Gender Difference in European Legal Cultures

Historical Perspectives

Geschichte

Franz Steiner Verlag

Edited by Karin Gottschalk

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Essays presented to Heide Wunder

Edited by Karin Gottschalk

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PREFACE AND ACKNOWLEDGEMENTS

This volume documents the fifth conference of the international research network *Gender Difference in the History of European Legal Cultures* (gendered-legal-cultures.de). Since its foundation in 2000, the network has brought together scholars who are working on the relevance and function of gender difference in law from a historical perspective. This has opened up the possibility of studies of an interdisciplinary nature that compare legal cultures. Various legal fields are touched upon: criminal, public, private and procedural law; however the main focus is on the area of private law, paying particular attention to legal practices in and out of court, and the relationship between legal and social norms.

Following conferences in Frankfurt am Main (2000), Trient (2002), Copenhagen (2004) and Rethymno/Crete (2006), in April 2009 the research network returned to the city where it was founded, Frankfurt.[1] Together with a number of colleagues, Heide Wunder had set up a network here that has now flourished for more than ten years. She has set a lasting mark on it with her scholarly work, as well as her inspiring personality. With her research on the Early Modern married couple as a "working couple" Heide Wunder played a particularly important part in establishing women's and gender history in Germany. By putting gender relationships centre stage, and in particular the way in which such relationships are structured by legal regulations, she gave form to marriage as a research topic in its own right beyond the family. The members of the research network which she created with so much passion would like to take this opportunity of thanking Heide Wunder for her enormous engagement and for the many stimuli she provided, as well as for the warm-hearted support which above all younger colleagues have enjoyed. This volume is dedicated to her.

Most of the contributions have their origins in papers which were delivered at the conference in 2009. These have been supplemented by contributions from colleagues who were either unable to attend the conference or to deliver a paper there. It is thanks to Katharina Stüdemann that this volume is included in the programme of the Franz Steiner Verlag. She and Harald Schmitt, who supervised the technical production of the manuscripts, were instrumental in the publication's progress. A particular challenge was presented by the realisation of an English-language volume with such an international circle of authors. This was made possible by the Cluster of Excellence "The Formation of Normative Orders" and Bernhard Jussen's Leibniz project "Pre-modern Kinship", both at Goethe Univer-

1 Since then further conferences have taken place in Budapest (2011) and Innsbruck (2012). The programmes of all conferences and additional information can be found at <http://www.gendered-legal-cultures.de/congresses.html>. For a review of the activities of the research network see also the contribution by Grethe Jacobsen in this volume.

sity Frankfurt am Main, the support of which facilitated the language editing of the contribution. It remains for me to thank the German Research Foundation, the "Vereinigung von Freunden und Förderern der Universität Frankfurt" and the "Förderverein Geschichtswissenschaften an der Universität Frankfurt – Historiae faveo", who provided generous support for the conference.

Karin Gottschalk

GENDER DIFFERENCE IN THE HISTORY OF LAW

Karin Gottschalk

Law is one of the central functions of social and state order. It is through law that power is institutionalised, actions and social relationships structured and sanctioned. It is in law that social conceptions of order are expressed and legitimised. This is particularly so for gender difference. Before formal legal equality was established, men and women enjoyed different levels of legal capacity, and therefore different possibilities of legal action. In this way the gender hierarchy was legally normalised. In spite of the establishment of formal legal equality in Europe since the 20th century, the matter of gender difference remains precarious. With its behavioural regulation it is the aim of law to produce a functional organisation of social relationships that is legitimised as being just. The manner in which gender difference is implicitly or explicitly expressed in law is directly connected with concepts of social and political order, and legal traditions contribute to its reproduction. But the law is also used when it comes to changing gender, and thus also political and social, order.[1]

It is against the background of these considerations that this volume approaches a gender history of law. It investigates the legal norms that explicitly refer to men and women. In addition it asks: what is the function of gender in the construction of law; and vice versa, what is the function of law in the construction of gender? Many of the contributions printed here extend the question of gender difference in law in that they pursue discursive interferences, that is the construction of gender in non-juridical discourses and their effects on jurisprudence, legislation and judicial practices. Others focus on cultural comparison or cultural interferences in that they elaborate differences and commonalities of legal cultures, or else interactions, transfers and mutual distinctions that enable us to recognise

1 Merry E. Wiesner, "European gender structures in a global perspective", in *Less favored – more favored. Proceedings from a Conference on Gender in European Legal History, 12th–19th centuries*, edited by Grethe Jacobsen et al. (Copenhagen: Det Kongelige Bibliotek, 2005), <http://www.kb.dk/da/publikationer/online/fund_og_forskning/less_more/index.html> (November 12, 2012); Susan Kingsley Kent, "Gender rules – Law and politics", in *A companion to gender history*, edited by Teresa A. Meade and Merry E. Wiesner, 86–109 (Malden, MA: Blackwell, 2004); Susanne Baer, "Komplizierte Subjekte zwischen Recht und Geschlecht. Eine Einführung in feministische Ansätze in der Rechtswissenschaft", in *Frauen im Recht. Entwicklung und Perspektiven*, edited by Christine Kreuzer, 9–25 (Baden-Baden: Nomos, 2001).

something like legal cultures, while at the same time questioning their clearly defined existence.

