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GENDER JUSTICE IN POLISH COURTS: INFORMALLY EMBEDDED FORMALITY

1. Introduction

In spite of all the legislation introduced to combat discrimination and provide equal opportunities, gender inequality still persists in nearly all institutions, and legal institutions are no exception. The problem is that formal rules alone are generally not sufficient to promote change. They must be considered within their contexts.

The effectiveness of new formal rules in regards to expected change can be influenced by many factors, for example:

– established social rules and cultural norms or behaviours may run counter to new formal rules and prove stronger;

– old formal rules that are to be replaced by new formal rules may still remain in place;

– the organizational context of the courts influences the way laws and regulations are applied. The strength and type of new formal rules (see Section 3) will, at least in part, determine their final results.

The starting point for this discussion is the basic intuition that, while new formal rules are introduced to promote gender equality, informal social rules, which are typically based on patriarchal hierarchical norms, still persist within institutions. Investigating the relations between these reveals the complexity of elements which influence the application of formal rules in the courts. By comparing the aims of new formal rules with their final effects, it can be seen that the results achieved through their application are directly dependent on their informal contexts[1].

[1] The informal context is discussed depending on which aspects are analyzed: e.g. 'nested newness' – where new formal rules are introduced within an old institutional system to replace old for-

Studi sulla questione criminale, XIV, n. 3, 2019, pp. 45-66

ISSN 1828-4973

The aim of the article is to reveal the "informally embedded formality" (A. Stinchcombe, 2001). That exists within the Polish legal system. By this I mean the roles played by informally and culturally embedded formal rules when new rules are introduced within an existing context. All are considered 'rules of the game'. The theoretical perspective for this analysis is socio-legal approach, and specifically New Institutionalism (NI), Sociological Institutionalism (SI), and Feminist Institutionalism (FI), with a particular focus on the enforcement of formal rules promoting gender equality and change in the Polish legal system. In particular, I will show how both the practices of the courts and the patriarchal social norms expressed by the attitudes of judges towards gender issues influence the adjudication process. This informal context is therefore focused on the cultural social norms and the specificity of the organizational culture of the Polish courts. I will also examine the extent to which new formal institutions arising from European legislation can effectively change the existing dynamics of formal and informal rules with regards to gender issues, and why certain types of rules are destined to fail.

The topic of gender inequality is discussed in the feminist jurisprudence (FJ) literature (A.P. Harris, 1990; M. Minow, 1987; A.C. Scales, 1985, 1373; R. West, 1988, 1; K. Bartlett, 2018; C. Smart, 2002). Despite differences among positions in the FJ, the lack of factual gender justice is a unifying aspect. These positions also differ in their approach to whether the law is in force to provide gender justice or not. Two opposing positions, liberal (P. Smith, 2005; M. Minow, 1990) and radical feminism (C.A. MacKinnon, 1983, 635-8), answer the question, respectively, in the affirmative and in the negative. However, what they have in common is a specific vision of law, in which legal and social norms are perceived as belonging to two different orders. Building on the FJ approach, however, one needs to accept that legal inequality cannot be significantly changed by the hands of law itself. Rather than this, a desired change is expected to come from the social and cultural level, in order to be later absorbed and reproduced by the law. For the current analysis, however, I follow the socio – legal approach to law as it provides the opportunity to go beyond the dualism between law and society, by considering them as two elements of a whole that are constantly interacting. This setting is better suited, therefore, to discuss the interaction between formal and informal rules, and provide new insights in the topic of gender equality.

mal rules (L. Chappell, 2011); the influence of individuals in shaping institutions (E. Boxenbaum, J.S. Pedersen, 2009).

2. Gender inequality in institutions

In political science, the term (NI) was coined to describe the study of institutions from a sociological perspective. One of the key findings of this research was that individuals act on their own conceptions or beliefs about the institutions they belong to rather than following the actual rules. Sociological Organizational Institutionalism (SOI) stresses the social features of institutions, which are perceived as a shared understanding of "the way the world works" (K. Thelen, 1999, 386). That is why, along with formal rules, there are also "symbolic systems, cognitive scripts and moral templates" that provide the "framework of meanings" guiding human behaviour (P. Hall, R. Taylor, 1996, 947). Many institutional forms and procedures were adapted in accordance with culturally specific practices, myths and ceremonies assimilated into organizations through the transmission of cultural practices (J.W. Meyer, B. Rowan, 1977) rather than by any formal means initiated to reach a goal or increase efficiency. NSI breaks down the conceptual divide between "institution"(organizational structure) and "culture'(shared attitudes and values) (G. Almond, S. Verba, 1980). One of the most important implications drawn from this is to redefine "culture" and "institution" as two shades of the same thing (P. Hall, R. Taylor, 1996, 15). What follows is that the behaviour of institutional actors is not only guided by institutions, but it also shapes and constitutes the social actors themselves according to how they imagine their roles. It's a mutual relationship between institutions and individual actors (P. Berger, T. Luckmann, 1966).

However, according to Campbell, the "logic of social appropriateness" (D.P. Green, I. Shapiro, 1994) should also be taken into account, which means that the legitimacy for what is appropriate may come form social acceptance in a given social network in an institution (this may, for example, be driven by discussion within a group, or a shared interpretation of the problems).

The implications are that formal rules should be studied together with social and cultural norms in order to explain the process of change within institutions, and that the roles of institutional actors are not only shaped by the normative dimension of institutions but also by the behaviour and perceptions of the actors themselves. As a result, institutions cannot be perceived as solely as organizational structures but should also be considered as the products of individual human agency (Di Maggio, W. Powell, 1991, 1-40). This picture provides the setting for understanding the gender perspective proposed by FI. FI is an approach that looks at how gender norms operate within institutions and how institutional processes construct and maintain gender power dynamics.

