

## 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.<sup>1</sup> 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 20<sup>th</sup> 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.<sup>1</sup>

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-judicial 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](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.<sup>2</sup> 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.<sup>3</sup> Studies on the codification efforts of the second half of the 18<sup>th</sup> and the beginning of the 19<sup>th</sup> centuries have also proved the role of non-juridical positions for the shaping of gender relationships in legal codes.<sup>4</sup> Less attention has been paid to research into the history of medicine, although from the 16<sup>th</sup> century onwards medical competence was called upon in judicial practice, for example in the witch trials and cases of infanticide.<sup>5</sup> Here recent contributions to the history of medicine such as that by Michael Stolberg<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> In them different approaches have been attempted that concentrate on themes or regions,<sup>9</sup> 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.<sup>10</sup> 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 femina 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,<sup>11</sup> but it is also used to characterise a particular (southern European) legal system of inheritance and marital property (dowry system).<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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 patrimoines" 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 14<sup>th</sup>-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”<sup>15</sup> 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.

*Violence and Social Order: Concepts and Discourses*

HIRAM KÜMPER sketches legal attitudes and judgements on rape from the Middle Ages to the mid-18<sup>th</sup> 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 16<sup>th</sup> 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.<sup>16</sup> 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 18<sup>th</sup> 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 16<sup>th</sup> 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.<sup>17</sup> With the Reformation came a further theological concept of marriage, resulting in Protestant marital regulations and the setting up of consistories as authorities.<sup>18</sup> 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