

Gender and Judicial Production: Empirical study with Brazilian State Judges

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Abstract: The study has two main objectives, the first is to identify whether male judges produce more than female judges do and the second is to identify whether the productivity of these two gender judges are related to the same factors, considering the experience and scope of the judges, the available support team, and the workload. In the empirical research, secondary data were used referring to 600 judges holding the first instance of the State Court of São Paulo. The data are from 2014 and were collected in the Court of Justice of São Paulo (TJSP) and in the National Justice Council (CNJ). The results do not show statistically significant differences between the productivity of the two gender judges, considering the variables investigated. However, it is possible to affirm that the productivity of these judges are influenced by different factors.

Key words: Justice administration; Judicial performance; Court productivity; Judge; Gender.

1. Introduction

The increase of diversity in the Judiciary is an issue that has received attention from the academic literature, especially in relation to gender (Camron & Cummings, 2003; Kulik, Perry & Pepper, 2003; Manning, 2004; Westergren, 2004; Segal, Spaeth & Benesh, 2005; Schanzenbach & Tiller, 2006; Collins & Moyer, 2007; Cox & Miles, 2007; Feenan, 2008; Mack & Anleu, 2012; Bessière & Mille, 2014; Kay, Alarie & Adjei, 2016). Previous studies (Gryski, Main and Dixon, 1986; Garrison, 1995; Sisk, Heise and Morriss, 1998; Kulik, Perry and Pepper, 2003; Segal, Spaeth and Benesh, 2005; Schanzenbach and Tiller, 2006; Choi et al., 2011) comparing the performance of men and women judges, using judicial production objective indicators, found no statistically significant differences between the two groups.

Even with women now accounting for about half of all law school graduates and with all the growth of the legal profession in the last 40 years, the representation of women in the legal world remains low (Kay, Alarie & Adjei, 2016). The issue of gender representation and its impact has attracted the interest of scholars from a wide range of academic backgrounds, obviously that gender issues and court decisions are not so new, but over the last two decades the measure that the presence of women in the courts has become truly representative a number of studies have tried to determine whether judges bring different perspectives to their jobs (Collins et al., 2010).

Feenan (2008) points out that a low number of women in the judiciary around the world has led to some rationalities such as equality of opportunity, representativeness and need for diversity. The judge with male connotation is something that comes historically, various forms of media, portraiture and films reproduce and reaffirm the image of the male judge (Feenan, 2008). When women occupy roles that are traditionally occupied by men, one perceives the occurrence of something that turn into as 'gender tension' (Tomsich & Guy, 2012), a situation that seems to be occurring in courts in Brazil and in other countries.

Despite the recent increases in the proportion of women, judiciaries in many countries are still male-dominated institutions, particularly in the employment of higher-level posts. With

this, women remain underrepresented in the courts (Mack & Anleu, 2012). Because they consider the career of a judge to be more difficult and with more barriers for women than for men, women are less likely than men to enter the profession (Williams, 2008).

Collins et al. (2010) list three motivations for the article in which they apply critical mass theory to understand possible gender-based differences in judicial decision making. The first would be to bring new evidence to bear on critical mass theory of relevance to decision makers, then advance theoretical understanding of judicial behavior by presenting a theory that focuses on the interaction among judges working in close proximity to one another and the third to inform the substantial debate about the political ramifications of a diversified judiciary (Collins et al, 2010). Feenan (2008) defends that although the arguments about equality and representation are strong to redress the historical exclusion of women they cannot be the basis for the justification for greater diversity based on gender or even other variables such as race.

In this context, it is essential to understand the peculiarities between male and female judges in the performance of their professional activities. The present study has two main objectives: the first is to identify whether male judges produce more than female judges, and the second is to identify whether the productivity of these two gender judges is related to the same factors: experience and scope of the judges, support and workload. To reach the proposed objectives, secondary data were used referring to 600 judges holding the first instance of the State Court of São Paulo. The data were collected in official documents of the Court of Justice of São Paulo (TJSP) and the National Justice Council (CNJ) and refer to the year 2014.

