The Entry of Women as Organic Professionals of Justice Systems: Reflections on Historical Records and Current Trends

A entrada das mulheres enquanto profissionais do sistema de justiça: considerações sobre registos históricos e tendências atuais

Vittorio Olgiati

Electronic version

URL: <http://journals.openedition.org/eces/1953>

DOI: 10.4000/eces.1953

ISSN: 1647-0737

Publisher

Centro de Estudos Sociais da Universidade de Coimbra

Electronic reference

Vittorio Olgiati, « The Entry of Women as Organic Professionals of Justice Systems: Reflections on Historical Records and Current Trends », *e-cadernos CES* [Online], 24 | 2015, Online since 15 December 2015, connection on 04 May 2019. URL : <http://journals.openedition.org/eces/1953> ; DOI : 10.4000/eces.1953

THE ENTRY OF WOMEN AS ORGANIC PROFESSIONALS OF JUSTICE SYSTEMS: REFLECTIONS ON HISTORICAL RECORDS AND CURRENT TRENDS

VITTORIO OLGATI

Abstract: In the last decades a rising number of sociolegal studies have been devoted to the official entry of women into Courts of Justice as lawyers, judges and public attorneys. These studies undoubtedly provided significant cognitive hints. It is apparent, however, that the matter still requires a wider perspective and a deeper introspection in order to enlighten the inner *rationale*, as well as the current social and legal *impact*, of the entry of women into such a traditional, age-old male-dominated, province of law. Accordingly, most significant historical trends will be outlined to mark basic events that fostered the enrolment of women into Advocacy and Magistracy professional guilds, their active role in Law Courts, and the ongoing collateral effects that such an entry implies, and will imply, as regards the traditional image of Justice systems as a whole.

Keywords: women, legal practice, law, courts, justice.

A ENTRADA DAS MULHERES ENQUANTO PROFISSIONAIS DO SISTEMA DE JUSTIÇA: CONSIDERAÇÕES SOBRE REGISTOS HISTÓRICOS E TENDÊNCIAS ATUAIS

Resumo: Nas últimas décadas, um número crescente de estudos sociojurídicos têm abordado a entrada oficial das mulheres nos tribunais enquanto advogadas, juízas e procuradoras do Ministério Público. Estes estudos forneceram, indubitavelmente, pistas significativas para o conhecimento sobre o assunto. Contudo, este parece necessitar de uma perspectiva mais ampla, bem como de uma introspeção mais profunda, de modo a esclarecer a sua fundamentação lógica interna, assim como o atual impacto social e jurídico da entrada das mulheres na área do direito, tão tradicional e há tantos anos dominada pelos homens. Neste sentido, o artigo salienta as tendências históricas mais significativas, de forma a assinalar os principais acontecimentos que incentivaram a inscrição de mulheres nas ordens profissionais de advogados e magistrados, o seu papel ativo nos tribunais e os efeitos colaterais em curso que daí decorrem e continuarão a decorrer no futuro, relativamente à imagem tradicional do sistema judicial enquanto um todo.

Palavras-chave: mulheres, prática jurídica, direito, tribunais, justiça.

FOREWORDS: GENDER, LAW-IN-ACTION AND JUSTICE IMPERATIVES

As is well known, since ancient times what has been and still is called “Justice” in relation to Law *enforcement* and State policy *rationale* is communicatively grounded on, represented by, and operationalised with a direct reference to three basic items: Justice as a *normative task* related to social troubles or personal sufferings raising social expectations for expert help-services backed by the institutional intermediation of authoritative *procedural treatments*; Justice as formal-official sign of the *performative action* of the so-called “Law’s Empire”, being this a specialised branch of State-run *legal apparatuses*; and Justice as a legally enforced *procedural outcome* imposing *binding decisions* – technically supported by, and specifically concerned with, context-specific *legal reasonings* related to given empirical evidences – that enables a veritable socio-institutional “neutralization” of actual or potential social reactions and/or political disorders.

The above mentioned first item – Justice as a possible task and expected outcome – is rooted in the theoretical mainstreams that qualify contemporary “Gender Studies” since their beginning. Leafing through the literature on the matter it is apparent that it has been used as a veritable *leitmotif* to support the thesis of the *utility* and *necessity* to culturally promote and socially assess specific gender-oriented values and voices, and thus enhance more suitable – peaceful and ordered – living conditions for society at large. In turn, the other two items – Justice as an officially institutionalized socio-technical display devoted to handle social conflicts and keep steady basic institutional arrangements – have been outlined as main *operational issues* to enhance to what might be called the second stage of sociolegal “Gender Studies”, as they were (and still are) basically devoted to fully assess the right-duty of women to act into in Court as recognised agents *equal* to men, and thus to overcome stereotyped narratives and behavioural cleavages between male and female agency.

