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Transformations in anti-discrimination law: progress against subordination

María José Añón

1 Introduction

1 Anti-discrimination law is used as the framework for conducting this review of some of the contributions of legal feminism. Feminist legal theories and critical feminist thoughts are plural and do not speak with a single voice neither synchronously nor diachronically. Further, although they do not converge in a single theory of law and are related in different ways with discourses that attribute varying relevance to the legal system in relation to inequality, they do nonetheless maintain a common denominator, namely, the questioning of the premises according to which the subordination of women takes place.[1] To explain this historical subordination, feminist studies mostly take a critical approach, following the sex/gender system in particular. Thereby, the category "gender"[2] is still considered pertinent and necessary for legal-political theory, an instrument for analysing the persistent processes in the construction of relationships of inequality, and for the critical assessment of relationships of power.

2 This approach coincides with the understanding of women in terms of subordination in a systemic sense. To speak in systemic terms means that these are factors with sufficient capacity to structure social relations. It is not the only system, but it has a very broad scope, running as it does through all social dimensions and crossing all variables.[3] The subordination structure is known by several names: subalternity (MacKinnon), oppression (Young), structural inequality (Clérico), subordiscrimination (Barrère), and structural or systemic discrimination.[4] Without being entirely simultaneous, these categories become appropriate instruments in legal systems to identify those inequalities that have found their meaning in one or more structures of power. As mentioned before, these structures may create systems and these systems

have the ability to arrange social relations *ad intra* and to confer to some socials groups a subordinated or inferior status, along with their reproduction and preservation.[5] Consistent with this, it is proposed the eradication of this subordination, in both an emancipatory and critical sense. From this perspective, the notion of autonomy and decision-making ability become fundamental. These notions acquire greater prominence to the extent that the need to reveal the contextual and relational background to autonomy,[6] the social processes linked to the public-private interaction,[7] and the realities in which women's decision is considered fundamental. The experience of women, and the resolution of the daily problems to which they have to respond, becomes a fertile study space for legal feminism as, for example, shown by the approach to sexual and reproductive rights.

3 Of the efforts to reveal the systemic and structural nature of the position of women though a legal analysis, the perspective adopted by CEDAW in 1979 and in general by international legal standards, and which is probably more sensitive to the contributions or development of legal feminism, stands out.[8] The Convention, especially articles 2 and 5, offers a complex view of the notion of discrimination directly related to the human rights approach.[9] To start with, it highlights different aspects of the concept: formal, substantial, structural - although it does not use this terminology-, and it also establishes guidelines for its eradication in all forms. Article 5[10] represents, in Holtmaat's words, [11] a unique legal standard in the field of international human rights law in the fight against the discrimination of women, and puts us on the trail of the issues to be addressed in this work. The aim of eliminating, and not only prohibiting, discrimination implies the adoption of a comprehensive vision of the obstacles to equality, and of the harmful effects they impose, wherein these are no longer interpreted in an isolated and individual way, nor through comparative models that assimilate the needs and concerns of women to those of men (and so leaving intact the existing masculine patterns, as denounced by Holtmaat).[12] In addition, the article prescribes an active commitment by authorities to eradicate all forms of discrimination by addressing the causes and origins of women's oppression or subordination, the stereotypes about what is expected of the masculine and the feminine. Hence, the obligations aimed at abolishing gender stereotypes in all spaces and those aimed at examining directives, policies, and practices from these parameters. Without ignoring that "the more equality is provided for by law, the more subtle gender discrimination becomes, precisely because stereotypes about the 'traditional' roles of men and women are so deeply rooted".[13]

4 Among the legal strategies for changing systemic subordination, a fundamental device in legal systems is anti-discrimination law. Legal feminism has made a wide range of conceptual, argumentative, and interpretative contributions in many areas, and in a wide range of specific legal institutions, but still, anti-discrimination law is a privileged space for its analysis. I will focus on some of the arguments at the centre of today's debate within the framework of anti-discrimination law from a gender perspective.

2 Reflections on and from anti-discrimination law

5 Legislation on gender equality has essentially worked with instruments from anti-discrimination policies based on the principle of equal treatment. Although over time they have expanded to include analyses that incorporate the idea that inequality

between women and men has is rooted in unequal gender relations in a social structure of women's subordination, the framework has not ceased to be that of policies and anti-discrimination law. The exclusion of women has been basically defined as a problem of lack of access to resources and opportunities.