In the present work, the term 'gender' was used as a synonym for 'sex'. This choice seeks to avoid possible confusion in the interpretation of some sentences, given the different connotations of the term 'sex' in Brazil. However, it is important to mention that the specific definitions of the two terms are different. While sex refers to the innate categories from the biological point of view, that is, an idea related to feminine and masculine, gender refers to the different social roles related to women and men (Moser, 1989).

2. Judicial performance and gender

Judge performance is not an easy-to-define term, there are different points of view as to how a judge's job can and should be assessed. Despite being an institutionalized procedure in private companies, performance evaluation has great challenges to be overcome in the public sector since the goods and services produced are not easily perceived (Gomes & Guimaraes, 2013).

The main indicators used in the literature to measure judicial performance are based on the workload of a judge (Gomes & Guimaraes, 2013). The most used indicators are the number of decisions and the number of sentences pronounced. At the court level individual judges' data are aggregated and the main performance indicator has been the number of completed cases. Thus, it can be said that a judge is considered more productive when he makes more decisions and judgments than the other judges who work in the same judicial unit. The voluminous literature dealing with gender issues in jurisdictional activities, called in some countries, such as the United States and Australia, of 'Sex on judging', emphasizes both judicial performance and the merits of decisions.

As to the merits of decisions, two central issues are investigated. The first is whether male judges and female judges decide cases distinctly and in what form this occurs, which in the literature is called the 'individual effect'. The second question is whether acting together with a judge alters the behavior of judges, what is termed the 'panel effect' (Boyd, Epstein &

Martin, 2010). For example, McCall (2005), Peresie (2005) and Baldez, Epstein and Martin (2006) found that the higher the number of female judges in a court, the greater the likelihood of judgments being given to the plaintiff. Davis, Haire and Songer (1993) and Crowe (1999) found that in US appellate courts there is a greater likelihood of female judges supporting plaintiffs in labor cases involving discrimination. Massie, Johnson and Green (2002) have found that female judges are more conservative than male judges in criminal cases and more liberal in civil cases. Martin and Pyle (2000; 2005) found that female judges are more liberal than judges in divorce cases, and tend to support more women than men in litigation in such cases. King and Greening (2007) found that in international criminal courts, female judges are more likely to apply sanctions on defendants of sexual assault cases against women. And Ostberg and Wetstein (2007) have found that female judges are more likely to support causes involving equality issues.

As for judicial performance, the results of previous studies are inconclusive. In the comparison between the performance of male judges and female judges using objective indicators, referring to jurisdictional activities, such as efficiency and productivity, much of the results of previous studies show that both judges have similar productivity. The studies of Gryski, Main and Dixon (1986), Ashenfelter, Eisenberg and Schwab (1995), Garrison (1995), Sisk, Heise and Morriss (1998), Bogoch and Don-Yechiya (1999), Cameron and Cummings, Kulik, Perry and Pepper (2003), Manning (2004), Westergren (2004), Segal, Spaeth and Benesh (2005), Schanzenbach and Tiller (2006), Collins and Moyer (2007), Cox and Miles (2007) and Choi et al. (2011) found no statistically significant differences between men and women. On the other hand, Boyd (2006) is one of the few studies to find results that show difference in the performance of male and female judges. Through regression analysis and using as covariates judicial experience, race and ideology, the authors found that in district courts in the United States female judges resolve more cases related to personal injury and civil rights than male judges. However, even in this last study the results point to a small and restricted difference to specific courts and justices. Collins et al. (2010) has shown that circumstances interfere in the issue if female judges decide cases differently from male judges.

Most interviewees in the research of Feenan (2008) believe that the presence of female judges would make a difference in various ways, the categories related to the answers are: (a) reflecting the gender ratio of society generally, (b) enhancing public confidence, (c) changing the working environment, (d) role-modelling for women, and (e) bringing different approaches to judicial office than those brought by men. Feenan (2008) calls attention to any distinctive approaches that female judges themselves report, in the context of reconsidering notions of judging and judicial authority.

