



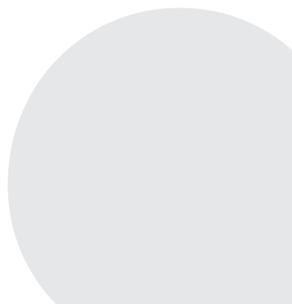
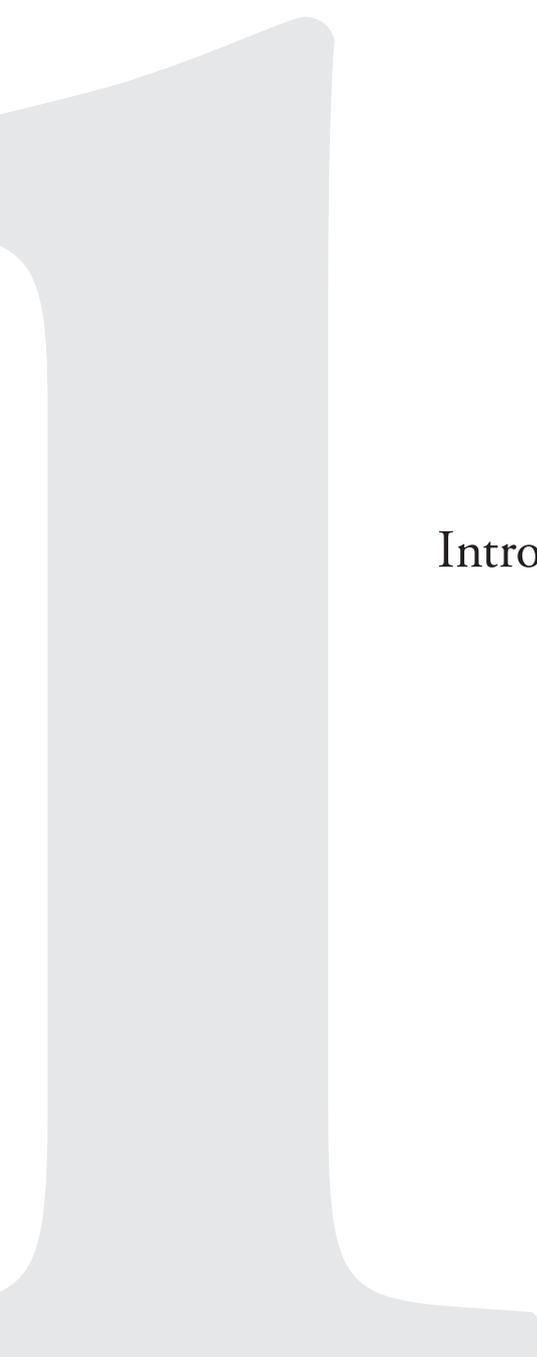
East meets West:

A Gendered View of Legal Tradition

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Introduction

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INTRODUCTION: EAST MEETS WEST: A GENDERED VIEW OF LEGAL TRADITION

I.

The title of the sixth conference of the International Research Network “Gender differences in the History of European Legal Cultures”,¹ held in Budapest in March 2011, was programmatic in several respects. “East meets West: A Gendered view of Legal Tradition” signals, in the first place, that scholars from Eastern and Western countries came together to intensify the exchange of their findings in the field of intersecting legal and gender history. As in previous conferences, we intended to explore European legal cultures “on location” (*vor Ort*) by changing the places of the meetings. This concept has proved to be very successful. The conference in Copenhagen (2004) attracted especially scholars from the Scandinavian countries², and the conference in Crete (2006) scholars from the countries bordering the Mediterranean Sea, including some former parts of the Ottoman Empire.³ This approach does not only intensify the exchanges especially among younger and established scholars, it also gives room to discuss methodological and theoretical issues of gender and law in differing scholarly cultures and traditions. At the same time, dominating generalizations derived from the gendered experiences in Western Europe can be evaluated in a larger context. They are more than an important pillar for a comparative approach, though, as “western” gender roles and gender constructions inscribed in law were “exported” to Central and Eastern parts of Europe either by migration as in the Middle Ages⁴ or as a tool in the process of modern state building as in the case of Greece.⁵

¹ <http://www.gendered-legal-cultures.de>, last accessed 01.10.2014.

² The papers of the Copenhagen conference have been published at http://www.kb.dk/da/publikationer/online/fund_og_forskning/less_more/, last accessed 01.10.2014.