Jurists were and are bound into social contexts, just as they are into the systems of knowledge and science of each era, and consequently the question of the role of non-juridical discourse in a gender history of law is vital. Today the effect that, for example, discourses in the natural sciences, medical ethics or politics have on courts or legislation are just as clear as, in reverse, the effects of forms of legal thought and modes of cognition are in non-juridical spheres. This discursive interlacing is in no way specific to Modernity. In the Middle Ages, and well into the Early Modern Period, constructions of gender were shaped by Christian anthropology. They were not just the object of theology, but imparted via study to all scholars. Just how wide the field of argument was can be recognised in the *Querelle des Femmes*, the discourse of 'philogynists' and 'misogynists', in which all sciences participated.[2] The jurist and legal historian Elisabeth Koch has elaborated in detail the influence of the *Querelle* in jurisprudence at the dawn of the Early Modern Period.[3] Studies on the codification efforts of the second half of the 18th and the beginning of the 19th centuries have also proved the role of non-juridical positions for the shaping of gender relationships in legal codes.[4] Less attention has been paid to research into the history of medicine, although from the 16th century onwards medical competence was called upon in judicial practice, for example in the witch trials and cases of infanticide.[5] Here recent contributions to the history of medicine such as that by Michael Stolberg[6] have led to critical questioning of over-simplified explanatory models of the construction of gender, and to a deeper elaboration of the complexity and mutual effects of discourses. In this context we must also ask which fields of knowledge were present or dominant to a greater or lesser extent in specific historical periods: theological-philosophical, confessional-religious, medical-scientific and political-social agendas and forms of thought were not as effective in the same way and to the same extent at all times.

2 Gisela Engel, Brita Rang and Heide Wunder, eds., *Geschlechterstreit am Beginn der Moderne. Die 'Querelle des femmes'* (Königstein im Taunus: Helmer, 2004).

3 Elisabeth Koch, *Maior dignitas est in sexu virili. Das weibliche Geschlecht im Normensystem des 16. Jahrhunderts* (Frankfurt am Main: Klostermann, 1991).

4 Susanne Weber-Will, *Die rechtliche Stellung der Frau im Privatrecht des Preußischen Allgemeinen Landrechts von 1794* (Frankfurt am Main: Lang, 1983); Ursula Vogel, "Gleichheit und Herrschaft in der ehelichen Vertragsgesellschaft – Widersprüche der Aufklärung", in *Frauen in der Geschichte des Rechts*, edited by Ute Gerhard, 265–292 (Munich: Beck, 1997); Karin Gottschalk, *Eigentum, Geschlecht, Gerechtigkeit. Erben und Haushalten im frühneuzeitlichen Leipzig* (Frankfurt am Main: Campus, 2003), 200–264.

5 Esther Fischer-Homberger, *Medizin vor Gericht. Gerichtsmedizin von der Renaissance bis zur Aufklärung* (Bern: Huber, 1983); Michael Stolberg, "Formen und Funktionen ärztlicher Fallbeobachtungen in der Frühen Neuzeit (1500–1800)", in *Fallstudien. Theorie – Geschichte – Methode*, edited by Johannes Süßmann et al., 81–95 (Berlin: Trafo, 2007).

6 Michael Stolberg, "A woman down to her bones. The anatomy of sexual difference in early modern Europe." *Isis* 94 (2003): 274–299; Thomas Laqueur, "Sex in the flesh." Ibid., 300–306; Londa Schiebinger, "Skelettestreit." Ibid., 307–314.

For a history of gender difference in the context of different cultures, comparative studies, as well as studies that stimulate comparison, can also be extremely productive of knowledge and open up new heuristic and analytical territory. Given the deficits in the state of research, studies to date had frequently focused on spatially, temporally and socially restricted deep drilling.[7] But now this is providing the foundation for a growing number of comparative studies. Particularly stimulating are the experiences which have been made as part of surveys and textbooks on the history of women and gender in the context of world history.[8] In them different approaches have been attempted that concentrate on themes or regions,[9] even if they do not systematically focus on a comparison of legal orders or legal cultures.

In order to go beyond the purely synoptic description of norms, practices and developments, we need to reflect on methods, terminology and questions. For example, the parameters of comparison must be discussed: the comparison of institutions is just as conceivable as the comparison of societies or countries, social groups or epochs. The methodological challenges and the possibilities of advancing knowledge that they offer are very different.[10] The use of different historical

7 For example, a number of stimulating contributions in Ute Gerhard, ed., *Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart* (Munich: Beck, 1997); Maria Ågren and Amy L. Erickson, eds., *The marital economy in Scandinavia and Britain 1400–1900* (Aldershot: Ashgate, 2005); Stefan Brakensiek, Michael Stolleis and Heide Wunder, eds., *Generationengerechtigkeit? Normen und Praxis im Erb- und Ehegüterrecht 1500–1850* (Berlin: Duncker & Humblot, 2006). Jutta Gisela Sperling and Shona Kelly Wray, eds., *Across the Religious Divide. Women, Property, and Law in the Wider Mediterranean, ca. 1300–1800* (New York, NY: Routledge, 2010).

8 Merry E. Wiesner, *Gender in history* (Malden, MA: Blackwell, 2001); Teresa A. Meade and Merry E. Wiesner, eds., *A companion to gender history* (Malden, MA: Blackwell, 2004); Bonnie G. Smith, ed., *Women's history in global perspective*, 3 vols. (Urbana, IL: University of Illinois Press, 2004/05); Peter N. Stearns, *Gender in world history*, 2nd ed. (New York, NY: Routledge, 2006); Bonnie G. Smith, ed., *Oxford Encyclopedia of Women in World History*, 4 vols. (Oxford: Oxford Univ. Press, 2008).

