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## Equality Adds Quality: On Upgrading Higher Education and Research in the Field of Law

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### EQUALITY ADDS QUALITY: ON UPGRADING HIGHER EDUCATION AND RESEARCH IN THE FIELD OF LAW

*Much has been attempted, and many projects are still underway aimed at achieving equality in higher education and research. Today, the key argument to demand and support the integration of gender in academia is that equality is indeed about the quality on which academic work is supposed to be based. Although more or less national political, social and cultural contexts matter as much as academic environments, regarding higher education and research, the integration of gender into the field of law seems particularly interesting. Faculties of law enjoy a certain standing and status, are closely connected to power and politics, and are likely to feature resistance to equality efforts, both in the law itself and in the curriculum and research agenda. However, a multidimensional, intersectional gender analysis helps to reframe cases and doctrines, rulings and regulations far beyond the law that evidently affects women, which the headscarf controversies illustrate. In addition to gender competence, team diversity is a procedural device for success, and non-discrimination is a key requirement when diversity is meant to work. After all, such efforts to expose bias and educate about gender in an academic field, to insist and integrate it continuously, and to not only demand but also do it produce quality. Thus, gender equality is crucial for the achievement of the best possible results in higher education and research.*

**Key words:** *Quality of research. Gender equality. Legal studies. Intersectionality. Headscarf.*

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## 1. INTRODUCTION

Efforts to achieve gender equality in higher education and research are not new, and some have had impressive results. However, such efforts are still needed,<sup>1</sup> because equality in higher education and research is, simply, a matter of quality. This is a broad claim since, after all, quality is what drives the field; sometimes it is called merit, sometimes excellence, and if equality is a key factor in its achievement, there is then an inherent reason to act.<sup>2</sup> And although to understand what needs to be done we must constantly assess the changing state of affairs as well as evaluate our own efforts to do better, there is no reason to wait. In the past, actors responsible for quality in science have put the quest for equality in a docket, to another subcommittee, in one more study, or on someone else's agenda. In 2017, this is no longer adequate, if it ever was. Today, there are smart ways to work towards gender equality in higher education and research, with sound assessments of results and effects, and there is abundant expertise. Unquestionably, there is never enough research on anything. Yet there is already enough to upgrade higher education and research regarding gender equality, to build upon and get going. This contribution shares some of the observations of gender equality efforts, primarily in Germany, to demonstrate why gender equality in higher education and research really matters, and why it must therefore be part of the mainstream, using the somewhat paradigmatic example of law.

## 2. SIMILARITIES AND DIFFERENCES IN CONTEXT

Certainly, both the state of affairs in higher education and research, as well as the toolbox to change it, vary depending on context. Both national and cultural settings matter, as do institutional arrangements and disciplinary traditions, practices, and status. Therefore, the situation in Serbia certainly differs from the past and future of gender equality in academia in Germany, or in other countries.<sup>3</sup> However, comparative observations do help. In addition, higher education and research have, in most

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<sup>1</sup> S. Klein *et al.* (eds.), *Handbook for achieving gender equity through education*, Routledge, 2014 (1<sup>st</sup> ed. 1985); L. Frehill *et al.* (eds.), *Advancing Women in Science*, Springer, 2015; E. Blome *et al.* (eds.), *Handbuch zur Gleichstellungspolitik an Hochschulen: Von der Frauenförderung zum Diversity Management?*, Springer, 2014.

<sup>2</sup> This is the rationale of the German Research Foundation's (DFG) "Research Oriented Standards in Gender Equality", to be found, with evaluation reports and a tool box for best practice examples, [www.dfg.de/en/research\\_funding/principles\\_dfg\\_funding/equal\\_opportunities/research\\_oriented/](http://www.dfg.de/en/research_funding/principles_dfg_funding/equal_opportunities/research_oriented/), last visited 12 September 2017.

<sup>3</sup> On the Nordic countries, see: L. Husu, *Advancing Gender Equality in Nordic Academia: Political will and Persistent Paradoxes*, XVIII World Congress of Sociology, 2014, [https://www.researchgate.net/publication/268085220\\_Advancing\\_Gender\\_Equali-](https://www.researchgate.net/publication/268085220_Advancing_Gender_Equali-)

fields, already moved across national borders, which enlarges the commonalities that we share. In fact, thinking across borders is the calling for law and thus for legal studies in the future, taking stock of today's embeddedness of national law in transnational and international legal pluralism. This does not affect only the law and legal studies, but all of academia. Therefore, a European as well as a global understanding of efforts to achieve gender equality in higher education and research is both relevant and necessary.

Similarities and differences between countries and contexts of the state of higher education and of gender equality as a social fact, a cultural phenomenon, an economic factor, a political topic and, not least, a legal issue, do matter. In particular, gendered inequalities in higher education and research may be perceived as a setback in former socialist societies, where more women had access to paid work than in Western European countries, including work at universities, as is the case in some South European countries. At the same time, such presence may coincide with a history that lacks academic freedom and features a hegemonic political ideology that informs disciplines, and particularly the field of law. Depending on various factors, higher education and research may then come with challenges to or even suppression of truly critical work, or a problematic tolerance of other injustices, e.g. excluding “the other”, something that has also varied with context. It seems important to understand this.

And there is lot to consider. Institutionally, higher education may or may not carry prestige, either for institutions or persons. Legally, higher education and research may be more or less public and formed by law, or private and regulated in non-democratic ways. All of this also impacts gender equality, and thus the inequality in higher education and research.

Again, in a world that is more closely connected than ever, and with research becoming more transnational by the minute, even in formerly national fields such as law, commonalities across borders and political systems tend to increase. When it comes to higher education and research, formerly socialist as well as older capitalist countries are both confronted with a turn to efficient governance, monetary and metric standards, and witness market logic applied to science and research. Some gain, some loose. Indeed, a greater entrepreneurial spirit, more transparency, or more competition may support gender equality, but it may also hurt such efforts. With the field in flux, it seems more important than ever to exchange ideas and experience, to collaborate towards a shared commitment: excellent research that informs the best practices for our future. One factor in achieving this is, again, gender equality.

