

## Gender and Judging in Portugal: Opinions and Perceptions

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### Abstract

In Portugal, the phenomenon of feminization of the legal professions is quite recent compared to other countries. The increasing predominance of women among magistrates – judges and public prosecutors – since 2006 has been overwhelming though. If, until 1974, the judiciary was forbidden to women, in 2015, from a total of 1990 judges in first instance courts, Appeal Courts and the Judicial Supreme Court and the Administrative Supreme Court, 1175 were women (59%). Within the Public Prosecution, 61% were women. The weight of women in the legal professions is visible, even, at the Centre for Judicial Studies, where 67,5% of the justice auditors, in 2014, were women. In this scenario, the aim of this article is to discuss the representations of the legal professionals, on the repercussions of this change to the judiciary and to the legal culture in Portugal.

### Key words

Legal professions; women; gender and judging; professional identity

### Resumen

En Portugal, el fenómeno de la feminización de las profesiones jurídicas es bastante reciente en comparación con otros países. Sin embargo, el creciente predominio de mujeres entre los magistrados -jueces y fiscales- desde el año 2006 ha sido abrumador. Si, hasta 1974, las mujeres tenían prohibido el acceso al poder judicial, en 2015, de un total de 1990 jueces en los tribunales de primera instancia,

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tribunales de apelación y la Corte Suprema de Justicia y el Tribunal Supremo Administrativo, 1175 eran mujeres (59%). Dentro de la fiscalía, el 61% eran mujeres. El peso de las mujeres en las profesiones jurídicas es visible, incluso, en el Centro de Estudios Judiciales, donde el 67,5% de los auditores de justicia, en 2014, eran mujeres. En este escenario, el objetivo de este artículo es analizar las representaciones de los profesionales del derecho sobre las consecuencias de este cambio en el poder judicial y en la cultura jurídica de Portugal.

**Palabras clave**

Profesiones jurídicas; mujeres; género y justicia; identidad profesional

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## 1. Introduction

In Portugal, the phenomenon of feminization of the legal professions is quite recent compared to other countries. The increasing predominance of women among magistrates – both judges and public prosecutors – since 2006 has been overwhelming though. If, until 1974, the entry into the judiciary was forbidden to women, in 2015, from a total of 1990 judges in first instance courts, Appeal Courts and the Judicial Supreme Court and Administrative Supreme Court, 1175 were women (59%). Within the Public Prosecution Service, 61% were women. The significant share of women in the legal professions is visible, even at the Centre for Judicial Studies<sup>1</sup>, where 67,5% of the justice auditors, in 2014, were women.

These numbers, as well as the growing role of some female judges and female prosecutors, have attracted the interest of media and of some sections of the judiciary that promote debates on the topic. International studies focusing on the increasing number of women in the legal professions already have a consistent tradition within the sociology of law, covering matters as different as the inequalities that women face in the legal profession (e.g. Harrington 1995, Thornton 1996, Sommerlad 1998, Schultz and Shaw 2003, 2013), and the transformative impact of female participation in judicial practice (e.g. Menkel-Meadow 1985, 1995). If this statement is true for the international scene, the same cannot be said about Portugal, where the subject has failed to attract attention in the sociology of law, with the exception of a few scattered references within general framework studies. In Portugal, the interpretation of the feminization of legal professions focuses mainly on the increasing number of women, relying widely on speculation and stereotypes.

Within this scenario, and seeking to fill this gap in socio-legal research, we developed a research project entitled “Women as judges and public prosecutors in Portugal: career paths, experiences and representations”, which sought to understand the repercussions of the increasing number of women in the judiciary in Portugal, through the analysis of the career paths and experiences of judges and public prosecutors, and also to identify the representations, both by legal professionals and by society at large, regarding the role of women in the Portuguese justice system.

For this purpose we conducted, between June 2012 and July 2013, interviews with around 60 male and female judges and public prosecutors at first instance courts, Appeal Courts and the Supreme Court. The first instance courts were selected according to the following criteria: diverse geographical context – urban and rural, littoral and interior, high and low population density – and the pendency of legal cases. These interviews intended to analyse the personal, academic and professional paths of women in the judiciary, seeking to assess any issues regarding access to the profession and the motivations to study and practice. Our focus included three areas of interest. Firstly, their views on their career, e.g., career expectations, career satisfaction, and peer relationships. Secondly, experiences of discrimination as well as problems arising in the context of reconciling family life and professional activity, and professional status. A third set of questions focused on their observation of differences between male and female judicial decisions as well as on factors that might influence the act of judging by both sexes. Finally, our aim was to understand the attitudes of these professionals towards society, jurisprudence and the role of the judiciary in the national context.

In this article we discuss some of the results of these interviews, aiming to contribute to a first step in the study of the role of gender in the legal professions in Portugal.

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<sup>1</sup> The Centre for Judicial Studies is the Portuguese school dedicated to the recruitment and training of judges and public prosecutors

## **2. The construction of the professional identity of judges and public prosecutors and the presence of women in judicial professions in Portugal**

The 20th century, in Portugal, was characterized by profound political changes; the country having experienced four different political regimes – monarchy, republic, dictatorship and democracy. The legal status of women and the social composition of legal professions have changed dramatically (Pimentel 2008). Until 1974 – the year of the establishment of the democratic regime – women were barred from the judicial professions. The growth of the presence of women in the judicial professions from then on was, as mentioned, significant. But, the judicial and the judiciary systems are more characterized by continuities than by discontinuities. The weight of tradition in the construction of professional identity of the judiciary is impressive (Coelho 2003, Azevedo 2001). The professional rituals and customs separate the judiciary from professions in general and embrace their symbolic capital (Bourdieu 1989). The judiciary of today is the result of its past and of an identity built long before women became part of it. It is, therefore, worthwhile to revisit some historical episodes that characterise the evolution of judicial professions in Portugal.

