

Gender and the Legal Profession – Changing Legal Cultures? Introductory Reflections

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This issue of the Journal of Law and Social Research deals with some of the changes which have taken place worldwide over the last few decades in the ‘world of law’. This development of a changing gender composition of first legal education and then the legal profession is first and foremost quantitative. Female students now comprise more than half of law students in the Western world, and their numbers have been growing quickly in the rest of the world as well, be it in Africa, in the Middle East or in Asia. Women have always been working, and many have also been doing (less well) paid work during most of the 20th century. Over the last generation the so-called bread-winner family model has been transformed, as women have more generally entered the world of paid work. Very many women have kept the major responsibilities for unpaid work, which has led to the introduction of a new concept and concern – that of the work-life balance.

The global movement of women into the professions outside of the communist and socialist world was boosted and supported by amongst others the feminist movements strengthened by the global “May revolution” of 1968. This movement – in some respects perhaps comparable to the Arab Spring – was influenced by and brought together black civil rights movements in the US with students and workers in Mexico, Paris and Europe (East and West) and anti-colonial struggles in Africa. The increasing focus on mass education on all levels alongside with general social and democratic movements gradually brought a lot more women into academia. To a very large degree they were newcomers to a professional culture, characterized by long term historical masculine domination. This was a professional culture, which was representative of a more general societal and legal culture dominated by conservative values supporting all societal institutions, be it the state, the family, religions or educational institutions.

Grethe Jacobsen, a Danish legal historian, claims in her article that for “*most of the last two thousand years of Western history, laws and courts were staffed by people, who had nor formal legal training but whose qualifications rested with their sex (male), civil status (married) and economic position (head of household, taxpaying citizen.*” The history of female legal professional in the Western world encompasses at most a century. However, this does not mean that women have not been involved in legal proceedings. What was important was the civil status of women – and men. In all western law “*the norm is male, usually qualified to the adult, propertied male. All legal rules, decisions and settlements were permeated by the issue of gender.*” The more male a woman was, the more rights she would enjoy, Jacobsen claims. Female monarchs were accepted, and women could hold certain property rights, especially inheritance rights were important.

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The role of law and especially the courts over the last two thousand years has been to keep up “the patriarchal equilibrium”. Economic changes and system changes did not impact on this during the industrial revolution, as the “*new active capitalist citizen remained purely male in spite of the need for capital and agents during the changing economic conditions.*” Muslim women in Eighteenth-Century Cairo actually had more property rights than contemporary women in France and England, but Islam did not overturn the patriarchal order as we know.

The German sociologist of law, Ulrike Schultz has written and published extensively on women in the legal professions. The book “*Women in the World’s Legal Professions*” from 2003 coedited with her German-British colleague, Gisela Shaw is a gold mine of descriptions of the situation of women in the legal professions in primarily European and English speaking societies (but also including articles from Brazil, South Korea and Japan). The book brings together 15 articles from four continents. “*What remains to be written is the story of women lawyers in underdeveloped and in developing countries, including those belonging to the world of Islam.*”²

This small journal will not fill out that lacunae, and also it is more oriented towards probing into the impact of women in the legal professions on the legal culture, but it does present articles from both Africa and the world of Islam.

In her introduction to the large anthology on *Women in the World’s Legal Profession*, Ulrike Schultz mentions a number of general issues that may be repeated here: Life and career planning for women generally, including women jurists, is shown to be greatly influenced by national preferences for specific life models for women. In most Western states, admission of the first female jurists to the advocacy occurred at the turn of the nineteenth to the twentieth century or during the first decades of the twentieth century. Granting women access to the legal professions was delayed even longer in countries where the move towards an industrialized economy and a modern state occurred at a later stage.

While the percentage of female practicing lawyers has been growing in Europe and in North and Latin America, in South Korea and Japan participation rates for women are very low due to the persistent exclusionary strategies in these countries.

