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**As mulheres nas profissões jurídicas: experiências e representações**

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## Judiciary and Gender Topics. German Experience and International Perspectives

Ulrike Schultz

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## **JUDICIARY AND GENDER TOPICS. GERMAN EXPERIENCE AND INTERNATIONAL PERSPECTIVES**

**ULRIKE SCHULTZ**

In Germany the first female judge was admitted in 1926 but it took decades for women judges to gain a substantial share of positions in the judiciary. In the 1970s, still only about 6% of judges were women. Their numbers only started to increase in the late 1980s, proportionally to the risen participation of women in law studies. For the past ten years more women than men have studied law (55% in 2014), the number of women judges has risen to 46% (out of 20,500), women public prosecutors even to 48% (out of 5,200), more than 50% are taken in annually, which means that their numbers will keep on rising. The bulk of women lawyers work in the legal profession (55,000 of 163,500), but their share is only 34% (rounded data from 2014 and 2015).

Women prefer an occupation in the judiciary, but admission to the judiciary depends on high marks in the qualifying examination. The judiciary offers high status and high prestige, although it has already been discussed that a feminization of the judiciary might lead to a loss in prestige. There is no income discrimination. The judiciary offers secure positions, German judges are career judges who start to work in their late twenties. The judiciary offers the social security of the civil service, a good pension scheme, maternal and educational leave, the possibility to work part-time and at least after the first few years a manageable workload.

But career perspectives are less favourable for women than men. In spite of leaders claiming that the trickle up effect would lead to an equal share in leading positions, they move up the ladder slower than their male colleagues and we can notice glass ceiling effects. The bulk of women are gathered in the local courts of first instance (68% of the

ordinary courts). In all jurisdictions, their share in positions in the appeal courts is too low compared to their overall number, age and time of service. In North Rhine–Westphalia, the largest federal state in Germany in which we have researched the situation of women in the judiciary on demand of the Ministry of Justice, only few of the presidents' positions in the first instance courts are held by women. Also the number of women in vice president positions and director positions (heads of local courts of first instance) has only risen slowly over the past ten years. This can be taken from the figures of the equal opportunities plans that the courts have to edit regularly. But there are female appeal court presidents: 1 from 3 in the ordinary jurisdiction, 1 out of 3 in the labour appeal courts and the president of the administrative appeal court is a woman (before she was president of the social appeal court). However, these swallows don't make the summer. It is a kind of virtual femininity: the number of women on the first career step, e.g. as heads of chambers is remarkably low.

The presidents of the first instance courts are the key players in the system. They decide who can get administrative experience at their court, which is a prerequisite for a career. There is also a slight tendency to give women lower marks in the regular grading, which is done every 4 years. To sum up other career impediments:

- Work at local courts of first instance is a blind alley for careers. There is a kind of barrier between the local and regional courts of first instance: the judges there are less visible to the president of the regional court, who is their supervisor.
- The classical career stop is to be a mother. Maternity and educational leave makes women “disappear”, and part-time work, which is very common amongst female German judges, is taken as part-time commitment in a system where a career demands considerable commitment: extra work in special functions, the usual long hours working culture in career positions, and mobility. Women also report a lack of support in their families. Presidents may, in a patriarchal caring attitude, also assign positions to them, which may help to combine family and work but are barriers for a career.
- Although the traditional gender roles of the male breadwinner and the caring woman have started to dilute, gender stereotypes still influence the notion of superiors. Women may also forego careers for the sake of their families, although their career motivation is high, as internal studies have shown. The question is whether their life circumstances are favourable and let them have enough time and strength for a career. Women also trust less in their competencies than men (lower perceived self-efficacy) and less in their success (lower perceived efficacy).

Due to the demographic factor, the proportion of women in the judiciary is constantly raising, so the judiciary needs more women to move up. This is why our research had been commissioned. On federal level actions have been taken through the Women Jurists' Association to get more "Women in Red Robes", i.e. to the federal courts. There is also political pressure to advance equal opportunities measures although the success is slow.

