Gender Stereotypes as an Obstacle to Equality of Opportunities between Men and Women in Employment – Possible Legal Contributions for Solving the Problem

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Abstract: Equality between men and women has long been legally established in national and international acts. As men and women show differences capable of undermine the equality between them in what regards to the opportunities they enjoy in the labor market, the equality established by law must be understood as a substantial equality, and not a merely formal one. A State truly committed to the goal of equal opportunities has the obligation to make the distinction in treatment between the sexes when it is necessary to correct inequalities of opportunities and hence achieve real equality. The analysis of the current reality shows us that the real equality is still unachieved. It happens due to sociological barriers that are preventing the achievement of equality legally established. Those are related to the system of gender (male and female) deeply rooted and that still puts the female in a position inferior to men. Studies were conducted in sociology to explain that the current «genders system» remain through coercive and voluntary factors and that the key factor for the maintenance and, consequently, for the change, lies in the sexual division of labor between the sexes, especially in the division of housework and labor market. Changes in this field would positively contaminate the whole «genders system». So, contrary to what has been done so far, instead of continuing to protect women, often sustaining gender stereotypes and creating the 'boomerang' effect that jeopardizes equality, the way to go should pass through establishing the men preferential treatment under the assumption of family responsibilities, inclusively by the adoption of temporary positive action measures appropriated and proportionate to this purpose. Important is however that these measures still leave a margin of self-organization to the families, in order to respect individual and conjugal liberty and not to endanger the interests of third persons, such as the children. Within the labor market, the division of work between the sexes can also be promoted with measures that encourage both sexes to choose areas where they are underrepresented.

Keywords: gender; equality; stereotyping; work; law.

Equality between men and women as a established right

The right to equality between men and women in labor and employment knows positive establishment in many different regulatory levels, although not always finds autonomy against the general principle of equality. This means that sometimes the gender equality is not covered by its own rules, but is absorbed by the generic principle of equality. Other times, however, gender equality has been independently established and even especially regulated.
In one or other way, we can find it in the Universal Declaration of Human Rights (UDHR)\(^1\), in the International Covenant on Economic, Social and Cultural Rights (ICESCR)\(^2\), in the Convention on the Elimination of All Forms of Discrimination against Women (CETFDCM)\(^3\), and in various Conventions and Recommendations of the International Labor Organization (ILO), such as Convention No. 100 (Equal Remuneration Convention, 1951), Convention No. 111 [Discrimination (Employment and Occupation) Convention, 1958], Recommendation No. 123 (Employment of Women with Family Responsibilities Recommendation) and Convention No. 156 (Workers with Family Responsibilities Convention, 1981).

On the European level we can already discover it, for example, in European Social Charter\(^4\), in the Treaty on the Functioning of the European Union (especially in the articles 2 and 157)\(^5\), in the Directive 2006/54/EC of the European Parliament and the Council, of 5 July 2006, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) and in the Charter of Fundamental Rights of the European Union.

What’s ‘equality’ in this context? What type of ‘equality’ must be achieved?

The right answer, in the design of the liberal feminist movement of the ‘60s and ‘70s, was the strict equality of treatment between men and women. Assimilation was the goal and the differences in treatment were seen as discrimination.

Feminists like RUTH BADER GINSBURG and HERMAN HILL KAY fought against the classifications and categories based on gender and advocated a legal model of ‘gender neutral face’\(^6\). The biological differences between men and women should be despised, as well as the other inequalities experimented by males and females. However, not all of them defended the total neutrality. KAY, for example, admitted considerations of gender differences during pregnancy, accepting maternity leave for these situations. After that, gender-neutrality should be the norm\(^7\).

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\(^1\) Adopted on December 10, 1948, by the General Assembly of the United Nations (UN).

\(^2\) Adopted on December 16, 1966, by the General Assembly of the UN.

\(^3\) Adopted on December 17, 1979, by the General Assembly of the UN.

\(^4\) Adopted by the Council of Europe on 18 October 1961 and revised on May 3, 1996.

\(^5\) According to the numeration and wording given by the Lisbon Treaty, published in the Official Journal C 83 of 30.3.2010.

\(^6\) Symbol of this reform effort was the movement for ‘Equal Rights Amendment to the Federal Constitution’, in the US, which despite of failing at the national level, led to changes in some State Constitutions, in order to prohibit distinctions based on sex — FINEMAN, Martha Albertson, «Feminist theory in law: the difference it makes», AAVV [ed. MASCHKE, Karen J.], Feminist Legal Theories, Garland Publishing, Inc., New York and London, 1997, p. 221.

