Voices and Choices
The social reality of justice

Gender and Judging
Changes in the Judiciary through feminisation

Ulrike Schultz
FernUniversität in Hagen, Germany
Gender and Judging

Voices: do women add another voice to judicial decision making or
Do women judge differently?

Choices: do women have a rational choice in opting for a career in the judiciary:
- entrance
- promotion
Gender and Judging – the research project

**International - Comparative**

- Research of *Women in the Legal Profession Group* results edited by Schultz, Ulrike and Shaw, Gisela
  - Special issue of the *International Journal of the Legal Profession* 2004
- Results to come from LSA - CRN *Gendered Judging*
  - Special issues of the *International Journal of the Legal Profession* 2009
  - Special issue of *Feminist Legal Studies* 2010

**National**

- Vast range of published and unpublished articles, mainly in common law countries

**Next Project: Women in the Academy**
Gender and Judging
the comparative volume

28 contributions from 18 countries:

• Europe: UK, France, Germany, Italy, Switzerland, Netherlands
• Africa: South Africa, Ivory Coast, Kenya
• North America: Canada, USA
• South America: Argentina (Brasil)
• Australia
• Asia minor/Arabia: Syria, Israel
• East Asia: India (Ann Stewart), Japan, Philippines, Cambodia
Gender and Judging
the comparative volume

• Pioneers and Eminent Women Judges
• Women Judges’ Work and Careers
• Gender Perspectives in Judging
• Gendered Construction of Judges
• Feminist Judges and Feminist Adjudication
• Quotas and Diversity
• Gender Training for the Judiciary
History: 19th cen. exclusion

- French revolution – creation of modern state
  - Society of men
  - Women denied civic rights in grand legislative projects
  - Legally subordinate to fathers and husbands
    - No access to higher education
    - No admission to professions
History: 20th cen. 1900 – 1950/70
rejection, discouragement, oppression

Admission due to social upheavals (war/revolution)
• Right to vote
• Constitutions with equality rules
• Persons´ Acts
• Explicit statutory regulations

ejudges
- Germany 1922 France 1946, Italy 1963
- common law countries 1960s/70s – USA late 19th cen.

Slow progress
Reasons for obstacles

• Gender stereotypes
  – Women the others: emotional, non-objective
  – Women too good/soft for hard task
  (male image 1955: “judges like soldiers in the Friderician army, one like the other, low in individuality, high in devotion to their task…”)

• Women unwanted competitors
Today: fast growth from fringe dwellers to solid basis

Common law countries 10 – 20%
    (Israel >50%)
Civil law countries 30 – >60%
    (East Asia 10%)
Increase due to
    - access to higher education
    - second women´s movement
    - financial situation
    - equal opportunities legislation
    - anti-discrimination legislation
• Different systems
  – Civil law countries: career judiciary
  – Common law countries: meritocratic system
Career perspectives - promotion

• Stratification:
  – Civil law countries: women at courts of 1st instance
  – Common law countries: women as magistrates

• Reasons
  – Networks, connections, gender stereotypes
    • Male gate keeping
    • Glass ceiling
    • Leaky pipeline
    • Slippery floor
The other voice
Do women judge differently - better?

• Are women different? Contested question
• Jutta Limbach: German Judges’ Day 1995
  “Changing Justice”

Do women change the third power (i.e. the judiciary)? Are we witnessing in our administration of justice the emergence of a feminine element, articulated through empathy and leniency? Or is it that the judiciary and the study of law tend to have greater appeal for women who are structured similarly to men?
Difference theory

• Carol Gilligan: In Another Voice (1982)
  female ethics
  logic of care  Fürsorgemoral
  relatedness, responsibility, care

male ethics
  logic of justice  Gerechtigkeitsmoral
  normative thinking, oriented towards abstract
  universal principles („blind justice“)
Difference theory

• Deborah Tannen: Women and Men in Conversation
  You simply don’t understand (1990)

Men’s Talk = language of report
Negotiating status in a hierarchical social order
Preserving independence

Women’s Talk = language of relatedness
Creating bonds, keep intimacy, avoid isolation
No difference?

- Assimilation in legal education and training/practice to neutralised image of the judge
- Equal qualification
- Primary identity as professionals (judges/prosecutors)
- “Individuals are more likely to be transformed by institutions than vice versa.”
Difference?

• “Myth of colour and gender blind judge”
• “Males and females develop different world views and see themselves differentially connected to society.”
  – Different life experiences
  – Different world views?
  – Is there a feminine essence (Bonelli – Brasil)
  – More pluralistic decisions (Bartholomei – Italy)

• In how far can these different experiences come into the judgment?
• Again: difference between the systems –
  – common law and civil law?
Findings:
Gender matters in gender coded cases!

• in any kind of family law
  – custody cases v alimony cases? (Brasil, Poland, Germany …)

• labour law
  – sex discrimination and sexual harassment cases (extended research USA)
  – individual effect – panel effect

• Administrative law
  – Asylum cases – genital mutilation (Brenda Hale UK)
  – Consent to abortion (Argentina)
Findings:
Gender matters in gender coded cases!

- Criminal law
  - Either more rigid or more lenient attitude
- Interpretation of rules
  - (Sexual) violence,
  - Rape non-consensual vaginal (anal) penetration South Africa
  - abortion
  - prostitution not only incrimination of prostitute but also of customer (S.A.)
- Pension law: widow benefit rules for non-married partners? (S.A.)
- Social law
  - viagra paid by insurance? (Germany)
  - Uniform tariffs for men and women in insurances (European Court f Justice – German judge Kokott)
Final questions

• Why are there fewer dissenters now? (Canada)
• Do judges need a gender education? (East Asia)
• What will the picture be like in 20 years?
• So:
• Is difference on the bench necessary?
• *The greater the diversity of participation by judges of different background and experiences – the greater the range of ideas and information contributed to the institutional process.*
If you want to contact me …

• Ulrike.Schultz@FernUni-Hagen.de
  FernUniversität, ZMI
  Postfach 940
  D 58084 Hagen
  Tel.: 02331 870811

• www.ulrikeschultz.de