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WOMEN'S EXCLUSION FROM THE ROMAN *OFFICIUM*¹

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Legal Gender Studies deal, among other issues, with the topic of (de-)constructing femininity and masculinity. Paradigms of the domestic and public spheres, which treat the domestic sphere as female and public sphere as male, are in their centre of interest. 1

Baring women from the public creates a state of inequality: There are only two possibilities for women to make a public appearance (public in the sense of a legal-formalistic function): as a thorn in men's sides or as a tolerated, yet sometimes even 2

1 The following text is mainly based on a presentation with the same title given at the 54th session of the Société Internationale „Fernand De Visscher“ pour l'Histoire des Droits de l'Antiquité (SIHDA). The session dealing with the main topic „The Legal, Social and Political Life of Women in Antiquity“ was held in Antalya/Turkey in September 2000.

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desired exceptionality. Either of these possibilities implies a state of marginalization.²

This situation may be illustrated by the following case study of selected examples from Roman antiquity.

3

The reasoning of women's exclusion from the *officium*

Women in Rome were debarred from exercising an *officium*. In this context, *officium* is not to be taken in the broadest sense as a moral obligation towards family, friends or the state. Instead, the concept applies in a narrower sense, referring to legal-formalistic functions, such as the managing of somebody else's affairs, the administration of justice,³ the general requirements of public administration, and political participation. Women could not act as judges or hold a magistracy. They could not submit a lawsuit or intervene on behalf of others⁴ or act as *procuratores*.

4

2 See Catharine A. MacKinnon, On Exceptionality: Women as Women in Law, in: Feminism Unmodified. Discourses on Life and Law, Cambridge/Mass.-London 1987, pp 70-77.

3 For a more comprehensive study on women acting in official court functions in Rome and the U.S. see Nikolaus Benke, Women in the Courts, An Old Thorn in Men's Sides, Michigan Journal of Gender & Law, vol 3/1, 1995, pp 195-256.

4 D 50.17.2 pr Ulpianus 1 ad ed does not expressly talk about *intercedere* but says *intervenire*, a notion to which different meanings have been applied. Apart from the liability for someone else's obligations it may also mean conducting a litigation (for reference, see H. Heumann/E. Seckel, Handlexikon, 11th unaltered ed, Graz 1971, p 284). Since Ulpianus' enumeration comprises both the *postulare* and the *procurare* (and thus, the prohibition to conduct another's litigation seems to fall within the ambit of those two) it is to be assumed that *intervenire* implies *intercedere* - otherwise the prohibition of *intercessio*-transactions for women to which Ulpianus also devotes a lot of attention would be missing in this enumeration (see the fragments in D 16.1 ad senatus consultum Velleianum, esp. D 16.1.2.1, where Ulpianus expressly refers to *intercessio* as *virile officium*).

From a modern perspective *intervenire* is not as inextricably linked with the public sphere and public law like, for instance, acting as a magistrate.

Therefore, the question arises how the antique Rome defines the public character of those acts and institutions which it calls *officia*. What is the criterion for „public“ or „private“? For Roman antiquity the difference, which was pointed out by Benke in the discussion following the presentation, is apparently based on the fact that from a structural point of view merely the relationship between two persons falls within the scope of „private“. Privacy comes to an end and a certain public sphere begins where a third person becomes involved.

This construction is hardly a surprising one: Legal Gender Studies have identified the technique of isolation of women as one of the primary and most effective instruments to entrench patriarchal dominance (see for example Benke, Women in the Courts [supra note 3] pp 209-210; Deborah L. Rhode, Gender and Justice. Sex Discrimination and the Law, Cambridge/Mass.-London 1991, pp 9-10). The patriarchal aim implemented by isolation is to enhance personal control which itself is not subject to direct control. This isolation is generally dismantled where a third person comes involved, a situation which creates options for coalitions and requires an increase of communication efforts. According to Benke the set up of marital obligations for Roman women shows striking parallels. In view of the drastic sanctions for women's adultery the aim of these regulations appears not only to be a guarantee for the children's biological descent from the husband but also to establish an enclave of exclusive control by way of a sphere of privacy.

*Feminae ab omnibus officiis civilibus vel publicis remotae sunt et ideo nec iudices esse possunt nec magistratum gerere nec postulare nec pro alio intervenire nec procuratores existere.*⁵

The above-mentioned functions are seen as foundations of Roman politics and society.⁶ In this ascription offices and functions themselves are associated with the male sex, since they are even referred to as *officia virilia*.⁷ However, text D 50.17.2 pr does not provide any reasons for the exclusion of women from the *officium*.

6

Why are women denied the function of a judge? According to Paulus (like Ulpianus a Roman jurist of the late classical period: they worked under the Severan dynasty, 193-235 A.D.), some are banned from being a judge because of the *lex*, some because of their nature, and others by reason of *mores*. Those, for instance, who are deaf, dumb, permanently insane or *impuberes* lack *iudicium* because of *natura*. Those who are suspended from the senate are banned from being a judge by the *lex*. Women and slaves are denied this function on grounds of *mores*. Paulus especially emphasises that this exclusion is not because of a lack of *iudicium* but a result of convention: *receptum est* - it is acknowledged that they may not exercise *officia civilia*.