Having women gained full access into both higher legal education and legal practice either as lawyers or as judges and prosecutors, all the above mentioned issues are now not only strictly intertwined, but also foster new and relevant aims at broader political and cultural level. It is not surprising, therefore, that a main line of enquiry of current “Gender Studies” is at present devoted to demonstrate the institutional relevance, degree of influence and technical expertise that “Women-in-Law” have been able to achieve so far. Being it so, one might wonder: can indeed the “law-in-action” set up and handled by women in Courts be conceived as a more fair and just “Justice” either as a socially-determined ideal goal or as a pillar of State run public policy?

THE ICONOGRAPHY OF JUSTICE AS A WOMAN: FROM PAST TO PRESENT

To have a better understanding as regards socio-cultural and political-institutional implications of the official assessment of legally qualified women as organic practitioners in contemporary Court systems, it is not sufficient to emphasize the rise of the specific cognitive styles, professional communicative interactions and way-of reasoning that women are able to assess in Courts' in the course of their sociolegal role-plays. Rather it seems useful to recall also, and above all, a topic that seems anyhow implicit, but it is quite often undervalued at present, especially by empirical studies devoted to "gender judging": the thousand-years-old *icon* of *Justice as a woman* holding a Sword (symbol of power) in one hand and a Scale (symbol of equity) in the other.

Surely the originary idea of symbolizing Justice, and the self-same Justice system, as a *woman* provided with a Sword and a Scale has been sorted out, and then supported over the course of centuries up to now, by a number of both living-law and official law symbolic and metaphorical images, as ancient paintings and legal documents provided by great civilizations of the past still show. Yet equally relevant references about "Justice-as-Woman" can be found in well documented historical records.

During the Roman Empire, for example, some women acted in Courts as lawyers to defend themselves or their clients. As experts in ritual religious *formulae* and *wordings*, Roman women also performed notarial functions as regards contracts and wills. In the Middle Age, some women of the ruling elites in Europe obtained a law degree and became eminent jurists in most renown universities. During and after the Renaissance women were allowed to act either as lawyers or judges, as the fictitious, but by no means atypical, specimen of Portia in Shakespeare's play *The Merchant of Venice* still makes apparent.

If one has the chance to visit the Royal Palace of Caserta, near Naples, Italy, one finds a large hall called "Astraea Room". Looking at the room's ceiling one can see a painting representing Astraea – i.e. the Goddess of Justice – surrounded, on the one side by Hercules – symbol of mighty force – and, on the other side, by Truth and Innocence – symbols of the human quest for help and salvation. Both figures compel Prepotence, Ignorance and Error, i.e. basic human patterns that go against Reason, to run away. The explicit "message" that this painting still suggests is clear: Justice *is not and cannot be let alone*, for even though Justice can be represented as a Goddess, her performance necessarily requires the support of Power, Knowledge and Truth, i.e. selected "agents" provided with special skills and expertise.

Given the clear meaning of the mentioned *Renaissance* painting a basic question cannot be avoided: what about the sociolegal representation of "Justice as a woman" *here and now*? In other words: given the increasing entry of women into Judiciary

systems at present, can one still interpret the image of Justice as it had been done in previous centuries? More than that: can one hypothesize to “revitalise” the iconic model of Law-as-Justice – i.e. the coupling of these two items as a proper gender-oriented and as a women-ruled device – as it might have been since the early stage of human societies? These questions are not negligible: the entry of women into Courts as judges and prosecutors is now a worldwide sociocultural and political-institutional trend, as demonstrated by the fact that even the Catholic Church legal system can be added to the list, as in 1970 it allowed women to act either as lawyers or as notaries in its own legal system and in 1973 it entitled the first woman to act, by grace, as *defensor vinculi* and *promotor justitiae* – that is, as a fully qualified judge – at the Supreme Court of Apostolic Signature (Olgiati, 2003). In other words: how can one undervalue the fact that the rate of women provided with higher legal education has grown exponentially, especially in the last decades, to such an extent in almost all Countries of the world that both lawyering and judging in Courts can be conceived as veritable competitive professional arenas for both men and women, and this up to the point that specialised Courts’ systems could even become female-dominated domains if the trend goes on?

Yet, what has been just said is not all there is to the matter. Indeed, leafing through the amount of available scientific studies on Justice systems in contemporary society, one cannot but realise that far from being a Goddess, Justice is actually equated to mere Court’s proceeding and binding decision-making. This means that it is conceived as an *institutional arena* running by virtue of its own formal-abstract normative guidelines, and this up to the point to lead even to *paradoxical* consequences for society at large (Sousa Santos, 1987). It is not surprising therefore that, in view of current Gender-oriented Sociolegal Studies, Justice in present-day society does not appear as provided by that kind of sentimental human *ethos* and *pathos* that in the past suggested to represent it as a nice and proud woman aiming at *reacting* towards social troubles in order to achieve a stable, valuable, societal equilibrium.

Indeed, so much it is so that, due to the mismatch between facts, values and rules typical of contemporary sociolegal pluralism, not even a formal-official “reduction” of the so-called “social complexity” (any sort of claims, conflicts, risks, etc.) that law-making and jurisprudence entail today can actually overturn such an ongoing trend. In turn, and besides, how can one deny that other sorts of *problematic* outcomes or side-effects are implied as a direct consequence of the way in which a variety of Justice systems are officially run today? In this respect, the escape of potential applicants from Courts’ procedural decision-makings, or the rising quest for *alternative* systems as regards disputes’ resolution – including highly specialized (as well as more speedy) private

procedural settlements – are among exemplary cases of that might lead also to veritable Justice's *miscarriages*.