6 Therefore, the use of the term "discrimination" corresponds to the more traditional normative standards in which discrimination is applied and interpreted in accordance with three elements: an act of discrimination, a reason or motive (catalogued as prohibited), and a result in terms of injury to rights.[14] In this sense, as Bodelón writes:

> It is a concept that individualises the problem and turns it into a problem of excluded people [...] it treats women as victims of individual situations and not as an example of the failure of the model, or as an example of the insufficiencies of liberal citizenship and the existence of unaddressed oppressions.[15]

7 Thus, although feminism has expressed itself through categories such as oppression, violence, and subordination, the translation of these categories into legal terms, as Holtmaat warns,[16] has automatically redefined them in terms of equality and equal treatment. The issue is then no longer the oppression of women or power relations, but their inequality. The legal reforms have been developed on the idea that woman and men deserve equal treatment, by looking at the situation of box sexes when compared to each other. This is a characteristic feature, for example, in the EU Equality Directives.[17]

8 In different areas of legal systems – for example family relations, sexual and reproductive rights, personal freedom and security, violence against women, labour rights and working conditions, and citizenship – it is repeatedly asked why this happens. In addition, despite achievements in formal equality and the deployment of specific regulations on equality between women and men, we continue to see strong limitations in overcoming structural discrimination. As Clérico advises,[18] beyond isolated instances of discrimination, this also refers to a pattern or a systematic practice of discrimination, the effects of which we cannot revert for those individually affected people. Faced with this tension, in recent decades feminist theory, including legal theory, has proposed a conception and an understanding of discrimination that does not coincide with the concept of discrimination inherent in traditional legal culture. It considers (structural) discrimination to be, above all, a systemic process and therefore, though concrete discriminatory acts are individualized, they are an epiphenomenon of underlying social processes. The idea of systemic or structural discrimination allows one to visualize not only the causes but also the effects of discriminatory processes. This becomes apparent, for instance, in the percentage of non-voluntary part-time contracts signed by women,[19] the index of care providers for elders and children, the poverty rate for women and children as a result of divorce, and the income and expense results in those fields with equal educational opportunities. As Mercat-Burns states, "The concept of systemic discrimination is a valuable frame to understand how the harms of discrimination can be addressed by the principal functions of antidiscrimination law."[20] These arguments are at the basis of the proposals aimed at coining the expression "antisubordination law".

9 It follows that with regards to the general idea of reforming the legal systems with a view to transforming them into a tool that contributes to achieving more just and egalitarian societies, the critical perspective argues that anti-discrimination law is substantiated and exhausted in the distinction between two classes of discrimination;

direct and indirect.[21] These classes, however, are insufficient to integrate the broader conception we have been referring to.[22] Nevertheless, other types of discrimination could have been accepted by the *European Court of Human Rights* (ECHR) and the *Court of Justice of the European Union* (CJEU), as well as in international human rights texts, such as intersectional or multiple discrimination and discrimination by association texts. That there are some interpretative references to structural discrimination,[23] the classification scheme has basically been maintained with the continued use of the two aforementioned categories.

10 For all these reasons, it seems appropriate to insist on those proposals that emphasise that there are aspects of the very reasoning behind the anti-discrimination clause that show that the dichotomous view of classes of discrimination must be overcome, and the need appreciate that the distinction between them is limited and insufficient. Categorizing discrimination exclusively as direct or indirect hinders the version of non-discrimination law connected to equal treatment, but it also restricts the (transformative) reach that indirect discrimination can get through the introduction of norms being able to breach the systemic norm, which assigns concrete roles to women and men, for instance the role of caregiver to women and worker for men.

11 Furthermore, reasoning in equality lawsuits must introduce some parameters that require the inclusion, in legal argument, of knowledge relating to aspects such as the social context and the social effects of legal regulations, the structural presuppositions that exist behind them, and the stereotypes used to justify differentiated treatment (to harm in some cases and to privilege in others). It is necessary to assume the widening of the range of justifying arguments, and such arguments find their meaning and origin in approaches that account for systemic or structural discrimination in discriminatory processes.[24]

3 Argumentative questions: grappling with determining of the causes and context of discrimination

12 The arguments to which I refer, which can be considered advances in the approach to this area of reasoning, have been put forward within a theoretical framework that is critical of standard anti-discrimination law. To highlight this change, we use expressions such as anti-subordination law (Barrère), as opposed to the anti-discriminatory law based on classifications (Pou), critical anti-discriminatory law, and structural inequality law (Clérico).[25]

13 Among the current proposals, I will refer to two arguments aimed at tackling gender discrimination in a context of structural inequality. The first concerns the value of the point of comparison, and the second the identification of gender stereotypes.