7

D 5.1.12.2 Paulus libro septimo decimo ad edictum

8

*Non autem omnes iudices dari possunt ab his qui iudicis dandi ius habent: quidam enim lege impediuntur ne iudices sint, quidam natura, quidam moribus. Natura, ut surdus mutus: et perpetuo furiosus et impubes, quia iudicio carent. Lege impeditur, qui senatu motus est. Moribus feminae et servi, non quia non habent iudicium, sed quia receptum est, ut civilibus officiis non fungantur.*⁸

5 Translation: Women are debarred from all civil and public functions and therefore cannot be judges or hold a magistracy or submit a lawsuit or intervene on behalf of anyone else or act as procurators.

6 „The elements from which Romans as individuals or collectively as a state assembled their power are all familiar: *beneficia, officia, gratia, clientelae, clientes, patroni*.“ Ramsay MacMullen, *Women's Power in the Principate*, *KLIO* 68 (1986), pp 434-443, 437.

7 For instance, D 16.1.2.1 Ulpianus 29 ad ed (on *intercessio*-transactions): *cum eas virilibus officiis fungi et eius generis obligationibus obstringi non sit aequum*; C 4.29.8 Gordianus, a 238 (on *intercessio*-transactions): *virilibus obligationibus eximantur propter exceptionem, quae ex SC Velleiano descendit*; D 3.1.1.5: Ulpianus 6 ad ed (on the prohibition of *postulare*): *ne virilibus officiis fungantur mulieres*; D 26.1.16 pr Gaius 12 ad ed prov (on tutelage): *tutela plerumque virile officium est*; D 26.1.18 Neraz 3 reg (on tutelage): *Feminae tutores dari non possunt, quia id munus masculorum est*; C 2.18 Diocletianus and Maximianus, a 294 (on the representation of a defendant): *alienam suscipere defensionem virile officium est et ultra sexum muliebrem esse constat*; C 5.35.1 Alexander, a 224 (on tutelage): *Tutelam administrare virile munus est, et ultra sexum femineae infirmitatis tale officium est*; see also D 2.13.12 Callistratus 1 ed monit (on the *argentarii*): *Feminae remotae videntur ab officio argentarii, cum ea opera virilis sit*.

See also Filippo Cancelli, *Saggio sul concetto di „officium“ in diritto romano*, *RISG* 63, 351-402, 384-385, who explains the general identity of the notions *officia civilia* and *officia virilia*.

8 Translation: Not everybody may be appointed judge by those with the right to appoint judges. For some are prevented by the *lex* from being judges, some by nature, and some by *mores*. For example, the deaf and the dumb, the permanently insane, and the *impubes* are prevented by nature, because they lack judgement. A person expelled from the senate is prevented by the *lex*. Women and slaves are prevented

It is highly remarkable that Paulus does not deny that women have the capacity to act as judges. For the prejudice that women were not capable of exercising judicial functions was still common in Central Europe in the last century and can be found in articles published in legal periodicals. 9

These emotional influences not only obstruct women in their intellectual judgement of the established circumstances of an offence, but - depending on the extent of these emotions - also obstruct them in their ability to establish the circumstances of an offence in a reasonably objective way [...] 10

This impact of emotions [...] would not only bring about the danger of unwarranted acquittals but also the danger of unjustified convictions. A defendant's conduct aimed at causing pity or convey a good impression could unjustifiably work in favour of the defendant whereas a conduct which is bound to annoy the judge could unjustifiably work against them although it may only have been caused by their clumsiness or rudeness. Severe damage, sustained through the criminal act, which cannot be imputed to the defendant by means of a causal link could create emotions of retaliation in women. 11

Yet, the dangers resulting from the emotional particularity of women rise considerably at the time of their monthly period, their pregnancy, and their menopause for during those periods women, that is to say the majority of them, are easily irritated. Men's submission under the will and judgement of women is in sharp contrast to the position which nature has assigned to men towards women.⁹ 12

Paulus instead does not deny that women have the capacity to act as judges due to their female nature.¹⁰ Quite on the contrary, he emphasises the contrast between the reasons for denying women the *officium* and the reasons for denying it to someone because of nature. For reasons of nature, the deaf, the dumb, the *furiosi* and *impuberes* would not be granted a judicial function because they lack *iudicium*. Women, however, would be excluded from *officia civilia* due to convention and not because of a lack of *iudicium*. 13

Gaius (who lived and worked about fifty years before Paulus and Ulpianus) displays a similar view in his summary of the *tutela mulieris*, where he takes both women's intelligence and their capacity of judgement as granted. It is remarkable that he expressly rejects the common idea of *animi levitas*.¹¹ 14

by *mores*, not because they lack judgment but because it is accepted that they do not perform civic duties.

9 Stadelmann, Deutsche Richterzeitung, 1921, pp 196-198 (translation B.F.).

10 For a different view, see Val. Max. 8.3: *Ne de his quidem feminis tacendum est, quas condicio naturae et verecundia stolae ut it foro et iudiciis tacerent cohibere non valuit.*

11 To describe the topos of women's mental weakness words such as *levitas*, *infirmitas*, *imbecillitas*, *fragilitas* are used; see, e.g., D 22.6.9 pr Paulus sing de iur et fact ignor (again referring to the common opinion: *quod et in feminis in quibusdam causis propter sexus infirmitatem dicitur*), D 16.1.2.2-3 Ulpianus 29 ad ed; C 4.29.22 Iustinianus, a 530; Inst Iust 2.8 pr.