Gender is perceived as a constitutive element of social relations, both on the personal or intersubjective level and also within gender structures of institutional life. Claiming that institutions are gendered means that constructions of masculinity and femininity are intertwined in the daily life and the logic of institutions. It means that masculinity and femininity are not existing out in society or fixed within individuals which bring the whole to the institution (S.J. Kenny, 1996, 456). What follows is that gender relations are seen as "institutional" but they are also "institutionalized", constraining and shaping social interactions (F. Mackay, M. Kenny, L. Chappell, 2010, 580). Gender relations cut across institutional life, starting from "symbolic level" to the interpersonal day-to-day interactions, where the continuous performance of gender takes place" (S.J. Kenny, 1996, 458).

As feminist theoretical and empirical works suggest, most institutions try to appear gender neutral in their rules and procedures but still remain gendered. There are almost always elements of gender discrimination hidden below the surface. One of the key observations formulated by NI suggests that change within institutions is more often driven by internal dynamics than by the external forces (J. Olsen, 2009, 9). Typical phrases used to describe this include: *"internal success criteria", "structures, procedures, rules, and practices", "career paths"; "socialization patterns", "styles of thought",* and *"interpretative traditions"* (*ivi*). What is indicated here is that there are informal power differentials between institutional actors. FI maintains that these imbalances are based on gender biases. Masculine and feminine forms of behaviour are prescribed and proscribed within the institutions (L. Chappell, 2002) and, what is more, they reproduce broader social and political gender expectations. However, the most important contributions FI has brought to NI is the focus on formal and informal institutions, seeing institutional change and stability as driven by a gendered process from within and perceiving actors as having agency (F. Mackay, M. Kenny, L. Chappell, 2010, 584). In the discussion that follows I highlight how gender analysis can enrich our understanding of formal and informal institutions.

3. Formal rules and informal practices

Although there are many formal legal regulations to prevent gender inequality, statistics and reports show that the introduction of equity and anti-discrimination laws has not resulted in gender justice in a full sense. Formal rules in themselves are insufficient to bring about change. We also need to consider the informal practices of the people within the institutions. By seeing how formal rules and informal practices operate together within the legal institution we can start to get a more accurate picture of why gender

inequality persists. Investigating informal practices is not without difficulties. They are rarely written down or even spoken about, but exist as a collective cognitive force within the minds of groups (or informal institutions) within a formal institution. One of the intuitive ways to confirm the existence of informal order is to establish where formal rules are consistently violated. With regards gender relations, systematic breaking of formal rules is particularly effective in identifying informal rules.

3.1. Informal norms and institutions

A very inspiring treatise concerning the legal phenomenon of informal rules can be found in Podgórecki's works on the sociology of law (A. Podgórecki, 1991, 100). He developed a broad approach to the topic based on the original conceptualization by Petrazycki and Ehrlich. Variously known as "unwritten law", "living law", "informal law", "intuitive law" and "folk law", the essence of informal rules is that they operate in social reality on the basis of informal attitudinal compulsions. Mutually related set of duties and claims have an obligatory force for the involved parties in a given social situation, irrespective of written norms or norms applied, supported, or sanctioned by a governing authority (A. Podgórecki, 1991, 100). Behaviors influenced by informal rules must thus be viewed as solely a product of internal compulsions. In the NI literature, especially in comparative politics, the importance of informal rules has been strongly stressed. However, the terms "informal rules", "informal norms" and "informal institutions" may have a variety of different meanings in different contexts. These could include: personal networks, clientelism (exchange of goods and services for political support), corruption, clans and mafias, civil society, traditional culture, and legislative, judicial, and bureaucratic norms (G. Helmke, S. Levitsky, 2004). Discussion mainly concerns the boundaries of the definition of informal institutions, in terms of whether their scope should be narrowed or broadly formulated. The debate tries to distinguish formal and informal institutions by addressing the following questions: should informal institutions be distinct from the broader concept of culture? (i.e. do they need to have shared values or just shared expectations?) (D. Galvan, 2004, 728). Should informal institutions be included within an organizational context? (G. Helmke, S. Levitzky, 2004, 727). Should informal institutions be distinguished from other informal behavioural regularities and weak institutions? (G. Helmke, S. Levitsky, 2004, 727-8). However, the most common definition says that informal institutions are characterized by "*socially shared rules, which are usually unwritten, that are created, communicated and enforced outside of officially sanctioned channels*". They are highly resistant to change, as there is

no central authority which directs and coordinates their actions (H.J. Lauth, 2000, 24-5). In contrast, formal institutions have "*rules and procedures that are created, communicated and enforced through channels that are widely accepted as official*" (G. Helmke, S. Levitsky, 2004).

This approach has been employed by FI (M.L. Krook, F. Mackay, 2011) with a central focus on "informal rules and norms as institutions" (G. Helmke, S. Levitsky, 2004, 581), investigating the process of continuity and change in institutions, looking at the interplay between formal and informal institutions. In the FI studies, shared cultural values and expectations and organizational context are all included in the concept of informal institutions.

4. Formal rules

There is a full package of legal acts promoting gender equality coming from International law, European law, and Polish law. These legal acts constitute political and legal order and are available to Polish courts to provide or guarantee gender equality. The Constitution of the Republic of Poland, Art. 32 contains general anti-discrimination clauses, and Art. 33 contains specific provisions for the equal treatment of women and men. However, EU directives[2] ban discrimination on various grounds. The Act of the Implementation of Certain Provisions of the EU Union in the Field of Equal Treatment, implemented to the Polish legal system in 2011, contains an exhaustive list of grounds for discrimination: gender, race, ethnic origin, nationality, religion, belief, political opinion, disability, age and sexual orientation. However, gender criteria only cover access to social protection, goods and services (including housing), not to health care or education (Ł. Bojarski, 2013). Under the Act, the principle of gender equality includes: equality before the law, equal pay, equal access to employment, vocational training, promotion, equality in working conditions, social security, job security, and access to maternity and parental leave. These rights only cover the public sphere (art. 5).

In terms of international conventions, we have a number of UN and Council of Europe legal acts protecting human rights[3]. However, in Poland, there has only been a few individual cases relying on international law. One

[2] The implemented directives are: no 1986/613; no 2000/43; no 2000/78; no 2004/113 and no 2006/54.