Given all the above, it is not at all surprising therefore that a rising question is now at stake: what about current performances of the Court system's *subsidiary* "agents" surrounding the ancient symbolic icon of Justice-as-Woman outlined in the above mentioned Astraea's painting made in the Royal Palace of Caserta: i.e. *Power, Truth and Reason*?

POWER, TRUTH AND REASON AS CONSTITUTIVE PILLARS OF JUSTICE AS STATE-RUN COURT SYSTEMS

If one looks at current political and institutional performances of contemporary State Law Courts hearings time-tables and decision-making, it is apparent that their once emphasized *Herculean* power is now perceived at best as a symbolic ideal-type vis-à-vis current quests for the expected Justice as such: not only is the epochal project of Nation-Statebuilding as a supreme rule-maker over, having been historically undermined by a conflicting variety of interior structural and ideological mainstreams, but it is now also challenged, and increasingly eroded, by new, exterior and powerful, political-patrimonial transnational private corporations.

As is well-known, in the last decades the above mentioned corporations have been able to create and enforce new, *extra-and-supra* State legal domains of their own. Their strategy – having dismantled already a great deal of the glorious *Jus Publicum* – is now oriented to spread newly-created polycentric as well as asymmetric, asynchronous and asystematic forms of legal pluralism at worldwide level. In other words, they are now *de facto* trying to autonomously rule a great deal of the socio-normative dynamic of society at large according to their own, interior, legal *rationale* (Petersen and Zhale, 1995; Olgiati, 2007).

As a consequence of the above, a serious decline can now be perceived by looking also at the inner consistency of both sociolegal notions of *Truth* and *Reason*. The ideological narrative about the words of the Law in ordinary Law Courts as veritable Truth-bearing devices –historically grounded upon a strict hermeneutical use of Reason – has almost withered away. On the one hand, current Law Courts practices, arrangements, discursive argumentations and binding decisions run around evidences provided to a large extent by a multidisciplinary legal expertise handled in law-offices provided by high-tech devices whose programmes and outcomes, in terms of methods and contents, can hardly be fully questioned – especially by ordinary Lay Juries– or coherently systematized in the course of Court hearings. On the other hand, the kind of legal discourses that legal education, law-policy making and jurisprudence are providing

at present not only are losing a great deal of their once systematic, and therefore hardly contested, logical coherence, but – due to the on-going processes of decodification and legal specialization – are not supported by a socially shared higher cultural reference anymore (Olgiati, 2008).

Surely, Justice as a Court system still gains – as has occurred in the past – support and legitimation by society at large, being these devices still considered unavoidable constitutive pillars of social and political *governmentality*. Yet, not only is contemporary society perceived as a highly mobile – *liquid* – environment, but a large portion of political power and social communication is now increasingly fragmented and therefore constitutively unstable. At the same time the above trends are directly challenged – as it has been already mentioned – by law-policy-makings autonomously produced and enforced by a variety of competing public and private (corporate) agencies. Consequently, even highest national Courts – Courts of Cassation and Constitutional Courts – do not seem to be able to assess a stable jurisprudential and legislative *nomophylactic* – i.e. univocal and coherent – *Ratio Juris*, nor can provide plausible and socially adequate responses to ongoing social claims, as rising quests for the assessment of innovative/alternative forms of disputes' resolution demonstrate.

The questionable “state-of-the-art” of contemporary Justice-though-positive-State-law that has been just briefly outlined cannot not be ignored or undervalued. Surely, as in the past, the icon of Justice can *still* be figured out as holding a *Scale* (Equity) and a *Sword* (Power). But even these symbolic devices do not reflect anymore the original potentials that they once evoked. Both of them are now subdued to the pressure exerted by a variety of other, newly created, technical tools that are able to provide highly binding – but *extra-legal* – punishments and rewards, as well as compulsorily forms of socio-institutional control that have little or nothing in common with the traditional normative *rationale* of State Court jurisprudential criteria. In turn, all this occurs at the time in which the erosion of traditional identitary territorial/cultural patterns of “citizenship”, either as in the form of rights or as values, is reaching a veritable threshold.

Under the above circumstances one might thus wonder: what sort of paths should or could women acting in State Courts as Lawyers, Judges and Prosecutors sort out to perform their own mission according to the ideal model of Justice-through-law as a primary expression of social peace and political order? What new kind of sociolegal skills and values should all these professionals individually embody and collectively promote in order to authoritatively *speak* –and be significantly *heard* – within and outside Law Courts to better cope with ongoing social claims for a more socially plausible and institutionally adequate Justice system? Indeed, these are questions that cannot be hidden or ignored. Accordingly, let us now try to deepen and expand the discussion by

looking at the broader historically-determined preconditions that enabled women to enter the Justice system, and focus on the most significant achievements and problematic issues now at stake.

