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THE DIFFERENCE A JUSTICE MAY MAKE: REMARKS AT THE SYMPOSIUM FOR JUSTICE RUTH BADER GINSBURG¹

SUSANNE BAER²

What have courts done to women? What can courts do for women? And what does it mean to do something for women without being paternalistic, or, eventually, maternalistic, which may be just as bad? These are questions Justice Ginsburg provided to inspire this symposium. Before I address them directly, we need to tackle some remarks on widespread assumptions that govern expectations around here, namely, expectations of, or attributions to, women on the bench.

The key question is, then: What is it that makes a difference, regarding an individual justice or judge, at a court? In the German Federal Constitutional Court, there are two women in the First Senate, out of five female justices on the Court as a whole, who work with eleven men.³ Does this make a difference? What happened when one woman worked with seven men in one Senate, sometimes mocked as Snow White with the seven dwarfs, a rather discomfoting comment for the men? Many believe biology matters, with more or less explicit reference to assumptions about femininity. What exactly is “this” that may indeed differ – the being female, being feminine, being male, or the masculinity of courts? Digging deeper, one may also want to ask whether this is too narrow a question.

Based on what we know about sex in/equalities today, largely due to gender studies and critical race studies, we need to ask for more. But what exactly matters, then, in an

1 I am grateful to Katherine Franke and Columbia Law School for the invitation to join in this Symposium, and to the editors of the Journal for their work on the written version.

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3 The German Federal Constitutional Court has two Senates, with eight justices each, which form Chambers with three justices each. The First Senate is responsible for most individual fundamental rights guaranteed by the German constitution, including genuine equality cases; the Second Senate is responsible for controversies around separation of powers, elections, international treaties, and the like. The Court is a siblings court, where both senates equally speak as “the” Court. It works by rules that oblige it to decide on everything that reaches it and that define which Senate decides and who is the reporting justice.

intersectional or multidimensional analysis of justices? As an example, I am among the younger justices at my Court—but does age leave a mark? Is it important that I have served for one year by now, out of a twelve year term, or, does seniority matter? I am also the only “out” homosexual there—yet does it matter? The nature of my spiritual life, or religion, is unknown, but I did not refer to God when the President of Germany took my oath in 2011. Additional demographic factors are not on the German agenda, but should we take them into account to make sense of what justices do? For example, my key impressions of life come from a city, Berlin, and I have worked in the United States, while others have stayed at home and live in small towns—but does this have any effect on my work on the bench? It has always been of interest to the wider German public whether justices are law professors, career judges, or politicians. But what does it do to my work that I am indeed a tenured professor, more specifically a professor of public law and gender studies (the latter often lost in reporting) at Humboldt University Berlin, at CEU Budapest, and, last but not least, at Michigan Law School? Does this academic biography really make a difference?

There is a lot of stereotyping around female judges, minority judges, old or young judges, rural or metropolitan background, and professors. One may add that there are quite strong assumptions about a person regarding one’s position in one’s family (the oldest daughter, the youngest kid, the sandwich child), and some ideas about key experiences in one’s life, yet those are privatized into the domain of gossip. Overall, there is indeed very little scientific data that indicate patterns. Regarding gender, it is my impression that biology does not color decisions. Therefore, we should hesitate before we emphatically embrace a notion of an automatic difference via someone’s sex, or gender, or any other such imprint. However, gender, just as religious belief, sexual orientation, age, class, or looks does not matter at all. Not only do we know from gender studies of organizations and the micropolitics of politics that there is a complex, intersectional mix of factors at work when people interact, including in courts. We also know that a feminist, namely a non-heteronormative perspective, does make a difference. At least, there is living proof that individuals with courage and the right views, namely views based on rights rather than ideology, may change things indeed—to only name Ruth Bader Ginsburg, Kate O’Regan, Claire L’Heureux-Dubé, Yvonne Mokgoro.⁴

Thus, I suggest we should understand this living proof as a particular stance towards law, and thus as a particular stance, a *Haltung*, towards power. It is an understanding of