In the Brazilian literature about judicial performance no scientific studies were found that sought to compare the performance of male judges and female judges. Given this gap in the literature, the present study intends to provide evidence that can clarify if there is a difference in the performance of judges and judges in Brazil, and, if it exists, what factors could explain it. For that, an empirical study was carried out, whose method is presented in the following section.

3. Method

In order to identify whether gender has any relation to the productivity of judges, secondary data from two sources were used in the study: the list of seniority of the magistrates of the State Court of São Paulo, made available by the São Paulo Court of Justice (TJSP) and also the Open Justice system of the National Justice Council (CNJ). The data refers to the year 2014.

The sample used consists of 600 judges holding the first instance of the TJSP, with 379 judges (male) and 221 judges (female), who work in courts of different judicial specialties - civil, criminal and mixed courts; and in counties located in the capital and in the countryside of the State. The sample was randomly chosen by electronic lottery among all the 1,742 judges in the first instance of the TJSP who took effective action in the year 2014. The proportion of male judges (63%) and female judges (37%) in the sample is very close to the proportion observed in the population of titular judges. The highest proportion of female judges is observed in the Family area (42%), while the lowest proportion is observed in the Civil (35%).

Data were analyzed using statistical analysis of variance and regression analysis. The multivariate analysis of variance (Manova) of a factor (male judges versus female judges) had the following dependent variables corresponding to the productivity of judges: (a) the number of decisions rendered, (b) the number of judgments delivered, (c) (D) number of approved agreements. In addition to these variables, another variable related to judicial performance was used, however, focused on the quality of decisions rendered: (e) number of decisions taken. Processes whose decisions receive appeals from the disputing parties are referred to the court or recursion class. It is important to emphasize that the interposition of appeals to decisions rendered is a legal mechanism and, therefore, legitimate. However, a number of above-average decisions in a particular judicial unit, *ceteris paribus*, may indicate deficiency in the quality of judgments handed down by the judges of that unit (Smyth, 2005).

The independent variable is the gender of the judge (male and female). Two covariates were used in the analysis: (a) judicial specialty in the field and (b) location of the judge's jurisdiction (dummy). Then, in the regression analysis, the following independent variables were tested in the two groups of judges - male and female: (a) time in the magistracy; (b) number of courts of the judge; (c) quantity of performed courts by the judges; (d) performance in a special court (dummy); (e) number of support staff; (f) the number from supporting judges to trial judge; (g) total charge of process, which is the hole amount in the court; and (h) new process load, which consists in the number of processes distributed in the reference month.

4. Results and discussion

The descriptive statistics of the variables used in this study has been presented in Chart 1. At first, it is possible to observe that male judges are more experienced than female judges; They act in a greater number of courts and counties, and count on a greater amount of support staff. On the other hand, women have more support judges than men. The workload, both the total load and the load of new processes, is practically the same between men and women. As for productivity, female judges make more decisions and hold more hearings, while male judges utter more sentences and endorse more agreements. It may also be noted that female judges' decisions are more challenged than judges' decisions. In general terms, the differences between the sexes are small in almost all variables.

Chart 1: Descriptive statistics of the variables used in the study

Variables	Total		Male		Female	
	Average	Standard deviation	Average	Standard deviation	Average	Standard deviation
Time in magistracy (year)	14.9	6.7	15.5	7.2	14.1	5.6
Counties of operation	1.5	1.2	1.6	1.9	1.4	0.9
Operating court	2.7	2.3	2.9	2.5	2.4	1.9
Support Staff	17.1	6.4	17.4	6.4	16.6	6.4

Assistant Judges	5.0	3.4	4.7	3.2	5.6	3.6
Number of processes (in thousands)	10.7	13.4	10.6	14.1	10.9	12.1
New processes (month)	176	94	179	98	178	89
Decisions rendered (month)	288	302	285	306	293	203
Judgments handed down (month)	114	61	118	63	107	55
Audiences held (month)	42.0	29.8	41.9	29.0	42.3	31.1
Agreements approved (month)	17.9	17.6	18.2	17.7	17.6	17.7
Resources (month)	27.9	20.2	27.5	19.6	28.6	21.4