GENDER ACCESS TO LEGAL PRACTICE IN COURTS: THE LEGACY OF CONTEXT-BASED PRECONDITIONS

To a large extent the amount of literature devoted to empirically assess the successful entry of women into State-run Justice systems at present is not devoted to investigate the historically-determined evolutionary preconditions that allowed gaining such an achievement. Yet, it is apparent that, along with the number of studies and research devoted to empirically “measuring” the consistency of such an achievement in terms of women’s numerical quotas and rank positions, the *rationale* of their historical progression into the so-called “Law’s Empire” is also a topic that can hardly be left aside, as it helps to understand *how* and *why* such a radical turn actually only occurred in the course of the 20th century, starting initially in Western countries in clear connection with highly-specific world-wide historically-determined space-time conditions it is necessary to look at the great bloody political conflicts related to rise of new, and previously unforeseen, epochal institutional changes fostered by the rise of new power elites. In relation to the pivotal relevance of such historical records, it is worth noting that, among the few sociolegal studies devoted to explain the first entry of women into the Justice system from a context-based *longue durée* perspective, some are indeed worthy of consideration.

In order to provide evidence to this statement, a reference to two – quite often hidden or ignored but certainly outstanding – historical records drawn from ancient and modern European context cannot be left aside, as they are altogether of fundamental importance to understand the inner *rationale* of women’s entry into a traditionally male-dominated systems such as that of Politics and Law. The first record is about the attitude of women during the wars that occurred in various City-States during the Renaissance (especially Italy) between the middle of the 14th and the beginning of the 15th Centuries. The second record – the one that really redefined and enlarged basic status-role patterns of women’s behaviour in society – is about the individual attitudes and collective performances of women in the 20th Century during World Wars I and II.

In Burrage’s studies on the matter, revolutionary ideals spreading during the American and French revolutions (Burrage, 1989) and political movements that occurred in the wake of the two World Wars favoured the emancipatory cause of women that we are now witnessing (Burrage, 2006). All in all – according to this author – economy, as such, was *not* a catalyst for the institutional changes that legal systems and legal

expertise endured during and after such circumstances. Rather, a rising idealistic cultural appeal and a politically-oriented disposition were the items that drove women to take part actively in such veritable epochal mainstreams. Burrage's ideological-political – and not merely economicist – approach is certainly correct. Yet – to my view – his analysis basically emphasizes the *super-structural* dimension of such a rise, thus leaving aside the other basic, and in the long run much more relevant, variable: that of *structural* changes that, in the last instance, led to a much wider and deeper social, institutional and political impetus to the civil “emancipation” of women in any social field, that of the “Law’s Empire” included.

Why – one might wonder – were women's attitudes and performances so relevant in the course of such bloody events of the past? Because they marked a real step-point either as regards the relationship between *law-and-society* as well as between *gender-and-power*! As regards these sociolegal “couplings”, let us look back firstly to the case of wars fought in Europe in the course of 14th and 15th Centuries and the case of World Wars I and II will be outlined.

As far as the first case in point is concerned, we are lucky enough to have extraordinary documentary sources such as those provided by Cristine De Pizan – an aristocratic French woman of Italian origin, wife of a notary, who, at the very beginning of 1400, wrote a book, titled *Cité des dames*, in which *Reason*, “*Rightness*” and *Justice* are recalled to contrast men's power and women's weakness in public affairs, and, consequently, to emphasize also the necessity for women to have access to a proper education, that is, equal to men, in order to gain a recognised degree of social authority-to-speak and political power-to-act in extra-domestic affairs (de Pizan, 1404/5; Favier, 1967). Having stated this, however, what is even more remarkable is the fact that, in 1410, Christine de Pizan published nothing less than a Treatise on *martial art and military law*. In this Treatise, Cristine not only recalls the kind of military tasks and actions that women were able to perform during periods of war – like other male authors of the time did – but describes women's attitudes and behaviour with reference to the protection of their relatives and/or their birth-places, within or outside the city walls, with or without men's support, in the course of defensive or aggressive dangerous circumstances (De Pizan, 1971). Equally significant it is the fact that in the same Treatise, Christine de Pizan explicitly raises the urge to rethink not only traditional *ordo militum* (i.e. the war asset of the Army), but also the Army strategic rules for war conduct, suggesting to revise and enlarge – let's say “democratise” – the chain-of-command of those in charge, so that to better profit from new technical and political war strategies – such as those offered by new types of fire arms. This implied, for instance, – adding two additional vantage-points: the potential of women's local knowledge of the given battlefields and their

“humanitarian-oriented” social tasks and performances. All this is meant – it should be stressed –, for the compelling general necessity of enabling the saving, at that time, of their own honour, life, city and country altogether, and not so much to politically promote the interests of those directly involved in the struggles.

