here, the rights of married women were not restricted or postponed. Thus, testamentary practice confirmed the equal treatment of men and women as imposed by family patrimonial law. Indeed, in most wills of married couples, no different treatment can be distinguished, but the spouses sometimes emphasized this themselves in their wills. The bequest, for instance, went to the 'longest-living spouse of them both, whoever it will be man or woman'.[48] Hardly no distinction was made in remarriage either. Most widows were no less discouraged than widowers from remarrying and wives could forbid their husbands from remarrying.[49] Only in a few cases could a difference in treatment between the widow and the widower be established. This particular type of will had two objectives. On the one hand, to secure the material basis of the surviving spouse and the heirs or children, and, on the other, to preserve the family goods.[50] The source material shows that men and women could have a different relationship to patrimonial goods. The couple had thus the option to stipulate restrictions that highlighted the gender difference, but the majority did not.

Although on the legal testamentary level the difference in treatment between husband and wife was small, the possibility that some husbands did not offer their wives the best future prospects did exist. Strong-willed men could persuade their spouse to make a spousal will, even if this will was not in the wife's favour. One subject of discussion among historians concerns the number of female will-makers and their position. They

47 For example: CAA, N, no. 2071, 30 Mars 1540, fol. 67r-68v; CAA, N, no. 2703, 14 February 1587, fol. 224v-226r.

48 'Langstleven(de) van hen beijden, wie dat het zij van manne oft wive' (SAA, N no. 523, 13 Mars 1532, fol. 173r-175r).

49 For example: CAA, N, no. 2071, 26 January 1540, fol. 22r-23v.

50 For example: CAA, N, no. 2071, 5 February 1542, fol. 28v-30v; CAA, N, no. 526, 17 September 1582, fol. 80r-81v.

point out that the low number of female will-makers indicates a decline in women's opportunities and possibilities.[51] For example in Nuremberg, fewer women made their own wills during the sixteenth century. While initially female testators often made bequests to women's charities, over time more and more women made a spousal will with their husbands. According to Wiesner-Hanks, this decreasing number of women's own wills demonstrates a decline in the legal position of wives.[52] Other historians, such as Guzzetti, confirmed this and even referred to the pressure that husbands could exercise in setting up a will. In fourteenth-century Venice, for instance, she found indications of violent behaviour.[53]

The testamentary practice in Antwerp indicates that the situation for women was different here. Firstly, not only could spouses have joint bequests, each spouse could also bequeath gifts individually, which some did. This practice did not differ whether the bequests were of married women or men.[54] Secondly, married women (and men) were at all times free to derogate or nullify their (spousal) will. They could decide not to respect the joint will and amend it after the death of their spouse. Some widows, such as Anna van Liefvelt, made use of this possibility. She revoked the spousal will that she had made with her husband on 2 March 1530, declaring that she would be 'deprived' of her property if this will would remain valid.[55] Such a revocation could just as well happen when both spouses were still alive. For example, on 15 October 1517, the first wife of Aerdt van den Werve had changed her mind and, 'without his knowledge', made a codicil on their spousal will of 30 June 1514.[56] After his first wife's death, Aerdt remarried Adriana van Ymmersseele, with whom he made a spousal will on 15 December 1532. In this will with his new wife, he asked his two children of his previous marriage to repudiate their mother's codicil, in order to keep 'friendship, love and unity' with their stepbrother.[57] It can be inferred that he was unaware of her codicil and was disadvantaged by her action.[58] It is thus not unreasonable to assume that these measures gave women considerable power. For wives in Antwerp, spousal wills did not automatically lead to submission to male power and control.

51 For a discussion of this, see: Sperling, 'Marriage', 164. Also see Diefendorf, 'Women and property', 182.

52 Wiesner-Hanks, Gender, 91. Also see Van Aert, 'The legal possibilities', 288.

53 Sperling referred to Guzzetti, Venezianische Vermächtnisse, 15-16. See Sperling, 'Marriage', 164.

54 For example: CAA, N, no. 3641, 28 June 1582, fol. 35r-35v.

55 'Gespolieert' (SAA, N, no. 523, 15 June 1531, fol. 165r-165v).

56 'Sonder zijn(en) wete oft kennisse gemaict soude moighen hebben' (SAA, N, no. 523, 18 December 1532, fol. 224v-226v).

57 'Vrientscap, liefde ende eendrachticheijt' (SAA, N, no. 523, 18 December 1532, fol. 224v-226v).

58 SAA, N, no. 523, 18 December 1532, fol. 224v-226v.

VIII. The marital economy: the couple as the most fundamental unit of society

Testamentary actions of married men and women provide much insight into the marital life. Most Antwerp spousal wills are a textbook example of what Ågren and Erickson described as the 'marital economy', or 'the economic partnership of husband and wife, which was the basis of all economic activities in the medieval and early modern period'.[59] During their marriage, spouses 'engaged in negotiation over issues of production, distribution and consumption for the best support of the household'.[60] Moreover, these wills cast light upon how the couple had a common understanding, rather than conflicting interests. The conjugal pair, and not their extended family, acted as the most fundamental unit of society.[61]

Several arguments within these Antwerp sources strongly suggest that the marital economy was at the heart of marital partnership. Firstly, spousal wills normally gave the surviving spouse, whether male or female, all remaining goods. Furthermore, married men recognised that both spouses brought property to the marriage. Their joint efforts were of great importance, as 'her' contribution was as fundamental for the survival of the family as 'his' contribution. Take, for example, husbands who properly compensated their wife, in case of unfortunate circumstances, for the assets she brought into their marriage.[62] The statements and examples mentioned above concisely sum up the shared interests of the marital union, and go against the general assumption that the husband was automatically somebody who abused his position. Rather, many husbands made clear arrangements in order to protect their wife, and in the interest of the household.

The desire to retain (economical) power within the conjugal pair can also be examined on the basis of other testamentary clauses. There are numerous examples of longest-living spouses who were not obliged to hand over an inventory of all assets and debts to the kinship of the first-dying spouse. This meant that there was no need for the surviving spouse to justify himself of herself to their kinship.[63] In addition, the will-makers sometimes made (charitable) bequests, which the surviving spouse was allowed to distribute in the name of the deceased spouse. Some couples left it to the surviving partner to bequeath their children 'at their own discretion', 'because they trusted each other'.[64] This means not only that the longest-living spouse had to take into account the interests of the offspring, but also had to have the qualities to manage their bequests. Furthermore,

59 Ågren and Erickson (eds.), The marital economy, without page number.

60 Erickson, 'The marital economy', 3.

61 See for this reasoning for mutual wills in particular: Ågren, Domestic secrets, 46-54; Lamberg, 'Mutual testaments'.

62 For example: CAA, N, no. 527, 16 February 1585, fol. 10v-12r.

63 For example: SAA, N, no. 522, 18 May 1519, fol. 40r-41v.

64 'Nae de faculteijt van hueren goeden weselijck nae huere discretie' 'zoe sij dat malcanderen betrouwende sijn' (CAA, N, no. 2071, 3 February 1542, fol. 27r-28v).

the spouses' wishes could also include funeral instructions, such as leaving the choice of burial place of the first-dying to the surviving spouse.[65]

A similar and common example of the marital economy is the choice of the longest-living spouse as the guardian of the children and the executor of the will. As guardian of the children,[66] the surviving spouse had important responsibilities not only with regard to the legal and financial affairs of the children, but also for their education, career and marital choices. Some parents even explicitly excluded the interference of family members and of the Orphan Chamber, which was the urban institution that looked after the orphans' property interests. As the executor of the will,[67] the longest-living partner was authorized to perform legal acts such as collecting claims and paying the debts of the testator. The appointment of the surviving spouse as guardian and executor demonstrates the mutual trust in each other's abilities to continue the management of the marital economy. This also indicates that wives had to be aware of the family's financial affairs during marriage.[68]

Not only the testamentary clauses themselves are particularly interesting to give us an inside into the marital economy, the motives cited reveal the more intimate sentiments and strategies involved. Like Cornelie and Wijnant, many couples explicitly stated their 'extraordinary love and affection that the one had for the other' in their will.[69] Likewise, Jehanne van Roije entrusted her husband Gheerijt Sterck all her goods, 'out of extraordinary grace, favour, love and affection that she felt for him'.[70] This 'unity that they had together during marriage' fits in with the development towards a modern so-called 'companionate marriage'.[71] The justification of showing affection and gratitude towards each other was expressed in several wills, although some studies showed that this rarely or never occurred elsewhere in the Low Countries.[72]

Besides references to conjugal affection, spouses also legitimized their wills with the labour argument. The couple stressed that they had accumulated and maintained their fortune through 'their hard work'. One could say that this explicit statement is a standard formula, as examples can be found in all the Antwerp notaries I examined. Moreover, this clause was not even unique to Antwerp, as various (legal) historians found this

65 For example: CAA, N, no. 527, 26 April 1584, fol. 11v-12v.

66 For example: SAA, N, no. 2071, 3 February 1542, fol. 27r-28v.

67 For example: SAA, N, no. 2071, 18 June 1540, fol. 131v-132v.

68 This argument is also mentioned by Diefendorf, 'Widowhood', 387.

69 'Deur sunderlinge liefde ende affectie diese d'eene totten ande(ren) draghen' (SAA, N, no. 522, 18 May 1519, fol. 40r-41v).

70 'Duer zunderlinge gracie, gunste, liefde ende affectie diese totten zelven draict vuijt hue(re)n vrijen eijghenen wille ende weten(en)' (SAA, N, no. 522, 13 October 1526, fol. 231v-218v).

71 'Eendrachticheijt diese 't samen in den huwelijck gehadt hebben' (SAA, N, no. 522, 13 October 1526, fol. 231v-218v). For the 'companionate marriage', see for example: Stone, The family. Also see Howell, 'The properties', 18-21.

72 For example, for sixteenth-century Mechelen: Overlaet, Familiaal kapitaal, 147; for seventeenth-century Leiden: Schmidt, Overleven, 98. In contrary to early modern Sweden: Ågren, 'Contracts', 215.

clause in cities in the Low Countries, as well as in other regions.[73] The clause in Antwerp does not have be seen as standard, but rather as a tailor-made one. Firstly, not all Antwerp couples felt the need to explicitly include this clause in their spousal will. Secondly, the content of the clause could be very different. Some will-makers made it clear that not the conjugal pair, but only one of the spouses was responsible for amassing their fortune. Niclaes Cock, for example, declared in his spousal will that 'most of their goods were assembled by his great persistence'.[74] Despite his statement, the spousal will still contained generous provisions for the longest-living spouse, namely half of all immovable goods, personal effects and six silver cups, 'out of extraordinary services and the favours they had to each other, and other reasons'.[75] The reverse also occurred, but was rather rare. Mertijne Svos, for instance, insisted that she 'gained her goods herself' with 'her own hard work'. The remarried widow mainly tried to protect herself from the natal kin of her two deceased husbands, since it were not her husbands who had provided her with wealth.[76] In other words, mentioning 'his', 'hers' or 'their' hard labour was a clever move in order to avoid tensions with the heirs of the first-dying spouse.

In short, it seems that Antwerp couples formed an (economic) partnership, in which both spouses tried to contribute rather than respecting patriarchal ideals. For many couples, the marital bond was mutual and complementary, leading to cooperation and shared goals. However, it would be incorrect to assume that all spouses had a perfect mutually dependent relationship. Moreover, women were still confronted with limited (legal) possibilities and with constraints, due to their gender. But at the same time, we need 'to caution against assuming that marriage automatically entailed dependence for women, or for women alone', as Shepard puts it.[77]

IX. The bigger picture: the conjugal strategy of commercial households

Looking at these spousal wills, it is clear that the hypothesis of a shift to increasing patriarchal and lineage tendencies does not apply for our Antwerp case study. On the contrary, throughout the sixteenth century, the conjugal strategy increased and prevailed in

73 For example: for the Low Countries: Howell, The marriage exchange, 172; for outside the Low Countries: Austria: Hagen, Lanzinger and Maegraith, 'Competing interests', 110; France: Hardwick, The practice, 116; Desan, The family, 162-163; Norway: Sandvik, 'Decision-making', 123; Scotland: Ewan, 'To the longer liver', 199; Sweden: Ågren, Domestic secrets, 52; Ågren, 'Contracts', 212-216; Venice: Bellavitis, Famille, 112-113.

74 'Zoe hij Niclaes tesateur vercleert van sijnder zijden meest ende al vercreghen goeden sijn die hij door sijne sijne groote neersticheijt verovert ende ontspaert heeft' (CAA, N, no. 2071, 23 Mars 1540, fol. 60v-62r).

75 'Door sunderlinghe diensten ende gunsten die sij tot malcanderen draghen ende meer andere redene(n) ende saicken hen over beijden zijden (al soe sij seijden) daer toe porren(de) ende moveren(de)' (CAA, N, no. 2071, 23 Mars 1540, fol. 60v-62r).

76 'Met hueren sueren arbeijt gewonnen heeft', 'selve gewonnen ende verovert heeft' (CAA, N, no. 2071, 11 February 1543, fol. 19r-21r).

77 Citation taken from Shepard, Accounting, 229. See also Shepard, Accounting, 214-231, 274.

Antwerp, which repositioned the relationships between the spouses and their kinship. The main aim of most spousal wills was not to conserve and transfer family wealth within (male) generations, but to protect the surviving spouse against their families. Therefore, wills were the ultimate legal tool for couples to adapt urban law according to their own wishes. Not only older, but also young couples found it important to carefully specify patrimonial dispositions, in order to keep the marital estate in the hands of the surviving spouse, while the extended family was set aside. They had taken the time to plan everything well in advance in order to provide for the longest-living spouse. In case a new situation occurred, spouses could make a new will to respond to the changed circumstances. Will-making must thus be seen as a conscious long-term economic planning, revealing personal preferences and tailored strategies. Hence, crucial in this context is the question why couples in Antwerp did what they did, and if these specific patterns constituted an anomaly.

On May 18, 1519, Cornelie and Wijnant violated the principles of family patrimonial law in Antwerp by drawing up a mutual will. According to Antwerp urban law, such a thing was not allowed. But Cornelie and Wijnant were not the only ones, and despite the legal restrictions, the prevalence of conjugal pairs over the lineage regularly occurred between 1525-1545. Many spouses were eager to make a will in order to leave their estate to each other. These couples thus managed to overrule the testamentary restrictions of urban law. They used wills to their advantage, which resulted in the weakening of kinship ties. Therefore, the conjugal strategy probably goes hand in hand with the economic growth. By using notarial wills, spouses wanted to adapt urban law to the economic upsurge. Antwerp's growing commercialized urban economy encouraged couples to pursue marital strategy through a contract. At the same time, this common practice stimulated the mobility of goods and the commercialization of the city.

Ultimately, these spouses reshaped and rewrote the law. Spouses clearly preferred their will over urban law, which clearly had legal consequences because Antwerp urban law formalised the already existing legal practice. This interaction was especially noticeable between 1525 and 1545 when Antwerp was the world's economic hub. The urban middle classes considered it desirable that urban law would be adapted to the socio-economic reality. For a couple, the conjugal strategy was a means of coping with trading uncertainties. By means of the wills, they adapted family patrimonial law to the socio-economic situation. Hence, the practice changed before the law and was even ahead of it. The Antwerp city's rulers eventually gave in and adapted family patrimonial law to the changing market circumstances. Urban law met the wishes of married people as the marital property regime eventually evolved into a near-universal community, which strengthened the claims of the conjugal pair. It contained a certain socio-economic logic and was adapted to commercialized needs. However, from 1560s-1570s onwards, on the eve of religious turmoil, war and economic crisis, urban law took less account of the needs of society. Just at a time that family property was vulnerable, law was less an expression of socioeconomic factors. Despite the uncertainties arising from crisis, couples were able to continue to make spousal wills concerning family wealth. But urban law had become dysfunc-

tional and did no longer directly respond to the economic changes. An explanation for this could lie in the law becoming more academic. The authors of the compilations of law of 1582 and 1608 relied more on doctrines than on practice.[78] In that respect, it is also relevant to point out that the individual character of the will was a rule of canon law, whereas the consent of the family was rather rooted in late medieval customary law.

The story told about spouses striving for a conjugal strategy in sixteenth-century Antwerp, may strike the reader as rather unique. Although the strengthening of the position of the surviving spouse is not in line with Jacob's and Howell's theory, the assumption that 'sixteenth-century Antwerp' was an exception can in all probability be debunked. Thus, it may be necessary to revise this general theory of a late medieval transition to the prevalence of the interests of the kin. First of all, the strong focus on the timing of those changes needs re-evaluation. At least for Antwerp, there is much reason to believe that the sixteenth-century spouses in this city were not the trendsetters. Although married couples often used wills to provide for surviving spouse throughout the sixteenth century, this appears to have been a popular practice as early as the late Middle Ages. Based on the study of the Antwerp aldermen's registers, Bardyn proposed that this evolution had already begun in the early fifteenth century. While her preliminary findings were limited to a qualitative study of approximately 45 contracts, it does suggest that the emphasis on the couple's interests did not just happen, but was a long process.[79]

The use of the marital strategy thus appears not only to already have occurred in the previous century, but evolved further in Antwerp in the following centuries. Although a general study is also lacking, preliminary findings of Deneweth and Stevens suggest that couples strengthened conjugal interests with the help of a will, appointing each other as the principal heir of the estate.[80] These results confirm the link with economic growth. Although Antwerp lost its leading position and commercial hegemony to Amsterdam, the city did experience an economic recovery at the end of the sixteenth century. In addition to a re-evaluation of the timing, the 'general' shift from conjugal to patrilineal strategies in north-western Europe can also be questioned. Seventeenth-century cities in the Northern Netherlands underwent exactly the same evolution as Antwerp. In the commercial cities, the universal community arose with the surviving spouse getting half of the property, reinforced by wills that gave him or her as many claims as possible on the other half.[81]

These findings encourage thus more research into the transition from conjugal to patrilineal strategies. As Bardyn pointed out, this theory for the late medieval Netherlands in combination with the hypothesis of the declining position of women, has so far

78 De ruysscher also noted this for Antwerp commercial law. See De ruysscher, 'Naer het Romeinsch recht'.

79 Bardyn, Women's fortunes, 35-37. Bardyn studied women's market participation in fifteenth-century Antwerp and Leuven, examining aldermen's registers.

80 Deneweth, 'A fine balance' (for the period 1660-1780); Stevens, Revolutie, 234, 236 (for the period 1794-1814).

81 Nève, 'Huwelijksvermogensrechtelijke stelsels'; Schmidt, Overleven, 90-100; Roes, Het naaste bloed, 37.

been based mainly on the study of industrial cities.[82] These very cities, once prosperous cloth towns, experienced an economic depression during this period and were characterised by declining textile exports. However, late medieval and early modern Antwerp, as well as certain early modern cities in the Northern Netherlands, experienced a completely different economic evolution. These similar urban economies were characterised by a high population size and vibrant economic development. Hence, the conjugal strategy was probably the result of adapting to a commercialized society and rapid urbanisation. Commercial cities revolved around trade and the constant circulation of goods, which influenced the property relationships inscribed in marital property law. In other words, socio-economic, demographic and political conditions played an important role. Comparative research of cities with different economic backgrounds will therefore be necessary in the future.

X. Conflicting interests with the kin

In sixteenth-century Antwerp wills, marriage was not a matter of strategies to keep properties in the hands of family. The marital union had chosen the surviving spouse, who was an 'outsider' of their own family circle. Couples ensured that the widowed spouse's interests prevailed over those of (direct) relatives, which resulted in disadvantaging the heirs. With such strong emphasis on the conjugal pair, it is no surprise that the potential for conflict among their heirs was ever present. Family members could take offence by mutual wills, which could create tensions between the couple and their relatives. Remarriage could increase these tensions, as conflicts between the remarried surviving spouse and the guardians in the case of minor children illustrates.

Like Cornelie and Wijnant, other Antwerp couples tried to avoid 'dispute, strife and discontent' between the surviving spouse and the heirs of the first-dying spouse.[83] Married people therefore developed strategies to avoid problems with their kin. To compensate them, some couples directed a small bequest to the heirs. These spouses could stipulate that the surviving spouse had to distribute a sum of money to the relatives, making them better off than nothing. Will-makers also tried to maintain some control over their heirs through a penalty clause, whereby heirs who obstructed the execution of the will were subjected to a penalty. For example, they could be denied their inheritance.[84]

To explain why they chose to favour the surviving spouse, the couple referred to their 'their hard work'. They also pointed out that they did not inherit important (immovable) family goods or that their household consisted only of movable wealth.[85] These arguments were obviously directed against their heirs and their claims to the estate. The

82 Bardyn, Women's fortunes, 5, 64-65. She referred to Douai (Howell, The marriage exchange; Kittell and Queller, 'Whether man'), Leiden (Howell, Women) and Ghent (Howell, Commerce, 53-92; Hutton, Women; Danneel, Weduwen). Also see: Kittell, 'Guardianship'.

83 'Geschil, twist ende onvrede' (SAA, N, no. 522, 18 May 1519, fol. 40r-41v).

84 For example: SAA, N, no. 522, 19 July 1525, fol. 55r-56v.

85 For example: SAA, N, no. 523, 2 February 1532, fol. 154r-155v.

spouses clarified that they had no obligations to the kin because they had received little or no help from them in setting up their household. In doing so they made it clear that their wealth had been acquired, accumulated and maintained by themselves, and not by the efforts of their relatives. Since both husband and wife contributed to the community, they compensated each other. However, do not be fooled by this practice as these ambiguous testamentary provisions could be useful to soften the effect of the spousal will. Spouses could use these dubious expressions to make their will and its legal consequences look more insignificant than they really were. This is fully in line with the vague description of their goods in their will, as mentioned above.[86]

Although the couple could prepare for death, an important point to bear in mind is that we do not know what happened after the death of the will-maker. These wills reflected the wishes and intentions of the spouses at a specific time in their lives, but had legal effect only upon the death of one spouse. If heirs lost their share of the estate, they still retained all rights to challenge the spousal will in court.[87] Whether the wishes of the will-maker were often ignored or disputed in sixteenth-century Antwerp remains unclear. However, this shows the limitations of a will itself and the tensions it could cause. Although a will did not necessarily bind the heirs to the execution of the spouses' wishes, this raises the question of whether or not the consent of the heirs could make the execution of (mutual) wills more likely. During my research, it appeared that Antwerp married men and women only rarely mentioned the consent of a family member. An explicit approval by relatives was found in only two wills.[88] It is apparent from the testamentary practice in Antwerp that spousal wills were made to the benefit of the spouses, and not the family. The lack of written approval by family members could be explained by the fact that Antwerp urban law did not require this, making the will an instrument for the couple to freely make their own patrimonial arrangements.[89]

XI. Won't someone please think of the children?

Although some early modern studies for other regions claim that mainly childless couples made wills,[90] my research showed that having offspring in sixteenth century Antwerp played a very important role in the decision to make a will. About half of the studied will-makers had a marriage with (young) children (table 4). Even childless spouses

86 This is also suggested by Ågren, 'Contracts', 212-216; Ågren, 'Caring', 61-62.

87 Several scholars refer to this, for example: Bellavitis, Famille, 97; Kuehn, Family, 235; Overlaet, Familiaal kapitaal, 78-79; Staples, Daughters, 17.

88 More specifically a will of a married woman with the permission of her dad (SAA, N, no. 523, 16 June 1531, fol. 45v-46v) and a spousal will set up in the presence of two guardians of the children of the previous marriage of the man (CAA, N, no. 2071, 17 Mars 1542, fol. 61r-62v).

89 In contrary to Antwerp, it is worth noting that in other regions, such as Sweden, the consent of close blood relatives was required to bequeath inherited land. See Korpiola and Önnerfors, 'Inheritance law', 47; Ågren, Domestic secrets, 46-47.

90 For example, for eighteenth – and nineteenth-century northern Sweden: Ågren, 'Caring', 59; for sixteenth-century Mechelen: Overlaet, Familiaal kapitaal, 117-118.

anticipated the division of their estate with their children to be born of the marriage.[91] Others had children from a previous marriage or children outside of marriage.[92]

	1525-1545	1575-1590	Total
Separate will	13 (39%)	19 (50%)	32 (45%)
Married men	7 (37%)	13 (62%)	20 (50%)
Married women	6 (43%)	6 (35%)	12 (39%)
Joint will	69 (44%)	69 (61%)	138 (51%)
Total	82 (43%)	88 (58%)	170 (50%)

Table 4. Number of married men and women with communal children who made a will in sixteenth-century Antwerp
Source: database Wills Kaat Cappelle

The primary purpose of most spousal wills was the care of the surviving spouse, yet they were forbidden by Antwerp urban law to harm the interests of their offspring in doing so. Every child, either son or daughter, was to be given an equal share. This egalitarian principle did not make sense for wealthy families, as they wanted to keep property in the hands of different male generations. The extended family might try to circumvent the imposed Antwerp urban rules in order to preserve patrimonial assets. Having precedence of sons over daughters would strengthen the patrilineal strategy and thus prevent the passing of family goods from one family to another. Most Antwerp parents aspired to provide for all their children in their will. The egalitarian principle was not called into question, for the bequests received by each child were similar in content and value.[93] Parents made no distinction according to gender, as daughters were given an equal share as sons.[94] They did not use their will to give their daughters less (valuable goods) than sons, nor did they make any difference in the control of those goods. Most daughters and sons enjoyed full control of the goods of their bequest. This could thus give daughters different incentives to later establish a business and to participate in (property) investment, which would benefit the marital economy.[95]

Although there did not appear to be any negative attitude of parents toward the interests of their offspring, having sons and daughters did have a major impact on the amount of property left to widowed spouse. Consequently, spouses found a will a useful legal instrument to protect the interests of the surviving spouse against their children. For example, parents could stipulate that the common household was at common expense. Being the surviving spouse with minors also had an advantage, as he or she could get the

91 For example: CAA, N, no. 2070, 25 May 1529, fol. 449v-451r.

92 Illegitimate children did not inherit the same way as legitimate children. Consequently, arrangements in a will could mitigate this difference.

93 Antwerp had special rules regarding gifts to children and the dissolution of the estate of parents. See chapters 1 and 3 of Cappelle, De strijd.

94 For example: SAA, N, no. 523, 20 Augustus 1532, fol. 229v-231r.

95 Several authors pointed this out. See for example: Andersson, 'Forming', 58; De Moor and van Zanden, 'Girl power', 7-11; Staples, Daughters, 146-169.

use of the minor children's goods and the collection of the income from these assets.[96] In return, the surviving spouse would be responsible for their maintenance and education.[97] This technique provided the longest-living spouse with sufficient material basis to continue life as the spouses were accustomed to when they were both alive. A second strategy parents could use to safeguard the interests of the remaining spouse was to limit the children's bequest to a sum of money or an annuity. In this way, the couple could prevent the longest-living spouse from having to divide (a part of) their house or shop among the children. The assets were then not divided among the children until after the death of both parents. However, this could lead to major financial difficulties when debts exceeded assets. This is probably why many couples left the decision about the concrete amount to their children to the surviving spouse. The couple could also choose to let the children's inheritance depend on the size of the estate. This enabled them to adapt to new circumstances, if necessary. From the children's point of view, a sum of money or an annuity was not always negative. For them, such a bequest could lead to economic emancipation. The parents thus gave their children the opportunity to establish themselves economically independently.[98]

The protection of the longest-living spouse can also be inferred from the conditions imposed on the bequests of the children. For example, most parents stipulated that the surviving spouse should not give their offspring their bequest until the age of majority or at a certain age, upon marriage, entering a monastery, attaining an honorable office or upon ordination to the priesthood.[99] Parents could specify that, in case a child died before receiving its share, that bequest would remain with the surviving spouse.[100] Other parents left a bequest to their son or daughter only on condition that the child married with the consent of the surviving spouse.[101] Finally, the first-dying parent could extend his or her authority beyond the grave, by including a penalty clause, which hopefully would prevent the offspring from attempting to challenge the will.[102]

All of these provisions had the same goal: to protect the surviving spouse from the claims of the children. In doing so, the parents did not infringe the interests of the children, but only tried to keep their assets together as much as possible in order to leave the surviving partner with sufficient resources. Measures were taken to preserve the conjugal pair, as parents had an arsenal of testamentary clauses to ensure that the surviving partner was taking care of. This provided a solid material basis for the well-being of the widowed spouse. Spousal wills were thus used as long-term strategy for old age planning. The independent management of the household took precedence over the desire to preserve and maintain important family goods.

96 More about this technique: Monballyu, Geschiedenis, 99.

97 For example: FAA, N, no. 2071, 25 February 1542, fol. 44r-44v.

98 This is also suggested by De Moor and van Zanden, 'Girl power', 9-10.

99 For example: CAA, N, no. 2703, without date 1588, fol. 253r-255r.

100 For example: CAA, N, no. 2071, 1 Mars 1542, fol. 47r-48v.

101 For example: CAA, N, no. 2072, 1 August 1545, fol. 130r-131v.

102 For example: CAA, N, no. 2703, 28 Mars 1585, fol. 43v-45v.

XII. Conclusion

This article ends with what it started with, namely the notarial will of Cornelie and Wijnant. This married couple living in sixteenth-century Antwerp opted for a spousal will to pursue as many marital rights as possible. Like many other couples in Antwerp, Cornelie and Wijnant chose to put the interests of the conjugal pair over those of the extended family. Their aim was to keep the marital estate in the hands of the longest-living spouse. Spouses relied on each other for the proper management of their possessions after their death. Moreover, the couple wanted to protect the longest-living spouse from the children in case those would not give enough resources to the surviving parent. The main concern of the couples was to maintain and preserve the marital economy, to which both spouses were expected to contribute. The Antwerp couple therefore formed the most important socio-economic unit, not the (extended) family.

Antwerp notarial wills indicate that the conjugal strategy survived, and was even reinforced within the commercial environment. The growing commercialized urban economy was probably the incentive for couples to pursue the conjugal strategy through a contract. Consequently, Antwerp's urban law adapted to this evolution. During the first half of the sixteenth century, urban law reflected the needs of society, and was adjusted where necessary as circumstances and needs changed. Through legal practice, new interpretations were gradually introduced in the legal compilations, in order to adapt to socio-economic realities. However, from 1560s-1570s onwards the legal codes no longer took the needs of society into account.

The Antwerp urban law and the notarial wills together provide a comprehensive picture of the early modern balance of power between the conjugal pair and the kinship. These findings invite to a re-evaluation of the traditional (legal) historiography, as they are not consistent with the shift towards a patrilineal strategy and consequently, the general assumption of women's declining legal position during the late Middle Ages and early modern period. Choosing this case study in sixteenth-century Antwerp enabled us to better understand the divergent impact on gender, the marital union and the lineal family. However, much more research is needed, as this contribution calls for further comparative research to thoroughly study and evaluate how (legal) changes within the context of different economic structures and trajectories determined women's activities in different regions and cities.

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Male offenders and convicted females – Sexual crimes and infanticide in Norway during the 17th and 18th century.