[3] The Convention on the Elimination of All Forms of Discrimination against Women (18.12.1979); The Convention on the Political Rights of Women New York on 31.03.1953; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), etc.

famous anti-discrimination case in recent years was Alicja Tysiac vs. Poland[4]. Alicja Tysiac lodged an action with the European Court of Human Rights about violating her right to a private life and inhuman or degrading treatment under the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court held that there had been a violation of Art. 8 of the Convention in that the State failed to comply with its positive obligations to secure to the applicant effective respect for her private life.

When new formal rules are introduced within an old institutional system, a mixture of old and new, formal and informal rules drive the dynamics. This phenomenon is known as "nested newness", another term borrowed from political science (F. Mackay, 2009). "Institutions are profoundly influenced by the past, and are nested in the institutional environment which interacts with and constrains their capacity to develop" (L. Chappell, 2011). In this sense, new formal institutions established to regulate gender issues are placed (or nested) within the context of old institutions and, over time, will develop their own complex equilibrium.

An interesting question to pose at this stage is "to what extent are new formal rules actually new?" More specifically, what do the new rules offer in terms of gender equality that was not already present in the Polish legal system? Answering this question helps us understand how the old and new orders relate to each other and enables us to predict the failure of expected change. In the Polish legal system, there are old rules that outlaw discrimination in general (Art. 32 and Art. 33 of Constitution). Anti-discrimination law are new rules in the sense that they are the first to specify gender-oriented discrimination. Thus, they are new rules, but not totally new, since they are in accordance with the main principles of legal system. However, added value in the form of *expressis verbis* rules should strength their binding force and effectiveness. Additionally, the traditional way of interpreting equity law in Poland was not gender sensitive, so in this sense anti-discrimination law promotes positive change.

4.1. Typology of formal rules

Typology of rules should be considered in terms of how they are interpreted and enforced (K. Thelen, 2009). These two aspects stimulate the process of change within the institutions and are directly dependent on how strong are the formal rules. There are four modal types of formal rules that can influence institutional change (J. Mahoney, K. Thelen, 2010):

[4] A. Tysiąc was refused the right to terminate her third pregnancy even though doctors knew that this would severely damage her sight. Case of Tysiac v Poland (Application no. 5410/03) Judgment 20th March 2007 Strasburg.

i) Displacement rules. These are introduced into the legal system as new institutions created to replace old rules. Alternatively, new institutions are created in direct competition with existing old institutions and are the strongest in the providing potential change. New institutions may in some cases be introduced by actors who were 'losers' under the old system. Displacement can be both a rapid or a slow-moving process;
ii) rules based on layering. New rules are introduced alongside or on top of existing ones, but they are not in competition with them. Actors have some power to create new institutions (by adding new rules on top) but not enough to displace old institutions. This results in a soft correlation with former official and informal rules. Layering does not introduce a new rule, but rather involves amendments, revisions, or additions to the existing ones. However, it is not excluded that layering can bring substantial change by the process of accumulation of small changes over the long term;
iii) drift rules. These take place when rules formally remain the same, but the impact of existing rules changes due to shifts in the environment, so giving institutions a new meaning (J.S. Hacker, 2005). The meaning of the changed rules can result from neglect by actors, whereby their inaction bring about a change in the impact of the institution;
iv) rules based on conversion. Formal rules remains the same but they are interpreted in a new way. In this case, actors do not have the power to change institutions, or else they are sympathetic to them. They therefore have to work within the system and take advantage of any slack or ambiguity that exists within existing rules to get institutions to act differently. Rules of this type are the weakest and they have a very little power in changing existing formal or informal rules.

Taking the above typology into account, it becomes possible to analyze the chances of gender equality law to be effectively enforced in the Polish legal system. (see Section 5.1)

5. Informal institutions and the context

Formal rules aim to provide or guarantee equal rights, but, when applied within the social context of an institution, informal rules can play a major role in changing their intended effect. This can be negative (undermine, subvert, annul), positive (reinforce, complement), or seemingly neutral (run in parallel) (L.S. Leach, 2007). With gender issues, informal rules most commonly have a patriarchal origins[5], so they mostly weaken the effects of

[5] Patriarchy is understood as a male domination over women in the family and in social institu-

the formal equality rules, especially when it comes to women rights. The most common characteristic of informal rules in the gender context is the fact that they are paternalistic and follow 'traditional norms,' according to which women are 'private,' that is, ordained to the private sphere. Cross-cultural studies have found that cultural norms favoring male dominance, female economic dependency, patterns of conflict resolution emphasizing violence, toughness and honor, and male authority in the family lead to higher levels of domestic violence and rape (R. Leigh, 2003, 10-1). However, as the analysis of the report provided below indicates, informal rules may also manifest in the organizational context of the courts, which support a given perspective without any ideological motivation (vide Section 4.1.4.).

5.1. Informal rules and anti-discrimination law

The Monitoring Report on Anti-discrimination Law in the Polish Courts of General Jurisdiction (2012-2013) (M. Wieczorek, K. Bogatko, A. Szczerba-Zawada, 2013) will be alalysed to understand how informal rules impact gender legislation. For this report, the Polish Society of Anti-Discrimination Law, composed by lawyers and experts, analyzed hundreds of judgments in criminal, civil and labour law. The vast majority of labour law cases under analisis (172 cases) on non equal treatment regards to non equal wages (43%). They also conducted interviews with 54 judges adjudicating in district and regional courts and courts of appeal, in the labour, civil and criminal departments, on their views towards discrimination and the role of NGOs in legal proceedings.