As one can see, we owe to a gifted woman who lived well before the Thirty Years War, a list of detailed insights in regard to the kind of problems and solutions that women had to face and sort out, just as they actually did in the course of 20th Century World Wars. Interestingly we owe also to Cristine’s personal intelligence the effort to outline cognitive and operational strategic tools – implying higher education, new rules and political changes – that only later on lead to the rise of Enlightenment ideology based on the principle of social equality between men and women.

Having stated the above, the specific attitudes of women during World Wars I and II cannot be left aside (Burrage, 2006). For the purpose of this study, the case in point can be briefly summarised as follows: due to the call to war, all men able to fight had to leave their homes, their towns and their jobs for several years. In turn, and consequently, women, as the only labour force available, were compelled to act as “functional substitutes” of men either in the same kind of jobs, or workplaces, in which their men were previously employed. Both World Wars I and II not only involved millions of men fighting along the front lines, but concerned cities, towns and villages as well, as these areas were basic targets of air strikes. Millions of women, therefore, reacted against such massive destruction, by collectively organizing their own defence to save, besides their lives, the remains of their social environment, acting just as if they were *equal* to men. Being direct witnesses to war’s destruction, women, in turn, could not but raise their voice to reconstruct their places and try to establish new forms of social identity and solidarity. In other words, and put briefly: the fact that both World Wars I and II turned out as veritable *civil wars* also (Schmitt, 1972) is a matter that basically changed not only traditional patterns of what is now called “civil society”, but also the socio-institutional “balance” of basic power relations that were at stake at socio-political level worldwide. This fact, in turn, reframed and enlarged women’s role in society, up to the point of officially gaining, at last, a full active, civil and political citizenship within higher State apparatuses as well. In this respect it is remarkable that just after World War I women began to be increasingly enrolled into Lawyers Bars. In turn, it was just after World War II that a new generation of women began to be recruited within the Judiciary systems also (Olgiati, 2003; Schultz and Shaw, 2003).

The above historical events are absolutely relevant to our concern. *Firstly*, because they demonstrate that the political impact of women’s claims for social emancipation and equalitarian positions at the government level were supported by a highly specific-

historically determined *rationale*: i.e. to restore as soon as possible peaceful, long lasting, living conditions, in order to concur to assess new super-individual—that were determined not just by family-oriented but actually by communitarian—political goals. *Secondly*, because only an explicit reference to the socio-institutional role played by women in such space-time circumstances provides the right key to fully understand the turn that the whole *Ratio Juris* endured in the course of the second half of 20th century: the implementation, within public institutions, and for civic purposes, of general standards that did not lead to new law-policy strategies as regards equal labour conditions only, but gave rise to access to a wider range of official public positions which were until then basically reserved only to men, the Judiciary system included. Yet, what has been just said does not tell the whole story.

Albeit in different socio-institutional circumstances, historical experiences such as those mentioned so far occurred also in many countries of the world involved in struggles for national independence. These fights are worthy of being mentioned here, as they give full evidence of a too often neglected fact: i.e. that Law, as such, has been, is, and will always be by necessity strictly related with a *socially controlled use of force as a means of public order*. Indeed, how can one underestimate that the kind of *Justice* legally provided by State-run Court systems is specifically tailored – in the first and last instance – to authoritatively settle any sort of social disputes and political conflicts? It is not by chance, therefore, that besides World Wars, wars for national independence also favoured the first official entry of women into the Army, the Police and many other public security systems, i.e. their entry – either as women and as citizens – within the *entire* set of State-power institutions specifically devoted to defensive and precautionary actions at any micro and macro level.

As one can realise, an explicit reference to the above mentioned epochal outcomes makes clear the limits that, by rule, the division of academic studies and researches too often shows about the topic under consideration, as such a division prevents a full understanding of what has been and still is really at stake in the whole fieldwork of “prevention” and “social defence” ran by official institutions devoted to social control and public order. Indeed, since the official entry of women in such fieldworks, an actual socio-institutional and cultural *transition* occurred from *male communities* to *gendered systems*, i.e. a move that further eroded traditional institutional, organizational and behavioural standards, up to a point when it fostered a variety of problematic issues not only at individual and collective levels as such, but also in regards to male/women’s public image and official representativeness at any numerical, operational and directorial level. These issues are now – due to physical differences – leading towards a *merely formal* equalitarian standing between men and women, while, quite paradoxically, such

a formal standing now couples with the reassessment of new typologies of male/female *functional* differentiations (Farina, 2004).

WOMEN'S STATUS/ROLES IN COURTS: TOWARDS NEW LAWYERING AND JUDGING PATTERNS?

Having briefly outlined historically-determined mainstreams that paved the way for the entry of women – firstly as private lawyers and, later on, as judges and prosecutors – into the so-called “Law’s Empire”, a reference to general consequences regarding the thousand-year-old *rationale* of the constitutional structure and function of Justice systems’ status-roles as such, cannot be left out.

As it is well known since ever and still today the constitutional structure and function of Justice systems is based upon a “great division” and “asymmetric position” of means, performances and prerogative *institutionally* ascribed (or excluded) respectively to private Lawyers, Judges and Public Prosecutors to *necessarily* perform their own respective status/ roles in Court. Indeed, the pivotal importance of such status-roles’ differentiation and asymmetry at any level of any Courts of Justice performances cannot be undervalued and even less ignored. In this respect is worth to briefly recall some basic patterns.