In legal education female students are experiencing what Schultz calls a process of ‘*assimilation*’ which is achieved through mainly male tutors teaching a traditional law school curriculum characterised by “*an ideology of masculinism and homosociality at the expense of attentiveness to feelings and personal beliefs.*”³ Women academics according to Schultz generally suffer from isolation, marginalisation and underrating of their achievements.⁴

² Ulrike Schultz, Introduction: Women in the World’s Legal Professions: Overview and Synthesis. In Schultz and Shaw (eds): *Women in the World’s Legal Professions*, Hart, 2003, p.xxv

³ Ibid, p.xxxix

⁴ Ibid, p.xl

For Schultz, the impression of a success story related to the increased quantity of female law students and female legal professionals, conceals a situation of unwitting discrimination where “*women lawyers tend to remain on the margins of power and privilege.*” However both women and men are inclined to attribute discriminations more to individual failings than to gender-based issues.⁵

Traditional social class structures survive in the Anglo-American bar, which is dominated by older white males from elite law schools, who work in commercial law with corporate clients. Low incomes are typical of women lawyers working on their own in Germany. Bread-winner arguments are still important in a profession, where many professional women forego a family especially in highly gender conservative societies. Women are considered to have lower social capital and fewer networks, but gender issues are not considered in professional codes, and women fear stigmatization (also seen lately in the discussion about the EU gender quota in relation to boards in business).

As a provisional conclusion Ulrike Schultz notes the following:

“We have noted that due to the continuing gendered division of labour between the sexes in the family, female jurists work harder but stand fewer chances of professional success. There are intentional and unintentional mechanisms that produce professional hierarchies and persistent social forces that cause gender discrepancies. To name but a few: conscious and unconscious stereotyping (men as breadwinners while women work to meet the bill for the child-minder); the effects and notions of motherhood and even of femininity as damaging to professional commitment and efficiency; structural barriers in selection procedures and workplace arrangements; a male symbolic order based on homo-social bonding; male networks and style of working; a ‘hegemonic masculinity’ with a fixation on male cultural capital as opposed to women’s human capital. All this leaves women with either no choice at all or with choices taken under pressure, thus belying rational choice theory.

It has been shown that legislative as well as voluntary measures to reduce discrimination against women (and gender stratification) have met with no more than limited success. Two forms of segregation persist: firstly, vertical segregation in a hierarchical order, where women are pushed into the low ranks and male gate-keeping mechanisms force them either to conform or to create their own niches outside the traditional order...; or secondly, horizontal segregation allocating men and women to different fields.”⁶

Ulrike Schultz is not very optimistic either about the possibilities of women changing the legal culture, as they have been subjected to the submission under the male dominated legal and professional culture. “*Quantitative feminisation does not automatically equate with feminisation in the sense of demasculinisation, or a change of gendered practices in legal work and culture or in the profession itself.*”⁷

⁵ Ibid, xli

⁶ Ibid, p.1-li

⁷ Ibid, lviii

The Finnish gender researcher, Harriet Silius, who writes in the anthology has found decreasing income discrepancies between the sexes but growing income differentials among women themselves. She also underlines the importance of general social changes as (in the Nordic societies) the expansion of the welfare state, the deregulation of markets and the economic recession of the mid-1990s in Finland following the collapse of the Soviet Union and the later economic boom in the end of the 1990s.⁸

Have women's entrance into the legal profession only reconstituted inequalities?

To some extent this is perhaps the case. It has been underlined repeatedly over the last years that globally inequalities have been growing to degrees, which are beginning to feel threatening even to the affluent in affluent countries.⁹ Some of the detrimental consequences of these growing inequalities have been discussed by two English doctors in their book *"The Spirit Level: Why Equality is Better for Everyone."*¹⁰ The spirit level used by the two authors indicates relations in a societal context. During the last decades – especially after the fall of the Berlin Wall – the income gap between the rich and the poor within individual affluent countries has grown considerably. According to the two authors, who are basing their book on a very large number of international statistics from well-known and recognized institutions, this has detrimental effects for society in different ways.