During the 1st Republic – a period of severe limitation of women's legal rights – two women staged two landmark events. Firstly, Carolina Beatriz Ângelo became the first Portuguese woman to vote in 1911. Taking advantage of the ambiguity of the electoral law that did not distinguish breadwinners (i.e. those eligible to vote) by sex, she saw her right to vote recognized by a court in a ruling pronounced by the father of a well-known Portuguese suffragist, Ana de Castro Osório (Ferreira 1998). Secondly, in 1913, i.e. the year when the electoral law was amended to expressly limit the right to vote to men, Regina Quintanilha became the first Portuguese woman lawyer, after receiving a special authorization from the Supreme Court to practice law. It took until 1918 for women generally to be admitted to the legal professions.

These two landmarks did not, however, coincide with the birth of modern jurisprudence. The permanent tension between judicial and political power during the 1st Republic and the advent of the dictatorship regime in 1926 blocked the development of the judiciary. During the dictatorship – until 1974 – the government's control of the judicial power was, mainly, achieved by the following principles: 1) the apologia of the autonomy of law, of its apolitical nature and of judges' duty of absolute obedience to the law; 2) the political control of access to the judicial career and to higher courts; 3) the creation of political courts within the judicial system.

The authoritarian regime built a judicial system sympathetic to the neutralization of the judicial power. Judges became mere syllogistic applicators of the law (which, in turn, was approved by the political leadership), unaware of the social consequences of their decisions. The idea of a technical judge, who merely applied the law in an apolitical and syllogistic manner, was indeed promoted.

The judiciary was severely weakened towards the end of the dictatorial regime, caught in a crisis of social legitimacy. The first months after the democratic revolution in April 1974 were devoted to the deconstruction of the main features of political control over the judiciary. Judicial independence was granted; the judiciary became accessible to women; and the Centre for Judicial Studies was created. In 1975, the first woman public prosecutor – Cândida Almeida – was appointed to a court. The first female Portuguese judge – Ruth Garcêz – was appointed in 1977. In 1993, Ruth Garcêz became the first woman to be appointed to an Appeal Court, and in 2004 Maria Laura Leonardo became the first female member of the Judicial Supreme Court, followed in 2012 by Joana Marques Vidal as the first female Attorney General. The largest share of women in the judiciary, especially among judges, remains, however, mainly, on the basis of the judicial career, i.e. at first instance courts.

### 3. Has the impact of gender been similar to that on other professions?

In recent decades, we have witnessed gender-related phenomena that were crucial to the reconfiguration of the labour market and of the production relations, including the increase in the investment in human capital, the increasing female presence at all levels of education and training, the increasingly active life of women; the shift to a more continuous career pattern, with fewer family related breaks, partly due to the integration of women with small children into economic activities and the reduction of the fertility rates; and partly to the gradual integration of women into professions from which they had previously been excluded (Ferreira 2010b).

However, some 48 years of dictatorship had produced strongly anchored prejudices regarding women's rights, both in the domestic sphere and in the public sphere, which was hard to fight even after the establishment of democracy and the adoption of a less discriminatory legislation. The labour market was no exception (e.g. Wall and Guerreiro 2005, Ferreira and Monteiro 2012). However, relevant studies barely focused on the qualified professions, leaving aside the legal professions in Portugal. The increase of women in highly skilled occupations, with high social prestige, such as the legal professions, suggests that equality in the labour market is an undeniable reality. But as Virginia Ferreira (1999, p. 26) shows, the situation of women in Portuguese society has been marked, at least since the late 1970s, by multiple paradoxes. We know that even in these professions there remain forms of discrimination, more subtle and cloaked than just wage discrimination.

The interviewees, of both sexes, agreed that progress in fighting gender-based-discrimination in Portuguese society has been remarkable and has produced visible results. The access of women to the labour market and the greater participation in political life were mentioned repeatedly as examples of that evolution. The reasons for social transformation are the same as those that keep it from going further: law and social attitudes. On the one side it is recognized in the literature and among the interviewees that since 1974, notably since the Constitution of 1976, the evolution of law with regard to equal opportunities between men and women has been quite swift. This was followed by changes in attitudes made possible in part by cultural exchange and the circulation of information from Europe that brought emancipatory ideas regarding women. Despite the improvements, the interviewees admitted that there is still a long way to go – although some limit this to specific areas, such as the domestic sphere or political leadership – precisely because the law has evolved faster than mentalities, the latter being still anchored in a patriarchal society.