\(^7\) KAY even discourages breastfeeding in order to bring the best of intimacy between parents and children. Men and women should share every responsibility in relation to child care — LAUPER-UKÉLES, «Selective recognition of gender difference in the law: revaluing the caretaker role», Harvard Journal of Law and Gender, p. 8 and following.
Equality meant, therefore, no distinctions: the legislative requirement to formulate general and abstract rules which should be uniformly applied to the cases governed by them. It’s pure and simple equal treatment, rigid and inflexible. The lawmaker itself could not formulate rules that would establish special circumstances of advantages for any class or individual, otherwise he would be harming the principle of equality.

This type of equality, from purely formal, ended proved as inappropriate to this context, once it doesn’t contribute for a substantial/material justice. Indeed, in what regards to the opportunities enjoyed in the labor market, men and women show differences capable of undermine the equality between them and people began to understand that a State of Law truly committed to the goal of equal opportunities had the obligation to make the distinction in treatment between the sexes in those cases, in order to correct the inequalities and achieve real equality.

The truth is that we must not forget that men and women have different biological characteristics (in particular in what regards to their role in the reproductive process) that introduce the inequality between the sexes. This inequality is enhanced by the gender stereotypes that are still experienced. Such circumstances must be brought into play when establishing the right to equality in employment; otherwise, a strictly egalitarian treatment will result in an actual benefit to one sex in relation to the other.

Liberal feminism has been attacked because of their vision of formal equality. Voices were raised against the ‘fake equality’ which would only create, recreate and renew the inequality, reinforcing the division between public and private sectors. At the end, women continued to bear the cost of society's expectations of raising children. A model of gender neutrality, not only didn’t compensate that fact, as actually penalized women.

According to that, the equality that must be achieved isn’t a simply formal one, but a substantial equality implemented as a genuine equality of opportunities. That implies taking differences into account. To achieve real equality it is so imperative ‘to treat equally what is equal’ as ‘dispensing special treatment to what is unequal’. The law itself should make that distinction.

Therefore, as a subdimension of the principle of equality, amongst with the principle of prohibition of arbitrariness (which prohibits a different treatment of similar situations and the similar treatment of situations manifestly unequal) and the principle of prohibition of discrimination (usually understood as the one who illegitimates any differences in treatment between citizens based on purely subjective categories), there’s the principle of the obligation of differentiation, imposing the governments the target of eliminating the factual inequalities, especially the economic, cultural and social ones.

Nevertheless, the goal doesn’t have to be a strict equality of results. What really matters is that both sexes are in possession of equal arms for the use of their rights. The focus should be placed at the starting point (equal opportunities) and not at the point of arrival (equality of results). Thereafter, the freedom of each individual to use, or not, their opportunities, can

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create a gap between equality of opportunities and equality of results. In fact, at this point we must consider the intervention of another core value – freedom. The conclusion that the ‘results’ do not correspond to the uneven implementation of the principle of equality can be precipitated to the extent that factual inequality may correspond to the discretion of (non) exercising a right.

The results are not, however, to devalue, as they always are an indication of the opportunities that originated them. Once a disparity of results is identified, it is important to check if that disparity has its origin on an inequality of opportunities or if it is due to other factors.

**Looking into the current ‘results’**

On a global perspective, if we look into the ILO report ‘Global employment trends for women’, from March 2009, we can see that although the rates of male and female activity are giving signs of convergence (in 2008 women accounted for 40.5% of the global workforce), “gender inequality remains an issue within labor markets globally”.

In what concerns to the sectors occupied by women, the ILO data indicate that women workers are concentrated in agriculture (in global terms, the proportion of women employed in agriculture is 35.4%) and services (in 2008 the sector services accounted 46.3% of the total female employment), with few working in industry (in 2008, 18.3%).

As regards the wage gap, the report announces that the lower payment of female labor remains a worldwide problem, despite it is having fallen in several countries.

On the European scene, the ‘Roadmap for equality between women and men 2006-2010’ presents women as victims of horizontal and vertical segregation. Most of them are still employed in sectors traditionally occupied by women, who are typically less recognized and valued, and occupy lower echelons of the organizational hierarchy.

Despite EU legislation on equal pay, women earn 15% less than men. This gap decreases at a rate much smaller than the asymmetries in terms of employment.