Even among the countries which have according to current yardsticks (so far) been considered the most affluent countries of the world, the authors point out that the greater the income gap, the worse the outcomes for everybody in unequal rich countries in relation to community life and social relations, social mobility, physical and mental health including obesity and life expectancy, educational performance, teenage birth, violence, imprisonment and punishment.

The book argues that inequality leads to erosion of trust, increase of anxiety and illness, and encourages excessive consumption. Inequality neither promotes justice nor peace or benevolence.

The authors have created an Equality Trust with considerable information and resources about their work.¹¹ The slides, which are available online show that the very rich do not necessarily live longer or better lives than the less rich and affluent, who

⁸ Harriet Silius, *Women Jurists in Finland at the Turn of the Century: Breakthrough or Intermezzo?* In Ulrike Schultz and Gisela Shaw (eds): *Women in the World's Legal Professions*, Hart, 2003, p.398

⁹ *See *The Economist* Oct 13-19, 2012. The cover story (and inside special report on the world economy) is entitled "TRUE PROGRESSIVISM. The new politics of capitalism and inequality". The cover image shows a huge well manicured white male left hand in a jacket and white shirt with cuff links. The hand bows the leaves of an orange tree towards the small white right hand of a poor person on the other side of the wall, for this person to pick the 'low hanging fruits'. The cuff link of the wealthy, powerful white man has an image with the face and name of Theodore Roosevelt 1858-1919.

¹⁰ Richard Wilkinson and Kate Pickett: *The Spirit Level: Penguin Hardback 2009, later paperback versions.* The book is translated into at least 10 languages and more translations are in preparation, <http://www.equalitytrust.org.uk/resource/the-spirit-level> The subtitles have varies according to country and publication time. The 2010 British edition was subtitled *Why Equality is Better for Everyone.*

¹¹ <http://www.equalitytrust.org.uk/>

live in poor but more equal countries. The dramatic comparison is that of the US and Cuba, where income is very different, but life expectancy is almost the same.¹² The authors, one of whom is a woman, do not address gender issues specifically, but it seems to me that gender aspects are clearly relevant in this context. Large income differences restrict social mobility and high numbers of teenage pregnancy influence girls' educational careers. High economic inequalities are also likely to lead to child poverty in single parent families.

Ulrike Schultz's article for this journal "*Do female judges judge better*" is translated from German and deals with German experiences. Once again it underlines the fact that women are everywhere newcomers to the legal profession. It also reminds us of the negative role of authoritarian regimes regarding women's rights and access to education, professions and the public sphere. In Nazi-Germany female lawyers disappeared almost entirely during the Third Reich. This undermined female authority in modern society for decades to come after World War II.

The conservative legal profession in a post-authoritarian state has required considerable assimilation and submission from its new female members. Women are finding themselves in an ambivalent situation, where their competency is being questioned and their self-confidence is undermined. In Germany as in many other countries, women are looking towards other fields and practices of law than the traditional legal profession to find access to ways of using their lawyering skills and to gain financial independence. Schultz claims that it is the communicative behaviour and style of work that distinguishes (some) female lawyers from male lawyers, but also that female lawyers have changed the law as judges, politicians, legislators and in cooperation with work done at grassroots level.

Julie E. Stewart's report on "*Lawyers? Women? Women Lawyers in Zimbabwe,*" is written for this journal. It is striking to note the more optimistic approach than in Ulrike Schultz and Gisela Shaw's anthology from 2003. Stewart's article is probably one of the first attempts at giving a both quantitative and qualitative description of the development of the situation of female lawyers in Africa. Julie Stewart is a white originally Australian lawyer, who has spent the last 40 years in Zimbabwe, most of them at the University of Zimbabwe, where she is a professor of law. She has a very long experience of dealing with issues concerning women and law, both regionally in Southern Africa, in cooperation with Nordic Women's Law environment as well as internationally.¹³

The number of female students and lawyers has been on the rise constantly since Zimbabwe became independent in 1980. In the 1982 graduating class only one out of 13 students was a woman, and 85% of students were white – whereas the white population in Zimbabwe made up about one per cent of the population at that time. In 2012 all graduates were black and more than half of them were women. Affirmative

¹² <http://www.equalitytrust.org.uk/docs/spirit-level-slides-from-the-equality-trust.ppt> See for instance Income per head and life expectancy. Rich and poor countries.