*Permissum est itaque parentibus, liberis quos in potestate sua habent testamento tutores dare: masculini quidem sexus inpuberibus, feminini autem sexus cuiuscumque aetatis sint et tum quoque cum nuptae sint. Veteres enim voluerunt feminas, etiamsi perfectae aetatis sint, propter animi levitatem in tutela esse.*¹²

Like Paulus, Gaius contrasts the provision of *tutela mulieris* with a „reasonable“ tutelage. Tutelage of *impuberes* is compatible with the concept of *naturalis ratio*. However, he sees no good reasons for the tutelage of women: The *veteres* had used *animi levitas* as an argument, but this seems to be more an assumption than reality, since adult women conduct business on their own and in some cases the *tutor* gives his consent to transactions merely as a formality. Frequently, the *praetor* even forces the *tutor mulieris* to give his consent against his own will.¹³

*Sed inpuberes quidem in tutela esse omnium civitatum iure contingit, quia id naturali rationi conveniens est, ut is qui perfectae aetatis non sit, alterius tutela regatur. Nec fere ulla civitas est, in qua non licet parentibus liberis suis inpuberibus testamento tutorem dare; quamvis, ut supra diximus, soli cives Romani videantur tantum liberos suos in potestate habere. 190 Feminas vero perfectae aetatis in tutela esse fere nulla pretiosa ratio suasisse videtur; nam quae vulgo creditur, quia levitate animi plerumque decipiuntur et aequum erat eas tutorum auctoritate regi, magis speciosa videtur quam vera; mulieres enim quae perfectae aetatis sunt, ipsae sibi negotia tractant et in quibusdam causis dicis gratia tutor interponit auctoritatem suam, saepe etiam invitae auctor fieri a praetore cogitur.*¹⁴

Also other Roman jurists do not expressly deny women the intellectual capacity to exercise an *officium*. Nevertheless, it becomes apparent that the exercising of civic functions by women is not regarded as desirable. Of course the opinion and reasoning of the Roman

12 Translation: Parents [fathers and grandfathers] are allowed to appoint by will tutors to the children whom they hold in *potestas*, to males below the age of puberty, to females of whatever age, even if they are married. For our ancestors held that women even of full age should be in *tutela* on account of their *levitas animi*.

13 That a jurist utters such explicit and ironical words against the *tutela mulierum* was reason for some to assume that Gaius (about whom there are only few sources and who is not quoted by other jurists until the end of the classical Roman period; but: D 45.3.39 Pomponius 12 ad Quint Muc ... *quod Gaius noster dixit*), was in fact a woman; first of all: Richard Samter, *Juristenzeitung* XIII (1908), column 1383, who bases his assumption on Gaius inst. 1.190, Gaius inst 1.144, D 35.1.63.1 Gaius 3 ad leg Iul et Pap and on the „truly feminine style“ of Gaius „which combines grace with simplicity“ (translation B.F.).

14 Translation: [189] That persons below the age of puberty should be under guardianship occurs by the law of every *civitas*, in agreement with reason that a person who is not of mature age should be guided by the guardianship of another person; indeed, there can be hardly a *civitas* in which parents are not allowed to appoint guardians by their will to their children below the age of puberty, though, as we have seen, it seems that only Roman citizens have their children in their *potestas*. [190] But there seems to be no convincing argument in favour of women of full age being in *tutela*. It is commonly accepted, namely that they would be liable to be deceived owing to their *levitas animi* and that therefore it would be just that they should be guided by the *auctoritas* of their guardians, seems more specious than true. For women of full age conduct their affairs by themselves, the interposition of their *tutor*'s consent is in certain cases a mere matter of form; indeed, often a *tutor* is compelled by the *praetor* to give his consent even against his will.

jurists must not concur with the common opinion. But reading literary sources (as the following from the first century B.C. to the first century A.D.), the impression remains the same: Women shall not exercise an *officium*.

Chelidon's scandal

If a woman succeeds in participating in an *officium* and thus, holds an uncommon position, she must expect to be accused of scandalous behaviour - all the more if the man in whose *officium* she participates himself is subject to serious allegations, like the allegation that he is abusing his functions. This may be illustrated by the trial against Verres and his mistress Chelidon. 19

Cicero depicts the following: From the moment that Verres became *praetor*¹⁵ he rose under the auspices of Chelidon and got the jurisdiction of the urban magistrate rather in accordance with Chelidon's and his own interests than those of the Roman population (Cic. Verr. 2.1.104).¹⁶ 20

The accusation is as follows: Magistrates, when they take office, are obliged to seek the gods' consent by watching the auspices: birds' signs or signs of lightnings.¹⁷ But Verres did not. Verres assumed office under the „auspices of Chelidon“ - a playing with the name of Chelidon, since her name corresponds with the ancient Greek word for „swallow“. ¹⁸ Thus, it was not the gods who gave their assent to his entry upon the *praetor*'s office but it was Chelidon who gave her consent. The fact that Verres assumed the function of the urban *praetor* fulfils Chelidon's desire but not the will of the Roman people. Verres - under the influence of Chelidon - created a situation of blasphemy against the gods and the Romans. 21

From the very beginning, it was she who pulled the strings. Verres was being manipulated in his behaviour and his decisions. Chelidon gained a most important position: 22

The houses of those who usually would be consulted whenever questions of the *ius civile* arose were empty. But Chelidon's house would be packed. If one person came straight from this woman and whispered something in his ear, Verres called back those whose cases he had just decided and changed his decision. And often he ordered the contrary of 23

15 Verres exercised the function of a *praetor* in 74 B.C.

16 Cic. Verr. 2.1.104: *Nam ut praetor factus est, qui auspiciato a Chelidone surrexisset, sortem nactus est urbanae provinciae magis ex sua Chelidonisque quam ex populi Romani voluntate.*

Translation: For when he was made *praetor*, he rose under the auspices of Chelidon and drew the lot of the city province, more in accordance with his own inclination and that of Chelidon, than with the wish of the Roman people.

