Sexism in law and the impact of gender stereotypes in legal proceedings

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Sexism – gender stereotypes

- Sexism
  prejudice, discrimination based on stereotyping typically against women, on the basis of sex

- Gender discrimination
  is against identity based orientation stereotyping like third gender or queer

- Gender stereotypes – where do they come from?
  History, religion, culture, economic situation – biology?
Origin of gender stereotypes in Germany

- **Classical period of German literature**
  - Schiller poem of the bell 1799
  - women’s role domestic, the indefatigable and hard-working housewife – man in the public sphere, creating and earning

- **Biedermeier period 19th cen.**
  - added halo of idyllic domesticity

- **German Empire 1871-1918**
  - middle class/bourgeois orientation strengthened

- **Nazi period (1933-45)**
  - glorification of the mother as the child-bearer and the heart and soul of the family

- **Adenauer republic (1949-67)**
  - conservative family model Dear-Mother–Image, housewife as social status symbol
German Biedermeier

Ludwig Richter (1803 – 1884)
Hausmusik im Winter
Gender Stereotypes

- Which gender stereotypes come to your mind spontaneously?
- Which gender stereotypes does a man/woman in the street have!
- Note three!
Gender stereotypes

- female:
  - Dear mother - raven mother
  - Bitch
  - Beautiful / ugly / fat woman
  - Soft, good, emotional, lenient, illogical, caring, talkative, sensitive, empathetic, helpful, neat, helpful, fearful
- male:
  - Great guy
  - Successful man
  - Fast climber
  - Looser
  - Alpha-man
  - Strong, brave, tough, authoritarian, dominant, logical, proud, intelligent, objective, assertive
Geschlechterstereotype männlich - weiblich

- Durchsetzungsfähigkeit / Erfolg
- Dominanz, Autorität, floßen Angst ein
- Selbstinszenierung
- kultivieren die Männerrolle
- Aufstiegsorientierung
- Seilschaften
- Männer sind intelligenter und schlauer
- Männer sind mutig und stark
- auf Karriere angewiesen
- arbeiten viel
- delegieren
- Arbeitsplatz: Computer, Technik
- Kollegialität
- Objektivität
- Vaterstolz
- Männer fahren mit dem Auto zur Arbeit
- Männer dürfen Tennis spielen
- arbeiten außer Haus
- verdienen mehr Geld

- fleißig
- müssen sich anstrengen
- unlogisch, emotional, weinen
- emotional schwer berechenbar, zickig
- sprunghaft, unbeherrscht
- Konkurrenz von Frauen untereinander
- Ziele 'von hinten herum' erreichen
- neugierig, vorlaut
- Selbstaufopferung, Bescheidenheit, Rücksichtnahme
- fürsorglich, mütterlich, hilfsbereit
- sozial, sozial engagiert
- kommunikativ, kontaktfreudig, geschwätzig
- angepasst, ängstlich, nicht konfliktfähig
- harmoniebedürftig
- empfindsam, einfühlsam, mitfühlend
- nehmen sich gegenüber Vorgesetzten eher zurück
- Arbeitsplatz gemütlich, sauber
- gepflegtes Aussehen, hübsch
The ideal man?
The ideal woman?
GENDER STEREOTYPES
Difference women – men?

- Biology? Hormones? Aggression?
- Intelligence?
- Girls have better marks than boys?
- Different spatial vision?
- Women talk more than men?
- Boys and girls prefer different toys?
Consequences

- Women considered to be more vulnerable, in need of protection, less reliable maybe due to family breaks, performing less well

- Women are due to male dominance subjected to physical, economic and psychological violence
Stereotypes in law

- Gender issues can be found hidden in all areas of law: tax, property, succession law, administrative law, social, labour law...
Consequence for legal status

- **Family law**
  - Wife owes obedience to husband
  - Husband has full custody over children
  - Husband has unenfringed right over wife’s assets
  - Breadwinner – housewife model of family

- **Labour law**
  - Husband could terminate wife’s work contract
  - Women protection rules
    - Labour at night
    - Heavy bodily work
    - Maternal leave,
    - Breaks for breastfeeding

- **Minijobs for women (and men)**
- **Tax law: benefits for breadwinner housewife model**
- **Social law: Derived health insurance, pension for housewife**
Consequences: e.g. gendered labour market

- Unequal pay / gender pay gap / income gap
- Women more threatened by unemployment
- Levels of employment:
  - Horizontal and vertical stratification
- Glass Ceiling
Differences in criminal law – positive discrimination?

- Different crimes for men and women?
- Homosexuality – male crime
- Adultery
- Abortion
- Criminal statistics:
  - Crime connected with violence – male
  - Neglect of minors – only crime with a majority of female offenders
  - Comparably higher percentage of theft and fraud due to women’s overall less good financial situation?
  - Proportion of female offenders for total criminal offence between 4 – 25
- Own sample: 400 cases – 2 women accused
Differences in criminal law - explanations

- **Are women less delinquent/ more law abiding**
  - Due to biological factors
  - Ascribed gender characters
  - Different socialisation
  - Lived gender role as caregivers?