¹³ See the article by Julie Stewart in Rubya Mehdi & Farida Shaheed (1997) *Women's Law in Legal Education and Practice in Pakistan*. New Social Science Monographs, Copenhagen

action for females is not required and there is no formal legal basis on which women can be excluded or discriminated against in the legal profession. However, a “*very male paradigm imbued culture within the legal profession*” may perhaps lead to that “*women within profession seek to stay as close as possible to male work parameters.*” Women fear victimization – for instance if they would take legal action against employers. This male paradigm may also have led to the fact that one of the chosen professional areas for women lawyers is the NGO world, where women work in a number of law related NGOs.

Stewart claims that women lawyers have been especially energetic in generating critical analysis of the law and its treatment of women in a way that men would not. Administrative practices demanding that a married woman must change her surname is one example. Another is that women have not been considered ‘persons’ under South African Law until recently. Women lawyers have over the recent years attacked these practises through test case litigation, law reform lobbies and trenchant critical research reports, which have been used to effect formal law reform and clarification or declaration as to the exact legal position. They have stimulated what Stewart calls ‘creative law reform measures’ in areas such as the Legal Age of Majority, intestate inheritance law and lobbying for comprehensive marriage law reform. Although not expressed explicitly it seems clear from this article that the legitimacy felt by women in the post-colonial legal regime and legal culture is also related to their involvement in the liberation struggle. What still remains are to make law school curricula more sex and gender relevant. There is also a need for development of business and legal models that override the negative impact of the assumption that all things business and agricultural are male, and there is a need for law to be imbued with female understanding and perspectives and the development of a cross cutting feminist jurisprudence.

“*Women in the legal profession do make a difference*” claims Julie Stewart, but it is clear that it is not only increasing numbers of female legal professionals that matter. It seems rather to be interconnections between female professionals and a number of other civil society actors such as NGOs, (female) politicians, academics, and other groups as well as development of creative measures and methods. It is by contributing to these processes of change that women in the profession make a difference.

Similar experiences and developments seem to be found in Northern Africa in Morocco, where Danish lawyer and ph.d. student, Mira Ramhøj, lived during the first decade of the 21st century with her (then) Moroccan husband and family. That gave her the opportunity to follow the legal reform of the Moroccan Family Law in force from 2004 and observe the many and diverse actors and strategies involved as well as the tensions amongst different parts of society regarding the reform. The changes of the Middle East during the Arab Spring also affected Morocco, where Islam light policies have become more influential. Mira Ramhøj discusses this development for the process of future interpretation and implementation. Her article also underlines the importance and presence of non-professional women and religious women, who struggle for a change not only of formal law, but also of misogynist legal cultures and traditions – a

struggle which women have been involved in for centuries all over the world. The interconnectedness of different strategies and struggles seems to be the clue to deeper societal and normative change.

Ridwanul Hoque, a Bangladeshi legal academic, gives us what to her knowledge is the first-ever essay on gender and the legal profession in Bangladesh. There are certain similarities to the situation in Zimbabwe, for instance the prohibition against (gender) discrimination in the Constitution of Bangladesh. The first law relating to legal practitioners in British India goes back to colonial times and to the Legal Practitioners Act of 1879. In 1923 the Legal Practitioners (Women) Act was enacted, providing that no woman can be disqualified by reason only of sex. This act coincides with the history of women in Great Britain entering the legal profession in 1922.