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*ty in Nordic Academia Political Will and Persistent Paradoxes*, last visited 12 September 2017.

### 3. ACADEMIC DISCIPLINES: THE EXAMPLE OF LAW

Certainly, gender equality in higher education and research does differ in relation to different academic disciplines. The field of law, as legal research and teaching law, may be particularly interesting in order to understand gender inequality in this context. In law, gender equality indeed matters in specific ways, and for specific reasons.<sup>4</sup>

First, the faculty of law is, traditionally,<sup>5</sup> a proud faculty in most universities in the world, with a long and strong tradition. Often, you find law schools in prestigious buildings, law professors who are paid more than others and who enjoy social and political capital, as part of their habitus,<sup>6</sup> as well as alumni in powerful positions. Regarding gender equality, this makes the faculty of law both an important place to induce change, and often, an institution not seriously challenged and thus particularly slow.

Secondly, the field of law, and thus law faculties or law departments as well as legal academics, are closely linked to power and politics. They do not only study a key instrument of politics and power, but legal research typically engages that instrument in the affirmative, providing doctrine, which is collaboration.<sup>7</sup> In fact, the more legal studies are driven by work on doctrine to systematize legislation and jurisprudence as well as administrative routine, the more relevant legal studies are to the actual functioning of the world. Even in deliberately skeptical academic environments, faculties of law educate and law schools train a large set of influential people who eventually occupy influential positions. Thus, one

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<sup>4</sup> S. Berghahn, “Wozu Gender-Aspekte in Lehre und Forschung von Rechtsfächern?—Über blinde Flecken und verkannte Professionalisierungschancen”, *Kompetenzen für zeitgemäßes Public Management* (Hrsg. D. Luck-Schneider, E. Kraatz), Nomos, 2014, 69–90.

<sup>5</sup> This goes back to philosopher Immanuel Kant, *Der Streit der Fakultäten, Anthropologie in pragmatischer Einsicht*, Berlin – New York 1907, 2000; in English “The Conflict of the Faculties/Der Streit der Fakultäten” (trans. M. J. Gregor), New York 1979. A critical view on the formation of disciplines is provided by M. Foucault, *Discipline and Punish: The Birth of the Prison*, Vintage Books, 1977.

<sup>6</sup> Pierre Bourdieu’s concept of “habitus” by captures the sources of the standing of a person and has been applied to the academy, D. Reay, “Cultural capitalists and academic habitus: Classed and gendered labour in UK higher education”, *Women’s Studies Int’l Forum* 27/2004, 31–39.

<sup>7</sup> This is why the British sociologist Carol Smart warned feminists against the “siren call” of law in *Feminism and the Power of Law*, Routledge, 1989. Famously, U. S. Black lesbian activist, scholar and poet Audre Lorde coined the saying that “The master’s tool will never dismantle the master’s house.” The text is available online. My interpretation is to call on us to modify the tool. See: A. Lorde, “The Master’s Tool Will Never Dismantle the Master’s House”, *The Bridge Called My Back: Writings of Radical Women of Color* (eds. Ch. Moraga, G. Anzaldúa), Kitchen Table Press, New York 1983, 94–101, [http://bixby.ucla.edu/journal\\_club/Lorde\\_s2.pdf](http://bixby.ucla.edu/journal_club/Lorde_s2.pdf), last visited 12 September 2017.

might expect a correlation between equality politics in society, addressing power, and the people who engage the instrument on their own as academics.

Thirdly, the field of law and legal studies is highly canonized. This accounts for the stability of the curriculum, yet it is also an impediment to change, a kind of structural conservatism. The canon also informs and is perpetuated by the large, or at least well-organized and implemented, consensus on standards. While other academic fields have a faster changing flow, law stays rather steady. In addition, law school curricula that define study material and degree requirements, thus converted into professional standards, are often at least partially defined by government. This may contribute to structural conservatism, yet it may also make legal education susceptible to the influence of current events. Accepting the risk that defenders of the status quo resist “outside intervention”,<sup>8</sup> there is certainly an opportunity for policy makers and funders of higher education and research to in fact demand equality, in order to upgrade quality.

Fourthly, the field of law is evidently relevant to us all, which is why people both in and outside academia tend to be concerned. Regarding the relevance of academic work, law fares much better than what are sometimes called “orchid fields”, a label for academic fields that are not even recognized as disciplines, quick to be sacrificed when budgets suffer, etc. (although orchids are also notably beautiful and rare). By comparison, legal studies and faculties of law have stability and strength resulting from their evident relevance to all. However, this does not seem to have an automatic effect on efforts to achieve gender equality. One would expect the field, and thus faculties of law, to quickly adapt to changes in society, and even be champions of social progress, based on the task to train lawyers and based on the foundational engagement with the concept and practices of justice. Yet, all too often, the opposite seems to be the case, with legal studies and law schools being champions of conservatism, widespread resistance, and thus ultimately justice limited to the few. A similarly inherent conservatism may be found in similarly strong, organized, proud and evidently relevant fields such as sciences, technology, engineering and mathematics (STEM), as well as medicine. This is why it seems highly plausible when studies show that women, and others who are traditionally “othered” in the field, work on the fringes of the academic spectrum. Yet, this is not all there is to the story. In fact, it underscores the claim that equality drives (real) quality, since studies also show that the fringe often drives innovation,<sup>9</sup> a facet of excellent education

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<sup>8</sup> For men’s strategies regarding quests for gender equality, see J. Hearn, “Men and Gender Equality – Resistance, Responsibilities and Reaching Out”, Örebro, Sweden 2001, [https://www.atria.nl/epublications/2001/Men\\_and\\_gender\\_equality.pdf](https://www.atria.nl/epublications/2001/Men_and_gender_equality.pdf), last visited 12 September 2017.