17 See Theodor Mommsen, *Römisches Staatsrecht*, vol 1, repr. of 3rd ed Leipzig 1952, pp 1-3; Idem, *Abriss des römischen Staatsrechts*, Leipzig 1893, pp 131-132, 218-219.

18 *Realenzyklopädie der klassischen Altertumswissenschaft*, vol 2, Stuttgart 1923, „Schwalben und Segler“, p 768.

what he had ordered before (in other cases) (Cic. Verr. 2.1.120) - an improper and illegal behaviour for a Roman magistrate. But Verres did it „without the least scruple“ (Cic. Verr. 2.1.120).¹⁹

Since it was difficult to approach Verres it was advisable to ask Chelidon for help (Cic. Verr. 2.1.136 f) - Chelidon, „who, during Verres' office as a *praetor*, not only presided over the Roman population in the *ius civile*, all litigation between private parties, but also played a decisive role in construction projects²⁰ „ (Cic. Verr. 2.1.136). And thus, people of high honour and rank were forced to enter - unwillingly and shamefully (Cic. Verr. 2.1.137) - Chelidon's house where she was ready to receive requests and to deliver the *praetor*'s answer (Cic. Verr. 2.1.138).

Cic. Verr. 2.1.136

Cum sibi omnis ad iustum adlegationes difficilis, omnis aditus arduos ac potius interclusos viderent - apud quem non ius, non aequitas, non misericordia, non propinqui oratio, non amici voluntas, non cuiusquam auctoritas pro pretio, non gratia valeret - statuunt id sibi esse optimum factu, quod cuivis venisset in mentem, petere auxilium a Chelidone, quae isto praetore non modo in iure civili privatorumque omnium controversiis populo Romano praefuit, verum etiam in his sartis tectisque dominata est. 137 Venit ad Chelidonem C. Mustius, eques Romanus, publicanus, homo cum primis honestus; venit M. Iunius, patruus pueri, frugalissimus homo et castissimus; venit homo summo pudore, summo officio spectatissimus ordinis sui, P. Titius tutor. O multis acerbam, o miseram atque indignam praeturam tuam! Ut omittam cetera, quo tandem pudore talis viros, quo dolore meretricis domum venisse arbitramini? Qui numquam ulla condicione istam turpitudinem subissent nisi officii necessitudinisque ratio coegisset. Veniunt, ut dico, ad Chelidonem. Domus erat plena; nova iura, nova decreta, nova iudicia petebantur. „mihi det possessionem, mihi ne adimat, in me iudicium ne det, mihi bona addicat.“ Alii nummos numerabant, ab aliis tabellae obsignabantur; domus erat non meretricio conventu sed praetoria turba referta. 138 Simul ac potestas primum data est, adeunt hi quos dixi. Loquitur C. Mustius, rem demonstrat, petit auxilium, pecuniam pollicetur. Respondit illa ut meretrix non inhumaniter; libenter ait se facturam, et se cum isto diligenter sermocinaturam; reverti iubet. Tum discedunt: postridie revertuntur. Negat illa posse hominem exorari,

19 Cic. Verr. 2.1.120: *Nam, quaeso, redite in memoriam, iudices, quae libido istius in iure dicundo fuerit, quae varietas decretorum, quae nundinatio, quam inanes domus eorum omnium qui de iure civili consuli solent, quam plena ac referta Chelidonis; a qua muliere cum erat ad eum ventum et in aurem eius insusurratum, alias revocabat eos inter quos iam decreverat, decretumque mutabat, alias inter aliquos contrarium sine ulla religione decernebat ac proxumis paulo ante decreverat.*

Translation: For, I entreat you, recall to your recollection, judges, what licence that fellow took in determining the law; how great a variation there was in his decrees, what open buying and selling of justice; how empty the houses of all those men who were accustomed to be consulted on points of civil law, how full and crammed was the house of Chelidon. And when men had come from that woman to him, and had whispered in his ear, at one time he would recall those between whom he had just decided, and alter his decree; at another time he, without the least scruple, gave a decision between other parties quite contrary to the last decision which he had given only a little while before.

20 For an account of Verres' control of the renovation works of the Castor-temple see P. E. Pieler, *Römisches Vergaberecht*, in: *Festschrift Heinz Krejci. Zum Recht der Wirtschaft*, ed. E. Bernat et al., Wien 2001, 2nd vol, pp 1479-1495.