3.1 On the value of the comparator

14 The approach is part of the general reconsideration and reformulation of the weight of comparative-type reasoning that characterizes the traditional focus of anti-discrimination law. In this model, the appeal to a comparator has been a key element in

the architecture of reasoning aimed at showing the existence of discrimination, especially in the case of direct discrimination.[26]

15 The reasoning behind direct discrimination requires, as the starting point, comparing a contested treatment with that received by another person, other subjects, or another legislative classification.[27] This subject, or the legislative classification linked to a regulatory treatment or solution, constitutes the point of comparison.[28]

16 Alleging a comparator is therefore part of the burden of argument for showing or proving discrimination. Clearly, this is but one element. Since discrimination entails an undermining of rights based on a difference in treatment that cannot be regarded as rational and proportionate, it cannot objectively be regarded as justified treatment and does not pursue either a legitimate aim. All these parameters have raised important questions on gender category presuppositions, and it has been fundamentally this perspective that has propitiated arguments aimed at their modification, basically arguing that a point of comparison, whatever it may be, leads to a differentiated legal treatment based also on gender (masculine or feminine). In this sense, the weight of the argument has shifted towards the protected or prohibited cause or motive, that is, towards proof of the causal nexus of the unfavourable treatment and the protected cause, and towards the effects of the law.

17 In this context I will fundamentally draw attention to the limits of the use and the argumentative force of the point of comparison, as well as some of the presuppositions on which this reasoning is anchored. Among them, I highlight the following.

18 First, a comparator arouses criticisms that traditionally legal feminism has directed at false universalism, which emerges from the presumption that there is no discrimination when the treatment does not differ. The comparator is interpreted as a standard, converted into a normative model with respect to which any difference is interpreted as deviation, stigma, pathology (Golberg).[29] Loaded with implicit assumptions and ideas, and the naturalization of differences, the prevailing appears as natural, neutral, and inevitable. The selection of the comparator derives from a social construct and in many cases is a model that replicates and reinforces exactly those differences and stereotypes that concepts such as direct discrimination came to challenge (Bramford, Malik, O'Cinneide).[30] Hence, the comparative rationale has been identified with assimilationism (West, MacKinnon)[31] and with the risk of leaving the pre-existing gendered-endowed norms and practices unchanged. The point of comparison is ultimately loaded with erroneous presumptions that need to be identified and dismantled before use.

19 Second, the comparator needs to be adequate, valid, relevant, credible. To this end we can turn to analogical reasoning, according to which two cases must be considered equal or similar when the introduction into one of them of a factor that differentiates it from the other is lacking sufficient relevance and rational basis.[32] Nevertheless, the decision about the validity of the comparator is a thorny issue with an ad hoc approach almost unavoidable. In fact, the point of comparison is the first filter of the equality and discrimination test, prior to the test of the rationality of treatment, and prior to, where appropriate, the test of proportionality and the aggravated/strict test. The assessment of suitability is not clear and this can lead to rejecting the validity of the point of comparison[33] and with it inequality, therefore replacing the equality judgement, which would involve above all assessing the purpose of the measure or the rule, what entails a weakening of the reasoning for the decision. The seemingly

prevalent approach for determining the differences and analogues between the legal situations is that this judgment does not proceed in the abstract, generally, but in relation with the sense or the objective of the particular legal norm.[34] However, Golberg[35] points out that to establish suitability is an especially thorny issue when it is necessary to analyse discriminatory social processes that involve complex social judgments and not just a particular action – it is a requirement that seems to presuppose that the identification of categories of subjects and legislative classifications is unproblematic in anti-discriminatory reasoning (Añon).[36]

20 Third, if the point of comparison is an indication of the causal link between the legal treatment and the protected ground, reason, or criterion on which the discrimination is based, we are actually faced with two arguments or two steps in the reasoning, intertwined in such a way that sometimes the less favourable treatment cannot be determined without deciding on the ground or motive (Bamforth, Malik, and O'Cinneide).[37] The aforementioned authors highlight two of its functions: establishing a standard that constitutes adequate treatment and against which less favourable treatment is judged (which is in itself already problematic), and identifying whether the prohibited grounds or categories are the reason that has influenced the decision making of the discriminating person. Golberg underlines that maintaining it may make the link between the protected cause or characteristic and the reduction of opportunities or adverse treatment imperceptible, and that it can even become a barrier in discrimination claims; hence his proposal to progress to considering it an alternative and/or complementary element in the overall reasoning.[38]

21 With this in mind, we see proposals aimed at limiting the weight and scope of the point of comparison as a means of establishing the presumption of discrimination, more in line with the ideas prescribed by CEDAW than with the comparative model represented, for example, by the EU Directives on equality. We might thus speak of determining discrimination "without comparison" as the most appropriate way to take into consideration the complexity of discriminatory processes – seen as social and systemic processes, which can be intersectional and intergroup – and with the objective of advancing the visibility and identification of social patterns of subordination (Barrère and Morondo, Holmaat).[39] This thesis would have as a corollary a reformulation of the concept of direct discrimination, understanding it to be a legal treatment that is harmful to a person and/or a class of subjects based on a prohibited ground for establishing differences. Among the proposals, the following should be referred to:

22 First, with the aim of somehow recognizing the systemic dimension, especially of direct discrimination, certain circumstances have been established that would not have a point of comparison.[40] Such is the case with adverse treatment that can result from maternity, breastfeeding, sexual harassment, parental leave, orders to discriminate, or violence against women. Indeed, the courts understand that in cases such as those mentioned, "which do not have" a point of comparison, discrimination is to be presumed.[41] Therefore, it is assumed that discrimination can be shown directly by appealing to the reason for the treatment received - to the reason on which a particular treatment is based - without comparative evidence.