<sup>9</sup> L. Schiebinger, *Gendered Innovations in Science and Engineering*, 2008, <https://genderedinnovations.stanford.edu/>, last visited 12 September 2017.

and research. When academic institutions commit themselves to equality, such innovation and its drivers will be properly recognized.

Overall, law offers insights into an old and well-established field, between the humanities and social sciences, entangled with technology and medicine, a powerful field, close to social needs and the politics required to address them, a field in which higher education and research are self-evidently relevant for all its participants. To properly address gender equality in higher education and research, the field is also bound by an understanding of the rules of the game, which in a truly merit-based system relies on fairness, non-biased judgment, and freedom from discrimination. As such, law may serve as both an object to be studied, and as a field that possibly offers the answer to what needs to be done. In fact, the law itself requires equality in education.<sup>10</sup> There is also a crucial difference between an interesting discussion on the one hand, and a decision to implement change on the other. Confronting an issue through the prism of the law<sup>11</sup> thus often sheds brighter light on the challenges that we face.

#### 4. EASY CASES

Imagine you are a judge willing to render good judgments, or a legislator drafting good laws, or an administrator applying the law, or a practicing lawyer committed to winning a case, or a law professor teaching, or a student trying to get it right; this means you need to be excellent at law, to be able to either apply or draft it. Also, imagine you are not on your own, but in a team, with colleagues, with members of your party or cabinet, of your faculty or study group, or on a judicial panel of a supreme or constitutional court. How do you go about being good, winning, teaching well, passing the exam?

There are many examples one could use to illustrate the strategies employed for the accomplishment of this task. In fact, there are many cases that seem easy and straightforward, which profit highly from additional perspectives, namely, by contributing the sophisticated understanding of gender. As an example, many seem to have a clear idea of the

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<sup>10</sup> Obligations come from local and state as well as national and international law, with the minimum guarantees of equal rights to access and protection against discrimination, and often more elaborate legal mechanisms to address sex equality as well as other situations typically subject to disadvantage.

<sup>11</sup> To apply the law means to not apply your normative ideas about the world. Certainly, there is no such thing as “pure” or “clean” legal thinking, suggesting complete neutrality, full objectivity and the like. After all, it is human beings who apply the law. Application thus is also the translation of an abstract idea into a proper response to a specific set of facts, which involves interpretation, a necessarily subjective element. Therefore, targeting bias is particularly relevant to the field.

problem of domestic violence.<sup>12</sup> However, the introduction of gender analysis to its understanding in the law upgrades our understanding significantly. In legal gender studies “violence” is a complex concept dependent on insufficiently elaborated, stereotypical, and largely biblical ideas of direct physical harm. Even better, violence is defined as a specific activity inducing different types of harm. Also, if the gendered nature of *home* and *privacy* are taken into account, our understanding of *domestic* advances to a nuanced analysis of a physical space, but also of a cultural site as well as a decisional mode. The point is that adding gender analysis upgrades the quality of the discussion.

One may want to consider *sexual harassment* as another example. Again, it will seem to many that we know what this is about. However, a gender analysis will allow us to understand the power relations in different workplaces, and regarding a variety of markers of inequality, namely sex, race, age, ability, as well as the implications of class. The point is that even in cases where it seems that gender is already recognized, a gender analysis, informed by the current work in the gender studies, upgrades our abilities to address the world properly.

Less obvious than these two cases, one may also consider *contracts*. Again, many have a quick take on the issue, and lawyers will quickly name the relevant aspects at stake. Again, gender adds to our understanding. Better understanding is based on the work linked to the gendered nature of our definition of the legal subject, of autonomy and free will, of consent, including the intersectional nature of inequalities that modify gender in the world. The point is, once more, that gender is a relevant component of cases, problems or issues beyond those ordinarily discussed. Thus, a gender analysis certainly also upgrades our notions of “torts”, but will also qualify our understanding of building and planning regulations, or of the regulation of infrastructure, such as telecommunication, etc. Despite the fact that gender matters tremendously to most people, its relevance has not yet been fully integrated to allow for a more informed discussion.

#### 4.1. Knowledge and Diversity

To quickly illustrate the argument that equality in higher education and research, and in law, produces better quality, you may also take a look at the telling case of the headscarf.<sup>13</sup> This garment has surfaced as an item of contention in many countries, and many will immediately have

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<sup>12</sup> N. Petrušić, S. Konstantinović-Vilić, *Porodičnopravna zaštita od nasilja u porodici u pravosudnoj praksi Srbije*, Beograd – Niš 2010.

<sup>13</sup> A more elaborate discussion in S. Baer, “Intersectional discrimination and fundamental rights in Germany”, *Sociologia del diritto* 2/2016, 65–86.



an idea of what is the essence of the problem. In Europe people tend to think of Islam in secular schools, be it as pupil or teachers of Muslim belief, or be it as a subject of studies. Often the headscarf case occupies an almost paradigmatic position, in which conflicting perspectives on religion, education and the public, but also women, sexual equality, and proper dress, come to the fore. These are not limited to but often culminate in primary schools: girls as pupils, women as teachers and social workers all have been expelled for refusing to remove their headscarves. The item is worn to cover hair for religious reasons, the religion in question being Islam.<sup>14</sup> However, it is even more complicated than that, and it matters, in law, whether we consider additional aspects or not.

Imagine, then, to be called on to argue, or decide, or teach, or “solve” in your exam one of the paradigmatic cases of Europe today: a headscarf case. Imagine to be called upon, as a lawyer or legislator, a judge or professor or student, to even “solve” the headscarf case. This may not seem overly difficult, because it is a well-known controversy around the globe, both in courts and legislatures as well as in politics, including politics beyond parties, i.e. in social and civil rights movements. How do you frame what matters? How do you know? And what makes your decision, lecture or test especially good, even excellent?

