

## Introduction

### *Law and Families, 1300–1600*

The period covered by this book was one of astounding developments and events – in art, culture, intellectual life, and the economy. The realities of family life were shaken by the great plagues, the constant spread of warfare, and the ups and downs of economic affairs. Family provided much of the social context in which Italians met these developments and attempted to cope with them. This was a period, as well, in which awareness of family and gender became more prominent, in and out of law. The “quarrel about women” became a literary genre, as did tracts about family, aimed especially at fathers. Images of the Holy Family and even scenes of domestic life came into art. Spurred by plagues and other swift messengers of death, the art of dying too became a trope and came to include making provisions for one’s property, both for the good of one’s soul and for the sake of one’s heirs. Coats of arms, family surnames, and more elaborate domestic architecture came to frame elite families apart from others. Governments used households as tax units and generated bodies to tend to orphans and destitute, to widows and abandoned wives and children, to poor girls unable to marry, and even to the policing of sexuality and morals.

It was also a period of transformation in law. Law, while not changing at anything like the pace of economic change (not to mention the sometimes dizzying political changes), did evolve over the three centuries under consideration. Family law especially was not static. The varying local laws, overlaid as they were upon a shared, complex, learned legal heritage, were formative of domestic life and generated possibilities for legal action and thereby conflict. There were both local legislative initiatives, especially with respect to women’s legal capacity, and, if at yet slower

pace, academic doctrinal developments. Laws responded to the exigencies of plagues and depressions, wars and political upheavals. Leading this legal response and addressing the complexities and gaps in the various laws were the university-trained experts who took an active role in court cases, attempting resolutions to problems that they brought into view. Laws regulating marriage, dowry, property ownership, and inheritance underwent developments, whether from external factors (e.g., demographic collapse) or from internal (e.g., jurisprudential elaboration of doctrinal texts), that facilitated certain developments and precluded or hindered others. Continuity and change in family law, and the factors that militated for or against change are an important focus of this study.

There is no claim here that law is *the* key to understanding family life in the past, but it is one of several keys, and it has been more neglected than respected. It set parameters for much of daily life and it was integral to shifting those parameters. It defined the status and agency of the family's members. In that regard law served to distinguish family from household, which had and retains distinct functional as well as symbolic qualities. And family itself had varying extensions, horizontal and vertical, metaphorical and legal.

It is also necessary to remain aware of the different possibilities of law by class and region, although it is difficult to plot them in any exact way. Poorer people had less use for law, but they too used it, especially when land and other real assets were at stake. But any simple distinction in legal roles between wealthy and poor has to yield to the reality that a debtor in one situation was quite likely a creditor in another. City dwellers whose wealth lay to a greater extent in commercial capital and bank assets availed themselves of contracts and other legal devices in manners that varied from those of nobles with large rural estates and firm claims to political offices. Women, of course, had different legal potentials and experiences from men, but also from women in other communities. The truly poor had little to adjudicate (and could not afford the costs). For the rest, some tenuous indicators may allow us to peg social and economic circumstances from time to time.

#### GENDER AND LAW

There are studies of families for many Italian communities for parts of the period 1300 to 1600. There are some, as well, that are comparative and range across the peninsula. These are enormously useful. Their utility is recognized throughout the notes and bibliographical entries. What the

present work does that they generally have not is incorporate an attention to gender and the exploitation of legal sources. Too often legal historical studies neglect the dimension of gender or simply accept the biases encoded in law on the assumption that they worked out that way in life. We will find instead that women were capable of circumventing legal limitations and of using the law to their advantage and that of their male relatives on occasion. Social historical studies of family have necessarily confronted law, at least to trace the outlines of vital legal institutions, such as dowry and testament, but generally without awareness of the gaps, ambiguities, and complexities that riddled the laws. The premise here is that law was not backdrop; it was formative, an array of possibilities for those looking to marry, establish households, and pass property to others.