³ Program see <http://www.gendered-legal-cultures.de>, last accessed 01.10.2014.

⁴ Cf. the essays by Ellinor FORSTER and Marija KARABIĆ in this volume.

⁵ Cf. Evdioxios DOXIADIS’ essay in this volume.

Yet, *east* and *west* denote much more than relative points of the compass depending on where you stand. For fifty years – known as the “cold war” – they defined two political spheres, which came into existence after World War II. They were made visible by the “iron curtain” splitting Europe into two parts, making the borders nearly impenetrable and setting up ideological and mental walls. This is especially true for gender and legal history. In the socialist countries, gender was not regarded as a category of the first order for analysing social inequality, but subordinate to class;⁶ law in general was seen as a tool of oppression. But scholarly contacts between Eastern and Western European countries were never completely cut, as for example the Warsaw conference of the Société Jean Bodin in 1976 has demonstrated, and extraterritorial neutral countries, such as Austria, Switzerland and the Scandinavian countries, became meeting points to some extent. It is important to remember that scholarly communication was also restricted, because English and Russian became the lingua franca in their respective area, superseding the traditional scholarly communication in French, Italian or German. In consequence, many “western” scholars hardly knew anything about the history of women in the east and vice versa. So, after the breakdown of the Soviet Union and its system of power, scholars on both sides of the former iron curtain got the chance to learn from one another.

Besides these more recent political borders there were also restrictions in traditional scholarship dealing with “the east”. It is evident that some parts of Europe were hardly taken notice of, e. g., early modern Greece and the Balkans, which became part of the Ottoman Empire. They were not regarded as part of Europe, the *Occident*, but part of the *Orient*. The same had already happened with the Byzantine Empire due to the divisions between Eastern and Western Christianity, although emperor Justinian’s law code exercised enormous influence all over Europe. Obviously, we have to consider different notions of the *east* and the *west* in different periods of European history and different criteria defining the differences, among which religion and its interconnection with

⁶ See the contributions by Petra RANTZSCH and Erika UITZ, “Historical Research on Women in the German Democratic Republic”, in *Writing Women’s History. International Perspectives*, ed. by Karen OFFEN, Ruth Roach PIERSON and Jane RENDALL. Bloomington, Indiana University Press, 1991, pp. 333–353, by Andrea FELDMAN, “Women’s History in Yugoslavia”, *ibid.*, pp. 417–421, and by Mary F. ZIRIN, “Women, Gender, and Family in the Soviet Union and Central/East Europe: A Preliminary Bibliography”, *ibid.* pp. 457–516.

the legal system seems to have been paramount. The comparative view with focus on the Mediterranean undertaken by Jutta SPERLING and Shona Kelly WRAY has also been inspired by this approach.⁷

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II.

Thanks to the Central European University in Budapest hosting the conference, scholars from Central and South-Eastern Europe were not a minority as usual but outnumbered scholars from Western Europe.⁸ Three historical periods, the Middle Ages, the 19th century, and the 20th century, received most attention, while the early modern period was touched only by three papers, reflecting to some degree the political situation, sketched above in the remarks on “the east” and “the west”.

After introducing the keynote lectures we shall briefly look at the individual essays and stress their bearing for the topic of “east meets west”.

KEYNOTE LECTURES

Both the opening keynote and the final keynote lecture address programmatic issues of “Gender differences in the History of European Legal Cultures”. Looking back on the 20th century, legal sociologist Hanne PETERSEN analyses the changes in the gendering of legal cultures by developing the concept of “legal culture” and connecting it with the crisis of gender order in its larger historical context. While in 1919, legal culture was characterized by Georg SIMMEL as strictly male, patriarchal and hierarchical, closely related to monotheistic religions, it was transformed by secularization, dissociating law and religion, and by political and economic changes in the course of the 20th century. At the end of the 20th century, legal culture was less hierarchical

⁷ Jutta Gisela SPERLING and Shona Kelly WRAY, eds., *Across the Religious Divide. Women, Property, and Law in the Wider Mediterranean (ca 1300–1800)*. New York, Routledge, 2004.

⁸ Speakers came from France and Belgium in the north-west, from Greece and Albania in the southeast, from Italy in the South, from Denmark in the north, from Germany, Austria, Hungary and Croatia in Central Europe.

and more horizontal with women as active participants in the legal system, producing new femininities. The consequences for men were quite different, as their patriarchal position got destabilized in the so-called “fatherless society”.⁹ They had to accept—at least outwardly—that women would be equal to men and participate in the legal process. As a result, new hybrid “masculinities” are emerging, which Hanne Petersen illustrates by four modern examples, both illuminating, encouraging and disturbing.