The difficulties mentioned by female and male judges and public prosecutors regarding their own professional careers and personal lives were seen by them as obstacles faced by women in general, most prominently the need to reconcile professional and family life:

I think there is a profound change in the role of women in Portuguese society, namely, I'll put this date as a reference, but it began even before, eventually with the amendment of the Civil Code [in 1967]. From April 25 up to now, there has occurred a huge advance of women throughout the Portuguese society; women may be magistrates which they could not become before that. [...] Actually, someone as old as me may remember that women working at TAP [the Portuguese airline] could not marry, the female telephone operators could not marry, nurses could not marry, and if they did they would hide it, just because a married woman would have to have work schedules compatible with caring for their children and husband. Nowadays the changing role of women still has a long way to go. Women have evolved a lot, but the positions of real power, everywhere, including in legal professions, in particular in legal professions, at least among judges, which is the one I know best – at the moment we have a female Attorney General and therefore I think that the Public Prosecution has some differences regarding to equality issues

and to the way women are seen – in the positions of power continue to be men! Men are in charge, and they exercise their power according to their stereotypes. Therefore, there is a negative difference for women. We earn the same, we have the same functions... ridiculous example, but it happens every day: a man arrives late, had to take his children to kindergarten, "he is a wonderful, extraordinary father"; a woman arrives late, because she took her children to kindergarten, "it is the hassle of working women, it is the hassle of women in courts". This happens every day! Contrary to what you may think, this continues to happen every day. A fellow male judge gets sick, with a hernia, as I have, "it is a pity, let's spare him from the distribution of lawsuits, it is a pity, he shall be operated", and so on. A woman gets sick: "oh, it's a silly thing, it is a pain in the back and everyone has it". This is the vision I have. (Female judge, FG\_4)

This double bind was a prime topic throughout the interviews, either with men or women, judges or public prosecutors.

### *3.1. Career paths and experiences*

Prior to asking magistrates directly about their perceptions regarding the existence of actual differences in professional practice between men and women, we asked them to describe their life paths – professional and private – from the moment they went to law school until being appointed to the court they were at that time.

Their responses clearly showed up differences in comparison with the experiences of the first women magistrates from the late 1970s to the 1990s. For the majority of the respondents the changes were significant. Women experienced more difficulties in the 70's and 80's and the displays of intolerance came mainly, even then, from elder judges.

The entry of women into the judiciary, in 1977, was an unhappy experience for older ones; among the young professionals it was experienced with joy, because, as it is easy to realize, the female law graduates that entered the judiciary really wanted it, it was by choice, because the judiciary is badly underpaid. [...] And graduates in law, as a rule with family connections in the field, never opted for the judiciary, because lawyering was much more appealing. It is important to say that female graduates were among the top in the admission exams for CEJ. (Male prosecutor 19)

When I entered the judiciary thirty or so years ago in the 1980s, women could just think about becoming public prosecutors. But to rule, to rule, that required a male judge! I remember once, before 25<sup>th</sup> April, my father, who was also a judge, said: "Women in the judiciary? No way". But as the daughter began to think about joining the judiciary and the 25 April came... My father was one of those who said: "okay, public prosecutors, it is ok for women. It is to protect women and orphans. But to pass judgment, it has to be a man!" I think this mentality is outdated, a bit. I do not know if anyone still thinks the judiciary is for men, because only men are able to make decisions. And women should join the public prosecution service, which is an area of social care, regulating details, which may be suitable for women... (Female public prosecutor, FG\_7)

The reported existence of discriminatory behaviour in the early years after the entry of women into the judiciary, is also attributed to older lawyers:

Occasionally, those gentlemen, old-school lawyers, would insist on kissing, instead of the normal urbane greeting; they would insist on indicating the gesture of the hand kissing when it was a lady, even in a trial, but very subtly. Because these were two compelling factors, gender and age, and they were of maximum importance. (Female judge, 19)

Remarkably, however, even for the early years, magistrates, and especially female magistrates, hesitated to characterize such behaviour by their older colleagues or community as forms of discrimination. Or, if they did, they readily attributed it to normal social practice.

No more than what you need when you want to assert yourself in a male group. I mean, in the profession I had neither more nor less than the usual constraints of daily life in which there are certain contexts in which women are still, nowadays, a bit minimized, disadvantaged. But no, I never felt, never had a situation... Indeed in my earlier career I felt openness, an adhesion proper of the values of justice, and even with a female face. It was appreciated. (Female judge, 19)

This goes back to what we said earlier: the magistrates do not see major difficulties in identifying discriminatory behaviours regarding women in society. In fact, when asked about the role of women in society, their narratives quite naturally include reference to problems the majority of women still face in the labour market. However, linking the general (women in society) and the particular (women in the judiciary), the interviewees, both men and women, tended to play down any sign of discriminatory behaviour. There appear to be two reasons: (1) because the judiciary is seen as a highly skilled profession; (2) because, in any democratic state governed by the rule of law, law courts tend to have the function of fighting against any form of discrimination and inequality.

Discrimination is a thing that stopped at the door of the court and as it was formerly said: politics is left outside the barracks. Discrimination stops at the door of the court, according to us. Discrimination exists for others, for the public that comes to court. As most men and women will think, we are not discriminated, isn't that so? And so, I am not being discriminated. (Female judge, 22)

Women who are discriminated against, as recognized by this female judge, are "the others".

However, although distancing themselves from these "other" women and tending to play down situations that could potentially be considered discriminatory, female magistrates did repeatedly refer not only to problems arising from the need to reconcile family and working life, but also to those connected with motherhood (actual and potential). This 'family/maternity gap' is, indeed, a factor widely portrayed in the literature on gender-based discrimination in the sphere of the labour market and employment (Ferreira 2010a):

There are penalties simply because women have children, they have maternity leaves, they have risky pregnancies; I had a very prolonged one. And when children are sick, when there is no support from the grandparents, it is still the woman who primarily stays with the children. Yes, it penalizes. Compared with my office colleague that did not have the same constraints, I have not produced less, but the work was not so good. So, yes, it penalizes, of course. The multitasking that women are obliged to perform... and I have a co-operative husband. I can't complain about not having a co-operative husband. (Female judge 12)

Nevertheless, this additional difficulty of balancing personal and professional life is seen by the interviewees as a factor not directly related to legal professions or their organisation, but resulting rather more either from the relationship with partners and the social expectations imposed on women about their role as mothers or, as some female magistrates said, from their innate conditions as mothers. In sum, there was no expectation of such problems being removable by better professional regulation, as they were seen to arise from within the private and not the public sphere.