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11 As we can read at the report: “In the United States, several studies of the National Committee on Pay Equity show that wage gaps continue to exist there and that the wage gap has been closing at a very slow rate(...).According to an article produced by the International Poverty Centre in 2008 focusing on gender gap indicators among urban adults in Argentina, Brazil, Chile, El Salvador and Mexico, the female hourly wage was around 80 per cent of that of males for all countries, except Argentina with a ratio of 92 per cent. (...)In his Report prepared for the 8th European Regional Meeting, the Director-General focused on the trend in the wage gap, concluding that, on average, the gap between men’s and women’s wages narrowed in the EU between 1995 and 2006. It narrowed by over 10 percentage points in Hungary, Ireland, Lithuania and Romania. However, it widened in five of the EU-27 countries: Denmark, Germany, Italy, Portugal and Sweden. In 2006, the gender wage gap ranged between approximately 4 per cent in Malta and 25 per cent in Estonia. In Turkey, men employed in manufacturing earn twice as much as women. The gender wage gap is also a cause for concern in the Russian Federation and Ukraine, at 39 and 28 per cent respectively.” – OIT, *Global..., op. cit.*, pp. 18-20.
Women remain the main carers for children and other dependents.

More recently, the statistical annex to the ‘Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on equality between men and women – 2010′, from December 18, 2009, announces that female employment in the EU increased from 54.9% in 2003 to 59.1% in 2008 and the average gap in employment rates for men and women decreased from 15.4 in 2003 to 13.7 percentage points in 2008. Although the gap is decreasing, it is still large. Besides, there are significant differences at national levels: in Malta, Italy and Greece less than half of working-age women are in employment, whereas this proportion is above 70% in Denmark (74.3%), Sweden (71.8%) and the Netherlands (71.1%). The employment rate gap between women and men ranged from less than 5 p.p. in Finland and Sweden to more than 25 p.p. in Greece and Malta.

The report still announces that in 2008, the employment rate for women aged 25-49 was 67% when they had children under 12, compared to 78.5% when they did not, which represents a negative difference of 11.5 p.p. Interestingly, men with children under 12 had a significantly higher employment rate than those without, 91.6% vs. 84.8% – a positive difference of 6.8 p.p.

Despite the women represented, in 2008, 59% of university graduates in the EU, “until now the generally high skills levels of women have not been fully reflected in their employment outcome”. The position of women in the labor market continues to focus on traditionally female sectors and occupations in lower job categories, with less access to senior positions (service workers and sales assistants, clerical staff and care workers and home helpers). As regards ‘highest decision-making body’ of the largest publicly quoted companies, in 2009, women represented, on average, only 11% of these board members at EU level. The percentage exceeded 20% only in Finland (24%) and Sweden (27%); it was below 5% in Malta, Italy, Portugal, Cyprus and Luxembourg.

Moreover, there is a persistent gender pay gap in the EU. The gender pay gap (defined as the difference between men’s and women’s average gross hourly earnings as a percentage of men’s average gross hourly earnings) was estimated in 2007 at 17.6% on average in the EU.

Checking the origin of the disparities; the gender stereotyping

Sociological studies inform us that the actual disparities are a result of sociological barriers. Those are related to the system of gender deeply rooted and that still puts the female in a position inferior to men.

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12 Available in www.igualdade.gov.pt, accessed in 05.05.10.
13 In the political field the average number of female members of national parliaments (single/lower houses) was only 24% in 2009. Also women only represented 26% of the senior ministers of national governments.
Women live a *gendered life*, based on physical, psychological, social and cultural experiences, some of them based on biological differences and others rooted in the culture and custom. Many of them are shared with men but experienced differently.\(^{14}\)

As Simone de Beauvoir stated, "one is not born, but one rather becomes a woman". This statement gets its sense when read in the light of the binomial *sex-gender*\(^ {15}\): tantamount to *sex* what is inherent, physiological, biological, innate, universal; corresponds to *gender* the sociologically constructed, the ideologically represented.\(^ {16}\)

Gender must be considered as a process constantly reproduced and represented. Through this process, different roles, attributes and behaviors are assigned to men and women. It ends with ideological representations of men and women in society, as if there were two ‘empty molds’\(^ {17}\) that were filled with the characteristics, roles, attributes that society assigned to each sex.

Moore said that “gender should be considered as symbolic construction or social relationship”,\(^ {18}\) because these two aspects are inseparable; the genre results from a bundle of social interactions that historically and geographically create and recreate paradigms of action associated with the man and woman at home, work, social life... These constructions lead members of each sex to match the constructed expected stereotypes.

There’s a set of social mechanisms that transform the biological sexuality into a product of human activity. Through social regulation, ‘sex’ turns into ‘gender’.

The division of society in the *masculine* and *feminine* remains one of the decisive elements of the behavior of contemporary societies. Women are expected to conduct more irrational, emotional and dependent, as well as located mostly in the private sphere. On men lie the expectations of rational and scientific acting, independence and participation in the public sphere.\(^ {19}\)

Those different categories produce a hierarchy between the sexes, once the female attributes are less valued than men, making women inferior. It is against this idea that we should fight for. The substantive equality between men and women that we desire to achieve exceeds the current reduced social opportunities for one gender over the other.

