(Wo)Men in legal history Possibilities and challenges for gendered legal historical research[1]

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From May 15 to May 18, 2013 the French *Centre d'Histoire Judiciaire* (University Lille 2) and the Belgian *Ghent Legal History Institute* (Ghent University) organised the nineteenth European Forum of Young Legal Historians. During three days, more than sixty young researchers from all over Europe and beyond gathered around the theme *(Wo)Men in legal history.*[2] Two main questions presented themselves : can law, from an evolutionary and dynamic point of view, be seen as a pathway to reduce differences between men and women? And what is the role and place of gender in legislation and legislative bodies, in justice administration and judicial bodies, as well as in legal science and education, both as subjects and objects? The past decade historians called out to legal historians to rethink those dominant narratives of law which produce and reflect cultural and social norms,[3] challenging scholars to use a gendered historical approach to law.

The main goal of this volume is to convince legal historians in Europe to apply a gendered lens when exploring the history of law, and to deconstruct the narrative of law as a product of male dominance over women, a vision which is a direct consequence of the work of radical so-called second wave feminist scholars.[4]

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[1] I want to thank Kaat Cappelle, Stefan Huygebaert, Nathalie Tousignant, Matthias Van Der Haegen and Amélie Verfaillie, for proofreading this text. Of course any remaining mistakes are entirely my own responsibility.

[2] The full programme can be consulted here : http://www.law.ugent.be/grond/forum2013/efylhprogrammeinfo.pdf.

[3] M. PERROT, "Ouverture", in C. BARD, F. CHAUVAUD, M. PERROT & J.-G. PETIT (eds.) *Femmes et justice pénale (XIXe-XXe siècle)*, Rennes, Presses Universitaires de Rennes, 2002, 12 ; F. BATLAN, "Engendering legal history", *Law & Society Inquiry* 2005, 824.

[4] The first wave of feminism was propelled by middle class women and took place in the late nineteenth and early twentieth centuries. It is connected to the famous suffragette movements, which focused on voting rights but also aimed for opportunities for women. More than being radical, they intended to reform and not overthrow the patriarchal society. The second wave feminist movement started during the 1960s and continued to the 1990s. It was more radical as it wanted to overthrow the patriarchal society that had oppressed women for millennia. The third wave of feminism deconstructed narratives such as 'universal womanhood', body, gender, sexuality and heteronormativity. Young feminists embraced the very lip-stick, high-heels, and cleavage proudly exposed by low cut necklines that the first two phases of the movement identified with male

Only recently, historians have started to nuance these traditional assumptions of oppressed women by taking a closer look at how discriminatory legislation was applied in practice. Or as the late Régine Beauthier stated on marital power : "*Pour cerner la situation civile de la femme, qui est un des objets récurrents des réflexions, la puissance maritale est systématiquement mentionnée, sans être jamais véritablement investiguée*".[5] In 2010 British scholar Jane Gardner made a similar comment regarding women in Roman Law.[6] This volume aims to contribute to a more complete picture of the rights of both men and women all over Europe. It will help to distinguish between different legal cultures when it comes to gendered topics, and, where possible, help to find parallels. It is the hope of its editors that this volume will stimulate legal historians to conduct more profound research on the issues of gender and law, and their many intersections in history. Historians already proved the approach to be very valuable and those insights might be interesting for other disciplines in the humanities.

Gender and law

Jurists often connect 'gender and law' to legal equality between men and women, which has been and still is discussed in parliamentary debates.[7] This narrow interpretation produced an abundance of publications and more and more universities offer it as a course in their curricula.[8] Even if gender equality

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oppression. Some feminist scholars are convinced a fourth wave is emerging; M. RAMPTON, "Four waves of feminism", 2015; online http://www.pacificu.edu/about-us/news-events/four-waves-feminism.

[5] *"To identify women's civil status, which is a recurring subject, marital power is always mentioned, without ever being really investigated."*; R. BEAUTHIER, *Le secret intérieur des ménages et les regards de la justice. Les relations personnelles entre époux en Belgique et en France au XIXe siècle*, Brussels, Bruylant, 2008, 2, translated by me.

[6] *"Hitherto, there has been no detailed study of Roman Law relating to women. Women studies made a relatively belated appearance among the concerns of ancient historians and classicists, and references to law, if made at all, tended to be confined mainly to marriage, tutela (guardianship) and divorce, not straying much further afield."*; J.F. GARDNER, *Women in Roman Law and Society*, London, Routledge, 2010, 1.

[7] After some discussion and based on linguistic regulations, the French authorities denounced the term 'genre' as a worthy translation of the English 'gender'. Generally, there is a European tendency to make legislation gender-neutral. Belgium introduced a gender-neutral marriage and not, as often mistakenly assumed, a 'gay marriage'. In January 2014, the French Assemblée adopted an amendment to replace the term *bon père de famille* by *raisonnable* in all legislation; E. FONDIMARE, "Le genre, un concept utile pour repenser le droit de la non-discrimination", *La revue des droits de l'homme* 2014, 2; L. WAELKENS, "Geen goede huisvaders meer in het Franse recht", *Rechtskundig Weekblad* 2014-15, 282-283; C. WILLIAMS, "The end of the 'masculine rule'? Gender-neutral legislative drafting in the United Kingdom and Ireland", *Statute Law Review* 2008, 139-153.

[8] E.g. E. SCHANDEVYL, S. BOLLEN & M. DE METSENAERE (eds.), *In luar recht. Vrouwe Justitia feministisch bekeken*, Brussels, VUB Press, 2009. It discussed from several points of the view the ongoing feminisation of Belgium's legal world. Two years later followed *Recht en gender in België*, a general introduction to gender-legal issues in Belgium. Five Flemish universities cooperated to organize a Master of Arts in Gender and Diversity; E. BREMS & L. STEVENS (eds.), *Gender en recht in België*, Bruges, Die Keure, 2011.

is a legal maxim in the Western world, inequalities still exist and a lot of work remains to be done to root out any kind of sexism.[9] Especially the gender pay gap – equal pay for equal work – and equality in decision-making – in both politics and companies – remains problematic in Europe and the rest of the Western world.[10]