Source: survey data

Initial tests with box diagrams have shown that the data for each of the dependent variables in Manova are normally approximately distributed. The Box M test (0.224) indicated that there is no violation of the homogeneity hypothesis of variance-covariance matrices in the analysis of the total sample. The analysis revealed that, in the case of the total sample ($N = 600$), there was no multivariate difference between the two groups of judges, men and women ($F = 1,390$, $p = 0,226$, λ of Wilks = 0.988). That is, although the descriptive analyzes show a small difference in the productivity of the two groups, it is very likely that this difference occurred due to sample error. When the dependent variables were observed individually, only a significant difference was observed between the groups ($F = 4,350$, $p = 0,037$), with advantage for the men. This means that, when considering only the number of judgments handed down, the productivity of judges is slightly higher than that of judges.

In order to identify how the two groups of judges behave in specific contexts, analyzes of variance (Anova) were performed for different judicial specialties (civil, criminal and mixed) and different localities (capital and interior). The requirement to analyze different specialties and localities consists of the contextual differences existing between the different units that exist in the analyzed justice system. For example, criminal courts operating in, state and federal court, are responsible to prosecution and prosecution of persons charged with committing crimes, while civil courts adjudicate disputes related to family property and issues. The mixed courts, usually located in small units, include different judicial specialties.

As Chart 2 shows, when the total sample is considered in the analysis, the results indicate that statistically there is no difference between male judges and female judges. However, when specific samples are considered, according to the judicial specialty and the locality of the bar of justice in which the judges act, there are statistical differences between men and women. Thus, in civil courts, men utter more sentences than women, and in mixed courts, women utter more decisions than men. As for the location, in the capital courts, women perform more audiences than men, while in the countryside ones, men utter more sentences and approve more agreements than women.

Chart 2: Results of analysis of variance for the productivity of judges and judges

Sample	Difference between groups?	In which variable?	What is the observed difference?
Total	No	-	-
Specialty			
Civil	Yes	Sentences	Men utter more sentences
Criminal	No	-	-

	Mixed	Yes	Decisions	Women make more decisions
Location	Capital	Yes	Hearings	Women hold more audiences
	Countryside	Yes	Sentences Agreements	Men utter more sentences Men approve more agreements

Source: search results

A second stage of the study aimed to identify which variables influence the performance of the two groups of judges, men and women. For this, different regression models were estimated for each group, each model being related to a specific dependent variable. Chart 3 presents the results. The first three models relate to the performance of men, and the following three models relate to the performance of women.

Chart 3: Results of regression analysis for men and women

Variables	Men			Women		
	Sentence	Hearing	Agreement	Sentence	Hearing	Agreement
Location of the region	-.226**	-.149**	.009	-.282**	-.382**	-.063
Judicial Specialty	-.045	.387**	.049	-.101	.274**	.085
Time in the magistracy	-.038	-.058	-.034	-.023	-.022	.041
Operating Rods	-.036	-.039	.035	.114	-.264*	-.010
Counties of operation	-.020	-.052	-.084	-.009	.226*	.005
Total workload	.358**	-.425**	-.218**	.329**	-.305**	-.123
Loading proc. new	.303**	-.022	.311**	.037	-.029	.178*
Support Staff	.201**	.003	.113*	.078	-.111	.118*
Support Judges	-.080	-.145**	-.015	-.076	-.113	-.150*
F (Anova)	24.2**	9.3**	7.2**	17.8**	8.3**	4.1**
R ² adjusted	.42	.20	.18	.33	.28	.18

Source: survey data

N = 600

* $p < .05$; ** $p < .01$

In the first regression model for men's performance, the variables 'total workload' and 'support staff' had a positive and statistically significant effect on the dependent variable 'pronouncements'. In the second model, the variables 'court specialty' and 'support judges' had a positive effect on the dependent variable 'number of audiences performed'. The variables 'location of the region' and 'total work load' had a negative effect. In the third model, the variables 'new process load' and 'support staff' had a positive effect in relation to the 'number of approved agreements', in which case the variable 'total work load' had a negative effect.