9 Margaret Strobel and Marjorie Bingham, "The theory and practice of women's history and gender history in global perspective", in *Women's history in global perspective*, vol. 1, 9–36; Ann B. Waltner and Mary Jo Maynes, "Family History as World History", in ibid., 48–91; Wiesner, "European gender structures"; ead., "Structures and Meanings in a Gendered Family History", in *A companion to gender history*, 51–69; Judith P. Zinsser and Bonnie S. Anderson, "Women in Early and Modern Europe: A Transnational Approach", in *Women's history in global perspective*, vol. 3, 111–144.

10 Z.B. Margareth Lanzinger, Gunda Barth-Scalmani, Ellinor Forster and Gertrude Langer-Ostrawsky, *Aushandeln von Ehe. Heiratsverträge der Neuzeit im europäischen Vergleich* (Cologne: Böhlau, 2010); Gérard Delille, "Position und Rolle von Frauen im europäischen System der Heiratsallianzen", in *Politiken der Verwandtschaft. Beziehungsnetze, Geschlecht und Recht*, edited by Margareth Lanzinger and Edith Saurer, 227–254 (Göttingen: V&R unipress, 2007); Amy L. Erickson, "The marital economy in comparative perspective", in *The marital economy*, 1–22; Andrea Eggenstein, *Uxor und femme covert. Eine vergleichende Untersuchung zur Stellung der Ehefrau in der römischen Antike und im englischen Recht bis zum 20. Jahrhundert* (Frankfurt am Main: Lang, 1995). Legal studies have their own tradition of legal comparison that generally considers individual legal institutions or regions.

terms can emphasise historical and regional specifics, but at the same time leads to problems of comparability. This is particularly apparent for the term *dowry*, which plays such a prominent role with regard to gender difference in law. The English term transports specific aspects of common law,[11] but it is also used to characterise a particular (southern European) legal system of inheritance and marital property (dowry system).[12] But it can also be used as a translation for parts of other (central and northern European) legal systems of inheritance and marital property (for example *Aussteuer*, *Heiratsgut* or *Mitgift* in German speaking regions). In all of these cases the institution that is referred to as dowry was also subject to historical change. This makes the comparative analysis of the function of dowries in different regions and at different times extremely problematic.[13] Some of the contributions presented here investigate the possibilities of solving this dilemma.

In this volume contributions on the Pre-Modern and the period of transition to Modernity on the one hand, and on the Modern Age itself on the other, stand equally side by side. The developments and challenges of the Modern Age receive clearer contours when they are viewed from a Pre-Modern perspective. And vice versa, Pre-Modern phenomena can be seen very differently from a Modern perspective. Sometimes surprising continuities and correspondences of problems and discourses are revealed. But naturally we also observe the very different effects of age-old arguments and regulations in different historical contexts. Long lines of historical change reveal themselves, but at the same time contrasting Pre-Modern and Modern legal cultures provide an excellent opportunity of throwing light on their specific peculiarities. Both help us review familiar narratives, and to modify them where necessary. The volume profits greatly from the previous conferences of the research network, as résumé of which is first provided by GRETHE JACOBSEN.[14]

11 Amy L. Erickson, *Women and property in early modern England* (London: Routledge, 1995).

12 Instead of many, I refer here to the classic article by Diane Owen Hughes, "From brideprice to dowry in Mediterranean Europe." *Journal of Family History* 3 (1978): 262–296, as well as to the instructive contributions in the special issue "Femmes, dots et patrimonies" of *Clio. Histoire, femmes et sociétés* 7 (1998), <http://clio.revues.org/704> (November 12, 2012), edited by Angela Groppi and Gabrielle Houbre.

13 *L'Homme. Europäische Zeitschrift für Feministische Geschichtswissenschaft* 22,1 (2011), special issue: Mitgift, edited by Karin Gottschalk and Margareth Lanzinger.

14 See also Karin Gottschalk, "Geschlechterdifferenz in der Geschichte des Rechts – ein Forschungsnetzwerk unterwegs in Europa." *Geschichte und Region/Storia e regione* 2 (2011), in print.

Part I
Violence, Confessionalisation, Property Rights: From the Late Middle Ages to the Dawn of Modernity

At the beginning of the section on the Pre-Modern, LINDA GUZZETTI'S contribution on late medieval Venice discusses aspects of Pre-Modern law that are markedly different to those of the Modern Period: for example the plurality of legal sources – statutes, glosses, adopted Roman law, customs and judicial practices all were legally normative and have to be taken equally into account as such. Guzzetti analyses the various 14th-century Venetian legal sources in order to see the extent to which they had differential effects, whether and in what way they express gender difference in detail. She recognises a tension between the law's claim to formulate general regulations, and how it dealt with inequalities which were neither substantiated nor called into question. Here we see how self-evidently inequalities were integrated into Pre-Modern law, inequalities that nevertheless imply that there was (limited) scope for action.

On the basis of the substantive regulations for dowries and inheritances, as well as procedural rulings for women plaintiffs, defendants and witnesses, Guzzetti traces the legally normalised access of women to and exclusion from particular social spaces. In the process she looks at argumentation and terminology, implicit and explicit legitimations of gender difference. There was hardly any need to explain these inequalities within the context of the law, for where necessary general reference was made to custom or to the notorious weakness of women. What is more, terminology was employed from a very different sphere, from the sphere of the control of female sexuality, and transferred to regulations of private law. This tension between general and differentiating norms in the legal sources is in contrast to a judicial practice in which women could play a role as plaintiffs, defendants and witnesses in significant numbers. Thus the restrictions in property rights which applied to women, as well as the normative limitations on their ability to act as witnesses, by no means meant that they were excluded from any legal capacity at all. But in spite of this women played only a small part in judicial practice. Here Guzzetti sees non-legal mechanisms at work which restricted the presence of women in court, such as the exclusion from control of the dowry and from large and profitable areas of business life. Apparently the "regime of inequality"[15] as a characteristic of Pre-Modern law was here at least partially restricted by a number of factors: written law had a tendency towards general regulations; women did have scope for action within the field of private law; and the everyday conflicts in the courtroom did have a certain logic. At the same time, gender difference did remain; it was not questioned but enjoyed the authority of custom, respected legal scholarship and implicit knowledge.