Gender, brief history of a term in need of redemption

Gender as a scientific notion was originally used in linguistic studies as a part of grammatical rules, but from halfway the twentieth century onwards, psychologists, sociologists and anthropologists adopted the term after challenging the strict biological dichotomy between men and women and seeing gender as a socio-cultural construction.[11] Children learned gender in early childhood; and biological sex, however it was defined, did not determine one's gender role and orientation. During the 1970s, American feminist scholars appropriated the word 'gender' and transformed its meaning. They used gender to reject the notion that the perceived sex differences, behaviour, temperament and intellect, were simply natural or innate, but they rejected functionalism and questioned whether gender and gender roles were necessary or good. To them, if gender was artificial, there was little reason to maintain it, especially when it played a part in subordinating women. Thus, these scholars focussed instead on reconstructing and revaluating women's studies.[12]

In an influential article, American historian Joan Wallach Scott reacted to those scholars preaching theories on patriarchy and male domination over women. First of all, their research had created segregation – namely women only – in scholarship.[13] Moreover, according to Scott, women's studies had failed

[9] Belgium introduced as the first and currently still only country in the world anti-sexism legislation defining and banning sexist speech in public places. The aim is to protect both men and women. Almost immediately after its promulgation, this law has been heavily criticised, not only by (female) lawyers but also by feminists, writers, sexologists and the Interfederal Centre for Equal Opportunities; J. Vrielink & S. Van Dyck, "Seksisme afgeschaft! (samen met enkele grondrechten)", *De Juristenkrant* 2014, n° 289, 15, Y. Janssens, "Krijgt Nederland ook een 'antiseksismewet'?", *De Juristenkrant* 2015, n° 303, 16.

[10] Equality between women and men is one of the European Union's founding principles. It goes back to 1957 when the principle of equal pay for equal work became part of the Treaty of Rome. Much progress has been made in getting more women into the workforce. The EU average is now close to 60 percent. The European Commission is aiming for a rate of 75 percent for men and women by 2020. In order to reach that number, the European Commission adopted a Women's Charter and committed itself to strengthening gender equality in all its policies.

[11] Psychologist and sexologist John Money (1921-2006) created the term 'gender role' while studying hermaphrodites. He considered gender not only one's status as man or woman, but the position he or she is ought to have in society. E. Fondimare, "Le genre, un concept utile pour repenser le droit de la non-discrimination", *La revue des droits de l'homme* 2014, n°5, 2-5.

[12] J. Meyerowitz, "A history of 'Gender'", *The American Historical Review* 2008, 1354-1355.

[13] Some stated very clearly that only women can do women's studies. This criticism has been uttered

its claims to rewrite the master narrative of history and had not yet adequately explained the persistent inequalities between women and men.[14] Scott considered the notion of gender as "*a useful category of historical analysis*" and represented gender as a relational understanding of the categories 'men' and 'women'. For Scott, gender was "a *constitutive element of social relationships based on perceived differences between the sexes*" and also "*a primary way of signifying relationships of power*".[15] Gender, just like class and race, produces hierarchies and deeply implicates structures of power.[16] Thus, women could not be studied without their relation to men.

Today, the same people who believed that the term gender would catch on and encourage research on the topic have started to question its very use. Despite its promising future in social sciences, 'gender' has become a synonym for 'women'. This withering does not only exclude men's studies, it neglects other facets in gender studies such as Lesbian, Gay, Bisexual and Transgender (LGBT) Studies, race and class.[17]

Law as a facilitator

A gendered-analytical approach to law is relatively new in legal scholarship. It aims to unravel the role of law in constructing, maintaining and changing gender patterns and stereotypes.[18] Legal historiography can play a primordial role in unearthing new perspectives. Until now, legal historians essentially stated that women were discriminated, period, leading some scholars that law served exclusively the patriarchal society. For centuries, legislation has been drafted by male members of parliament, and applied by male judges in the court room. It degraded women to second rank citizens. In other words : law oppressed women. However, ethnographic studies indicated that women exercised considerable influence on both marital and community affairs, even though norms were explicitly patriarchal.[19] In their roles as mother and spouse, women do a large part in raising their children, including their sons, and influencing their husband. This *de facto* power, which cannot always be confirmed by historical sources, is often neglected. In addition, the historical and structural inequality of men and

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often and even today, female students are mainly working on 'gendered legal history', often reduced to 'women's legal history'; R. CHRISTENS, "Verkend verleden. Een kritisch overzicht van de vrouwengeschiedenis 19de-20ste eeuw in België", *Belgisch Tijdschrift voor Nieuwste Geschiedenis* 1997, 5.

[14] J. MEYEROWITZ, "A history of 'Gender'", *The American Historical Review* 2008, 1356.

[15] J. SCOTT, "Gender : a useful category of historical analysis", *American Historical Review* 1986, 1067; J. MEYEROWITZ, "A history of 'Gender'", *The American Historical Review* 2008, 1355.

[16] J. SCOTT, "Gender : a useful category of historical analysis", *American Historical Review* 1986, 1054.

[17] F. BATLAN, "Engendering legal history", 825.

[18] E. BREMS & L. STEVENS, "Inleiding", in E. BREMS & L. STEVENS (eds.), *Gender en recht in België*, Bruges, Die Keure, 2011, 17-18.

[19] R.L. WARNER, G.R. LEE & J. LEE, "Social organization, spousal resources, and marital power : a cross-cultural study", *Journal of Marriage and the Family* 1986, 122.

women is not a misogynistic conspiracy but is due to different interpretations of the differences between both sexes.[20] On the one hand, men deemed women to be less capable of managing money affairs and less interested in politics, thus the marital patrimony needed to be ruled by the husband and voting rights were exclusive to men. On the other hand, those same men judged women more capable for nursing tasks.[21] Legal historical research enables scholars to reconstruct the context in which women's rights evolved and might unearth when and how gender inequality became institutionalized.

Law played at least an unequivocal but ambiguous role. It shaped and determined gendered roles, but it was also incontestable as a facilitating structure for gender equality.[22] Europe's women's movements believed changing legislation was the path to equality. The goal was not to usurp power, but to acquire a fair place in society. In her study on Hungarian women's movements, Kinga Csàszàr (University of Pécs, Hungary) offers a glance on their objectives. Suffrage seemed not the most important matter, equality in private law all the more. As such, Hungarian suffragettes strove for equal partners in marriage, better social protection, especially for pregnant women and access to education and work.[23] At the end of the nineteenth century, the first feminists posited that legislation was the path to equality.[24]

Today, gender equality is a legal principle embedded in numerous international treaties[25] and legislative initiatives, such as quota laws,[26] formally wiping out the excesses of inequality. Nonetheless, legislation is a first step, but a change in mentality seems to be the other and most important factor. Recently, an American think tank published a report stating Americans deemed women every bit as capable of good leadership in politics and corporations as

[20] E. BREMS & L. STEVENS, "Inleiding", in E. BREMS & L. STEVENS (eds.), *Gender en recht in België*, Bruges, Die Keure, 2011, 19-20.