Men have an easier life than women, haven't they? They do! They have an easier life than women, necessarily. I think women are more connected, are more sentimental, are more connected to the family, men have much more availability. They are more available. They are more detached. Why have I come here, for example? I could have stayed in Lisbon, but I chose to come here. I came here to be closer to my parents, my brothers. It is a sentimental side, of not breaking the bond, of not being far away. (Female public prosecutor 4)

The difficulty of reconciling their demanding personal life as mothers with the demanding profession as regards availability to work is associated, by the interviewees, with two other negative consequences of motherhood in the career of

women magistrates: 1) the negative impact that motherhood seems to have on the evaluation of their work; and 2) the generalization by their male colleagues and, more substantially, by inspectors and hierarchies, of a misuse of sick leave due to risky pregnancy.

When kids get sick, when school closes, that falls on the mother, I speak for myself. If it is something that will last several days, we may share the responsibility, but if it is sudden it is the mother who interrupts her job. [...] Inspections are a risk factor, dependent on the character of the inspector; he may be an understanding person, but it's a risk factor. It depends a lot, some say it is commendable that we manage to reconcile our personal life... But it does happen, of course, that two days' absence would be sufficient and yet some female magistrates stay at home four days. We know that there are abuses, as in all professions ... (Female judge 16)

Interviewees' accounts indicate that inspections have a dual negative effect on women magistrates: firstly, the time in which they are absent on maternity leave is not counted for evaluation – which leaves them in a situation comparatively less favourable than that of their male colleagues; and, secondly, the absence causes a reduction of cases dispatched – an element that inspectors take particularly seriously.

It is the mirror of how the personal life of a magistrate can be influenced by, can constrain their professional life. Because clearly, this is what happened to me, [...] I was given the grade "good" for no other reason than that it was not the moment to have the grade "with merit". In my case, and very clearly highlighted by the inspector, it was due to the time I was away taking care of my children, despite the grade "excellent" I had on productivity [...] These are accounts of the Inspector, they are not mine. [...] And it is just my conclusion, but my perception cannot be articulated because it cannot be said, that what lies behind the fact I wasn't graded with "Merit" is simply this one. [...] A parenthesis: all my male colleagues had the grade "Merit" on the second inspection, except me and another female colleague, by the way also classified exactly with the same argument (Female judge 12)

Even these "additional difficulties" – a term used by the interviewees – are not generally referred to as gender-based discrimination. These are "difficulties" or situations that "harm" women, but not forms of discrimination.

Objectively speaking, there are two related differences between female and male judges and public prosecutors in Portugal. Firstly, women's judicial career tends to start straight after graduation, while men often begin by working as lawyers for a few years. Secondly, men are more likely than women to move in-between courts, possibly because women give greater weight to family stability than to job satisfaction. This is closely related to the difference in professional expectation and satisfaction. If female magistrates are less ambitious than male magistrates, they also seem more willing to reject a promotion in favour of the family if promotion requires moving to another city. Currently, the judicial career structure requires a number of such moves. Even inside the first instance courts, career progression depends on moving from a general jurisdiction court to a specialized court, the latter being fewer in number as well as geographically more concentrated. Our interviews showed that both female judges and female prosecutors would willingly reject a promotion if that required moving to a different court - this being a rarity amongst male judges and public prosecutors interviewed.

#### 4. Judging in a male world?

One of the recurring questions in the script of the interviews and of the focus groups was whether women and men judge differently. The preferred view of interviewees was that, given the impartiality and neutrality of judges, a gendered distinction of this kind was not possible.

I must say [...] it is still tough for me to use the term lady judge\*, because the judge does not have a sex... lady judge. If there were a neutral form, as in German, I would prefer it. Because it has really nothing to do with being a woman or a man, it is a position, it is a function. (Lawyer 7)

The reasons invoked for this neutrality were related, from the outset, to the common training and technical preparation, particularly at CEJ, but also to life experience and the legal method that operates according to rational logic that does not allow ambiguities:

We are all professionals. I have worked with men, I have worked with women, and I do not see that being a man has anything to do with doing a better job than that done by a woman. A good professional, whether a man or a woman, is someone with legal-technical preparation, with a certain life experience, dedicated to her or his work, someone who is a good services provider. (Female public prosecutor 4)

These opinions are echoed in socio-legal literature which argues that in the context of such a masculine culture, the family roles must remain invisible. Women are expected to demonstrate their commitment by working more and with more intensity, as the feminine form of participation is not welcome. Moreover, the masculinity of law makes it very difficult for women and other oppressed groups to imbue the legal system with alternative values. This masculinity leads Kohen (2008) to question whether the professional context completely excludes female differences. It is possible that the entry of women into legal professions has led to their assimilation to the strong masculine culture through the study of law and professional socialization (Kohen 2008). This assimilation is reflected even in posture, tone of voice and sober and discreet attire:

It has to do with the way of dressing, it has to do with how we speak, it has to do with the tone. You see, nowadays almost all women have a similar voice to the one I have, which I also acquired, which is a non-shrill tone of voice; when we, women, in general, have a voice more strident, more... In general, we normalize it... I mean... we adapt it to the general rule, isn't that so? And it has to do with the way we dress, it has to do with everything, with all this. It's the story of "when in Rome do as the Romans do", you know? I think I can have this voice and defend certain points of view. There are other people who think they should have another tone of voice in order not to be annoying. (Female judge 22)

As the traditional model of the judge has been a man, women make an effort, perhaps more visible during the early years, to adjust to this model (Rackley 2002). However, the presence of women does seem to have the advantage of introducing new perspectives into the law, making it more representative of the population as a whole (Rackley 2002). Most narratives found in the interviews reflect precisely this tension. Several interviewees referred to differences, although for some more striking than for others, in the performance of judges and public prosecutors, contrary to the neutrality imposed by a male model:

The legal system was preparing itself to receive women, it was progressing. There were problems of socialization. There were problems of adapting the system to grant women the total equal terms, ergo, the system ideologically perceived the equality issues, but necessarily witnessed a long period of doing anything about them. And today we still have some problems, we have these problems of women's access to positions of leadership, we also have the problem of women's own culture, of women wearing their own skin, their own clothes, and when accessing to leading positions not assuming the male stereotypes and not acting exactly like men. (Male judge, FG\_ 6)

In a sense, we can say that the enhanced female features approach the controversial theory of a different voice or of a "ethics of care" to use Carol Gilligan's (1982) term:

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\* Translation remark: In Portuguese, as in other Latin languages, the noun judge has a distinguished gender mark: "juiz" (male form) and "juiza" (female form).

I appreciate women within the judiciary, the more the better. If the world was ruled by women there would be less wars because women are more peaceful, have innate human qualities, are more sensible, more applied, they know better what they want. More women enter in the university, with better grades, we can see by the entrance in CEJ. It is genetic; women are more intelligent; it is also influences of society. [...] I like to work with female colleagues, because of their posture. There is a more open relationship. I never got burned with anyone, there was always warmth and respect, but I prefer to work with female judges. (Male judge 4)

In our interviews, such comments were mainly made by male magistrates, which may point to a certain paternalistic rather than a feminist spirit (Duarte 2013). Gilligan's work has been the target of criticism due to the tensions created by the problems of subjectivity, of essentialism and of women's political agenda. One type of such criticism fears that the identification of women with the "ethics of care" could have a negative impact on their status, thus perpetuating the subordination and marginalization of women which by cultural status, social class, sexual orientation, or ethnic characteristics do not match the "model of care ethics" which in reality corresponds to white middle-class women (MacKinnon 1985, p. 47, Greenberg 1992, p. VIII-IX). She is also criticized for essentialism, i.e. for correlating the social characteristics of women with their biology and for equating all men and all women with the categories of "public man" and "private woman", with the corresponding features. Kohen (2008) identifies three types of such criticism: a question of method, the problem of conservatism and the critique of essentialism. Menkel-Meadow opts for a sociological explanation to explain women's preferences for care ethics, giving preference to primary socialization within family, and to the later forms of institutional socialization through school, peers, media and professional context imposing gender stereotypes about how children and adults should behave.

But the difference was not always phrased in positive terms. Indeed, some professionals of both sexes spoke in rather derogatory terms about women magistrates' attributes:

I don't want to be misunderstood, I notice that women in the judiciary have a less pragmatic view of justice than men and the exercise of power tends to be more noticeable, more arrogant. I think, and many of my female colleagues agree, that a woman in power is not as pragmatic. [...] (Male public prosecutor 10)

Yes, men are more practical. I rather work with men, honestly. Women are pickier; they easily engage in bickering between them. It's our nature. But men are more practical, they are also more stubborn... when they decide that something is that way, it is that way. If men are more practical, women are more sensitive dealing with certain problems. [...]. (Male public prosecutor 13)

Some of the attributes absent in women are commonly considered key traits in the role of a magistrate, as for instance objectivity and total dedication to work:

Maybe in terms of sensitivity to these subjects, they may bring some novelty, I think. But also in terms of sensitivity, I think women are more sensitive. They do have a negative factor: which is the fact that they are not as concise as men. I think men are more synthetic in what they write, they are more objective. Women are not as objective. I think this is a negative aspect. (Female judge 9)

Female judges are less competent, I guess. You know unfortunately I came across with some female judges – I do not know why, I do not know if it has to do with issues of lack of time, family demands, and so on, I have no idea... I mean, the female judges who I worked with, I do not hold in high esteem, professionally. (Male public prosecutor 19)

The female gender devaluation undermines the authority of women in the exercise of their duties, in the eyes of their peers, colleagues, and of defendants or witnesses.