The Report researched the following issues: attitudes of judges towards discrimination, application of European standards by the courts in the field of equal treatment: cooperation between judges, experts and non-governmental organizations in promoting anti-discrimination principles; and the way judges interpret legal provisions of Polish anti-discrimination law. The main aims were to understand how Polish judges apply anti-discrimination law, to describe the awareness and sensitivity of judges toward discrimination and in particular what is their approach toward the minority groups. The report is divided into three main parts: analyses of cases on discrimination in the Polish courts and the results of questionnaires examining attitudes of

tions. As anthropological research indicates most societies, with very few exceptions, are patriarchal. However they vary in extent (N. Chodorow, 1999). The division between the workplace and household, together with the development of capitalism and of particular features of family life, shaped the family patterns which had a huge impact on the position of women in society. See more, A. Giddens (1998, 178).

judges towards discrimination on gender, disability, sexuality, religion, and ethnic background. The third part was focused on the analysis of NGOs taking parts in the courts proseedings.The most general connclusion of the report is that courts are very often not able to justify their rulings, rarely referring to the cases of supreme courts or to the standards of European and international law, which are more advanced and senstitive to the problems of descrimination.

5.1.1. Judges' attitudes

The report makes remarks on judges' attitudes towards gender discrimination. The objectivity and impartiality of judges, guaranteed and required by law, makes them seemingly detached from personal factors influencing the process of decision making. The principle of neutrality or impartiality should eliminate any distortion of the effects of the legal procedure. Judges have to uphold this idealistic vision in the process of application of law, but, as they all know, it is impossible to practice. This is the magic transformation from judge to the court, moving from person to institution and from subjectivity to objectivity. Apparently this "magic" does not now work and it is the main reason for distortion in the application of anti-discrimination law. As the report indicates, judges' attitudes to the problems of discrimination are the main reasons why rules are not put into practice. Some judges felt that discrimination is not an issue at all and they do not perceive it as an important social problem. This fact can be also confirmed by their indifferent attitude while responding to the question about the qualification in discrimination cases. In consequence, legal actions concerning discrimination are dismissed as being not relevant for legal protection. Some judges also believe that the sources of discrimination are inherent in the attitudes and actions of the same people who are discriminated against and so do not represent any form of inequality.

5.1.2. The Mentality of polish judges in evaluating the situation of women

Only 65% of judges indicated that discrimination in general is an important social problem in Poland. Furthermore, according to the judges, most Polish women are not threatened by discrimination. However, this opinion is not justified by the case law. In 2011, 334 discrimination claims[6] were made by women to the regional courts, and 34 in the district courts. Polish judges

[6] Claims made on the base of art. 18 § 3 The Polish Code od Labour Law.

show little sensitivity towards identifying discrimination against women on the grounds of gender, though they do point out that women have an inferior status in the labour market. Judges indicated both discriminatory and non-discriminatory reasons for this. The discriminatory reasons are mostly associated with pregnancy and motherhood, which results in the perception of women being less valuable employees in an economic sense. Secondary factors of discrimination are related to the lack of availability, mobility, and flexibility of women. Non-discriminatory reasons indicated by the judges are related to the very essence of femininity: women are passive, emotional, and do not stand for their rights. The response given by a judge appears as connected to the very fact of being a woman: "*because women more often than man are oportunistic. Man are programmed to be more risk oriented, while women are more carefull, as they know what is the most important in life*" (M. Wieczorek, K. Bogatko, A. Szczerba-Zawada, 2013, 138).

Therefore, this negative characterization of women in the labour market by the judges, based on stereotypes, suggests that gender inequality originates in women's characteristics and behaviour. Overall, this implies that the behaviour of judges reinforces the existing discrimination instead of combating it.

The authors of the Monitoring Report found this shocking, since it this is exactly the type of negative stereotypes which distort the proper application of anti-discrimination law. Overall, judges clearly indicated that, without any doubt, gender discrimination is not a problem that concerns Polish courts.

5.1.3. Judges have low awareness of indirect forms of discrimination

"The Act of December 3rd, 2010 on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment" defines some key concepts that should be applied in the cases of discrimination. Art. 3 lists legal definitions of direct discrimination indirect discrimination, and discrimination by association[7]. As we can read in the Monitoring Report, in spite of these instruments provided by anti-discrimination legislation, judges often don't detect or recognise forms of indirect discrimination, and their decisions are limited only to cases of direct discrimination.

[7] Direct discrimination takes place when a person is treated less favourably than another because of her characteristics such as gender or ethicity; Indirect discrimination is defined as situation in which for a person because of his/her gender, race, etc. due to an apparently neutral provision, unfavourable disproportions or particular disadvantage occur.; Discrimination by association is not regulated and remains a rather unknown concept. Ł. Bojarski (2013).

The majority of the judges questioned pointed out that what determines an occurrence of discrimination is the transgression of the characteristic protected by law whereby a person or a certain social group is treated less favorably. However, none of the judges paid attention to the fact that the protected characteristic indicated by law can be interpreted broadly, not only based on the textual legal premises, but by identifying the existing factual discrimination. What followed from this is that complex forms of discrimination, such as multiple discrimination or discrimination by association, were not recognised as being covered by legal protection according to the judges' decisions. Thus, it happened that the factual victim of discrimination is excluded from legal protection because the protected characteristic feature is not literally listed in the legal provision (M. Wieczorek, K. Bogatko, A. Szczerba-Zawada, 2013, 124). It should be noted that the concept of discrimination is based Polish labour law, which is defined by the Supreme Court (*ivi*).

The majority of judges considered that terminating a woman's employment after maternity leave was discrimination. However, the vast majority of judges did not recognize paying lower rates to part-time employees as a form of discrimination, though some conceded that these cases were not always easy to deal with. Judges justified their decisions with arguments such as people are free to choose, or those that work less can expect less. Although this is a paradigm case of indirect discrimination, only a small minority qualified this is as "sharp discrimination". As the summary report concludes, only 9% of judges (in first and second instance courts) made reference to European legislation, case law or international law in their justifications for judgments on discrimination cases.

5.1.4. Formal Tools are best for deciding equal opportunity cases

European law provides for equality of opportunities according to the formulated aims of EU anti-discrimination law. These aims should be taken into account when deciding in anti-discrimination cases even if a simple formal rule following process doesn't indicate for the need for embracing legal protection in a given case. The concept of formal equity is strongly rooted in the Polish judicature and influences the way of equality is applied. Criteria indicated by formal rules carry far more weighting than the actual facts of individual cases.