This book thus approaches the historical features of family, kinship, and domestic life from two perspectives. It stresses gender, a “useful category” for historical analysis, as Joan Scott put it thirty years ago.<sup>1</sup> Gender (as a set of culturally constructed meanings loosely related to but distinct from sexual biology) was enacted first and foremost in the home in the roles of fathers and mothers, sons and daughters. As Cesarina Casanova says, in an immensely useful study of Italian families in our period, “in the interior of the house, in which the encounters and affections of everyday are lived, the real position of each member is configured as the result of a continual negotiation, in which male and female confront each other and there are put into question the values and models of comportment socially imposed on the sexes and the different age groups.”<sup>2</sup> Every aspect of family life struck men and women differently. It is impossible to understand family and kinship in different areas of Italy without considering the variant roles of men and women in the different communities.

While sociological, anthropological, and economic perspectives on family play a role – as they necessarily must, having been at the heart of so much existing research – it is the more neglected realm of law as a second perspective that holds a privileged position in this analysis. That neglect needs to be addressed. As Lloyd Bonfield has said,

Law governing family relations seems to be regarded as a product of family history, and not a participant in shaping either its biological or cultural elements.

<sup>1</sup> Scott, “Gender: A Useful Category of Historical Analysis.”

<sup>2</sup> Casanova, *La famiglia italiana in età moderna*, 148.

In short, family law surfaces in historical studies of the family only occasionally, indirectly, and tangentially, as a collection of rules to be obeyed or circumvented as the case may be; its origins and nature, and its role as an integral part of the family and its structure are not discussed in any great detail.<sup>3</sup>

Lack of attention to law as a formative element of family life is all the more disturbing as so many of the processes of family life that historians have explored, and the documents they have used to explore them, are legal in form, purpose, and language. This is not to say that the sources for investigation of domestic life in the Italian past are all legal, or even predominantly so. For Florence, perhaps the most prolific site of family history research in Italy, effective use of letters, diaries, domestic account books, and civic fiscal records has been vital. But study of processes of marriage and dowry, inheritance, guardianship, domestic enterprise, kin membership, and more is not possible without utilizing records drawn up in legal terms, mainly in the papers of notaries.

Yet it is not so much the records of notaries recording the legal business of families, of men and women, in dowries, testaments, emancipations, and more that is the focus of our attention. It is the very different judicial records that are of concern here. Neglect of judicial materials and of prevailing and changing norms can tend to overplay regular patterns of family life and overlook or downplay consistent moments of intrafamilial conflict and dispute resolution. Conflicts and disputes were a regular feature of family life, especially at pivotal moments when the membership and fortunes of a domestic group were in play. François-Joseph Ruggiu, in one of the few studies directed at inheritance disputes, was moved to speak of the “banality of intrafamilial conflicts.”<sup>4</sup> Above all, inheritance seems to have been regularly disputed. Marriage was another legal area where disputes were common. Yet only recently has systematic use been made of ecclesiastical court records to see how some marriages were less than peaceful.

Conflicts involved emotions and interests and could take form outside the legal, but they had to work themselves out in legal terms and to some degree in legal institutions. The law is a separate domain, a “distinct social form,” a distinct form of thought even that, especially in early modern Italian societies, was sufficiently ambiguous to give rise to recurring issues in dispute. Social life is and was messy, and so is and was the law. Law does not just regulate; it constitutes society with whole sets of

<sup>3</sup> Bonfield, “Developments in European Family Law,” 88.

<sup>4</sup> Ruggiu, “Pour préserver la paix des familles,” 139.

categories and relationships. It is a way of understanding as well as manipulating one's world. And in early modern Italy there was not one law, but several. In that mess of materials were various ways of comprehending individuals and families, gender, property, generations, and much more.