#### 4.1. *Is there gendered judging?*

A few studies have been trying to understand if there is what has been called female judging, precisely through the enunciation of feminine qualities as the ones mentioned previously. These (scarce) studies with this precise focus are not consensual and many are not even conclusive. Ulrike Schultz and Gisela Shaw (2003, 2013) have been central to the debate, bringing together different authors with this same concern. The empirical study conducted by Regine Drewniak (1991), pointed out in Schultz's research (2003b), analysed male and female judges' attitudes towards decision-making and compared judges from criminal courts with judges from other branches of the judiciary. The study hypothesis was that female judges might be less interested in asserting their authority than to reinstate the defendants in society. Women would therefore be less inclined to resort to universal legal principles but would demonstrate a greater sensitivity to the specific situations of the defendants. However, no evidence of such gendered attitudes emerged in the conflict resolution. Women were more reluctant to punish defendants but they did not demonstrate to be more open or more willing to take into account the individual circumstances in the allocation of punishment than their male colleagues. A study by Oberlies (1995) on rulings on homicide cases did find a correlation between the presence of women judges in the application of procedures and softer punishments. The study carried out by Eliane Junqueira (2003), on the other hand, has found that female judges in Brazil tend to be less generous than their male colleagues towards women that request alimony. Junqueira suggests that female professionals feel less empathy for women who expect someone else to earn a living for them. In this sense, cross-gender preferences have also been noted, i.e., female judges judging men more leniently, and vice versa.

This plurality of studies leads to three conclusions. Firstly, that it is unclear to what extent the construction of a professional identity guided by neutrality and impartiality, resulting from a purely technical legal education, implies a rationality that supersedes the subjectivity that is acquired during a person's primary and even secondary social development, in which gender identity is central. Secondly, even if it is true that, as Gilligan puts it, women speak in a different voice, it is rather difficult to know where this difference lies (Berns 1999). Finally, one aspect seems clear: the expectation of a feminist transformation placed on the increasing number of women in the legal profession, as it is advocated by liberal feminism, is a rather fragile (though not fatal) one.

In Portugal, as mentioned before, the presence of women is much higher in first instance courts than in Appeal Courts or in the Supreme Courts. In the eyes of some members of the judiciary, this has contributed to more conservative rulings in the context of women's rights, such as domestic violence cases and rape. Let us consider some examples.

In 1989, the Judicial Supreme Court, ruling on a lower court decision that condemned two Portuguese boys for the rape of two young foreign girls who had requested a ride, stated the following:

[...] it is true that these are abhorrent crimes that have no justification. However, the truth is that, in this case, the two victims have to take part of the blame. After all, they did not hesitate to come to the road hitching a ride from whoever passed in the knowledge that they found themselves in the hunting ground of the "Iberian macho". We cannot believe that the two women were not aware of the risk they were running, because here, as in their home country, attraction to the opposite sex is an undeniable fact and sometimes not easy to dominate. Thus, when the two women got into a car with two men in it, they did so, in our view, aware of the danger, specially being in a tourist area of international fame abounding with foreign tourists whose sexual behaviour is often more liberal and relaxed than that of most natives.

In May 2004, the Judicial Supreme Court drew up a ruling on a murder accepting the breach of the obligation of a woman's sexual subjection to her husband as a mitigating circumstance:

In this particular case, we will take into account some particular circumstances of aggravation, not to mention yet the [few] mitigating circumstances to which the offender is entitled. On the one hand, the fact that he is illiterate; on the other hand, that from the end of March 2002, when the defendant returned from France after he finished a work contract, the victim, without knowing why – ignorance once more favourable to the defendant – [...] did not even want to have sex with him, a fact, which may at least help to explain the doubts raised in his mind about her (in)fideliy.

In September 2013, the Appeal Court of Oporto, confirmed the decision of a lower court to absolve a psychiatrist accused of raping a patient who was 34 weeks pregnant:

To pull the head (or the hair) of a woman, obliging her to have oral sex and push her down on a couch to have intercourse, do not constitute acts susceptible of being framed as violent.

Although some magistrates attribute the conservatism of the rulings of the superior courts to the scarcity of women in those courts, the truth is that among the magistrates we interviewed, both male and female, we found two trends. The first one was to affirm that there are no differences at all between male and female judging. The other one was the claim, mainly put forward by men, that there are no differences, except in certain legal matters for which women have, as seen, more sensitivity, like domestic violence, child abuse or rape.

From the interviews, we can assume that differences between men and women are evident in relation to work styles, but hardly in relation to outcomes. This is certainly at least partly attributable to the rigorous and critical nature of legal methods that is to ensure objectivity and impartiality. In her article – *Feminism and Legal Method: The Difference It Makes*– Mary Jane Mossman (1986) identifies three major elements of traditional legal methods: setting limits, relevance and analysis of the case. The first element refers to the identification of limits within which the method is entirely appropriate. Certain topics are considered outside the scope of law, i.e., subjective areas such as moral evaluations or political bias. The second element concerns the definition of relevance. The example given by the author is paradigmatic. A law student learns that it is essential in a case of rape to know the victim's sexual life. However, the sexual life of the accused is considered not relevant. With this insight, the law student knows how to defend the breach successfully and learn, indirectly, a clear technique of oppression of women. The myth of neutrality and independence prevails, although clearly it is just that (Duarte 2013). Analysis of the case is the third element. It is very common in systems with a tradition of *res judicata* as a precedent, i.e., resorting to previous cases to support a judicial decision. In this process some cases are considered "good decisions" while others are not, which means that it is neither logic nor legal positivism that reigns, but the discretion of the judiciary. In other words, although the legal method strives for objectivity, it also creates room for subjectivity.

Our judicial interviews produced anything but a clear picture. Although the majority firmly denied any link between gender and the decision, some simultaneously highlight certain areas in which gender does acquire relevance.