*permagnam eum dicere ex illa re pecuniam confici posse.*²¹

As is commonly known, Cicero does not intend to give an objective report but a speech amounting to a criminal accusation: One must expect exaggerations to a certain degree. However, because of his role as a plaintiff, Cicero may not carry his rhetoric too far without losing credibility: It is therefore to be assumed that Chelidon did indeed perform some of the praetorian activities. 26

Describing how Chelidon exercised the functions of a *praetor* and describing how Verres failed to be a *praetor*, Cicero uses unambiguous language: Not the *iusconsulti* are consulted but Chelidon (Cic. Verr. 2.1.120), not the *praetor* is asked for assistance but his mistress (Cic. Verr. 2.1.136), it is not he who orders the applicants' reappearance but she (Cic. Verr. 2.1.138),²² not Verres presides over the *ius civile* and building operations but Chelidon (Cic. Verr. 2.1.136). It is in her house where *nova iura, nova decreta, nova iudicia* are requested (Cic. Verr. 2.1.137). 27

Cicero associates her behaviour with the behaviour of a prostitute: Shameful men enter Chelidon's house where they are treated with courtesy and kindness and are told to come again. „She says that she will gladly do what they wish“ (Cic. Verr. 2.1.138). In return for the kindness they pay or promise money (Cic. Verr. 2.1.137 f). In fact Cicero does not only use the mere metaphor, for on several occasions he expressly refers to Chelidon as 28

21 Translation: [136] As they found that all applications to this man were ineffectual, all access to him difficult, and almost impossible, being, as he was, a man with whom neither right, nor equity, nor mercy, nor the arguments of a relation, nor the wishes of a friend, nor the influence of any one had any weight, they resolve that the best thing which they could do, as indeed might have occurred to any one, was to beg Chelidon for her aid, who, while Verres was *praetor*, not only presided over the Roman population in the *ius civile*, all litigation between private parties, but also played a decisive role in construction projects. [137] Caius Mustius, a Roman knight, a farmer of the revenues, a man of the very highest honour, came to Chelidon. Marcus Junius, the uncle of the youth, a most frugal and temperate man, came to her; a man who shows his regard for his high rank by the greatest honour, and modesty, and attention to his duties. Publius Potitius, his guardian, came to her. Oh that praetorship of yours, bitter to many, miserable, scandalous? To say nothing of other points, with what shame, with what indignation, do you think that such men as these went to the house of a prostitute? Men who would have encountered such disgrace on no account, unless the urgency of their duty and of their relationship to the injured youth had compelled them to do so. They came, as I say, to Chelidon. The house was full; new laws, new decrees, new decisions were being solicited: „Let him give me possession“, „do not let him take away from me“, „do not let him give sentence against me“, „let him adjudge the property to me.“ Some were paying money, some were signing documents. The house was full, not with a prostitute's train, but rather with a crowd seeking audience of the *praetor*. [138] As soon as they can get access to her, the men whom I have mentioned go to her. Mustius speaks, he explains the whole affair, he begs for her assistance, he promises money. She answers, considering she was a prostitute, not unreasonably: she says that she will gladly do what they wish, and that she will talk the matter over with Verres carefully; and desires Mustius to come again. Then they depart. The next day they go again. She says that the man cannot be prevailed on, that he says that a vast sum can be made of the business.

22 The order says to come to Chelidon's house again - which is, as Cicero suggests, the house of a *meretrix* (Cic. Verr. 2.1.138). One is entitled by law to disobey such an order. If the *praetor* decrees that the litigating parties appear in an ill reputed house, for instance in a bar or a brothel, the parties may, according to Ulpianus, disobey this order without being exposed to sanctions (D 4.8.21.11 Ulpianus 13 ad ed).

meretrix (Cic. Verr. 2.1.137 f).

The report of a *meretrix* participating in official functions²³ of her lover or husband is a common notion:²⁴ Namely, in this case the official function is abused in a double sense. First, the woman is exercising a function without being legally entitled. Only her lover or husband is chosen to hold official functions, she is not elected and therefore shall not participate. Secondly, a prostitute is behaving in a most immoral way. Especially this attribute of immorality ensures that this behaviour is viewed as a scandal by the common public: Women as well as men will not accept a *meretrix*' participation in power.

29

The example of Carfania

Another intriguing case is to be found in the area of legal representation in litigations.

30

The *praetor* promulgates edicts which are to safeguard the dignity in his legal administration (D 3.1.1 pr Ulpianus 6 ad ed). For this purpose he exercises strict control over the *postulare*: the appearance in court. Some he would ban from the postulation completely, others he would authorise to conduct the postulation in their own affairs only, and others again he would grant the *postulare* in their own affairs as well as in affairs of certain people (D 3.1.1.1 Ulpianus 6 ad ed).

Women are among those who are forbidden to make applications on behalf of others (D 3.1.1.5 Ulpianus 6 ad ed). According to Ulpianus, the reason for this prohibition is to prevent women from involving themselves in legal affairs of other people contrary to the modesty which is assumed to be appropriate for women (the *pudicitia*)²⁵ and to prevent them from performing the functions of men. He mentions that the introduction of this edict was caused by a shameless person called Carfania,²⁶ who brazenly made applications and annoyed the magistrate.