Ulrike Schultz writes that the Anglo-Saxon legal culture seems to provide women with a hurdle especially as regards both the bar and the judiciary.¹⁴ It took until the 1960s and 1970s before women were appointed to county courts or high courts in England, Wales, Australia and New Zealand. In this respect it is significant that in the Anglo-American legal culture the judiciary has the highest status and prestige, and could thus be expected to be guarded most jealously by a male legal profession and culture. There seem to be similarities to the post-colonial history of Bangladesh, where women have also had considerable difficulties accessing both the bar and the courts. As of today only 10% of advocates in Bangladesh are women, but not all of them are even active in what Hoque describes as a “*prohibitive social culture*” with restrictions vis-à-vis women legal practitioners. Hoque also mentions the importance of family relationships for access to the courts and other high status levels of the legal profession. Similar observations are made for Germany by Schultz (2003), although here in relation to private practice and not for the judiciary. “*As advocates tend towards liberal conservatism, I see definite effects of another factor: the highly qualified daughters of formerly patriarchal lawyers make their way into the profession and their fathers and consequently those around them go through a process of reeducation.*”¹⁵ Here different legal cultures are at stake.

Judges do not have the same high status in continental legal culture as in Anglo-American legal culture. Schultz writes that women, who “*have been shown to be more conservative, from higher strata of society, more obedient, less competitive and more willing to adjust than men*” seem well suited for the continental European judiciary¹⁶ – but not for the Anglo-American influenced legal cultures.

With legal academia having a lower prestige in the Anglo-American legal culture and profession including in the post-colonial societies influenced by that tradition, it is perhaps not surprising that the level of women in academia is higher, on average 30%. As in Zimbabwe Bangladeshi female lawyers opt for other professions than the traditional legal ones such as development practice, corporate jobs, social legal movements and associated NGOs. The ambivalent role of the Supreme Court towards

¹⁴ Schultz above, p.xxxiii

¹⁵ Schultz (2003) *The Status of Women Lawyers in Germany*, in Schultz and Shaw (2003), p.289

¹⁶ Schultz above p.279-280

claims for change of gender biased practices also shows similarities to Zimbabwe, another post-colonial state.

Hoque identifies the following factors or reasons as explanations for the lower rate women in the legal profession:

- the crowded environment of the courts and the absence of women-friendly facilities
- sexual harassment or stalking by colleagues, or clients or others
- the difficulty of balancing career and family life (or the expansion of family responsibility)
- decline of professionalism, reputation, and ethics
- absence of income and lack of remuneration paid by the 'seniors' in the early years of the profession
- lack of enough role-models in the legal profession
- failure to keep up with technology and changes in law
- the nature of the work involving much labour
- availability of alternative careers with relatively more remuneration (at the early stage of career) and time-flexibility

Hoque also mentions that many in responsible positions feel uncomfortable to discuss and debate inequality and inequity in the legal profession.

Mengia Hong Tschalaer presents an article on *Competing Model-Nikahnama: Muslim Women's Spaces within the Legal Landscape in Lucknow*. Based on empirical data gathered in the city of Lucknow, Northern India she explores the ways in which Muslim women's activists seek to carve out space for the creation of gender-just laws within a religious framework, and how within these women's legal spaces, orthodox demarcations between secular and religious practice and legal authority become blurred.

The legal mobilization of Muslim women in Lucknow contributes to an emerging landscape of interlegality. Already at the beginning of the 20th century, upper class Muslim women's activists in India sought to challenge orthodox interpretations of the Islamic marriage by reinterpreting the religious parameters of female subjectivity within conjugality. They reasoned that the textual sources of Islam are subject to interpretation and are changeable rather than absolute.

In 2005 the All India Muslim Personal Law Board published a model-marriage contract, a small document of four pages in Urdu. However, the activists were not satisfied with this contract. Muslim women's activists in Lucknow felt that their identities and rights as citizens were seriously jeopardised by patriarchal interpretations of matrimony by the clergy. They argue that a model-*nikahnama* drafted entirely by women was necessary in order to question the clergy's discriminatory interpretation of the textual sources of Islam and hence challenge their authority of interpreting religious texts. These Muslim women's activists command an eloquent knowledge of Islamic laws as well as state-governed Muslim Personal Law, Criminal Law, the Indian Penal Code and transnational human and women's rights. The activists are hence fluent in a

variety of legal languages, which they combine as well as fragment in order to challenge or even subvert hegemonic legal discourses on gender.