Siri Elisabeth Bernssen

Sexuality and reproduction have across time periods and cultures been subject to extensive social and legal regulation. This paper will discuss how the legal regulation of sexuality in Norway during the 17th and 18th century resulted in serious consequences for women in particular. The paper takes as its point of departure the 1687 Code of Christian V and studies of local Norwegian court records. The discussion is structured in two main sections. The first section provides a brief outline of the historical legal and cultural points of departure regarding regulation of sexuality. The second section addresses a severe issue connected to sexual regulations, namely secret births and infanticide. While the initial section discusses the legal position in 17th and 18th century Norway on a more general level, the discussion of infanticide will draw on a study of court records from three local jurisdictions in rural Western Norway.

Sexuality and reproduction are central aspects of human interaction and have across time periods and cultures been subject to extensive social and legal regulation.[1] Improper suitors, rapists, prostitutes, and sodomites have, each in their own ways, been regarded as threats to family, religion, society, and individuals, and they have been sanctioned accordingly. This paper addresses a type of penal provisions that were prevalent in the Dano-Norwegian Realm during the 17th and 18th century, but of which we hardly have any examples in modern Western legal cultures. These penal provisions presume consensual sexual relations between two adults. More specifically, this paper will discuss how the legal regulation of sexuality resulted in serious social and legal consequences for women in particular.

The examination of the regulation and legal practice of sexual regulation in this period is based in the 1687 Code of Christian V and local Norwegian court records. The discussion is structured in two main sections. The first section provides a brief overview of the legal and cultural points of departure. It outlines the system of government in the Dano-Norwegian Realm in the 17th and 18th centuries, and its sexual regulation in force,[2] and shows how the formulation of the sexual legislation, while apparently primarily targe-

1 The word and the concept of 'sexuality' were not introduced until later in time (See e.g., Foucault 1976). This modern concept is used here for reasons of brevity

2 The 18th century sexual regulation in Denmark has been thoroughly accounted for in e.g., Koefoed 2008.

ting men, in practice came to predominantly affect women. The second section addresses another severe issue connected to the sexual regulations, namely secret births and infanticide. The discussion of infanticide will draw on a study of District Court records from three local jurisdictions in rural Western Norway: Nordhordland, Sunnhordland, and Hardanger between 1642 and 1799.[3]

I. Male offenders and convicted females – legal and cultural context

1. Male offenders: Dano-Norwegian Law and sexual regulations after the 1687 Norwegian Code of Christian V

In order to understand how the penal regulations affected Norwegian women, a brief outline of the general legal position in 17th and 18th century Norway is necessary. In the period from 1380 to 1814, Norway was subject to Danish rule.[4] Notwithstanding, the ancient Norwegian Code of the Realm of 1274 was to a great extent respected and enforced on Norwegian territory. King Christian IV confirmed this by re-publishing this Code with only minor changes as late as in 1604.[5] In this new edition, the archaic legal Norse language in the original version was translated to Danish, and the printed edition replaced a range of unauthorized translations which had circulated in the 16th century. In addition to this Code – known as Christian IV's Norwegian Code of 1604 – Norwegian Law consisted of an array of legal acts issued by the central administration in Copenhagen.[6]

What had initially been an equal union between Norway and Denmark had over time developed into a situation where Norway increasingly lost sovereignty.[7] In 1661, Frederick III established absolute monarchy. In the wake of this reform, a new Danish Code of Law was put in place in 1683. Some years later, this new Code was issued in a Norwegian edition: Norwegian Code of Christian V of 1687.[8] The Norwegian and the Danish Codes of Law were virtually identical, with the exception of certain aspects of the property law. The preamble states that this Code was comprehensive, and that it was to replace all former law.[9] In spite of this assertion, it turned out that this Code too was in need of amendments, and in the period from 1687 until the dissolution of the Dano-Norwegian Realm

3 The section on infanticide builds on studies conducted in relation to the author's M.A. thesis, Bernssen 2017a, further addressed in the Norwegian historical journal Heimen, 2018.

4 See e.g., Bagge/Mykland 1987

5 Sunde 2005 p. 177

6 Inter alia ordinances, rescripts, open letters and placates.

7 The Norwegian Council of The Kingdom was abolished in 1536, and during the 17th century, the positions of power were gradually taken over by Danish nobility. See, Sunde 2005 p. 177.

8 The English translation of the Danish Code from 1756 – for the use of the English inhabitants of the Danish settlements in America – has been used as reference for translations of the Norwegian Code (NC). While there are some minor differences between these two documents, the content and phrasing largely correspond.

9 Preamble to NC p. 13

in 1814, more than 4500 legal acts were added.[10] The criminal law in this Code were largely in force until the passing of the Criminal Code of 1842, and it was only when the General Civil Penal Code of 1902 was passed that it was formally nullified.

The Norwegian Code of Christian V is structured thematically and divided into six Books which are in turn divided into Chapters. The rules on sexual violations are cited in Book 6 of criminal cases, under Chapter 13 of Lewdness. The punishable acts encompassed by The Norwegian Code of Christian V can be categorized as adultery (intercourse where one or both parties is/are married or engaged to someone else); incest (intercourse between persons related by blood or by law); sodomy (intercourse between same-sex person or between persons and animals); bigamy and rape.[11] The Dano-Norwegian legislation furthermore included the explicit criminalization of fornication, i.e., intercourse between two unmarried persons. While other European countries primarily viewed fornication as a sinful act to be handled by the Church, the Nordic State-Church model meant that these kinds of sexual violations were encompassed by the general legal system.[12]

Although the categorization of sexual violations may give the impression that the legislation was gender neutral, closer inspection reveals that this was not the case. Among the Articles in the Chapter of Lewdness, more than half of the rules exclusively targeted men, such as men who engaged in sexual intercourse with women under his guardianship; men who had sexual intercourse with several women; men who abducted a woman; and men who entered a brothel.[13] Additionally, the penal provision of rape presumed a male perpetrator, and the provision on sodomy in practice only applied to men.[14] In contrast, only four provisions applied exclusively to women: two provisions on false testimonies;[15] one rule on penalties for prostitution;[16] and a special law on "a daughter or widow of a person of rank" who "permits herself to be defiled."[17] Although the penalties for adultery, bigamy, and incest were equal for both genders, the general penalty was more severe for men than it was for women: Article 1 states that in cases of fornication, the fine for the man would be "24 lodges of silver," and "the woman half as much." In addition, the punishment included a public penance in Church, which will be addressed below. In the case that the couple married, the fine would be reduced to 9 lodges for the man and half of this for the woman, and no public penance would be required.

Based on the provisions of penalty in the Norwegian Code of Christian V, the man appears to be considered the primary perpetrator in sexual violations.[18] Legal scholar Chri-

10 See Sunde 2007 p. 66.

11 See e.g., the categorization in Telste 1993 p. 53

12 Sandvik 2006 p. 142

13 NC Book 6 Ch. 13 Art. 2, 8, 9, 22 and 31.

14 See Brorson 1797 p. 283-285.

15 NC Book 6 Ch. 13 Art. 6 and 27

16 NC Book 6 Ch. 13 Art. 31

17 NC Book 6. Ch. 13 Art. 10.

18 Note, however, that Koefoed argues that the legislator had an intention of equality. p. 102-103.

stian Brorson emphasised two main points as explanations for the gender difference in fines for fornication in his legal comments from 1797. The first point is based on the premise that "the woman's innate modesty must convince any and all that she is not the seducing party."[19] Second, he refers to the consequences of the misconduct itself: that the woman would lose her respectability and any hope of a happy marriage, and that the burden of bringing up the child would fall upon her.[20]

According to Brorson, the presumption that the man was the initiating party in combination with the social repercussions that sexual relations outside of wedlock would have on behalf of the woman, are the most important reasons why the legislator targeted men in particular.[21] However, as will become clear below, this intention was not realized in practice.

2. Female convicts: The displacement of responsibility in legislation and in practice

While we have seen in the above that men appeared to be the primary subject of sexual regulations, it is clear from both legislation and in legal practice through the 17th century and the beginning of the 18th century that women were increasingly held accountable for sexual relations. As for legislation, we find indications of this in an ordinance of fornication dated October 12th, 1617. Although provisions had also previously targeted women, it was only with this ordinance that a general fine was established for women who gave birth outside of wedlock.[22] Yet, a former rule that women who became pregnant under the promise of marriage could demand marriage or a form of compensation from the father was maintained and continued in the Norwegian Code of 1687.[23] Notwithstanding, the latter period of the 17th century saw a gradual decrease in the number of such cases in court, and the right to demand marriage was eventually revoked by a 1734 ordinance.[24] Moreover, soldiers were exempt from the penalty for fornication from 1671. This provision was, however, modified several times. An ordinance from 1696 stated that this exemption only applied for first time offences, and exclusively for soldiers who were already enrolled in the armed forces at the time of the offence.[25] At the start of the 18th century, approximately half of all Norwegian men at the ages between 20 and 30 are estimated to have been enrolled in the armed forces, meaning that quite a few fathers would have been able to avoid the legal consequences of fornication.[26]

19 Brorson 1797 p. 286 (my translation).

20 Brorson 1797 p. 286

21 Koefoed also emphasises the gender discrepancy in income as motivation for targeting men, see Koefoed 2008 p. 103.

22 Telste 1993 p. 63.

23 Telste 1993 p. 94-95. Whether this should be seen as a social or a legal duty can, however, be discussed. See

Koefoed 2008 p. 41

24 Ordinance of March 15th, 1734. See also Telste 1993 p. 139 and Hedegaard 1779.

25 Telste p. 92.

26 Sandvik 2006 p. 143.

Also in the legal practice there are signs of displacement of responsibility as women were to an increasing extent prosecuted. A study of court records from District Courts in the jurisdiction of Ringerike and Hallingdal shows that the convicted women in cases of lewdness outnumbered convicted men as early as in the 1670s, and that this discrepancy continued to expand in later years.[27] We recognize the same tendency in the numbers of public penances through the 18th century. Public penance was a clerical arrangement for those who had committed severe moral violations to earn back the right to go to Communion and receive sacrament, and it required the perpetrator to confess the crime to the priest and the congregation.[28] As mentioned above, this public confession was included in the legislation of fornication in the Norwegian Code. Although the relative distribution between genders varies in different geographical jurisdictions in Norway, several studies show that women performed the majority of such public penances throughout the 18th century.[29] An examination of the church registers in a Christiania church between the years 1731-1742, for instance, revealed that as few as 7% of fathers of baptised children born out of wedlock performed public penance, while virtually all of the mothers did. [30]

There are probably several reasons why women were increasingly held accountable for lewdness. One such reason pertains to societal attitude. For instance, it has been pointed out that changes in the legislation caused changes in fathers' attitudes; fathers were less likely to stand forth and take responsibility when the law opened for their extrication.[31] Another change in attitudes emerges from the first Danish publication on Natural Law: Ludvig Holberg's The Core of Morality or Introduction to Natural and International Law from 1716.[32] In this work, unmarried women were portrayed as potential seductresses who could cause harm for the State as well as for the societal stability.[33] The following paragraphs will turn the focus towards how not only the societal attitudes, but also the Law itself contributed to the gender discrepancy in the responsibility for sexual violations.

The first and most obvious aspect to be mentioned in this regard, is that the risk of exposure was far greater for women than it was for men. The main reason for this is that the misconduct itself was rarely sanctioned; penalties were rather directed towards the pregnancies resulting from sexual relations. An ordinance from November 30th, 1759, specifies that fornication was punishable solely in cases where it resulted in pregnancy.[34] As it was necessarily the women who carried the physical evidence of sexual relations, it followed that they were the most accessible for prosecution.

27 Telste 1993 p. 97.

28 Koefoed 2008 p.96.

29 Hoff 1996 p.97

30 Sogner 1990 p.116 citing. Hoff 1996 p. 97

31 Telste 1993 p. 139.

32 Also, this was the second legal work of significance published in Danish. Christen O. Veile published his Glossarium juridicum Danico-Norwegicum around 1650.

33 Aune 1994 p. 54

34 Brorson also states that 'lie with' [beligge] in the legislation should be equated with 'impregnate' [besvangre]. See e.g., Brorson 1997 p. 320.

Second, the woman would normally be the only person to know with any certainty who the father was, and she could have various motivations for withholding this information. As evidence in these cases most often relied on the accounts of the involved parties, the man had ample opportunities to avoid liability. As a result, women were often coerced into silence. Notwithstanding, it is not unthinkable that women might have stayed silent on their own accord in order to protect the father from legal and societal repercussions.[35]

Third, in cases of adultery or incest, the different penal provisions in themselves carried an incentive to conceal the identity of the father. If it were revealed that the father was related to the mother through blood or law, or that he was married, this would constitute an aggravating circumstance not only for the man, but also for the woman. Incest in close relations, e.g., between stepfather and stepdaughter, was punishable by death.[36] In such cases, it would doubtlessly be in the woman's best interest to conceal the identity of the father and conjure up a different explanation for her pregnancy. In a case from 1708, for example, Siri Andersdatter upon baptising her child, declared that the father was a soldier. Only in the subsequent trial was the explanation, for reasons unknown, changed, and the father identified as a married man.[37] It is likely that this story represents a failed attempt to reduce the severity of the repercussions for the illegal intercourse.

Court records from District Courts in Western Norway also illustrate how coercion from the father and others led to the fabrication of stories of procreation, and that the woman was the sole party to be punished. One rather extraordinary example of this may be found in a case of infanticide from 1705: The woman on trial had, upon two young girls discovering her new-born twins, proclaimed that they were 'imps'.[38] During the trial, it was revealed that the father was the son on the farm where the woman was hired help, and that his mother had coerced her into concealing the pregnancy and the birth.[39] In a 1730 case in Western Norway, the maid Borni Joensdatter had birthed a child outside of wedlock, and first explained that the father was a traveller whom she had met on only one occasion. After several interrogations, however, she finally admitted that the father of the child was her cousin, and that it was he who had conjured up, and demanded that she would stick to, the first version of the story. Upon being confronted in court, the cousin denied having any part in the procreation, and he was acquitted.[40] It is worth adding that this outcome not only benefited the cousin, but also Borni, as she thereby would not be punished for incest.[41]

35 It is worth mentioning that some fathers likely paid another man to claim paternity. See Koefoed 2008 p.41.

36 NC Book 6. Ch. 13 Art. 13-14

37 Bratland 2002 p. 62. (not peer reviewed)

38 I.e., mythical creatures [trollunger]

39 State Archive in Bergen (SAB): Court records Sunnhordland I.A. 27 (1705) fp. 53-57b, 76-78b,

40 State Archive in Bergen (SAB): Court records Nordhordland I.A. 38 (1728-31) fp.139-142

41 Yet, note that this example is taken from a case of infanticide, meaning that the sexual misconduct of Borni was not treated independently.

Silence tended to be in the interest of women also in cases of rape: The Norwegian Code stated specific rules of evidence for accusations of rape and attempted rape. For accusations of attempted rape, the law required testimonies that the women had been heard calling out, or that she could demonstrate "marks of violence on her body or clothes."[42] For accusations of rape, the law required that the woman, once safe, must report the incident to neighbours, congregations, and at the local court assembly. If she failed to do so immediately, and said nothing until she e.g., discovered that she was pregnant, one was not to believe that the intercourse had been involuntary. Women accusing a man of rape without providing sufficient proof, could be fined for defamation.[43] Additionally, false accusations of rape meant – until the law was revoked in 1734 – that the woman lost her right to demand marriage and/or compensation from the father. If a woman had been raped, but did not have external testimonies or physical evidence, she thus risked punishment herself by making such accusations. In cases where a rape had been committed under threats and coercion rather than with violence, the woman's position was a weak one. This issue may be illustrated by a case derived from the court records in Nordhordaland in Western Norway: In 1718, Ingeborg Pedersdatter was charged with birthing a child outside of wedlock. Upon being questioned about the identity of the father, she stated that he was a Swedish convict named Joseph. He had threatened her at knifepoint and raped her twice as she was working alone in the fields. When asked why she had not told anyone about the rapes immediately, she stated as the reason her own foolishness. In keeping with the law, the court disregarded the accusation, and assumed that the intercourse had been voluntary. Ingeborg was fined for fornication. Examination of retained District Court records from Western Norway between 1642 and 1799, shows that rape accusations such as the one reported by Ingeborg, were far from common. During this period, we find only a handful cases involving rape, and none of these accusations were taken into consideration. It thus appears that not a single man was convicted for rape in these jurisdictions in the scope of one and a half century. [44] It is not unlikely that any rape victim in this period would consider the likelihood of prevailing in court so slim that they refrained from reporting the incident at all.[45]

Despite the apparent intention in the penal property of the Norwegian Code of Christian V, that men and women should not merely be equal before the law, but that the men should be punished more severely than the women, legal practise shows that the opposite was most often the case; women were convicted; men were acquitted. This was, as shown above, not uncommonly due to the women themselves, who, either out of loyalty or out of self-interest, or under great pressure from the baby's father or from others, chose to remain silent about the identity of the father. Regardless of the motivation for shouldering the punishment alone, the fact is that it was mostly the women who were

42 NC Book. 6 Ch. 13 Art. 18.

43 See Brorson 1997 p. 351.

44 Note that due to the nature of the source material, the examination is not comprehensive. For an extensive account, see Bernssen 2017a pp. 104-105. (not peer reviewed)

45 Conversely, in Sweden, where men were still presumed to be the active party in sexual relations, we find a number trials and convictions for rape in the 17th and 18th century. See Jansson, 2002.

subjected to the most severe repercussions for illegal sexual relations. In addition to fines and public penance, they lost their social standing and were left with the responsibility for bringing up the child. Taken together, these consequences in all likelihood strongly contributed to another crime that primarily involved women, namely secret births and infanticide.

II. Infanticide in Western Norway

The discussion of infanticide in this section draws on a study of District Court records from three local jurisdictions in rural Western Norway: Nordhordland, Sunnhordland, and Hardanger, between 1642 and 1799.[46] The geographical limitation in combination with the broad time span of these court records make it possible to single out representative personal narratives while maintaining a contextualised historical perspective.

1. Sexual regulations as incentive to infanticide

Infanticide and secret births are not particular to the Norwegian context. Different studies from around Europe show that it was a widespread problem that unmarried women – often young and socially deprived – chose to conceal pregnancy and birth.[47] After giving birth, these women would hide the body of the naturally deceased or murdered child as well as they could. If discovered, many would claim that the child had been stillborn and that this was the reason why they had tried to hide it.

The social and economic consequences of birthing an illegitimate child was a strong incentive for 17th and 18th century European women to keep such pregnancies secret.[48] As mentioned above, the Dano-Norwegian Realm issued several new legal acts during the 17th century regulating sexual relations outside of marriage. It is safe to assume that the secular penal provisions for fornication presented yet another reason for hiding such relations, and for taking the life of illegitimate children.

When infanticide was acknowledged as an increasing problem in the Dano-Norwegian Realm, several measures were initiated. A new regulation which may be seen in direct relation to the 1619 gender-equal penal provisions for fornication, is an ordinance from 1635.[49] Not only did this ordinance make infanticide an independent penal category distinguished from homicide; it also equated secret childbirth with murder. If a "lewd" woman gave birth "remote from Help and Witness," and her child did not survive, then this was punishable in the same vein as if the woman had intentionally murdered the child.[50]

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46 The section on infanticide builds on studies conducted in relation to the author's M.A. thesis, Bernssen 2017a, further addressed in the Norwegian historical journal Heimen, 2018.

47 E.g., Wächtershäuser 1973; Gowing 1997; Langer 1974; Levin 1986; Rizzo 2004; and Nielsen 1980.

48 See e.g., Gowing 1997 p. 88

49 Ordinance of March 31st, 1635; see Nielsen 1980 p. 3–6

50 King Christian IV's recess of 1643 Articles 2-5-1, continued with slightly modified wording in NC Book 6 Ch. 13 Art. 8.

The punishment for "secret births" was in the Norwegian Code of 1687 decapitation, and the woman's severed head should be placed on a spike on the execution site.[51]

Secret pregnancy and birth could thus have fatal consequences for the woman. Yet, studies of court records from the 17th and 18th century show that many women chose to take the risk of death penalty rather than revealing to their surroundings that they were pregnant. Examination of District Court records from reveals 43 trials where women were suspected of infanticide in these jurisdictions between 1642 and 1799.[52]

With the exception of a few adjustments pertaining to the method of execution, the law on infanticide remained unchanged for the entirety of this period. In legal practice and theory, a softer approach to punishment can be noted, particularly from the 1770s. The turn towards a more humane criminal law occurred in parallel with changes in the conditions and treatment of women who gave birth outside of wedlock, through e.g., an ordinance of alimony on behalf of the father. [53] Yet, the law-centred methodology where legal acts from the king were the only legitimate source of law meant that the legal framework for cases of infanticide was the same during the examined period. [54] Considering the relatively broad time scope of the source material – more than 150 years – there is a striking resemblance between the cases of infanticide when it comes to motive, physical and social circumstances, and the course of events. Therefore, the material examined in this article does not only provide insight into the historical development of sexual regulation, but also documents infanticide as a social phenomenon in a coherent legal context across a broad timespan. The following section will address the social and legal factors that, based on these court records, can be said to have motivated infanticide, and discuss how the legal system dealt with women and men in the subsequent trials.

2. From mother to murderer – What made a woman commit infanticide?

In the 17th and 18th century, women's societal role was generally defined by her relation to a man – as father, husband, or as employer. The man of the household was the head of the household above wife, children, and servants, and he was the point of contact between the private household and public life.[55] The woman's social standing was thus tightly connected to her male guardian. In the court records, this is also visible in that while men were referred to by their occupation: farmer, soldier, or sailor, women were largely denoted on the basis of their social standing via a man: as daughter, wife, widow, or maid in their respective households.

51 NC Book. 6. Ch. 13 Art. 7.

52 Note that not all of these women were actually convicted for infanticide. Also note that due to the nature of the source material, the examination is not comprehensive. For an extensive account of the selection of source material, see Bernssen 2017a pp. 11-22. (not peer reviewed)

53 Ordinance October 18th, 1763

54 See Sunde 2005, s. 278.

55 Sogner 1990 p. 68.

As a first observation, out of the 43 defendants, 42 were unmarried.[56] This corresponds to the legislator's presumption that infanticide was generally committed as an attempt to avoid the consequences of disclosed sexual relations outside wedlock.[57] Although it is not unthinkable that in certain cases it was suspected that procreation had occurred through affairs and adultery, for married women, the presumption that the husband was the father of the child would limit the sanctions against the mother and the child. Hence, it was less crucial for the married woman to keep the pregnancy secret. The only married woman in the material was 26-year-old Elen Marie Olsdatter. Despite of her married status, her husband had been away for so long that it was clear that the child had to have been conceived through adultery.[58] Based on this material, central driving forces for infanticide were that the pregnancy lacked legitimate circumstances, and that the women risked legal penalties and social repercussions by revealing it.

The women on trial for infanticide thus did not have the protection of a marriage within which to go through with the pregnancy. Further to this point, there is reason to question whether other social frameworks and the woman's relationship to male guardians placed her in a more or less vulnerable position in cases of pregnancy outside of wedlock. Closer examination of the material in terms of the women's positions in the household strongly indicates that this was indeed the case. 29 of the women, i.e., close to 70%, are recorded as holding a position as maid. As will become clear below, these women seem to have less of a solid social network in their immediate surroundings, a circumstance which made them all the more exposed to social and legal repercussions in cases of pregnancy outside of wedlock. Out of the women who presumably held a stronger position within a household, we find five unmarried daughters living on their home farms, and two younger women denoted as foster children. In addition to the already mentioned married woman Elen Marie Olsdatter, we find two widows, two sisters-in-law of the man of the household at their respective farms, and finally, one woman whose position is unknown.[59] The number of maids among the suspects of infanticide can be connected to different aspects. First of all, the majority of maids in the numbers of women having a child out of wedlock may be explained based on the Norwegian societal organisation. As opposed to the feudal societies elsewhere in Europe, Norwegian servants were not a distinct social class. It was very common for young women and men from smaller farms to serve for a time until they had the opportunity to get married and set up a household for themselves.[60] For this reason, a great many of the women of childbearing age were in service. Secondly, it is not unlikely that daughters and other female family members were more thoroughly controlled than were servants who had been taken in. For instance, the family of the household slept in the main house, while both male and

56 This information is often only implicitly stated in court records.

57 See also Bernssen 2017a pp. 60-62. (not peer reviewed)

58 State Archive in Bergen (SAB): Court records Nordhordland I.A. 41(1743-48) fp. 173b-177.

59 See Bernssen 2018 p.66.

60 Sogner 2003 p. 42.

female servants often slept together in the barn loft.[61] Compared to maids, then, women who lived at home would typically have somewhat slighter possibilities for engaging in covert sexual relations.

The above-mentioned circumstances indicate that the likelihood of getting pregnant outside of wedlock were greater for maids than it was for women living at home. When it comes to cases of infanticide, it is also worth noting that maids to a lesser degree could expect support and aid from their immediate relations than could the women living at home. This first of all applied to the possibility of providing for themselves and the child, which was complicated insofar as the woman was financially dependent on her position as maid. Additionally, women from more affluent families were in a position to limit the consequences of unwanted pregnancy, e.g., through a shotgun wedding or by sending the woman away to give birth in secrecy. We find examples of this in a case of infanticide from 1705, where the woman, Sille Knudsdatter, who lived at home, had a father of high military rank. In this case, her parents knew that she was pregnant, and they assisted in hiding the pregnancy while concocting a plan for a wedding to take place between Sille and the Dutch sailor who was the child's father. However, the birth occurred sooner than expected, and Sille delivered before the marriage could be arranged.[62]

The women's social position thus seems to have been an important factor deciding whether they chose to hide pregnancy and birth. Their role in the household furthermore seems to have been connected to yet another factor influencing the proceedings, namely the risk that the infanticide would be revealed. While a maid would typically have to shoulder the burden of secrecy on their own, the trials involving women of a stronger position in the household indicate that they had far better conditions for hiding their pregnancy, as well as the birth and the body of the deceased child. We find clear examples of this in cases where the women gave birth at their home farm. In two cases from respectively Nordhordland in 1687 and Sunnhordland in 1789, it is evident that the women were assisted by their mothers.[63] Not only did the mothers help during the delivery itself – they also played an essential role in hiding the allegedly stillborn child. In the former example, the mother of the accused woman had placed the child in a sealed wooden box, and the body was only discovered by the Bailiff a month later, based on a rumour circulating in the local community. In the latter example, from 1789, the women's mother first hid the child in the kitchen bench, before the birthing woman's father hid it in a shed. Both of these cases seem to have been revealed due to rumours about the pregnancies circulating in the local communities, which in turn led to closer inspection. We may therefore assume that such cases, where the head of the household did not immediately report the birth but rather had a certain interest in concealing the crime, increased the probability that it would never be discovered.

61 See e.g., Sogner 2003 p.184.

62 State Archive in Bergen (SAB): Court records Sunnhordland I.A. 27 (1705) fp. 22b.

63 State Archive in Bergen (SAB): Court records Nordhordland I.A.22 (1685-87) fp. 70-72, 73-74b, court records Sunnhordland I.A. 43 (1787-92) 170-182.Note that in the latter case, the indicted woman was a maid who was only at home on a temporary visit.

Turning to the case of the married woman and the case involving a widow, we again note that it seems that these women had better possibilities for hiding the pregnancy and the birth than did most of the maids.[64] The widow gave birth in her private chamber and hid the child's body in the hay barn, while the married woman lived alone. As these two women were the heads of their own households, it is likely that they were relatively free to choose their own chores as well as their close companions. Hence, they had better preconditions for secrecy, and their behaviour was less likely to raise suspicion in the community. From the records, it is apparent that these two births were discovered more or less coincidentally: The widow was exposed because a group of children came upon the dead child as they were playing in the hay barn, while the married woman was so weakened after the birth that her neighbours became suspicious.

The maids convicted for infanticide had been exposed quite immediately, due to the sudden sickness and/or because they had not been in a condition to hide the child's body properly. In the above-mentioned cases, we saw that the women to a greater extent succeeded in concealing the births, and that it was apparently coincidences that led to their exposure. This observation gives cause for questioning whether the distribution of infanticide between maids and women living alone as it appears in the court records is really representative, or whether women living at home were more susceptible to get away with the crime.

3. The father – a distant figure or partner in crime?

The question to be addressed in this section is the issue of the role played by the child's father in the cases that resulted in infanticide. Out of the 43 accused women, 37 were proven to have given birth, which means that an equal number of men would in one way or another have been complicit in the suspected crime.[65] As noted above, a succeeding wedding would relieve some of the more severe repercussions for pregnancy outside of wedlock. To the extent that the father was aware of the pregnancy, and free to marry, a more active involvement on their part would likely have been able to forestall many of these hidden births. We have seen that the women were normally socially as well as economically dependent on a male guardian, and in the following, the discussion will revolve around how the child's father's position and conduct directly or indirectly affected the women's choice to keep pregnancy and birth hidden.

The court records from Western Norway show that the children's fathers had different occupations: Farmers, soldiers and officers, servants, sailors, and a craftsman are represented. Recalling that the man's social standing was largely determined by his occupation, and as will be elaborated upon below, there were great disparities between these men's social and economic preconditions for limiting the consequences of an unwanted pregnancy.

64 State Archive in Bergen (SAB): Court records Nordhordland I.A. 12 (1671) fp. 42b-43, Court records Nordhordland I.A. 41 (1743-48) fp. 173b-177.

65 The remaining cases were matters of false confessions and unproven accusations.

There is also variation in the relationships between the child's father and mother at the time of conception. Several of the sexual relations that precluded the infanticides appear to have been of a rather brief and casual nature. Only six of the cases show signs of the parents being engaged or otherwise romantically involved. There is also variation in the extent to which these romantic relations were public or based on a more private mutual understanding, and the court records are at times vague about these circumstances. Whatever the case may be, it is clear that for different reasons, a wedding had not been performed prior to the birth. As a first observation, this appears to have been largely rooted in practical circumstances, e.g., if the couple were both in service in different places and did not have the option to set up their own household at the time. Secondly, the records show that the women's conduct may have affected the men's opportunity to take responsibility, e.g., in cases where the mother never informed the father of the pregnancy at all.[66] In one particularly dramatic case where the child's mother upon being directly confronted by the father denied pregnancy and proceeded to cut the child's throat immediately after delivering, the father stated that he had by no means wanted the child to be kept a secret, but that he would have wanted it to live and to marry the mother.[67] Thirdly, the records show that several of the unmarried men who had impregnated women with or without the promise of a future marriage, remained more or less passive when informed about the pregnancy, or to a various degree coerced the women to hide the pregnancy. One example of this can be found in a case from 1712, where the boyfriend was the only person to know about the pregnancy. When the woman a few weeks before the expected delivery told him that she no longer felt signs of life, he asked her to keep the situation a secret as long as possible. Thus, she gave birth alone, and hid the child's body for 3-4 days before she was eventually exposed.[68]

Considering that relatively few of the pregnancies appear to have been a result of romantic relations and promises of marriage between the involved parties, one might speculate whether these pregnancies may have rather been a result of the opposite kind of sexual intercourse, namely rape or sexual abuse. A more general study of infanticide in Europe emphasises the sexual exploitation of servants and maids on behalf of the upper classes. Such sexual abuse from members of the upper classes was regarded as an "inevitable aspect of lower-class life," and in these cases, the women were often ostracised by their masters as well as by their families and left to fend for themselves.[69]

At first glance, it might appear as though this was the case in several of the Western Norway cases in the material studied in this paper. As many as 13 of the cases report as the father the head of the household in which the women worked, or his son. Any immediate assumption of abuse of power should, however, be checked and nuanced. The class divide in rural Western Norway was not pronounced. As already mentioned, it was qui-

66 E.g., State Archive in Bergen (SAB): Court records Nordhordland I.A. 27 (1699-1701) fp. 34-35b, 55-55b.

67 State Archive in Bergen (SAB): Court records Sunnhordland I.A. 43 (1787-92) fp. 35b-41.

68 State Archive in Bergen (SAB): Court records Hardanger, Voss and Lysekloster I.Ad. 7 (1711-13) fp. 76 – 79

69 Langer 1974 p. 357.

te common to spend some time in service before setting up a household of one's own. Hence, the class-divide between servants and masters in terms of background and social circumstances was far smaller than the equivalent situation in Europe at large. As the power balance was more equal, sexual exploitation in its purest sense seems to be less common.[70] This point is supported by the court records themselves, as they do not give the impression that the intercourse would have been involuntary. Two cases report on a married husband eloping with a maid.[71] In a third case, the woman disclosed the dead child to the father who was the head of the household, and it is cited that they, both crying, went into the living room to confess to the rest of the household what had occurred.[72] Although a few cases are to be found where the sexual intercourse appears as a matter of abuse of power, pregnancies involving the head of the household in the main appear to be a result of relatively equal romantic relationships. The decisive factor motivating infanticide in these cases appears to be connected to incest and/or adultery.