In our example, imagine “the case” is the request of a primary school teacher to work with her hair covered (not to be confused with covering the face), calling into question the decision of the school principal, the Minister of Education, and the legislature, not to tolerate that kind of religious display, to safeguard the order of the school, and secular education. What is this case about?

To many, the headscarf case is about religious freedom, first and foremost. And indeed, it is necessary to understand the nature of religion, and the place of religion in a society, including its official legal status that could range from *laïcité* to less or more state-church-cooperation, to religious states. However, if a case is framed like this in law, the spectrum of relevant rights and principles taken into account is too limited.

#### 4.2. A Multidimensional Gender Analysis

Indeed, a gender analysis is beneficial, which compels us here to bring gender into the mainstream of legal analysis. As a first step, it is not just any teacher that is called to leave the school, but a woman. Acknowledging this, we need to take into account the history of women gaining access to professions, and a prohibition of a particular item of clothing as a classic device to disenfranchise women. In law, it is then not only the

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<sup>14</sup> For a comparative account, see: N. Dorsen, *et al.*, *Comparative Constitutionalism*, West Academic, 2016<sup>3</sup>, chapter on religious freedom, the clash.

right to religious freedom that matters, but also the right to sex or gender equality that is at stake. Yet this recognition of the physical presence of people as women or men is only the first step, while a comprehensive gender analysis calls for more.

As a second step in our effort to do justice to the world, it helps to consider the gendered status and nature of the job and schools as institutions. Primary schools are often staffed by women (but have male directors), while later schooling is done much more by men. This may be based on the different expectations of what is taught, namely basics and manners versus knowledge and mind. In addition, schools are place where the citizen is formed, similar to the family, which is much more foundational to society than theories of the state and democracy have long been willing to acknowledge.<sup>15</sup> In law, this may inform different notions of a state interest in a particular school practice, starting with what is in Germany labeled as “peace at school” (*Schulfrieden*) and has rather authoritarian roots, but nevertheless opens us to greater comprehension. With a gender analysis, we are able to understand the professional tasks and challenges of teachers, including the gender and sexual politics at play, which may inform a distinction between rational expectations of professionalism and unfair presumptions, directed, in this case at a woman covering her hair, which are in fact not relevant to the task.

Additionally, a gender analysis calls on us to understand gender in the context of still other markers of inequality and discrimination.<sup>16</sup> With an enormous impact on gender studies, Black women in the U.S. have used the concept of intersectionality, which is now also discussed as multidimensionality of equality.<sup>17</sup> It recognizes that no one may be reduced to one characteristic or social structure alone, but must be understood in a much more realistic manner, situated in multiple dimensions. This has an immediate appeal to anyone who has ever addressed all the aspects that matter to who we are in the world and how the various relevant as-

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<sup>15</sup> D. Vujadinovic, “Family Structures and Civil Society Perspectives in Present-Day Serbia”, *The Golden Chain: Family, Civil Society, and the State* (eds. P. Ginsbourg et al.), Berghahn Books, 2011. On the Anglo-Saxon tradition, see S. Moller Okin, *Justice, Gender and the Family*, Basic Books, 1989.

<sup>16</sup> A. Scherr, A. El-Mafaalani, G. Yüksel (eds.), *Handbuch Diskriminierung*, Springer, 2017.

<sup>17</sup> A more recent account is given by S. Cho, K. Crenshaw, L. McCall, “Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis”, *Signs: Journal of Women in Culture and Society* 38/2013, 785–810; D. Schiek, V. Chege (eds.), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, Routledge, 2009; B. Bello, “Multiple Discrimination Between the EU Agenda and Civic Engagement: The Long Road of Intersectional Perspective”, *Women’s Studies* 13/2010, 22; on challenges, see: S. Baer, J. Keim, L. Nowotnick, “Intersectionality in Gender Training”, 2009, [http://www.quing.eu/files/WHY/baer\\_keim\\_nowotnick.pdf](http://www.quing.eu/files/WHY/baer_keim_nowotnick.pdf), last visited 12 September 2017.

pects change across contexts. Namely, men tend to acknowledge themselves as men only in particular settings, and reluctantly if it does not serve to perpetuate the hegemonic version of masculinity, while women are often reduced to being nothing but women, with a focus on traditional sexist femininity. Conversely, age is constantly referred to, yet aging is taken very differently, again, highly contextually. In the headscarf case, adding gender as an intersectional category to the analysis allows us to again upgrade our understanding of “the case”. We must acknowledge that religion is not just a liberty interest but also a marker of discrimination. Furthermore, the rights of Muslim women are often connected to a specific migration background, i.e. to ethnic identity, and thus to more than only one such label. Also, class may be relevant to our understanding of the case, in that the teaching profession is, in many contexts, a gateway to climbing the social ladder, to emancipation via social mobility. Again, the point is that equality adds to quality.

Thus, the “headscarf case” is certainly about varieties of religious pluralism that challenge established notions of what seemed normal, including the way people dress and cover, or not cover, the head, and often, but not always, hair. Conflicts around the headscarf focus on a particular type of dress as a religious item, and not as a means, such as hygiene or for protection while working, cultural tradition or practicality. But the case is just as much about gender and other markers of inequality. To do justice to the case, as a lawyer or legislator, a judge, professor or student, it is a necessity to take that into account.

## 5. TEAM DIVERSITY AND NON-DISCRIMINATION

As a gender-competent analysis of one case illustrates, to do better in law and in other fields of higher education and research, it is necessary to expand one’s knowledge. Additionally, this is extremely helpful, and in fact a necessary procedural device for critical analysis to work in a team. Despite the idea of a lone genius at his desk, teamwork forces efforts in the humanities and social sciences as much as in STEM fields to work from multiple perspectives. In addition to its heuristic value, the emphasis on teamwork not least discards the ideal, which was a privileged and usually male vision of the genius on his own, save for his trusty sidekick, who takes care of his personal life and the tedious work of less challenging research.