Judges questioned for the Monitoring Report agreed that formal equality is the proper conceptual tool for deciding discrimination cases. However, they also indicated that anti-discrimination law shouldn't privilege marginalized groups. Failure to recruit women or disabled people on the basis of parity was

evaluated by the majority of judges as a form of discrimination. The judges agreed in their justifications that competencies and skills should always be the dominant factors in the selection of candidates[8]. This is a clear example of the application of the formal, not substantial, concept of equality.

As the authors of the report stress, courts should take into account European Law and not just rely Polish anti-discrimination law when deciding discrimination cases. There are other authorized means for providing equal opportunities allowed by European law (M. Wieczorek, K. Bogatko, A. Szczerba-Zawada, 2013). As it stands, the overall tendency amongst Polish judges is low reliance on EU directives and European case law, along with a narrow positivist approach that seeks formal rules for justification rather than being aim and function oriented.

5.1.5. Women judges in polish courts

In 2000, there were 4594 women judges in the Polish Courts, giving them a majority over men at 63.6%. Compared to 1968, when women judges represented 33.2% of the total, there has been a very significant increase in numbers. However, women judges mostly occupy lower positions in the lower courts – in 2007, there were 66% of women in regional courts, 58% in districts courts, 53% in courts of appeal, 26% in the Supreme Courts, and 21% in the Constitutional Tribunal (D. Szlewa, 2011). As a comprehensive study on this topic shows (E. Michelson, 2013, 14) Poland, among other Eastern European countries, represents has the most feminized legal professions, as more than 50 % of the positions are occupied by women.

Malgorzata Fuszara's analysis of women in legal professions tackles the question of the change made by the feminisation of legal profesions, analysing for example whether the presence of women in legal profesions influences the resolution of cases, as for example for favourable athmosphere in the courtrooms for the female victims (M. Fuszara, 2003). In her articles, she indicates many examples in which women judges, especially in divorce cases, tend to reinforce stereotypes of male and female roles in the family[9].

[8] See art. 18^{3b} § 3 k.p. (the Code of Labour Law) and Art. 7 (1) The Employment Equality Framework Directive 2000/78/EC. See also cases: Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist (C-407/98); Eckhard Kalanke v Freie Hansestadt Bremen (C-450/93); Serge Briheche v Ministre de l'Interieur and Others (C-319/03).

[9] Polish family code states that "*the spouses have equal rights and responsibilities in marriage*". The obligations of a man, as they are interpreted by the court, lead us to believe that they are described negatively, i.e., as a range of behaviours that a husband should not perform: he should not drink excessively, hit his wife and children, cause fights, especially with verbal abuse, cheat on his wife. See, M. Fuszara (1999).

This suggests that, in patriarchal societies, the male-dominated views on gender roles are adopted by both sexes. Also, the analysis of rulings of the Polish Constitutional Tribunal deconstructing the social construction of feminity and masculinity indicates that the roles are defined according to patriarchal scheme, based on the dihotomy of masculine as rational, public, socially important, superior and of feminine as emotional, homely socially less important, inferior (H. Dębska, T. Warczok, 2016, 129).

In addition, the fact that more women work in the lower courts' instances and few women occupy top positions in the higher courts means that most women are in situations with little power to influence or direct change. As the analysis of the biographies of women judges of the Polish Constitutional Tribunal indicates that only very few are able to reach the most prestigious position in legal professions. The numbers clearly indicates that around 81 % belong to man and only 19% to women(measured from the beginning of the existence of the Tribunal) (H. Dębska, 2014, 93). Family courts are mainly occupied by women judges because women are considered to be the specialists of family issues, which could be interpreted as another example of patriarchal indoctrination.

The analysis of the Supreme Court indicates that women are distributed according to their social roles and the features ascribed to them (e.g. having sensitivity, being oriented to compromises, etc). In the chambers of Supreme Court, for example, there are more women in the labour and civil law sections where the restitution process is important, while their presence is less frequent in the penal law sections, where punishment is inflict (H. Dębska, 2014).

This situation in Polish courts, where the vast majority of women judges still apply the patriarchal social patterns, clearly indicates that Polish courts are the type of institutions that are substantially gendered. It means that increasing the number of women within the institution does not provide gender balance or equity, since women continue to apply the patriarchal policies introduced by men. This phenomenon can be explained by the concept of substantially gendered courts. Institutions have mostly a formally neutral appearance, but gender is always hidden within them. Feminist scholars have demonstrated how gender is deeply implicated in institutions (L. Chappell, G. Waylen, 2012). It is claimed that institutions are gendered in two ways: nominally – men traditionally continue to hold positions of power in greater numbers than women (A. Witz, M. Savage, 1992) and substantially, male mechanisms dominate in institutions because an increasing presence of women does not necessarily make a significant difference (L. Chappell, G. Waylen, 2012).

6. The relation between formal and informal rules

As explained in the first section, the effectiveness of change is directly dependent to the relation between formal and informal institutions. There are many types of informal rules and they can be hard to identify. There are also different types of formal rules, as explained in Section 3.1, and there may be other factors influencing the situation which are not described in this article.

The conclusion from the Monitoring Report indicates that, as well as the patriarchal context that strongly determines that character of informal rules, there are also rules linked with the particular way law is applied in Polish courts. Patriarchal-oriented norms reveal their existence in the stereotypes used by judges when deciding cases. As we have seen from the examples in the Monitoring Report, judges are not free of gender stereotypes and have a low sensibility towards discrimination against women.

Informal organizational contexts regarding the approach to the way law is applied in Polish courtrooms are again linked to the attitudes of the judges. Broadly speaking, they are followers of narrow positivism and are mostly oriented towards formal rules. This not-very-sophisticated form of legal positivism, where legal texts are made the centre of attention, dominates Polish courtrooms E. Łętowska (2013, 11-5). This is confirmed by the Monitoring Report in its analyses. One of the most telling facts is the failure of judges to recognize discrimination or inequality unless it can be directly referenced in the criteria of a given legal act (*ivi*). That is why protecting and promoting equity is only exercised by judges in compliance with formal rules. Other forms of equity, like equity of results, equity of chances given by the law, and procedural guarantee, are simply not recognized. There is a similar lack of ability in recognizing complex forms of discrimination, like indirect discrimination, multiple discrimination or discrimination by association. These failings are typical for "text-oriented" lawyers.