These factors also largely look to have been a concurrent factor for hiding the pregnancy: Records show that a total of 17 out of the 37 reported fathers were married to someone else than the woman charged with infanticide. We recall that the marital status could cause complications and more severe penalties for the involved parties – a circumstance which constituted a further incentive to hide pregnancy and birth. It is also worth noting that the father exercised more coercion, and also took a more active role in the secrecy itself, in the cases of adultery or incest where he had a higher risk of severe repercussions. A case from 1753 involves both: the woman was the sister of the husband's deceased wife, and in addition he had already married another woman. Records show that the father in this case took a very active role in concealing both the birth and the child. For instance, he instructed the woman on several occasions about how she should act in order to avoid suspicion of the pregnancy and birth among the household members. He was also the one who handled the dead child by hiding it in a sealed chest for 18 months before it was eventually discovered.[73] In a similar case where the child's father was married to the woman's cousin, he had at some point provided an abortion potion which the woman had both ingested and rubbed on her knees.[74] In a third case, where the child's father was a married subordinated officer, he himself went and got the child from the women and buried it at a cemetery in the vicinity.[75]

From this it is clear that there has been variation in the degree to which fathers were involved in the course of events that resulted in hidden pregnancy, secret births, and po-

70 This conclusion corresponds to the conclusion of Østebø 2005 pp. 45–46. (not peer reviewed)

71 State Archive in Bergen (SAB): Court records Sunnhordland I.A. 35 (1741-46) fp. 24b-26b, Court records Hardanger, Voss and Lysekloster I.Ad. 14 (1734-1737) fp. 200a-201b, 206-207. In the latter case, the couple were alone in the mountains for the birth, where they discussed the possibilities of eloping and even suicide before they eventually agreed to turn themselves in.

72 State Archive in Bergen (SAB): Court records Nordhordland I.A. 34 (1715-19): fp. 156b-157b, 162-163b.

73 State Archive in Bergen (SAB): Court records Nordhordland I.A. 42 1748-53) fp. 318b-321b.

74 State Archive in Bergen (SAB): Court records Sunnhordland I.A. 40 (1772-77) fp. 164b-166. However, the court based their decision on the ineffectiveness of this potion.

75 State Archive in Bergen (SAB): Court records Nordhordland I.A. 44 (1760-68) fs. 233-235, 236-236b.

tentially infanticide. The following sections will turn the focus towards how the father's knowledge, passivity, degree of coercion, and direct complicity affected the subsequent trials.

4. Men and women in court

What stance did the court take towards men and women who were involved in cases of infanticide? In the 17th and early 18th century, we find that the women who were found guilty of hiding pregnancy and birth almost without exception were sentenced to death in District Courts.[76] This sentence was passed regardless of whether the women had been coerced into hiding the pregnancy; whether the child had been stillborn or murdered; and whether close family members had been present at the birth. The objective rule that hidden pregnancy and births should be regarded as infanticide if the child did not survive, was thus strictly enforced until the 1770s. In cases tried in the latter decades of the 18th century, practise had changed, and the women received the death sentence only in the cases where they were proven to have murdered the child – the rest got away in workhouses. [77]

When it comes to the child's father, though, a slightly different picture emerges. As mentioned above, 37 of the women on trial were proven to have given birth.[78] In all of these cases, the woman was interrogated about the identity of the father, and out of the cases where it was possible to subject the identified father to official inquiry, only one man denied paternity.[79] Out of these 36 cases, six cases resulted in death sentences on behalf of the father. It is, however, worth noting that these six cases stand out: In two of these cases, although the pregnancy had been secret, several witnesses confirmed that the child had died of natural causes shortly after the birth, meaning that these two women were acquitted of secret birth and infanticide. Notwithstanding, the couple were both sentenced to death due to incestual relations. In three of the cases where the child's father was sentenced to death, he had taken an active role in hiding the birth and the body of the child. These cases, however, also involved adultery and incest, and from the court records, it appears that these factors were decisive for the verdicts. In the final case involving death sentence on behalf of the father, his role had not been limited to the murder and subsequent disposal of the child's body in the fjord; the couple had also murdered the father's wife.[80]

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76 It can still be noted that several of these sentences were reduced in appeal courts, or in a King's pardon. In 1705, two women were acquitted in the District Court, in spite of having hidden pregnancy and birth. One of these women were sentenced to death in the court of appeal, while the other case appears not to have been appealed at all, meaning that the woman avoided any punishment. See Bernssen 2017a p. 56 and pp.111-118.

77 See Bernssen 2017a p. 57 and pp.79-86.

78 The remaining cases were matters of false confessions and unproven accusations. See Bernssen 2017 p. 55.

79 Alleged fathers who were not interrogated were e.g., away on work related travel; deceased before the case was tried; or absconded. As mentioned, it is possible that some of these women intentionally identified fathers who were not eligible for interrogation in order to protect the true father.

80 State Archive in Bergen (SAB): Court records Hardanger I.Af. 4 (1767-72) fp. 27-28b, 38b-43; 65b-69,

In contrast to the treatment of the mothers, it appears that none of the child fathers were sentenced to death exclusively for their role in hiding the pregnancy and the birth. Moreover, it largely appears that the fathers faced relatively mild repercussions. In the additional 11 cases where District Courts sentenced the child's father, the repercussions for the sexual crime mostly took the shape of fines and public penance in addition to shorter periods of detention in the more serious cases, such as in cases involving adultery.[81] One exception is, however, to be found in the case where the child's father had provided the woman with an abortion potion. While it should be noted that the father in this case was also married to the woman's cousin, it appears from the court records that it was the complicity in secrecy that constituted the primary justification for the equal sentencing of the man and the woman: six years of imprisonment with hard labour.[82] The timing of this case is, however, significant: It is dated as late as 1774, and thus, the sentencing of both parties must be considered in the context of the late 18th century development towards a more humane criminal practice,

In more than half of the cases, however, the District Courts did not convict the father at all. There are several reasons for this. In addition to Borni Joensdatter's cousin who denied paternity, there are cases where the child's father was already dead before the case was prosecuted; the father belonged to a different jurisdiction; or the father had absconded. Additionally, we find that around one third of the fathers were in military service.[83] Most likely, these men were exempt from punishment due to the ordinance that made first time offences of fornication a non-punishable offence for this group.[84]

Thus, it is clear that the men were largely acquitted, and the woman carried the consequences alone also in cases of infanticide. As the nature of the crime made women the primary and obvious perpetrator, this is not in itself particularly surprising. There seems, however, to be a tendency in court practice that the child's father was largely exempt from responsibility, even in cases where passivity or coercion on his part clearly appear to have impacted the course of events leading up to the crime.

III. Conclusion

Examination of legislation and practice in sexual regulation and infanticide in the 17th and 18th century shows that the repercussions for such crimes were more severe for women than they were for men. Although the threat of punishment primarily targeted men, changes in the surrounding legislation and in general social attitudes meant that it was in practice women who faced the gravest social, financial, and legal consequences of sexual intercourse outside of wedlock. E.g., we find that from the turn of the century and through the 18th century, women held a clear majority when it came to both public pe-

78-79b,

81 Bernssen 2017a p. 125 (not peer reviewed)

82 State Archive in Bergen (SAB): Court records Sunnhordland I.A. 40 (1772-77) fp. 164b-166.

83 Bernssen 2017a p.125 (not peer reviewed)

84 See Koefoed 2008 p.125 on these ordinances.

nance and fines for lewdness. Whether this displacement of responsibility from man to the woman was coincidental or an intended result of policy, remains to be investigated through further research.

In order to escape the burden of the repercussions connected to birthing an illegitimate child, several women went so far as to murdering their new-born in an attempt to hide the sexual crime. Examination of cases of infanticide over a period of 150 years shows that some factors appear to have increased the risk that pregnancy outside of wedlock would end in infanticide. Particularly, the women's social status and relation to the male head of the household appears to have been central components. Furthermore, we find that the child father in many cases was absent but was more likely to be involved if the sexual relation exposed him to severe punishment. Direct or indirect coercion from the child father was a further incentive for the women to hide the pregnancy. At the same time, the men in these cases more often got away with relatively mild punishment, in stark contrast to the practice of sentencing the women to death.

Towards the end of the 18th century, some signs of change are observable. Both increased accountability of the child fathers through the duty of alimony, and a softer penal practice in cases of infanticide indicate a gradual shift towards a more gender-balanced practice. Closer examination of the background and consequences of legal and sociopolitical changes may further illuminate how the sexual regulation of the 17th and 18th century affected women in Norway.

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Epistemology of Translation: Erasing Viscountesses and Viscounts from High Medieval Legal Records, Selective 'Anglo-Saxonism', and Teleology

Stephen Hewer

By applying translation theories and discourse analysis to the study of thirteenth-century English law, it is apparent that some of the terms used in secondary works and printed editions of primary sources are not based on the actual manuscript sources but instead modern biases (intersecting ethnicity and gender). The knock-on effect of this practice is that reference works, such as translation dictionaries, do not provide accurate references regarding these terms. Another crucial effect of the mistranslation of medieval terms is a tendency to assume continuity of the conception and role of certain offices – here, only men as 'sheriffs' – over a thousand years. A punctilious re-examination of primary and secondary sources reveals temporal differences (in England) and geographic similarities (with the European Continent) that have been filtered out through 'Anglo-Saxonism' and further evidence for medieval women with power.

I. Introduction

For many legal historians, accurate terminology is paramount. Reading thousands of judgments based on an exceptio to a single word in the writ or in the count probably influences this phenomenon. This is not ipso facto a problematic practice, but it is rather ironic that legal historians also do not question certain terminology used in studies of medieval law which is an inaccurate 'translation' that anachronistically places later words onto earlier people and events, and more importantly erases the existence of medieval women holding public power. The truth is that when someone was physically in an English royal court (in England or English Ireland) in the thirteenth century, they did not summon, address, call, vouch, or admonish any 'sheriffs'. Brevia (briefs or 'writs') were not dispatched to 'sheriffs' and 'sheriffs' did not summon defendants, tenants, or appellees to court. If a counter or serjeant in the Westminster Bench had referred to a 'sheriff' in their count, everyone in court would have been greatly confused and the writ probably would have failed. This article is a call to recognise the existence of medieval legal terminology which described a particular legal-administrative position in a specific time (viscounts and viscountesses of English counties in England and English Ireland in the thirteenth century). It is not a mandate to republish all existing works that place 'sheriff' onto thirteenth-century viscounts and viscountesses.

There are three main lenses to analyse this term: ethics of translation (II and III), historicity (IV), and personnel (VI). In contrast to standard practice, I have placed the historiography section (V) near the end because encountering the theoretical underpinnings and the medieval evidence first will better prepare the reader to engage with the scholarship. The current use of sheriff, although so familiar to Anglophone scholars as to seem irrefutable, actually misrepresents the medieval evidence. No administrative record in the twelfth or thirteenth centuries applied the term to the official responsible for county administration. Fortunately, English has other words for that office, which are much more suitable since they come from the medieval words actually employed: viscount and viscountess. They also have the benefit of being free from all of the historiographical baggage that, as we shall see, has been attached to the term 'sheriff' since at least the seventeenth century. The terminological change might seem odd to Anglophone scholars at first, but its use will not only free us from the unsavouriness of the alternative, it will also remind us that there were a few medieval women exercising power in a polyglot society.

It is nothing new to medieval legal history to demonstrate that a long-held belief concerning a particular term or phrase was merely a concoction of the modern period.[1] No translation or convention is exempt from examination and legal terms are not transcendental of time and place. Legal theorists have argued against 'objectivity' for over fifty years as have historians and others.[2] Yet certain critiques[3] of historiographical traditions are met with 'thought-stoppers' or 'thought-terminating clichés'.[4] These are terms used in other disciplines to describe speech acts that are meant to prevent and stop critical thinking and deconstruction of recent, invented 'traditions'.[5] Medieval English legal history is a science just as other legal, social, or historical studies, and must be allowed to explore, discover, and deconstruct traditions.

The mistranslation of vicecomites to 'sheriffs' (or occasionally 'shire-reeves') and the near complete erasure of vicecomitisse, are not only inappropriate and incorrect practices but also erase the different functions, roles, and conceptions of the various positions over the centuries. The teleological connection of twenty-first-century British 'High Sheriffs' to late seventh-century West Saxon scírmen might facilitate studies of 'continuity'

1 For example, Sara Butler's work on the 'benefit of the belly', a historiographical construct which was portrayed as the female version of the 'benefit of the clergy' but, as Butler demonstrated, was in fact only a delay of execution at best: Butler, 'Pleading the Belly'. There are also older works, as analysing and critiquing a particular legal term or phrase (even those promoted by Maitland) is an established practice. 'Toby' Milsom addressed the medieval and modern (Maitland's) conceptions of vi et armis contra pacem regis: Milsom, 'Trespass'. Thomas Watkin addressed the historiographical constructs of in consimili casu: Watkin, 'The Significance'. Many thanks to Gwen Seabourne for suggesting these two articles.

2 Legal scholars have noted the 'myth of objectivity' for over fifty years, but it persists: Miller, 'The Myth'; Harris, 'Race and Essentialism'; Cain, 'Feminist Legal Scholarship'; Douzinas, Warrington and McVeigh, Postmodern Jurisprudence.

3 See, for example, the works critiquing 'Anglo-Saxon' and the responses, below, (Fn. 17).

4 A brief sample and history of the usages of the terms: Lifton, Thought Reform, pp. 428-9; O'Neill and Demos, 'Semantics'; Kim, 'Religious Deprogramming'; Wettstein, 'Churches'; Chiras, 'Teaching Critical Thinking Skills'.

5 Hobsbawm, 'Mass-producing Traditions'.

but those are based on a fundamental misunderstanding at least. Perhaps 'sheriff' might work for longitudinal studies of the modern period (c.1550-1900) when it was used in court, but the term is impertinent for an in-depth, synchronous analysis of the 1250s.[6] One might wonder then why this piece is focused on the thirteenth century. The reason is that this period witnessed the rise of surviving, official (court rolls and parliament rolls) and semi-official (year books and records from 1258) records of the business of English royal courts and parliaments in England and English Ireland. Many of these records survive in the vernacular – instead of just Latin – and this allows us to interrogate actual terms and phrases used in the courts without hiding behind the claim that the Latin records obfuscate the putative thirteenth-century usage of 'shire-reeve' or 'sheriff'.

Scholars of thirteenth-century English law ignore or discount the English law in Ireland – except Richardson, Sayles, and Brand.[7] The exportation of English law to Ireland greatly benefits this study because the exportation encouraged codification and the terminology that the English chose to export to Ireland demonstrates the difference between English 'common law' terms and regional terms in England. For example, the English colonists in Ireland did not create any 'wapentakes' there. Including legal records from English Ireland elucidates the high medieval conceptions of English law.

II. Venuti's 'Ethics of Translation'

Lawrence Venuti argued, over twenty years ago, that the 'marginality' (invisibility) of the translator and translation methodologies in translation works is a profound problem.[8] While most scholars will highlight difficult translations – usually by including a transcription of the original text in brackets or in a footnote – many (mis)translate cultural terms that may seem banal, uncontroversial, or unimportant without comment. Law and legal science rely on language and translation. Legislation is written, complaints are filled out and submitted to court, parties plead cases verbally, justices and judges censor speech acts by parties and give instructions to juries, and juries pronounce verdicts. None of this is new to practicing lawyers, but for scholars of thirteenth-century English law, linguistics, translation theory, and critical studies appear to be desperately needed. Venuti wrote that:

> *Translation patterns that come to be fairly established fix stereotypes for foreign cultures, excluding values, debates, and conflicts that don't appear to serve domestic agendas. In creating stereotypes, translation may attach esteem or stigma to specific ethnic, racial, and national groupings, signifying respect for cultural difference or hatred based on ethnocentrism, racism, or patriotism… Yet since translations are usually designed for specific cultural*

6 This cognitive dissonance led Mabel Mills to publish on 'adventus vicecomitum' and Richard Cassidy to follow her example: Mills, '"Adventus Vicecomitum", 1258-72'; eadem, '"Adventus Vicecomitum", 1272-1307'; Cassidy, 'Adventus Vicecomitum'.

7 For example, Richardson and Sayles, 'Irish Parliaments'; Brand, Making, ch. 2, 12, 13, 19, 20.

8 Venuti, Scandals, pp. 1-7.

> *constituencies, they set going a process of identity formation that is double-edged. As translation constructs a domestic representation for a foreign text and culture, it simultaneously constructs a domestic subject, a position of intelligibility that is also an ideological position, informed by the codes and canons, interests and agendas of certain domestic social groups.*[9]
>
> *Bad translation shapes toward the foreign culture a domestic attitude that is ethnocentric: 'generally under the guise of transmissibility, [it] carries out a systematic negation of the strangeness of the foreign work' (Berman, 1992: 5). Good translation aims to limit this ethnocentric negation: it stages 'an opening, a dialogue, a cross-breeding, a decentering' and thereby forces the domestic language and culture to register the foreignness of the foreign text.*[10]

The issue in this article is temporal and not geographical (replace 'foreign' with 'medieval'[11]), but Venuti's substantive points still very much apply here. The value of Venuti's work is the consideration of the act of translating: the cultural commentary that is inherent in any translation, the effects and affects on readers, the pedagogical ramifications of translation (with and without an original transcription), the need to conceptualise translation as an open process and to question the motives behind 'traditional' practices/orthodoxy, and the relevance of ethnic studies, race studies, and critical theory to the practice of translating medieval legal records.

James Milroy, who coined the term 'English Linguistic Purity', noted that language is not a physical object that can be 'cleaned'. Yet scholars of medieval England and medieval 'English' regularly attempt to 'purify' medieval England, English people, and English languages (unconsciously or not does not change the effects – intent does not concern us here).[12] Milroy warned readers that 'genetic purism' (removing any words believed to be from another language) is driven by nationalism which extends to 'racial purism and [the] stigmatization of minorities'.[13] Many medievalists transform cultural terms from thirteenth-century England into modern iterations. Viscounts become 'sheriffs', viscountesses are dismissed or ignored, counts become 'earls', counties become 'shires',[14] briefs become 'writs', and seigniors become 'lords'. All of these examples are already English words translated from the medieval records (e.g. vescunte to viscount). Many medieval concepts are strained out through the 'purification' of the translations. Latin is regularly used as a fosse to shield critiques.[15] The claim is that terms such as 'sheriff' were used by the courts but the clerks could not report that because the plea rolls were written in La-

9 Venuti (Fn. 8), pp. 67-8.

10 The '[it]' is Venuti's emendation of Berman: Venuti (Fn. 8), p. 81.

11 One could be tempted to cite L. P. Hartley here.

12 Examples of this are in section V, below.

13 Milroy, 'Some Effects', p. 327.

14 For example, Paul Hyams referred to 'shire eyres': Hyams, 'Thinking English Law'. Some scholars believe the county and shire are interchangeable synonyms, but that is imprecise at best.

15 Latin can, however, sometimes belie the actual terminology used in some medieval courts. See Heirbaut, 'Dangers'.

tin. Below we discover that that was not the situation. Milroy specifically discussed the attempt to remove 'French', Latin, and Greek words from modern English and its connection to 'Anglo-Saxonism'.[16] He noted that the invented, 'pure' English language was not just 'Old English' but also words from the Scandinavian languages (Old Norse and Old Danish) and some 'Germanic' fabrications.

Milroy noted the undeniable racism in the language of nineteenth-century writers who wished to promote 'Anglo-Saxonism'.[17] Works such as Reginald Horsman's trace the origins of 'Anglo-Saxonism' to the English Reformation (1534) and then detail how the phenomenon evolved in England over the following centuries and was then exported to British colonies.[18] The nineteenth-century antiquarians and politicians who promoted the 'purity' of modern 'English' (language) also ventured to 'purify' medieval English people. Twelfth- and thirteenth-century English people (Anglice/Anglici) became 'Anglo-Normans' or sometimes simply 'Normans'.[19] This 'normanization' (Gillingham's term) surprisingly continues in scholarship today.[20] The practice of codifying peoples based on what languages they speak, DNA, and surname origin are examples of nationalism, racism, and primordialism.[21] Scholars need to be mindful of the proximity of medieval studies to current nationalism and racism,[22] not just regarding their discourse in print or online, but also the very real problem of repeating racist interpretations and tropes in the classroom.[23] Mary Rambaran-Olm has been highlighting these problems for years.

16 Milroy (Fn. 13), pp. 327-9.

17 'Anglo-Saxonism' is the established term for the unhistorical or anachronistic application of terms and concepts to people and places where those terms and concepts were not used. Part of 'Anglo-Saxonism' is English Linguistic Purity. But the term itself is problematic because 'Anglo-Saxon' supports racist points of view. The term 'Anglo-Saxon' is used by scholars and non-scholars alike as a euphemism for 'white' people. Scholars of colour (such as Stuart Hall and Mary Rambaran-Olm) who wish to study England before 1066 are told that they are not 'Anglo-Saxons' and therefore cannot study Early English history. 'Anglo-Saxons' never existed – there was only a few charters with a concocted neologism to combine the Angles and Saxons of Britain into one people for expansionist, political purposes. There is a great deal of scholarly work on this topic, but some key works are: [especially] Rambaran-Olm, 'Anglo-Saxon Studies'; eadem, 'Misnaming the Medieval'; eadem, 'History Bites'; eadem, 'Wrinkle in Medieval Time'. See also, Reynolds, 'What Do We Mean'; Kim, 'Question of Race'; Ellard, Anglo-Saxon(ist) Pasts; Wilton, 'What Do We Mean'.

18 Horsman, Race and Manifest Destiny. See also, Boyce, 'The Persistence'.

19 Gillingham, 'English'; idem, 'Second Tidal Wave'; idem, 'Normanizing the English Invaders'.

20 For example, O'Keeffe and Virtuani, 'Reconstructing Kilmainham'.

21 Eller and Coughlan, 'Poverty of Primordialism'; Smith, Nationalism and Modernism, pp. 145-69. For examples of this in the UK today, see Wardle and Obermuller, 'Windrush Generation'.

22 Dockray-Miller, Public Medievalists; Elliott, 'Internet Medievalism'; Blake, 'Getting Medieval'. This problem is not limited to medieval studies, the Western academe has old connections to racism and colonialism and some academics oppose studying or mentioning this (and even more so oppose substantive decolonisation): Gopal, 'Decolonisation'.

23 For studies on the problem of racism in British pedagogy, see Ginther, 'Dysconscious Racism'; Esson, 'Why and the White'. This problem is not new. The official website of Oriel College, University of Oxford, admits that William Stubbs and his friend and successor, Edward Freeman, both vehemently supported the teleology of 'Anglo-Saxons' to Victorians and it stresses Freeman's racism was connected to this: https://www.oriel.ox.ac.uk/william-stubbs-1866-1844; https://www.oriel.ox.ac.uk/edward-augustus-freeman-1884-1892. Oriel College still has a statue of Cecil Rhodes over its front door: Gopal (Fn. 22), pp. 874-5.

Milroy also notes another type of 'purity': sanitary.[24] Sanitary purity calls for the removal of 'corruptions' or 'mistakes' in usage and 'cleansing' extant records. Many medieval legal scholars practice this when they produce a critical edition of a medieval plea roll or law tract. Spelling is 'standardised', punctuation is added, capitals are added to proper nouns and removed from the middle of words, and some information (e.g. process marks) is omitted. It is important to differentiate noting the effects of these practices from assigning conscious intent on the part of the scholars conducting the practice. Many medieval scholars, not just legal historians, conform to Roy Hunnisett's suggestions[25] to the point that the suggestions have become hegemonic. Noting the variations in spelling could demonstrate regional pronunciation differences, indicate whether the clerk was polyglot, or differentiate two clerks in one manuscript. By 'sanitising' a medieval manuscript, we all miss out on that analysis.[26]

Beyond the 'purifying' of twentieth – and twenty-first-century English, there is also the formalist bracketing of what can and cannot be medieval 'English'. I am using 'formalist' here in the literary and not legal sense, referring to the removal of the human aspects of the term 'English'. Linguistically a formalist would describe 'English' as a 'Germanic' language and thirteenth-century English as 'Middle English'. The problem here is that many thirteenth-century English people – especially, for this study, the justices, counters/serjeants, attorneys, and court clerks – spoke what formalists label 'Law French' or 'Anglo-Norman'.[27] Thirteenth-century people did not call the vernaculars of England 'Anglo-Norman' (or 'Law French', 'Norman-French', or even 'French') and 'Middle English'. There are scattered references (romanze, gallica, englois), but in the historiography only a certain viewpoint is acknowledged: the 'Middle English' speaker.[28] Modern scholars seem antithetical to calling medieval English people 'English' if the latter were polyglot or simply had a non-Germanic surname.

Another point that is regularly glossed over in the historiography is the application in Anglophone scholarship of certain terms to all lands outside of England/Britain – or at least to all other European lands – and a different set of terms reserved exclusively for medieval England/Britain. This is 'English Linguistic Purity' and colonialism.[29] Specifi-

24 Milroy (Fn. 13), pp. 324-6.

25 Hunnisett, Editing Records.

26 James Holt demonstrated this by highlighting spelling in the vernacular copy of 'Magna Carta' from 1215 (Willaume instead of Guillaume, Wales instead of Galles, and Estievene/Stefne instead of Etienne): Holt, 'Vernacular-French Text', p. 351.

27 'Formalist' is describing the practice of formalism and not describing the entirety of these scholars' work. The scholars are mentioned in some detail in the next section. Examples of this usage by medieval legal historians are discussed in section V, below.

28 Legge, 'Anglo-Norman'; Garnett, 'Franci et Angli'; Short, 'Tam Angli quam Franci'. See also section V, below. Cf. Philippe de Rémi (c.1274) called 'Anglo-French' Englois [English!]: de Remies, The Romance, p. 91, l. 2624.

29 Colonisation is not limited to the seizure of land and material resources, but also includes verbal attacks on cultures and it deploys othering discourses. A range of scholars have noted the relabelling of peoples, not just the names for themselves but also the titles of people within those cultures, was a central part of colonisation. See for example, Said, Orientalism; Wolf, Europe; Gopal (Fn. 22), pp. 895-7. If one wants to

cally highlighting the gendered nature of the phenomenon, when scholars refer to a man in – not necessarily from – thirteenth-century England, he was a 'sheriff' or 'earl', but when a man – sometimes the same man – was in France, Flanders, Holland, Lombardy, or Aragon, he suddenly became a 'viscount' or 'count'. Some dictionaries (next section) claim that this man was a 'vicomte' or 'comte' without any consideration of time or place. For David Crouch, the 'Beaumont Twins' were Waleran, count of Meulan, and Robert, 'earl' of Leicester, and that Waleran was created 'earl' of Worcester.[30] Crouch's work is focused on the aspects of twelfth-century noble men that crossed boundaries, but then forces site-specific terminology unhistorically onto these medieval men. An older trend, which has largely been discontinued, was to refer to Continental men as 'earls' and 'sheriffs'.[31] This practice may explicate the dictionaries' definitions and translations. The people that are affected represent English men. One reason for the title of 'selective Anglo-Saxonism', is the odd use of accurate, tangential terminology. The noun is a 'sheriff', but the 'sheriff' received viscontiel writs and had viscontiel jurisdiction and viscontiel debts. Another noun is 'earl'. An area or event under the influence or power of an 'earl' was comital. 'Lords' held seigniorial control over their tenants in their seignories. Yet scholars have no issue writing about mort d'ancestor, novel disseisin, and mesne processes. More importantly, English women are largely excluded from substantive-law discussions – despite the existence of medieval women attorneys, receivers,[32] and viscountesses – and countesses (comitisse) are rendered as 'countesses' in the historiography without any recognition of the gender imbalance in this translation practice. English men are selectively 'Anglo-Saxonised' but English women are not.

III. Etymology and Dictionaries

Before getting into the specifics of the thirteenth century, we should analyse the name itself. Viscontesse came from the Latin vicecomitissa, just as viscounte came from vicecomes. We can deconstruct the formation of the terms and why that is important to this study. Vice meaning a stand-in, deputy, or place holder – hence related terms such as vicar, viceroy, vice-chancellor. Comitissa was the feminine version of comes (count) that developed from the trend of daughters inheriting noble titles, and comes itself was a development from the older meaning of simply an aide, assistant, friend, or councillor. In some places in France, vicecomites did hold the place of counts and others were the deputies of counts,[33] but vicecomitas was not a monolith. In England after 1066 and Eng-

argue that relabelling historical people is somehow not colonialism because the people are dead, then it is at least a colonial mindset that insists on relabelling other peoples.

30 Crouch, Beaumont Twins; idem, 'Between Three Realms'. As the second work shows, Crouch sometimes calls Waleran 'count of Meulan and Worcester'.