15 Gerhard Dilcher, "Die Ordnung der Ungleichheit. Haus, Stand und Geschlecht", in *Frauen in der Geschichte des Rechts*, 55–72.

HIRAM KÜMPER sketches legal attitudes and judgements on rape from the Middle Ages to the mid-18th century, and thereby touches on a central aspect of Pre-Modern legal culture: the orderly handling of conflicts and illegal acts of violence. The Pre-Modern state had no monopoly on the use of force, instead various holders and forms of power were active (and vied with each other), partly in dependence, partly independently of each other (for example territorial lordship, manorialism, headship of household etc.). The exercise of violence was a legitimate element of these power relationships, as well as of social relationships generally, although excessive use of it was illegal. It was under these conditions that the offence of rape had to be defined as such, the legally responsible instance determined, the relationship between punishment and reconciliation or settlement fixed, and a solution for the conflict found that was acceptable for all sides, or at least enforceable. Here the normative specifications of gender hierarchy came into conflict with other conceptions of order.

For this reason Kümper suggests historicising the crime of rape and investigating it in its legal-cultural and social context. He asks how the crime was perceived in each case, which discourses played a role in this, and what the relationship was between rape and culturally accepted forms of violence in sexual contacts. The terminology used in legal texts indicates that the crime of sexual violence was much less clearly differentiated from other crimes than it is today. The Latin terms *raptus* (theft) and *abducere* (kidnapping) left the matter open as to whether violence was actually involved, that is whether it was against the will of the woman concerned or, rather, against the will of the father, for example. But from the 16th century onwards rape took on an increasingly more concrete form in law: emphasis was placed on the exercise of violence as a central characteristic of the crime. It was no longer compared to theft but placed in the same context as other sexual crimes; in other words, rape was quasi sexualised. This concretisation included concepts of accepted violence against women, as well as concepts of legitimate sexuality in contrast to sexuality that was worthy of punishment. Such concepts determined how rape was perceived and punished. Furthermore, according to Kümper, the changing construction of rape included concepts of sex, being human, social status and honour.

The fact that rape was prosecuted *ex officio* earlier than other crimes shows, above all, that it was not just regarded as a violation of private interests, but rather as a violation of public order. Conflicts and illegal violence were a danger for this order. This also applied to conflicts between married couples, for the gender hierarchy within households was a central element of the Pre-Modern social order.[16] At the same time, in this context contradictions between the various normative concepts could come to the fore, as INKEN SCHMIDT-VOGES elaborates. Her contribution focuses on *peace* as a central political-theological concept of the Pre-

16 Heide Wunder, *He Is the Sun, She Is the Moon. Women in Early Modern Germany* (Cambridge, MA: Harvard University Press, 1998).

Modern Age that also unfolded its normative power in cases involving marital matters, and so under particular circumstances could compete with the gender hierarchy. On the basis of court cases from North Germany in the 18th century which were the result of violent conflicts between married couples, Schmidt-Voges shows how recourse was made to peace in order to find a solution for difficult conflicts beyond the conventional gender hierarchy. To be sure, this hierarchy was the foundation of the concept of domestic, and so ultimately of social peace. But if a husband was guilty of a violation of his duties as a Christian spouse and father of the household, then he also violated the social order in the process. The pragmatic solution for a conflict of this kind might therefore take the form of restoring the social peace at the expense of the gender hierarchy. According to Schmidt-Voges taking recourse to peace enabled the parties to place their own interests in the overall context of the social order. At the same time it was possible for the court to be flexible in its application of norms in the interests of a higher concept. Given the public character of the household in the Pre-Modern Age and the reference to the concept of peace, settling a conflict between married couples in a court of law can actually be understood as an act of political communication. Just like Kümper, Schmidt-Voges demonstrates here how profitable the analysis of language, argumentation and the use of terminology of both jurists and those without a legal education can be for a gender historical consideration of legal cultures.

Marriage and Confession

Since the 16th century, the gender order within marriage not only had to be set in relationship to political-theological concepts of peace, but also with confessional conceptions of order overall. Responsibility for marital law and for hearing cases lay in the hands of the Catholic Church, which had developed its own learned law in the form of canon law.[17] With the Reformation came a further theological concept of marriage, resulting in Protestant marital regulations and the setting up of consistories as authorities.[18] In the face of confessional rivalry a new impediment to marriage joined the previous ones of close kinship; this was the 'wrong' confession of the prospective spouse. Thus the Holy See forbade mixed-confession marriages absolutely, only rarely granting dispensation, and then with strict conditions. It is on the basis of such dispensations, and how they were assessed by church authorities at various levels of the hierarchy, that CECILIA CRISTELLON analyses how the relationship between the genders in marriage was seen from a theological-canonical and pastoral point of view, and which aspects of this rela-

17 Richard H. Helmholz, *The Spirit of Classical Canon Law* (Athens, GA: Univ. of Georgia Press, 1996).

18 Joel F. Harrington, *Reordering Marriage and Society in Reformation Germany* (Cambridge: Cambridge Univ. Press, 1995); John Witte, *From Sacrament to Contract. Marriage, Religion, and Law in the Western Tradition* (Louisville, KY: Westminster John Knox Press, 1997).

tionship the individual instances placed particular weight on. She follows their development from the Council of Trent in 1563 to the end of the Early Modern Period. The cases of dispensation for couples where the wife was Catholic and the husband Protestant show that the local and regional instances were often on the side of those who sought dispensation, not least due to personal acquaintance of the situation. They regarded such marriages less as a danger for the wife's belief, than as a chance to win over a new convert. On the other hand, Rome rejected mixed-confession marriages completely, only allowing them in a few cases under specific circumstances: the couple was to live at the place of residence of the wife, and the children were to be brought up in the religion of the mother. But above all, even prior to the marriage the wife should make a concerted attempt to convert her future husband.