[21] Idem.

[22] T. THOMAS & T. BOISSEAU, "Law, history and feminism", in T. THOMAS & T. BOISSEAU (eds.), *Feminist legal history : essays on women and law*, New York, NYU Press, 2011, 1.

[23] K. CSÀSZÀR, "Objectives of the Hungarian women's movements in the age of the Austro-Hungarian Dual-Monarchy (1867-1918)", in this volume, 311-326.

[24] J. CARLIER, "Mannen, mannelijkheid en vrouwenrechten in de Belgische Belle Epoque. Gender en klasse in het feminisme van de jurist en publicist Louis Frank", *Tijdschrift voor Genderstudies* 2012, n°1, 6.

[25] The most important are : Article 1 Universal Declaration of Human Rights, Article 14 European Convention on Human Rights, Article 157 TFEU implements the 'equal pay for equal work'- principle.

[26] Quota laws intend to increase the number of women and other segregated social groups in leading positions in politics and corporations. Nowadays, this kind of legislation shows the failure of an equal opportunity policy on voluntary basis and fuels discussion on the qualification of its benefiters. M. DE VOS & P. CULLIFORD (eds.), *Gender quotas for company boards*, Antwerp, Intersentia, 2014.

men.[27] When we look to regulations, gender equality has been reached, but the real world tells another story : the gender income gap remains, women are still target of violence, remain vulnerable to poverty and social exclusion and are still perceived and represented as non-equal. These facts thus question the efficiency of the 'rule of law'.

Gendered symbolism and law

Scholars recognised gender as a social construction of power, which was often symbolised in canonical and rigidly gendered schemes.[28] Illustrations of these schemes can be found in the contribution by Rainer Silbernagl (University of Leopold Franzes I, Austria) who discusses the establishment of power relations in the German realm between a lord and his vassal through a specific gesture : the kiss.[29] It was an important part in the vassalage ritual, sealing a mutual legal obligation between both parties. By exchanging a kiss on the mouth the vassal became the lord's 'man of mouth and hand', which represented the two as equal allies. The symbol can also be found in marriage where the binding force of the rites came from the physical contact between parties holding hands, kissing and exchanging rings.[30] This contribution illustrates that law is symbol driven.

Another symbolic and gendered scheme can be found in literature and art where women often stand for an abstract notion, such as liberty, victory[31] or justice.[32] However, as Warner stated : "*Justice is not spoken of as a women, nor does she speak as a woman in mediaeval moralities or appear in the resemblance of one above City Hall in New York or the Old Bailey in London because women were thought to be just, any more than they were considered capable of dispensing justice*".[33] Indeed, especially the attributes – more particular the blindfold – of Lady Justice have been studied,

[27] http://www.pewsocialtrends.org/2015/01/14/women-and-leadership/.

[28] For instance in the early modern period, young men were not supposed to have a beard as it would undermine the patriarchal structure in society. In Early Modern England literature, bearded women were metaphors alluded to sexual or economically independent women, challenging patriarchal prerogatives; M.A. Johnson, "Bearded women in Early modern England", *Studies in English Literature 1500-1900* 2007, 1-28.

[29] R. SILBERNAGL, "Kuss, Mann, Frau, Recht. Skizze zum Lehenskuss im hochmittelalterlichen Deutschland", in this volume, 45-60.

[30] E. MUIR, *Ritual in early modern Europe*, Cambridge, Cambridge University Press, 2005, 36.

[31] M. WISEMAN, "Gendered symbols", *The Journal of Aesthetics and Art Criticism* 1998, 241-249.

[32] We are all familiar with Lady Liberty in New York or Marianne, the national symbol of the French republic and an allegory of liberty and reason. An interesting work on these female allegories is M. WARNER, *Monuments and maidens : the allegory of the female form*, New York, Atheneum, 1985 ; M. AGULHON, *Marianne au combat : l'imagerie et la symbolique républicaines de 1789 à 1880*, Paris, Flammarion, 1979 .

[33] M. WARNER, *Monuments and maidens : the allegory of the female form*, New York, Atheneum, 1985.

but her femaleness is seldom perceived as an integral part of her iconographic message. Only when Justice's female sex is omitted or emphasized, does her femininity become all the more notable. Stefan Huygebaert (Ghent University, Belgium) illustrates this convincingly through the reconstruction of the history of two Belgian sculptors representing Justice unconventionally.[34] Juliaan Dillens (1849-1904) depicted Justice as an old man, seated in between young women, whereas Henri Boncquet (1855-1943) represented Justice as an 'earthly mother' teaching a toddler – representing humanity – to walk. Both works are paradoxes as on the one hand they questioned traditional illustrations of Justice but on the other they upheld the roles men and women fulfil in society. Legal iconography proves a most worthwhile source to unravel what people expect from justice, but also how gender roles in society are perceived. It endorses the viewpoint that law – in the broadest sense of the word – shores up those roles.[35] Unravelling the impact of law on legal historical research can prove its worth.

Challenging gender and legal history

In comparison to other disciplines in the humanities, legal historiography lags behind when it comes to applying a gendered approach in which the power relation between women and men can be unravelled. The historical exclusion of women from the law itself was replicated in the production of legal history and the topics of which legal historians traditionally wrote.[36] Announced during the 1980s in the United States as the 'emerging legal history of women',[37] American feminist scholars engaged in an intense dialogue with mainstream legal history as well as with women's history,[38] resulting in several studies on feminist legal history.[39] Until today, narratives of women's legal history remain somewhat skeletal and because of that, general assumptions are still present in legal historiography.[40] However, innovative approaches towards law in the past challenge so called universal truths on the legal relation between both biological sexes.

[34] S. HUYGEBAERT, "Justice : man-judge or earthly mother ? Feminity of Justice and her sisters of virtue in Belgian fin de siècle legal inconography", in this volume, 23-44.

[35] K. CALAVITA, "Gender, migration and law : crossing borders and bridging disciplines", *International Migration Review* 2006, 105.

[36] See for example F. BATLAN, "Introduction : making history", *Chicago-Kent Law Review* 2008, 335.

[37] N. BASCH, "The emerging legal history of women in the United States : property, divorce, and the constitution", *Signs* 1986, 97-117.