Surely, altogether Lawyers, Judges and Public Prosecutors as official Courts of Justice “organic agents” have been, still are, and will certainly also be in the future at the core of the sociolegal “architecture” of the Judiciary systems. As such, as each and all of them – by virtue, as well as in spite of their specific performances – share a coherent reliability and allegiance vis-à-vis basic Court procedural duties and ultimate aims, being provided with a quite common higher legal culture; and – last but not least – dealing with technical-institutional commitments that, to a large extent, imply their practice in Court not only as a common playground but also as an institutional duty in the view of the achievement of Justice as fair procedural performance and decision-making as their basic common aim. Yet, as we know, what has for ever really mattered in what concerns the actual *functioning* of any Judiciary system is the *different* type of postures, skills and reasoning that any Court case under examination necessarily requires, i.e. *different* technical/ analytical sources; *different* discursive strategies and powers-to-act; and *different* responsibility within and outside the Court as regards the issues at stake.

Unfortunately, up to now sociolegal Gender-oriented Studies about Justice systems rarely focused *comparatively* on actual professional patterns of women lawyers, on the one hand, and of women judges and on women prosecutors, in relation to the above *different* variables – cognition, performance and power – in Court, on the other hand. A comparative analytical effort, the lacking of which looks indeed quite surprising if one

thinks, e.g. that the time-lag between the very first entry of women into the Judiciary system as a lawyer, as a judge and as a public prosecutor was, and still is, far from symbolically and ideologically negligible for a number of socio-technical and political-institutional reasons. In turn, leafing official historical records as well as current sociolegal literature on gender-and-law, one cannot but notice also the time-lag between the first enrolments of women into Lawyers Bars at the very beginning of 20th century, their generalised individual abilitation to act in Court, in the first half of the 20th century, and their first entry into the Magistracy, which took place in the second half of the same century (Schultz and Shaw, 2003).

Perhaps a fact that can explain the lack of studies concerning detailed *comparative* insights as regards gendered lawyering, judging and prosecuting *differences* is that, altogether, higher legal expertise still stems from a somehow commonly shared legal education, often technically handled according to a set of age-old – and therefore accustomed – theoretical and practical *mannish-like* standards. Yet, on closer inspection, this sort of “explanation” seems to go against the grain of some current empirical evidences, such as the fact that, since the entry of women in Law Courts’, common daily communicative and documentary interplays between lawyers, judges, or prosecutors are increasingly conditioned by *extra-legal* discourses, such as those occurring especially in criminal cases, being often concerned with the overlapping of a variety of psychological variables.

Unfortunately, it is not possible to enter into details about the above evidences, given either privacy or secrecy issues at stake, as regards written and oral communicative interactions in Court. However, even this topic deserves to be emphasized here as the discursive and factual “control” that the self-same “division of labour” in Court compulsorily entails is at the very core of the “great division” that runs between lawyers, as client-oriented legal professionals, and judges and prosecutors as State power-oriented administrative public agents. In fact, as we know, and history still teaches us, since time immemorial lawyers’ training, mission and performance only have embodied the quintessence of thousand-year-old *classic traits* of professionalism.

By contrast, judges’ and prosecutors’ training, mission and performance have embodied the quintessence of politically constituted official power. So much is still so, that this basic “division” not only clearly implies different postures in different Courts’ levels, but is a veritable structural-functional pillar of the same Judiciary system. For substantive institutional reasons and actual social necessity, such a structural/ functional differentiation clearly implies, *de jure* and *de facto* an explicit socio-technical *asymmetry* in regard to each and all Court roles: a sharp institutional asymmetry indeed, as it excludes not only the possibility to equate lawyers’, judges’ and prosecutors’ respective

attitudes in relation to the parties involved in any kind of trial, but also to equate their respective “sociotechnical” responsibility regarding Court proceedings, their outcomes and the final decision-makings.

In any case, to fully grasp the institutional rationale of such an asymmetry as a pivotal trait of any Justice system, the most useful and enlightening path is still to rely on the etymology of the word *profession* as it has been assessed conceptually and empirically during the course of the centuries. In this respect, it is not surprising to note that *all existing classic professions* – whether concerned with law, medicine, or other expert knowledge and/ or skill – have always been compelled to handle their “calls-for-help” by means of a highly specific “professional mandate” allowing to provide a veritable *location operarum* i.e. provision of mere means only, instead of a *location operis*, i.e. provision of a given, expected result. Yet, again, one thing is to provide the means to obtain the (expected) Courts’ decisions (as lawyers do), and quite another is being able to fulfil the task raised by the calls-for-help at stake, i.e. to promote the *enforcement* of a coherent decision-making and a right sentence (as Judges do). The only way to deal with these formally *intertwined* performances is therefore that to reshape symbolically and materially the same call and its context-based items by means of an actual *transposition of the aim*: i.e. in the case of lawyers: by placing it into a proper *scenario* (Court hearings), that enables a *therapeutical action* (legal proceedings), allowing the use of particular technical *prostheses* (legal acts), in order to provide a *special result* (legal statements), each and all of these step-points fit to *reduce personal risk* and *secure social rewards*.