31

D 3.1.1.5 Ulpianus libro sexto ad edictum

32

Secundo loco edictum proponitur in eos, qui pro aliis ne postulent: in quo edicto exceptit praetor sexum et casum, item notavit personas in turpitudine notabiles. Sexum: dum feminas prohibet pro aliis postulare. Et ratio quidem prohibendi, ne contra pudicitiam sexui congruentem alienis causis se immisceant, ne virilibus officiis fungantur mulieres: origo vero introducta est a Carfania improbissima femina, quae inverecunde postulans et

23 Cicero tells us about some more women who also exerted an influence on Verres, for instance Tertia (Cic. Verr. 2.3.78) whom he denies *pudicitia* referring her family background - she is the offspring of a family of actors.

24 An illustrating example of this notion can also be found in Procop's reports on Theodora, Justinian's influential wife (see esp. the detailed account of her offensive indecency in Proc. Anec. 9).

25 On the interference with someone else's legal affairs see supra note 4.

26 On the *exemplum* of Carfania see Benke, Women in the Courts (supra note 3), pp 203-212.

*magistratum inquietans causam dedit edicto.*²⁷

Like Chelidon, Carfania is scandalised to a considerable degree. Her negative example is not only mentioned by Ulpianus but also by Juvenal (Juv. 2.69, „Carfinia“) and by Valerius Maximus (Val. Max. 8.3.2). Valerius Maximus reports that Carfania, wife of the senator Licinius Buccio, had always spoken *pro se*²⁸ - not for the reason that she lacked advocates but because she lacked *pudicitia*. However, Carfania is not only denied *pudicitia*. Her name is used as an insult to describe women of bad character. And she is declared to be an *exemplum* of female *calumnia*. Finally, she is even called a *monstrum*: 33

Valerius Maximus 8.3.2

34

*Carfania vero Licini Buccionis senatoris uxor prompta ad lites contrahendas pro se semper apud praetorem verba fecit, non quod advocatis deficiebatur, sed quod impudentia abundabat. Itaque inusitatis forolatratus adsidue tribunalia exercendo muliebris calumniae notissimum exemplum evasit, adeo ut pro crimine improbis feminarum moribus Carfania nomen obiciatur. Prorogavit autem spiritum suum ad C. Caesarem iterum P. Servilium consules: tale enim monstrum magis quo tempore extinctum quam quo sit ortum memoriae tradendum est.*²⁹

In addition to Carfania, Valerius Maximus mentions two more women who appeared in court or in front of the triumviri respectively. The first one is Maesia Sentinas who defended herself in a litigation before the *praetor non solum diligenter, sed etiam fortiter* that she was, in the first hearing, acquitted by a vast majority. Apparently because of these attributes - circumspection and strength - she is declared to have a male spirit. Consequently she is called „the androgynous“: *quam, quia sub specie feminae virilem animum gerebat, Androgynen appellabant* (Val. Max. 8.3.1). 35

27 Translation: Next comes an edict against those who are not to make applications on behalf of others. In this edict the *praetor* mentions *sexus* and disability. He also blacklisted exceptionally disreputable persons. Concerning *sexus*, he forbids women to make applications on behalf of others. There is a reason for this prohibition, to prevent them from involving themselves in the cases of other people contrary to the modesty in keeping with their *sexus* and to prevent women from performing the functions of men. Its introduction goes back to a shameless women called Carfania who by brazenly making applications and annoying the magistrate gave rise to the edict.

28 In case that Carfania should have acted in her own affairs only, it is difficult to conclude that she was the cause for prohibiting women from acting in someone else's legal affairs. Referring to D 3.1.1.5, Benke's interpretation in Women in the Courts (supra note 3) p 211 note 67, is suggesting that the *pro se* in the passage of the Valerius Maximus text is not to be understood as „in one's own legal matters“ but as „in one's own person“ (which leaves some room for interpreting it either way as „in their own“ or as „in someone else's matters“).

29 Translation: But Carfania, wife of the senator Licinius Buccio, always ready for litigation, spoke in front of the *praetor* always *pro se*; not because she lacked advocates, but because she lacked *pudicitia*. Therefore she became the best known example for female *calumnia*, because she constantly bothered the courts with her barking, unusual for the forum; so that women are insulted with the name Carfania, when they are meant to be of bad character. She lived until the year in which C. Caesar (for the second time) and P. Servilius were *consules* [48 B.C.]; since it is better to pass on when such a *monstrum* has died than when it was born.

The other woman appearing is Hortensia. In 42 B.C she spoke up successfully as head of an affiliation of rich women who fought against the introduction of a special tax.³⁰ The reports say that she acted *constanter* and *feliciter*. Yet, she is portrayed as owing this success to her father only, to the famous speaker Hortensius (who acted as counsel for the defendant in the trial against Verres and thus, as Cicero's counterpart): It is suggested that it was Hortensius' reincarnation who breathed in his daughter's speech (*revixit tum muliebri stirpe Q. Hortensius verbisque filiae aspiravit*).³¹ 36

A similar image can be found in Quintilianus' report: Hortensia's eloquence is not only credit to the female sex because she was educated by her father. *In parentibus vero quam plurimum esse eruditionis optaverim: Nec de patribus tantum loquor ... Hortensiae Q. filiae oratio apud triumviros habita legitur non tantum in sexus honorem.* (Quintilianus inst or 1.1.6.) 37