In this way the Church placed its demands for confessional integrity above a legally founded gender order according to which it was the husband who decided on the place of residence, and as the holder of the *patria potestas* also decided on the education of the children. The Church even demanded missionary activity on the part of the wife before the marriage. Just as with the cases of marital law examined by Schmidt-Voges, here too the hierarchy of the genders was manipulated in the service of a higher cause. Behind this conflict of norms we find on the one hand the almost classic concept of the weakness of women; the *imbecillitas* of the female sex was a common argument that had already been used in ancient Rome in order to legitimise the difference between the genders in law and for regulations on exclusion and protection (see also on this Guzzetti's contribution). Seen from this perspective it was unthinkable that Catholic women should be exposed to Protestant husbands without protection, let alone in a Protestant environment. On the other hand, the Church considered women by all means strong enough to work towards the conversion of their potential husbands, and so to actively spread the faith of the Catholic Church. This conflicting perception of the strength or weakness of women is also to be found in attitudes of the Church towards women of its own or another confession: Cristellon demonstrates that the view that women of one's own confession were weak and in need of protection, but women of another confession were stubborn and dangerous was one shared by clerics of all Christian confessions.

But from the end of the 1780s it became easier for mixed confession couples to obtain a dispensation. Cristellon suggests that this was related to the enlightened reform politics practised in Catholic countries such as France and Austria. In Austria Joseph II, who was enthusiastic about the spirit of Enlightenment, decreed in 1783 that state courts were now responsible for marital cases, so putting an end to the Church's responsibility. But this by no means meant the end of a marital law shaped by the Church, nor that it was completely secularised, as ELLINOR FORSTER demonstrates in her contribution. Joseph II may have made a distinction between the confessional sacrament on the one hand, and the contractual part of marriage on the other – the civic relationship was important for the latter and here the priest was only acting as a state officer with an official mandate. Jewish couples were also to have marital cases heard in the secular rather than the rabbinic

court, while the secular court was also to be responsible for all divorces. But under Joseph's successor, Leopold II, the secularisation was rolled back to some extent in that different divorce regulations were introduced for the different confessions. After protests from the Jewish authorities, in 1791 a divorce law was introduced for Jewish couples that distinguished between the genders; the grounds for divorce were different for men and women, so that in cases of adultery only the husband could unilaterally sue for divorce. The only possibility for Catholic couples was the "separation from bed and board". These different divorce regulations were then adopted in the General Civil Code of 1811/12.

In spite of the fact that the Austrian legal reformers embraced such a central ideal, a private law code that was uniform, systematically derived and equal, regulations were included in marital law that differentiated between confession or religion, as well as gender. However, during the second half of the 19th century this was heavily criticised: the regulations for divorce for Jewish couples both went too far (consensual separation without stating the reasons was possible) and were too narrow (in the case of adultery only the man could sue for divorce, not the woman). As Forster discovered, during the same period a growing number of cases came before the Supreme Court in which Jewish women unilaterally wanted a divorce and thereby quoted the grounds for divorce that applied to Protestant couples. The Supreme Court rejected such petitions, arguing that the grounds for divorce were not based on a general marital law, but were valid for Protestants only. Forster also shows that the court's arguments on the universality of marital law varied considerably, depending on whether the plaintiff was a man or a woman.

Thus in this case Enlightenment did not lead to a secularisation of marital law. On the contrary, it resulted in the adoption of different regulations for different confessions and religions, in the spirit of religious tolerance. In the process, law makers and courts seem to have approved this violation of the principles of the new systematic and general civil code such as equality of the law. But nevertheless, new justifications now had to be found for the difference between the genders, for example the political aims of law and order. Forster uses examples to demonstrate how at the end of the Pre-Modern Period, at the dawn of the Modern Age, perceptions of law changed, and how in this context gender difference in the law was renegotiated. The plurality of norms, legislative powers and jurisdiction, which are characteristics of Pre-Modern legal cultures, turned towards a general civil law, as well as a state monopoly of legislation and jurisdiction. Due to the ideas of natural law such as the original equality of all, of justification based on reason and of submission that could only be legitimated by contract, gender difference became dubious in a new way – only for it subsequently to be cemented anew but differently.[19]

19 Ursula Vogel, "Gleichheit und Herrschaft in der ehelichen Vertragsgesellschaft".

Property Rights in Comparison

Given the focuses of previous research concerning gender difference in law, it is no surprise that in this volume it is in particular the contributions on property rights that deal with the comparative perspective or encourage comparison. In many Pre-Modern societies in Europe the transfer of property on the occasion of a marriage, property rights during a marriage, and inheritance were crucial points in the social organisation of property ownership. On these occasions a significant amount of economic resources were moved, kinship groups were materially tied to each other, and the future of households as public institutions and productive units negotiated. It is precisely this similarity that brings with it difficulties when it comes to the terminological precision of a comparison.