THE IMPACT OF WOMEN ATTITUDES AND PERFORMANCES IN COURT AND THEIR IMPLICATIONS FOR SOCIAL DYNAMICS

Having said all the above, why are also individual attitudes and performances of the rising number of women acting in Court as lawyers, judges and prosecutors so relevant? At a first insight one might answer: because the “great division” between lawyers as private professionals, and between judges and prosecutors as veritable public agents, is not only deeply rooted in the history of the political power as a pillar of the centuries-old “Doctrine of State Interests”, otherwise called *Raison d’État*, but is, also and above all, a factual *precautionary* technical and institutional device for society at large. Yet, again, this is not all.

To the extent that women lawyers, on the one hand, and women judges and prosecutors, on the other hand, perform their own specific tasks according to their specific *feminine* attitudes, at the same time the structural and functional coupling between Court systems, as actual *scenarios*, as well as Law-in-action as a *technical device*, ultimately turn out and act as a veritable social *Pharmacon*, as the ancient

Greeks called it, i.e., as a sort of new socio-institutional “medicine”. The comparison applies also to *antagonistic* performances of the parties in Court or the *strepitus fori* outside Court – i.e. rumors about such performances (sentences included) on the part of the public – imply (Cantarella, 1972). Given the above, it is not an accident that Justice systems have always normatively assessed respectively: the *necessity* for *lawyers* to provide arguments about the case in point before a party – the judge – able and allowed to act *super partes*, i.e. well beyond mere social occurrences of the client or of the case in point; the *utility* for *judges* to exploit, in their turn, the procedural potentials of the Court hearings procedure to legally cover the flaws of their own self-styled “juris-prudential” decision-making power; the *imperative* for the *Court* to assess enforceable statements able to *stop* and/or *limit* the social danger of a never-ending conflictual social dynamic.

Each and all the structural and functional details that have been listed in such a detailed manner so far could not be omitted. Indeed, all of the issues just outlined is the general framework that substantiates and reflects the remains of a sociolegal experience *handled by men alone* for thousands years! In brief: it is nothing less than the recognition of then withering away of the legacies of a long-lasting, systematic and hegemonic, role gained, and refined accordingly, by men. In this respect, if it is true that the entry of women into the once “unpromised land” of the Judiciary is in effect the outcome of quite recent historically-determined circumstances – leading towards an epochal *overturn* of traditional law-and-society interplays – it is true also that one cannot but raise a basic interrogative from now on: which sort of sociolegal consequences and collateral effects – psychological, behavioural, sociopolitical – is the entry now producing, and what will determine in the long run? In other words: will the thousand-year-old sociotechnical precautionary devices, and the whole experiential and jurisprudential *rationale* that they entailed, really over? How far can current and prospective mainstreams leading to the rising entry of women into Justice systems as lawyers, judges and prosecutors be able to keep steady, or definitively refine and change, the age-old male-determined imprinting, and consequently the broader, intertwined, dynamic of Justice systems, law making and social dynamics? In spite of a move from “theory” to “practice” (Hunter, McGlynn and Rackley, 2010) the above questions are open.

WOMEN-IN-LAW AS NEW “ORGANIC INTELLECTUALS” OF THE JUDICIARY SYSTEMS?

Each and all the issues that have been raised in this paper are and will be worth of consideration from now on, as it is likely that women’s numerical rate, social visibility, institutional ranking and specialised expertise within the Justice systems will increasingly match with their gender-specific personal orientations and natural attitudes. Such a coupling however is still on the move. In this respect, leafing through most recent

empirical studies *carried out by women* on the topic so far, one cannot but note that the main trends raised by ongoing empirical variables are backed, by rule, by women's rising quests for *being heard* and *being credited*, i.e. to have better opportunities to attest their gender-specific communicative potentials and gain full recognition as regards their official positions within and outside Courts, i.e. at broader social-institutional and political level (Olgianti, 2011).

A rising emphasis on gender-specific potentials can certainly improve social expectations, refine the area of applications and provide higher rewards. To my view, however, this strategy cannot be carried too far, as it could turn rather misleading and questionable: misleading because explicitly self-referential rather than society-oriented, and questionable as it could soon lead towards a sort of "intraspecific competition" rather than towards the fairest Court interplay and Justice decision-making. But what it seems to be quite questionable at present is the fact that the recurrent appeal to the so-called "feminine added value" too often covers the lack of concerns for the dynamic of two basic, intertwined, epochal trends: the deepening of the "crisis" of the modern State-form, clearly evident since the beginning of the last century, and the ongoing fragmentation of positive official law systematic construction, somehow still based upon general principles of Enlightenment narratives.