4 These justices were present at the Symposium, and there are more. For an attempt to rewrite Court opinions from a feminist perspective, see the Canadian project in Melina Buckley, *Symes v. Canada*, 18 CANADIAN J. OF WOMEN & L. 27 (2006) and online at *Rewriting Equality*, THE WOMEN’S COURT OF CANADA, <http://womenscourt.ca/> (last visited Jan. 5, 2013).

law as a site of struggle, but also an understanding of law as a promise, as a specific type of argument for better politics, but always also of law as a double edged sword. Here, I do disagree with those who want to reduce law to a last resort and leave complicated controversies to a private sphere or to politics. Yet I do also disagree with those who see law as an inherent guarantee of justice. While law is always a good idea, it may also turn out badly—a double-edged sword. Put differently, I do not see law (anymore, I should add, due to the learning curve in feminist jurisprudence) as “the master’s tools [that] will never dismantle the master’s house,” to quote radical critic Audre Lorde.⁵ Namely, the right to equality is, as Catharine MacKinnon has pointed out early on in her work with Marx and radical feminism to deconstruct legality, a crack in that house’s walls.⁶ I do understand law to be a site of power that may, particularly in the form of court decisions, have ambivalent and even contradictory effects. For women, and for men, on the bench, this indicates that everything depends on how they fight, in the civil mode of argument, and that this argument is deeply embedded in power, and in that sense political, yet bound by law, which may make all the difference. Therefore, the question of what law can do for, or to, women, and what women can do to, for, or with the law, thus deserves a richer than purely demographic account. Therefore, I will turn to the law.

First, I will briefly summarize the state of the art of equality law in Germany today.⁷ A distinct dimension of this story from a European Union member state is that we are not just theorizing postnational constitutionalism these days, but that we live it already, since law is not anymore isolated as national but needs to be seen in the context of transnational migration and multinational regimes.

Second, I turn to a key feature and key challenge in and to equality law today. It is what I have called the triangle of fundamental rights, referring to the three most prominent human fundamental rights around, namely dignity, liberty, and equality. The triangle calls upon us to think equality in relation to dignity (in order to reach the substantive basics, like violence, and to reach a minimum standard for distributive justice), and the triangle reminds us to think equality in relation to liberty (in order to avoid paternalism,

5 AUDRE LORDE, *The Master’s Tool Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110, 112 (1984).

6 CATHERINE A. MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE* 244 (1989) (the law of equality is “a peculiar jurisprudential opportunity, a crack in the wall between law and society”).

7 For those who do not read German, see Blanca Rodriguez Ruiz & Ute Sacksofsky, *Gender in the German Constitution*, in *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 149 (Beverly Baines & Ruth Rubio-Marin, eds., 2005); on European Union equality law, see *EUROPEAN COMMISSION, GENDER EQUALITY* (2012).

or, again, maternalism).⁸

Finally, I would like to point out three trends that may endanger equality law, in Germany, Europe, the United States, and more.

I. Equality Law

What does equality law mean today, in Germany? What does it do to and for women, and men, and to people otherwise identified?

My understanding of the state of the law today is only somewhat biased since I did not participate in those path-breaking equality decisions, but I should note that I am also somewhat bound by loyalty to the institution and my predecessors. However, the status of equality as a constitutional right in Germany, not a principle and not a value, is better than ever. Specifically, the status of sex equality law, not to be confounded with sex equality in life, is pretty good. There are several indicators to support this assessment.

First, sex equality is explicitly protected in German constitutional law, and not just as a right against state intervention (in Art. 3 sec. 3 sentence 1 of the Basic Law (BL), similar to antidiscrimination clauses in most—yet not the United States—constitutions and all human rights treaties). Sex equality is also, due to the political victory of femocrats in the 1994 constitutional revision after the fall of the wall in 1989, an obligation of the state to actively pursue gender justice (in Art. 3 sec. 2 BL).