Intriguingly, our interlocutors frequently emphasized that other factors ultimately constrain discretion rather more than does gender identity. In fact, the majority of magistrates interviewed valued the assessment of the evidence as a key moment of judging. It is an old aphorism used among practitioners that true justice is done in first instance courts while fixing the matter of fact as proven or not proven; the instance where one feels the pulse of social problems. Despite the legal directives that establish guidelines for the assessment of evidence (rules of burden of proof;

mandatory documentary evidence in some situations; unenforceability of proof by confession in some cases, full valuation of the confession, among others), the type of proof regarded as essential remains the testimony and, here the free assessment of the evidence from the judge plays an important role.

Judging has to be seen in two aspects. One strand is the judgment of the facts and another thing is the trial of the matter of law. The trial of the matter of law is perhaps the technical side, but the judgment of the facts is the judgment of truth; but truth in a case is often not the truth of what actually happened. And that is where I think one's own experience has an influence, namely on evaluating witnesses ... (Male judge 6)

The interviewees claimed that for the formation of a judge's conviction – paradoxically labelled independent – variables such as sensitivity, training, personality and life experience, are of greater importance than gender:

Regarding the gender gap in the area of decision, I would have much more difficulty affirming there is a difference. And the difference can be any or total, but I think that it has more to do with the training people have, their sensitivity, their life experience, than with gender issues. From the several years of experience I have working with men and women, what I noticed or I think I can conclude is that the difference is not one of gender, the difference is really one of training, sensibility, the way people face the problems. [...] It is not a gender issue. (Female judge FG\_4)

Comments like these show that it is not uncommon to highlight traditionally feminine characteristics, such as sensitivity or a sixth sense, while in the end still concluding that, despite these, gender is irrelevant when faced with the immutable objectivity of legal procedures. Moreover, the narratives of the interviewees combine opposing views in the same utterance: awareness of the importance of a judge's personality in reaching a final conclusion, and the apologia of neutrality in law enforcement. This duality often results in the assumption that diversity in the judiciary is, for its own, a virtue, but it fails to produce any effective results.

This leads us to a second assumption. The interviewees are, however, less assertive as to the irrelevance of gender in judging when it comes to certain areas, namely to areas which are related to the private and domestic sphere, associated with women, in opposition to the public sphere that is dominated by men:

In terms of people there is still this issue of men and women in specific and differentiated areas. Not so long ago, I was listening to a lady involved in a domestic violence trial; she also had a parental responsibility case. She was a person with higher education and she told me: "My case was assigned to a man. It is in a family court composed only of men. I am very worried by this!" This still happens, and it happens regarding persons ... as I said, a person with higher education. (Female public prosecutor FG\_1)

If, as some magistrates assume, this view emerges from society, the question is whether it is echoed in the understanding of the judiciary itself. In 2012, Madalena Duarte (2013) conducted a survey among justice auditors attending the Centre for Judicial Studies. In the survey they were asked whether they agreed with the statement "female magistrates deal differently with domestic violence cases compared to male magistrates". Most respondents (32.9%) answered "neither agree nor disagree". In the present study we also noted some indecision among respondents of both sexes. However, men seemed to emphasize more strongly the existence of differences in judging in these specific areas:

[...] Except to the extent that we are dealing with facts directly related to gender, where we have to admit that there are some personal dramas of women that a woman will understand better, in the same sense in which I understand better some personal dramas which are typically male. Rape is a typical case. (Male judge 7)

Two arguments contradict this idea of greater empathy on the part of a female judge in areas related to family or to violence against women and children. The first is that, according to the interviewees, men are increasingly aware of and sensitive to these problems and all social dimensions implied. Some interviewees maintained that this has been due to the growing number of women in the judiciary.

I think women aroused men in terms of work and their presence in the courts, with a different sensitivity they themselves had not. They could be very good and make an effort, but it does not touch them. This was also an evolution of society, because women have a different sensitivity to certain issues, but I also see male magistrates with such sensitivity; with children, with domestic violence. But I think it was the result of working with women. I think women have brought this to the courts. (Court official 1)

A second argument is more complex and relates to what we call the inversion of gender identities. This reversal can occur in three forms. We have seen that literature shows a tendency to assume a process of assimilation on the part of female judges to male professional standards. Thus, a first form consists in, as suggested by Carrie Menkel-Meadow (1989), the individual success of women in the legal profession to be inversely related to the extent of commitment to issues concerning gender. The higher their public commitment towards transforming society into a more equitable and less discriminatory society for men and women, the greater is their ghettoization and cantonment in specific areas such as family and children. A female judge is therefore not necessarily a feminist judge.

I think we brought something to legal profession because even emotionally, we are able to perceive things in a way men cannot ... This turns out to be a "double-edged sword" because we have a hand more heavy, I do have this notion. Sometimes we are much tougher judging than men. In certain kinds of crimes, we are able to be much tougher than men are. Men are able to go over some types of crimes that we do not, exactly due to the experience we have. (Female judge 21)

A second form of gender inversion concerns scrutiny over women exercised precisely in areas in which they are supposed to be more sensitive and empathic. As shown by Lahey (1991), they run the risk of being required to project a certain "reasonableness" in order to be taken seriously, a judicial reasonableness that may go against a female reasonableness; if they are not empathetic to a victim, they are bad women; if they defend the position of the victim, they may be considered irrational and influenced by a sort of gender solidarity, which puts into question their suitability as "judges".