In her article MARIA ÅGREN suggests that rather than single institutions or concepts, particular constellations of problems are a better starting point. In this way she is able to avoid the terminological difficulties mentioned above. Accordingly she starts by phrasing a question: how were the property rights of women protected in patriarchal societies before 1800? Behind this lies the reasonable supposition that there was a basic constellation within Pre-Modern patriarchal societies: on the one hand there was an inequality of power between the sexes in marriage. But on the other hand the wife's family of origin had an interest in protecting her from any abuse of power by her husband. From this perspective Ågren asks to what extent there was an awareness of the problems related to this basic constellation, and what the solutions were. In an example from Sweden she shows how particular protective mechanisms were changed in the face of economic developments, and what this meant for the property rights of women. With the rise of the economic importance of credit, objections on the part of the wife's family which were intended to help protect her fortune from being too heavily strained declined in importance. Instead the fortune the wife brought with her was now registered in court. It was protected by the law (and so by authorities), and no longer by the family outside the law. Ågren shows that this transition meant not just that one protective mechanism was replaced by another, it also meant that the protection was now subjected to the logic of the law. Therefore it became necessary to make the property rights of women 'visible' to the law, to transform them into facts that were legally relevant. An example from Sweden quoted by Ågren makes this clear. She uses her analysis of it to develop parameters for a comparison of legal cultures that focus on problems.

One of the questions that Ågren would like to mobilise for her comparison is the question of what the law perceived to be a problem at all, and named as such. This is very much the approach of JURGITA KUNSMANAITĖ in her contribution on the property rights of widows and widowers in Lithuania in the 16th century. She notes that the law had a number of things to say about widows, but that widowers were hardly ever mentioned. Arrangements about *dower* and property rights after the end of a marriage only made reference to the widows. So too in legal practice widowers were not mentioned as such, in stark contrast to widows. Quite clearly this is related to the widespread practice of mentioning women together with their

marital status, and in relation to their fathers or husbands. What is more, the evidence indicates that being a widower was not perceived as a problem in the legal sphere since, in contrast to widows, widowers were not regarded as being in need of protection. That this observation is more than just a truism becomes particularly clear when Kunsmanaitė compares it with the practice of dower agreements. From the middle of the 16th century a trend is visible in Lithuania towards mutual bequests between spouses. This meant that although the property of each of the spouses in effect remained separate and was to be inherited accordingly, because of the mutual bequests it actually remained in the hands of the surviving spouse, at least as long as he or she lived, and its division was postponed. This trend is also observable in other parts of North and West Europe. On the one hand Kunsmanaitė shows here just how important lifelong rights of use were for economic survival in societies where resources were scarce, even if this did not actually involve full possession. In doing so she adds usage rights like the *dower* to the *dowry*, which so often is the sole focus of research. On the other hand she demonstrates that these mutual legacies placed the emphasis on the spouses providing for each other, in contrast to the dower regulations which were consciously geared to providing for widows only. According to Kunsmanaitė, by postponing dividing up the property to the advantage of the surviving spouse, the couple was strengthened at the expense of the family of origin, while at the same time control over the children was extended by extending control over the resources.

The societies of North Europe did not form a 'classic dowry region' – that is rather how the European Mediterranean is seen. However, the latter can just as well be described as a contact zone between different legal cultures. For this reason not only do we have to take into account the legal variety that is so characteristic of the Pre-Modern – legal customs and written law, local statutes and transregional learned law, civil and church law – when considering property law and gender difference. We also have to deal with overlapping, parallel legal systems and residues from other legal traditions. AGLAIA KASDAGLI shows this quite clearly for the Aegean islands. She considers fundamental aspects of the legal culture upon which institutions such as dowry were based. Typical for the Cyclades was the interlocking and coexistence of different and changing lawmakers, laws and jurisdictions: Medieval feudal law, Byzantine-Roman and Venetian law, the Islamic *Sharī'a* and Ottoman law, written and non-written legal customs all provided elements that were adopted in legal practice. When the ruling power changed, this did not mean that the law or the institutions changed completely, with the result that the parties involved could often choose between Christian and Islamic laws, jurisdictions and possibilities of appeal.

Embedded in this context, on the islands dowry was shaped by legal customs that may have differed greatly in detail, but were nevertheless also built on common principles. Only particular regulations were actually written down, and marriage contracts often just referred to 'the custom' in general. Here Kasdagli draws attention to a central difference between written and unwritten law: while unwritten custom tended to transport general principles, left room for variations and included a measure of flexibility, written law was more precise and in so doing of-

ten indicates controversies or innovations within the context of power relations and state formation that lay behind its codification. In the case of dowry this meant that legal customs shared with written law certain basic principles that were also known from other systems of dowry, for example the fact that the dowry was unalienable. However there were differences in how these principles were applied. For example, in the case of couples with no children a dowry that was based on legal custom did not necessarily have to be returned to the family of origin, but could be transferred to the surviving spouse in the form of mutual bequests. This meant that while legal customs facilitated differing strategies, written law sought to enshrine the return of the dowry in all imaginable cases. Kasdagli also shows that on the Cyclades the property that the men brought with them into the marriage was also called dowry, but that written law remained almost totally silent on this point. Given the fundamental difference between unwritten and written law, she suggests that written law chose not to characterise the property that men took with them into marriage as dowry in order to avoid this property being subjected to the restrictions that applied to dowry. The situation that Kasdagli presents demonstrates just how fruitful it can be to investigate thoroughly the legal-cultural basis of the written record when it comes to mapping the property rights of women systematically. Not only does the practice of mutual bequests that she identifies on the Cyclades present surprising parallels to the practices described by Kunsmanaitė, thus questioning the validity of all too simplistic contrasts between conditions in North and South Europe. So too the existence in unwritten law of a dowry for men that is not visible in written law raises new questions and confirms just how productive Ågren's comparative parameters of the legal visibility or invisibility of particular forms of property can be.