[38] F. BATLAN, "Engendering legal history", 823.

[39] T.A. THOMAS & T.J. BOISSEAU (eds.), *Feminist legal history. Essays on women and law*, New York, NYU Press, 2011.

[40] T.A. THOMAS & T.J. BOISSEAU, "Law, history and feminism", in T.A. THOMAS & T.J. BOISSEAU (eds.), *Feminist legal history. Essays on women and law*, New York, NYU Press, 2011, 1-43.

The illusion of a private and public sphere

To this day, researchers generally accepted the main division of gender spheres of the male market and the female home. Women ruled inside the realm of the family, whereas the husband could rule outside. This line of reasoning grew in early nineteenth century Europe because of, amongst others, the drafting of the Napoleonic Civil Code. Napoleon, the drafters of the code and their successors, believed that women's political role as a citizen was cast in terms of domestic responsibility.[41] In the past decade American historians proved the boundaries between state regulation, the public, and the family, the private, to be more porous than assumed.[42] By studying the emancipation of slaves and connect their marriages to citizenship, they convincingly show that the partition between the private and the public sphere is no longer tenable.[43] Moreover, law often intervenes in that private sphere conferring it a public importance. Regulating the intimate relations of people also has a social and political purpose.[44] The paradigm of private and public spheres masks the fact that both men and women lived together, thus easily transgressing those boundaries. Men and women moved on the streets, at markets, in workplaces, churches and such more. Historians and legal historians should make clearer distinctions between the ideology of the (public or private) roles of men and women and their actual role in everyday lives.[45] Several contributors in this collection proved this separation artificial.

For instance, female rulers moved in the public realm, taking political and legal decisions, while as a spouse or mother they were part of the private realm.[46] Frederik Dhondt (Vrije Universiteit Brussel, Belgium) discusses how the Spanish Queen Elisabeth Farnese (1692-1766) was perceived by French

[41] At the end of the nineteenth century, Belgium's government wanted to tackle the problems emerging from the industrialisation and especially the rise of alcoholism as it undermined family life severely. Empowering the justices of the peace to take the necessary measures, the government also appealed on the cooperation of women to be 'good wives' and prevent their husbands from drinking. A woman's 'social function' was at home and this way, she contributed to a strong state ; H. DE SMAELE, "Het Belgisch politieke discours en de 'eigenheid' van de vrouw aan het einde van de negentiende eeuw, *Tijdschrift voor Genderstudies* 1998, 30 .

[42] F. BATLAN, "Engendering legal history", 826.

[43] A.D. STANLEY, *From bondage to contract : wage labor, marriage, and the market in the era of the slave emancipation*, Cambridge, Cambridge University Press, 1998; K. FRANKE, "Becoming a citizen : reconstruction era regulation of African American marriages", *Yale journal of law & the humanities* 1999, 251-309.

[44] R. BEAUTHIER, *Le secret intérieur des ménages et les regards de la justice*, 18; D. HEIRBAUT, "De vrouwen(on) rechtsgeschiedenis van Napoleon tot vandaag. Een verhaal van voortdurende vooruitgang?", 28.

[45] M. VAN DER HEIJDEN, "Women, violence and urban justice in Holland, c. 1600-1838", 91.

[46] C. CAMPBELL ORR (ed.), *Queenship in Europe 1660-1815 : the role of the consort*, Cambridge, University Press, 2004.

and British diplomats as 'irrational', and needed 'to be brought to reason'. By *de facto* ruling Spain, she showed herself more masculine than her '*docile époux*' King Philips V or any of her negotiating partners would have desired.[47] During that same era, empress Maria Theresa of Austria (1717-1780) became the first female Habsburg ruler and one of Europe's most influential monarchs. Even though the 1713 Pragmatic Sanction prescribed that a daughter could inherit the Habsburg hereditary possessions, no one at that time had expected that Maria Theresa would enjoy this privilege. By scrutinizing this important document and the 1839 family statute, which only to a certain extend followed the provisions of the Austrian Civil Code (ABGB), Christoph Schmetterer (University of Vienna) discusses the legal status of the female members in the Habsburg dynasty. When female members wanted to marry, they needed the *Kaiser's* approval. Moreover, when it comes to inheritance rights, women were discriminated against, although the ABGB treated children born within wedlock as equal. This contribution concludes that the family was more conservative than a common family of that time as relevant provisions stipulated that women had one role only : securing the family by giving birth to a (male) heir.[48]

Protective measures lead to constraint

Conventionally, law is portrayed as a constraint or barrier upon women's rights, imposed by male legislators in order to submit women. When looking at history, most legislative initiatives had a protective finality.[49] Roman legal writers believed that women should receive assistance in legal matters and their ignorance of the law could be excused. The most renowned example was the Roman *Senatusconsultum Velleianum* (Velleian Senate Decree),[50] implemented as a means to protect women against cunning third parties. However, it resulted in a barrier for women to engage freely in contracts, and made women less reliable actors in business life, and thus less active and less present in public and commercial spheres.[51] This made feminist legal theorists consider law as a tool and symbol of male power, deliberately imposed to secure patriarchal society by excluding women from the public sphere and ensuring that women remained

[47] F. Dhondt, "'Bring this mad woman to reason'. Elisabeth Farnese as a female ruler in 18th Century Europe", in this volume, 277-292.

[48] C. Schmetterer, "Die rechtliche Stellung der weiblichen Mitglieder des Hauses Habsburg", in this volume, 293-310.

[49] J. Amiel-Donat, "Egalité des sexes", in D. Alland & S. Rials (eds.), *Dictionnaire de la culture juridique*, Paris, PUF, 2012, 591-592.

[50] Enacted about 46 A.D.; in Digests D.16.1 and Codex C.4.29; J.E. Grubbs, *Women and the law in the Roman Empire : a sourcebook on marriage, divorce and widowhood*, London, Routledge, 2002.