While earlier research on women’s history was guided to a great deal by the attempt to deconstruct “woman” as a category by elaborating differences between women, Merry WIESNER-HANKS in the final lecture focuses on similarities between women and the importance of law in the process of producing them. Three “areas” are selected and scrutinized from a global and intertemporal perspective: (1) motherhood and fatherhood, (2) male dominance and female subservience and dependence, (3) gender egalitarianism. In all three areas, law was and is fundamental in creating similarities among women, who in other respects, such as class, differ. In the first two topics, law is instrumental in keeping women unequal as compared to men. Only in the third area does law contribute to gender equality due to feminist commitment. This is interpreted by WIESNER-HANKS—as Hanne PETERSEN did in her lecture—as a sign of change in the long run. Coming back to whether “woman” is a useful category, WIESNER-HANKS appeals from a political point of view that similarities among women outweigh differences, therefore we should leave aside all theoretical scruples and “work for their [women’s] empowerment in the real world”.

LAW AND GENDER IN THE 20TH CENTURY

Questions of gender equality and its connection with law are discussed for Belgium, Georgia, Hungary and Germany.

Departing from the long way women lawyers had to go until they gained access to the bar and the judiciary in Belgium, Eva SCHANDEVYL stresses the necessity of individual and political efforts in order to push gender equality

⁹ Alexander MITSCHERLICH, *Auf dem Weg zur vaterlosen Gesellschaft. Ideen zur Sozialpsychologie*. Piper Verlag, Munich, 1971.

in the law courts and the judiciary. Although democracy is well established in Belgium, changes concerning equal participation of women in all spheres of public economic life do not follow automatically, because conservative attitudes continue to exist and emerge under changing conditions. Juxtaposed to this Western experience in the process of attaining gender equality, women in post-soviet Georgia are confronted with the traditional requirement of virginity when they want to get married, although gender equality is ruled in Soviet and Georgian legislation. As defined by ethnologist Elke KAMM, virginity comprises physical and sexual integrity as well as “behavioural virginity” in order to keep the husband’s blood line pure. The power of legal tradition is obvious, notwithstanding that virginity in modern urban society has lost its economic function. The importance of virginity is highlighted by the custom of bride kidnapping, which, of course, is illegal, but as reports are not prosecuted by the police, the kidnappers are not deterred, while their victims have to accept their fate if they want to keep their honour. This case study from Georgia is by no means marginal. Virginity and honour were not only of high importance in the early modern period and well into the 20th century in Western and Southern Europe, but during the last forty years, several waves of immigrants from “the east” have brought their religious and legal cultures concerning marriage and virginity with them to Central and Western Europe.

Wolfgang FORM analyses the prosecution of female war criminals after World War II in the British Zone of occupation in Germany, where Germans were tried for war crimes and crimes against humanity by British courts and according to British war crime law, because the German penal court did not refer to such crimes. Although, generally, only men were held responsible for crimes in warfare, women were also tried before the British military courts when they had committed crimes against allies, while crimes committed by Germans against Germans, were judged in German courts. In contrast to the practice of the military courts in the American Zone of occupation, women and men were judged remarkably similar. Gender stereotypes did play a role, though, with respect to carers of Baby Houses, who were considered as having violated the traditional gender role by their cruelty. Nevertheless, they were sentenced to death only if murder was combined with Nazi political activities. Last, but not least, it turns out that transitional justice in the British Zone was part of the process by which the British administration contributed to achieve integration of Western Germany into Western Europe: Central Europe ceased to exist politically.

TRANSITIONS: THE 19TH CENTURY

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In the process of nation building and the formation of “bourgeois society” in the 19th century, new gender constructions manifested their power in exercising strong influence on the codification of civil law, negating regional differences, differences between social classes, and differences between town and countryside. The results for women’s legal position concerning property and inheritance rights are not as uniform as one might expect, as their prior legal status and the socio-economic conditions varied from country to country.¹⁰

In the multi-ethnic Habsburg monarchy, attempts to institute a common law book for the German hereditary lands of the Austrian monarchy began already in the middle of the 18th century. Whether and how women’s property and inheritance rights were lessened or enhanced is studied by Ellinor FORSTER by comparing the Bohemian and Moravian town statutes, being the most favourable for women, with the respective paragraphs in the “Allgemeines Bürgerliches Gesetzbuch” (ABGB), published in 1811. The former statutes dated from the Middle Ages, when these towns had been founded, and the towns tried to keep their privileges, while the compilers of the ABGB had to consider also differing laws in other parts of the monarchy as well as ideas of equality derived from natural law, which did not favour gender-specific legal privileges. The outcome was ambivalent: The Bohemian and Moravian norms were not accepted as a general norm in the ABGB, but women in all parts of the monarchy could choose them, if they wanted to.