31 The exception being John Baker's continued use: Baker, Introduction, p. 36, n. 113 ['earl of Anjou and Poitou'].

32 Some examples of these women are in Hewer, Beyond Exclusion, pp. 97-8.

33 Débax, 'Vice-comtes'. Viscountesses are mentioned briefly to note that they were created from hereditary viscountships and the earliest references to viscountesses are 865 in Toulouse and 926 in Narbonne.

lish Ireland after 1171, the lands were divided into counties (comitatus) and the counties were administered by viscounts (vicecomites) and a few viscountesses (vicecomitisse). There was no thirteenth-century 'Suffolkshire', 'Cornwallshire', 'Tipperaryshire', or 'Connachtshire'. While some counties occasionally had a form of 'shire' in their name, none was considered legally a 'shire'.[34] In 1208-9 eyre justices (errantes iusticiarii) were sent to several counties. Although the record is in Latin, it appears that we can see which counties included 'shire' in their name and which did not. The list includes: Euerwicsyre (Co. Yorkshire), Northumberlandsyre (Co. Northumberlandshire), Cumberland (Co. Cumberland), Westmeriland (Co. Westmorland), Laicestre (Co. Leicester), Lincolnesyre (Co. Lincolnshire), Cantebrigesyre (Co. Cambridgeshire), Huntindunesyre (Co. Huntingdonshire), Northfolke (Co. Norfolk), Suthfolke (Co. Suffolk), Notinghamsyre (Co. Nottinghamshire), Derebi (Co. Derby), Warewic (Co. Warwick), Slopesyre (Co. Salopshire [Shropshire]), Stafford (Co. Stafford).[35] What is important is that royal orders and official royal court records clearly state 'county' and 'counties'.[36]

Sanford Schane mentioned one method for dealing with legal ambiguity was consulting a dictionary.[37] This method might work for unscientific and quotidian situations, but for an ontology of vicecomitas, it will not work. The reason why a dictionary will not work is that the methodology of making dictionaries is not fit for our purpose. A 'modern' dictionary is focused on 'modern' usage, which is the main problem. The Oxford English Dictionary defines 'sheriff' as:

> *In England before the Norman Conquest, the scírgeréfa (also called scírman) was a high officer, the representative of the royal authority in a shire, who presided in the shire-moot, and was responsible for the administration of the royal demesne and the execution of the law. After the Conquest, the office of sheriff was continued, that title being retained in English documents, while in Latin and French the usual term was vice-comes, viscounte, which had been applied to similar functions in Normandy.*[38]

This demonstrates that the definition is not accurate as it equates scírman with scírgeréfa, connects both to vicecomes, then rationalises this erratum with English Linguistic Purity ('in English' versus 'in Latin and French'). The differences between shiremen, shire-reeves, and viscounts/viscountesses are detailed below. The entry for 'viscount' is less precise. The OED states: 'One acting as the deputy or representative of a count or earl in the administration of a district; in English use spec. a sheriff or high sheriff… 3. In Con-

34 See, for example, from 42 Henry III: 'Stephano de Seggraue quondam iusticiario etc. tam in banco quam in itinere per diuersos comitatus etc.' From 55 Henry III: 'ad communia placita in comitatu Kancie'. From 6 Edward I: 'rotulos de assisis captis in diuersis comitatibus anno regni regis'. From Ancient Correspondence, temp. Edward I: 'Willem Bagot e Willem de Beyuille e autres en le cunte de Leycestre': Sayles (ed), Select Cases, pp. cliv-clv, clxviii.

35 Bateson, 'London Municipal Collection, part II', p. 710.

36 See (Fn. 34).

37 Schane, Language.

38 'sheriff, n.', oed.com.

tinental usage: The son or younger brother of a count.'[39] The first definition confirms my argument that viscount is an English word and refers to the administrators of counties in medieval England and English Ireland. The problem is that the majority were royal appointments and not liberty/franchise appointments of English counts, bishops, and seigniors. 'Viscountess' is only considered to be the wife of a 'viscount' (the modern conception of a noble: e.g. 'Viscount Gormanston').[40] No mention is made of the medieval usages of the term or women outside of England/the UK.

A bilingual/translation dictionary (of medieval Latin) provides possible translations of terms but does not go into the context of the translations. For 'medieval' Latin this is extremely important as the period covers almost (or in some sub-fields more than) a thousand years. The Dictionary of Medieval Latin from British Sources is usually the preferred translation dictionary for scholars of thirteenth-century English law. The DMLBS translates vicecomes as:

> *1 vicomte (as continental title) … 2 (in post-Conquest England and Wales) chief financial and executive officer of the Crown in a shire, sheriff… c (transf., applied in retrospective use w. ref. to pre-Conquest office) sheriff (scírgeréfa). d reeve, alderman… 3 (in other jurisdictions) sheriff a (Sc., also as law officer)… 4 private sheriff… 5 (as title pertaining to the fourth order of the English peerage, ranking between earl and baron) viscount.*[41]

The first definition of vicecomes is highly problematic because it applies the modern French translation of the Latin to the entire European Continent. Vicecomes was used in many areas besides France/Francia and should not be translated as 'vicomte' for Flemish, Aragonese, Lombardic, etc. vicecomites.[42] This is the opposite side of the English Linguistic Purity coin: failure to recognise differences outside of England (another aspect of colonialism). This phenomenon is definitely not limited to vicecomites, but that is the focus here. The second and third translations present an odd barrier between England and Scotland because Wales is subsumed under England, and the second translation ignores temporal differences (the Franci invasions in the 1060s and English conquest in Wales in the 1280s).[43] If we were to rely on dictionaries as 'objective' references – as some scholars do[44] – we would fall prey to the teleological trap of shrieval continuity.

The DMLBS does have an entry for vicecomitissa. It is: 1 wife of vicecomes a (of vicomte) b (of sheriff). 2 female sheriff (holding the office when hereditary, usu. as being widow of sheriff).[45] The first definition does not even allow the women a title. They are only wives. In the second entry there is at least a small recognition of the existence of me-

39 'viscount, n.', oed.com.

40 'viscountess, n.', oed.com.

41 'uicecomes', brepolis.net/dmlbs.

42 For more, see section VI, below.

43 Wales was not under English royal control until 1282-3, and since 'sheriff' is used for royal (and not liberty/franchise) vicecomites, this definition is not correct: Lieberman, Medieval March, p. 1.

44 Schane (Fn. 37), p. 18.

45 'uicecomitissa', bepolis.net/dmlbs.

dieval viscountesses who held public power, although they are, in contradiction of the usual trend regarding medieval women, 'Anglo-Saxonised' as 'sheriffs'. The medieval viscountesses (as county administrators) in England appear to have inherited the position from an ancestor (father or brother) and not to have held a viscounty in dower as a widow. There is still the problematic inclusion of the adjective 'female' to separate the women who were 'sheriffs' from the men who were 'sheriffs'. This practice indicates that 'sheriff' cannot be labelled as a gender-neutral alternative to the binary created by 'viscountess' and 'viscount'.

Finally, there are translation dictionaries for medieval English court vernacular, unhistorically called 'Anglo-Norman'. The AND translates visconte as 'sheriff' without any contextualisation, clarification, or parameters.[46] Thirteenth-century English sources mention vicomtes and vicomtesses from France,[47] so this 'translation' clearly does not function as is. Adjacent terms in the AND are equally problematic: 'viscontal' is rendered as 'viscontial, to be carried out, executed by the sheriff',[48] and 'viconté' is rendered as '1 shire, sheriffdom; 2 office of sheriff; 3 right to appoint a sheriff'.[49] There is no justification provided for this English-linguistic-purity distortion. The quotes used to justify these 'translations' imply that 'sheriff' is not what the medieval author meant. Compare two 'translations':

> *right to appoint a sheriff: (1295) les cyteyns tienent le visconté de Lounres du Rey pour cccc. li. Payaunt par an al Escheker*

The AND would translate this sentence as: 'the citizens have the right to appoint a sheriff'. But clearly this sentence is stating: 'the citizens hold the viscounty of London from the roy ('king') for £400 paid per year to the exchequer'. 'The right to appoint a sheriff' implies that said 'sheriff' would still answer to the royal exchequer for issues whereas 'holding the viscounty' implies that the citizens of London did not have to answer for individual issues from London. De-domesticating (or de-modernising) the translation of medieval texts will aid readers in understanding and conceptualising medieval English culture and law. The AND has no entry for viscontesse or vicomtess.

IV. Legal Terminology

The study of thirteenth-century English law, in legal theory and practice, reveres linguistic meticulousness regarding certain words and phrases. The medieval court system was excessively preoccupied with linguistic 'accuracy'.[50] If narrators/counters, justices, ser-

46 'visconte', anglo-norman.net.

47 Calendar Chancery Warrants, pp. 1 (vicomte de Lomagne), 292-3 (vicomtesse de Marsan), 296 (vicomtesse de Béarn), 338 (vicomte de Tartas), 367 (vicomtesse de Marsan), 386-7 (vicomte de Lomagne et Auvillar), 389 (vicomtesse de Béarn et Marsan), 548 (vicomte de Luuaign), 561 (vicomte de Benauges et Castillon). Some of these are from the early fourteenth century.

48 'viscontal', anglo-norman.net.

49 'visconté', anglo-norman.net.

50 Cases were quashed for the place name being off by one letter in a time when spelling was not concre-

jeants, and bailiffs in court had referred to and addressed 'shire-reeves' (or 'schirreue' or even 'sheriff'), then there should be references to this practice and instances when a narrator/counter was admonished by the justices for not using the 'correct' term. This section will focus on the usage of versions of le viscounte in thirteenth-century vernacular legal records (la viscontesse is only recorded in royal letters). The focus on the English court vernacular is because some scholars might try to use Latin as an excuse that 'sheriff' was secretly pleaded in court but changed in the Latin records – it has been argued that 'Middle English' was the main or sole language of England by the end of the thirteenth century.[51] The final section will delve into the roles and functions of thirteenth-century English viscountships versus other times and regions.

Before the period of study begins, there is a single reference in an official royal (financial) record that William Morris framed as a smoking gun.[52] In the pipe roll for 14 Henry II (1167-8) there is a man named 'Alfwinus schirreue' listed among the people of Gudmundcestria (Godmanchester, Co. Huntingdon).[53] Alfwinus was not 'the shire reeve' of Gudmundcestria or counties Cambridge and Huntingdon. The viscount of 'Cambridgeshire and Huntingdonshire' (two counties formed a single viscounty) at that time was Phylip de Dauintre.[54] We can see that contemporary clerks could write 'shirreue' in Latin but did not call viscounts shirreues (or 'shire-reeves') because the viscounts and viscountesses were not shire-reeves.

Near the end of the reign of John of England (1199-1216), a list of the laws of London was recorded mostly in the court vernacular. It survives in British Library, Add. MS 14252 which was transcribed and analysed by Mary Bateson in 1902.[55] This account shows that the claims by several notable scholars that 'sheriff' was never replaced by 'viscount' are not true,[56] but that many legal terms from before 1066 did survive into the thirteenth century. The laws of London uses a form of viscount ten times[57] and includes pre-1066 words such as 'socne' (soke), 'husteng' (husting), 'aldremans' (aldermen), 'Gildhalle' (guildhall), and perhaps very relevant for this study 'soccirieue' (soke-reeve).[58] Husting is a linguistic adoption from Old Danish or Old Norse hús-þing (house assembly). The word 'geréfa' had become 'rieue' (reeve), which was used in two fashions: as a label for certain administrators – but definitely not administrators of counties – and as a sur-

te: e.g. John fitz Ralph brought an assize of novel disseisin for one messuage and some land in Coylagh, Co. Waterford, Ireland and the defendants replied that the lands were in 'Coulagh'. John could not deny the mistake and the defendants were given a sine die: An Chartlann Náisiúnta, KB 2/4, fol. 198r. See also, Sutherland, Assize, p. 142, n. 3.

51 Below, section V.

52 Morris, Medieval English Sheriff, p. 113.

53 Great Roll, 1167-1168, p. 104.

54 Great Roll (Fn. 53), p. 99.

55 Bateson, 'London Municipal Collection'; eadem (Fn. 35).

56 Section V, below.

57 'uescunte' five times and 'ueskunte' five times.

58 Bateson (Fn. 55), pp. 492-5.

name.[59] English clerks in the thirteenth century were able to write 'syre' (shire) and 'reeve' in English court vernacular but did not call viscounts 'syre reeves' because they were not 'shire-reeves'.

In 1215 John of England was forced to put his seal on a charter at Roueninkmede (Runnymede) and shortly afterwards a copy of this charter was made in the court vernacular. In the vernacular copy of the charter 'visconte' was used seven times. At the same (June 1215), John sent a vernacular writ to the viscount of County Hampshire (visconte de Suthanteshire … en cel conté), William Briwerre.[60] During the 'Period of Baronial Reform' or 'the Second Barons' War' (1258-66), many political opinions regarding English law and its enforcement were written down. These writings show that English magnates, burgesses, and legal professionals in the mid-thirteenth century did not conceive of 'Englishness' in the same manner or fashion as nineteenth-to-twenty-first-century historians. Firstly, greatly surprising to modern scholars, Simon de Montfort was the leader of the 'anti-alien' (xenophobic) faction that rebelled against Henry III of England and his Continental friends and relatives – despite Simon being born in France.[61] There were petitions by 'the barons' (which historiographically were labelled the 'Petition of the Barons') that were debated and 'published' and then influenced the Provisions of Westminster. The vernacular copies of the petitions and the Provisions referred to 'vescuntes'[62] and not 'scyra reeves' while maintaining their call for English reforms and for English people (almost all men) to be appointed to curial positions and allowed to council Henry III. They considered 'vescuntes' to be the English term.

There is a damaged surviving record from an 'Irish' (English Ireland) parliament from c.Easter 1278. It was transcribed by Richardson and Sayles twice and the second instance included more of the damaged text.[63] Legislation was drafted specifically regulating 'viscuntes' in English Ireland. It is unclear whether all or part of this legislation was ever enacted, but that is not relevant as this was a legislative parliament (and not simply a meeting or parley: parlement) and the 'prudes homes' who devised the legislation had the approval of Edward I.

Paul Brand theorised that the manuscripts forming Casus Placitorum were lecture notes taken by law students during the 1250s and 1260s.[64] These manuscripts show the some of the oldest training of legal professionals and use the term 'viscounte' and 'visc-

59 For example, Maurice fitz Adam le Reve was a plaintiff and David le Reve was a juror in the Dublin Bench in 1290: British Library, Add. Ch. 13598, fol. 10r. Richard le Reve vs. William le Reve in a plea of land at Barnet manorial court (1340): Poos and Bonfield (eds), Select Cases in Manorial Courts, no. 20. These were surnames as the court records used prepositus for provosts of manors.

60 Holt (Fn. 26).

61 Michael Prestwich called de Montfort a 'foreigner' several times: Plantagenet England, p. 96. Cf. Lucy Hennings presented a nuanced and considered approach: Hennings, 'Simon de Montfort'. Many thanks to Colin Veach for informing me about this book chapter.

62 Brand (Fn. 7), pp. 359-67.

63 Richardson and Sayles (Fn. 7), pp. 142-4; iidem, Irish Parliament in the Middle Ages, pp. 290-3.

64 Brand (Fn. 7), p. 63.

unte' but never 'shirreve' in the training of future narratores and justices.[65] Beginning c.1268 and lasting until 1290, a series of law reports were made concerning the pleading in the 'Common Bench' (or Westminster Bench). Brand, who edited the reports, uses these law reports as accurate speech in regard to the form of pleading in court (in abstract), but doubts that most of these reports can be taken as verbatim quotes of any named individuals.[66] These Westminster Bench law reports use 'vesconte',[67] 'vicomte',[68] 'viconte',[69] 'visconte',[70] and many instances of the Latin vicecomes. During the reign of Edward I, lists of the counts (opening accusation by the plaintiff) were compiled and recorded into what analysts consider three textual/manuscript series. These lists were originally unlabelled or called Narrationes (counts) and many copies survived.[71] In these manuscripts we find 'viconte',[72] 'vicontes',[73] 'vicount',[74] 'vicounte',[75] 'vicountes',[76] 'viscont',[77] 'visconte',[78] 'viscount',[79] 'viscounte',[80] and 'viscontz'.[81] Another manuscript tradition described by Brand is the Brevia Placitata, a treatise made out of student notes from law lectures that shows changes made to teaching after the creation of the Statute of Gloucester (1278).[82] In the Brevia Placitata, there are 'vesconte',[83] 'vescunte',[84] 'viscont',[85] 'visconte',[86] 'viscounte',[87] and 'viscunte'.[88] The training of thirteenth-century court clerks, attorneys, counters, and serjeants included several variations of viscount and no references to 'shire-reeves'.

65 Dunham (ed), Casus Placitorum, pp. 1, 35.

66 Brand, Earliest English Law Reports, i, cxix-cxx.

67 Brand (Fn. 66), ii, 196v

68 Brand (Fn. 66), i, 74v, 132v, 135v (bis), 144v (bis)

69 Brand (Fn. 66), i, 132v; vol 2, 197v

70 Brand (Fn. 66), ii, 329v (ter), 355v (bis)

71 Shanks and Milsom (eds), Novae Narrationes.

72 Shanks and Milsom (Fn. 71), nos B 240 (in one MS: Rawl. C.245), C 317, C 321, C 329, C 328 (in one MS: Gg.vi.7).

73 Shanks and Milsom (Fn. 71), no. CX 23.

74 Shanks and Milsom (Fn. 71), nos C 336, CX 3.

75 Shanks and Milsom (Fn. 71), nos B 229, B 239, B 240, C 321 (in one MS: Pemb.), CX 1 (bis), CX 2 (bis).

76 Shanks and Milsom (Fn. 71), no. CX 2.

77 Shanks and Milsom (Fn. 71), no. C 317.

78 Shanks and Milsom (Fn. 71), no. C 336.

79 Shanks and Milsom (Fn. 71), nos C 38, C 57, C 320, C 336.

80 Shanks and Milsom (Fn. 71), nos C 308, C 320.

81 Shanks and Milsom (Fn. 71), no. CX 23.

82 Brand, Making (Fn. 7), p. 62.

83 Turner and Plucknett (eds), Brevia Placitata, p. 219 (bis).

84 Turner and Plucknett (Fn. 83), p. 96.

85 Turner and Plucknett (Fn. 83), pp. 173, 208.

86 Turner and Plucknett (Fn. 83), pp. 26, 65, 120 (quinquies), 161 (ter), 173, 185, 223.

87 Turner and Plucknett (Fn. 83), pp. 142, 204.

88 Turner and Plucknett (Fn. 83), pp. 41, 131.

In 1294 Geoffrey de Geneville and Maud de Lacy, his wife, petitioned Edward I to prevent royal ministers in Ireland (the treasurer and the barons of the exchequer) from violating the formers' franchise of their liberty of Trim. In the petition, Geoffrey and Maud said that the treasurer and barons had sent the 'brief au viscounte de Divelin' qe le viscounte ne lessast por la dite fraunchise' (brief/'writ' to the viscount of Dublin that the viscount must not fail [to execute the order] because of the said franchise).[89] This order violated the wording of the original grant of Meath, which had been confirmed several times by inquisitions.[90] Geoffrey and Maud also mentioned that the viscount of Dublin had tried to interfere in the jurisdiction of the viscount of Limerick. Geoffrey had been chief justice or 'justiciar' (capitalis justiciarius) of Ireland in 1273-6 and so was well aware of the terminology of English law.

Just as there is a large lacuna concerning viscountesses as royal administrators in the dictionaries, there is a similar one in the vernacular legal records. While there are notable references in Latin records to vicecomitisse, the vernacular term 'viscontesse' comes from royal letters and petitions.[91] The lack of references to viscountesses in the formulaic registers of writs and law reports does not erase the existence of twelfth – and thirteenth-century viscountesses who exercised power in a misogynistic society. The fortunate instances that do survive tell us how viscountesses were probably addressed in official duties and functions (la viscontesse).

Vernacular Legal Records	Use of Viscount	Written as	Use of Sheriff
Laws of London (c.1212)	10	uescunte, ueskunte	0
Vern. 'Magna Carta' (1215)	7	visconte	0
Vern. Providencia Baronum	2	viesconte, visconte	0
Draft Version of the Provisions of Westminster	9	vescunte, vescuntes	0
Casus Placitorum (c.1250x69)	2	viscounte, viscunte	0
Irish parliament (1278)	6	viscuntes, vescontes, vescuntes	0
Brevia Pacitata (1278x9)	22	vesconte	0
'Law Reports'	14	vesconte, vicomte, viconte, visconte	0
De Geneville/de Lacy petition (1294)	11	viscounte, viscountes	0

Table 1. Usage of a Version of 'Viscount' in Thirteenth-Century Royal Legal Records

89 Sayles (ed), Affairs of Ireland, no. 51

90 For example, from 1289, Edward I and his council at Sarum declared that the liberty of Trim was exempt from royal writs and justices until Geoffrey de Geneville (no mention of Maud de Lacy at that point) defaulted in administering justice: Sweetman (ed), Calendar of Documents, no. 525.

91 For example, NAUK, SC 8/292/14578.

V. Historiography

Usually, a scholar would place the historiographical section near the beginning, but here it is helpful to see the actual medieval usage before learning of the genealogy of 'sheriffing' medieval English viscountships. Where to begin the analysis of the historiography is somewhat hazardous. If we start with seventeenth-century histories of the twelfth and thirteenth centuries, this section would turn into an entire article on its own. But leaving out the older material might give the impression that 'sheriffing' began in the mid-nineteenth century.

Pollock and Maitland's work, The History of English Law, is held in astoundingly high esteem by many historians of medieval English law – despite its age (2nd ed. 1898). It is unfortunate for Maitland that his argument for mistranslation has been accepted almost without critique for so long. Maitland – who wrote the quote below – was not shy to spell out in detail his estimation for English Linguistic Purity:

> *If for a moment we turn from the substance to the language of the law, we may see how slowly what we are apt to think the most natural consequences of the Conquest manifest themselves. One indelible mark it has stamped for ever on the whole body of our law. It would be hardly too much to say that at the present day almost all our words that have a definite legal import are in a certain sense French words… On many a theme an English man of letters may, by way of exploit, write a paragraph or a page and use no word that is not in every sense a genuinely English word; but an English or American lawyer who attempted this puritanical feat would find himself doomed to silence. It is true, and it is worthy of remark, that within the sphere of public law we have some old terms which have come down to us from unconquered England. Earl was not displaced by count, sheriff was not displaced by viscount; our king, our queen, our lords, our knights of the shire are English; our aldermen are English if our mayors are French…*[92]

This quote is full of problematic speech acts. Many legal history scholars – from the nineteenth century until today – use language which excludes women and non-binary people.[93] Angela Harris and Patricia Cain highlighted this problem thirty years ago,[94] but it persists.[95] Maitland implied that people 'of letters' (scholars) were only men despite the existence of women scholars in his own time, including Mary Bateson who he knew and

92 Pollock and Maitland, History of English Law, i, 87-8.

93 The UK government, the UK Office of the Parliamentary Counsel, the UK Government Legal Department, and the Law Society recommend using gender-neutral pronouns: <https://civilservice.blog.gov.uk/2020/01/10/breaking-down-gender-stereotypes-in-legal-writing/>; <https://www.lawsociety.org.uk/topics/hr-and-people-management/using-pronouns-in-the-workplace>; <https://www.interlawdiversityforum.org/guide-to-gender-neutral-drafting>.

94 Harris (Fn. 2); Cain (Fn. 2).

95 Gwen Seabourne noted this and Maitland's distaste for discussing women's legal history: Seabourne, Women, pp. 1-6.

perhaps even respected despite her gender.[96] Maitland also felt that women at Cambridge asking to be awarded degrees was a 'distraction': 'there are these women – drat them'.[97] Elsewhere, Maitland published his three essays on the Domesday Book when he retreated slightly from his stance on Linguistic Purity. Specifically, he noted that when discussing England in 1086: '[i]f we render vicecomes [as] sheriff we are making our sheriff too little of a vicomte. When comes is before us we have to choose between giving Britanny an earl, giving Chester a count, or offending some of our comites by invidious distinctions.'[98] Just as Milroy described, Maitland's process defined 'English' words as not 'French', Latin, or Greek but did include Scandinavian words without justification. This was not a geographically or culturally based argument as many of the words that Maitland thought were 'French' were developed and used exclusively by the English in England and English Ireland.[99] It is important to explicitly state the facts about Maitland since he is still cited and heavily admired by scholars today.

William Morris produced a monograph on the 'medieval English sheriff' in 1927.[100] In it, 244 out of 285 pages are dedicated to 1066-1300 when the term 'sheriff' was not used legally. Morris admits this and even notes that 'vescunte [is] a name which in the legal language of later times [post-1066] becomes viscount'.[101] Morris confirms that 'viscount' is the legal term (for a man). He argues that 'the Norman office' of vicomte did not replace scírgeréfa despite the changes made after 1066 that made the position 'like the vicomte'. He also notes that the term 'scírgeréfa' was an invention of Knútr (1016-35) and that the position of sheriff is not as 'ancient' as some scholars (especially Stubbs) believe.[102]

George Woodbine, who had edited numerous medieval law tracts, released an article on the language of English law for the uninitiated.[103] He was a linguistic formalist and despite mentioning some medieval terminology, referred repeatedly and forcefully to the thirteenth-century English court vernacular as 'French'. He noted that the historiography of the question of the language of the majority of English people, c.1066-1300, had been framed in Marxist conceptions: the argument was that 'French' was 'the regular spoken tongue of the upper classes.' Woodbine may be one of the first legal scholars to suggest that medieval English people were not monoglot. Similarly, he did not attempt to separate out English people into two different groups ('English' and 'Anglo-Norman' or the more problematic 'Anglo-Saxon' and 'Norman'). He did, however, postulate that by the

96 Nicholas Vincent notes that Bateson was a protégée of Maitland: Vincent, 'Magna Carta', p. 653.

97 Letters of Maitland quoted in Seabourne (Fn. 95), p. 3.

98 Maitland, Domesday Book, p. 31.

99 For example, 'mayor' and 'count' are not French words.

100 Morris (Fn. 52).

101 Morris (Fn. 52), pp. 41-2.

102 Morris (Fn. 52), pp. 18-19.

103 Woodbine, 'Language'.

time of Edward I, the 'cradle tongue' was 'English' and that 'French' was acquired only from teachers or special instruction.[104]

Robert Palmer published an extensive study on English county courts (barely mentioning English Ireland) for the period of 1150-1350.[105] He mentioned 'viscontiel' 217 times (excluding headings, glossary, and index), but he never referred to one viscount relating to these viscontiel writs, debts, or duties. All viscontiel writs, debts, and duties supposedly were related to 'sheriffs'. Many of the records that he cites are translated and his translations give the reader the impression that all of these writs were in fact to 'sheriffs', but he does provide a transcription of a vernacular record in one footnote that reads: 'Viscuntes pleident en Cuntez' (viscounts shall hear pleas [whole cases, not just the arguments/pleading] in county courts).[106] He wrote an entire chapter on 'viscontiel writs' and one on 'the sheriff and his staff' but makes no mention that he is changing viscount to 'sheriff' or that women held viscountships. Like Maitland and Morris, Palmer used male pronouns exclusively for indefinite people despite the existence of twelfth – and thirteenth-century viscountesses.

Paul Brand wrote a book chapter on the linguistics of thirteenth-century English law.[107] In it he maintains the formalist brackets but uses 'English' and 'Anglo-Norman' instead of 'English and French' or 'Anglo-Saxon and French'. Brand silently translates vicecomes and viscounte as 'sheriff'. He does take issue with Michael Clanchy's assumption that the majority of dialogue in court was in 'English' and provides evidence to the contrary.[108] Brand, while analysing and discussing linguistics, does not mention or cite any linguistic theories or theorists. He did somewhat break from the tradition of formalism when he noted that the Westminster Bench used 'gallica', but he 'translated' gallica to 'French'.[109]

Louise Wilkinson's contribution was revolutionary for the study of thirteenth-century vicecomites as she produced a piece of work that focused on 'women sheriffs' (vicecomitisse).[110] One of the main arguments for the scholarly use of 'sheriff' instead of viscount is that thirteenth-century vicecomites were believed to have been appointees and not hereditary positions or even held by nobles. Wilkinson elucidated the existence of vicecomitisse, one of whom was a tentatively hereditary vicecomitissa (Ela de Longespée, countess of Salisbury[111]) and the other obtained the viscountship through being a hereditary castellan (Nichola de la Haye[112]). Although men dominated the viscountships

104 Woodbine (Fn. 103), p. 399.

105 Palmer, County Courts.

106 Palmer (Fn. 105), p. 235, n. 29.

107 Brand, 'Languages'.

108 Brand (Fn. 107), p. 64.

109 Brand (Fn. 107), p. 63, n. 3.

110 Wilkinson, 'Women as Sheriffs'.

111 Wilkinson later noted that Henry III of England ensured that Ela's heirs could not claim the viscountship as hereditary even if it had been hereditary earlier: Wilkinson (Fn. 110), pp. 122-3. Cf. Maitland relegated Ela's entire existence to a footnote: Pollock and Maitland, (Fn. 92), i, 509, n. 287.

112 She inherited custody and constableship of Lincoln castle and then her husband purchased custody of the castle and viscountship of Lincoln: Wilkinson (Fn. 110), pp. 112-13.

of thirteenth-century England and English Ireland, to refer to a 'he' for an abstract viscountship is erasing history. These two women were very exceptional but were not the only or first viscountesses in medieval England. The other viscountesses are discussed in the next section.

VI. Personnel of Viscountships

Thirteenth-century English royal viscounts administered royal county courts, not shire moots (scírgemót), and answered to the exchequer for their counties' rents, revenues, etc. By erasing this practice – by referring to all counties as 'shires'[113] and all viscounts as 'sheriffs' – students and scholars are missing the connection between the names and the contemporary conceptions of geography, politics, culture, and law, and are missing the opportunity to study many details that have been 'filtered' out through this 'English Linguistic Purity'. More importantly, some have argued that the vicecomites in England (and by extension, English Ireland) were functionally different from those on the European Continent and so refer to the former as 'sheriffs' to highlight these differences.[114] This is presumably the source of the dictionary mis-definitions. Looking only at the vicecomites of northern France and the Low Counties,[115] we can see that there was no universal definition of the role in those regions and this can, therefore, be extended to others (e.g. Italian peninsula or Iberian peninsula). We should also note the profound lack of discussion of viscountesses/vicecomitisse in all of these discussions.

In Flanders, the vicecomites were exclusively in the southwest on the Picard border. The seigniors of Crecques were briefly vicecomites to the bishops of Thérrouanne.[116] We should probably leave vicecomites in Latin for this situation as the seigniors of Crecques functioned as vidames for the bishops. The title of vicecomes fades from the family but they retained the rights and duties to collect half of the fines, imprison people accused of theft or capital offenses, execute court sentences, maintain order, and receive the right of wreck. The small counties that were nominally under Flemish seigniory – Saint-Pol, Guînes, and Boulogne – all had their own viscounts. Saint-Pol had a viscount named Raimbaud listed as the first among the barons of Saint-Pol in the twelfth century,

113 This practice is not as ubiquitous as 'sheriffing' but it is still deployed. It is not accurate because despite the fact that some counties had 'shire' in their name, they were not legally 'shires' and most counties did not have 'shire' in their name. Even the counties with 'shire' in their name only had that enclitic occasionally – Euerwicsyre (1208-9) versus comitatus Eboraci (1218-19): above, p. 56; Stenton (ed), Rolls of the Justices, p. 420, no. 1143.

114 Hagger, 'Norman Vicomte', p. 81.

115 The structure of society in Normandy obviously influenced England after 1066, but the Low Countries also heavily influenced England. William I's wife was Matilda de Flanders. Henry I's second wife was Adeliza de Louvain. Stephen of England's wife was Matilda, countess of Boulogne. Stephen and Matilda's children became counts and countesses of Boulogne. Medieval culture was not entirely top-down but one cannot deny that the number of ordinary Englishwomen named Agnes, Julia, Maud, etc. that appeared in the twelfth and thirteenth centuries were the result of Continental immigration and influence.