[51] T. Chiusi, "'Fama' and 'infamia' in the Roman Legal System", in A. Burrows, D. Johnston & R. Zimmerman (eds.) *Judge and jurist : essays in memory of Lord Rodger of Earlsferry*, Oxford, Oxford University Press, 2013, 152.

subordinate to men.[52]

Looking back, legislative initiatives concerning women demonstrates how protective measures are never far away. An interesting example concerns labour performed by women. Contrarily to what is generally assumed, during the Middle Ages and (a large part of) the Early Modern Period, women could earn their own income.[53] It might seem as a paradox, but the protective law for female workers issued during the nineteenth and twentieth century was a step towards modern labour standards, but also a barrier to equal rights.[54] At that time, the ideology of a man as main breadwinner earning an income sufficient to maintain all his dependants was flourishing. His earnings were ought to be fixed at a certain level, sufficient to maintain the family without needing an extra income. Conversely, the income of other family member was conceived of as complementary at best, reinforcing the belief that women and children's work was inferior and low-paid. The rising impoverishment, inflicted by social problems related to the industrialisation, called for governmental action all over Europe. Children and women needed to be protected against the poor conditions in factories and were for instance prohibited to work at night.[55] Almost paradoxically it made women highly dependent on men. Her best chance of getting a good income was attaching herself to a man capable of having a good income.[56]

Going beyond traditional legal sources

Studying gender from a legal historical point of view urges for new methodology and sources. More than ever, contextual legal history needs to replace traditional legal history, which considers law as an autonomous field, undisturbed by social, economic, political or religious changes. These legal historians prefer to study law in the books, which gives only a limited number of sources.[57] Especially in the field of engendered legal history, this leads to general assumptions and theories without testing real life experiences.[58] When legal sources omit women, roughly half of the population, the legal historian

[52] L. HANEY, "Feminist state theory : applications to jurisprudence, criminology and the welfare state", 643.

[53] For instance in Northern Germany : D. RABUZZI, "Women as merchants in Eighteenth-century Northern Germany : the case of Stralsund, 1750-1830", *Central European History* 1995, 435-456.

[54] N. WOLOCH, *A class by herself : protective law for women workers, 1890s-1990s*, Princeton, Princeton University Press, 2015.

[55] P. HUMBLET, "De invoering en de afschaffing van het verbod op nachtarbeid door vrouwen : vragen bij een (de)mobilisatie", in E. BREMS & L. STEVENS (eds.), *Gender en recht in België*, Bruges, Die Keure, 2011, 57-72.

[56] E. HOBSBAWN, *Age of empires*, 198.

[57] D. HEIRBAUT, "Reading past legal texts. A tale of two legal histories. Some personal reflections on the methodology of legal history", in D., MICHALSEN, *Reading past legal texts*, Oslo, Unipax, 2006, 92.

[58] D. HEIRBAUT, "De vrouwen(on)rechtsgeschiedenis van Napoleon tot vandaag. Een verhaal van voortdurende vooruitgang?", 27.

needs to turn to alternative sources.

Authors in this book convincingly show how legal sources can, and if possible must, be complemented by other sources. Frederik Dhondt, for example, uses correspondence between diplomats. Through the debates in in the Norwegian Parliament (*Storting*), Eugenia Blücher (University of Oslo) demonstrates the arguments on which Norwegian lawmakers based their legislative reforms to grant women full legal capacity.[59] Elisabetta Fiocchi (University of Milan) used the diary of the Italian poetess and writer Grazie Mancini Pierantoni (1841-1915) as a source to analyse her visions on politics, law, women's rights and family life.[60] Less obvious and less examined sources, can bring new insights on how the power relation between men and women was perceived and legally confined.

Gender in private law

The vast majority of gendered approaches of legal history can be found in private law issues such as marriage, with an emphasis on marital power, property law and inheritance law. These legal branches are closely related to one another.

Women's legal incapacity

Throughout history, women were seen as legally incapable of entering into contracts, carning an income, inheriting, drafting wills, representing themselves in the court room and owning property. According to traditional research, the roots of this legal incapacity lay in Roman Law, which had introduced *tutela* (guardianship or tutelage) mainly for minors and emancipated youngsters or women who were put under the protection and control of a *pater familias*. When a woman married *cum manu*, she was placed under the legal control of her husband, whereas when the marriage was *sine manu*, the wife still resided under her father's *potestas*. The aforementioned *Senatusconsultum Velleianum* has also been recognised as the source of female legal incapacity. Recently, this history has been revised now that it becomes clear that constraints on women's contracts grew over time and followed no discernible logic.[61]

[59] E. Blücher, "How women got full legal capacity in Norway : the Acts of 1863 and 1888", in this volume, 231-254.

[60] E. Fiocchi, "A life lived in the shadow of her father and her husband : Grazia Mancini Pierantoni and the rights of Italian women", in this volume, 327-340.

[61] S. Feci, *Pesci fuor d'acqua : donne a Roma in età moderna : diritti e patrimoni*, Rome, Viella, 2004.

Through her quantitative analysis of documents related to real estates, Aneta Skalec (University of Warsaw, Poland) brings the history of Egyptian women to life. These women held a strong legal position as they could engage in business transactions without a guardian, they had to consent into their marriage in which they retained full rights to their property, and they could even inherit real estate from their father.[62] Before the court, women needed assistance of a guardian, named *kyrios,* a role which could be fulfilled by women. In Ancient Greece as well, women had more legal capacity, just as in Roman Law.

In Ibsenian Norway,[63] discussions arose on women's legal capacity, and in 1888, women older than 25 were granted full legal capacity. Eugenia Blücher shows the proposals were instigated by a variety of reasons, both societal as legal in character. At that age, women were ought to have enough life experience, hence not in need of legal protection anymore. In addition, there was an equality problem between women as common practice granted widows, regardless of their age, full capacity. Maybe, however, the most important reason may have been that, according to members of Parliament, all 'civilised countries' had introduced some form of legal capacity and Norway could not lag behind. Norway mirrored itself to other European – civilised – countries, but in France and Belgium, basically sharing the same Civil Code, it took a lot more time before men and women were equal partners in wedlock and married women gained full legal capacity.[64] Legal capacity of a woman was often connected with the question whether she was married or not.

Marriage or the withering of the pater familias?

Marital power seems an excellent topic for gendered legal historiography as it not only defined wives but also structured concepts of masculinity, affirming men's status and power over women. When consulting legal historical works on marriage, one cannot comprehend why women ever engaged into holy matrimony as they submitted themselves to marital power, disabling them to act as a litigator and trusting their property to their husband. For a long time, legal historians – maybe because most of them were men – accepted without any

[62] A. SKALEC, "Men and women as neighbours in Ptolemaic and Roman Egypt (331 BC-641 AD)", in this volume, 257-275.