It comes as a surprise that in Greece, married women’s property rights did not undergo radical change when after the War of Independence (1821–1829), Ottoman Greece became the Kingdom of Greece in 1832 and a new Civil Code was introduced by and by. As explained by Evdoxios DOXIADIS, Greeks had kept their traditional Byzantine and customary law under Ottoman rule, indeed, the independent legal position of married women and widows appears to have been pretty similar to that in many parts of the former German Empire. But the War of Independence eroded women’s property, and the dowry which included real property became devaluated by the rationalization of family holdings and by migration to the growing urban centres. Consequently,

¹⁰ A useful tool for comparing these developments would be Helmut COING, ed., *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, Bd. 3: *Das 19. Jahrhundert*. München, Beck, 1982–1888.

women had already lost their economic independence, when the new Civil Code was introduced, favouring common conjugal property. But women could not compensate this loss by getting access to an enlarged labour market, as there was no industrial development as in Central and Western European countries. There was a growth in administrative, academic, and professional positions, from which women were excluded, and traditional professionals, such as midwives, lost their independent work rights as in most European countries. The only labour market available to young women was domestic service for the emerging middle class in the towns and (seasonal) agricultural work.

In Italy, a new Civil Code, levelling out existing local and regional differences emerged in 1865, after the unification of the country had been achieved in 1861. Economic historian Stefania LICINI explores the consequences of its legislation in a case study on propertied women's wealth in Milan (1861–1900) based on obligatory “acts of succession”. To explain why men were far wealthier than women, LICINI proposes several reasons: Married women were hindered in economic activities, as they were under their husbands' “*patria potestas*” and needed his consent. The differing starting positions of women and men seem to have been of perhaps greater importance. Although daughters and sons as forced heirs received equal shares of their parents' wealth, this did not mean equality, because it concerned only fifty percent of the parents' wealth, while the other fifty percent were freely disposed of. Apparently, parents favoured sons for the “free” share of their wealth. Looking at prior inheritance law in Milan and Lombardy, it turns out that the splitting of parents' wealth meant by no means an improvement of daughters' legal position, as the Austrian “*Allgemeines Bürgerliches Gesetzbuch*”, which decreed that the parental inheritance was equally divided between sons and daughters (§732), was valid in Lombardy until 1865. Obviously, in the process of creating a common Italian Civil Code, women in Milan lost, while women in other parts of the monarchy gained from sharing the fifty percent with their brothers. Of special interest is LICINI's comparison of Roman law countries such as Italy and common law countries such as England, the USA and Canada, which makes evident the enormous legal differences between “western and western” countries.

ECONOMY AND LAW IN THE MIDDLE AGES AND
EARLY MODERN PERIOD

·16· The four essays dedicated to women's legal and economic status in Slavonian, Dalmatian, and Albanian towns (mostly) during the Middle Ages encompass a great distance geographically, offering the opportunity to discover important differences between towns in the north and in the south. Marija KARBIĆ inspects the evidence relating to women's property and work rights in Gradec and Varazdin, two free royal towns of Slavonia, then part of the Hungarian kingdom, which benefited from western immigration. Although no town statutes are still extant, there is ample evidence from other sources. KARBIĆ's findings concerning the economic activities of merchants' and artisans' wives, the status of widows, the presence of women in court, and children sharing equally the parental inheritance sound very familiar to historians of Central European towns. Only the statement that widows inherited from the deceased husband seems unusual. But on the whole it is evident that Gradec and Varazdin were part of the Central European urban pattern, which has also been described for Bohemia and Moravia by Ellinor FORSTER. Being situated in the western part of Slavonia, which was not subject to Ottoman rule, both towns were able to keep their favourable status in the early modern period.