116 Warlop leaves vicecomes in Latin and Nieus translates it to vicomte: Warlop, Flemish Nobility, i, 187, 190; Nieus, 'Vicomtes'.

but although his son inherited the title, the powers, and responsibilities appear to have been absorbed by the seneschal of Saint-Pol.[117] The viscounts in Guînes (were called the 'viscounts of Markene') functioned as feudal seigniors under the counts, but they did not rule a 'viscounty' of Markene. They eventually became one of the peers of Flanders and ceased using the title of viscount.[118] In Boulogne, the viscount appears to have been an appointed administrator and the twelfth-century holders did not even have surnames or loconyms. There are also references to multiple viscounts at one time in Boulogne.[119] To the southeast, in Vermandois and Cambrai, there were no viscounts, and in Champagne the viscounts were hereditary financial bailiffs over towns and markets.

In Ponthieu and Normandy, the counties were subdivided into viscounties (vicomtés or vicecomitatus) and had a viscount for each one, or sometimes, like in England, a viscount administered the entire county. The viscounts of Normandy came from the aristocracy but were still agents/administrators of the duke.[120] Their functions were economic (collect monies), judicial, and peace keeping. The positions were hereditary but also could be confiscated. The viscounts of Ponthieu were not hereditary. Some were locals but were not magnates or nobles. Their functions were judicial and financial: dealt with thefts, controlled duels, made arrests and seizures of debts, settled land disputes, and policed markets.[121] Perhaps the reason many scholars have theorised that English viscounts were not 'viscounts' but instead 'sheriffs' is that the Norman viscounts/vicomtes were believed to hold different functions. Mark Hagger uncovered that many of Charles Haskins's conclusions were based on misreadings of single references (viscounts were not military leaders, did not hold castles ipso facto, etc.).[122] In Normandy, seigneurs (seigniors) had viscounts, even though the former were not counts, and some even had multiple viscounts.[123] In England and English Ireland, there were also seigniorial viscounts.

Assuming (incorrectly) that the English scírgeréfan of the shires were simply rebranded as vicecomites only in Latin writing in 1066x70[124] but were still called 'scírgeréfan' by kings and their courts and that this practice continued uninterrupted until today, there is still a great deal of change and interaction to be studied in the official, legal name change. Blithely stating that vicecomites of the thirteenth century were the same as pre-1066 shire-reeves erases events and facts.[125] We have already learned that vicecomites were officially called viscountes, vicontes, vescuntes, and veskuntes in English courts. More importantly, many of the scholars who employ this practice know that the role and function

117 Nieus (Fn. 116), pp. 297-8.

118 Nieus (Fn. 116), pp. 299-300.

119 Nieus (Fn. 116), pp. 300-1.

120 Hagger (Fn. 114), p. 66; Nieus (Fn. 116), p. 295.

121 Nieus (Fn. 116), p. 297.

122 Hagger (Fn. 114), pp. 67, 69, 70, 80.

123 Hagger (Fn. 114), pp. 66-7.

124 Many scholars note that some of the pre-1066 scírgeréfan did remain in place in 1066 but were replaced within a few years. This study is not concerned with that transition.

125 For example, see Maitland's quote above, p. 63.

of English vicecomites changed significantly in the thirteenth century. Before we get into the specifics of the thirteenth century, it is helpful to briefly discuss England before 1066.

Scholars of Early England have noted that scírgeréfa was not used until the eleventh century and that terms used in England before 1066 were not static.[126] Before mentioning more on scírgeréfan, it is important to note that hundred moots were far more important in Early England than shire moots.[127] The hundred moots were organised by prepositi (portreeves) or motgeréfan (moot reeves), and they were not the kings' reeves. Hudson notes that the word scírgemót (shire moot) does not appear until Edgar (959-75).[128] The hundred moots met every four weeks while, if there was a shire moot, it only assembled twice per year. The few shire moots were supervised by ealdormen and bishops, and the levelling of accusations and seizing the accused was done by thegns.[129] Men who are now labelled 'shire-reeve' (rarely) or 'sheriff' (more often) in secondary literature were in fact called 'scirman' (shire man), king's reeve, reeve, thegn, or a number of other terms. Morris noted that Mercia did not even have 'shires' (a West Saxon concept) until 1000x16.[130]

During Knútr's time, the term scírgeréfa is officially used, and during Edward the Confessor's time, two scírgeréfan held two 'shires' (Toli had Norfolk and Suffolk, and Godric had Berkshire and Buckinghamshire).[131] This contrasts with the post-1066 practice of large viscountships: Hugh de Buckland held eight counties in 1110, and Aubrey de Vere and Richard Basset jointly held eleven counties in the 1120s.[132] The shire moots belonged to the ealdormen or later earls (a rendering of 'jarl' from Old Danish or Old Norse), and Edward sent letters to the bishop, the earl, and the thegns of a shire, and not to the shire-reeve.[133] A great deal of the information known about scírgeréfan in England before 1066 is from the Domesday Book. Just as modern scholars have rebranded viscounts as 'sheriffs', the Domesday Book clerks rebranded scírgeréfan as 'vicecomites'. Repeating this same anachronism is not helpful. Prior to 1066 the only Latin term applied to scírgeréfan was iudex comitatus.[134]

For the royal viscountships of the thirteenth century, there are some rough parameters to list. The viscounts and viscountesses were (ipso facto) royal officials who performed executive and some judicial duties and were responsible for financial payments and receipts from their viscountships. Similar to the pre-1066 ealdorman, the holders of viscountships were charged with supervising county courts but without a bishop co-super-

126 Morris (Fn. 52), pp. 1-39; Wormald, 'Frederic William Maitland', p. 1; Hudson, Oxford History, pp. 37-40. Hudson even notes that people he calls 'sheriff' were not labelled as such in the sources: ibid. p. 49, n. 42.

127 Hudson (Fn. 126), pp. 50-5; Karn, Kings, Lords, pp. 1-10.

128 Hudson (Fn. 126), p. 48.

129 Hudson (Fn. 126), pp. 49, 204.

130 Morris (Fn. 52), p. 8, n. 61. See also, Hudson (Fn. 126), p. 38; Karn (Fn. 127), pp. 5-7.

131 Morris (Fn. 52), pp. 18-19, 24.

132 Hudson (Fn. 126), p. 265. See also, Table 2 below.

133 Morris (Fn. 52), pp. 25.

134 Morris (Fn. 52), p. 23.

vising. Morris, in his study on sheriffs, noted that priests and deacons were not allowed to be geréfan (reeves) before 1066 and Pope Alexander III ordered that no one in sacred orders could be a viscount or secular provost.[135] Numerous bishops, however, were viscounts in the thirteenth century.[136] William, bishop of Worcester, held Shropshire and Stafford for a half-year (Feb-Michaelmas 1224).[137] Walter Mauclerc, bishop of Carlisle, was viscount of Cumberland in 1223-33, and Robert, bishop of Carlisle, was viscount of Cumberland in 1270-2.[138] Peter des Roches, bishop of Winchester, was viscount of Hampshire, in 1232-4.[139] Walter, archbishop of York, held Nottingham and Derby in 1271-4.[140]

Besides the royal viscountships established in England after 1066x70, there were also English liberties and seigniories with seigniorial viscounts.[141] William le Gros, count of Aumale and York, had personal viscounts in Co. York during the reigns of Henry I and Henry II. The rapes (subdivisions) of Sussex had viscounts under their respective seigniors. The counts of Gloucester had viscounts in Glamorgan, and the bishops of Durham had one in their liberty.[142] The liberty of Leinster had four viscounts even after it was split into five parcenaries for the heirs of the five daughters of Isabella de Clare and William Marshal.[143] The liberty of Meath had a viscount under the seneschal.[144] The viscounts were listed in charters and inquisitions, along with liberty justices, as acceptable and legal aspects of the liberties.

Similar to some areas (but not all) on the European Continent, viscountships could be hereditary. Urse d'Abetot received the viscountship of Worcester in c.1069 and it was considered a hereditary grant for over 250 years. Urse had built Worcester Castle and it passed along with the position.[145] His son was viscount, c.1110-c.1115. After Roger fitz Urse was banished, the viscountship passed to Walter de Beauchamp, husband of Urse's daughter. The des Beauchamps held onto the viscountship (with a few breaks) for several centuries.[146] In addition to Worcester, William de Beauchamp held the viscounty of

135 Morris (Fn. 52), pp. 13, 14, 22, n. 39, 113; Stubbs (ed), Chronicle, i, 85.

136 For earlier, John Sabapathy noted Hilary, bishop of Chichester, was viscount of Sussex in 1154-5: Sabapathy, Officers, p. 84, n. 6. Geoffrey, archbishop of York, paid to be viscount of York in 1194: Lists of Sheriffs, p. 161.

137 Lists of Sheriffs, p. 117.

138 Lists of Sheriffs, p. 26.

139 Lists of Sheriffs, p. 54.

140 Lists of Sheriffs, p. 102.

141 A lack of records concerning seigniorial viscountships in the twelfth and thirteenth centuries should not lead us to assume that there were no seignorial viscountesses.

142 Morris (Fn. 52), pp. 108-9.

143 Otway-Ruthven, 'Medieval County', p. 188. For background on the partition, see Orpen, Ireland, pp. 319-35.

144 Sweetman (Fn. 90), no. 525; Mills and McEnery (eds), Calendar of the Gormanston, pp. 5-6, 13, 169, 176-7.

145 Morris (Fn. 52), pp. 43, n. 20, 46-7, n. 47, 51, n. 63, 76; Lists of Sheriffs, p. 157.

146 Morris (Fn. 52), pp. 79, 85, 108, 112, 180-1. The family held onto the viscountship well past the end of this study.

Bedford and Buckingham in 1235-7.[147] The viscountship of Cornwall had been attached to the countship of Cornwall in its earlier conceptions and had remained that way when it was given to Richard, brother of Henry III, in 1225.[148] Robert de Vieuxpont received the viscountship of Westmorland in fee in 1203.[149] He held it until he died, then Hubert de Burgh held it on behalf of Robert's underage son John, who inherited it in 1234. After John, it passed to his son Robert and then to Robert's two surviving daughters as coheirs, Isabella de Clifford and Idonea de Leybourne.

It appears that the hereditary viscountships led to the understudied phenomenon of viscountesses. Besides the two viscountesses examined by Wilkinson, there were at least four more definitive viscountesses and two possible ones. Beginning with the earliest, Juliana fille Richard Winton accounted for £43 5s. 1d. of the old farm of counties Buckingham and Bedford in 1129-30.[150] In 1129-30, everyone else on the list was a current or former viscount so Juliana probably was a former viscountess of Buckingham and Bedford.[151] Accounting for the farm of a county was the duty and role of a viscount/viscountess. If she had been delivering the account for someone else, the record would have stated such. There was an unnamed viscountess in c.1157 who was financially in charge of Co. Devon.[152] We do not know if she held any military or judicial duties. The count of Devon, Richard de Redvers, rendered her account (compotus) to the exchequer and she, the viscountess, was acquitted (liberauit). This accounting on her behalf was a common oc-

147 Lists of Sheriffs, p. 1.

148 Immediately before Richard, both positions had been held by Henry fitz Count, count of Cornwall and John of England's cousin, but Henry had been disseised by the regency: Morris (Fn. 52), pp. 45, 123, 177, 181.

149 Morris (Fn. 52), pp. 179-80; Lists of Sheriffs, p. 150. He later held the viscounty of Nottingham and Derby in 1204-8: Lists of Sheriffs, p. 102.

150 Hunter (ed), Magnum Rotulum, p. 100; Green (ed), Great Roll, p. 80.

151 Curtis Walker assumed that Juliana had to be accounting for her father but provided no proof: Walker, 'Sheriffs', pp. 67-8.

152 She is not named in the Pipe Roll (only 'vicecomitissa liberauit per breve Regis'). An Adeliza/Adelicia is named as hereditary viscountess (vicecomitissa) in the Monasticon Anglicanum, where it is said that she was the sister of Richard fitz Baldwin. Richard had been viscount of Devon and castellan of Exeter Castle, and Baldwin had been given the barony of Okehampton. The problem is that the Monasticon Anglicanum and the Annales Plymptoniensis claim that Adeliza died in 1142, fifteen years before the entry in the Pipe Roll. The viscountess from 1157 was most likely another woman entirely. Adeliza's heir was Maud d'Aranches, her granddaughter, who was married to William de Curci (d.1162), so Maud was unlikely to have had control of the viscountship while married, and there is no record of William claiming the viscountship. There may be an earlier reference (1154) to an Adeliza in the register of the priory of Plympton (Bodleian Library, MS Tanner 342 fol. 177v, quoted in the DMLBS) which states that 'precipio quod permittas ecclesiam et canonicos de Plimpton tenere elemosinas omnes quas Atheliza vicecomitissa filia Baldwini eis dedit': order that the church and canons of Plympton have all of the alms that Viscountess Adeliza fille Baldwin gave to them. This grant is interesting because Plympton was the de Redvers's honour and the latter were rivals with the barons of Okehampton for control of Devon and the viscountship. It seems unlikely that the viscountess in 1157 was Count Richard de Redvers's wife, Denise, or stepmother, Lucy. Richard's grandmother, Adeliz/Alice de Redvers, was still alive but she was called not usually given any title in her surviving charters and she was at least 80: Hunter (ed), Great Roll, 1155-8, pp. 157-8; Cokayne, Complete Peerage, iii, 100-1; Dugdale, Monasticon, v, 377-8; Bearman, Charters, pp. 3, 8-9, 11, 59-63; 'uicecomitissa', brepolis.net/dmlbs; Fizzard, Plympton Priory, pp. 62, n. 27, 83, 89, n. 165.

currence and had no bearing on the power afforded to her as the viscountess. Emma, viscountess of Rouen, accounted for the farm of Southampton and a manor in Co. Surrey in 1158-61.[153] Anselm, her predecessor in Rouen, had also held the same farms in England. While her viscountship (vicomté) was in English roy's lands in Normandy, her title was recognised in England where she held similar administrative duties on a slightly smaller scale. She was only named as 'the viscountess of Rouen' in the Pipe Rolls, but she was identified by scholars of twelfth-century France.[154] Her children were known as Geoffroi fils vicomtesse (Geoffrey fitz Viscountess) and Hugo fils vicomtesse (Hugh fitz Viscountess) demonstrating her social status. Two additional thirteenth-century viscountesses escaped Wilkinson's study. After Robert de Vieuxpont died, his two daughters, Isabella and Idonea, inherited his lands and titles, including the viscountship of Westmorland. After both women's husbands died, the sisters held the viscountship as almost co-viscountesses.[155] Isabella de Clifford, the elder, claimed the title of 'viscountess' and the right to appoint the sub-viscount who would perform their duties, and Idonea de Leybourne, the younger, agreed on the condition that she would approve the appointments. It seems that their ancestors had also appointed sub-viscounts.[156] The agreement was witnessed in the exchequer. After Isabella died, Idonea remained as the secondary co-viscountess (and was referred to as 'viscountess' in records) and her nephew, Robert de Clifford, inherited the elder position from his mother.[157] They held the position for several years, well into the fourteenth century. Finally, also in the fourteenth century (1301), Margaret de Clare, countess of Cornwall, received the viscountship of Rutland (but not Cornwall) on the death of her husband.[158] She held it for two years.

The counties and viscountships established in English Ireland were entirely new inventions and had no previous position from which to claim a heritage. One viscountship was hereditary at its creation in English Ireland. In 1215, Thomas fitz Anthony was granted the county of Waterford, the castles of Waterford and Dungarvan, the royal demesnes in Waterford except the city, county of Desmond, the city of Cork, and the royal demesnes for 250 marks per year.[159] The splitting of Co. Desmond into two new coun-

153 Great Roll, 1158-1159, pp. 50, 56; Great Roll, 1159-1160, pp. 22, 33; Great Roll, 1160-1161, p. 54; Great Roll, 1161-1162, p. 39.

154 Six, 'Vicomtesse Emma'. Six names older scholars who had also examined or mentioned Viscountess Emma.

155 Nicolson and Burn, History and Antiquities, pp. 272-3; Duckett, 'Sheriffs', pp. 302-3.

156 Duckett (Fn. 155), pp. 289-92. Duckett also calls them 'pro-vicecomites' and lists most viscounts of Westmorland as actually being sub – or pro-viscounts under the de Vieuxponts. His list does not list Idonea serving along with her sister but does have her serving as co-viscountess with her nephew, Robert de Clifford, and states that Idonea was married to John de Crumwelle while being a viscountess! This would make her situation profoundly different from the other viscountesses who appear to have been widows while serving. His Latin transcripts show that appointments under Roger de Clifford were considered sub-viscounts (under Roger) by the exchequer.

157 Nicolson and Burn (Fn. 155), p. 273; Duckett (Fn. 155), pp. 302-4; List of Sheriffs, p. 150.

158 List of Sheriffs, p. 112. Her husband, Edmund de Almain, was viscount of Cornwall (by right of being count of Cornwall) and of Rutland.

159 Otway-Ruthven, 'Anglo-Irish', p. 2.

ties (Cork and Kerry) did not end the fitz Anthony viscountship. Many of the hereditary viscountships in England were interrupted by the disturbances of 1204, 1215-17, 1223-4, 1236, and 1258-66, but de Beauchamp (Worcester) and de Vieuxpont/de Clifford (Westmorland) were able to keep their viscountships in the long term. The Geraldines of Desmond, who had inherited the hereditary viscountship of Desmond, lost it between 1284 and 1292 and were granted the hereditary 'beadleries' or chief sergeanties of counties Waterford, Cork, and Kerry in exchange.[160]

One common conception of thirteenth-century 'sheriffs' to differentiate them from Continental viscountships, is the idea that they were all short-term appointments of local or curial men.[161] Just as in Normandy, many English nobles (men and women) held royal viscountships in England, and many of those held multiple viscountships at once (see Table 2, below). The nobles that held several viscountships – some of the English viscountships were already combined counties instead of subdivisions of a single county – probably did not personally conduct peace keeping, the hundred courts, and possibly even the county court. English Ireland had sinecure viscounts. Otto de Grandison was viscount of Tipperary but was not physically present in Ireland. His bailiff appears to have served as his locum tenens.[162] Thomas de Clare, seignior of Thomond, was viscount of Limerick in 1274-6, but did not fulfil this position personally. His son, Richard de Clare, was viscount of Cork in the early fourteenth century (1309, 1312-16).[163] There are also a few references to 'viscountesses' who were the wives of viscounts implying that those viscountships were considered hereditary and noble.[164]

Name	Title	Viscountship	Years
William Marshal	count of Pembroke	Gloucester	1193, 1198-1207
William de Warenne	count of Surrey	Northumberland Surrey	1212-14 1217-26
Ranulf de Blondeville	count of Chester and Lincoln	Lancashire Shrop & Staff	1216-22 1216, 1217-23

160 Otway-Ruthven (Fn. 159), pp. 2-3, 22-3.

161 David Carpenter produced a lengthy analysis of the shift from politically connected curiales to local knights and minor tenants-in-chief but also mentioned that William Marshal held Gloucester (1204), the count of Chester held three counties (1223-4), and that the viscountship of Worcester was a hereditary position. He interestingly said that William Marshal and William de Longespée were curiales: Carpenter, 'Decline', pp. 7, n. 4, 8, 11, 17, n. 5. Sabapathy thought that 'shrievalties' (viscountships) were not hereditary but theorised that successive members of a family could hold them, and he made no mention of the many noble viscounts/viscountesses or of the recognised hereditary nature of Westmorland (in exchequer records): Sabapathy (Fn. 136), pp. 83-5.

162 Hartland, 'Household Knights', pp. 165-6.

163 Hartland, 'English Lords', pp. 339-40.

164 Maitland noted that Berta Vicecomitissa was the wife of Ranulf Glanvill, viscount of York: Pollock and Maitland (Fn. 92), i, 509, n. 287. The mother of Walter de Gloucester (he and his father were viscounts of Gloucester), Adeliza, was called 'Adeliza vicecomitissa' in 1129 when supposedly Miles de Gloucester, her grandson, was viscount of Gloucester: Hart (ed.), Historia et Cartularium, pp. 81, 125.

William de Longespée	count of Salisbury, jus uxore	Camb & Hunt Devon Lincoln Shrop & Staff Somerset Wiltshire	1212-16 1217-21 1223 1223 1217 1199-1203, 1204-7, 1213-26
Nichola de la Haye	baroness of Brattleby, castellan of Lincoln	Lincoln	1216-17
Richard, brother of Henry III	count of Cornwall (1225)	Berkshire Cornwall	1217-20 1225-72
Ela de Longespée	countess of Salisbury	Wiltshire	1227-8, 1231-7
William de Ferrers	count of Derby	Lancashire	1223-8
John de Lacy	count of Lincoln	Cheshire	1237
Humphrey de Bohun	count of Essex	Kent	1239-41
William de Forz	count of Aumale	Cumberland	1255-60
John de Plessetis	count of Warwick	War & Leic	1261
Lord Edward	primogenitus regis	Bed & Bucks Hereford Wiltshire	1266-70 1269-70 1272
Edmund Crouchback	count of Leicester, Lancaster, Derby, and Champagne	Lancashire	1267-84
Thomas de Clare	seignior of Thomond	Limerick	1274-6
Edmund de Almain	count of Cornwall	Cornwall Rutland	1278-1300 1288-1300
Thomas de Lancaster	count of Lancaster, Leicester, Derby, Lincoln, and Salisbury	Lancashire	1298-1320
Margaret de Clare	countess of Cornwall	Rutland	1301-3

Table 2. Nobles Who Held Viscountships[165]

VII. Conclusions

This legal-linguistic examination will hopefully encourage new avenues of research. Louise Wilkinson noted that Nichola de la Haye was referred to, twice, in masculine terms while she was performing bellicose duties ('castellum viriliter custodiebat': she defended the castle manfully in 1191 and 'viriliter se defendit': she manfully defended herself

[165] Lists of Sheriffs, p. 49; Lists of Sheriffs, p. 97; Lists of Sheriffs, p. 135; Lists of Sheriffs, p. 72; Lists of Sheriffs, p. 117; Lists of Sheriffs, p. 12; Lists of Sheriffs, p. 34; Christmas 1223-February 1223/4: Lists of Sheriffs, p. 117; Lists of Sheriffs, p. 117; Lists of Sheriffs, p. 122; Lists of Sheriffs, p. 152; Wilkinson (Fn. 110), pp. 112-19; Lists of Sheriffs, p. 6; Morris (Fn. 52), p. 181; Wilkinson (Fn. 110), pp. 119-24; Lists of Sheriffs, p. 72; Lists of Sheriffs, p. 17a; Lists of Sheriffs, p. 67; Lists of Sheriffs, p. 26; Half-year, did not account: Lists of Sheriffs, p. 144; Lists of Sheriffs, p. 1; Lists of Sheriffs, p. 59; Lists of Sheriffs, p. 152; Lists of Sheriffs, p. 72; Hartland (Fn. 163), p. 339; Morris (Fn. 52), p. 181; Lists of Sheriffs, p. 21; Lists of Sheriffs, p.112; 28 Lists of Sheriffs, p. 72; Lists of Sheriffs, p. 112.

[inside Lincoln Castle] in 1217).[166] Were the other medieval viscountesses masculinised? This masculinisation of Nichola was to highlight that her actions were not stereotypically 'feminine' or 'womanly' for early thirteenth-century English society. In a time before homosexuality, bisexuality, and transmen were recognised or accepted, the ramifications of Nichola being described in these terms may seem minor to some readers now, but that does not mean we should ignore the possibility that this gendering language had wider connotations than bravely performing feudal castle duty. When analysing the framing and depictions of medieval viscountesses, intersectionality will be pertinent as the viscountesses appear to have all been nobles. The expectations of the duties to be performed personally by a countess acting as a viscountess should be compared to those expected of a count acting as viscount,[167] and additionally the viscountesses should be compared to the other noble women who performed similar functions. Maud de Lacy was made custodian of Windsor Castle in 1249 and successfully sued to recover the custody in 1253.[168] Isabella de Mortimer received custody of castles in the March of Wales in 1272 and 1280.[169] If some of these women acted through bailiffs or seneschals, that should be compared to the noble men who did the same.

Viscounts in thirteenth-century English courts could be appointed administrators (curiales or locals), bishops, or a rather powerful count or countess. The viscountesses were probably all of upper status, if not nobility, and do not appear to have been clerical or bureaucratic appointments. They were not alone as many noble men inherited viscountships or received them as political rewards. The position (viscountship/vicecomitas) was not a monolith. Several – at least six (if not eight or more) overall and four in the thirteenth century – were women. In vernacular court and legal records, the men were called viconte, vescunte, viscounte, etc., and in royal letters the women were called viscontesse. None were called 'sheriff', 'shire-reeve', or 'woman sheriff' in royal courts. Legally they were not sheriffs. When the idea of English courts and English law was brought to Ireland by English people, they did not bring certain popular terms from the historiography. Many scholars look back to the thirteenth-century courts through the eyes of Blackstone, Wordsworth, or Stubbs, but eighteenth – and nineteenth-century antiquarians had no issue with ethics of translation, colonialism, or erasing historical women with power. For them, 'he' did include everyone that mattered, and there was no problem with labelling French, Italian, or Spanish vicecomites as 'sheriffs' and comites as 'earls'. The tenth-century scírmen and eleventh-century scírgeréfan were remarkably different from the viscounts and viscountesses. Ealdormen might control multiple shires, but shire-reeves did not. The name scírman indicates that this position was probably impossible for women to hold, but the nature and survival of records from Early England obscure any investigation of possible 'shirewomen'. Like the vicomtes and vicomtesses of Normandy, the Eng-

166 Wilkinson (Fn. 110), pp. 114, 117.

167 Louise Wilkinson provides a good example of this when discussing Ela and William de Longespée: Wilkinson (Fn. 110), p. 123.

168 Black and Isaacson (eds), Calendar Patent Rolls, 1247-58, p. 52; Stamp (ed.), Close Rolls, 1251-3, p. 444.

169 Cavell, 'Intelligence and Intrigue', pp. 4, 11; eadem, 'Aristocratic Widows', pp. 72–75

lish viscounts and viscountesses did not hold castles ipso facto, but a few exceptions existed. For legal studies of thirteenth-century English law precision is usually paramount. A scholar might object to 'loose' phraseology such as 'report to the exchequer' instead of 'answer' in regard to escheated chattels. The question is why then do scholars choose to use imprecise language concerning certain persons in court. I do not believe 'tradition' is a scientific answer.

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Women's Access to the Profession of Judiciary in Estonia in 1920s-1940s: Rules and Reality[1]

Merike Ristikivi, Marju Luts-Sootak, Heli-Triin Räis

Estonian women were allowed to study law already in the early years of the twentieth century and the possibilities to obtain a law degree expanded with the foundation of the Republic of Estonia in 1918. Nevertheless, it turned out to be much harder to start working in the chosen field: before the Second World War, out of 143 women who had graduated the faculty of law, only 42 were practising attorneys. The first female notary started to work only in 1936.

In the 1920s, two Estonian female lawyers tried to run for the judicial office. Auguste Susi-Tannebaum and Olli Olesk had graduated from the Faculty of Law at the University of Tartu and were the members of Estonian Bar Association. However, their applications (from 1924 and 1929) for the candidacy to the judge's profession were rejected. Both women contested the negative decisions in the Supreme Court. The Supreme Court was guided by the principle of gender equality and expressed implicitly its opinion that female lawyers cannot be excluded from the candidacy on the grounds of gender. Regardless of the Supreme Court's opinion, it was possible to exclude women from the competition for judge's position on the basis of the law which granted the President of the National Court of Appeal an exclusive right to decide on the suitability of candidates, without the obligation to justify the decision. During the period of Estonia's first independence period between two Word Wars only one person, Jaak Reichmann, was on this decisive position. As a result, women were deprived of the opportunity to become judges in the 1920s and 1930s. No female lawyer did become a judge in Estonia before the Second World War and the first female judges were appointed in the first Soviet year of 1940–1941. During the 1940s, repressions and replacement of previous lawyers offered new employment opportunities for women. Regrettably, several women who were appointed judges from 1940 to 1941 had no higher education in law and some of them did not even have any kind of legal education. In this period, it was not a priority to have a legal education, because the loyalty to the Soviet regime was a more important prerequisite.

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I. Introduction

Estonian women had the opportunity to start acquiring higher legal education in the early years of the 20th century as Estonian territories where under the rule of Russian Empire.[2] According to the order of the Tartu University[3] Council of 1905, female students could start their studies as auditors, since 1917 women have been admitted to the University on an equal footing with men. Nevertheless, it turned out to be much harder to start working in the field of specialization after the completion of studies. Before the Second World War, out of 143 women who had graduated the faculty of law at the Estonian University of Tartu,[4] only 42 were practising attorneys.[5] As the first female notary in 1936, Ilma Sarepera became the only woman among the notaries before the Second World War.[6] Nevertheless, the first female judges were appointed during the Soviet Era in the period of 1940–1941. It does not mean, that femal lawyers did not try to run for the judicial office.

In Europe and in the Nordic countries in particular, female lawyers had taken up professional work a few decades earlier.[7] Scandinavian countries were among the first to give women the right to enter the Bar Association. In Sweden, women were allowed to work in the courts already in 1897.[8] Although the Oslo Bar Association in Norway had voted in favour of the right of women to become attorneys already in 1895, the right to practice in legal fields was granted to women in Norway only in 1904 and the first female judges took office there in the mid-1920s.[9] The Danish legislator opened the doors of the Bar Association for women in 1906.[10] In Finland, which was also under the Russian imperial rule authority from 1809 until the end of the Empire, women were allowed to partici-

2 For more information on higher education for women before 1918, see Leppik, 'Naiste haridusvõimalustest', pp. 34-52; Kivimäe and Tamul, 'Eesti naiste kõrgkooli õpingud', pp. 213-252; Tamul, 'Konfession und nationale Herkunft', pp. 555-581; Whelan, 'The debate on women's education', pp. 163-180.

3 In year 1892, the city of Tartu (Estonian)/Dorpat (German) was recalled as Russian Jur'jev and the German University of Dorpat became the Russian University of Jur'jev. On the law faculty in this period see Anepaio, 'Die russische Universität in Jur'jev'.

4 Between the two world wars, 1618 students graduated from the Faculty of Law, of which 1475 were men and 143 women (or 8.8% of law students). Karjahärm and Sirk, Vaim ja võim, p. 145.

5 More than half of them, i.e. 22 women were sworn in as attorneys in the 1930s, while the other 20 remained as assistants of attorneys until 1940. For details, see Eesti Vabariigi Vannutatud Advokaatide Nõukogu aruanded 1927–1939.

6 For a closer look at I. Sarepera and Estonia's first female notaries, see Ristikivi and Räis, 'Eesti esimesed naisnotarid', pp. 114–134. The next female notaries were appointed by the Soviet authorities in the autumn of 1944 during the opening of notarial offices, but none of them had a higher level of legal education.

7 For more details on the educational and employment opportunities of the first female lawyers in Europe and the world, see Albisetti, 'Portia ante Portias', pp. 825–857; Women in the world's legal professions; Mossman, The first women lawyers.