- **Criminal code made by male legislator (1878) sanctionizing typical male behaviour?**

- **Are women due to gender stereotypes treated differently by police, prosecution, judges?**

- **In prison only 2-9% women**
  - They commit less serious crimes
  - Do they get more lenient sentences due to better social prognosis?
GUT GETROFFEN! NORMMENSCH! OHNE GESCHLECHT! KEINE VORLIEBEN...

... KEIN VERmöGEN! KEINE BESONDEREN KÖRPERLICHEN FÄHIGKEITEN!
... TOLL!
Female offenders rise in numbers - explanation

- Due to process of emancipation?
- Women getting more violent (role models – pressure)
- Due to changing gender roles and perceptions women more often investigated by police and accused by prosecution – women getting less pardon?
- More light in darkfield?
Legal Proceedings
Who uses which stereotypes?
Do women judges make a difference?
Do they judge better?
Do judges have stereotypes?

- Theory of the 1980s: preconceived opinions
- “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?
- What else matters?
  - Education
  - Background (class?), life circumstances, ethnicity
  - Financial situation
  - Family status
  - Political views
- In how far can these different experiences come into the judgment?
Do women make a difference?
No difference?

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

- BUT
Difference?
Do women judge differently or even better?

- *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.* (Judge Sonia Sotomayor)
- *The incorporation of difference on the bench subtly changes and, ultimately, improves the judicial product.* (Brenda Hale)
Men make a difference

- Jurisdiction of the old men at the Highest Federal Court
  - Man as head of the family
  - Decisions on procurement
Outcome Gender matters in gender coded cases!

- **in any kind of family law**
  - custody cases v alimony cases? (Brasil, Poland, France, Germany …)
  - More caring attitude from female judges (France, Israel)
  - Women judges rank work in family courts higher than their male colleagues (France)

- **labour law**
  - sex discrimination, sexual and racial harassment cases (extended research USA)
  - individual effect – panel effect (men decide with women)
  - Women judges write more in a pro-women fashion

- **administrative law**
  - Asylum cases (USA, Germany) – genital mutilation (Brenda Hale UK)
  - Consent to abortion (Argentina)
Outcome
Gender matters in gender coded cases!

- **Social law**
  - viagra paid by insurance? (Germany)
  - Pension law: widow benefit rules for non-married partners? (S.A.)
  - Uniform tariffs for men and women in insurances (European Court of Justice – German judge Kokott)

- **Criminal law**
  - Criminal cases broad gateway for sexist arguments as perpetrator’s (also witnesses and victim’s) personality and act are evaluated
  - Either more rigid or more lenient attitude
  - Women judges rank work in criminal courts lower than their male colleagues
Differences in criminal law – empirical results

- Research 1980s and 90s:
- Women could get a bonus if conforming to stereotypical gender role – being subserviant, gentle, helpless
- Role-breakers run risk of less sympathetic treatment, stiffer sentences
- Criminal proceedings not only as an investigation into their conduct, but also evaluation of expectations regarding their role as women
- Women as victims of rape rather seen as seducing or provoking
- **Today with almost 50% of female judges and prosecutors and 30% of women in the police???

- Women the true beast (Sunday TV crime series Tatort and court trial shows – judge Salesch, Hold)
Gender in the communication process

- Do women listen better?
- Is their style of leading the proceedings and their style of interrogation friendlier, better? (France)

- Versus:
- Male statements towards female participants in a proceeding (parties, accused, professionals) were geared towards establishing male power and hierarchical status. (Bryna Bogoch, Israel)
Gender issues in judging current examples

- Cuts in alimony for divorced partners (disadvantaging mainly women)
- Child care rights of men and women
- Rights in same sex marriages (ECHR, ECJ, Federal Constitutional Court)
- Legal position of transsexual and intersexual persons
- Wearing of headscarf or burka in public
- Tax benefits for married couples
- Cuts in social benefits for non-married partners
- Interpretation of stalking, domestic and sexual violence
- Asylum or refugee status for women threatened by female genital multilation
Women’s contribution?
Do women judge better?

Do women judges promote substantive justice?
- Use a more interdisciplinary approach,
- Avoid rigid application of universal rules and narrow doctrinal decisions,
- Redraw the boundary between the legal and the social?
- Do they reach more balanced decisions?
- Avoid contentious solutions, search for win/win solutions?
- Decisions written in a pro-woman (empathetic) fashion
What about gender awareness?

- In all gender coded cases it is important to take gender aspects into account

- But: deficits in gender knowledge
  - In legal publications
  - In legal education
  - In judicial training

- How to create gender awareness
  - special gender trainings
  - gender aspects in any kind of judicial training

- Why is it so important?
Lasting gender stereotypes

- I had written an editorial for our Journal for Judges and Prosecutors. The editor in charge wrote to the colleague who had commissioned the article:

  Herewith the corrections for the editorial the style of which strikes me as masculine and harsh rather than feminine and gentle. Never mind.
Why is it important to have women on the bench?

Diversity on the bench

- is a demand of the gender equality principle in the constitution
- is a demand of the EU and national anti-discrimination legislation
- will give equal participation which is an inherent feature of a democracy
- means that the judiciary will better reflect society and represent diversity of litigants
- enhances legitimacy and public confidence into the judiciary
- raises the awareness of gender issues within the judiciary and the public at large
- counterbalances the traditional perception of the judiciary as a masculine enterprise
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