

"Sex" and "gender" as constitutional categories — Critical notes from iusfeminist legal dogmatics

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Abstract

The article invites reflection on the apparent neutrality of legal discourse and the importance of detecting gender biases and/or stereotypes. Hence, it begins by alluding to the Nobel laureate in Economics, Daniel Kahneman (2011), who in one of his works invites us to visualise two lines of equal size, but which, at first glance, appear to have a different extension. The Nobel laureate in economics states that what is seen and observed is never neutral. Hence the importance of stopping to think about the form of socialisation of the sex-gender system in order to subsequently reflect on the terms in which the legal discourse has outlined the subject of Law (normative model of the human) and has recognised rights, and its effects from the point of view of interpretation and normative application.

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1. Contextualisation

The article seeks to reflect on a series of key questions to be asked in the analysis of legal discourse, namely:

1. Why is a feminist (gender) perspective important in the study of legal sciences?
2. Is the law neutral from the point of view of the socio-sexual configuration of the subjects?
3. What is the contribution of gender-sensitive teaching and research?
4. In what terms are the variables "sex" and "gender" relevant to the study of legal norms in the field of law-making, interpretation and implementation?
5. In what terms has progress been made normatively for the implementation of gender-sensitive analysis, and doctrinally and jurisprudentially?
6. What is the practical dimension of gender mainstreaming in the legal praxis of the forum, in the drafting of legal reports, in the drafting of claims and complaints, in the insertion of contractual clauses, in the planning of social responsibility measures, in gender impact reports, in remuneration audits, etc.?

2. Objectives

Based on the above questions, the objectives of the article can be summarised as follows:

- Legally and constitutionally delimit the gender perspective from a triple dimension (normative, axiological and sociological) (Torres, 2018).
- Emphasise the roots of the analytical categories "sex" and "gender" within critical constitutionalism and critical legal theories of human rights.
- Signify the origin, development and contributions to law of theories framed in *Feminist Jurisprudence*, *Feminist Legal Theory*, etc., as an epistemic privilege of the situated and positioned vision of women (Pitch, 2003; Olsen, 1990; Makinnon 1983; Facio, 2000).
- To highlight (and signify) the potential of gender-sensitive analysis for the protection and guarantee of women's rights in the field of normative application and interpretation (Torres, 2022).

3. Narratives of the "I" in Legal Discourse

The article delves into the importance of the narratives of the "I" in the legal sphere as exponents of situated knowledge (Araiza, 2009), and as a bulwark for revaluing the categories "sex" and "gender" in the analysis of legal discourse for the purpose of questioning the socio-sexual neutrality of the law. From this prism of analysis, the starting point is to be found in the legal delimitation of so-called "*sex discrimination*" as structural discrimination of the sex-gender system, for the purpose of delving into and deepening discriminatory conduct and practices in the legal praxis of the forum by legal operators incapable of identifying asymmetrical situations of power in the relational (and, social) sphere of people. It is therefore a question of being able to identify and make discriminatory practices visible from the "legal" sphere when legal operators are reluctant to analyse the facts and assess the evidence in a specific case without gender bias and prejudice, as well as when they are reluctant to question the neutrality of the procedural and substantive rules to be applied.

In the light of the above, the importance of the principle of equality between women and men in university teaching should be highlighted. Equality which, from a constitutional approach in Spain, is articulated from a triple dimension: as a value (art. 1.1 CE), as a fundamental right (art. 14 CE) and as a mandate to the public authorities (art. 9.2 CE). Furthermore, it recalls how equality in the European sphere has been established as a fundamental principle of Community law.

Hence the importance of a brief overview of international, international-regional, European, constitutional, infra-constitutional and regional regulations on equality and non-discrimination on grounds of sex. From this perspective, the article focuses on the important legal distinction between "sex" and "gender" as analytical categories for legal discourse. Sex" as "the biological" and as a constitutional category for the protection and guarantee of women's rights, and "gender" as the socially constructed based on the sex of the subjects, erected as a category of constitutional relevance to identify socio-sexual power structures in the field of interpretation and application of regulations.