23 This reasoning undoubtedly helps make the measures that are falsely protective or that generate greater exclusion explicit, as opposed to the analysis provided by the comparative type criteria. In short, this would be a legal presumption that alters the distribution of the burden of proof and obliges the respondent to prove that there was

no discrimination.[42] It thus breaks the egalitarian principle according to which the one who makes allegations must provide proof, aimed at facilitating the proof of the claims of one of the parties.

24 Second, also fitting into this context, is the argument that proposes to emphasize the weight of reasoning in the objective of the regulation, measure, or practice and the legitimacy or admissibility of that objective, justified constitutionally or by virtue of the principle of conventionality. This means that whoever has the burden of proof would have to assume, as Pou proposes,[43] a minimum content. This would include: the identification of the objectives and needs that have guided the decision, the regulation, or the practice; the conformity of such objectives with the constitution and fundamental rights; as well as the arguments that make the decision reasonable in the light of the objectives. Namely, the criteria for the justification of the objective of the regulation or measure where the principle of substantive equality can play a particularly relevant role, given that it would be the ultimate objective. In this sense, the comparative reasoning is no longer able to detect if a norm or a practice has a certain impact to maintain or make the situation of disadvantage worse, what could provide a contextual test.

25 Third, because of the growing perception of the existence of unconscious and involuntary discriminatory events, and the effect of the social reproduction of prejudices and stereotypes, there is currently an analysis of discrimination that favours objective factors - among them, the discriminatory *effect* or *result* over the *intention to* discriminate,[44] as occurs in certain cases of both direct and indirect discrimination. As Timmer[45] warns, "The wrongs of stereotyping are not comparative in nature: they do not derive from a comparison with another group that has been treated better". In this regard, Pou[46] suggests including in the reasoning a test to indicate if the action of the contested norm creates, perpetuates or exacerbates some of the damages/harms that discrimination entails, or whether the treatment established by the norm perpetuate the discrimination or even the disadvantages. In the following section, we will see that these effects are also assessed in relation to the concept of the damage caused, and that it justifies abandoning the recourse to comparative reasoning as proof of discrimination (Gerards).[47]

26 This range of more substantive arguments supports the thesis of limiting the weight of the point of comparison, thereby preventing it from fulfilling a filtering function in the identification of discrimination. At best, it would be included as a complementary argument in the assessment of the context in which the subordiscriminatory process takes place. The context and experience of women is thus of fundamental importance in this respect.[48] In this sense, although there are comparable cases, the presence of the stereotype means that contextual reasoning has more weight than comparative reasoning, as I will try to show.

3.2 Gender stereotypes: identification and deconstruction

27 We started from the thesis, supported by what is prescribed in article five of the CEDAW, regarding the relation among the eradication of systemic discrimination and gender stereotypes. To this end, the task of identifying the possible stereotypes that underlie legal regulations, practices or decisions, dismantling them or breaking them down, and modifying them, is of particular importance.

28 The concept coined by Cook and Cusak[49] defines stereotype as a generalized vision, or a preconception about what attributes or characteristics the members of a particular group have, must have, or must comply with. The key issue is, insofar as the specific group is presumed to possess such attributes or characteristics, whether or not they are common to the people making it up, the particular person will act in accordance with the generalised view of the group, just for their belonging to it. This concept has a twofold dimension or a mixed character, since stereotypes can fulfil a descriptive function, when they establish properties or characteristics of a group and/or a normative function, when they also define the roles that certain categories of people should play.[50] These are stereotypes that have a social origin, which legal systems assimilate while adding their own stereotypes created through legislation and processes of interpretation and application.[51]

29 For the purposes of this paper, a relevant distinction is the distinction between harmful gender stereotypes[52] and negative gender stereotypes.[53] From a human rights perspective, it is important to be able to explain what makes a stereotype detrimental or harmful. Harmful stereotypes can be both hostile or negative (e.g., women are irrational, women are unwilling to commit as much time to their work as men, lesbian women are selfish and are no longer interested in children,[54] women older than 50 lose their sexual interest[55]), or seemingly benign (e.g., women are nurturing). From a human rights perspective, it is therefore important to focus on harmful gender stereotypes, rather than on negative gender stereotypes. A gender stereotype or compound stereotypes does not necessarily have to be negative to cause harm (victims of sexual abuse should react explicit and strongly). This would occur with those generalizations, characteristics, or roles understood as needing to be performed, and yet limit the ability to develop autonomy, personal skills, and decision making about a life plan, for example developing a professional career. From the legal point of view, what is relevant are the negative or positive stereotypes that cause damage or harm assessed in terms of an undermining of or adverse effects in the recognition, exercise, and protection of rights. In particular, when they have impacts on the access and exercise of basic rights, like the right to food, health, and education.[56]