The legal dimensions of gender and the experiences of women in law have also been relatively neglected, in contrast to the attention that has been shown to other matters, such as sexuality and marriage, motherhood, education, religion, and work. A seminal essay on women in the Renaissance entirely neglects the law in favor of examining images of women in literature.<sup>5</sup> Three decades later a collection of 29 essays on women in the Italian Renaissance placed five of them under a heading about “legal constraints,” yet one was in fact about marital love and two were about sumptuary laws. Only one essay truly examined the legal contradictions revolving about gender in a particular city.<sup>6</sup> Even a fine overview of women in medieval Europe devotes only six pages to law, despite the fact that it notes that access to property gave women access to power and that changes in women's rights of inheritance and property holding are the “principal key” to understanding their shifting social position.<sup>7</sup>

The general disregard of law in relation to gender can be attributed to two things. For one, there is an assumption that law was not good to women. In an account of women in the Renaissance, Romeo De Maio devoted a chapter to women's “legal inferiority” (in fact largely relying on literary texts), and depicted marriage as the passage of a woman from the prison of her father's *patria potestas* (legal paternal authority) to her husband's control. He bemoaned the “harsh illegality, contrary to nature” of parentally dictated marriage choices that included directing women to convents rather than married life.<sup>8</sup> His is far from a solitary position.

Closely related is the sense that law itself was and is just not that important in life (not to say boring, perhaps). History has taken a linguistic and cultural turn. It has embraced narrative again. It is poststructural and postcolonial. It is about metaphor and representation. And, after all, the realities of daily life and love do not proceed through legalities, except

<sup>5</sup> Kelly, “Did Women Have a Renaissance?”

<sup>6</sup> Meek, “Women between the Law and Social Reality in Early Renaissance Lucca.”

<sup>7</sup> Ward, *Women in Medieval Europe 1200–1500*, 4–11.

<sup>8</sup> De Maio, *Donna e Rinascimento*, esp. 95–96.

of course at pivotal moments like marriage or buying a house. And neglect of law is also to a degree the fault of legal history, of legal historians, whose neglect of more general history and pursuit of arcane details and stilted language can leave their perspectives as an outlier in historical practice, rather than in the mainstream. And it is undeniable, in our context, that looking at women and family through a largely legal lens means that we will see only hazy aspects of them as wives and widows, and nothing at all of them as thinkers, as midwives, servants, or even as nuns or prostitutes. We will be concerned with property and power.

Equally it can be said that early modern Italian families were about property and power. They were certainly different from the families of the contemporary West. Studying them puts us in a world where marriages were arranged and their economic bases carefully negotiated. Parental control over career choices was paramount. And yet parents were not themselves uncontrolled. Testaments had to recognize children and leave them an appropriate share. Testators were not entirely free to do what they wanted with their belongings after death. Kin relationships, across geography and across time, provided an individual with both options and constraints, places to seek help but from which help might also be sought. In all of this, then, law was a central element.

Law seems to have a certain autonomy in western European societies, including early modern Italy, with its numerous law courts relying on written documents and procedures, in dense, difficult, and arcane legal Latin. But law cannot be reduced to simple application of a rule. Law, as the French sociologist Pierre Bourdieu saw it (and he was not alone), obscured relations of power and contests over it. That does not mean that law is then only epiphenomenal. Law operates in the social and judicializes it. Or, in terms of Bourdieu's seminal contribution, the notion of *habitus*, people know how to act and succeed in the particular historical situation that is the law. There is a certain plasticity and motion in a field like law.<sup>9</sup> The relationship of law to power is not to be assumed but precisely what needs to be studied.<sup>10</sup>

To take a cue instead from a historian, Renata Ago, who notes that early modern Italian litigiousness was the result of more than a failure to banish all ambiguity from contracts: "Recourse to the court cannot indeed immediately be considered as the sign of the failure of an

<sup>9</sup> Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field."

<sup>10</sup> Engel, "How Does Law Matter in the Constitution of Legal Consciousness?"

*The Law in Italy*

7

agreement. It rather is seen as a means to integrate or remediate a defective situation.”<sup>11</sup> Which is not to ignore the prevailing ambiguities in law regarding ownership, agency, person, and family. In families in which law was so pivotal, such ambiguities broke out in conflict with frequency.