Second, the German constitutional sex equality clause has been mobilized, in the sense of the socio-legal concept of law put into action, and it has been applied by the Court. Without mobilization, law on the books may be asleep for a long time if there are no litigants to wake it up, and courts may take their time to hear that alarm. In Germany, the Federal Constitutional Court (FCC) did sometimes even ring it. The Court played a consistent and powerful role in reminding the legislature to take sex equality seriously: in the 1950s, to equalize the law of marriage⁹; in the 1990s, to address equality in labor

⁸ See Susanne Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, 59 U. TORONTO L.J. 417 (2009).

⁹ Decision of the Federal Constitutional Court, in German: Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 29, 1959, 1 BvR 205/58 et al., ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 10, 59 (Ger.) (Stichentscheid).

law¹⁰; and to extend equality to private business, namely banking contracts¹¹; after 2000, to also cover transsexuals and provide for equality regardless of what sex the person that you marry claims.¹²

Third, the FCC understands discrimination as such if there is direct, or explicit, unequal treatment, but it also, since 1997, applies the equality standard to indirect, implicit, or disparate impact discrimination.¹³ In 2011, the FCC clarified that laws which target mothers or pregnancy do, however, amount to direct sex discrimination—there are no abstract pregnant persons here—and that such laws may only be justified if they undo an inequality, but not if they produce one.¹⁴ In addition, statutes may not delegate child responsibility solely to mothers.¹⁵ The state must indeed support fathers to take on at least a bit of caregiving.¹⁶ To quote from a seminal decision on nightshifts from 1992:

The sentence [in Art. 3 sec. 2 BL] “men and women have equal rights” does not only want to remove laws that attach advantages or disadvantages to gender characteristics, but it wants to implement equality of the sexes in the future. It strives towards the assimilation of living conditions. Women shall have the same income opportunities as men. Traditional role distributions that lead to a higher burden or other disadvantages for women may not be stabilized by measures taken by the state. Factual disadvantages that typically hit women may be compensated for by advantageous rules because of the equality imperative in Art. 3 sec. 2 BL.¹⁷

10 BVerfG Nov. 16, 1993, 1 BvR 258/86, BVerfGE 89, 276 (§ 611a BGB).

11 BVerfG Oct. 19, 1993, 1 BvR 567/89, 1 BvR 1044/89, BVerfGE 89, 214 (Bürgschaft).

12 The FCC held that legislation that introduces registered partnership in order to end discrimination of gay and lesbian couples does not violate the marriage guarantee in the Constitution, and it also held that laws may not disadvantage partnerships if the characteristics that matter (commitment, shared financing etc.) do not differ from marriage. All decisions may be found in German, some also in English, online at DAS BUNDESVERFASSUNGSGERICHT, www.bverfg.de (last visited Jan. 5, 2013) (German) and <http://www.bverfg.de/en/index.html> (English).

13 BVerfG, Nov. 27, 1997, 1 BvL 12/91, BVerfGE 97, 35 (43) (Hamburger Ruhegeldgesetz, part-time workers and pension law), at B. II.1.

14 BVerfG, Apr. 28, 2011, 1 BvR 1409/10 (mothers and pension law).

15 BVerfG Oct. 25, 2005, 2 BvR 524/01, BVerfGE 114, 357 (370).

16 BVerfG, Aug. 19, 2011, 1 BvL 15/11; BVerfG, Nov. 9, 2011 1 BvR 1853/11 (parental leave).

17 BVerfG, Jan. 28, 1992, 1 BvR 1025/82, 1 BvL 16/83 and 10/91, BVerfGE 85, 191 (207) (prohibition

Luckily, European Union law, in Art. 157 TFEU, is even more clear on affirmative measures.

Thus, the problem is not a lack of affirmative rules, since at least all public employment in Germany, be it state or federal, is governed by affirmative action laws, and private companies are by now under—last but not least—demographic pressure to act accordingly. Rather, the problem is a lack of good will, coupled with a lack of sanctions. No law will ever undo inequality without sharp teeth, and without a willingness to bite, too. In 1993, the FCC stated that equality law needs such teeth, such as effective sanctions;¹⁸ a point that had been made by the European Court of Justice in 1986 already.¹⁹ The FCC has also held that privatization of formerly public companies does not allow the state to protect only men and drop women along the way.²⁰ As such, the law is not bad as it stands, but there is still work to do.