[63] Henrik Ibsen's *A doll's house* (1879) is considered as an important feminist play. Throughout the drama, the main character Nora sees herself confronted with her husband, Torvald, who treats her as a child and believes she's not capable of understanding anything but spending money and taking care for him and the children; J. Templeton, "The Doll House backlash : criticism, feminism and Ibsen", PMLA 1989, 28-40.

[64] Switzerland abolished women's legal incapacity in 1907, France in 1938. In Belgium, the discussion was only started after WWII with a first proposal filed in Parliament in 1945. It took until 1958 to make a married women legally capable, but the complete equality was only reached in 1976.

criticism the impact of marital power on the relation between husband and wife, who allegedly had to cater to his every whim.[65] Despite the fact that marriage is probably the best-known gendered relationship in law, legal historians seem not to be interested in the personal relation between the spouses.[66] Studying only the legal dispositions concerning marriage and marital power led to a rather superficial analysis and general assumptions.[67] However, many studies found that cultural norms influence marriage and marital power.[68]

For instance, because of their legal position in Roman Law and the ban on marriage during their army service, Roman soldiers allegedly engaged in polygamous marriages. An often heard explanation is that this legalisation protected moving troops by leaving their rape of women unpunished. Those so-called polygamous practices were often attributed to Roman soldiers in an uncritical way. Tomislav Karlovic and Ivan Milotic (University of Zagreb, Croatia) point out that, though soldiers were not legally bound by rules on monogamy because their unions were of *de facto* (illegitimate) nature, legal and non-legal sources do not suggest a widespread practice of polygamy. Quite the opposite, a vast number of epitaphs and other inscriptions in which they commemorated their women exclusively contain records of a single woman addressed as *uxor* or *coniux*. Monogamy and heterosexuality were generally adhered to principles, although possible polygamous practices are not *a priori* rejected. It must be emphasised, though, that these were very rare and restricted to individuals and they are not recorded in legal and literary, epigraphic sources.[69]

Today, the Western world connects polygamous marriages almost exclusively to Islamic law and criticises it heavily. However, as Šejla Maslo Čerkić (Džemal Bijedić University of Mostar, Bosnia and Herzegovina) proves in her contribution, polygamy was not a general practice amongst Bosnian Muslims. Her study gives us an interesting insight on how the Austro-Hungarian government tried to 'modernize' the region by introducing its Civil Code (ABGB). In the meantime it sought to keep a balance in this melting pot. By the example of Islamic rule, Maslo Čerkić shows how religious, ethnic and national affiliation influenced the position of women in the family.[70]

[65] R. Beauthier, *Le secret intérieur des ménages et les regards de la justice*, 2.

[66] J. Mulliez, "Droit et morale conjugale : essai sur l'histoire des relations personnelles entre époux", *Revue historique* 1987, n° 563, 35-106.

[67] R. Beauthier, *Le secret intérieur des ménages et les regards de la justice*, 5.

[68] R.L. Warner, G.R. Lee & J. Lee, "Social organization, spousal resources, and marital power : a cross- cultural study", *Journal of Marriage and the Family* 1986, 121.

[69] I. Milotic & T. Karlovic, "Polygamy among soldiers in the shadow of monogamy in Roman Law", in this volume, 138-156.

[70] S. Maslo Čerkić, "Women between family and law : a study of Muslim women's legal status in Bosnia and Herzegovina under Austro-Hungarian rule", in this volume, 207-229.

In common law countries, when a woman married, her property became her husband's. In return, he had the legal duty to protect and support his wife.[71] In other words, marital power – or coverture in common law – also had a protective finality. Napoleon's Civil Code (1804) has been considered as an apogee of marital power, in which the husband and he alone had the right to administer and manage his wife's goods. The French *Code Civil* had re-introduced the concept of the Roman *pater familias*,[72] a key concept in the Roman Law of persons and property allowing a man to rule as a tyrant over children and women alike. In a way, this concept mirrored Napoleon's idea as head of the French Empire. A strong man needs to maintain law and order on a macro-level (Empire) and a micro-level (family).[73] Though the head of the household was stereotyped as male by use of the term *pater familias*, in reality Roman women owned property and must often, in the absence of husbands, have wielded power over households with dependents. This gendered language causes historians to lose sight of female heads of households.[74] Moreover, and not without irony, scholars discovered how women and their lawyers employed marital power to their own advantage to avoid claims of their creditors.[75] Yet, it does not negate the larger disempowering role of marital power.[76] This right of a husband to administer the property of his wife was not unlimited. When he periled her interests, the spouse could demand the separation of goods.[77] It would be interesting to see to which extend women relied on this provision in reality.

Marriage affected men when it came to their descendants. The legal axiom *pater is est, quem nuptiae demonstrant* remains until today important and offers legal certainty on children born within wedlock. Giuseppe Mecca (University of Macerata, Italy) discusses the way fatherhood could (not) be disputed in nineteenth century Italy. This principle held close with how a family was seen as a unity and not as a union of several partners. New proposals to revise this principle served middle-class interests instead of redefining the social and legal role of men and women.[78]

This idea has been strengthened during the ongoing industrialisation, which

[71] F. BATLAN, "Engendering legal history", 830-833.

[72] J.-L. HALPÉRIN, *Histoire du droit privé français depuis 1804*, Paris, PUF, 2012, 78-90.

[73] D. HEIRBAUT, "De vrouwen(on)rechtsgeschiedenis van Napoleon tot vandaag. Een verhaal van voortdurende vooruitgang?", 28.

[74] R. SALLER, "Pater familias, mater familias and the gendered semantics of the Roman household", *Classical Philology* 1999, 196.

[75] H. HARTOG, *Man and wife in America : a history*, Cambridge, Harvard University Press, 2000.

[76] F. BATLAN, "Engendering legal history", 830.

[77] J. AMIEL-DONAT, "Egalité des sexes", in D. ALLAND & S. RIALS (eds.), *Dictionnaire de la culture juridique*, Paris, PUF, 2012, 591.

[78] G. MECCA, "Fatherhood cannot be demonstrated. The investigation into paternity in Italy (1865- 1922)", in this volume, 189-205.

changed domestic relations drastically. The proto-industrialisation provided rural women a means of earning a little cash independent of men. The Industrial Revolution separated the household from the place of work and resulted in a pattern of sexual-economic division. A woman became a household manager ; the man became the main breadwinner and had to earn a wage sufficient to maintain all his dependents.[79] It made children and wife financially dependent on the husband, who was not restrained by any limits.