This non-identification, in part, may be one of the justifications for, often, the sentences of female judges, contrary to what would be assumed, being less severe in sexual crimes. In part, but is not essential. I think it is not the main reason. I mean, it is a part of it, but it is not it. The first – from my point of view, at least – justification has to do with this: "I have accepted the rules of this game. I'm not... The judiciary is neutral, whatever you are a man or a woman". It is like what is written on the statute of magistrates: the judiciary is one body. Thus, "I cling to the dominant values in the judiciary and I do not want to assert my own". Not to say: "I identified myself with that woman in concrete", but: "I identify myself with the dominant values and therefore I do not want to be considered less than ..." [...] the judiciary is a matter of power and, therefore, I have to demonstrate that I have power. (Female judge 22)

The inability to put oneself in the place of a victim contributes to a greater distance from and a slighter empathy with the victim. If the female magistrate looks at the victim as an image in a mirror, we cannot forget that this image is reversed, and in this case distorted by myths, stereotypes and prejudices (Duarte 2013).

There may be an idea that female judges will be milder in cases of domestic violence, but it does not happen. (Female judge 13)

Thus, even though or precisely because they are of the same sex, and both subjected to gender-based discrimination, the truth is that the condition of

victimization, and how it arises, can actually cause more distance and censorship than empathy.

## 5. Concluding remarks

Some authors project optimism regarding the effects of the increasing number of women in legal professions. Kanter (1977), Menkel-Meadow (1995), Mossman (1993) and Bogoch (2003) suggest that this growth may be translated into the liberation of women from compliance with norms and preexisting behaviors, built on a patriarchal view of the judiciary. Other authors, however, are more skeptical. For Schultz (2003a) and Malleson (2003), the course of time and the gradual increase in the number of women in the professions are not the solution.

As emerged in our research, the majority of female judges and public prosecutors recognize that women face more difficulties in the exercise of the professions than men, pointing out the difficulties in reconciling professional and personal life. Male judges rarely report any impact of children or family life on inspection outcomes, problems in reconciling family and career, or a sense of guilt for not being a good parent or a good spouse as well as a good professional. Nonetheless, the majority of female judges and public prosecutors claimed that they never experienced any kind of gender-based discrimination. The question of any experience of gender-based discrimination in the context of work conditions, work environment and relationships with peers, is seen as a very sensitive subject among legal professions. They prefer to relate those difficulties to the *Woman* condition, something external to the profession. Their general perception is that the judicial career is highly demanding in terms of technicality and of personal availability, and it is this that complicates the management of family life. Differences among men and women do appear in the way they describe their problems. While women ask themselves whether they can properly perform both roles, men tend to wonder if their intense dedication to work does not make them miss out on an important part of their family life. They admit that this “woman condition” does negatively impact on women's professional performance and career progression. In other words, men adopt an attitude that represents a shift from unashamed sexism to a camouflaged, subtle paternalism that is harder to spot and therefore harder to fight, but obvious in men's view that key attributes of good legal practice, such as objectivity, are not normally found in women.

The late acceptance of women into the legal professions is attributed by most to 48 years of dictatorship characterised by the oppression of women. Intriguingly, while variables such as age, social background and life experience, are readily acknowledged to affect the process of decision-making and assessment of facts, gender variables tend to be excluded from the list.

This dissonance between women's lived experience and their awareness of it leads us to a problematic concept in feminist literature, which is “false consciousness”. Not all women see their situation as one of oppression. For some authors, like Mackinnon (1983), many women are victims of “false consciousness”, that is, women's experiences are so conditioned by the context of domination that their awareness of these experiences are nothing more than the reflection, unconscious, of their oppression (MacKinnon 1983), which in this case would be a system of justice that remains patriarchal. Although this concept causes us theoretical discomfort because it denies an agency attributed to women, we do not put it aside totally, but we think it is important to see it in the light of the notion of alibi women in superior judicial positions (Ferreira 1998), and of camouflaged paternalism (and therefore more difficult to fight). This hypothesis gains support from the fact that, despite at the top of the Portuguese judicial hierarchy we find three women (Minister of Justice, Attorney General and the President of the Bar Association) and three men (Presidents of the Constitutional Court, Supreme Court and Administrative Supreme Court), our interviewees tended to convey the impression

that the top was, in fact, dominated by women. Therefore, the obstacles experienced by women in first instance courts or in their ambition to reach the Appeal or the Supreme Court, as well as the need for debates on the place of gender in the judicial system are being relativized.

This whole scenario might suggest a certain inconsistency. If it appears that the judiciary continues to self-perceive as mere appliers of law – hence projecting the characteristics of neutrality and impartiality – the truth is that the professionals interviewed, in particular men, seemed to especially value the characteristics attributed to women, such as greater sensitivity and attention to social context. Indeed, we may assume that we are still facing the legacy of the long period of dictatorship in Portugal. Even today, the judicial system remains dominated by what Boaventura de Sousa Santos (2007) calls technical-bureaucratic normative culture. This culture manifests itself in the idea of the autonomy of law, in a restrictive view of what law is and in a bureaucratic conception of lawsuits.

Santos *et al.* (2011) advocate recruitment for the judiciary that ensures that candidates are selected according to two main criteria: high technical competence and ability to contextualize the social phenomena affecting judicial reflection and decision-making. Magistrates are to be representative of the society in which they are working. However, the insistence on the need for heterogeneity among the professional body of magistrates challenges the confidence in the universality of justice. Heterogeneity is not a value in itself, but a means to achieve the necessary dialectic between the various experiences that exist in society. Within this context, the liberal values of neutrality and impartiality collide with the understanding that experiences, understandings and perspectives are quite fundamentally dependent on who in particular a person is. Inadvertently, the insistence that it is essential to have a representative judiciary has the potential to destabilize conventional and liberal understandings of law.

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