II. Triangle

As it stands, equality law does indeed target sex inequality, but it does not reach all inequalities and sometimes fails to undo them. What do we do about sexed poverty, about the pay gap, actually: the pay drama, about the sexual division of labor, actually: the precarization of women,²¹ and what about sexual violence, racialized sex discrimination, gendered disability?

This is where the triangle enters, a feature of human rights theory in general, at least as I read it, but also a feature of German and EU fundamental rights. The basic idea is: Equality fails when liberty is not sufficiently taken care of, and equality and liberty do mean very little if dignity is missing. It is of specific interest to feminist lawyers, judges, and justices that an exclusive focus on equality does not suffice. Sexed poverty, the pay drama, the precarization of women are not just issues of sex (in)equality. Rather, all

of some nightshifts for women).

18 BVerfG, Nov. 16, 1993, 1 BvR 258/86, BVerfGE 89, 276 (sex discrimination in access to employment).

19 See Case C-222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. 1651; Case C-177/88, *Dekker v. VJV-Centrum*, 1990 ECR I-3941. Sanctions are explicitly called for in all equality directives, to be transposed into national law by the member states.

20 BVerfG, Apr. 14, 2010, 1 BvL 8/08, BVerfGE 126, 29 (Privatisation Hamburg).

21 Precarization is the sociological concept to capture the social exclusion of people by means of rendering or keeping them impoverished. On gendered effects see Isabell Lorey, *Becoming Common: Precarization as Political Constituting*, E-FLUX, June 2010, <http://www.e-flux.com/journal/becoming-common-precariation-as-political-constituting/>.

such problems raise questions on the limits of contracts, including collective bargaining agreements, and thus do challenge some notions of liberty. The FCC has held that contracts are based on parity, and if that parity is “disturbed” a contract may be invalid.²² This seems to be an already controversial yet still sleeping beauty. We have yet to see whether pay is, in capitalism, a form of recognition, thus invoking dignity concerns. In the German social state, radically different from a socialist one,²³ the FCC already held that the state, to not violate a fundamental right to dignity, is obliged to provide for an existential minimum, both physical and socio-cultural, based on a realistic assessment of needs,²⁴ for Germans and non-Germans alike.²⁵ Currently, I am the reporting justice on social security, labor law, and academic freedom in a chamber that decides cases on financial market regulation as well. There is very little choice in doing what I do. But there is a lot of responsibility, and a stance, a *Haltung*, towards how to do it.

Furthermore, sexual violence, racialized sex discrimination, gendered disability—these are liberty issues, and instances of violations of dignity, but they do also, simultaneously, pose equality questions. Depending on how you look at them, equality modifies liberty just as dignity modifies equality, and so on.

III. Dangerous Trends

This is complicated indeed. Yet there are more complications ahead. I want to point out four challenges to equality, particularly for women and others not represented by, and not representing, a traditional, specifically male, heteronormative, white, and able norm.

The first challenge ahead is postnational constitutionalism. Today, German constitutional law cannot be read without European Union law and, albeit to a lesser degree, without international law (which I omitted in my brief account). To me, transnationalization is generally a good idea, partly because I learned from feminism and postcolonial critique that national parochialism is usually worse. However, postnational constitutionalism is a centrifugal force, and it tends to integrate some standards, but

22 BVerfG, Oct. 19, 1993, 89 BVerfGE 214 (personal loan security).

23 The more or less intentional confounding of the two may be observed in United States political criticism of the politics of the Obama administration. It indicates that such use of the term is based on not the faintest idea of a socialist state, like those in Eastern and Central Europe before 1989.

24 BVerfG, Feb. 9, 2010, BVerfGE 125, 175, available at http://www.bverfg.de/entscheidungen/ls20100209_1bvl000109.html (“Hartz IV,” social security minimum).