This attitude may explain why the more complicated forms of inequality and discrimination are not recognized in legal proceedings. They can be recognized only in a broader contextual perspective with the necessary insight on consequences. That is why lawyers are able to detect different forms of inequality or discriminations only in a situations when it has been done earlier by the legislator (*ivi*). This could be explained by the style of legal education which trains lawyers to apply ready-made rules and interpret them using text-oriented techniques. In accordance with the ideology transmitted by legal education, there is also a tendency towards low risk taking, where risk is identified with decisions that are cannot justified by texts alone. There is a very common "discourse of agreement"

which prevails amongst judges, who rely mainly on pre-existing line of adjudication as an accepted paradigm.

Last but not least, the situation of adjudication itself influences the attitude of judges. The informal rules of Polish judges are influenced by criteria such as promotion at the workplace. Promotion in higher instance courts is directly dependent on the judges not having their cases appealed. As a result, it is more popular to take non-controversial decisions justified by text-oriented arguments.

6.1. The relations between formal and informal in polish gender legislation

The situation in Polish courtrooms can be characterized as follows: there are formal rules which are seemingly neutral but express male dominance. They are complemented and supported by informal norms of two kinds, those linked with the way law is applied by judges and social norms with patriarchal origins. Informal practices play the role of subverting and competing with formal rules.

Closer analysis shows that, amongst all the regulations of gender justice in Polish legal system, the rules mainly applied are those that have little power of change and a limited range of impact. Starting with the Polish Constitution, which introduces the principle of equality, Art. 32 is formulated in a very general way that prohibits discrimination on any grounds (and is interpreted to include prohibition of discrimination on grounds of gender). This could be an example of a drift type of regulation, where existing rules get a new meaning as a result of introduced institutional change.

Art. 33 of Polish Constitution provides the guarantee of equal rights in family, political, social and economic affairs. However, the main emphasis is on equality in the public sphere (Art. 33, point 2). The fact that the principle is very broadly formulated makes it less effective. Although the Constitution is the highest legal act in Polish legal system, reliance or direct use of the Constitution in case law is very limited.

Polish anti-discrimination law is in principle one of the strongest rules introduced to Polish legal system for the regulation of gender issues. Rules based on layering are created to be added to existing rules. In theory, they should guarantee a soft correlation between new rules and existing formal rules. However, as it turns out, the impact of anti-discrimination law is very limited and informal rules are stronger that expected. Firstly, its relevance is limited mainly to labour law. This creates an island where the legislation is surrounded by existing formal rules, so weakening its implementation. Cases are very often decided by applying legal rules belonging to different branches of law. The consequence of this is that gender equality rules introduced in labour law do not freely spread into other branches of law.

Last but not least, as shown in Monitoring Report, what makes the real impact of anti-discrimination law very low are the informal rules directly linked with the adjudication system. Judges, through applying their informal rules in accordance with a positivist scheme of interpretation, lower the effectiveness and the extent of implementation of anti-discrimination legislation. These two factors are correlated, since the way rules are put into practice is influenced by the broadly shared informal rules that determine the way new formal rules are interpreted. Since the area of change under the rules based on layering is surrounded by old formal rules, the impact of change remains low. All these factors together make rules based on layering, which are supposed to be the second strongest, weaker than theoretically expected.

European law and EU case law on gender equality has only a symbolic impact on the Polish legal system in terms of its real effects. In principle, they are legal instruments that should be applied by Polish courts but only a tiny minority of judges rely on them. This can be said to be an example of the drift type of rule, where formally Polish law remain the same and the impact of changes is dependent only the judges who can employ new meanings of the institutions. However, the impact of European legislation can be interpreted as a weak source in terms of its symbolic binding force.

However, there are paradigm cases like Alicja Tysiac vs Poland, that potentially could have a huge impact on the legal mentality and the power to change informal rules, since they define the symbolic framework of legitimate practice. However, the reality turns out to be different. After 12 years, we know that the Alicja Tysiąc case, did not significantly impact on the social perception of the right to abortion. As the discussion of the effectiveness of the Polish abortion law demonstrates, informal social rules can be particularly strong and resilient. Polish abortion law has not changed in a literal sense since 1993, but the interpretation of the applicable law has significantly evolved, so that access to abortion has been severely limited in practice[10].

In this case, abortion law after 1989 is the displacement types of rules, which were introduced into the legal system as new institutions created to replace old rules. In the typology of the formal rules, they are the strongest in

[10] The backlash against reproductive rights is strengthened by social and political events such as: the signing of the Declaration of Faith by doctors, pharmacists and medical students, supported by the Polish Catholic Church in 2014; the increase of the importance of the conscience clause by the decision of the Constitutional Tribunal (K 12/14; the submission of various legislative proposals of both right and left wing political parties to the Polish Parliament to amend the abortion law; the increase of the activity of grassroots pro-life initiatives and conservative NGO such as Ordo Iuris advocating for further limitations of reproductive rights).

the providing potential change. However the informal social rules, going the same direction, strengthen them reinforcing their restrictive effects.

7. Conclusions

The type of formal rule determines its effectiveness. In the case of gender equality, there are no factual displacement rules, the strongest in their potential to effect change. This means that it's unlikely that new rules will become widespread. The most common types of rules in equality law are the weakest, drift, layering and conversion. Drift is by definition slow in changing things and has very little power to influence change. Layering and conversion rules are the most common instruments for implementing gender equality, but, while actors have some power, they are not enough to displace old formal rules. The ambiguity of some formal rules and the broad extent of discretionary power given to judges in deciding cases simply weakens their implementation and their ability to effect change.