4. The Need to Rethink the Normative Model of the Human

Both analytical categories help to rethink the subject-model of law, as well as the legal articulation of rights. And to do so, in turn, from a triple dimension:

- From the position of women in legal narratives and discourses. Note the so-called "*constitutional periphery*" in which women seem to have been positioned.
- From the construction of women as legal-political subjects (Mackinnon, 2006). Therefore, from the critical reflection on a subjectivity that is predicated autonomously from the postulates of formal equality, but with clear discriminatory notes for women in relation to the reference model (Torres, 2021).
- From the normative effectiveness of laws (and the legal system as a whole) when the (feminist) gender perspective is ignored as a criterion for the interpretation of law with a solid constitutional basis (Torres, 2017), and when the potential of the categories "sex" and "gender" as analytical categories is ignored, with "gender" being erected as a specific guarantee of women's rights (Torres, 2019).

5. Conclusions

At this point, it is argued that a review of the scientific literature is necessary based on the postulates of anti-discrimination law, on the demand for "due diligence" in the field of interpretation and application of regulations and, finally, on the demand for state responsibility when gender biases and/or stereotypes are observed in the interpretation and application of regulations.

With regard to the review of the scientific literature, special emphasis is placed on the important role of law faculties in supporting the transfer of knowledge without gender bias and stereotypes (Torres, 2021) to future legal practitioners. On this point, attention is drawn to the two volumes published by the University of Salamanca "Manual of Spanish Constitutional Law with a gender perspective" (VVAA, 2020).

References

- Araiza Díaz, A. (2009). De la política de la localización a los conocimientos situados. Notas para la creación de una ciencia feminista. Artículo en línea. Recuperado de: https://www.academia.edu/9678875/De_la_pol%C3%ADtica_de_la_localizaci%C3%B3n_a_los_conocimientos_situados_Notas_para_la_creaci%C3%B3n_de_una_ciencia_feminista
- Facio, A. (2000). Hacia otra teoría crítica del Derecho. En Herrera, G. (2000). Las fisuras del patriarcado. Reflexiones sobre Feminismo y Derecho. Ponencias en el Programa de Género de FLASCO que en febrero de 2000 organizó el Seminario "Género y Derecho: reflexiones desde la teoría y la práctica (pp. 15-44) Ecuador.
- Kahneman, D. (2011). *Pensar rápido, pensar despacio*. Editorial Debate. Traducción de Joaquín Chamorro Mielke. Versión original: *Thinking, Fast and Slow*. Los Ángeles Times Book Award for Current Interest. Madrid.
- Mackinnon, C. (2006). *Are Women Human? And Other International Dialogues* Cambridge: Harvard University Press.
- Olsen, F. (1990). El sexo del derecho. En Kairys, D. (ed.). *The Politics of Law*, pp. 452-467. New York: Pantheon.
- Pich, T. (2003). *Un Derecho para Dos. La construcción jurídica del género, sexo y sexualidad*. Madrid: Trotta.
- Torres-Díaz, M.C. (2022). **Los retos de la Justicia Constitucional ante los Derechos de las Mujeres** En Castañeda Otsu, S. (dir.). (2022). *Justicia Constitucional y Derechos de las Mujeres*, pp. 62-121. Edición: Escuela de Derecho LP, Perú. Registro editorial: 31501132200521. Biblioteca Nacional del Perú: 2022-09310. Referencia en Dialnet aquí: <https://dialnet.unirioja.es/servlet/articulo?codigo=8980989>
- (2022) Garantías normativas e institucionales. La categoría jurídica «género» como garantía constitucional. En Ventura Franch, A. e Iglesias Báñez, M. (2022) *Manual de Derecho Constitucional desde la perspectiva de género. Derechos, Deberes y Garantías Constitucionales* (vol. 2), 1ª edición, Ediciones USAL, Salamanca, pp. 567-599. Referencia en Dialnet aquí: <https://dialnet.unirioja.es/servlet/articulo?codigo=8671074>
- (2022). Los deberes constitucionales: aportaciones iusfeministas. En Ventura Franch, A. e Iglesias Báñez, M. (2022), *Manual de Derecho Constitucional desde la perspectiva de género. Derechos, Deberes y Garantías Constitucionales* (vol. 2), 1ª edición, Ediciones USAL, Salamanca, pp. 255-290. Referencia en Dialnet aquí: <https://dialnet.unirioja.es/servlet/articulo?codigo=8671057>
- (2022). Derecho a la vida y a la integridad física y moral. Los problemas de la bioética. Aportaciones desde las teorías jurídicas feministas. En Ventura Franch, A. e Iglesias Báñez, M. (2022), *Manual de Derecho Constitucional desde la perspectiva de género. Derechos, Deberes y Garantías Constitucionales* (vol. 2), 1ª edición, Ediciones USAL, Salamanca, pp. 116-161. Referencia en Dialnet aquí: <https://dialnet.unirioja.es/servlet/articulo?codigo=8671063>
- (2022). El «sexo» como categoría jurídica de relevancia constitucional. Debates actuales para la tutela de los derechos de las mujeres. En Campanelli, G., Frazao, H., y Luzzi, C. (coords.). *La tutela dei diritti umani tra giurisdizioni interne e sovranazionali: profili teorici, sostanziali e processuali. Scritti scelti a partire dal CAF 2021* Edición: Università di Pisa e