8 About the professionalisation of Swedish female lawyers, see Svensson, Forskaren Elsa Eschelsson.

9 More about the first female lawyers in Norway, see Støren, Justitias døtre.

10 Dübeck, 'Lærde damer', pp. 11–30, also Dübeck, 'Refexionen über Frauen', pp. 19–29.

pate incourt trials as representatives already in 1895.[11] The first female judge, Katri Hakkila, was appointed in Finland in the 1930s. It was such a remarkable event that the male judges were curious to see the first female judge (especially at the beginning of her career) and occasionally took a look in her office.[12] At the same time, it should be noted that, compared to a number of other professions requiring academic education, there were remarkably few women in the legal professions in Finland prior to the Second World War. In 1930, for example, only one woman acted as an attorney – Agnes Lundell, who had entered office in 1911.[13] Although Finnish women had already obtained electoral rights in 1906, and more and more women took part in the work of the Finnish Parliament year-on-year, there was still a strong prejudice in society as to the suitability of women for the profession of a lawyer.[14]

As nearly a third of women who graduated from the faculty of law of the University of Tartu were employed as attorneys in Estonia between the two world wars, it seems that compared to Finland, the career of Estonian female lawyers was more successful.

The First Constitution of the Republic of Estonia, adopted on 15 June 1920[15] and entered into force on 21 December 1920, also provided for gender equality in section 6:

> *All Estonian citizens are equal in the eyes of law. There cannot be any public privileges or prejudices derived from birth, religion, sex, rank, or nationality. In Estonia there are no legal class division or titles.*

Formally, therefore, there were no constitutional barriers which would have prevented women from applying for a judicial post.[16] Nor can it be said that female lawyers would have had no interest in the judge's office. After all, the work in the judicial system is a traditional career perspective for lawyers with academic education, alongside the profession of attorney and notary, or even above all other legal professions.

This article examines the applications for the judicial office of two female lawyers, Auguste Susi-Tannebaum and Olli Olesk, as well as the conduct and justification for their rejection. On the basis of this material, Susi-Tannebaum's referral to the Supreme Court on the issue of the protection of fundamental rights has previously been examined.[17] Ho-

11 Korpiola, 'Attempting to advocate', p. 299.

12 For more information on career opportunities for Finnish female lawyers, see Silius, 'Women jurists in Finland', 389.

13 Korpiola, Attempting to advocate, p. 293.

14 Ibid., pp. 294–296. For a critical attitude towards female lawyers at the beginning of the 20 th century, see also Albisetti, "Portia ante Portas", pp. 842–844.

15 Riigi Teataja [State Gazette], 09.08.1920.

16 The 1920 Constitution was rather progressive for its time, containing provisions for social and economic human rights. At the same time, there were problems with gender equality in the sphere of private law. For more details, see Leppik, 'Soolise võrdõiguslikkuse küsimus', pp. 341–361; for the wider context Siimets-Gross and Leppik, 'Estonia: first landmarks', pp. 304–307; Siimets-Gross, 'Social and economic fundamental rights', pp. 135–143.

17 E.g. Anepaio, 'Eesti Vabariigi Riigikohus' (1999), pp. 41–43; Siimets-Gross, 'Social and economic fundamental rights', p. 139; detailed from the special perspective of constitutionality Leppik, 'Soolise võrdõiguslikkuse küsimus', pp. 351–353.

wever, it has not previously been further analysed why, despite the favourable ruling of the Supreme Court, these women did not become judges. In this context, the factors and regulations that had an impact on the career of female lawyers in judicial office are also important: who could become judges and the level of education of judges. Therefore, we first give an overview of the courts administration and the conditions for becoming a judge in 1920s. Article concludes with the closer look at the beginning of the Soviet period when the first female judges were appointed to the various judicial posts.

II. Estonian courts administration between two world wars

Although the independence of the Republic of Estonia was declared on 24 February 1918, due to the German occupation of Estonia, it was not until the end of 1918 when the organisation of the courts system was started in Estonia.[18] Relying on the Order of the Provisional Government of 18.11.1918 on the establishment of temporary courts,[19] the Deputy Prime Minister and Minister of Justice Jaan Poska issued an order to restore the activities of pre-revolutionary judicial institutions reestablished in Estonia from 2 December 1918. Instead of previous legal languages – German and Russian – Estonian became the working language of the courts. As a general rule, the courts had to work under the same laws as the courts in Tsarist Era. Prior to the adoption of new laws or the amendment of the former laws, the legislation in force on the territory of Estonia before the Bolsheviks came to power in Russia was considered to be valid in Estonia. The general laws and regulations issued by the German occupying authorities remained in force on a temporary basis.

Instead of the highest national court of the Russian Empire, the Ruling Senat, the Supreme Court of the Republic of Estonia was established in 1919 as the highest national court, which was also granted all rights belonging to the previous highest judicial authorities of Tsarist Russia.[20]

Although section 1(b) of the Regulation on the Establishment of Temporary Courts provided that parish courts and the supreme peasant courts would be abolished, the parish courts remained, and their competence remained with regard to the tutelage, welfare and guardianship over the estates.[21] The supreme peasant courts were liquidated and

18 The justice system created by Russian Empire in the course of the 1864 judicial reform was introduced as modified under the Baltic governorates' courts administration reform laws in November 1889 also in the Baltic Provinces and was in principle in force here until the 1917 October revolution, constituting initially the basis for the establishment of the Estonian national courts administration. For more information on the development of the courts administration, see Anepaio, 'Eesti Vabariigi kohtute kujunemine', pp. 33–38; shortly also Anepaio, 'The Supreme Court', pp. 110–111.

19 Riigi Teataja [State Gazette], 1918, 1, from 27.11.1918.

20 For the establishment and jurisdiction of the Supeme Court, see Anepaio, 'Eesti Vabariigi Riigikohus', pp. 26–27.

21 Riigi Teataja [State Gazette], 1919, 4, pp. 26–27. For more information about parish courts, see Anepaio, 'Vallakohus', pp. 343–368.

their assets handed over to the peace councils. The peace councils acquired the competence of the previous district courts, i.e. became the first instance in the judicial system.[22] Besides, the peace councils obtained permanent members and, in addition to reviewing the decisions of the peace courts in the appeal procedure, they were also subject to greater claims and more serious criminal matters, which were previously the jurisdiction of the district courts. In place of the latter, a new instance of appeal was created – the Tallin Circuit Court, which was renamed the National Court of Appeal (Kohtupalat) in 1920 and, in 1935, as regards the reorganisation of the names of judicial authorities and civil servants as the Kohtukoda. Peace courts from the time of Russian rule were later named as district courts.[23]

As a complete novelty, in 1919, administrative courts were established.[24] In the activity report of the Ministry of Justice presented at the meeting of the Estonian Constituent Assembly on 26 April 1919, the Minister of Justice Jüri Jaakson stressed that there was an urgent need for administrative courts to be created in Estonia, as it was not possible to file a complaint against an official during the Russian regime.[25] Thus, citizens were given an opportunity to sue government agencies and thereby have their activities chekked for legality.

From the general courts, minor matters were discussed as a first instance by the peace judge, as a second instance by the peace council and as a third by the Supreme Court. In major matters, the first instance was the peace council, the second was the National Court of Appeal and the third was the Supreme Court. A number of special courts[26] were also active alongside the general courts, including: the peace courts where the 1864 Peace Court Penalty Code and their own civil and criminal procedure laws were in force; peace councils (since 1935 circuit courts); in this respect, one must distinguish between: a) the peace councils as the appellate body of the peace court where the same laws as in the peace courts were applicable; and b) the peace courts as the general courts of first instance[27] and their own civil and criminal procedure codes, which were the same as in the National Court of Appeal and the Supreme Court; court martials that had their own procedural law and penal law; military courts with their special procedure and the so-called "military penal law" as of 1 March 1917;[28] administrative court with its own special pro-

22 Anepaio, 'Eesti Vabariigi kohtukorralduse kujunemine', p. 25.

23 The district courts were exclusive courts which, as a court of first instance, dealt with claims of up to a thousand kroons and criminal cases where the penalty was primarily a fine, an army or a prison house. Claims for heritage and alimony were subject to the district court regardless of the amount. The district judge was also the head of the land registry office, and he could also be assigned the duties of a court investigator. Schneider, Kohtud Eestis, p. 26.

24 Administrative court procedure, p. 23. For more information on administrative courts during the interwar period, see Pilving, 'Die Schaffung und Entwicklung', pp. 46–48; Pilving and Ernits, 'Verwaltungsgerichtsbarkeit', pp. 1601–1604.

25 Eesti Vabariigi sisepoliitika 1918–1920, p. 302.

26 Anepaio, Eesti Vabariigi kohtunikekorpus, pp. 37–38; Anepaio, 'Kriminaalõiguse muutumisest', pp. 139–158.

27 About the implementation problems caused by these and their parallel existence, see Sedman, 'The historical experience' and Sedman, 'Karistusseaduste paljusus', pp. 179–183.

28 More about the military penal law and procedure, see Sedman, 'The historical experience', pp. 227–235;

cedure; the guardianship and custodianship courts in the cities by their own order and in the country, the parish courts as the guardianship and custodianship courts under the old status-based parish courts law; as well as the tenancy mediation institutions and the Committees of the Ministry of Interior.

One of the most complex problems was finding of judges with appropriate education for these different types of judicial authorities. It was difficult because Russian lawyers and officials who worked in the courts during the Tsarist Era had left, so there was not enough people with judge experience. In general, it was not possible for Estonian lawyers to become a judge in Estonia or Livland during the Tsarist Era. Thus, many lawyers with higher education had gone to court work in other areas of the Tsarist Russia or had chosen the profession of an attorney.[29]

All judicial authorities in the Republic of Estonia had to start work from December 2, 1918.[30] The country didn't have time to prepare the judges. Therefore, the people who existed and wanted to do the court work had to be used. Consequently, on 22 November 1918, the Ministry of Justice issued a call for "Lawyers and court officials":

> *Persons who have received legal education as well as those who have served before the judicial authorities and wish to serve in the courts of the Republic of Estonia as judges or as court investigators or as prosecutors' assistants are asked to disclose their wishes to attend the service.*[31]

Applications had to be submitted to the chairman of the Tallinn Circuit Court.[32] Despite the call, only a few lawyers were willing to exchange an attorney's profession for a judge's job. Judicial agencies with their relatively small salaries and responsible work failed to provide equivalent earning opportunities as a private service.[33] The situation started to change in 1924 when the salaries of judicial positions increased, and in the late 1920s the inflow of lawyers who graduated from the University of Tartu increased in the courts. There was therefore plenty of courts and judges in Estonia. Given the low popularity of these posts among male lawyers, women with legal education should have had a pretty good chance of finding work in the courts.

III. Requirements for to become a judge

Article 69 of the Constitution of the Republic of Estonia, adopted in 1920, provided that the judges of the Supreme Court are elected by the Riigikogu (Estonian Parliament). According to the Procedure of Appointment of Judges and Court Investigators adopted in

Sedman, 'Military Penal Law', pp. 253–273.

29 See more about Anepaio, 'Eesti kohtutest', p. 60.

30 Riigi Teataja [State Gazette], 1918, 4, 7.

31 Riigi Teataja [State Gazette], 1918, 2, 6.

32 Anepaio, 'Eesti Vabariigi kohtukorralduse kujunemine', p. 26.

33 Anepaio, 'Eesti Vabariigi kohtute kujunemine', p. 35.

30.12.1920,[34] only citizens of the Republic of Estonia who were at least 25 years old could be appointed court officials.

Regarding the judges, a requirement was made that the judges of the peace councils (later circuit courts) had to have graduated from the faculty of law of either the Estonian or some former Russian Imperial university. However, the law also allowed persons with lower education to be assigned to the judicial authorities, who complied with other conditions and had the necessary experience. This exception was due to the lack of qualified lawyers in the early years of Estonia's independence. Later, the education requirement was strictly adhered to.[35]

The level of education of judges in the early years of the Republic of Estonia was particularly low. The then state prosecutor, Richard Rägo, noted that in 1921, out of the peace judges, only 29.3% had legal education, only 2.4% had studied law at university, and only 4.8% had high school education. The vast majority (53.7%) of peace judges were only with urban school (i.e. higher elementary school) education, and 9.7% were home educated.[36] Thus, nearly 70 percent of the peace judges at that time were without any legal education. Also, in 1934, one of the 19 judges of the Tallinn-Haapsalu Peace Council had no higher education, while the out of the 15 permanent judges of the Tartu-Võru Peace Council, three judges had no legal higher education, with the judges of the younger age group all having legal higher education.[37] It can therefore be concluded that the requirement for education was respected in the appointment of new persons, but it did not apply so strictly to those who were already in office. The overall low level of education of the judges could have even encouraged career opportunities for women with university education in the justice system. In any case, they should have started as a candidate for judicial office and that was the position that Auguste Susi-Tannebaum and Olli Olesk sought.

IV. Procedure for becoming a candidate for judicial office

The recruitment of the candidates for judicial office was governed by various legal instruments: On 30 December 1920, the Government of the Republic adopted the Procedure of Appointment of Judges and Court Investigators[38]; in 1924, the Judicial Authorities and State Public Service Act[39] entered into force, according to which the candidates for judicial office were considered to be officials; on March 24, 1927, the Composition of Public Authorities Act[40] was adopted, according to which the candidates for judicial office were

34 Riigi Teataja [State Gazette], 1921, 2, 14.

35 Anepaio, Eesti Vabariigi kohtunikekorpus, pp. 121–122.

36 Rägo, 'Missugusel määral kohtunikkude', p. 170.

37 Anepaio, Eesti Vabariigi kohtunikekorpus, pp. 140, 142, 171, 172.

38 Riigi Teataja [State Gazette], 1921, 2, 14.

39 Riigi Teataja [State Gazette], 1924, 149.

40 Riigi Teataja [State Gazette], 1927, 27.

considered to be freelance employees[41]. The candidates for judicial office were appointed at the National Court of Appeal and their adoption was decided by the President of the National Court of Appeal together with the Prosecutor of the National Court of Appeal. They were not required to give reasons for their decisions, either when granting or rejecting the candidacies.[42] All the time between the world wars, Jaak Reichmann served as the President of the National Court of Appeal.[43]

In an article published in 1929, the Public Prosecutor Richard Rägo described the posts of candidates for judicial office as the institution of freelance employees.[44] He considered that the current legislation would not allow them to perform the functions of a judge, one way or another, and that the introduction of the institute of a freelance employee would give the people who are hiring candidates a free hand to remove from the list of candidates at an early stage the persons who are unfit for the post. However, Rägo criticised the procedure for the admittance of the candidates for judicial office in force at the time, that the assessment of the personal qualities of a candidate was essentially left to a single person. Rägo thought that this exclusive decision-making power would make the whole of the future court family dependent on only one person, and it would not be expedient to confer such power on one person. He suggested that it would be beneficial if a collegiate body could assess candidates for judicial office instead of a single official, in order to avoid both the prevalence of personal preferences and post-factum complaints. First of all, Rägo considered that the nomination of candidates for judicial office should be transferred from the National Court of Appeal to the Supreme Court, which was better informed of all the courts of the Republic and their needs in staff affairs. In Rägo's view, in order to decide on the admission of candidates, the Board of Directors of the Supreme Court, or the Presidium, which would include the President of the Supreme Court, its heads of divisions and the Prosecutor of the Supreme Court, could have been set up. He also found that such a college would be sufficiently authoritative.[45]

It is not clear from this article whether Richard Rägo, as one of the factors, was also prompted to write the article because of the fact that the candidature of Auguste Susi-Tannebaum and Olli Olesk had been rejected by the President of the National Court of

41 Pursuant to § 1 of the State Public Service Act, the freelance employees were public servants serving in the vacant posts provided for in the composition of public authorities or temporarily fulfilling the duties of public servants. Riigi Teataja [State Gazette], 1924, 149, 97.

42 Anepaio, Eesti Vabariigi kohtunikekorpus, p. 79.

43 Jaak Reichmann (1874–1945), after graduating from St. Petersburg University Law Faculty in 1901, worked as a candidate for the judicial office in Tallinn Circuit Court, later as an attorney in Tartu and Tallinn. During Estonia's first independence period, he was appointed the President of the Tallinn District Court (later, the National Court of Appeal). Reichmann was Minister of Justice of the Republic of Estonia for the period of 1921–1923. At the beginning of the Soviet occupation, he was dismissed as the President of the National Court of Appeal and thus was deprived of a certain position. By summoning the Estonian courts by the German authorities during the Second World War, Reichmann was re-appointed the President of the National Court of Appeal, see Anepaio, 'Kohtupalat', p. 45; 'Jutuajamine kohtukoja esimehe J. Reichmanniga', p. 2.

44 Rägo, 'Kohtutegelaste praktilisest ettevalmistusest', pp. 213–216.

45 Ibid., 213–214.

Appeal. Here, however, it can also be borne in mind that Rägo himself participated in the deliberations of these cases in the Supreme Court, and, at the time when the article was published, the applications of both female lawyers had been rejected for the post of candidate for judicial office.

V. Auguste Susi-Tannebaum's application for judicial office in 1924

Auguste Susi-Tannebaum was the first woman in Estonia to express a desire to become a judge. She was born on 5 February 1900, in Kuban Oblast, Russia, as a schoolteacher's daughter, in 1911–1918, she was studied at the Tallinn Commercial School for Girls. She had already submitted her first application for admission to the Faculty of Law of the University of Tartu on 1 October 1919 and was entered in the list of students on 23 January 1920.[46] However, as she did not have a school leaving certificate, she studied in the meantime as an auditor at the University of Tartu. Auguste Susi graduated from the Faculty of Law on 5 June 1923.[47] On December 22 of the same year, she married Feliks Johann Tannebaum.[48]

After graduating from the university, Auguste Susi made a request to the Ministry of Finance on 28 August 1923 to employ her in some department of the Ministry, and a few weeks later, on 15 September, she became secretary there. On 19 October, she was accepted as an assistant of attorney, so on 15 December she asked to be dismissed as the secretary of the Ministry of Finance[49] and took up her job as an assistant of Johan Aronson[50], an attorney.[51] On 1 November 1923, Auguste Susi submitted a request to the Tallinn-Haapsalu Peace Council asking the Peace Council to grant her permission to conduct external proccedings in the Tallinn-Haapsalu Peace Council, and on 14.11.1923, a notation has been made on the written request of Auguste Susi-Tannebaum by the afore mentioned Peace Council indicating that Susi-Tannebaum as the assistant of attorney has been

46 The postponement was not caused by the gender or person of the student candidate. Alltough the festive opening of the Estonian National University in Tartu took place on 1 December 1919, the Law Faculty had difficulties in finding the teaching staff and thus the activities of Law Faculty begun only at the end of January 1920.

47 Born Susi, from 1923 to Susi-Tannebaum, from 1939 after the Estonianization of the surname, Tanner. Estonian National Archives (ENA), EAA.2100.1.15284, pp. 1, 5–7, 14, 19–20, 29, 37.

48 ENA, ERA.1357.4.522, p. 11. Feliks (also Felix) Johann Tannebaum (from 1939, Tanner) was born on 10.11.1893, graduated from the division of commerce by the Faculty of Law of the University of Tartu in 1924; 1923–1924 he was an official of the Bank of Estonia in Tallinn, a 1924-1929 bank official in Pärnu, 1929–1932 Director of the Bank of Estonia, 1932–1940 Director of Tartu Bank. Album Academicum, p. 57.

49 ENA, ERA.20.2.55, pp. 1, 5, 7–9.

50 Johan(n) Aronson was born on 03.05.1879. He was an attorney in Narva since 1905, an attorney in Tallinn from 1919 to 1941. He died in 1947. Vahtre, Eesti Advokatuuri ajalugu, p. 214.

51 The notice sent to the Tallinn-Haapsalu Peace Council of the Council of Attorneys on 20.10.1923: ENA, ERA.1357.4.522, p. 1.

given a permission to conduct proceedings at the second instance of the Tallinn-Haapsalu Peace Council.[52]

In 1924, Susi-Tannebaum tried to apply for the position of a judge. On 15 February 1924, she submitted a request to the President of the Tallinn-Haapsalu Peace Council, requesting that she be appointed as a candidate for judicial office.[53] On the following day, the President of the Peace Council, by order, rejected the request of Susi-Tannebaum on the ground that the Judicial Authorities Act prohibits women from being admitted to judicial office.[54] Auguste Susi-Tannebaum brought an action against the order of the President of the Peace Council before the President of the National Court of Appeal, in which she stated that, in her view, the Judicial Authorities Act did not contain such a prohibition.[55] By order of 26 March 1924, Jaak Reichmann, the President of the National Court of Appeal, dismissed the action, stating that the Judicial Authorities Act did not impose any obligations or restrictions on the appointment of the presidents of the court for the appointment of the candidates for judicial office and that, in his view, the appointment of a person as a candidate for judicial office was entirely dependent on the approval of the presidents of the court, so that the president of the court could not be compelled to appoint a candidate for judicial office.[56]

Auguste Susi-Tannebaum decided to proceed and, one month later, on 26 April 1924, lodged a complaint with the Supreme Court seeking an amendment to the order of the President of the Court issued in March. In support of her complaint, she relied on the fact that the President of the National Court of Appeal did not base his order on the reasoning of the President of the Peace Council on the basis of which he had rejected Susi-Tannebaum's request. In her complaint to the Supreme Court, she pointed out that, when rejecting her request, the President of the Peace Council had taken the view that the law did not allow any female citizen to be appointed as a candidate for judicial office. However, in his order of 26 March, the President of the National Court of Appeal had addressed a matter which had not been raised by the President of the Peace Council in the Order of 16 February.[57]

At the regulative meeting on 1 September 1924, the Supreme Court en banc[58] discussed the complaint brought by Auguste Susi-Tannebaum and decided that the order of the

52 Ibid., pp. 2, 5, 8. The respective notice was also published in the Annex to the State Gazette 137 of 22.11.1923.

53 ENA, ERA.1356.1.356, p. 2.

54 Ibid., p. 4: "Bearing in mind that the Judicial Authorities Act prohibits women from being admitted to judicial office, Auguste Susi-Tannebaum's request for her appointment to the judicial office cannot be accepted, of which Susi-Tannebaum must be informed on 16.02.1924".

55 Ibid., p. 2.

56 Ibid., p. 8.

57 Ibid., p. 2v.

58 Composed of Karl Parts, the President, and Peeter Kann, Jaan Lõo, Dmitri Verhoustinski, Johan Arro, Martin Taevere, Harald Johannes Jucum, Victor Karl Maximilian von Ditmar and Anton Palvadre, acting as members. For more detailed information about the staff of the Supreme Court in the period of 1920–1940, see Anepaio, 'Eesti Vabariigi Riigikohus', pp. 30–33. The Public Prosecutor of the Supreme

President of the National Court of Appeal should be annulled and that "he should be obliged to make a new order in this matter in accordance with the law".[59] Admittedly, the Supreme Court en banc took the position that, in itself, the deliberations of the President of the National Court of Appeal in the order of 26 March were entirely correct. However, such a debate did not justify the refusal to appoint Auguste Susi-Tannebaum as a candidate for the judicial office, as the initial refusal was justified by the President of the Peace Council by the fact that women cannot be accepted as candidates for the judicial office at all. The Supreme Court found that the President of the National Court of Appeal had left an important question unaddressed in his order as to whether the law in force in Estonia does or does not prohibit women from being accepted as a candidate for the judicial office. Given the fundamental meaning of the above question, the Supreme Court considered it expedient to provide a precise explanation to the courts. In doing so, the Supreme Court referred to the relevant provisions of the Judicial Authorities Act and the Constitution of the Republic of Estonia and took the view that "the law in force in the Republic of Estonia does not prohibit female persons who have the citizenship of the Republic of Estonia and who have graduated from the Faculty of Law of the University of Tartu and where some of these special obstacles of a personal nature provided for in § 201 of the Judicial Authorities Act do not prohibit entering the judicial service, are to be accepted as candidates for the judicial office".[60]

Although the order of the President of the National Court of Appeal was annulled by the Supreme Court who was instructed to issue a new order concerning the appointment of Auguste Susi-Tannebaum as a candidate for judicial office, it is not known whether any further decisions were taken in this case or whether Susi-Tannebaum withdrew her own application.[61] In any case, she did not become Estonia's first female judge.

The incident also attracted attention in the media. An article was published in the "Postimees" newspaper on 4 October 1924, describing the course of the process and setting out the views of the Supreme Court on the candidacy of female lawyers.[62] Unfortunately, nothing has been said in the "Postimees" about further developments of events either.

Auguste Susi-Tannebaum discontinued her activity as an assistant of attorney in the same year, in 1924, and was removed from the list of attorneys' assistants. Between 1924 and 1928, she lived in Pärnu, where she gave civic education classes at the Pärnu Gymnasium for Girls. Since autumn 1928, she moved to Tallinn.[63] The change of residence of Susi-Tannebaum was most likely related to the change in the workplace of her husband, Feliks Tannebaum, as the man worked from 1923 to 1924 in Tallinn and from 1924 to 1929 in Pärnu as an official of the Bank of Estonia.[64]

Court, Richard Rägo, also attended the meeting. ENA, ERA.1356.1.356, p. 8.

59 ENA, ERA.1356.1.356, p. 9v.

60 Ibid., pp. 8-9v.

61 Unfortunately, the archive file does not contain any documents describing the future course of the case.

62 'Kas naisterahvad', p. 3.

63 ENA, ERA.1357.4.1168, p. 2.

64 Album Academicum, p. 57.

Auguste Susi-Tannebaum was reinstated as assistant of attorney on 11 March 1931 and, between 1931 and 1932, she worked as an assistant of her older brother, an attorney, Arnold Susi.[65] However, Auguste Susi-Tannebaum did not become an attorney, she left the ranks of the assistants of attorney at her own request in 1932.[66] In 1944, she was already headed to Germany from Estonia by a new surname, Auguste Tanner[67] then to England in 1948.[68] No data have been found on Auguste Tanner's date of death. Her husband, Feliks, fought in the German army in World War II, was arrested in October 1944 and died in captivity.[69]

VI. Application of Olli Olesk for judicial office in 1929

Five years after the Susi-Tannebaum's case, in 1929, the next female lawyer wished to become a judge. Olga Desideria Olesk[70] was born in Tartu on 16 April 1906 as the daughter of the female movement and welfare activist Minni Kurs-Olesk and the daughter of Lui Olesk, a stateman and attorney. After graduating from the Gymnasium for Girls of the Estonian Association of Youth Education in 1924, she studied at the Faculty of Law of the University of Tartu, graduating on 21 December 1928.

On 2 January 1929, Olli Olesk[71] asked the President of the Tartu-Võru Peace Council to appoint herself to the Peace Council as a junior candidate for judicial office. Her request was rejected by order of 17 February of the President of the Peace Council and the President of the National Court of Appeal. The order stated laconically: "Don't agree – on the basis of former views."[72] It can be assumed that, in taking a negative view of her request, an analogous case of Auguste Susi-Tannebaum was referred to from 1924.

Olli Olesk then lodged an appeal before the Supreme Court on 21 February, stating, inter alia, that Eduard Sillasoo[73] had been accepted as a candidate for the judicial office a few days after her application had been rejected.[74]

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65 Arnold Susi was born on 4 January 1897, was an attorney in Tallinn from 1924 to 1941, he was the Minister of Education in the government of Otto Tief in 1944. See Vahtre, Eesti Advokatuuri ajalugu, 358, Album Academicum, pp. 16, 29, Laar, September 1944, p. 331.

66 Eesti Vabariigi Vannutatud Advokaatide Nõukogu 1932, p. 11. Also, leaving the Bar Association in 1932 may have been linked to a change in the husband's job, as Feliks Tannebaum took office from 1932 as director of the Bank of Tartu. Album Academicum, p. 57.

67 Both spouses wore the surname Tanner since 1939. Auguste Tanner's travel passport: ENA, ERA.1.3.4744 (not paginated); Felix Tanner's travel passport: ENA, ERA.1.3.4745 (not paginated).

68 Vahtre, Eesti Advokatuuri ajalugu, p. 358.

69 Album Academicum, p. 57.

70 Her surname at birth was Ollesk, see Album Academicum, p. 319.

71 In 1929, she used the name Olli Olesk in official documents.

72 ENA, ERA.1356.1.363, p. 15.

73 Eduard Sillasoo (1899–1940) studied at the same time as Olga Olesk at the University of Tartu, both graduated from the Faculty of Law in 1928. From 1931, Sillasoo was an assistant of attorney; from 1935 to 1938, he worked as an attorney in Tartu. Album Academicum, p. 128.

74 ENA, ERA.1356.1.363, p. 15.

Following an enquiry from the Supreme Court, the President of the National Court of Appeal clarified in his letter of 23 March that the Act does not contain rules requiring all applicants to be appointed as candidates for the judicial office or prohibiting the further appointment of candidates if anyone's request has been rejected. He therefore considered that the nomination of Eduard Sillasoo did not constitute an infringement of Olli Olesk's rights. In addition, the President of the National Court of Appeal stated that the appointment of Olli Olesk as a candidate had not been approved by the Prosecutor of National Court of Appeal and that the President of the Tartu-Võru Peace Council was also opposed to Olli Olesk's being appointed as a candidate. He also pointed out that the President of the National Court of Appeal had "the right to satisfy one's requests for the nomination of candidates, but to reject the other's requests".[75]

On 10 May 1929, the President of the Tartu-Võru Peace Council made a short announcement that he would only support the applications for nomination of persons in respect of whom he was convinced that they could become "the best court officials". He had no such conviction about Olli Olesk, which is why he did not support her request.[76] What is interesting here is that Tõnis Kalbus, the then Minister of Justice and Internal Affairs,[77] in a letter sent to the Supreme Court on 15 May 1929, expressed the view that Olli Olesk's request should be satisfied in his opinion. He justified his position on the ground that it was not possible to state in advance whether any of the candidates was eligible for the post of judge, as this would be clear from the work and activities of the individual at the time of being a candidate.[78]

This letter by the Minister of Justice and the Internal Affairs was accompanied by a position sent by the Prosecutor of the National Court of Appeal on 26 April 1929 to the Minister of Justice and the Minister of the Internal Affairs on complaint lodged by Olli Olesk,[79] in which the Prosecutor expressed his firm conviction that women were unfit to be judges. In that regard, he explained: "The profession of judge is too difficult for them. There must be a free decision-making power in this profession, free from the influence of feelings and any kind of extraneous circumstances. A woman, in my view, does not have that capacity to the extent that a man does. Perhaps my position is not worthy of the approval, there may be exceptions, but the President has also taken this view, and we

75 Ibid., pp. 7–7v.

76 Ibid., p. 9.

77 Minister of Justice and Interrnal Affairs from 1925 to 1930, see Järvelaid and Pihlamägi, 80 aastat, p. 20.

78 ENA, ERA.1356.1.363, p. 10. Tõnis Kalbus and Olli Olesk's father Lui Olesk were both members of the Consitutent Assembly (Asutav Kogu), the First Riigikogu (Estonian Parliament), but one cannot presume that only this circumstance could have affected Kalbus to send a letter supporting Olli Olesk to the Supreme Court.