What follows from the analysis is that new and old formal rules coexist, supported by an informal context. This is exactly the situation known as "nested newness', where a mixture of old and new, formal and informal rules drive the dynamics within the institutional system. Under the current Polish legal system, informal rules which are to be replaced by new formal rules subvert potential change of "new institutions" regulating gender issues as they are stronger than the new formal rules designed to displace them.

In the light of all that has been said, it becomes clear why new legal regulation concerning gender justice do not result in visible and significant changes. None of the mechanisms introduced by the legislator are strong enough to compete with existing informal rules and promote change.

In the light of the conducted analyses, we may pose a question about the role of law, from the point of view of its efficiency. Is law, providing equality for all legal entities at the formal level, supposed to cooperate with the existing social context, in other words in this case it should be based on the existing social inequalities. In the light of the broad concept of law by A. Podgórecki as a set of official and unofficial law, these two subsystems of law should cooperate with each other to increase their efficiency. The standard system of law, should provide "appropriate relation" between official and unofficial law, and the observations indicate that there must be at least some possibility for such cooperation. Secondly, the compatibility of eventually generated legal framework and values is significant. In the case of gender justice, a condition of the possible cooperation between these subsystems is fulfilled but, however, there is a main difference at the level of values to be followed. Assuming that the function of law, as comes to gender equality is to equalize

the existing social inequalities, the result the formal rules are supposed to bring about is to cause changes. Drawing conclusions from the description of the functioning of formal and informal rules indicating that the current regulations are so weak that they suffer the pressure of stronger informal rules supported by the organisational context of judicial reality, we may suggest the solutions for a legislator, which support the real ways of bringing about changes. One solution is the implementation of stronger formal regulations, of 'displacement' type, which would not only be the regulations implementing neutrality and equality, but would enforce sanctions for non-compliance with the principle of equality. The dialogue of law with the present social context turns out to be, as it was emphasized by classics of sociology of law – Ehrlich and Petrażycki – always a bit obsolete. The unofficial law as the expression of informal regulations is current and vivid, as Ehrlich used to say that 'living law' is as an eternally pulsing spring, and the official law that is legislated is like a pond, in which water stands still' (E. Ehlrich, N. Isaacs, 1922). What is more, the official law regulations seem to be additionally weak and inefficient. They tend to be dependent on the informal context, despite the formal instruments and legitimisation to implement changes.

References

ALMOND Gabriel, VERBA Sidney (1963), *The civic culture*, Little Brown, Boston.

ALMOND Gabriel, VERBA Sidney (1980), *The civic culture revisited: An analytical study. Verba*, Little, Brown and Company, Boston.

BARTLETT Katherine (2018), *Feminist legal theory: Readings in law and gender*, Routledge, London.

BERGER Peter, LUCKMANN Thomas (1966), *The social construction of reality: A treatise in the sociology of knowledge*, Anchor, Garden City (NY).

BOJARSKI Łukasz (2013), *Executive Summary Country Report Poland 2013 on measures to combat discrimination*, in https://www.refworld.org/pdfid/5473516f4.pdf (accessed 21st October 2019).

BOXENBAUM Eva, PEDERSEN Jesper Strandgaard (2009), *Scandinavian institutionalism: A case of institutional work*, in LAWRENCE Thomas B., R. SUDDABY Roy, LECA Bernard (eds.), *Institutional work: Actors and agency in institutional studies of organizations*, Cambridge University Press, Cambridge, pp. 178-204.

BRINKS Daniel (2003a), *Informal institutions and the rule of law: The judicial response to state killings in Buenos Aires and Sao Paulo in the 1990s*, in "Comparative Politics", 36, 1, pp. 1-19.

CHAPPELL Louise (2002), *Gendering government: Feminist engagement with the State in Australia and Canada*, University of British Columbia Press, Vancouver.

CHAPPELL Louise (2006), *Comparing political institutions: Revealing the gendered logic of appropriateness*, in "Politics and Gender", 2, pp. 223-35.

CHAPPELL Louise (2011), *Nested newness and institutional innovation: Expanding gender justice in the international criminal court*, in KROOK Mona, MACKAY Fiona (eds.), *Gender, politics and institutions. Toward a feminist institutionalism*, Palgrave Macmillan, Basingstone.

CHAPPELL Louise, WAYLEN, Georgina (2012), *Gender and the hidden life of institutions* (paper presented at the MPSA, Chicago).

CHODOROW Nancy J. (1999), *The reproduction of mothering: Psychoanalysis and the sociology of gender*, University of California Press, Berkeley.

DĘBSKA Hanna (2014), *Płeć i władza. Kobiety w Trybunale Konstytucyjnym*, in "Studia Podlaskie", 22, pp. 87-107.

DI MAGGIO Paul J., POWELL Walter (1991), *Introduction*, in DI MAGGIO Paul J., POWELL Walter (eds.), *The new institutionalism in organizational analysis*, University of Chicago Press, Chicago, pp. 1-40.

EHLRICH Eugen, ISAACS Nathan (1922), *The sociology of law*, in "Harvard Law Review", 36, 2, pp. 130-45.

FUSZARA Małgorzata (1999), *Feministyczna socjologia prawa*, in J. Kurczewski (ed.), *Prace Instytutu Stosowanych Nauk Społecznych Uniwersytet Warszawski*, PISNSUW, Warszawa.

FUSZARA Małgorzata (2003), *Women lawyers in Poland under the impact of post-1989 transformation*, in "Oñati International Series in Law & Society", 8.

GALVAN Dennis C. (2004), *The State must be our master of fire. How peasants craft culturally sustainable development in Senegal*, University of California Press, Berkeley.

GIDDENS Anthony (1998), *Socjologia: Zwięzłe, lecz krytyczne wprowadzenie* [*Sociology. A brief but critical introduction*], traduzione di Joanna Gilewicz, Zysk i S-ka, Poznań.

GREEN Donald P.P., SHAPIRO Ian (1994), *Pathologies of rational choice theory*, Yale University Press, New Heaven.