A dramatic illustration of this marital power is domestic violence. Libraries have been stacked with literature on domestic violence, but again traditional legal history seems to be stuck in the same narrative. Men, having marital power over their children and wives, were violent power-mad people who, when their authority was defied, could physically correct their dependants. Indeed, domestic violence was legally allowed but was it accepted in practice?[80] In Moldavia and Walachia during the 1600s, legal codes were issued dealing inter alia with domestic violence. Romanian scholar Cosmin Dariescu (University of Iasi, Romania) focuses on the regulations on domestic violence stipulating 'how to beat your wife'.[81] Even though he did not test the codes to case law, Dariescu shows us that a husband was allowed to use violence against his wife, but only in a mild manner and only when she had committed a mistake. The authorities could punish any excess by allowing temporary separation or even divorce, which was almost only allowed by secular rules.

For centuries, religious institutions had monopolised all regulation concerning marriage. Under the dogma of the Roman Catholic Church, marriage is regarded as indissoluble. During the period of the Enlightenment, secular authorities allowed divorce after grave marital misconduct of one of the parties, or when both partners consented, or on the ground of deep and lasting incompatibility of temperament. Piotr Pomianowski (University of Warsaw, Poland) fills the gap on the legal practice of divorces in the Polish region. Working from the hypothesis that in catholic Poland, divorce was largely disapproved, he contextualises divorce as a legal concept in several legal traditions : ecclesiastical regulations, the Austrian *Ehepatent*, the Prussian *Landrecht* and the French Civil Code. He concludes that in the Polish regions, catholic opposition to the

[79] E. Hobsbawn, *Age of Empire*, 197-199.

[80] For instance in Holland, neighbours often acted as plaintiffs in in cases of domestic violence. Severe maltreatment was not only a domestic problem, it could also bring shame and dishonour to the neighbourhood; M. van der Heijden, "Women as victim of sexual and domestic violence in seventeenth-century Holland : criminal cases of rape, incest, and maltreatment in Rotterdam and Delft", *Journal of Social History* 2000, 632-644.

[81] C. Dariescu, "How to beat your wife : regulations on domestic violence in 17th century Moldavia and Walachia", in this volume, 157-170.

Napoleonic Code has been less effective than one assumes. Moreover, women acted as litigators, starting a procedure and often obtaining the divorce, which freed them from their husband's power.[82]

Gender in public law

Conventionally, women are considered to be less violent than men and to be more often victims of criminal acts. Historians proved women's violent behaviour to be almost invisible in the early modern higher criminal courts of Holland, but it became more apparent in the records of the lower courts where a third of all condemnations involved female offenders.[83] Belinda Rodriguez Arrocha (University of La Laguna, Spain) confirms this in her study on violent women in the Canary Islands. She studied criminal records in a colonial setting where due to legal plurality – Spanish secular law and catholic and indigenous rules – households and sexual moral seemed to be less stable. Sexual crimes, such as rape, incest, adultery and seduction, were both a crime and a sin. In addition, social class played a role when a girl filed a complaint against her attacker. Honour and chastity were virtues belonging to elite families in which virginity of girls was a primary element.[84] This connection between honour and class concerning sexual crimes did already exist in classical Roman Law. In this collection, Christine Lehne (University of Innsbruck, Austria) shows that the victim's status mattered. Sexual crimes against women and children under *patria potestas* infringed the honour and the rights of their *pater familias* and the law did not really acknowledge the victim's rights. If a free-born citizen – man or woman – was sexually assaulted, the penalties were harsh. At the bottom of the social pyramid, rape of slaves was only punished when the slave belonged to a third party, as it was considered an interference of property rights.[85]

Female rulers took a public role, which could bring them into trouble. An example is Mary Stuart, Queen of Scots (1542-1587), who ascended the throne when she was six days old. After a marriage with the French dauphin, which had made her Queen of France (1559-1560), she was widowed and returned to Scotland. In 1565, she married her cousin Henry Stuart, lord Darnley, but their union was unhappy. After seventeen years in prison, she was executed after a long trial. Eléonore Bonnaud (University of Rennes, France) asks in her contribution

[82] P. POMIANOWSKI, "The beginnings of secular divorce in Poland", in this volume, 171-187.

[83] M. VAN DER HEIJDEN, "Women, violence and urban justice in Holland c. 1600-1838", *Crime, history & societies* 2013, 71-100.

[84] B. RODRIGUEZ-ARROCHA, "Women and Justice in the Canary Islands during the Ancient Regime : a projection of female roles?", in this volume, 101-121.

[85] C. LEHNE, "Sexual relationships and sexual crimes in classical Roman Law", in this volume, 63-81.

whether Mary Stuart would have faced another fate if she would have been a man. This seems not to be the case. In fact, Stuart's execution seemed symptomatic for that period in a Europe stirred by religious problems, with Kings and Queens murdered or executed. The killing of kings takes an unprecedented and alarming color. While in England a queen is executed for the first time, just two years later, a French monarch was murdered for the first time in nearly a thousand years.[86]

A similar case, but four centuries later was that of the German-Brazilian communist militant Olga Benario Prestes (1908-1942). Diego Nunes (Federal University of Uberlândia, Brazil) analysed the legal arguments presented by the Justices of the Brazilian Supreme Court to deny the habeas corpus presented by her against her expulsion. He wonders why her husband, Luiz Carlos Prestes, was prosecuted according to criminal law. Her lawyers expected to win time as Olga was pregnant of a Brazilian national and extradition would have left a new-born Brazilian national in the power of a foreign government which was forbidden by Brazilian law. Her extradition has been seen as good will towards the Nazi-regime and Olga died in an extermination camp in 1942.[87]

New opportunities : gender, race, class and sexual orientation

The contributions in this collection have been selected after a procedure of blind peer review and offers a wide European overview, both in time and space. It discusses the relationship between women and men from ancient civilisations to the twentieth century; from the Spanish Canary Islands in the South to the North in Norway, over the Eastern outskirts in today's Romania to Western Europe. This enables to discover gaps in legal historiography.

All contributions endorse that, just like all histories of oppressed minorities, the existing narrative of gender in legal history is not one of women's linear progress from oppression under the law to equal opportunities in modern times.[88] Linearity and evolutionism do not provide any satisfactory explanation for changes. These new researches challenge legal historiography by illustrating that throughout history, women have always been legal actors, even when they had no legal power because they were, for instance, married and were dependent on their

[86] E. Bonnaud, "Le procès et l'exécution de Marie Stuart, Reine d'Ecosse", in this volume, 83-99.