30 Given that these stereotyped images can reflect and even reinforce the unequal distribution of power (locating some people or a social group in a position of subordination, and others in an advantageous position, because of the assignment of social roles), Clérico[57] proposes to disassociate the reasons invoked to justify the undermining of rights, to evaluate them through a strict examination of equality, and to demonstrate gender discrimination (strict scrutiny standard).[58] Beyond a mere test of rationality, this kind of judgment demands a judgment of proportionality requiring some aggravated requests of justification. The point of departure is a presumption of a lack of justification for the discrimination, moving the burden to provide reasoning to those who assert the justification of the classification, generally the state. The adopted measure must be the most adequate to reach the proposed objective. The arbitrariness cannot be reverted if those who have the burden of reasoning affirm and justify reasons more than important – for instance, an imperative statewide aim more than urgent[59] –, a constitutionally legitimate aim, and there is no other alternative means to avoid the classification. At the strict scrutiny, we can mention also an epistemic rule, according to which if doubts remain at the end of the argumentation, both the classification and its effects must be considered arbitrary.[60]

31 Among the most articulated proposals are the steps in argumentation in the processes of identification and evaluation of stereotypes by the courts, indicated by Timmer.[61]

32 The first aims to identify the stereotypes. The reasoning as to whether a regulation or practice is based on a prejudicial stereotype should be examined by the court, evaluating the prejudice as a moral and/or social harm. This requires a rigorous judicial assessment of the context, which not only serves to bring stereotypes to light, but also to understand the extent to which they are harmful, and to make explicit and problematic what experiences a society has naturalised.[62] Without an interpretation of the context, it is difficult to identify them.

33 Another key idea is to connect the stereotype(s) with a generalization that produces or has harmful effects.[63] According to Moreau and Clérico,[64] in the presence of stereotypes this harm can be inferred from any situation that: *(i)* perpetuates oppressive power relations, and imposes burdens on women; *(ii)* leaves some people without access to basic goods, and denies some benefit or other to women; *(iii)* diminishes people's autonomy and self-respect because it impacts dimensions that centrally affect control over one's own life or related basic decisions, and degrades women, minimizing their dignity or marginalizing them. These are stereotypes that diminish relational autonomy, as Álvarez maintains,[65] thus referring to "a conception of the agent whose rational and moral possibilities are only adequately understood by taking into account their context of interaction, and the socialization processes in which the autonomous person is inscribed and acts". Such processes, and their network of relationships, are loaded with socio-cultural meanings that shape positions and therefore options, the legacy of patriarchy and gender stereotypes being central amongst them.

34 The second step is in the area of the legal bases aimed at assessing stereotypes as a form of discrimination. Timmer[66] proposes that once the court has determined which stereotypes are involved in the case that is the subject of the decision, it proceeds to assess them as forms of discrimination by means of a strict scrutiny of equality.[67] Although, we have certain criteria established by some relevant judicial cases such as the *Atala Case* (§125) of the Inter-American Court or ECHR *Konstantin Markin v. Russia* case (§ 142 and § 143) and more recently the *Carvalho Pinto v. Portugal* case (§52). Among other issues, it is of particular importance to recognise that the argumentation falls upon the States, that the reasoning on harm should be limited to a concrete, specific, and real harm and not an abstract harm, that gender stereotypes are proof of discrimination on the basis of sex, and that a stereotyped reasoning by trial judges can lead to discrimination. In the end, if doubts about the argumentation persist, the measure or regulation should be considered unjustified.[68] As Justice Motoc points out: "The case also shows the methodological difficulties in identifying the connection between discrimination and stereotyping and the danger of self-enforcing the invidious circle."[69] Arguments such as these support the idea of understanding that, in these cases, not only is discrimination presumed, but also the type of discrimination; that is, that one is faced with a case of structural discrimination, which under no circumstances should be considered a justifying factor.

35 The two arguments we have tried to address propose transformations in the paradigm of anti-discrimination law in various senses. One of them shifts the weight of comparative reasoning toward the examination of the causes and the impact of the regulation on the social reality; the second explores the assumptions, prejudices or

stereotypes that give us the key to understanding the quality of the damage originating from the violation of rights. In short, they both lead us toward substantive equality.