Both the inhabitants of the Aegean islands and their changing rulers seem to have been particularly pragmatic when it came to coping with the parallel structures of Christian and Islamic legal institutions. This shows just how difficult it is to delineate clear boundaries between legal cultures that are religiously defined. JUTTA SPERLING presents a strong case for not assuming that religion is the guiding difference in comparative studies of the Mediterranean. Accordingly, her comparison of the property rights of women focuses on the question of whether the Mediterranean societies which were all shaped (to a different extent) by gender hierarchy developed similar forms of exclusion of women and asymmetrical kinship structures.

Sperling's starting point is the dowry system of the Italian city states that developed from the Late Middle Ages, and which is assumed to have been generally adopted in the Mediterranean. Here the transfer of a dowry became a constitutive part of a marriage. One of its central features was the disinheritance of the daughters – quite independently of the dowry, the size of which was dictated by 'market forces'; they had to renounce all claims to inheritance in favour of their brothers or male relatives. A logical extension of this transfer of property, based as it was on patrilinear or agnatic strategies of inheritance, was the strict separation of property in the marriage. The dowry was invested in the business of the husband or his family, but was to be refunded unchanged at the end of the marriage. The

widow had absolutely no rights to the estate of her deceased husband, returned to her family of origin, and even had to leave behind her children from the marriage. Alternatively she could leave the dowry in the estate and in return secure the right of residence and maintenance. Thus the underlying principle was the separation of the lineages of the two families and of their property.[20] According to Sperling, this Italian model of dowry and marriage can by no means be generalised as South European. For example, in Portugal dowry and separation of property remained a phenomenon of the elite, whereas for most of the population equal inheritance rights of sons and daughters, community of property during marriage and mutual inheritance rights of both spouses were common. Here the practice demonstrates forms of the transfer of property which were oriented on the married couple rather than family lineage. This corresponded to a less formal view of marriage according to which cohabitation and the sharing of property were the most significant characteristics of marriage, not the provision of a dowry. In the Greek world, on the other hand, there were a number of different forms of dowry that could correspond to patrilinear as well as cognatic structures of kinship, as Kasdagli reveals in her contribution on the Aegean islands. In Mediterranean Islamic societies, property was actually transferred in the opposite direction; the groom paid a 'brideprice' which generally became the property of the bride. The payment of part of the brideprice was linked to the possibility of divorce: if the husband wanted a divorce, then he had to pay this part out, if the wife wanted a divorce she had to forfeit its payment. In other words the brideprice acted as a kind of regulative designed to make divorce more difficult or financially unattractive for both sides. Nevertheless, the impression we have here is of marriage as a temporally limited contract committed to a particular aim and quite unlike the Christian concept. What is more, even as wives women still had comprehensive control of their property.

Thus, as Sperling shows, forms of marriage, property rights, the formation of households and the kinship structures could vary significantly both within the Christian Mediterranean, as well as between Christian and Islamic regions. In the latter case it is probably the possibility of divorce that is the most striking difference. As early as the Middle Ages, for contemporary Italians this was already a sign of cultural difference. Both the incontestable rights to their property and the right of divorce were connected with each other, and were seen as a sign of a (morally reprehensible) greater sexual freedom for Muslim women – a completely different view of gender relationships in Islamic societies to that which became prevalent from the 18th century, one of a despotic harem culture.[21] Here there is an

20 On Italian-style dowry see for instance Anna Bellavitis, *Famille, genre, transmission à Venise au XVI^e siècle* (Rome: École française de Rome, 2008); Isabelle Chabot, "La loi du lignage. Notes sur le système successoral florentin (XIV^e/XV^e-XVII^e siècle)." *Clio. Histoire, femmes, et sociétés* 7 (1998), <http://clio.revues.org/344> (November 12, 2012); Christiane Klapisch-Zuber, *Women, Family and Ritual in Renaissance France* (Chicago, IL: Univ. of Chicago Press, 1985).

21 Claudia Opitz, "Der aufgeklärte Harem. Kulturvergleich und Geschlechterbeziehungen in Montesquieus 'Perserbriefen'." *Feministische Studien* 9, no. 1 (1991): 41–56. On the property

interesting parallel to the use of terms such as modesty or chastity in Venetian legal sources of the 14th century as observed by Guzzetti: apparently here too a semantic connection was established between women's property rights and control over their sexuality – according to this, modesty and chastity led Christian Venetian women to be restrained when it came to exerting their property rights. But irrespective of any contemporary claims that there were differences, as Sperling shows a simple juxtaposition of Christian and Islamic societies does not function: not only is it impossible to find a common denominator for conditions in the Christian Mediterranean, Sperling also draws attention to overlaps or parallels between Islamic and rather peripheral Christian regions such as Portugal. In particular the patrilinear or agnatic strategies of kinship which developed at the beginning of the Early Modern Period led to quite comparable asymmetries of rights for women and men. Thus it would be an oversimplification to expect differences and similarities purely on the basis of association with a particular religion. Instead, Sperling demonstrates gradations and differences, as well as parallels to the exclusion of women, that at least in part have more to do with the centre-periphery axis. We may also suppose that they have their origin in the tendency of elite strategies towards similarities.