79 The Supreme Court had asked the Prosecutor of the National Court of Appeal for the explanation of the considerations of the non-appointment of Olli Olesk's for judicial office through the Minister of the Justice and the Minister of the Internal Affairs, Kalbus. When transmitting the position of the Prosecutor of the National Court of Appeal to the Supreme Court, the Minister also considered it necessary to forward to the Supreme Court a personal position which was fundamentally different from that of the Prosecutor, according to which Olli Olesk should have been nominated as a candidate. ENA, ERA.1356.1.363, p. 8.

did not have any discrepancies in the general sense." In addition, the Prosecutor stated that the appointment of women as candidates for the judicial office "would make it difficult for suitable male candidates to move on to paid positions, which in turn would reduce the will and ability for more mettlesome employees to continue to work, which in turn would have a negative impact on the composition of the courts".[80] It is also worth noting that the position stated in the letter is that the law does not require the justification of such a decision or the opening of motives in the event of rejection of applications for candidacy. In this regard, the Prosecutor referred to the case of Susi-Tannebaum in 1924 and considered that the Supreme Court, in its order of 1 September 1924, had also supported and accepted the sufficiency of the general arguments of the President of the National Court of Appeal in the Susi-Tannebaum case and had not called for their motivation.[81] Such a position by an official whose opinion depended on the appointment of a person as a candidate certainly gave a clear signal for the future. Thus, women did not have any particular prospect of applying for judge's position – there was no point in challenging a decision which the recipient of the decision did not have to justify.

At the regulative meeting of the Supreme Court en banc on 25 May 1929, the order issued by the President of the National Court of Appeal on 17 January of the same year, by which Olli Olesk had not been accepted as a candidate for the judicial office, was annulled and the President of the National Court of Appeal was ordered to re-examine the request of Olli Olesk in substance. In that order, the Supreme Court also referred to its judgment of 1 September 1924 in the case of Susi-Tannebaum, in which it had already explained that the law in force did not prohibit women from being employed by the court. In the judgment adopted in the Olli Olesk's case, the Supreme Court pointed out that, if such a position was already in force, the grounds relied on by the Prosecutor of the National Court of Appeal, that is to say, the lack of suitability of women for the office of judge and the aggravation of the movement of male candidates at the reception of female candidates, cannot be regarded as legitimate. In addition, the Supreme Court stated that the admission of a candidate for the judicial office is intended to enable persons who have received legal training to prepare themselves for the future court officials, and to enable them to demonstrate their abilities and eligibility for judicial activity.[82] The Supreme Court therefore clearly supported the opinion that the essential factor for applying for judicial office must be the education of the candidate and not his or her gender.

By order of 18 October 1929, the President of the National Court of Appeal dismissed Olesk's request with a brief explanation: "Olli Olesk's request for the nomination as a candidate for the judicial offide has been dismissed by me for non-formal reasons".[83] Olli Olesk appealed the decision on 25 November,[84] but in the decision of 14 December examining her new complaint, the Supreme Court has taken the view, in a laconic and brief

80 Ibid., pp. 11–12.

81 Ibid., p. 11.

82 Ibid., pp. 16–16v.

83 ENA, EAA.1356.1.366, p. 4.

84 Ibid., p. 1.

manner, that "the assessment of the eligibility of a candidate falls within the discretion of the appointing authority and that the Supreme Court has not been granted the right to make such an assessment and, for its part, to make nominations". As a result of that reasoning, the Supreme Court dismissed Olli Olesk's second complaint[85] and confirmed the view that the rejection of the applications of the candidate for judicial office did not require a statement of reasons for the decision.

During the examination of the complaint in 1929, Olli Olesk worked for four months as a trainee at the office of the 3rd Tartu District Judge.[86] Following the dismissal of the appeal before the Supreme Court, she decided not to pursue the position of a judge and to continue her career as an attorney, following the example of her father. By decision of the Council of Attorneys of the Republic of Estonia, she was admitted on 13 October 1930 as an assistant of attorney, six years later, on 6 April 1936 she became an attorney.[87] On 1 October of the same year, however, she went to work as an official and secretary at the Guardianship and Custodianship Court in the city of Tartu, where she worked until October 1939, after which she went to work in Tallinn as the General Secretary of the Estonian Foundation for Child Protection.[88] In 1945, Olli Olesk took up work as an inspector of kindergartens in the education department of the city of Tallinn.[89] Although it is not exactly known whether Olli Olesk's career transition might have been linked to political change or why she withdrew from the profession of attorney, it may be assumed, by looking at her subsequent job choices, that she wished to work more in positions relating to children and their rights. In 1952, Olesk published a book "What a working mother should know",[90] which describes health care in general and focuses specifically on health services provided to mothers. Olli Olesk died on 26 February 1988, in Tartu.[91]

As a result, women were not accepted as candidates for judicial office in Estonia between 1920 and 1930. At the same time, it is apparent from the archives that women were recruited as trainees in the offices and departments of Peace Councils since the 1920s without opposition. Some of the later attorneys and assistants of attorneys worked as trainees at the Peace Councils before they entered the Bar Association. Mostly initially without pay, but often after a few months of practice, women were employed by the Peace Councils as paid secretaries and clerks.

However, the issue of becoming a judge for women remained on the agenda, and the article in the "Maa Hääl" newspaper on 8 May 1933 also stated that all the female attorneys really wish that women would be allowed to become a judge. This article recognises that although it is not prohibited by law, women are in fact prevented from becoming

85 Ibid., pp. 6–6v.

86 Ibid., p. 4.

87 Riigi Teataja lisa [Annex to the State Gazette], 32, 21.04.1936, p. 1722.

88 ENA, EAA.3501.3.66, p. 7, 12.

89 Vahtre, Eesti Advokatuuri ajalugu, p. 310.

90 Olesk, Mida peab teadma iga töötav ema?, 7 pages. A reprint of the book was published in 1958.

91 Album Academicum, p. 319.

a judge.[92] The article ends with the conclusion that women do not have access to the position of a candidate for judicial office, although it is only at this point that one might decide whether or not a woman is mature enough to be a judge.

VII. First female judges in Estonia in the first Soviet year

The first women were elected as judges in Estonia not before than in the first year of the Soviet occupation in 1940–1941. There were six of them in total. No doubt the political and social situation of this abundance of female judges necessitated this. During Estonia's occupation and annexation by the Soviet Union, the judicial system was quikkly cleaned up, many of the judges so far were dismissed.[93] By the decree of 29 July 1940,[94] the existing Code of Courts was amended and supplemented. It "revoked the privileges of judges and prosecutors in comparison with other officials",[95] that is to say, the independence of the courts and justice was abolished and subjected to the control of the Communist party. The procedure for appointing and dismissing judges was also considerably simplified.[96] The positions of lay judges were changed to elected offices. The reorganisation was carried out by the Alexander Jõeäär, the People's Commissar of Court of Justice, according to the Soviet pattern.[97] In order to fill the vacancies, courses were organised for former lawyers and also for persons without legal education and people were also brought from Soviet Russia. Yet it was hard to find enough people who would have known new law[98] or law at all and were also loyal to the new regime.[99] The mass dismissal of former judges and the entry into office of new judges in a completely different manner therefore opened up new career opportunities for female lawyers as well.

By the decree of the ESSR Temporary Presidium of the Supreme Council of 31 December 1940,[100] appointed as the first woman to be judge at the Tallinn District Court, Leida Puusepp, who had graduated in the same year from the Faculty of Law of the University of Tartu.[101] A few months later, by the decree of the ESSR Presidium of the Supreme

92 'Igatsus kohtunikutiitli järele', p. 5.

93 Peep, 'Pilguheit', p. 25. About the "demolition" of the bourgeois court order and the "rebuilding" of the new Soviet courts, see also Raudsalu, 'Nõukogude justiitssüsteemi loomine', pp. 219–220.

94 Riigi Teataja [State Gazette], 1940, 87, 835.

95 Raudsalu, 'Nõukogude justiitssüsteemi loomine', p. 217.

96 Orgmäe, EKP tegevus, p. 12.

97 More detailed information about the activities of the activities of the People's Commissariat of the ESSR Court of Justice in the period of 1940-1941, see Järvelaid and Pihlamägi, 80 aastat, pp. 78–90.

98 Already from 16 December 1940, the Russian SFSR Criminal Code was enacted, see ENSV Teataja [The ESSR Gazette], 1940, 65, 868. On 1 January 1941 also the Civil Code, the Code of Criminal and Civil Process and the Code of Marriage, Family and Guardianship Laws, see ENSV Teataja [The ESSR Gazette], 1940, 73, 1006 and 1007; 1941, 8, 92.

99 Karjahärm and Sirk, Kohanemine ja vastupanu, pp. 433–435.

100 ENA, ERA.R-3.3.64, p. 21.

101 Leida Puusepp was born on 30 July 1915. After her marriage with chemist Hans Soss in 1942, she took her husband's surname. She died in 1998. Ibid., p. 1.

Council of 20 March 1941,[102] Miralda Tooma, became a judge of the Rakvere Circuit Court.[103] She had graduated from the Faculty of Law of the University of Tartu in 1935.[104] She was in the position of a circuit court judge for a short period of time. Later, she worked as secretary at the Nõmme police station and, from 1942 to 1944, Miralda Tooma was already the auditor of the bailiffs of the Court Directorium.[105] After the war, Miralda Tooma worked as economic manager of the "Leek" tobacco factory.

Ludmilla Vallner was appointed the judge of the Tallinn Circuit Court by the decree of the ESSR Presidium of the Supreme Council of 26 March 1941.[106] Ludmilla Vallner had been a member of the Leninist Communist Youth League of the Soviet Union since 1931.[107] She had studied law for a short time at the Leningrad Law Institute, but did not have complited her legal education.

By the decree of the ESSR Presidium of the Supreme Council of 16 April 1941,[108] two women were appointed judges of the Supreme Court of the ESSR: Nadežda Tihanova-Veimer[109] and Hilda Põder[110]. Nadežda Tihanova-Veimer was a member of the ESSR Temporary Presidium of the Supreme Council since 1940 and was also a member of the Soviet Communist (Bolshevik) Party.[111] In 1926, she had graduated from the Russian Gymnasium of the City of Tallinn[112] and had worked as a textile worker between 1926 and 1940 before being elected the Chief Justice, while being on the board of the textile

102 ENA, ERA.R-3.3.110, p. 2.

103 ENA, ERA.R-3.3.110, pp. 1–1v. Miralda Regina Tomann (also known as Toman, from 1935, Tooma) was born on 13 February 1913 in Tallinn. She studied in the E. Lender Private Humanitarian Gymnasium for Girls, graduating in 1931, see ENA, EAA.2100.1.16659, pp. 2, 3v, 4, 7. Before being elected the judge of the Rakvere Circuit Court, she had served as a clerk in the Railways Board and, from 1 January 1941, as a bailiff in the 2nd division of the Rakvere People's Court. M. Tooma died in 2002.

104 From 1931 to 1935, she studied in the Faculty of Law of the University of Tartu. ENA, EAA.2100.1.16659, pp. 11, 60.

105 Album Academicum III, p. 81.

106 ENA, ERA.R-3.3.115, p. 2.

107 Ibid., p. 1. Ludmilla Vallner was born on 31 January 1916 in Valga as a railway worker's daughter. She grew up in Tjumen and served as an attorney-trainee at the Collegium of Leningrad Attorneys from 1940 to 1941. During the war, she was a jurisconsult in Tjumen, in 1945, an assistant prosecutor in Harju County, in 1946, a trainee, from 1948, a member of the Estonian College of Attorneys, worked at the Tallinn I Legal Counselling Office, from 1950, the II Legal Counselling Office. In 1953, she was expelled from the College for conflict and disciplinary violations, see also Vahtre, Eesti Advokatuuri ajalugu, p. 382.

108 According to other data, the 9 April 1941 Act of the ESSR Supreme Council, ENA, ERA.R-3.3.66, pp. 4, 6.

109 Nadežda Tihanova-Veimer was born on 13 January 1907, according to other data, on 14 January 1907 in Narva, she was of Russian ethnic origin. She died in 1978 in Tallinn, ibid., p. 2; also see Tihanova, ENA, ERAF.1.6.3812, p. 1 and Veimer, ENA, EAA.2100.1.17908, p. 1.

110 Hilde Valfriide Põder (born Steinmann) was born on 23 July 1892 in Jõhvi rural municipality, Ida-Viru County, she died on 30 August 1973. She graduated in 1934 from the Tallinn College of the Private Gymnasium of the Association of Tallinn Universities, see ENA, EAA.2100.1.12225, pp. 3, 5, also Album Academicum, p. 221.

111 See Tihanova, ENA, ERAF.1.6.3812, pp. 1–2.

112 See Veimer, ENA, EAA.2100.1.17908, pp. 3–4.

workers' trade union. In her resume written on 2 November 1944, she notes that because of political propaganda, the board of the trade union was removed from office by decision of the then Minister of Internal affairs in 1936 and 1939. In July 1940, Nadežda Tihanova-Veimer was elected a member of ESSR Presidium of the Supreme Council, and in August of the same year, she was appointed the second Deputy People's Commisar of the ESSR light industry. As a judge of the ESSR Supreme Court, she was able to be a short period of time as she travelled to Russia in July 1941, but she continued to serve as a judge after the war, after having returned to Estonia.[113] Although the personal file of Nadežda Tihanova-Veimer of the University of Tartu is included in the historical archive, there is no information and documentation in the file on the entry in and graduation from the university.[114] Given that she worked as a textile worker for a long time before the war, it is likely that she had no higher legal education at the time of appointment as the Chief Justice. Probably, Nadežda Tihanova-Veimeri's career could have benefited from her marriage with the communist Arnold Veimer.[115]

The second female Chief Judge, Hilda Põder, had studied at the Faculty of Law at the University of Tartu from 1934 to 1940, immediately before being elected to this position.[116] She was a judge of the ESSR Supreme Court in 1941 and from 1944 to 1957, from 1941 to 1944, she was in the rear of the Soviet Union.[117]

By the decree of the ESSR Presidium of the Supreme Council of 29 April 1941,[118] Liidia Saarna was appointed the judge of the Viljandi Circuit Court.[119] Liidia Saarna had been a member of the Leninist Communist Youth League of the Soviet Union since 1930. In 1940, she graduated from the Law Institute of Leningrad and served as the Head of Department of the Bar Association in the Russian SFSR between 1940 and 1941.[120]

113 See Veimer, ENA, ERA.R-3.12.75, pp. 1, 3, 4.

114 On the title page of the resume of Nadežda Tihanova-Veimer, there is a note written in a hard-to-read handwriting: „Rematriculation on 13.11.42 by the decision of the Rector of the University of Tartu", see Veimer, ENA, EAA.2100.1.17908, p. 1v.

115 Arnold Veimer was born on 20 June 1903 in Nehatu rural municipality. From 1924 to 1938, he was imprisoned for communist activities, but already from 1940 to 1942, he was the People's Commisar of the ESSR Light Industry, from 1942 to 1944 and from 1955 to 1968, Deputy Chairman of the ESSR Council of Ministers and from 1944 to 1951, the Chairman of the latter. From 1944 to 1955 and from 1967 to 1977, he was the Ambassador of the ESSR Supreme Council. Before the war, after being released from prison, Veimer had studied economics at the University of Tartu and also defended a doctorate in 1963. From 1951 to 1952, he was the Director of the Institute of Economics of the Estonian Academy of Sciences, from 1957 to 1965, the Chairman of the National Council of Economics. In 1967, Veimer became an academic, and from 1968 to 1973 he was the President of the ESSR Academy of Sciences. He died on 3 March 1977 in Tallinn. Album Academicum, p. 238.

116 See Põder, ENA, EAA.2100.1.12225, pp. 11, 19, 30.

117 Album Academicum, p. 221.

118 ENA, ERA.R-3.3.144, p. 4.

119 Liidia Saarna was born on 26 February 1915 in the town of Vologda in the Vologda Oblast as the worker's daughter, in 1932, she graduated from the Pedagogical Technical School, from 1933 to 1936, she worked as an elementary school principal in the town of Vologda, see ibid., pp. 1–1v.

120 Ibid., p. 1v.

Of the six women appointed as judges between 1940 and 1941, two were the judges of the ESSR Supreme Court and four were appointed to the Circuit Courts of Tallinn, Rakvere and Viljandi. Four female judges had acquired legal education, three of them at the University of Tartu and one in Leningrad. Two judges, including one Supreme Court judge, were without professional education. Three new female judges were members of the Communist Party, two of them without legal education.

In the light of the appointment of these female judges at the beginning of the 1940s, it must be noted that the existence of a higher degree of legal education was not a necessary precondition and that it was rather loyalty to the party and Soviet order which was decisive. In its initial period, the Estonian SSR needed not so much educated lawyers, but "Soviet lawyers", whose professional skills and knowledge were subject to very great concessions.[121] At the same time, the new power did not hesitate that the judicial office could also be feasible for women.

VIII. Summary

In the early years of the Republic of Estonia, there was a problem of filling judicial posts and men were appointed without sufficient or no training as a lawyer. On the other hand, women who had obtained academic legal education at university and could successfully become, for example, attorneys, did not become judges or even candidates for judicial office in the inter-war period.

Auguste Susi-Tannebaum and Olli Olesk, who applied for the position of a candidate for the judicial office, had graduated from the Faculty of Law of the University of Tartu and were both members of the Estonian Bar Association at the time of the application. The applications of both Susi-Tannebaum (1924) and Olesk (1929) for judicial office were rejected. Both women challenged the respective decisions of the President of the National Court of Appeal in the Supreme Court. The Supreme Court was guided by the principle of gender equality enshrined in the Constitution and expressly expressed the view that a female candidate should not be prevented from applying for judicial office on a gender-related basis. Despite that view of the Supreme Court, the principle that candidates' suitability could be decided solely by the President of the National Court of Appeal, without being required to state the reasons for its decision, allowed women to be excluded from competition.

Thus, the cases of Susi-Tannebaum and Olesk indicate that a closed circle was formed when applying for the post of judge of female lawyers: after challenging the negative response of the President of National Court of Appeal before the Supreme Court, they received a decision on gender equality. However, the President of the National Court of Appeal formulated a further negative (and legally correct) decision on the applicant's incompatibility for "non-formal reasons", without further explanation, or without mentioning the reasons themselves. As there was no need to motivate the decision to refuse, in

[121] Järvelaid and Pihlamägi, 80 aastat, p. 91, also Sirk, 'Haritlaskond', p. 53.

the 1920-1930s, women were deprived of the opportunity to become a candidate for judicial office, as the decision could not be appealed to challenge its causes.

The first female judges were appointed in Estonia after the occupation of Estonia by the Soviet power. In this way, the repressions and the replacement of the former legal professionals and, as a consequence, the scarceness of suitable men who had previously filled these posts led to new employment prospects for women in the judicial system in the early 1940s. Several of these first female judges had obtained legal education before the war at the Faculty of Law of the University of Tartu or in the Law Institute of Leningrad. Nevertheless, persons without legal education, including women, were also appointed as judges, since what mattered was not so much the existence of legal education, but loyalty to the Soviet authorities.

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Werkstattbericht: „Frau Professor“ – zu Lebenswegen von Ehefrauen Rechtsgelehrter zwischen Patriarchat und Emanzipation[1]

Kamila Staudigl-Ciechowicz

The contribution is a report on work in progress on the study of wives of legal scholars. So far, the topic has received little attention, and very few of the wives of professors have been biographically researched. The article shows the methodological approach to the question and draws on individual examples to illustrate the research questions and research difficulties. Many of these women supported their husbands in their academic activities and performed administrative tasks. Through two approaches - one collective-biographical and one individual-biographical - abstract statements can be made about the professors‘ wives as a social group as well as case studies on life, work and gender roles can be created through individual biographies. The presented study intends to create a conscious culture of remembrance and to at least partially close the research gaps on this group of persons.

I. Zur Einführung

In den letzten Jahren erfuhren bedeutende Persönlichkeiten der deutschsprachigen Rechts – und Staatswissenschaften des 19. und 20. Jahrhunderts zunehmend eine biographische Aufarbeitung.[2] Es verwundert nicht, dass es sich bei den untersuchten Lebenswegen bis auf wenige Ausnahmen[3] um jene von Männern handelte, erfolgte die Öffnung der Rechts – und Staatswissenschaften für Frauen in Mitteleuropa doch zumeist erst in den ersten Jahrzehnten des 20. Jahrhunderts,[4] und selbst dann blieb Frauen die akademische Laufbahn lange faktisch verwehrt, nur allzu schnell stießen sie an die „gläserne Decke“. Im Deutschen Reich öffneten die juristischen Fakultäten zu Beginn des 20. Jahrhunderts nach und nach für Frauen ihre Tore: Bereits 1903 konnten Frauen an allen Fa-

1 Für wertvolle Hilfe und Anmerkungen möchte ich mich bei Ilse Reiter-Zatloukal, Petra Skřejpková und Stephan Wagner bedanken.

2 Beispielhaft seien hier genannt: Jörg Guido Hülsmann, Mises: The Last Knight of Liberalism, Auburn (Alabama) 2007; Reinhard Mehring, Carl Schmitt. Aufstieg und Fall, München 2009; Thomas Olechowski, Hans Kelsen. Biographie eines Rechtswissenschaftlers, Tübingen 2020.

3 Mehrere Werke gibt es zu Marianne Weber: ua Bärbel Meurer (Hg.), Marianne Weber. Beiträge zu Werk und Person, Tübingen 2004; Bärbel Meurer, Marianne Weber. Leben und Werk, Tübingen 2010.

4 Für einen Überblick zur Zulassung von Frauen zum Rechtsstudium und juristischen Berufen vgl. James C. Albisetti, Portia Ante Portas. Women and the Legal Profession in Europe, ca. 1870–1925, in Journal of Social History 33 (2000), S. 825–857.

kultäten der bayerischen Universitäten immatrikulieren,[5] Preußen hingegen öffnete erst 1908 die Universitäten für Frauen.[6]

In Österreich wurden Frauen 1919 zum Studium der Rechtswissenschaften zugelassen,[7] universitäre Karrieren in diesem Bereich begannen aber nur zögerlich. In der Zwischenkriegszeit habilitierte sich an der Wiener Fakultät keine einzige Rechts – oder Staatswissenschaftlerin, ein gleiches Bild zeigen die Fakultäten in Graz und Innsbruck. Erst nach dem Zweiten Weltkrieg erfolgten die ersten weiblichen Habilitationen, zunächst in den Grundlagenfächern der Rechtswissenschaften, insbesondere im Kirchenrecht. Zur ersten ordentlichen Professorin im Bereich der österreichischen Rechts – und Staatswissenschaften wurde Sibylle Bolla-Kotek 1958 ernannt[8] – also rund 40 Jahre nach der Öffnung dieser Studienrichtung für Frauen. Sie hatte sich bereits 1938 an der Deutschen Universität in Prag für Römisches Recht und Antike Rechtsgeschichte habilitiert, musste diesen Schritt nach ihrer Emigration nach Österreich an der Universität Wien 1947 wiederholen und wurde 1949 zur außerordentlichen Professorin für Römisches und Bürgerliches Recht berufen. Bemerkenswert ist, dass Österreichs erste Dekanin (Studienjahr 1972/73), Marianne Meinhart, ebenfalls im Römischen Recht ihren Wirkungsbereich hatte.[9] Ein Blick nach Deutschland zeigt, dass auch hier Frauen nur langsam eine universitäre Laufbahn aufbauen konnten. Allerdings gab es bereits in der Zwischenkriegszeit einige Habilitationen aus dem Bereich der Rechts – und Staatswissenschaften.[10] Als erste Frau habilitierte sich Magdalena Schoch 1932 an der Rechts – und Staatswissenschaftlichen Fakultät der Universität Hamburg für Internationales Privat – und Prozessrecht, Rechtsvergleichung und Zivilprozessrecht.[11] Die Berufung einer Frau zur Professorin an

5 Gisela Kaiser, Studentinnen in Würzburg, München und Erlangen, in: Hiltrud Häntzschel/Hadumod Bußmann (Hg.), Bedrohlich gescheit. Ein Jahrhundert Frauen und Wissenschaft in Bayern, München 1997, S. 57–68, S. 63.

6 Albisetti, Portia Ante Portas (wie Fn. 4), S. 836.

7 Zur Zulassung von Frauen vgl.: Alois Kernbauer/Anita Ziegerhofer, Frauen in den Rechts – und Staatswissenschaften der Universität Graz. Der Weg zur Zulassung und die ersten Doktorinnen von 1919 bis 1945, Graz 2019; Tamara Ehs, (Studium der) Rechte für Frauen? Eine Frage der Kultur!, Beiträge zur Rechtsgeschichte Österreichs 2 (2012), S. 250–261; Elisabeth Berger, „Fräulein Juristin“. Das Frauenstudium an den juristischen Fakultäten Österreichs, Juristische Blätter 122 (2000), S. 634–640.

8 Vgl. zu ihr: Thomas Maisel, Sibylle Bolla-Kotek, o. Univ.-Prof. Dr. jur., [https://geschichte.univie.ac.at/de/sibylle-bolla-kotek, 2. 9. 2021, abgerufen: 26. 12. 2021]; Ursula Floßmann, Sibylle Bolla-Kotek, die erste Rechtsprofessorin an der Universität Wien, in: Waltraud Heindl/Marina Tichy (Hg.), „Durch Erkenntnis zu Freiheit und Glück...“ Frauen an der Universität Wien (ab 1897), Wien ²1993, S. 247–256; Elisabeth Berger, Bolla-Kotek, Sibylle, in: Brigitta Keintzel/Ilse Korotin (Hg.), Wissenschafterinnen in und aus Österreich. Leben–Werk–Wirken, Wien ua 2002, S. 81–84.

9 Meinhart habilitierte sich 1967 an der Universität Wien, im gleichen Jahr wurde sie nach Linz berufen, wo sie zunächst als außerordentliche und ab 1969 als ordentliche Professorin für Römisches Recht tätig war. Vgl. zu ihr Peter Apathy, Marianne Meinhart (1920–1994), Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung 112 (1995), S. 739–743.

10 Christina Altenstrasser, Umstrittene Anerkennung: Habilitation und Geschlecht. Das Beispiel der Berliner Staatswissenschaften 1920–1933, in: Ulrike Auga/Claudia Bruns/Levke Harders/Gabriele Jähnert (Hg.), Das Geschlecht der Wissenschaften. Zur Geschichte von Akademikerinnen im 19. und 20. Jahrhundert, Frankfurt/New York 2010, S. 237–257.

11 Marion Röwekamp, Magdalene Schoch, in: Juristinnen. Lexikon zu Leben und Werk, Baden-Baden 2005, S. 368–372; Ulrike Lembke/Dana-Sophia Valentiner, Magdalene Schoch – die erste habilitierte Ju-

einer juristischen Fakultät erfolgte jedoch erst nach dem Zweiten Weltkrieg. Die Rolle einer Pionierin – nicht nur für Deutschland, sondern für den gesamten deutschsprachigen Raum – übernahm Gertrud Schubart-Fikentscher, die 1948 als erste Frau auf einen Lehrstuhl einer juristischen Fakultät berufen wurde.[12] Auch die weitere Entwicklung hin zur Normalisierung der weiblichen universitären Karrieren ging schleppend vor sich. Ein Blick in den Personalstand der rechtswissenschaftlichen Fakultät der Universität Wien, somit der größten Universität des deutschsprachigen Raumes, zeigt, dass Frauen in der Professorenschaft weiterhin unterrepräsentiert waren. Im Studienjahr 1998/99 stand 28 männlichen Ordinarien eine einzige weibliche Ordinaria gegenüber, auch bei den anderen Kategorien der Professoren – durch Reformen der Universitätsorganisation bestanden verschiedene Professorenarten nebeneinander – und bei den Habilitierten war die Anzahl von Frauen gering.[13]

Folglich kam die Bezeichnung „Frau Professor" im Bereich der Rechts – und Staatswissenschaften (aber auch in anderen akademischen Disziplinen) bis in die 1990er Jahre nicht weiblichen Professoren, sondern meistens den Ehefrauen von Professoren zu. Mit dieser Personengruppe beschäftigt sich der vorliegende Beitrag. Da sich die entsprechenden Untersuchungen erst im Anfangsstadium befinden, ist er noch als Werkstattbericht einzustufen. Er führt in die Fragestellung ein und soll die Schwierigkeiten, die die Auseinandersetzung mit diesem Thema bringt, beleuchten.

Studien zu Professorengattinnen gibt es bislang wenige. In manchen biographischen Werken zu Professoren werden die entsprechenden Ehefrauen auch – in ganz unterschiedlicher Intensität – beleuchtet. Vereinzelt beschäftigen sich universitätshistorische Schriften mit Professorenehefrauen bestimmter Gelehrter[14] oder auch als soziale Gruppe, so enthält das umfangreiche Werk zur Berliner Universitätsgeschichte aus 2012 einen kurzen Abschnitt zu den Professorengattinnen bis 1918, verfasst von Charles W. McClelland.[15] Dieser bringt einige Beispiele von Berliner Professorengattinnen, die als „geistige Gehilfin[nen] oder gar […] ebenbürtige Mitarbeiterin[nen]"[16] ihre Ehemänner unterstützt hatten, und erklärt dieses Thema mangels vertiefter Untersuchungen zu einem Forschungsdesiderat.

ristin in Deutschland, in: Hamburger Rechtsnotizen. Zeitschrift der Fakultät für Rechtswissenschaften der Universität Hamburg 2012, S. 93–100.

12 Rüdiger Fikentscher, Gertrud Schubart-Fikentscher (1896/Zwickau – 1985/Halle). Dekanin und erste Frau im deutschsprachigen Raum auf einem juristischen Lehrstuhl, in: Stadtverwaltung Zwickau (Hg.), Muldeperlen. Tagungsband zu Frauenpersönlichkeiten der Zwickauer Geschichte, Zwickau 2018, S. 52–59, S. 57.

13 Personalstand der Universität Wien für das Studienjahr 1998/99, Wien 1999, S. 31–39.

14 Beispielsweise: Christine Schirrmacher, Marie Kahle (1893–1948): Bonner Professorengattin, Pädagogin und Gegnerin des NS-Regimes, in: Andrea Stieldorf/Ursula Mättig/Ines Neffgen (Hg.), Doch plötzlich jetzt emanzipiert will Wissenschaft sie treiben. Frauen an der Universität Bonn (1818–2018), Göttingen 2018, S. 137–164.

15 Charles E. McClelland, Die Professoren an der Friedrich-Wilhelms-Universität, in: Heinz-Elmar Tenorth (Hg.), Geschichte der Universität Unter den Linden Bd. 1: Gründung und Blütezeit der Universität zu Berlin 1810–1918, Berlin 2012, S. 427–511, hier S. 506–508.

16 McClelland, Professoren (wie Fn. 15), S. 506.

II. Forschungsgegenstand und Methode

Die Untersuchung zu den Professorengattinnen setzt es sich zum Ziel, diese Personengruppe, deren gemeinsames Merkmal die Ehe mit einem Universitätsprofessor ist, aus verschiedenen Blickwinkeln zu beleuchten. Dabei werden zwei Ansätze verfolgt: ein kollektiv-biografischer und ein individuell-biographischer. Durch diese zwei Herangehensweisen können sowohl abstrahierte Aussagen über die Professorengattinnen als soziale Gruppe gemacht als auch durch die konkreten einzelnen Biographien Fallstudien zu Lebensweg, Wirken und Geschlechterrolle erstellt werden.

a. Der kollektiv-biographische Ansatz wird mit Hilfe von prosopographischen Untersuchungen ausgearbeitet. Zu diesem Zweck wird in einem ersten Schritt die Wiener rechts – und staatswissenschaftliche Fakultät als die größte deutschsprachige juristische Fakultät herangezogen. In einem weiteren Schritt soll eine Ergänzung der zu untersuchenden Fakultäten erfolgen, wozu sich beispielsweise die juristische Fakultät der Humboldt-Universität zu Berlin, der Universität Heidelberg oder der Universität München eignen würde. Dadurch könnten vergleichende Erkenntnisse erzielt werden, insbesondere stellt sich die Frage, ob die für die Wiener Fakultät gewonnenen Ergebnisse jenen der anderen Fakultäten entsprechen, oder andere Faktoren eine Rolle spielen.