25 BVerfG July 18, 2012, 1 BvL 10/10, 1 BvL 2/11, available at http://www.bverfg.de/entscheidungen/ls20120718_1bvl001010.html (asylum seeker benefits act).

also disintegrates some others. Bluntly, if a transnational, global, or regional legal order comes along and drops women or the welfare state to mitigate class on the way, I am skeptical as to its quality. In the European Union, there are fears that some of this may still happen.

The second challenge ahead is family. In the United States, there is a mostly ideological debate about family values, while the German Basic Law, like many other constitutions, explicitly protects the family as an institution in Article 6. It took ages and several courageous women and some men in the FCC to disentangle family from marriage, to grant family rights to all intergenerational units, and to extend relationship rights to more people committed in love.²⁶ However, such consensus is not carved in stone. Around the globe, pro-natalistic policies meet patriarchal regressive forces and use our attachment to love and commitment and also to children, thus “family,” to actually privilege only the love of some, devalue the commitment of others, and select the children they deem fit for their world. “Prop 8,” the California homophobic plebiscite, may be out,²⁷ but similar efforts may quickly be in. Similarly, abortion, in Germany, is accessible and part of medical aid, and the FCC obliges the legislature to take a pregnant woman seriously and prohibits the law to force her into counselling, yet it is heavily regulated, and the burden on women persists.²⁸ In addition, political controversy abounds regarding state subsidies (*Betreuungsgeld*, or care money) for mothers who stay home. Thus, the family is alive and well, and still a key component of any equality, and of every inequality, strategy.

Third, there is the challenge of religion. Closely related to conservative and discriminatory family politics, we may also observe a comeback of religion. In German law as well as in the European Union, the European human rights system, and in the United Nations, religious rights and religious righteousness are frequently used to fight sex equality, and even more often, non-heteronormative visions of it. Religious freedom for some quickly amounts to sex discrimination for others. I believe that a right to a spiritual life is fundamental, but just as in the triangle, one right may never trump another. It is a particular version of religion that nonetheless endangers equality in complicated

26 The FCC held that a transsexual may not be forced to divorce, but remains married after transition although this in fact amounts to a same sex marriage, while German law allows only for homosexual registered partnership. BVerfG, May 27, 2008, BvL 10/05, BVerfGE 121, 175, available at http://www.bverfg.de/entscheidungen/lis20080527_1bv1001005.html.

27 *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

28 BVerfG, May 28, 1993, 2 BvF 2/90, 4,5/92, BVerfGE 88, 203 (265 ff., 282) (second abortion decision); see also BVerfG, Oct. 27, 1998, 1 BvR 2306/96, paras. 229–32, available at http://www.bverfg.de/entscheidungen/rs19981027_1bvr230696.html.

ways today.²⁹

Finally, I want to mention class (and yes, Marx and Hegel, the grand theorizers of class, and Engels, who saw some gender dimension in it,³⁰ were German indeed . . .). Today, the world is, financially, but also spiritually, in a state of crisis. Noticeably, both states and people do not have enough money. But what did we expect after killing large chunks of welfare states softly, as in Europe, or after rejecting the introduction of welfare right from the start, as in the United States? To me, poverty and precarization, or put differently, social justice without discrimination of any kind, is the future challenge. Some equality rights talk risks downplaying the economic face of discrimination, the class side of it. If you dare to look, you see the stark realities of the lives women live. I promised myself to care, just like so many Justices before me, with such a stance towards law. Or to put it in more or less contemporary terms: My “occupy” tent seems to be a court building.

29 See Susanne Baer, *A Closer Look at Law: Human Rights as Multi-level Sites of Struggles over Multi-dimensional Equality*, 6 *UTRECHT L. REV.* 56 (2010).

30 The classic text is Friedrich Engels, *The Origin of the Family, Private Property and the State* (1884), reprinted in 2 *KARL MARX & FRIEDRICH ENGELS, KARL MARX AND FRIEDRICH ENGELS: SELECTED WORKS IN TWO VOLUMES* (1949).