Part II
Scientification, Industrialisation, Equal Rights: Challenges of Modernity

Specialised research that is restricted to a particular epoch, or overly disparate research agendas often prevent us crossing the boundaries between the epochs, yet this can provide important impulses in work on gender difference in law. At the beginning of the second section, which essentially concerns the Modern Age, EVDOXIOS DOXIADIS takes a look at how abortion was viewed from Antiquity to the 19th century, in a contribution that crosses these boundaries. He shows how changes in the philosophical, medical, and political perceptions of life and being human, authority and knowledge, motherhood and nation had an effect on the construction of abortion as a crime. Important changes took place here in the 18th and 19th centuries. The assumption that the first movements the foetus made represented the beginning of human life was replaced by the assumption of a continuous human development of the foetus from the moment of conception. Medicine replaced philosophy and theology as the key science, while at the same time academic knowledge came to the fore at the expense of the practical knowledge of midwives and pregnant women themselves, raising its claim to sole professional authority. Finally, morally laden concepts of motherhood and their political instrumentalisation in the service of the nation states of the 19th century led to the

rights and capacity for economic activity of Muslim wives in the 18th century in comparison with those of English and French wives, see Mary Ann Fay, "Counting on Kin. Women and Property in Eighteenth-Century Istanbul", in *Across the Religious Divide*, 207–223.

legal development of abortion generating its own dynamic – ranging from a degree of indifference and ambiguity to absolute criminalisation.

To the examination of this historical process Doxiadis adds the dimension of cultural transfer. Using the example of the new Greek nation state that developed out of the war of independence against the Ottoman Empire, he shows how in a process of legal borrowing the penal regulation of abortion found its way from Western Europe into the new nation states of Southeastern Europe. The Greek state not only adopted the moralisation of motherhood and motherliness, but in its efforts to follow the Western European path of modernisation also implemented the corresponding legal system – with the result that without any public debate at all penalties were introduced for abortion that were quite incompatible with social practices. The fact that it was doctors who had been trained in Western Europe who held the leading political offices serves to emphasise the extent to which medical and political constructs of gender had an effect on the development of the legal system. Doxiadis draws attention to aspects that also play a role in the contributions that follow: the increasing importance of medical knowledge, the authority of academic knowledge and professional expertise, as well as the relevance of concepts of social and political order for the legal construction of gender.

Medicine and Law

The debate on body, gender and sexual integrity within legal discourse, the interaction of medical and legal knowledge are also at the centre of the contributions by Geiger and Klöppel. KATJA GEIGER shows how in the juristic-forensic examination of assumed infanticide in the years about 1900 male experts produced 'objective' statements about female suspects. Non-scientific views of women, lower classes, the conditions under which servants lived etc., medical and juristic expertise, social status, education and experience, as well as specific narrative strategies provided forensic pathologists and jurists with a common authority to produce statements on birth, death, motherhood and typical behaviour. The process involved mutual information: the pathologist had access to a juristic description of the case which provided the basis for his autopsy. He then translated his forensic results into a language which was comprehensible to legal practitioners, who in turn based their judgement on this. Finally the case was prepared for publication and scientific discussion.

However, the relationship between medicine and law was and is not always characterised by cooperation in the way it is in the production of 'objectivity'. At the interfaces between the disciplines rivalry between differing interpretations and concepts of order also play a role, as ULRIKE KLÖPPEL reveals. The legal differentiation between intersexuality and transsexuality that occupied German courts during the second half of the 20th century resulted in fundamental questions as to what sex was and to what extent it can be changed or not. Here medicine and law contested the claim to being the definitive authority. From the perspective of medicine, belonging to a sex was in no way a clear cut matter. Instead medical

experts increasingly argued that sex involved a continuum of characteristic traits and that it was not always possible to arrive at a definite classification on the basis of them. What is more, it could also change. From a legal standpoint the dichotomy male-female and the 'natural' attribution to one sex was one of the foundations of social, and thus also of legal order. The recognition that sex could change or could not be clearly determined would destroy this order and so could not form the basis for a legal judgement. While medical experts laid claim to responsibility for sex classification, jurists claimed responsibility for social order. In the end the drafting of new laws led to a compromise: medical experts accepted the demands of jurists that sex should be clearly determined in court cases involving sex change, while jurists for their part accepted the view of medical experts that not only physical, but also psychosocial development was important when it came to determining which sex a person belonged to.

In spite of this rivalry, ultimately medicine and law strengthened each other in their claim to scientific expertise, as the contributions of Doxiadis, Geiger and Klöppel show. In cases of abortion and infanticide trials male experts and female suspects confronted each other, while concepts of social order (and the social divide between them) were formative in the development of the legal system and in judgements. On the other hand, jurists laid claim to being the sole authority when it came to what it is to be human, on sex and sex difference. In the case of how the law coped with inter- and transsexuality, even the model of the two sexes itself was open to discussion. This shows in all clarity just how much sex is a legal category, a legal status.

Politics and Society, Profession and Economy

The Modern scientification was paralleled by a 'biologisation' of gender difference, as a result of which the inequality was defined physically. So too within the political discourse of the 19th century the proof of a essential difference between the sexes united positions which otherwise were opposed and provided the scientific argument for the existing gender order. But at the same time, since the French Revolution and the revolutionary unrest of the first half of the 19th century, demands for civic equality remained alive and ensured that the matter of gender difference in law never disappeared from the agenda.

Both of these, the scientific argument for a essential physical difference and the idea of a general civic equality, were in fundamental opposition to the concept of order prevalent in the Pre-Modern, corporate society with its multiple, overlapping inequalities. In spite of this, after 1848 conservative circles in the German Empire attempted, for example, to restabilise this social order, as DORON AVRAHAM shows. At the heart of this was a political theology according to which a person's rights corresponded to his or her place in society and function in God's master plan. Thus the functional difference between humans was the reason behind differences in social and legal status and the hierarchical organisation of society. From this perspective the 'question of women's rights' (*Frauenfrage*) appeared to