Another question is whether the rising number of women on the bench changes the judiciary, whether they make a difference. Historically, women had been kept out from the legal field because it had been feared that due to their emotionality they would be unable to judge objectively. This notion had been fiercely fought against by generations of female judges. The question is whether women bring in another life experience and different world views. When the American president Barack Obama proposed Sonia Sotomayor to the Supreme Court, it was questioned whether she would be able to be a "good" judge. Her response was: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." Notions of difference were also uttered by Brenda Hale, the first woman at the British House of Lords, which is now the constitutional court of the U.K.: "The incorporation of difference on the bench subtly changes and, ultimately, improves the judicial product."

In our international comparative research on "Gender and Judging" (Schultz and Shaw, 2013) it is mainly in Anglo-American countries, where the judges personality matters more than in civil law countries statements, that we found statements like: "The colour and gender blind judge is a myth"; "Males and females develop different world views and see themselves differentially connected to society."

Does it mean that women decide differently? Do they change the culture at law courts, a phenomenon which has been described for other fields of work in society? Do they listen better? Is their style of dealing with parties and accused at the courts more cooperative, friendlier? Are they less set on competition? Or are women even more capable of better decisions?

In our book, the questions were discussed whether women:

- use a more interdisciplinary approach;
- avoid the rigid application of universal rules and doctrinal decisions;
- redraw the boundary between the legal and the social;
- reach more balanced decisions;
- avoid contentious solutions, search for win/win solutions.

There is some evidence for gender effects but of course no definite and clear answer to these questions is possible. After all, the personality of the individual judge matters.

Empirical research in common law, as well as in civil law countries, has shown that the gender of a judge may matter in gender coded case, e.g. in family law, in labour law, administrative law, criminal law, but also pension law and social law. In family law, female judges tend to be less generous than their male colleagues are to female applicants who ask for alimony (e.g. results from research in Brazil, Poland, France and Germany), an effect which can be easily explained: women judges, as working women, expect other women to gain their living themselves too. Research in France and Israel showed that women judges tend to have a more caring attitude. Women judges also wrote their decisions in a more pro-woman fashion (they even rate work at family courts higher than their male colleagues do).

In labour law in the U.S., in sexual harassment and sex discrimination cases a panel effect was observed, i.e. that male judges on labour court panels tended to orient their decision to their female colleagues' opinion, possibly expecting them to be more competent in these matters. In administrative law in asylum cases, women judges were more willing to grant asylum than their male colleagues. It was also women judges who accepted to consider genital mutilation as a cause for asylum. In criminal law women were initially expected to be more lenient, milder than men. There is some evidence that they are, but research in some countries showed that they tend to be stricter in cases of (sexual) violence due to more empathy with the female victim and another understanding of these offences, and even in these cases in some countries the opposite was found. Here the explanation can be that women counteract what is expected from them as decision. In South Africa, when at the end of apartheid black women judges were nominated to the constitutional court, they left clear traces in judgments e.g. in dealing with cases of abortion and prostitution. They also widened the definition of rape from vaginal to also non-consensual anal penetration. In pension law they e.g. granted widows' benefits also to non-married partners.

In social courts in Germany female and male judges voted differently on the question whether the health insurance should cover the prescription of Viagra or not.

In Canada it was found that after the first women took part in decisions of the constitutional court they dissented far more often than their male colleagues, an effect which decreased in recent years maybe due to a reduction of gender issues in upcoming cases.

So the question remains: why is it important to have women on the bench? It is a demand of the gender equality principle in the constitutions; in Europe it is also a demand of the EU and national anti-discrimination legislation.

Equal participation is an inherent feature of democracy, it enhances legitimacy and public confidence into the judiciary, and means that the judiciary will better reflect society and represent the diversity of the litigants.

It also raises awareness of gender issues within the judiciary and the public at large and counterbalances the traditional perception of the judiciary as a masculine enterprise.

### **ULRIKE SCHULTZ**

FernUniversität in Hagen  
Kammannstr. 18, D58097 Hagen, Alemanha  
Contact: Ulrike.Schultz@FernUni-Hagen.de

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