[87] D. Nunes, "woman, revolution, law. The expulsion of Olga Benario Prestes before the Brazilian Supreme Court (1936)", in this volume, 123-133.

[88] T. Thomas & T. Boisseau, "Law, history and feminism", in T. Thomas & T. Boisseau (eds.), *Feminist legal history : essays on women and law*, New York, NYU Press, 2011, 2; D. Heirbaut, "De vrouwen(on) rechtsgeschiedenis van Napoleon tot vandaag. Een verhaal van voortdurende vooruitgang?", 27.

husband. The authors subscribe that legal rules are a product of societal factors and a contextual approach is required since law and gender know different levels of analysis.[89] Socio-economic, cultural and political situations influenced the law and that legislation may sound hard, but in practice was not always applied with the same rigour as the text suggests. When researching gender, it is important to take social class into account. A vast majority of the women's movements members belonged to the middle-class. Often they had enjoyed education and had the financial means to take the lead. The status of a woman defined the rights she had with regards to her husband, but also to the institutions and other citizens. Therefore, the legal historian needs to go beyond traditional legal sources and adopt different approaches.

Even though this book offers a spectrum of research topics, a lot remains to be done when it comes to gender and legal history. Unfortunately, there are no contributions on the Middle Ages, which would be interesting to test the hypothesis whether the sixteenth century was a time of greater paternalism and the start of degradation of women's rights. It would also be interesting to continue the research on how adultery was dealt with for both men and women,[90] and also problems around the penalisation of prostitution remains an issue that stirs social debate.[91]

Postcolonial studies bring the issue of race, gender and law to the foreground and may offer interesting insights. Scholars pointed out that the emancipation of Afro-American coincided with other emancipatory movements such as women's movements. In order to obtain American citizenship, the former slaves had to comply with the image of an perfect family which actually meant that the legal subordination of a freedwoman affirmed a freeman's freedom and citizenship.[92]

[89] R. PIETERMAN, "Contextuele rechtsgeschiedenis van de negentiende eeuw", in C. JANSEN, E. POORTINGA & T.J. VEEN (eds.), *Twaalf bijdragen tot de studie van de rechtsgeschiedenis van de negentiende eeuw*, Amsterdam, Faculteit der rechtsgeleerdheid Universiteit Amsterdam, 1993, 128-144; R. PIETERMAN, "Rechtsgeschiedenis en rechtssociologie", in J. GRIFFITHS, (ed.), *Een kennismaking met de rechtssociologie en rechtsantropologie*, Nijmegen, Ars Aequi Libri, 1996, 554-559; D. HEIRBAUT, «Reading past legal texts. A tale of two legal histories. Some personal reflections on the methodology of legal history", in D. MICHALSEN, *Reading past legal texts*, Oslo, Unipax, 2006, 91-112.

[90] R. BEAUTHIER, *La répression de l'adultère en France du XVIème au XVIIIème siècle : de quelques lectures de l'histoire*, Ghent, Story-Scientia, 1990.

[91] In December 2013, France adopted a bill penalizing people paying for sex. Critics say that outlawing prostitution will put the problem underground, bringing women into the hands of human traffickers. Very recently, Hélène Duffuler-Vialle (University Lille 2) defended her doctoral thesis *La prostitution dans le Nord de la France pendant l'entre deux-guerres* and offers a glimpse on how French legislators tried to find an equilibrium between advocates for prohibiting prostitution and allowing it.

[92] A.D. STANLEY, *From bondage to contract : wage labor, marriage, and the market in the era of the slave emancipation*, Cambridge, Cambridge University Press, 1998; K. FRANKE, "Becoming a citizen : reconstruction era regulation of African American marriages", *Yale journal of law & the humanities* 1999, 251-309.

How did the European colonial powers deal with these issues?

Another emerging aspect in this discipline is the access of women to legal professions. For centuries, attorneys, notaries and judges were men and only from the second half of the nineteenth century, things slowly changed.[93]

So-called 'queer justice' offers also an innovative point of view.[94] Throughout history and through several cultures, gay people have been prosecuted and sentenced to death. However, there were also periods of tolerance towards homosexual relationships. Another point of particular interest concerns transgender and transsexual people. Generally, law sees the gender binary (male/female) as a taken-for-granted social reality and distinguishes only two biological sexes. In other words, law institutionalises gender outlawing people who did not comply by the types of behaviour is considered acceptable, appropriate or desirable for a person based on their actual or perceived sex. Eunuchs and castrates had a particular social position. As law only acknowledged two biological sexes, transgender people caused legal issues.[95] Nowadays medical technology with gender reassignment surgery even more questions this legal division. How national governments will deal with these new challenges remains at this moment a question mark.[96]

Even though this collection is far from complete, it calls out for all legal historians to apply a gendered approach to shed new light on the relationship between women and men.

[93] E.g. M. Korpiola, "Attempting to Advocate : Women Entering the Legal Profession in Finland, 1885-1915," in S. Kimble & M. Rowekamp (eds.), *New Perspectives on European Women's Legal History*, New York, Routledge, 2015 (forthcoming). Recently, Judith Bourne (St. Mary's University, Twickenham London) set up the 'First Women Lawyer's Symposia', a series of scientific gatherings between 2015 and 2020. More information on this can be found on : https://womenandthelegalprofession.wordpress.com/2015/07/03/women-and-the-law-symposia-st-marys-university-9-september-2015/.

[94] M. Boone, "State power and illicit sexuality + insights into the ideological apparatus of repression of homosexuality in a Burgundian commercial center of the Late Middle Ages : the prosecution of sodomy in late Medieval Bruges", *Journal of Medieval History* 1996, 135-153; J.L. Mogul & A.J. Ritchie, *Queer (in)justice : the criminalization of LGBT people in the United States*, Boston, Beacon Press, 2011; J. Roelens, "Visible women : female sodomy in the Late Medieval and Early Modern Southern Netherlands", *BMNG/The Low Countries Historical Review* 2015, n° 3, 3-24.

[95] Transgender individuals have characteristics that are normally associated with a particular gender. There are cases known where courts had to determine whether a person was a man or woman; T. Meadow, "'A rose is a rose'. On producing gender classifications", *Gender & Society* 2010, 814-837.

[96] A majority of European countries allow transgender and transsexual people to change their name to reflect their gender identity, whereas several amongst them recognize the right of transsexuals to marry in accordance with their post-operative sex. Germany is at this moment the only country on the European continent offering a third gender option on birth certificates.