Marija MOGOROVIĆ CRLEJENKO has based her analysis of the position of women in the towns of the East Adriatic Coast on urban matrimonial property law that primarily regulated property rights and rights of disposal of the possessions and wealth of the marital couple, but the law also regulated the rights of widows and widowers vis-à-vis their children. The complex and changing balance of power in the Eastern Adriatic with its mixture of Byzantine, Slavic, Ottoman, and Venetian influences also shaped matrimonial property law. Several marriage patterns are discernible when one looks at issues of joint property, separate property, joint right of disposal, widows' rights and the distribution of accrued gains and debt liability. Women enjoyed the most favorable position in the Istrian marriage pattern according to which the spouses had the same right to administer the marital fortune and which awarded the widow/widower half of the moveable and immoveable property. The least favorable position was the Venetian marriage pattern, which was partially adopted in Dalmatia: it was based on separate property, which

meant that the dowry of the wife remained her property yet was managed by the husband whereby her economic ability to act was very limited. The widow only received her dowry back and might be forced to leave the marital house within a year and a day unless her husband in his will had appointed her “*domina et domina*”. The latter regulation also makes it obvious that urban statutes only present one aspect of women’s economic and legal position, as it was common in all towns that the spouses themselves made arrangements for marital property in their marriage contract, just as it was common practice in Central European towns. The situation of women becomes even more complex when taking into consideration the social status of women, because different social groups utilized different marital property laws. The wealthy merchants in the Dalmatian towns regulated marital property according to the Venetian model so that they might legally invest the dowry in their businesses while the lower classes, where both spouses contributed to the support of the household, made contracts which created joint property.

Tomislav POPIĆ presents one example of the problems that arose from the late-medieval legal pluralism as described by ČRLJENKO, revealing different rules regulating the fate of the dowry in case the wife died without leaving children. Anna, a noblewoman from Dubrovnik, had married a nobleman from Zadar and made a will in which she disposed of her dowry: as her son, who was her legitimate heir, had died, she made her father her heir but also created several legacies, which amounted to more than half of her dowry. Her father and her brothers did not acknowledge this will and in court sued the executor of the will (the husband having also died) for half of Anna’s dowry on the ground that the marriage contract had been concluded under the law of Dubrovnik, and accordingly, that law would also cover the case of the wife dying without living children. In other words, Anne could dispose freely of only half her dowry. The court turned down the suit, and her will remained valid, because Anna had been living in Zadar after her marriage. In the actual case, it was a matter of whether half the dowry was returned to the natal family of the wife or whether the major share remained as legacies in Zadar, but it was also a conflict between the inheritance law of Dubrovnik, which limited the share to be disposed of, and that of Zadar, which gave the testator the free disposal of his and her property.

Etleva LALA's essay on women's status in (late) medieval Shkodra is a pioneering study for Albanian towns, based on the Statutes of Shkodra from the 15th century, but supposedly first codified in the middle of the 14th century. It appears that the dowry was conceived as women's inheritance as in Dalmatian and Italian towns, but there are differences in the social context: Daughters were not only excluded from their father's inheritance as long as there were brothers, but also as long as there were nephews. The dowry had to be protected against husbands, who wanted to pay "the blood" (*uzarba*). It also seems to have been rather common that children were married off rather young and continued to live in the father's household, who also received the dowry. But when the young couple left, everything they acquired became common property and was shared equally between husband and wife. Although the wife took the husband's place during his absence, she could not represent him personally but had to engage a lawyer, because women were not thought fit to appear in court. There is no information about the legal status of widows and remarriage, nor, except for domestic service, about women's economic activities. Comparing the evidence for Shkodra to laws for the surrounding countryside, LALA maintains that women's status was more favourable in the town, but compared to women's status in the Dalmatian towns it appears rather restricted. Yet, we have to be cautious to draw any consequences from statutes at this point of our research, as long as evidence from legal practice is not extant. It has been revealed for Dalmatian towns that only a small segment of a town's population married according to town statutes, because these were suited only to the economic situation of the wealthy elite, while the majority of commoners who had to earn a living contracted marriages under the condition of common property and common business.¹¹ At any rate, the competition of statutory law and contractual law is evident and has to be taken in consideration.

¹¹ Marija MOGOROVIĆ CRLJENKO, "Women, Marriage, and Family in Istrian communes in the Fifteenth and Sixteenth Centuries", in *Across the Religious Divide* (note 7), p. 145.

REVISIONS

Legal historian Dave DE RUYSSCHER revises current notions about the impact of *ius commune* on “The Capacity of Married Women to Engage in Contract.” At first, he discusses the main scholarly interpretations of women’s legal position in the Middle Ages and its supposed decline during the early modern period attributed to the reception of *ius commune*. He then turns to examine evidence from towns in the Southern Netherlands, which shows that the *ius commune* did not restrict the capacity of married women to contract independently, but on the contrary strengthened it. This result, up to now based on regional evidence, may become of general bearing, if it can be confirmed by evidence from those town republics in Central and Eastern Europe, where the *ius commune* was received.