Carfania, whose public appearance is not approved of, is denied her *pudicitia*. On the contrary, the two others, Maesia Sentinas and Hortensia, receive special credit for their oratory talent and success. Therefore, they are granted „masculine“ characteristics: Acting in public is not conceived as feminine (Val. Max. 3.8.6; Gell. 5.19.10) - such acts will only be acknowledged if the acting women are declared to behave like males. 38

Agrippina, socia imperii

Women of the emperor's family are portrayed in the same way of gender stereotyping. Already Livia, the third and last, well honoured wife of the first Roman *princeps* Augustus, made a shiny public appearance.³² She is characterized in a typical way: It is said that she had a lot of influence on her husband, especially regarding the successorship of her son from a former marriage, Tiberius.³³ And as mother she is characterized as boundless and hungry for power.³⁴ 39

Another colourful example depicts Agrippina Minor,³⁵ fourth and last wife of the emperor 40

30 See also esp. Leo Peppe, *Posizione giuridica e ruolo sociale della donna romana in età repubblicana*, Milano 1984, pp 17-19. An interesting parallel can be found in the demonstration against the lex Oppia and the repeal thereof (Liv. 34.2.2.6).

31 Also in Appianus bell. civ. IV, pp 32-34, Hortensia appears as a passive person: Words are placed into her mouth. The women affected by the intended tax spoke through Hortensia's mouth, for it was Hortensia who had been chosen as spokeswoman for them.

32 Among the honours enjoyed by Livia (58 B.C. - 29 A.D.) were the privileges of a Vestal, priestess of Augustus and the title Augusta (determined by the testament of Augustus; the consecration followed not till 42 A.D.).

For her public appearance see Suet. Tiberius 50; Tac. Ann. 1.14; 1.73; 3.64; 3.71; 4.15; 4.16; 4.36.

33 See Suet. Augustus 84; Suet. Tiberius 51, Tac. Ann. 4.57.

34 „*Mater muliebri inpotentia*“ (Tac. Ann. 1.4), „*mater inpotentia*“ (Tac. Ann. 4.57), „*mater inpotens*“ (Tac. Ann. 5.1).

35 Agrippina Minor lived from 15-59 A.D.

Claudius: Not only does she succeed in defeating her enemies behind the scenes (that is to say, in the domestic sphere) by plotting and scheming against them, but Agrippina's status in society is characterized by her particularly intensive appearance in public.³⁶

She appears as very active and ambitious: She by herself raises her *status*, says Tacitus (Tac. Ann. 12.42: *Suum quoque fastigium Agrippina extollere altius*). In the words of Cassius Dio she is not content with having the same or even more privileges than Livia - she desires to exercise the same power as her husband Claudius and to hold the same title (Cass. Dio 61.33.12; Tac. Ann. 12.26; 12.27). 41

Her *status* is outstanding: She demonstrates her power - her *vis* as Tacitus says (Tac. Ann. 12.27) - in many ways: For the first time a woman is appointed Augusta during her husband's and her own lifetime (Tac. Ann. 12.26). Also for the first time, the image of the wife of an emperor is stamped on coins on its own, without the image or mentioning of the husband's name.³⁷ Agrippina achieves that her place of birth is named Colonia Agrippinensis (Tac. Ann. 12.26; Cass. Dio 61.33.2). She is provided a praetorian guard of honour and a Germanic bodyguard (Tac. Ann. 18.2; Suet. Nero, 34). Agrippina gives receptions in her own name³⁸ and she uses a *carpentum* for transportation (Suet. Claud. 17; 25; Tac. Ann. 12.42; Cass. Dio 61.32.4) - a privilege which only Vestals have.³⁹ 42

And presiding over a ship-fighting-game together with Claudius, they seem to be of equal power: He wears a *paludamentum* (the purple coat of a general symbolising the emperor's dignity), she wears the Greek counterpart: the chlamys, a cloak interwoven with gold (Tac. Ann. 12.56; Cass. Dio 61.33.3). In line with this position of power, the imprisoned leader of the British tribes, Caractus, not only publicly thanks the *princeps* but also the emperor's wife for being pardoned (Tac. Ann. 12.37). 43

36 Besides the fragments named hereinafter see, for instance, Cass. Dio 61.33.1; 33.4; 33.7; 33.12; Tac. Ann. 13.2.

37 See, e.g., Ulrich Kahrstedt, *Frauen auf antiken Münzen*, Klio X, pp 261-314, 296-297; Ernst Kornemann, *Doppelprinzipat und Reichsteilung im Imperium Romanum*, Leipzig 1930, pp 197-199. Maria H. Dettenhofer, *Frauen in politischen Krisen. Zwischen Republik und Prinzipat*, in: *Reine Männersache? Frauen in Männerdomänen der antiken Welt*, Köln-Weimar-Wien 1994, pp 132-157, 155-157.

38 See, e.g., Thomas Späth, „Frauenmacht“ in der frühen römischen Kaiserzeit?, in: Dettenhofer, *Reine Männersache?* (supra note 37), pp 159-205, 189.

39 As priestesses the Vestals on the one hand exercise a kind of *officium* and participate in public affairs. They enjoy a very high position in public life and many privileges (for example they are given the *ius trium liberorum* and are released from guardianship). On the other hand, their main duty is a very domestic one: The Vestals are obliged to take care of the eternal flame. Their private life is strictly regulated: They have to stay unmarried during their thirty years of service; sexuality is forbidden. If a vestal is convicted of unchastity, she is buried alive.