To illustrate the point, we turn to collegiate courts in which judges sit in panels, or chambers, or senates. They are called to the bench as individuals, yet once there, they are called upon to share their individual approach with all others, and argue their solution; at no point do they

decide on their own. There is a long tradition and widely accepted value of such teamwork in most legal systems. Thus, diversity as an aspect of quality should come naturally to the law, and also to law schools and faculties of law. To date, socially meaningful diversity is still more wish than reality or even goal in legal institutions, including faculties of law and departments of legal studies.<sup>18</sup> Seemingly, a desire for closure dominates. Yet, as much as our international legal thinking and practice profit from exchange, the quality of one's work in general will profit from more voices to be heard in the search. Even in courts, the aspects considered as productively diverse must be expanded.<sup>19</sup>

Diversity is not just the positive side of non-discrimination. Let us be clear that diversity is a productive procedural device for the care of justice. Nevertheless, first and foremost, non-discrimination is the rule. In fact, there is no option to ever achieve meaningful diversity if sexism, racism and other practices of discrimination are not addressed adequately, which means swiftly and resolutely. If discrimination persists, and particularly if it is taboo ("that does not happen here"), there will be no team diversity to cherish.<sup>20</sup> Discrimination in whatever form simply cannot be tolerated in legal education, nor in legal practice, and this still needs to be exposed, adequately addressed, and unambiguously rejected.<sup>21</sup> The absence of discrimination consists both of a refusal to engage in it as either actor or bystander, as well as of the clear condemnation if it happens from

<sup>18</sup> V. Eickhoff, L. Schmitt, "Herausforderungen hochschulischer Diversity-Politik", *Managing Diversity* (eds. K. Fereidooni, A. P. Zeoli), Springer, 2016, 199–228. Also see: N. Dowd, K. B. Nunn, J. E. Pendergast, "Diversity Matters: Race, Gender, and Ethnicity in Legal Education", *U. Florida JL & Pub. Policy* 15/2003, 11.

<sup>19</sup> Not all collegiate courts foster the ideal of diversity on the bench, but some constitutional and many international courts deliberately integrate diverse experience and perspectives into their design. According to German political practice, justices for the Constitutional Court are nominated by political parties in relation to their long-term success in national elections, yet have to be voted in, according to law, by a 2/3 majority. They thus require the support of all relevant political factions. In addition, the law requires at least 3 career judges per Senate of 8, and asks for fully qualified lawyers of a minimum age. Recently, proposals for a legal obligation to achieve gender parity on the bench has failed, yet a record gender quota has been achieved in 2016 (7 women, 9 men; plus age, sexual orientation, professional background, etc.).

<sup>20</sup> When teams start getting more diverse, there will always be a "first", i.e. first woman, first disabled, first non-heterosexual, first younger/older, etc.; Sharing experience helps to ease this start. Ulrike Schultz, a longtime champion of gender equality in the law, produced an online database of interviews with female law professors in Germany, to circulate stories, <http://www.feruni-hagen.de/jurpro/>, last visited 12 September 2017. See also: U. Schultz, G. Shaw (eds.), *Women in the Legal Profession*, Hart Publishing 2003; U. Schultz, G. Shaw (eds.), *Gender and Judging*, Oñati International Series in Law and Society, Hart Publishing, 2013.

<sup>21</sup> L. Chebout, S. Gather, D-S. Valentiner, "Sexismus in der juristischen Ausbildung. Ein Aufschrei dreier Nachwuchsjuristinnen", *Zeitschrift des Deutschen Juristinnenbundes* 19/2016, 190–193.

colleagues, peers, as well as the institution. As such, it is a necessary condition for diversity to thrive.

When it comes to diversity, in the sense of a meaningful presence of multiple perspectives, the courts seem to be a place where this clearly matters. To again use the example of the headscarf, it seems rather obvious that when a court is called upon to address the issue, different judges with different perspectives on life and a different set of personal first-hand experience, as well as trained in a variety of specialist and professional expertise, will also approach legal issues in different ways. In fact, it seems clear that such predispositions do frame the take of the case, and eventually do also inform the ruling. To illustrate, someone close to the school as an institution, be it via one's children or a family member who is teacher, may think about today's challenges of keeping "peace in schools" first. Someone close to discrimination, however, whether via one's own or someone else's experience as "different", may consider that meaningful equality is more important. Ultimately, a person with strong religious views may understand the case to be about religious freedom only. The argument for diversity is thus not that one perspective is better than the other, rather, the argument is that diversity in a team allows it to share perspectives, and thus enriches the consensus that is eventually achieved. Often the focus is on professional diversity (in international settings on national diversity), yet there are also strong arguments made for gender and other types of diversity, be it on the bench, in a law firm, or on either side of the lectern at law schools.

## 6. QUALITY

As such, the key argument in favor of gender in the higher education of law and legal research is that equality improves quality. Both an intersectional or multidimensional gender analysis as well as an arrangement that acknowledges socially relevant diversity, effectuates more quality in the law itself. Fortunately, after many years of an insistence on "outsider jurisprudence",<sup>22</sup> this can now be stated openly. If one is willing to learn and understand, there are many more examples that illustrate that gender matters in and to law.<sup>23</sup> This reaches far beyond the classic

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<sup>22</sup> M. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story", *Michigan L Rev* 87/1989, 2320–2381; F. Valdes, "Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education", *Asian LJ* 10/2003, 65.