HACKER Jacob S. (2005), *Policy drift: The hidden politics of US Welfare State retrenchment*, in STEECK Wolfgang, THELEN Kathlenn, (eds.), *Beyond continuity: Institutional change in advanced political economies*, Oxford University Press, Oxford, pp. 40-82.

HALL Peter A., TAYLOR Rosemary C.R. (1996), *Political science and the three new institutionalism*, in "Political Studies", XLIV, pp. 936-57.

HARRIS Angela P.P. (1990), *Race and essentialism in feminist legal theory*, in "Stanford Law Review", 42, 3, pp. 581-616.

HELMKE Gretchen, LEVITSKY Steven (2004), *Informal institutions and comparative politics: A research agenda*, in "Perspectives on Politics", 2, 4, pp. 726-7.

KENNY Meryl (2007), *Gender, institutions and power: A critical review*, in "Politics", 27, 2, pp. 91-100.

KENNY Sally J. (1996), *New research on gendered political institutions*, in "Political Research Quarterly", 49, 2.

KROOK Mona, MACKAY Fiona (2011), *Gender, politics and institutions. Toward a feminist institutionalism*, Palgrave Macmillan, Basingstone.

LAUTH Hans-Joachim (2000), *Informal institutions and democracy*, in "Democratization", 7, 4, pp. 21-50.

LEACH Steve, LOWNDES Vivien (2007), *Of roles and rules: Analyzing the changing*

relationship between political leaders and chief executives in local government, in "Public Policy and Administration", 22, pp. 183-200.

LEIGH Raymond *et al.* (2003), *Making change: Norms and informal institutions as solutions to "intractable" global problems*, in "Political Research Quarterly", 20.

ŁĘTOWSKA Ewa (2013), *Przedmowa*, in WIECZOREK Monika, BOGATKO Katarzyna (eds.), P*rawo antydyskryminacyjne w praktyce polskich sądów powszechnych. Raport z monitoringu*, Polskie Towarzystwo Prawa Antydyskryminacyjnego, Warszawa, pp. 11-4.

MACKAY Fiona, KENNY Meryl, CHAPPELL Louise (2010), *New institutionalism through a gender lens: Towards a feminist institutionalism?*, in "International Political Science Review", 31, 5, pp. 573-88.

MACKAY Fiona, WAYLEN Georgina (2009), *Critical perspectives on feminist institutionalism*, in "Politics and Gender", 5, 2, pp. 237-80.

MACKINNON Catharine A. (1983), *Feminism, marxism, method, and the State: Toward feminist jurisprudence*, in "Signs: Journal of women in culture and society", 8, 4, pp. 635-58.

MAHONEY James, THELEN Kathleen (2010), *A theory of gradual institutional change*, in MAHONEY James, THELEN Kathleen (eds.), *Explaining institutional change: Ambiguity, agency, and power*, Cambridge University Press, Cambridge, pp. 1-38.

MEYER John W., ROWAN Brian (1977), *Institutional organizations: Formal structure as myth and ceremony*, in "American Journal of Sociology", 83, pp. 340-63.

MICHELSON Ethan (2013), *Women in the legal profession, 1970-2010: A study of the global supply of lawyers*, in "Indiana Journal of Global Legal Studies", Forthcoming; "Indiana Legal Studies Research Paper", 218, pp. 1071-137.

MINOW Martha (1987), *The Supreme Court, 1986 term*, in "Harvard Law Review", 101, 1, pp. 7-370.

MINOW Martha (1990), *Making all the difference: Inclusion, exclusion, and American law,* Cornell University Press, Ithaca.

OLSEN Johan P.P. (2009), *Change and continuity: An institutional approach to institutions of democratic government*, in "European Political Science Review", 1, 1, pp. 3-32.

PODGÓRECKI Adam (1991), *A sociological theory of law*, Giuffrè, Milano.

PODGÓRECKI Adam (2011), *Intuitive law versus folk law*, in ALLOTT Anthony, WOODMAN Gordon R. (eds.), *People's Law and state law*, De Gruyter Mouton, Berlin.

SCALES Ann C. (1985), *The emergence of feminist jurisprudence: An essay*, in "Yale Law Journal", 95, pp. 1373.

SMART Carol (2002), *Feminism and the power of law*, Routledge, London.

SMITH Patricia (2005), *Four themes in feminist legal theory: Difference, dominance, domesticity, and denial*, in GOLDING Martin P.P., EDMUNDSON William A. (eds.), *The Blackwell Guide to the philosophy of law and legal theory*, Blackwell, Oxford, pp. 90-104.

STINCHCOMBE Arthur L. (2001), *When formality works. Authority and abstraction in law and organizations*, University of Chicago Press, Chicago-London, pp. 1-195.

SZELEWA Dorota (2011), *The policy of gender equality report. Poland*, European Pairlament.

THELEN Kathlenn (1999), *Historical institutionalism in comparative politics*, in "Annual Review of Political Science", 2, pp. 386.

THELEN Kathlenn (2009), *Institutional change in advanced political economies*, in "British Journal of Industrial Relations", 47, pp. 471-98.

WELDON S. Laurel (2002), *Protest, policy, and the problem of violence against women: A cross-national comparison*, University of Pittsburgh, Pittsburgh.

WEST Robin (1988), *Jurisprudence and gender*, in "Univeristy Chicago Law Review", 55.

WIECZOREK Monika, BOGATKO Katarzyna, SZCZERBA-ZAWADA Aleksandra (2013), *Prawo antydyskryminacyjne w praktyce polskich sądów powszechnych. Raport z monitoringu*, Polskie Towarzystwo Prawa Antydyskryminacyjnego, Warszawa, pp. 110-69.

WILLIAMS Wendy W. (1992), *The equality crisis: Some reflections on culture, courts, and feminism*, in "Women's Rights Law Reporter", 14, 2-3).

WITZ Anne, SAVAGE Mike (1992), *Theoretical introduction: Gender in organizations*, in *Gender and Bureaucracy*, Blackwell, Oxford.