With regard to women and gender, law is doubly important, for while law took a lead in defining and disadvantaging women, it is also true that within law women were able to do important things for themselves and others.<sup>12</sup> Women could turn notions of their supposed frailty and irrationality, notions also enshrined in the law, to their advantage to gain protection of their rights and persons. Above all, while law defined gender in part by agencies and abilities conceded to men but not to women, women still had important roles in transmitting and preserving family wealth. Women and men, as various studies have shown, used testaments differently. Those differences had to do with what laws allowed them to do. To understand such matters, in turn, requires that we look at what law was like in Italy between 1300 and 1600.

THE LAW IN ITALY

The law at work in Italy drew on two types of sources, issuing in two types of law. There was what was known as *ius commune* (“common” law). This common legal heritage itself derived from several sources. At its simplest, *ius commune* was the body of law given sophistication and coherence and expounded in the law schools to be found in several Italian towns (first of all Bologna, but also importantly in Padua, Perugia, and elsewhere). Its major components were the texts of Roman civil law, excised and assembled at the behest of the emperor Justinian in the sixth century, and collectively referred to as the *Corpus iuris civilis*. There were also the texts of canon law of the Church, of more recent creation, assembled and released in different forms from the early twelfth century, and known in parallel as the *Corpus iuris canonici*. To these were added a few fragments, imperial decrees, and a collection of traditions covering what is widely referred to as feudal law. Even more, *ius commune* included the glosses and opinions of jurists who read the texts into a coherent system, or tried to. *Ius commune* itself was no simple matter of distillation from Roman and canon law texts. The *ius commune*

<sup>11</sup> Ago, *Economia barocca*, xi–xii.

<sup>12</sup> Wiesner, *Gender, Church and State in Early Modern Germany*, 82.

constituted a bedrock of institutions and generally valid norms (Venice was a notable exception to its reach).

Alongside *ius commune*, presupposing it, relying on it, but also consciously modifying or rejecting it in line with local cultural models and customs (some deriving from Lombard or other traditions), lay the *ius proprium*, or more properly *iura propria* (plural). These were local statutes and customs, compiled sporadically in each community legislating for itself, as well as intervening provisions and exemptions. Here is where a great deal of variety crept into the legal situation on the Italian peninsula. Though many similarities can be found among the laws of very different localities (and notably so in regard to women's dowry and inheritance rights, as we will see), no two places were precisely the same (even when, as with Milan, a dominant city's statutes were the basis of those in nearby subordinate communities). One necessary dimension of the present project is thus comparison of statutes from different communities, large and small. These are not always easy to locate, and it is very difficult to track changes in them for communities that did not redact new versions with any regularity (as Venice did not after 1244, or Florence after 1415). I have pursued these in a large sampling of those Italian community statutes that are in print.

The pluralistic quality of the law necessarily made for uncertainties, which in turn made the law into a field of doubt and argument. As a noted scholar of Italian family history has recognized, “the incongruities between common law and particular laws opened a space of uncertain definition at the heart of which arose conflicts that were resolved in a disparate manner, depending on the court and the judge.”<sup>13</sup> Those called on to adjudicate these conflicts thus stood at a privileged point where meaning and enforcement, law and culture, were in flux. It is their work, and those moments and types of fluctuating meanings, that are our focus.

In the juristic culture that came to maturity in the medieval universities, what mattered was mastery of grammar, rhetoric, and logic, and understanding of the fundamental elements of civil, canon, and feudal law. Proficiency in local law was left to practitioners to pick up as they went. Students in the law schools encountered the authoritative glosses, commentaries, manuals, *consilia*, and all else that contributed to the *communis opinio* (common position) on a multitude of issues, questions, and points of law. They learned rules and forms of interpretation, such as

<sup>13</sup> Casanova, *La famiglia italiana*, 88.



analogical reasoning. But their professional treatment of local laws, even at moments when they restricted or argued to void those laws, served to enlarge their weight and that of the institutions linked to them.