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NOTES

1. Pitch 2010: 440-444.

2. The concept of "gender" and its background are of great complexity. In law and some other areas, gender denotes a social construction elaborated on the basis of the existence of the "male sex" and the "female sex"**,** and the social, cultural, and psycho-social characteristics that from there are imposed as guidelines of identity and conduct on each of the sexes. Therefore, gender is not synonymous with any given sex, but with the differentiated social construction for the two sexes. As a consequence of this internalized socialization, the masculine gender becomes an expression of a value, of superiority, and the feminine gender of subordination or inferiority, which is translated into forms of objectification of power. The notion of a sex/gender system is theoretically built on feminist reflection on patriarchy, meaning that discrimination is not just a breach of equal treatment, but something deeper that becomes reiterative because of its systematic pattern. A system of domination, which expresses inequality by delimiting hierarchical spaces that function as barriers of belonging or exclusion, it points to place and hierarchises to exclude.

3. The depth of this systemic dimension and its articulation with other factors (ideologies, interests, stereotypes, symbols, representations, myths) explains why gender stereotypes are characterized as socially dominant and persistent (Cook & Cusak 2010: 25).

4. Mackinnon takes the question of equality back to the question of the redistribution of power: "gender would not even designate differences, it might not even mean distinction epistemologically, were it not for its consequences on social power" (MacKinnon 1987: 40). Hence, she points out that the prohibition of discrimination is aimed at eliminating the social inferiority of one sex over another and dismantling a social structure that maintains cumulative practices on women and that consolidates their situation of exclusion or disadvantage (Young 1999: ch. 2; Clérico 2018: 74-80; Barrère 2003; Barrère 2018).

5. Barrère 2018: 32.

6. Álvarez maintains that if personal and reproductive autonomy should be strengthened, it cannot be done outside of this reality nor independently of the context in which women decide, and therefore "without attending to gender relations , maternity, paternity, care, work, parentage and justice" (Álvarez 2017: 141; Álvarez 2018: 42). Likewise, Pozzolo 2018.

7. Moller Okin 1998; Mestre 2011: 148-150.

8. Coomaraswamy 2015.

9. Formal Equality, substantive Equality and Transformative equality (art. 2.f and 5). Comments about CEDAW Cusak & Pusey 2013.

10. CEDAW, Article 5: "States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".

11. Holtmaat 2010: 204.

12. Holtmaat 2010: 203.

13. Concurring Opinion of Judge Yudkivska Case Carvahlo Pinto v Portugal, Judgement 25 October 2017, ECHR, p. 23.

14. For example, article 1 International Convention on the Elimination of All Forms of Racial Discrimination (1965).

15. Bodelón 2010: 88.

16. Holtmaat 2014: 194-195.

17. The content of the prohibition of discrimination in a specific sense has been consolidated through international human rights law and European Union law, especially Directives 2000/43 on equal treatment based on racial or ethnic origin, DI 2000/78 in relation to equal treatment in employment, and DI 2006/54 on equal treatment and opportunities between women and men in matters of employment and occupation. These mark the scope of the right to non-discrimination in Spain. Directive 2004/113/EC, 13 December on the principle of equal treatment for men and women in the access to goods, services and supplies.

18. Clérico 2011: 149 ff.

19. The Spanish Constitutional Court has examined the evolution of these contracts in two court cases, only 15 years apart from each other: the STC 253/2004 and the STC 91/2019. In the Legal basis 10.b of the latest, the Court says that data confirm, fifteen years later, that the part-time contract affects to the female sex, neatly with an unaltered percentage, and the here reviewed legal treatment cannot be justified objectively for reasons of social politics.

20. Mercat-Burns 2018: 4.

21. According to European Directives: "Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1"; "indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".

22. Añón 2014: 110, 121-126.

23. Recognized as a modality of autonomous discrimination by the Committee of Economic, Social and Cultural Rights, General Observation nº 22. Systemic discrimination: "The Committee has regularly found that discrimination against some groups is pervasive and persistent and deeply entrenched in social behaviour and organization, often involving unchallenged or indirect discrimination. Such systemic discrimination can be understood as legal rules, policies, practices

or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups". "Non-discrimination in economic, social and cultural rights", , 2009, §12.

24. Añón 2014; Barrère 2003; Morondo 2013: 44-45.

25. Pou 2015: 175-176; Barrère 2018; Clérico 2018.

26. Réaume: 2013: 13.

27. Giménez Gluck 2004. In a coincidental sense, the *European Court of Human Rights,* beginning with the judgement in the *Belgian Linguistic Case,* established a test to assess the inequality that has been applied in all cases affected by Article 14 of the European Convention. The test is based on an examination of whether the different treatment of comparable cases is objectively justified, whether its effects are compatible with the nature of democratic societies, and whether there is reasonable proportionality between the means employed and the aim pursued (Freixes 1995: 100).