Anhand der Personalverzeichnisse – und bei Bedarf unter Heranziehung von Personalakten oder anderem Archivmaterial des Universitätsarchivs – werden die Grunddaten zu den jeweiligen Professoren ermittelt und anschließend deren Familienstand recherchiert. Unter Zuhilfenahme von biographischen Lexika und Datenbanken,[17] Zeitungsdatenbanken[18] und genealogischen bzw. Kirchendatenbanken sowie biographischer Literatur[19] können die familiären Verhältnisse der Wiener Professoren eruiert und in weiterer Folge die Recherchen zu den Lebenswegen der Ehegattinnen durchgeführt werden. Es ist dabei anzunehmen, dass die Quellenlage bei der Erforschung der Lebenswege der Frauen deutlich schlechter ist und entsprechende Informationen schwieriger oder gar nicht zu finden sind, da Frauen weniger präsent im öffentlichen Raum waren und dadurch seltener in der medialen Berichterstattung aufscheinen. Nähere Angaben können fallweise in Archivbeständen zu sozialen Unterstützungsleistungen nach dem Tod des Ehegatten gefunden werden. Aus kollektiv-biographischer Sicht sind insbesondere folgende Fragestellungen bzw. Annahmen zu untersuchen:

17 So insb. das Österreichische Biographische Lexikon und die Neue Deutsche Biographie.

18 Hier kommt für den österreichischen Raum insb. die Datenbank ANNO https://anno.onb.ac.at/ zum Gebrauch.

19 Gerade in den letzten Jahren erschienen einige Arbeiten, die für die Wiener Professoren zumindest grundlegende biographische Daten lieferten: vgl. Thomas Olechowski/Tamara Ehs/Kamila Staudigl-Ciechowicz, Die Wiener Rechts – und Staatswissenschaftliche Fakultät 1918–1938 (= Schriften des Archivs der Universität Wien 20, Wien 2014); Franz-Stefan Meissel/Thomas Olechowski/Ilse Reiter-Zatloukal/Stefan Schima (Hg.), Vertriebenes Recht – Vertreibendes Recht. Zur Geschichte der Wiener Rechts – und Staatswissenschaftlichen Fakultät zwischen 1938 und 1945, Wien 2012; Irmgard Schartner, Die Staatsrechtler der juridischen Fakultät der Universität Wien im „Ansturm“ des Nationalsozialismus. Umbrüche mit Kontinuitäten, Frankfurt a.M. 2011. An älteren Werken sind zu nennen: Wilhelm Brauneder (Hg.), Juristen in Österreich 1200–1980, Wien 1987.

Mehrere der biographischen Untersuchungen zu österreichischen Rechtsgelehrten[20] betonen die Notwendigkeit der finanziellen Absicherung seitens des Mannes vor der Hochzeit. Angesichts der oft prekären beruflichen Situation im wissenschaftlich-universitären Bereich waren die ehewilligen Paare vor eine langwierige Wartezeit gestellt. Eine wesentliche Rolle spielte dabei der Umstand, dass die Privatdozentur keine sicheren Einkünfte brachte, somit oft die Eheschließung erst nach erfolgter Berufung zum Professor erfolgte. Vor diesem Hintergrund soll aufgezeigt werden, inwiefern das Heiratsalter mit dem wissenschaftlichen Fortkommen korrelierte und welche Strategien zur Bewältigung dieser Schwierigkeiten angewandt wurden.

Wichtig für die Untersuchung erscheint die Herkunft, das familiäre Umfeld und die Konfession der Frau im Vergleich zum jeweiligen Professor. Dabei stellt sich auch die Frage, inwiefern jüdische Partnerinnen konvertierten, in welchem Zeithorizont dieser Schritt geschah und inwiefern durch konfessionelle Fragen die Eheschließung verzögert wurde, was beispielsweise für die Ehe von Joseph Unger und Emmi Worms anzunehmen ist.[21] Recherchen zu Herkunft und Konfession werden im individuell-biographischen Teil ebenfalls von großer Bedeutung sein, insbesondere vor dem Hintergrund des Nationalsozialismus und der Vertreibungen von jüdischen WissenschaftlerInnen.

Etwas schwieriger zu rekonstruieren ist die Frage der Bildung der Professorengattinnen, insbesondere welche Schulbildung ihnen zuteil wurde, ob eine universitäre Ausbildung angestrebt oder gar absolviert wurde und wie sich dieser Umstand auf ihren Lebensweg auswirkte. Zwar gibt es Jahresberichte einiger Frauenbildungseinrichtungen, doch geben diese lediglich für manche Jahrgänge die Namen ihrer Schülerinnen bekannt. Dabei stellt sich auch die Frage nach familiären Verflechtungen innerhalb von Professorenfamilien, die Untersuchung der familiären Verhältnisse der Professoren kann zum Verständnis der Bedeutung von sozialen Netzwerken bei Habilitationen und Berufungen beitragen. Bekannt sind einige Professorengattinnen, die gleichzeitig Professorentöchter waren wie Helene Ehrenberg, die Tochter von Rudolf v. Jhering und Ehefrau von Victor Ehrenberg, und Inge Gürke, die Tochter von Otto Koellreutter und Gattin von Norbert Gürke.[22]

b. Der individuell-biographische Ansatz richtet den Fokus auf einzelne ausgesuchte Professorengattinnen. Für diese Untersuchung werden Professorengattinnen des deutschsprachigen Raums herangezogen, zu deren Leben und Wirken bzw. zu dem ihres Ehemannes es vertiefende Quellen gibt. Die individuell-biographische Studie basiert auf Selbstbildnissen, Nachlässen, biographischen Untersuchungen und allfällig vorhandenen Korrespondenzen. Dabei muss stets hinterfragt werden, welche Aufgabe der

20 Klaus Kempter, Die Jellineks 1820–1955. Eine familienbiographische Studie zum deutschjüdischen Bildungsbürgertum, Düsseldorf 1998, S. 204; Olechowski, Hans Kelsen (wie Fn. 2), S. 116, S. 126 verweist auf die vor Eheschließung erfolgte Habilitation Kelsens und seine Aufnahme der Lehrtätigkeit im Rahmen der Volksbildung, als zusätzliche finanzielle Quelle.

21 Dazu vgl. kurz in: Lisa-Maria Tillian, „Tausend Dank für dein Briefl." Eine Untersuchung weiblicher Lebenswelten im jüdischen Großbürgertum in Wien zwischen 1872 und 1937 anhand der Briefe von Mathilde Lieben an Marie de Rothschild (Diss. phil., Univ. Wien 2013), S. 51 f.

22 Schartner, Staatsrechtler (wie Fn. 19), S. 57.

jeweiligen Quelle ursprünglich zugedacht war und was für Verzerrungen des entsprechenden Ereignisses bzw. der Lebensgeschichte sich dadurch ergeben könnten. Folglich werden die unterschiedlichen Quellentypen quellenkritisch untersucht und in die politische Geschichte sowie das gesellschaftliche Umfeld eingeordnet. Das Ergebnis soll eine möglichst vielseitige Darstellung der einzelnen Frauen vor dem Hintergrund ihrer Zeit sein. Besonders berücksichtigt wird insbesondere einerseits die Frage, inwiefern sie selbst auch wissenschaftliche Interessen pflegten und andererseits, welchen Einfluss sie auf die wissenschaftliche Arbeit ihrer Ehemänner hatten. Berücksichtigt wird auch die Vernetzung der Frauen innerhalb der gesellschaftlichen Kreise der jeweiligen Universitätsstadt. Durch die Teilnahme am gesellschaftlichen Leben hatten Professorengattinnen die Möglichkeit, mit anderen Professorenfrauen Kontakte zu knüpfen und Freundschaften zu schließen, untersucht wird, welche Rolle diesen Netzwerken zukam. Ziel ist es, aus diesen einzelnen Biographien auch Schlüsse zur allgemeinen gesellschaftlichen Stellung von Professorengattinnen zu ziehen, ihren Lebensalltag und die Veränderung von Rollenbildern aufzuzeigen.

III. Wiener Juristenfakultät der Zwischenkriegszeit als Beispiel des kollektiv-biographischen Ansatzes

In der Zwischenkriegszeit verzeichnete die Wiener rechts – und staatswissenschaftliche Fakultät insgesamt 42 Professoren. Davon war der Großteil verheiratet. Zwar bedarf es noch eingehender Recherche zu den Ehefrauen der Professoren, doch lassen sich anhand der vorliegenden biographischen Daten ein paar Thesen aufstellen. Wesentlich für die Möglichkeit der Eheschließung war die finanzielle Absicherung der Familie. Dieser Umstand ergibt sich deutlich aus dem Abgleich des Zeitpunktes der Eheschließung mit der beruflichen Laufbahn des Mannes. In der Regel waren die Männer bereits habilitiert, nur vereinzelt erfolgte die Habilitation nach der Eheschließung, doch war in diesen Fällen der akademischen Karriere eine andere Berufstätigkeit vorangegangen.[23] Da die Habilitation als solche – als bloße Lehrberechtigung – keine unmittelbaren finanziellen Auswirkungen für die Betroffenen mit sich brachte, bedurfte es in den meisten Fällen noch einer Anstellung, bis die finanzielle Situation gesichert genug war, um eine Familie zu gründen. Folglich ergaben sich daraus in einigen Fällen längere Wartezeiten für die Verlobten. Als gut dokumentiertes Beispiel kann hier die Eheschließung von Henriette Lang und Josef Freiherr von Schey dienen: Schey habilitierte sich 1877 und wurde im September 1884 zum außerordentlichen Professor an der Wiener juristischen Fakultät ernannt, Ende Jänner 1885 folgte die Ernennung zum ordentlichen Professor an der Universität Graz. Keine zwei Monate später erfolgte die Eheschließung mit Henriette Lang.

[23] Das war der Fall bei Alexander Hold-Ferneck und Ferdinand Kadečka. Vgl. Kamila Staudigl-Ciechowicz/Thomas Olechowski, Völkerrecht, in: Thomas Olechowski/Tamara Ehs/Kamila Staudigl-Ciechowicz, Die Wiener Rechts – und Staatswissenschaftliche Fakultät 1918–1938, Göttingen 2014, S. 521–547, S. 526–533; Kamila Staudigl-Ciechowicz, Strafrecht und Strafprozessrecht, in: Thomas Olechowski/Tamara Ehs/Kamila Staudigl-Ciechowicz, Die Wiener Rechts – und Staatswissenschaftliche Fakultät 1918–1938, Göttingen 2014, S. 420–463, S. 432–437.

Die jüdische Wochenzeitschrift „Die Neuzeit" berichtete von der glanzvollen Hochzeit und bemerkte: „Das Brautpaar hatte in treuer Liebe viele Jahre ausgeharrt, bis die Stunde der Vermählung herannahte."[24] Die weiteren Recherchen sollen verdeutlichen, inwiefern dieser Fall typisch für die Ehen von Professoren war. Interessant erscheint auch, dass an der Wiener Fakultät mehrere Professorengattinnen zum Zeitpunkt der Eheschließung beinahe dreißig oder sogar über dreißig Jahre alt waren. Hier gilt es anhand statistischer Daten und der Sekundärliteratur herauszuarbeiten, inwiefern das für den entsprechenden Zeitraum ungewöhnlich war.

IV. Zur Schwierigkeit der Quellenlage für die individuell-biographische Forschung

Wie bereits ausgeführt wurde, lassen sich die Lebenswege der Professorengattinnen oft schwer rekonstruieren, da viele Informationen nur schwer greifbar sind. Umso mehr gilt das für die im Mittelpunkt stehende Frage, nach der Rolle der Professorengattin für die Forschung des Professors. Oft lässt sich die Teilhabe der Ehegattin an der wissenschaftlichen Arbeit des jeweiligen Rechtsgelehrten kaum rekonstruieren. Nur selten wird die Mitwirkung explizit erwähnt. Folglich stellt sich die Frage, welche Quellen für eine entsprechende Fragestellung herangezogen werden können. In erster Linie geeignet sind autobiographische Texte, Tagebucheinträge und Korrespondenzen der Ehegatten. Einer eingehenden Untersuchung bedürfen ebenfalls die Vorworte oder Geleitworte der Publikationen des Gelehrten sowie die Anmerkungen im Werk selbst. Letzten Endes sind es jedoch eher Zufallsfunde, die eine Mitwirkung der Ehegattin an einem konkreten Werk dokumentieren. Angesichts der fehlenden Untersuchungen kann dieser Punkt nur beispielhaft anhand der bestehenden biographischen Literatur zu den Gelehrten illustriert werden:

Reinhard Mehring erwähnt in seiner Biografie Carl Schmitts[25] die zweite Frau Schmitts, Duška Todorović, widmet deren Beziehung jedoch keine eigene Analyse, sondern folgt den Tagebüchern Schmitts in einer deskriptiv-chronologischen Art. Folglich sind die einzelnen Hinweise zur Beziehung zwischen Carl und Duška verstreut auf die gesamte Biografie. Carl Schmitt lernte Duška Todorović kennen, als sie zum Studium der Philosophie nach Bonn kam. Zwar brach sie ihr Studium schlussendlich ab, besuchte aber gelegentlich das Seminar von Carl Schmitt.[26] Einen Anhaltspunkt für die Teilhabe von Duška Schmitt an Carl Schmitts wissenschaftlicher Tätigkeit nach der Eheschließung gibt das Kapitel zum Weimarer Leben und Werk. Mehring führt darin an, dass Schmitt im Frühjahr 1927 an seinem Aufsatz „Begriff des Politischen" saß, während Duška Schmitt, die an Tuberkulose litt und sich immer wieder verschiedenen Therapien unterzog, im Krankenhaus wegen einer Lungenoperation lag. Schmitt formulierte den Text zügig und las

[24] Die Neuzeit v. 20. 3. 1885, Nr. 12, S. 114.

[25] Mehring, Carl Schmitt (wie Fn. 2).

[26] Mehring, Carl Schmitt (wie Fn. 2), S. 178.

ihn anschließend „Duška im Krankenhaus vor, die ‚begeistert‘ war“.[27] Der Umstand, dass Schmitt seiner schwerkranken Frau seinen Text vorliest, zeugt zumindest davon, dass er annehmen durfte, dass sie seinen Ausführungen folgen und ein Urteil dazu abgeben konnte . Zwar lässt sich daraus keine besondere Mitwirkung ihrerseits an Schmitts Arbeit herauslesen, doch ist es ein Hinweis darauf, dass Schmitt seine Ehefrau in seine wissenschaftliche Arbeit zumindest als Zuhörerin einbezog.

Etwas besser gestaltet sich die Quellenlage bei der Ehegattin von Hans Kelsen. Thomas Olechowski zeichnet in seiner umfassenden Biografie Hans Kelsens ein stimmiges Bild der Ehepartner.[28] 1912 heiratete Hans Kelsen Margarete (Grete) Bondi, und über sechzig Jahre lang – bis zum Tod Margaretes 1973 – blieben sie in der Ehe verbunden. Die Rolle Grete Kelsens für die wissenschaftliche Tätigkeit ihres Ehemannes erwähnte bereits Rudolf Aladár Métall in seiner 1969 erschienen kurzen Biografie Kelsens.[29] Grete Kelsen übernahm im Wesentlichen die gesamte administrative Arbeit, die für die Forschung Kelsens notwendig war: Sie tippte „viele Tausende, vermutlich Zehntausende [sic] Seiten von Manuskripten und die meiste Korrespondenz“.[30] Einen Hinweis auf die Mitwirkung Grete Kelsens gibt auch die persönliche Widmung, die Kelsen in ein Exemplar seiner 1911 – also noch vor Eheschließung – publizierten Schrift „Über Grenzen zwischen juristischer und soziologischer Methode“ schrieb: „Fräulein Grete Bondi mit herzlichem Dank für ihre Mitarbeit. 6. Juni 1911, Hans Kelsen.“[31] Dass Grete Kelsen weit mehr als nur Schreibarbeiten für ihren Ehemann erledigte, lässt eine Anmerkung im Aufsatz des russisch-französischen Rechtswissenschaftlers Boris Mirkin-Getzewitsch vermuten. Die von Hans Kelsen herausgegebene „Zeitschrift für Öffentliches Recht“ publizierte 1929 den von Mirkin-Getzewitsch verfassten Beitrag „Die Rationalisierung der Macht im neuen Verfassungsrecht“, und in einer Anmerkung findet sich der Hinweis, dass „Margarete Kelsen das französischsprachige Manuskript dieses Aufsatzes ins Deutsche übertragen hat“.[32] Dieser Umstand macht deutlich, dass Grete Kelsen ein gewisses fachliches Verständnis für das Forschungsfeld ihres Ehegatten besitzen musste, andernfalls wäre eine Übersetzung des Textes nur schwer möglich gewesen. Über die Schulbildung von Grete Kelsen ist nicht sehr viel bekannt, Deborah Holmes nannte Grete Bondi als eine der Schülerinnen der wissenschaftlichen Fortbildungskurse des Schwarzwald-Kreises um Eugenie Schwarzwald.[33] Sie scheint im Jahresbericht des Mädchen-Lyzeums am Kohlmarkt aus 1908 als Teilnehmerin der wissenschaftlichen Fortbildungskurse auf.[34]

27 Mehring, Carl Schmitt (wie Fn. 2), S. 202.

28 Olechowski, Hans Kelsen (wie Fn. 2), S. 115 f.

29 Rudolf Aladár Métall, Hans Kelsen. Leben und Werk, Wien 1969.

30 Zit. n. Olechowski, Hans Kelsen (wie Fn. 2), S. 115.

31 Das Exemplar befindet sich im Privatbesitz von Nicoletta Bersier-Ladavac. Vgl. Olechowski, Hans Kelsen (wie Fn. 2), S. 115 Fn. 466.

32 Zit. n. Olechowski, Hans Kelsen (wie Fn. 2), S. 115 Fn. 465.

33 Deborah Holmes, Langeweile ist Gift. Das Leben der Eugenie Schwarzwald. St. Pölten/Salzburg/Wien 2012, S. 132.

34 VI. Jahresbericht des Mädchenlyzeums der Frau Dr. phil. Eugenie Schwarzwald in Wien (Stadt), Wien 1908, S. 84.

Diese Kurse waren – so die Eigenbeschreibung – „für erwachsene junge Mädchen bestimmt und soll[ten] eine höhere Fortbildung in wissenschaftlichen Fächern ermöglichen." Der Gedanke dahinter war, die jungen Frauen „vornehmlich zu selbständigem Denken, Arbeiten und Lesen an[zu]regen".[35] Unterrichtet wurden die Schülerinnen von akademisch ausgebildeten Vortragenden. Fächer aus dem rechts – und staatswissenschaftlichen Bereich übernahm der Jurist Hermann Schwarzwald. Seine Kurse bestanden aus drei Teilen: der Nationalökonomie, dem Sozialismus (Geschichte und Theorie) und der Geschichte der Philosophie bis zur Neuzeit. Ein Blick auf den Lehrstoff zeigt, dass Hermann Schwarzwald sich in diesen Einheiten mit den nationalökonomischen Theorien von Adam Smith, Thomas Robert Malthus, David Ricardo, Friedrich List und Henry Charles Carey beschäftigte und die Rolle des Staates im Wirtschaftsleben behandelte. In den Stunden zum Sozialismus besprach Schwarzwald unter anderen den Marxismus und beleuchtete die Geschichte der deutschen Sozialdemokratie. Dabei wurden die jungen Frauen auch mit zeitgenössischen Entwicklungen und Theorien konfrontiert – als Lektüre scheint beispielsweise Emil Dölls 1897 erschienenes Werk „Das Schicksal aller Utopien oder sozialen Charlatanerien und das verstandesgemäß Reformatorische" im Jahresbericht auf. In der Geschichte der Philosophie brachte Schwarzwald nicht nur griechische und römische Philosophen der Antike, sondern besprach auch Werke von Arthur Schopenhauer.[36] Die Übersichten zu den anderen Fächern zeigen eine vielseitige Einführung in verschiedene Wissenschaftszweige. Es ist nicht bekannt, ob Grete Kelsen aus diesen Kursen einen besonderen Nutzen für ihren weiteren Lebensweg schöpfen konnte, sie stellten jedoch eine gute Basis auch aus fremdsprachlicher Sicht[37] für ihre unterstützenden Tätigkeiten für Hans Kelsen dar. Zu erwähnen ist außerdem, dass Hans Kelsen noch als Privatdozent an der Universität Wien begonnen hatte, Privatseminare bei sich zuhause zu veranstalten. Es gab zwar vereinzelt weibliche Teilnehmer – so bspw. Henda Silberpfennig[38] – über eine Teilnahme von Grete Kelsen ist allerdings nichts bekannt.

Verhältnismäßig gut erforscht hingegen ist beispielsweise Camilla Jellinek.[39] Die Ehefrau des Staatsrechtlers Georg Jellinek kam 1860 als Camilla Wertheim in einer bürgerlichen Familie in Wien zur Welt. Anders als den einige Jahrzehnte jüngeren Grete Bondi und Duška Todorović standen Camilla Wertheim kaum Möglichkeiten offen, außerhalb des familiären und privaten Rahmens eine Schulbildung zu erhalten. Wertheims Familie gehörte dem Bildungsbürgertum an, sowohl ihr Vater, ein Mediziner, als auch ihr On-

35 VI. Jahresbericht des Mädchenlyzeums der Frau Dr. phil. Eugenie Schwarzwald in Wien (Stadt), Wien 1908, S. 83.

36 Der Lehrstoff ist abgedruckt in: VI. Jahresbericht des Mädchenlyzeums der Frau Dr. phil. Eugenie Schwarzwald in Wien (Stadt), Wien 1908, S. 89-92.

37 Die Kurse umfassten auch englische und französische Literaturgeschichte, sowie einen Anfängerkurs für Italienisch.

38 Olechowski, Hans Kelsen (wie Fn. 2), S. 147.

39 Vgl. zu ihr bspw: Kempter, Die Jellineks (wie Fn. 20); Klaus Kempter, Camilla Jellinek und die Frauenbewegung in Heidelberg, in: Bärbel Meurer (Hg.), Marianne Weber. Beiträge zu Werk und Person, Tübingen 2004, S. 111–126.

kel, ein Nationalökonom, waren wissenschaftlich interessiert. In späteren Jahren erinnerte sich Camilla Jellinek:

> *„Ich hatte das große Glück[,] in meinem Elternhause das zu finden, was öffentliche Schule und Universität den Mädchen damals noch verweigerten. Meine Eltern und die Geschwister meines Vaters, die unseren Haushalt teilten, weckten und pflegten frühzeitig meinen Bildungsdrang.“*[40]

Entsprechend den gesellschaftlichen Gepflogenheiten erhielt Camilla Wertheim einen Unterricht, der sie auf ihre Pflichten und Aufgaben in Familie und Haushalt vorbereiten sollte. Bemerkenswert ist, dass sie zwei Jahre lang Unterricht an der höheren Bildungsschule des Frauen-Erwerbs-Vereines besuchte. Finanziell dürfte die Schwester des Vaters, Eleonore Felix, diesen Schulbesuch ermöglicht haben. Sie scheint in der Mitgliederliste des Vereines auf.[41] Das verwundert nicht, beschreibt Kempter die Familie Wertheim in seiner Biographie doch als „nicht […] besonders wohlhabend“.[42] Dieser Umstand verdeutlicht den Stellenwert, welchen die Bildung im Hause Wertheim genoss, sowie den starken Bildungsdrang Camilla Wertheims. Camilla Wertheim lernte Georg Jellinek Anfang 1880 kennen, die Verlobung folgte im Frühsommer, die Eheschließung erst drei Jahre später nach der Ernennung Jellineks zum außerordentlichen Professor an der Universität Wien.[43] Bereits im Winter 1881/82 erledigte Camilla Wertheim Hilfstätigkeiten für Jellineks Publikationen. Kempter berichtet über ihre Hilfe bei „den Korrekturen des Entwurfes“ des Werkes „Die Lehre von den Staatenverbindungen“.[44] In Jellineks Buch selbst findet sich kein Hinweis auf die Mitarbeit seiner Verlobten. Angesichts der wiederkehrenden finanziellen Schwierigkeiten, die das Ehepaar Jellinek bis zur Berufung Georg Jellineks 1891 nach Heidelberg verfolgten, liegt die Vermutung nahe, dass Camilla Jellinek auch bei weiteren Werken ihres Mannes als Hilfskraft tätig wurde. Die Untersuchung Kempters beschäftigt sich freilich nicht näher mit dieser Frage, da es sich wohl nicht um eine zentrale Tätigkeit von Camilla Jellinek handelte, die sich bis 1900 fast ausschließlich ihren familiären Pflichten widmete. Das umfangreiche Quellenmaterial zur Familie Jellinek kann für die Frage der Mitarbeit Camilla Jellineks an den Werken ihres Mannes weitere Anhaltspunkte liefern. Entsprechende Hinweise könnten sich in den Nachlässen von Georg und Camilla Jellinek befinden, insbesondere in deren Korrespondenz. Ein Blick auf Camilla Jellineks Lebensweg und Errungenschaften zeigt deutlich, dass sie sowohl Interesse an rechtlichen Fragen hatte, als auch als Autodidaktin juristische Fähigkeit entwickelte. Beachtenswert ist die Bibliographie Camilla Jellineks. Sie umfasst über 100 Positionen und das, obwohl sie erst 1902 ihre ersten Publikationen

40 Kurzer Lebenslauf von Camilla Jellinek, Bundesarchiv, N 1137/19, zit. n. Kempter, Die Jellineks (wie Fn. 20), S. 201 Fn. 331.

41 Wiener Frauen-Erwerb-Verein, Rechenschafts-Bericht des Ausschusses vom 1. September 1876 bis 31. August 1877, Wien 1877, S. 29.

42 Kempter, Die Jellineks (wie Fn. 20), S. 200.

43 Kempter, Die Jellineks (wie Fn. 20), S. 204.

44 Kempter, Die Jellineks (wie Fn. 20), S. 236.

veröffentlichte.[45] Der Großteil dieser Publikationen beschäftigt sich mit unterschiedlichen Rechtsbereichen, gemeinsam ist ihren Publikationen allerdings, dass sie darin frauenspezifische Rechtsfragen aufgreift. Ihr großes Engagement in der Frauenbewegung und ihre jahrzehntelange Arbeit in den Rechtschutzstellen für Frauen wurden 1930 anlässlich ihres 70. Geburtstags von der Heidelberger Universität gewürdigt: Sie wurde von der juristischen Fakultät zum Doctor honoris causa promoviert.[46]

An der gleichen Fakultät wurde bereits 1922 Marianne Weber zum Doctor honoris causa der Rechte promoviert. Sie stellt jedoch im Rahmen der gegenständlichen Untersuchung einen Ausnahmefall dar. In den letzten Jahrzehnten wurden nicht nur unzählige Arbeiten zu ihrem Mann, Max Weber, veröffentlicht, auch ihr Leben und Wirken stand im Mittelpunkt einiger Untersuchungen.[47] Darin wurden verschiedene Aspekte ihrer eigenen wissenschaftlichen Arbeit, ihres Engagements für die Frauenbewegung, aber auch für die Fortführung der Werke ihres 1920 verstorbenen Ehemannes gewürdigt. Nach Max Webers Tod überwachte Marianne Weber die Herausgabe seiner Werke, mit der Unterstützung einiger Fachmänner ermöglichte sie die posthume Publikation einzelner weiterer Arbeiten. Sechs Jahre nach seinem Tod publizierte Marianne Weber eine über 700 Seiten starke Biographie ihres Mannes. Damit spielte sie auch eine wichtige Rolle bei der posthumen Darstellung und Wahrnehmung Max Webers als Menschen und Wissenschaftlers.[48]

V. Ausblick

Die Untersuchungen zu den Professorengattinnen der Rechts – und Staatswissenschaftler sollen diese Frauengruppe aus dem Schatten ihrer Ehemänner holen, ihre Lebenswege sowie ihren Einfluss und Beitrag zum wissenschaftlichen Oeuvre ihrer Ehegatten aufzeigen. Dabei werden Lebensbereiche und Aufgaben beleuchtet, die in zeitgenössischen Berichten oft nur wenig Aufmerksamkeit erfuhren, da sie als selbstverständlich galten. Professorengattinnen begegnen uns meist nur in beiläufigen Erwähnungen, sie sind auch kaum in der universitären Erinnerungskultur verankert.[49] Auf den ersten Blick mag die Wiener Rechtswissenschaftliche Fakultät hier eine Ausnahme darstellen, denn in einem der Sitzungszimmer der Fakultät, Josef-Hupka-Zimmer genannt, hängt neben einer Reihe von Professorenbildern ein Gemälde einer weiblichen Person, Rosa Siegel. Es handelt sich dabei um die Tochter des Politikers und Mediziners Ludwig von Löhner und Ehefrau des Rechtshistorikers Heinrich Siegel, ein Gemälde seiner Person hängt ebenfalls im gleichen Raum. Weshalb gerade ein Bild von Rosa Siegel im besagten Sit-

45 Eine Zusammenstellung ihrer Publikationen ist abgedruckt in: Kempter, Die Jellineks (wie Fn. 20), S. 566–572.

46 Kempter, Die Jellineks (wie Fn.20), S. 439.

47 Vgl. oben Fn. 3.

48 Edith Hanke, "Max Weber's Desk is now my Altar": Marianne Weber and the intellectual heritage of her husband, History of European Ideas 35 (2009), S. 349–359, S. 356.

49 2018 hatte die Universität Heidelberg anlässlich 100 Jahre Frauenwahlrecht auch der Professorengattinnen gedenkt. [www.uni-heidelberg.de/100-jahre-frauenwahlrecht].

zungszimmer hängt, ist unklar – vermutlich ohne tiefere Motivation, einfach weil es das (schöne) Bild gab.[50]

Wichtig erscheint es den betroffenen Frauen einen Platz in der universitären Erinnerungskultur zu verschaffen, ihre Verdienste nicht nur als „geistige Gehilfin“[51] aufzuzeigen, sondern auch in Bereichen, die nicht mit der wissenschaftlichen Laufbahn des Ehemannes verknüpft waren. Viele der Professorengattinnen setzten sich für die Verbesserung der Situation von Frauen ein, engagierten sich für Frauenrechte und Frauenbildung. Damit setzten sie einen wichtigen Schritt für die Öffnung der juristischen Fakultäten für Frauen. Bezeichnend für die Bedeutung der Wahrnehmung der eigenen Arbeit für die Frauen ist die Reaktion Marianne Webers auf die Verleihung des Ehrendoktorats: „Marianne Weber schreibt vom beglückenden Gefühl nicht mehr ‚Frau Professor‘ sondern ‚Frau Doktor‘ zu sein.“[52] Mit dem gegenständlichen Projekt gilt es eine bewusste Erinnerungskultur zu schaffen und die Forschungslücken zu dieser Personengruppe zumindest teilweise zu schließen.

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VI. Jahresbericht des Mädchenlyzeums der Frau Dr. phil. Eugenie Schwarzwald in Wien (Stadt), Wien 1908

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