Anna BELLAVITIS situates the topic of “Gender and Apprenticeship in Early Modern Western Europe” in the broader social context of family, education, and work, as it was common practice in all social classes to circulate children and youths in their formative years to qualify for their future social roles. In contrast to traditional research in guild history based on guild statutes, BELLAVITIS has studied contracts for apprenticed boys and girls from mercantile cities such as Venice, Florence, Lyon, Paris, Orléans, and London. She provides new evidence concerning the differences between female and male apprentices in different trades and crafts, but of greater importance is the discovery that practice (= contracts) made the law. While many guild statutes did not accept girls as apprentices, contracts for female apprentices in these guilds prove the contrary. These findings are intimately connected to the legal system, requiring written legal documents and the institution of obligatory notaries. In Central and Eastern European mercantile cities, where German law was valid, the normative power of contractual law is known for marriage contracts, testaments, and business contracts, but apprenticeship was not contracted in this way. Yet, there are serial sources from the guild archives in imperial cities such as Cologne and Augsburg, which also reveal female apprenticeship, thus questioning the reliability of guild statutes in this respect.¹²

¹² Margret WENSKY, *Die Stellung der Frau in der stadtkölnischen Wirtschaft im Spätmittelalter*. Köln/Wien, Böhlau, 1980; Muriel GONZÁLEZ ATHENAS, *Kölner Zunft-
handwerkerinnen 1650–1750. Arbeit und Geschlecht*, Dr. phil. Kassel, 2010; Christine WERKSTETTER, *Frauen im Augsburger Zunft Handwerk. Arbeit, Arbeitsbeziehungen und Geschlechterverhältnisse im 18. Jahrhundert*. Berlin, Akademie Verlag, 2001.

CONCLUDING REMARKS

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The meeting of East and West at Budapest has revealed many similarities in law and legal practice across Europe in the medieval, the early modern, and the modern period, as well as unique features of law and legal practice that are shaped by local cultures and traditions. Similarities and differences brought up are by no ways accidental, for nine out of twelve essays concerned towns from the twelfth to the twentieth centuries, while legal conditions of the countryside have, except for Greece, not been treated explicitly. Two distinct directions of urban development up to the 19th century emerge. While urban settlements in the East Adriatic coast looked back to a long legal tradition of Roman and Byzantine law, and were to some degree also influenced by Slavonic migration and by mercantile expansion from Italy, urban development north of the Alps made its appearance only in the 11th century in Western Europe and migrated with merchants as their main agents to Central and Northern Europe as far as the Baltic towns, Poland and Hungary. The focus on women's property rights, their work rights and overall legal status has proven to be an apt instrument to analyse several gendered aspects of both legal cultures and to bring out essential differences between the two urban systems. Obviously, it was possible to successfully organize urban economies following diverging paths in interconnecting marital economies, one based on (partly) common property, the other on separate property.¹³ In consequence, we are far from having attained definite results, rather even more questions have been raised. Nevertheless, intercultural and intertemporal comparison offers opportunities for a better understanding of the modes and functions of gendering legal cultures.

What is most interesting, though, is the picture one gets of an active legal culture in which all participants sought to utilize the local laws and customs to solve conflicts to their own benefit and perhaps also to the benefit of the community. One tends to forget this aspect when studying the rules formulated by rulers and jurists. This is especially true for the older periods when the laws will often be the only source a scholar has for exploring her/his topic in legal and social history. One of the great benefits of these kinds of meetings

¹³ Heide WUNDER, "Matrimonio e formazione del patrimonio nella prima età moderna. Un contributo sulla rei azione tra la storia di genere et la storia economica", in *Studi Storici*, 50 (2009), pp. 747–778.

of scholars is, therefore, finding similarities in law and then seeing the legal practice in those areas where there are available sources that will allow us to draw some analogies in order to squeeze out more information of meagre sources. Hearing and reading about how people actually used the rules and the court system also reminds us that legal cultures were part of daily cultures, a meeting place for written norms, imposed from above (ruler, church), and unwritten norms, formulated by the community to solve and reduce—or attempting to solve and reduce—conflicts. The more we meet and exchange ideas and results, the more fascinating the history of gendered European cultures turns out to be.