28. The British Equality Act of 2010 refers to this in the following terms: "The comparator is someone who's in the same or similar enough situation to you, but who doesn't have the same protected characteristic." According to Section 13 of the Act "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. If the protected characteristic is sex (a)less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding; (b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth".

29. Golberg 2011: 772-775.

30. Bramford, Malik & O'Cinneide 2008: 278.

31. West 2000: 159; MacKinnon 1987: 37-38.

32. This is the doctrine of the Spanish Constitutional Court since STC 68/1990.

33. On this issue, the Spanish Constitutional Court holds a criterion on the validity and adjustment of the point of comparison limited to determine which cases do not accept the comparator. The first is when the invoked notion constitutes an illegal practice, which seems clear. Second, when the difference between the invoked notion and the disputed facts is pre-existing, original, or natural. Nonetheless, what has an original or pre-existing to the norms difference, and the criteria to determine a difference as a "natural" one are unclear. Those social differences considered pre-existing to norms also deserve a careful study. Giménez Gluck 2004: 74-79.

34. This is also the approach taken by the ECHR. For instance: ECHR, *Petrov v Bulgaria* nº 15179/02, 22 May 2008, par 55. ECHR, *Varnas v Latvia*, nº 42615/06, 9 July 2013. Nevertheless, the ECJ examines the analogy in those cases related to the pay equity, and if the work done by the women is "equal" or has an "equal value" to that done by the men workers. ECJ, C-256/01, *Debra Allon/Accrington & Rossendale Collegue, Education lecturing Services, and Secretary of State for Education and Employment*, 13 January 2004. In some ways, which have already been referred to, in decision C-83/14 *CHEZ Razpredelenie Bulgaria AD/Komisia za zashita ot diskriminatsia*, 16 July, the ECJ deepens the notion of discrimination, the difference between direct and indirect discrimination, and the adequacy to the reference of comparison. This is not a case based on gender grounds, but it has become a benchmark.

35. Golberg 2011: 740.

36. Añón 2014: 110.

37. Bamforth, Malik & O'Cinneide 2008: 276.

38. Golberg 2011: 737, 751-752.

39. Barrère & Morondo 2015: 39-40; Holmaat 2010: 203-204.

40. CESCR, General Comment 22, §8. "Non-discrimination and social and cultural rights (article 2, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights)" E/C.12/GC/20, 2 July 2009.

41. There is a case law in the European Court of Justice from the 1990s, in relation to the damage related to pregnancy, maternity leave and parenthood In this, there is no requirement to identify a reference of comparison, at least regarding the work and labour relations, this being the most privileged field of discrimination within the European Union. The European Directives in this regard contain direct discrimination figures (ECJ, C-177/88, *Elisabeth Johanna Pacifica Dekker/ Stichting Vormingescentrum voor Jong Volwassenen*, 8 November 1990). In other issues, such as parental leave, working hours, the wage gap, and other kinds of labour conditions, the comparator becomes as relevant in the direct discrimination as in the indirect discrimination, where this comparator is determined through a group. Therefore, the requirement of a comparator does not result from identifying some cases as direct discrimination, but because there is no applicable point of comparison, and so the discrimination is presumed.

42. The distribution of the burden of proof is the central point that marks the emergence of contemporary equality law. In many legal systems, such as the Spanish, it becomes less suitable to address the evidence reasoning with regard to discrimination in terms of reversing burden of proof than in terms of distribution and sharing of the burden of proof. Nonetheless, this issue is not addressed here. Regarding the presumption, see Aguiló Regla 2018.

43. Pou 2015: 170-171. The author explains her thesis based on a Mexican Supreme Court ruling on age and gender discrimination relating to two clearly discriminatory job advertisements. Pou's reasoning is interesting when she states, in line with the argument corresponding to the discriminator - in this case a company - the following: "This would make it possible to examine and assess, for example, whether "the preservation of a corporate image" is a legitimate aim for a company in relation to the recruitment of personnel. "It may be that the selection and dissemination of certain corporate images - and not just the means of the company to maintain it - may be incompatible with the constitution. A corporate image can be racist, classist, homophobic, misogynistic. It should not be accepted that as a generic end and under any possible concretion, it is legitimate" (Pou 2015: 172).

44. Morondo 2013: 186-187.

45. Timmer 2015: 239, 252.

46. Pou 2015: 175; Moreau 2004.

47. Gerards 2005: 669-675. Reasoning that is evident in ECHR *Konstantin Markin v Russia* (2008).

48. Bartlett 1990; Álvarez 2017.

49. Cook & Cusak 2010: 23.

50. The CEDAW Committee has studied the issue of gender stereotypes in depth. Thus the case of Angela Gónzalez v. Spain (2014) considers that "the authorities in charge of granting protection privileged the stereotype that any father, even the most abusive, should enjoy visitation rights and that it is always better for a child to be educated by its father and mother; this without really valuing the rights of the child and ignoring that the child had expressed fear of its father and refused contact".