Instituto de Estudios Constitucionales del Estado de Quétaro. México, 2022, pp. 147-169.

Referencia en el repositorio académico RUA aquí: <https://rua.ua.es/dspace/handle/10045/121467>

- (2021). *Derecho y Criminología: guías para una docencia universitaria con perspectiva de género*. Editor: Universitat d'Alacant & Xarxa Vives d'Universitats, 2021. Recuperado de: <https://www.vives.org/book/derecho-y-criminologia-guia-para-una-docencia-universitaria-con-perspectiva-de-genero/>.
- (2021). El discurso jurídico sobre el cuerpo de las mujeres: O, la artificiosa articulación del derecho a la gestación por sustitución. En Carrió Sampedro, A. (dir.) (2021) *Gestación por sustitución. Análisis crítico y propuestas de regulación*, Marcial Pons, col. Lege Ferenda, Madrid, pp. 75-108.
Referencia en Dialnet aquí: <https://dialnet.unirioja.es/servlet/articulo?codigo=8066650&fbclid=IwAR3dLSSVhJuc7LH45Lr-CdqH6ikRKUuGRhkj1OSLDOtVUHZeSt2LK7mCzEg>
- (2020). Prostitución y teoría jurídica feminista: sobre mujeres, cuerpos y derechos. En VV.AA (2020). *Libres, dignas e iguales. Las claves jurídico críticas de la prostitución y el trabajo sexual*, Tirant Lo Blanch, col. Monografías, Valencia, pp. 121-148.
Referencia en Dialnet aquí: <https://dialnet.unirioja.es/servlet/articulo?codigo=7906626>
- (2020). Fuentes de Derecho y Constitución con perspectiva de género. La concepción clásica del sistema de fuentes y la aportación de la teoría feminista del Derecho. El Derecho Internacional. El Derecho Antidiscriminatorio. En Ventura Franch, A y Iglesias Báñez, M. (2020), *Manual de Derecho Constitucional desde la perspectiva de género*, 1ª edición, Ediciones USAL, Salamanca, pp. 175-205.
Referencia en Dialnet aquí: <https://dialnet.unirioja.es/servlet/articulo?codigo=7666224>
- (2019). Las mujeres como sujeto constituyente: la crisis de los 40 ante la reforma constitucional. En *Revista Valenciana de Estudios Autonómicos*, nº 64 pp. 160-185.
Referencia en Dialnet aquí: <https://dialnet.unirioja.es/servlet/articulo?codigo=6888855>
- (2018). Iusfeminismo, género y discurso jurídico: análisis desde la praxis y estado de la cuestión. En *Revista Pensamiento Constitucional*, nº 23, pp. 205-240.
Referencia en la Revista pensamiento constitucional aquí: <https://revistas.pucp.edu.pe/index.php/pensamientoconstitucional/article/view/20953>
- (2017). El sustento constitucional de la impartición de Justicia desde la perspectiva de género. En el monográfico «Mujer y Constitución» de la *Revista Peruana de Derecho Constitucional*, nº 10, diciembre 2017, ISSN: 2222-0615, pp. 181-214.
Referencia en el repositorio académico RUA aquí: <http://rua.ua.es/dspace/handle/10045/74703>