The position of the Vestals is not examined in detail here as their *officium* is not seen as a male domain into which women could break in. See also Hildegard Cancik-Lindemaier, *Kultische Privilegierung und gesellschaftliche Realität. Ein Beitrag zur Sozialgeschichte der virgines Vestales*, in: *Saeculum. Jahrbuch für Universalgeschichte* 41 (1990), vol 1, pp 1-16.

Novum sane et moribus veterum insolitum, feminam signis Romanis praesidere: ipsa semet parti a maioribus suis imperii sociam ferebat, writes Tacitus (Tac. Ann. 12.37)⁴⁰. 44

According to the reports Claudius does not play the role of the emperor, but that of a servant (Suet. Claud. 29; Cass. Dio 61.32.1; 33.1-3; see also Tac. Ann. 12.1 und 12.3) - an unsurprising parallel to Verres and Chelidon. 45

Agrippina's public exercise of power can hardly be reconciled with the ideal image of a Roman *matron*,⁴¹ living a life with restricted access to the public sphere. The common means to sustain this image is already familiar: The woman who does not fit into tradition is denied the attribute which sets the code for appearing as a honourable female in society - her *pudicitia*. Correspondingly, we learn that Agrippina abuses the close relationship with her uncle Claudius for caresses and presumably she therefore becomes his wife (Tac. Ann. 12.1-8; Cass. Dio 61.31.6), that she commits adultery (Tac. Ann. 12.25; 12.65; 13.2; 14.2; Suet. Claud. 42) and - as a widow - maintains an incestuous relation with her son Nero (Suet. Nero 28; Tac. Ann. 13.13; 14.2).⁴² 46

However, besides punitively denying her the feminine *pudicitia*, she is ascribed masculine qualities - for instance, as Tacitus reports with some acknowledgement, that „she had firmly and, with manlike determination, tightened the reins of slavery“ (Tac. ann. 12.7). 47

Results

The image presented of Agrippina fits well into the already created frame: Roman women are generally excluded from holding an *officium* themselves and from participation in exercising power. In case they should still succeed, which does occur in quite a few exceptional cases, two kinds of reactions are to be expected. First, if the woman who acts in public is disapproved of, she is denied *pudicitia*. Secondly, if she is approved of, she is declared having „masculine“ characteristics.⁴³ In the case of Agrippina both reactions can 48

40 Theodor Mommsen speaks of an „ephemeral usurpation of joint rule on the part of a woman“ (translation B. F.) (Römisches Staatsrecht vol 2/2, repr of 3rd ed Leipzig 1952, p 831, see also 788 and 821), Kornemann of a double principate (Doppelprinzipat und Reichsteilung [supra note 37], pp 51-53).

41 On the ideal image of Lucretia see Val. Max. 6.1: *Dux Romanae pudicitiae, cuius virilis animus maligno errore fortunae muliebri corpus sortitus est*. For the vesting of Lucretia and Verginia with an ideology see Sandra R. Joshel, *The Body Female and the Body Politic: Livy's Lucretia and Verginia*, in: Amy Richlin (ed), *Pornography and Representation in Greece and Rome*, New York-Oxford 1992, pp 112-130.

42 If a wife is reproached of having no *pudicitia*, this triggers a second reproach: The husband is alleged to have failed to show his wife her actual position (see also Tac. Ann. 3.34). And this disputes his masculinity - an emperor is thereby denied the essential criterion for exercising power: See Thomas Späth, *Skrupellose Herrscherin? Das Bild der Agrippina minor bei Tacitus*, in: Thomas Späth/Beate Wagner-Hasel (ed), *Frauenwelten in der Antike. Geschlechterordnung und weibliche Lebenspraxis*, Stuttgart-Weimar 2000, pp 262-281, 271, 273, 275.

43 Such a male-dominated gender bias is still valid today, especially in the discipline of law. MacKinnon, *Feminism unmodified* (supra note 2) p 71 says in this context, „In other words, for purposes of sex discrimination law, to be a woman means either to be a man or to be a lady. We have to meet either the

be perceived at the same time.⁴⁴ Disapproval and approval of public appearances are determined by the patriarchal regime in a given situation.⁴⁵ A woman contemplating to act in public must expect to be strictly categorized. The patterns are confined to categories like „the indecent woman“ or „the masculine woman“. Both categories marginalize women and, above all, guarantee that the „regular“ image of women is sustained in accordance with patriarchal interests.

male standards for males or the male standards for females“.

- 44 Another example of this is Theodora who is described as lascivious and shameless in Procop's anecdotes (see Proc. Anec. 9). On the other hand she gets a lot of credit for her determined and courageous acting during the Nica insurrection (Proc. 1.24.33-35).
- 45 Roman women may make the following contributions to gain respect and thus, participation in power: Belonging to the upper class, a conduct conforming to their role (*pudicitia*), property, and being physically attractive. Plancia Magna, for instance, greatly honoured by inscriptions in Perge (close to Antalya where the SIHDA-session took place), achieved a high degree of participation in public life through her descent and property. Between 121 and 126 A.D. she raised money for her extensive (charitable) foundations. See Die Inschriften von Perge, Part I (edited by the Austrian Academy of Science and the North Rhine-West Phalian Academy of Science), Bonn 1999, pp 107-109.