51. UN, OHCHR Commissioned Report, *Gender Stereotyping as a Human Rights Violation*, 2013: 4-5. One of the issues that has received special attention is the question of the valuation of the victim's (woman's) testimony and her credibility in cases of sexual violence at all jurisdictional levels. CEDAW Committee case *Karen Tayag Vertido v. The Philippines* (July 2010). On this case, see Cusack 2014: 25; Cusack & Timmer 2011.

52. CEDAW *V.V.P. v. Bulgaria*, UN Doc. CEDAW/C/53/D/31/2011 (24 November 2012), § 9.6.

53. CEDAW *R.K.B. v. Turkey*, UN Doc. CEDAW/C/51/D/28/2010 (13 April 2012), § 8.8.

54. IACHR Case *Atala Riffo v. Chile* (2012).

55. ECHR *Case Carvalho Pinto v. Portugal,* Judgement 25 October 2017.

56. Olivier De Schutter, Report of the Special Rapporteur on the right to food, UN Doc. A/HRC/22/50, 24 December 2012), para. 27(b). Magdalena Sepúlveda Carmona, Report of the Special Rapporteur on extreme poverty and human rights, UN Doc. A/HRC/21/39 (18 July 2012), para. 24, 83. Raquel Rolnik, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, UN Doc. A/HRC/19/53 (26 December 2011), para. 4, 64. Nand Grover, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/66/254 (3 August 2011), para. 16.

57. Clérico 2018: 74.

58. In relation to the Inter-American Court, the first case on gender stereotypes is the *Gonzalez et al. v. Mexico case* (Campo Algodonero) of the 2009 IACHR and the *Atala Riffo v. Chile* (2012). Other cases have identified stereotypes about people with HIV, the conception of family and others.

59. Chemerinsky 2006: 671.

60. Clérico 2011: 147-148.

61. Timmer 2011: 718.

62. The decision marking a significant change in the relatively formalistic jurisprudence of the court is *D.H. v Czech Republic* (2007). Dissenting votes critically point to the fact that the court makes an assessment of the social context. *Alajos Kiis* v *Hungary* (2010) paragraph 42-44. Timmer (2011: 722, 2016: 44-45): examining the historical context, given that whether a stereotype is harmful depends to a large extent on the historical context in which it is used. In the case of the European Court of Human Rights *Andrle v Czech Republic,* in which the pension system in the Czech Republic is examined, the court considers that it is clearly based on the stereotype of the male provider and female housewife blueprint. See also Konstantin Markin v Russia, §127. *ECHR Carvalho Pinto v. Portugal,* Judgement 25 October 2017, where the Court recognises that the key argument justifying the state judgement is based on two stereotypes: the sexual stereotype and that of the gender roles associated with women (§52). Which shows, as the court says, "the prevailing prejudices among the judiciary in Portugal" (§54).

63. Pou: 2015: 179.

64. Moreau 2004: 7-23; Clérico 2018: 220; Cook & Cussak 2010.

65. Álvarez 2017: 300.

66. Timmer 2011: 725.

67. O'Cinneide 2008: 81-83; Letsas 2006: 705.

68. Clérico 2017: 231-238.

69. Concurrent vote Juez Motic, Carvalho Pinto vs Portugal, § 3.

ABSTRACTS

This article proffers a reflection on some of the most recent feminist legal proposals within the context of anti-discrimination law. The notion of structural discrimination is an appropriate starting point for exploring two relevant aspects of anti-discrimination arguments: the review of

comparative type rationale and the weight given to the relevant comparator, and second, the meaning or purpose of the identification of gender stereotypes. As a further step in this field, the article provides an analysis that reinforces the proposal to advance anti-subordination law.

Preobrazbe protidiskriminacijskega prava. Napredek v boju proti podrejenosti. Avtorica te razprave ponudi razmislek o nekaterih novejših predlogih feministične teorije v okviru protidiskriminacijskega prava. Izhajajoč iz pojma strukturne diskriminacije razišče dva pomembna vidika protidiskriminacijskih argumentov: najprej preuči utemeljitev tipske primerjave in težo, ki se pripisuje relevantnemu kriteriju primerjave; nato preuči še pomen oz. namen identifikacije spolnih stereotipov. K razvoju protidiskriminacijskega prava končno prispeva z analizo, ki stremi h krepitvi boja proti podrejenosti.

INDEX

Keywords: antidiscrimination law, systemic discrimination, subordiscrimination, relevant comparator, gender stereotypes, harm
motsclessl protidiskriminacijsko pravo, sistemska diskriminacija, podrejevalna diskriminacija, relevantni kriterij primerjave, spolni stereotipi, škoda

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