<sup>23</sup> A short "walk" through the legal fields and their gender dimension in: S. Baer, "Justitia ohne Augenbinde? Zur Kategorie Geschlecht in der Rechtswissenschaft", *Recht und Geschlecht – zwischen Gleichberechtigung, Gleichstellung und Differenz* (eds. M.

gender-related fields of family law, marriage and relationships law, or law on sexual violence. In fact, there is inspiring work on gender in criminal law,<sup>24</sup> tax law,<sup>25</sup> in land use regulation,<sup>26</sup> “male” practice on the street that may inform police law,<sup>27</sup> health law (particularly regarding providing sufficiently high standards for all<sup>28</sup>), as well as torts,<sup>29</sup> constitutional law,<sup>30</sup> and human rights law.<sup>31</sup> In addition to all this, there is work on the complicated effects of law regarding gender equality, including the ambivalence of quota.<sup>32</sup> All in all, a thorough and nuanced gender analysis upgrades our understanding of the world, and this informs and eventually also changes our understanding and practice of the law.

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Koreuber, U. Mage), Nomos, Baden Baden 2004, 19–31. An inspiring Australian approach is R. Graycar, J. Morgan, *The Hidden Gender of Law*, Federation Press, 2002, and R. Graycar, J. Morgan, “On The Hidden Gender of Law: A Public Talk”, *Australian Feminist LJ* 41/2015, 29–36.

<sup>24</sup> G. Temme, C. Künzel (Hrsg.), *Hat Strafrecht ein Geschlecht?: zur Deutung und Bedeutung der Kategorie Geschlecht in strafrechtlichen Diskursen vom 18. Jahrhundert bis heute*, Bielefeld, 2010; S. Baer, S. Elsumi, “Feministische Rechtstheorien”, *Handbuch Rechtsphilosophie*, Springer, 2017, 270–277.

<sup>25</sup> B. Crawford, A. Infanti, *Feminist Judgments: Rewritten Tax Opinions*, Cambridge University Press, 2017; K. Bartlett, D. Rhode, J. Grossman, *Gender and Law: Theory, Doctrine, Commentary*, Kluwer, 2016; U. Mückenberger, U. Spangenberg, K. Warncke, *Familienförderung und Gender Mainstreaming im Steuerrecht*, Nomos, 2007; U. Spangenberg, M. Wersig (eds.), *Geschlechtergerechtigkeit steuern: Perspektivenwechsel im Steuerrecht*, Nomos, 2013.

<sup>26</sup> N. Menon, Y. Rodgers, A. R. Kennedy, “Land Reform and Welfare in Vietnam: Why Gender of the Land-Rights Holder Matters”, *Journal of International Development* 29/2017, 454–472.

<sup>27</sup> A. Filipović, “Resonant masculinities: affective co-production of sound, space, and gender in the everyday life of Belgrade, Serbia”, *NORMA* 2017, 1–14.

<sup>28</sup> J. Janevic, J. Jankovic, E. Bradley, “Socioeconomic position, gender, and inequalities in self-rated health between Roma and non-Roma in Serbia”, *International Journal of Public Health* 57/2012, 49–55; O. Milovanovic, S. Radevic, M. Jovanovic, “Legal Framework and Retirement Policies in Serbia from 1990 to 2016 – Gendered Perspective”, *Frontiers in Public Health* 2016, 4, 208.

<sup>29</sup> A North American classic is: L. Bender, “Teaching Torts as if Gender Matters: Intentional Torts”, *Virginia J Soc. Pol’y & L* 2/1994, 115.

<sup>30</sup> H. Irving (ed.), *Constitutions and Gender*, Cheltenham – Northampton 2017; R. Rubio-Marín, W. C. Chang, “Sites of constitutional struggle for women’s equality”, *Routledge Handbook of Constitutional Law*, Routledge, 2013, 301.

<sup>31</sup> U. Lembke (ed.), *Menschenrechte und Geschlecht*, Nomos 2014; K. Knop (ed.), *Gender and Human Rights*, Oxford University Press, 2004; C. A. MacKinnon, *Are Women Human?*, Belknap Press, 2006.

<sup>32</sup> E. Nacevska, S. Lokar, “The Effectiveness of Gender Quotas in Macedonia, Serbia and Croatia.” *Teorija i Praksa* 54(2)/2017, 394; S. Ignjatović, A. Bošković, “Gender Equality in Serbia”, in *Gender Equality in a Global Perspective*, Routledge, 2017, 198.

## 7. STRATEGIES OF CHANGE

What is necessary to achieve the quality embedded in equality in higher education and research? As ever, these are knowledge and non-discrimination, while diversity helps in that a multiplicity of perspectives opens the door to challenge one's own presuppositions and prejudices, and reconsider the framing often taken as normal and given. Now how can this be achieved?

To change the status quo, relevant actors need to be willing to integrate both unbiased knowledge about gender as well as the recognition and appreciation of diversity into higher education and research. It is my impression, again, that this may come with some specific challenges in the field of law, which only reminds us that in higher education and research, disciplinary differences already matter. Luckily, to eliminate the gender bias that still exists, there are gender studies that deliver important data, concepts and analyses from and to many academic fields. Much of it is highly relevant to the law, and may be put to better use by informing law, legal education and research. Interestingly, there are also studies on types, levels and sources of resistance to such efforts now as well,<sup>33</sup> to better deal with these, too. Also, there have already been successful efforts in law and legal studies to learn from, and there are ongoing activities in many contexts to support or join, to eventually achieve the quality we need. However, exposure seems as important as education, and to insist on the necessity to change must be accompanied by efforts to integrate gender into the mainstream, which will thus need to change. Often, change also requires more than its demand, in that one simply has to do it: demonstrate that quality is based on equality.