In the first regression model for the performance of women, with respect to the dependent variable 'sentences pronounced, the variable' location of the region 'had a negative effect, while the variable' total work load 'had a positive effect. The second model, having as a dependent variable the 'number of audiences performed', the variables 'specialty of the stick' and 'performance counties' had a positive and statistically significant effect. On the other hand,

the variables 'location of the region', 'number of sticks' and 'total work load' had a negative effect. Finally, in the third model, the variables 'new process load' and 'number of support staff' had a positive effect in relation to the dependent variable 'quantity of approved agreements'. On the other hand, the 'number of support judges' had a negative effect on this same dependent variable.

As shown in Choi et al. (2011), no support was found necessary to allege that judges perform better than judges. What we can conclude is that the productivity of judges and judges is influenced by different factors.

The location of the county is significant for both judges and judges in relation to the number of hearings, but it interferes more with the audiences presided over by women, probably because the woman has greater difficulty adapting to the change between interior and capital. The study by Mack and Anleu (2012) showed that location can be an important aspect of entry into the judiciary, in the case of Australia magistrates may be forced to move to rural areas and this was a determining factor for almost half (47%) of female judges. The JAC survey (2009) showed that travel is a barrier for 60% of women in the judiciary.

The acting sticks and counties influence the hearings directed by judges, but not by judges. The specialty of the stick affects more the number of hearings presided over by judges than by judges. The importance of the type of work was highlighted by Mack and Anleu (2012).

In relation to male judges, the total workload only showed a positive effect in relation to the number of sentences handed down. When it comes to hearings and agreements, the total work load shows up as negative. The total workload is significant in agreements approved by judges, but not agreements reached by judges.

The actuation sticks and the acting regions are significant only for the audiences realized by judges, but the first presents a negative effect and the second positive one. Mack and Anleu (2012) identified that diversity at work is a significant factor for judges and that they have more experience with criminal and family law. The burden of new processes is significant in sentences made by men, but not by women. Just as support workers are significant in the sentences made by men, but not by women. Supporting staff influence judgments delivered by judges, but it is not a significant variable for women's sentences. Supporting judges present interference in hearings conducted by male judges, but not in hearings conducted by female judges.

As Collins et al. (2010) showed that circumstances interfere in the question if women decide cases differently from men, the present study showed that different factors interfere in the productivity of judges and judges. In agreement with the study of Choi et al. (2011), no support was found necessary to allege that judges perform better than judges

5. Final considerations

In summary, no statistical support was found necessary to affirm that male judges perform better than female judges in relation to the variables investigated. What can be said is that the productivity of both judges are influenced by different factors.

The results are important in theoretical terms because they provide evidence of how male judges and female judges depend on specific contexts to adequately perform their functions. In practical terms, the study is relevant for judicial managers responsible for the allocation of judges and servers in the various judicial units, since the results indicate in which situations high levels of productivity can be achieved.

It is advisable that qualitative studies should be carried out to deepen the knowledge about the subject in the scope of the Brazilian Judiciary. The results found in the present study could be compared with the opinion of male judges and female judges can means of structured interviews. In addition, it is suggested to use other samples, with judges who work in other state courts and in courts of other segments of the Brazilian Judiciary.

Finally, although the results of this study are of empirical value in order to understand how the trial courts, counties and courts of the country operate, it is important to emphasize that the comparison between male judges and female judges, based on objective indicators, related to their productivity, must be considered with great caution and restraint. This is because there are other aspects, perhaps more important than judicial performance, that should be considered in managerial decisions related to gender. Diversity in the Judiciary, for example, is seen as advantageous in several respects. The greater the diversity of judges, different genres, different backgrounds and experiences, the greater the breadth of ideas and information that will contribute to the legal process (Epstein, Lee, Knight & Martin 2003, Cameron & Cummings 2003, Boyd, Episten & Martin 2010).

Despite Thémis, the goddess who symbolizes justice to be a female figure, society has long been blindfolded to the presence of women in the judiciary, but with the increasing representation of the female gender in that power, the studies involving this subject have gained notoriety.

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