Unfortunately, it is impossible to deal here with the amount of problems that the coupling of the above historically-determined trends raise at every level, except for stressing that they cannot be handled with a mere reference to feminine "voices" and "values". The overall impact that such they have, and will exert even more in the future, on the general functioning of the Justice systems (conceived either as public administrative apparatuses or as jurisprudential work-areas) is now driving already towards a real process of *defensive modernization* of all basic valuable social issues and political interests, and therefore also towards a technical and institutional *reconversion* of the jurisdictional patterns and expert socio-professional standards. As current claims for alternative models of disputes' resolutions indicate, these trends, in turn, are transnationally intertwined with equally epochal economic and social transformations. It is therefore likely that any sort of potential local resource – among which "positive State law" included – will be de-re-constructed accordingly. In this case it is likely also that such a re-framing will imply a rising recognition of new forms of extra-infra-super State legal pluralism, and therefore will compel to a deeper revision of the overall *Ratio Juris* that now qualifies Nation-state Justice systems.

To sum up, if the case of contemporary Justice systems is fully considered, one might even expect that all the innovative changes that gender-specific potentials of gender-oriented performances might promote in Court by women could *not* be – as

Gillingan suggested – a new kind of law-making based merely on a *different voice* (Gillingan, 1982) but it should turn into a veritable *new voice* also: that of women acting as veritable leading agents able to execute the mission by performing as true, active, *organic intellectuals* of a more plausible and socially adequate law-and-society interplay.

VITTORIO OLGIATI

Retired Professor
Dipartimento di Giurisprudenza, Università di Macerata,
Piaggia dell'Università, 2, 62100 Macerata, Italy
Contact: vittorio.olgiati@unimc.it

Received on 04.02.2014

Accepted for publication on 18.12.2015

REFERENCES

- Burrage, Michael (1989), "Revolution as Starting Point for Comparative Analysis of the French, American and English Professions", in Richard Abel; Philip. Lewis (eds.), *Lawyers in Society. Comparative Theories, Vol. III*. Berkeley and Los Angeles: University of California Press, 322-374.
- Burrage, Michael (2006), *Revolution and the Making of Contemporary Legal Profession: England, France and the United States*. Oxford: Oxford University Press.
- Cantarella, Eva (1972), "Lo scudo di Achille. Considerazioni sul processo in età omerica", *Rivista Italiana di Scienze Giuridiche*, 16, 237-267.
- De Pizan, Christine (1992), *Le livre de la cité des dames*. Paris: Stock Ed. French translation of *The Boke of the Citye of Ladys* (orig. ed.: 1404). London: H. Pepwell.
- De Pizan, Christine (1971), *The Book of Fayttes of Arms and of Chyvalrye*. New York: edition and translation by A. T. Byles.
- Farina, Fatima (2004), *Forze armate: femminile plurale. Il femminile e il maschile del militare nella transizione dalla comunità maschile al sistema di genere*. Milano: F. Angeli ed.
- Favier, Marguerite (1967), *Christine de Pizan, muse de cours souveraines*. Lausanne: Rencontre.
- Hunter, Rosemary; McGlynn, Clare; Rackley, Erika (2010), *Feminist Judgments. From Theory to Practice*. Oxford: Hart Publ.
- Gillingan, Carol (1982), *In a Different Voice: Psychological Theory and Women's Development*. Cambridge Mass: Harvard University Press.
- Olgiati, Vittorio (2003), "Professional Body and Gender Difference in Court: The Case of the First (Failed) Women Lawyer in Italy", in Schultz Ulrike; Gisela Shaw (eds.), *Women in the World's Legal Professions, vol. II*. Oxford: Hart Publ., 419-435.

- Olgiate, Vittorio (2007), "Il nuovo pluralismo sociale, il nuovo pluralismo giuridico e la nuova identità del giurista", in M. Poggi; O. Roselli (eds.), *Trasformazioni sociali e trasformazioni giuridiche*. Napoli: ESI, 59-91.
- Olgiate, Vittorio (2008), "Legal Policentrism and the New 'Struggle for the Law' in Contemporary Legal Education in Europe", in Vittorio Olgiate (ed.), *Higher Legal Culture and Postgraduate Professional Legal Education in Europe*. Napoli: Edizioni Scientifiche Italiane, 21-65.
- Olgiate, Vittorio (2011), "On Women Lawyers' Voice in Europe: Scenarios for a Legal Education Agenda", in Josef Langer (ed.), *Analysis and Visions for Europe. Theories and General Issues*. Frankfurt-am-Main: Peter Lang GmbH, 127-150.
- Petersen, Hanne; Zhale, Henrik (1995), *Legal Polycentricity. Consequences of Legal Pluralism in Law*. Aldershot: Dartmouth.
- Schmitt, Carl (1972), *Le categorie del politico. Saggi di teoria politica*, in Gianfranco Miglio; Pierangelo Schiera (eds.), Milano: Giuffrè ed.
- Schultz, Ulrike; Shaw, Gisela (2003), *Women in the World's Legal Professions*. Oxford: Hart Publ.
- Sousa Santos, Boaventura (1987), "A Map of Misreading: Towards a Post-Modern Concept of Law", *Journal of Law and Society*, 20, 274-302.