### 7.1. Expose and Educate

To achieve gender equality in higher education and research, both by upgrading knowledge and by practicing diversity that in fact allows for and offers a multiplicity of perspectives, it seems necessary first to expose and to educate. Gender equality in higher education and research will not come about without exposing the blind spots of the canon, or elaborating the need to understand more and thus better. There is always a challenge to expose what is considered “normal” and why, both in school and beyond, and to ask for the real substance of any claim to *neutrality*, including the neutrality of law to address such highly charged questions. Also, there is a need to expose the gender dimensions of a conflict that is predominantly registered as religious or otherwise, and, in

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<sup>33</sup> E. Lombardo, L. Mergaert, “Gender Mainstreaming and Resistance to Gender Training: A Framework for Studying Implementation”, *NORA – Nordic Journal of Feminist and Gender Research* 21/2013, 296–311.

a reflexive turn, to expose how gender is used in specific ways to support political agendas. For example, wearing a headscarf is often portrayed as an expression of sex inequality, which then in turn justifies the prohibition, a claim that might be a nuanced account of the situation at hand or driven by an Islamophobic agenda. Also, every conflict around self-determination, religious or otherwise, confronts us with the task to challenge “normal” understandings of *free will*, and *choice*. Thus, in cases surrounding the issue of the headscarf, it is often argued that women are forced to wear such an oppressive garment, which may be true, but also may be a false attribution of a stereotype. Additionally, the notion of *religion* itself must be questioned to understand which version of belief informs or in fact requires a specific behavior. Similarly, to properly understand conflicts in which *women* fare worse than *men*, in their access to a profession, there is always the question of who exactly we are talking about in that the collectives called women or men do in fact have very little internal coherence, so that the gender label may itself be wrong. However, exposing this is often not welcomed very much.

Exposure may excite people, and be fascinating, yet it also stirs anger and motivates resistance. To make your point regarding the concerns of an outsider, or even from an outsider position, and introduce a formerly excluded and therefore outsider perspective, there is a challenging need to insist, again and again, that it counts, despite laughter, denial, a generous smile, or outright rejection. Sometimes, this is born of ignorance, which can be cured. Yet there is also a strong and often rather intuitive will to defend one’s privilege, or the privilege one hopes to enjoy soon.<sup>34</sup> To deal with such resistance, it will often not suffice to expose the blind spots, the lack or distortion of data, the false assumption; rather one must also educate what gender equality offers to higher education and research. Even among very smart people, when it comes to gender, it is not enough to demonstrate that things are biased, and thus false, and that research and teaching should be upgraded with gender analysis. This calls for more systematic efforts of and in education.

For example, in German legal studies there are clear indications that many of the hypotheticals that form the core of the curriculum are biased,<sup>35</sup> yet it still takes educational as well as, last but not least, political efforts to achieve change. In fact, people need to not only see the

<sup>34</sup> A. Shalleck, “Report of the Women and the Law Project: Gender Bias and the Law School Curriculum”, *J of Legal Education* 38/1988, 97–99. On masculinity as a key factor in this context, see: J. Hearn, *Men of the World Genders, Globalizations, Transnational Times*, SAGE, 2015.

<sup>35</sup> D-S. Valentiner, *(Geschlechter) Rollenstereotype in juristischen Ausbildungsfällen*, Hamburg 2017; L. Morgenthal, “August Geil und Frieda Lüstlein: der Autor und sein Tätertyp”, *Kritische Justiz* 16/1983, 65–68; F. Pabst, V. Slupik, “Das Frauenbild im zivilrechtlichen Schulfall”, *Kritische Justiz* 10/1977, 242–256; J. Limbach, “Wie männlich ist



blind spot, but to also learn how to challenge their own assumptions. There is a constant need to study how to systematically address gender in all its dimensions in a given field. In science, workshops have been conducted with scientists to address the gender dimensions of their newest innovation, to educate and enhance research. Not least, bias in grading needs to be exposed,<sup>36</sup> but to remove the bias, institutions need training and lasting mechanisms to maintain the competence as well. Again and again, we need to discuss why it matters to take gender on board, and we need to learn from each other, thus be willing to teach and study how this can be done. In seeking to remove bias and prejudice, teaching law is a prime place to address gender inequality, including its intersectionalities, based on as well as inspiring research – all with the aim of better understanding the world.

## 7.2. Insist and Integrate

Secondly, to achieve gender equality in higher education and research, at the level of knowledge and of persons, it also seems necessary to insist and integrate gender matters into the field at hand. This may sound very similar to exposure and education. However, the emphasis on insistence highlights the necessity to constantly uphold and renew such efforts. Facing resistance and rejection, collaboration often helps, not necessarily because others know better or more, but because they may divert the aggression that is more dangerous to those inside.

Additionally, the emphasis on integration highlights the need to import gender expertise and gender equality into the mindsets and actions of people. It is this necessity that has motivated the struggle for sex equality to be transformed into gender mainstreaming strategies, to position formerly minor and disregarded concerns into the larger picture, and eventually contribute, hopefully then with a broader base, to the broader task.<sup>37</sup> Additionally, integration makes you, or allows you, to remain part of the team, and it may prevent others from leaving.

To successfully achieve integration, challenging demands often can and must be packed into the larger project of working on the quality of higher education and research, for law schools as well as for other aca-

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die Rechtswissenschaft?“, *Wie männlich ist die Wissenschaft?* (Hrsg. K. Hausen, H. Nowotny), Suhrkamp, 1986, 87–107.

<sup>36</sup> E. Towfigh, C. Traxler, A. Glöckner, “Zur Benotung in der Examensvorbereitung und im ersten Examen”, *ZDRW* 1/2014, 8–27.

<sup>37</sup> Cf. M. Verloo, “Displacement and Empowerment: Reflections on the Concept and Practice of the Council of Europe Approach to Gender Mainstreaming and Gender Equality”, *Social Politics: International Studies in Gender, State & Society* 12/2005, 344–365; UN by H. Charlesworth, “Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations”, *Harvard Hum Rights J.* 18/2005, 1.

ademic contexts.<sup>38</sup> For example, a commitment to achieve gender equality may be well integrated into a commitment to value diversity, both in teaching and research, as well as among students and visitors, and commitment to a productive study environment may support a smaller class structure, if that shows fairer grading results, which may in turn also support gender equality.<sup>39</sup> To bring about change, such backpacking and mainstreaming do often go hand in hand. Thus, to render a good judgment, to draft a good law, to apply the law well, to win a case, to teach for the future, or to get it right even beyond exams – there is not only the need to insist that an equality perspective be taken into account, but also a necessity to integrate it in context.