In March 2008, the All India Muslim Women's Personal Law Board (AIMWPLB) released its own model-*nikahnama*, a seven-page document available in Hindi and Urdu. Shaista Amber, the president of the AIMWPLB and author of the document argues that in India, where most women remain uneducated and ignorant about their rights, a number of 'un-Islamic' and gender-unjust practices have been established as law within conservative religious circles. Therefore, a *nikahnama* that stipulates the rights and duties of husband and wife according to the *Quran* and the *Hadith* is needed. In order to ensure that women can legally enforce the rights set forth in this *nikahnama*, Amber lobbies the state to recognize this document. Tschalaer argues that in a context within which women's legal mobilization is constrained, the conceptualization of gender-justice as brought forward in this *nikahnama* cannot be understood against Western, liberal parameters.

This *nikahnama*, which has received considerable media attention, constitutes a crucial counter-hegemonic voice in the debates on women's rights in South Asian Islam. It focuses especially on the financial rights of the wife with regard to *mehar*, marital property, gifts and maintenance. These are issues, which have also been dealt with in the context of Zimbabwe, although there is a less religious context and interpretation. In the Indian case of normative pluralism – legal and religious - it appears according to Mengia Hong Tschalaer to be precisely the complexity and competitive nature of the legal field by which room and possibilities open up for Muslim women's rights activists to work toward gender-justice beyond the normative dichotomies of state versus community and women's rights versus religion.

This is another interesting case of strategic approaches to normative cultures and diverse authorities, which are used specifically by women for women.

Jean-Philippe Dequen deals with the same empirical case in his article *Justice for Muslim Women in India: the sinuous path of the All India Muslim Women Personal Law Board (AIMWPLB)*. It presents the example of an attempt to challenge the 'patriarchal' legal discourse on Islamic Law by procuring an alternative dispute resolution forum specifically aimed at Muslim women's issues, as well as advocating for a more gender equal interpretation of the Quran through the prism of 'Islamic Feminism'. Dequen considers the ADR-forum in the Lucknow area somewhat successful but geographically limited. Islamic feminism originates from a global movement which was not prone to gender equality to begin with. Yet by relying almost exclusively on the Quran, it also paved the way for Feminist movements to interpret the Holy text on their own and to consider it quite gender neutral, if not very protective of women. The AIMWPLB follows this trend by advocating its sole reliance on the Quran as the only valid source of Islamic law. For Shaista Ambar (also mentioned in Tschalaers article), the Holy text suffices to solve most of the legal problems that Muslim women face. Dequen however is weary of the possible counterproductive effects of the AIMWPLB's alternative legal discourse and the attempt to strengthen it based on individual interpretation and positivation through the Indian constitutional

frame.

In modernizing societies the self-perception and legitimacy of the legal profession is often related to values of neutrality and equality, and this probably makes it more difficult to acknowledge biases, discriminations and malpractices in the profession.

What the articles in this issue seem to underline are a continued presence of women in normative traditions and cultures, which are often hybrid traditions mixing different norms and forms of authority. In all the normative traditions and cultures mentioned in these articles – be they religious or secular or most often overlapping and interconnected, women have had to assimilate, adjust and adapt to time and context – as have probably men, although more often under more privileged conditions.

The articles demonstrate that assimilation has also often gone – and still goes hand in hand with activism, critical analysis and creative strategies as well as dynamic interaction and cooperation between different walks of lives of different women from different parts of society.

There seems to be room for optimism and there is certainly inspiration to be sought in these diverse contributions which link analysis with reflections on gender and legal cultures undergoing changes.