The learned law was a written law (especially in contrast to the Germanic procedures widely used in northern Europe), with little in the way of oral proceedings, aside from the taking of witness testimony where appropriate, and little of the drama of an actual trial. Just about every Italian city was teeming with notaries, who for a fee would record in Latin the legal (at times also illegal) doings of the city's residents, or, perhaps better, clothe their doings in legal garb. In a real way it was the notaries who embodied law, at the junction of *ius commune* with local statutes. But there were other legally relevant records as well. Merchants' accounts, for example, were part of the legal record in debt cases, one reason accounting methods and private accounts were so relatively advanced and sophisticated in Italy.

Though the law often being applied consisted of texts decades and frequently even centuries old, that does not mean that the law was an unchanging backdrop to the lives of individuals and their families. It is true that statutory legislating (or the official amending of a commune's statutes as a whole) was sporadic. But tinkering with statutory language and crafting exemptions was a continual process in some communities. Statutes and other forms of legislation clearly changed, annoyingly so, to judge by frequent complaints on that score, which reached a more sophisticated level at the hands of Francesco Petrarca (1304–74) and later humanists, who were regular critics of law and legal professionals. But the interpretations and uses of even the older canonical texts of the *ius commune* also changed.

We begin our examination around 1300 because of the state of the learned law by that point. The great gloss to the civil law and the parts (most of it) of canon law, also glossed, were completed around that point. The canonical texts had been seemingly integrated into a comprehensive *corpus*. The era of post-glossators or *moderni* saw new and more systematic approaches to areas of law. Rolandino de' Passaggieri (d. 1300) of Bologna constructed a *summa* of the notarial art; Alberto da Gandino (1278–1310) penned a treatise on statute interpretation; Guglielmo Durante (d. 1295) composed what amounted to a procedural treatise, *Speculum iudiciale*; Dino del Mugello (d. 1303) supposedly talked Pope Boniface VIII into adding a section on rules of law (*regulae iuris*) as the final title in his compilation of new decretals to be added to the body of canon law in 1298.

The so-called *moderni* of the late thirteenth and early fourteenth centuries began to look as well beyond the canonical texts to the chaotic and often ill-written statutes of various city-states. The more legal objections were raised in courts as to the meaning of local laws and their relation to the “common law” as a font of logic and justice, the more judges who fielded those questions turned to learned jurists for help. Such jurists thus acquired real power to decide, or at least influence, the decision of actual cases. The means they used was the formal legal opinion, the *consilium*, which examined arguments advanced in litigation and, relying on canonical texts, texts of local laws, opinions of great academic jurists, and *consilia* of others, offered a resolution. From around 1300, then, it can truly be said that “to draft *consilia* became the most relevant judicial activity performed by professors, *doctores legum*, and simple judges.”<sup>14</sup> The phenomenon would grow throughout the period and reach its apogee between 1400 and 1550.

The transition ran to the generations of commentators who followed, beginning perhaps with Cino da Pistoia (1270–1336), but encompassing figures like Riccardo Malombra (d. 1334), Jacopo Bottrigari (ca. 1274–1347), Oldrado da Ponte (d. 1335), Alberico da Rosate (d. 1354) – but most famously Bartolo of Sassoferrato (1313–57), his students Baldo (1327–1400) and Angelo degli Ubaldi (1323–1400), the canonist Giovanni d’Andrea (ca. 1270–1348), and later Paolo di Castro (1360–1441) and others, some of whom we will encounter. In their academic lectures and in their *consilia*, they made attempts at harmonizing diverse texts, including those of their predecessors, who determined the *casus* of each text and sought the underlying rule (*regula*). It is no accident that the writings of these men were cited and treated as authoritative. They were systematic, comprehensive in many cases, and learned. As practitioners themselves they shared the same problems so many other doctors of law faced.

Also arising early in the fourteenth century, after the full elaboration of judicially driven inquisitory procedures, was a new summary procedure. Problems of procedural delay, which had become apparent, were thus addressed to a degree. Litigation did not have to be so lengthy and expensive. Statutes quickly adapted it from canon law. Indeed, one of the other legally relevant developments in place by around 1300 was the fact that it was about then that civic statutes began to be assembled in a

<sup>14</sup> Vallerani, “The Generation of the *Moderni* at Work,” 153.