Insisting on quality, via equality, thus calls for more than a mere presence of “women, too”. To make things last, gender equality as a quality factor needs to be integrated into the larger task at hand, consistent with professional and institutional identities, and thus pride, to deliver the academic quality we need.

### 7.3. Conclusion – Demand and Do It

Finally, to achieve gender competent knowledge as well as diversity of actors, thus eventually truly better quality in higher education and research, it seems necessary to demand, but also do what you are asking for. Luckily, once again, there are many instances in which simply better academic and educational work has been produced.

It starts with the hypotheticals one uses in the classroom or in exams,<sup>40</sup> or in textbooks. It then influences the methods we use to teach and learn.<sup>41</sup> All of this can in fact be replicated and amended, eventually be made better, in the development of training in law, therefore to do no less than contribute to justice in the world.

Others have developed teaching and training tools to rewrite judgments from a feminist perspective.<sup>42</sup> It teaches students, as well as pro-

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<sup>38</sup> F. Bleckmann, “Grundlagen und Themen einer kritischen Rechtsdidaktik”, *Kritische Justiz* 49/2016, 305–316; P. Mann, “Dimensions of Justice in 21st Century Legal Practice and Law School Pedagogies”, *Charleston L. Rev.* 9/2014, 251.

<sup>39</sup> See studies on US law schools, D. E. Ho, M. G. Kelman, “Does Class Size Affect the Gender gap? A Natural Experiment in Law”, *J of Legal Studies* 43/2014, 291–321; see also: D. L. Rhode, “Missing Questions: Feminist Perspectives on Legal Education”, *Stanford L. Rev.* 45/1992, 1547.

<sup>40</sup> D. Schweigler exposed the sexism in exam hypotheticals in Bavarian state exams, but also pointed out that administrative law exams have been revised successfully. D. Schweigler “Marginalized in the Name of the Law”, *Max Planck Research* 4/2014, 10–14.

<sup>41</sup> C. Dark, “Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching”, *Willamette L. Rev.* 32/1996, 541.

<sup>42</sup> R. Hunter, C. McGlynn, E. Rackley (eds.), *Feminist Judgments: From Theory to Practice*, Hart Publishing 2010; R. Hunter, “The Power of Feminist Judgments?”, *Fem-*

fessors, a lot about the challenges of rendering judgment.<sup>43</sup> Yet it also educates the legal community and the judges themselves, tasking them to do better in the future. In law schools, the ability to truly comprehend the cases, to then properly argue or decide, may also be enhanced by storytelling,<sup>44</sup> in that this allows for a more ambivalent account of “facts”. There are very practical examples out there of how to achieve what may be labeled as gender competence in law,<sup>45</sup> thus providing more quality in legal education.<sup>46</sup>

To bring about change in a well-established field is a challenge and a promise, a fascinating journey and a daunting task. To carry forth what is relevant to the best solution, to better understand the law, to argue convincingly, and to decide justly, we need to expose bias and educate colleagues and teammates continuously, to make all of us understand what we have not yet thought of or what most have thought of differently, but unfortunately wrongly. Eventually, one also needs to educate the wider public to accept what has been done or is about to happen, in order to be allowed to continue doing it and prevent a roll back. All in all, change requires a flexible shifting between demanding and doing. If possible, simply teaching in a diverse team, acknowledging diversity in the classroom, using a feminist, antiracist etc. analysis of material, as well as design hypotheticals and exams without bias – all this has lasting effects. Talking about the need for equality in higher education and research is certainly worth the effort. Yet in addition to the demand, it seems that doing it will have the most impressive effect.

In short, gender equality in higher education and research calls on those committed to merit, or even excellence, necessarily including fairness and non-discrimination, to expose and educate, insist and integrate, and demand as well as do it. In law, gender equality indeed matters in

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*inist Legal Studies* 20(2)/2012, 135–148; H. Douglas, F. Bartlett, T. Luker, R. Hunter (eds.), *Australian Feminist Judgments: Righting and Rewriting Law*, Hart Publishing 2014; K. M. Stanchi, B. J. Crawford, L. L. Berger (eds.), *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*, Cambridge University Press, 2016; M. Enright, J. McCandless, A. O’Donoghue (eds.), *Northern/Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity*, Hart Publishing 2017. See also: M. Cole (ed.), *Education, Equality and Human Rights: Issues of Gender, ‘Race’, Sexuality, Disability and Social Class*, Routledge, 2017.

<sup>43</sup> See R. Graycar, “The Gender of Judgments: Some Reflections on ‘Bias’”, *University of British Columbia Law Review* 32/1998, 1.

<sup>44</sup> N. Levit, “Legal Storytelling: The theory and the Practice – Reflective Writing Across the Curriculum”, *J of Legal Writing Institute* 15/2009, 259–283.

<sup>45</sup> D-S. Valentiner, “Genderkompetenz im rechtswissenschaftlichen Studium”, *ZDRW* 2/2016, 152–161.

<sup>46</sup> For the US, see: M. Hart, “The More Things Change-Exploring Solutions to Persisting Discrimination in Legal Academia”, *Columbia J. Gender & L.* 31/2015, 1.

specific ways.<sup>47</sup> There is not only the need to reach gender equality in higher education and research, there is also a lot of knowledge out there to integrate, and many strategies to learn from, to better train people, even in law schools.

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<sup>47</sup> S. Berghahn, 69–90.

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