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\(^{15}\) In 1949, Simone de Beauvoir issued a challenge to biological determinism in her book ‘The Second Sex’, where she claimed that "One is not born, but one rather becomes a woman".


\(^{17}\) Idem, p. 39.


What is maintaining this gender system?

Quite interesting is the study realized by JANET SALTZMAN, since it parts from the various theories built on the issue to build a theory that combines and integrates all the elements individually targeted for those.

According to this author, sex permeates every aspect of life – individual, sociocultural and intrapsychic – shaping the processes and structures in all these levels. Thus, any theory seeking to explain stability or change in gender stratification systems should incorporate and integrate structures and processes of micro level, macro level, and medium level, even because each level acts deeply on others. The major goal is to find the systematic explanation of how these levels are linked to produce the gender system, because then we can identify the variables capable of changing the whole system.

Over time, several factors have been identified as responsible for the system of gender inequality. They can be classified as coercive and voluntary factors.

The instituted capitalist model is usually appointed as a macro level coercive factor. The capitalist model searches cheap labor in order to obtain maximum benefit. On the other hand, creates a segmented labor market, stratified by classes (identified by Marxism). As women entered into a labor market already occupied and dominated by men, they were led to places undervalued and underpaid. This kept the dependence of women compared to men, helping to stabilize the traditional concept of family and society. Segregation is both horizontal and vertical: horizontal with the tendency of men and women being employed in different occupations, where women take the least valued ones; the vertical because even when men and women perform the same type of activity, the tasks more qualified, more responsible and better paid are usually addressed to men. This segregation, in the Marxist-feminist perspective, is largely explained by the benefit of working women to patriarchal capitalism. However, by concentrating on the production system and on the struggle of equal treatment of women (which they considered to be the proper response) they failed to recognize the

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21 The micro level includes intrapsychic phenomena affected by social and cultural factors and face to face interactions between individuals, especially within couples and small groups. For sociologists of the sexes, the family is the most important institution of micro level.
22 The macro level consists of phenomena that affect all society (to some theorists, the whole world), such as economic and political systems, systems of stratification and class, gender ideologies, as well as systems of beliefs widely accepted.
23 The medium level refers to organizations, communities, racial/ethnic groups.
24 This theory was taken to an extreme by the Marxist-feminists (namely SACKS, EISENSTEIN, VOGEL and HARTMANN), for whom the elimination of oppression of women requires the death of capitalism and patriarchy as an ideology and as a form of relationship between husband and wife.
25 The capital itself is sex blind; his interest is to get the most with the least cost. However the woman entered a market already occupied and controlled by men, who reserved to themselves the seats that secure their socio-economic advantage position.
process of sexualization importance and neglected the other field in which men benefit equally from the uneven division of labor: at home.26

The difference in social roles assigned to men and women is understood as a medium level coercive factor, while the direct interactions between sexes are translated into micro level coercive factors. On the latter, it is said that within stable relationships, individuals shall provide each other approximately equal values. Consequently, when a member of a relationship has greater access to resources needed or desired by the other, this one must offer something in return to balance the exchange. In result, the member who has less access to resources enjoys pays with deference to balance the exchange, offering or satisfying the claims to the one that is providing the resources. As men generally have superior resources, women are the ones who tend to give deference.

As a voluntary factor is appointed the fact that women value the relations with others as a fundamental part of their lives, which affects the types of work they choose and promotes a division of labor where the nurture of children is addressed to women. This, in turn, drives to the nurture of daughters (not sons) who want to nurture children – Neo-Freudian feminist theories.

The socialization theory explains that, through adults, school, styles of dressing, among other social and cultural phenomena, there is the seizure of socially defined standards for each sex by children, who make sex an essential component of the concept of themselves. Moreover, in seeking confirmation of their own gender identity, adults unwittingly succumb to recreation of social definitions of their sex in order to give validity to their sexual identities (theory of everyday life). These elements are also taken as voluntaries factors on the maintenance of inequality between the sexes.

But which are the factors currently considered crucial for maintaining the system?

According to JANET SALTZMAN, the male superior power of resources and the sexual division of labor are the two key coercive aspects that are maintaining the current system of gender: on the one hand, men have greater power resources; on the other, there is a sexual division of labor in which women are at least more responsible than men for child rearing and other work in the family and home.

The greater the men’s advantage of the resources, the greater their power on defining interaction with women (especially their wives) so they accept male definitions of reality, which contributes to the sexual division of work. At the same time, the greater the gender division of labor, the greater the power resources of men, once the higher male presence in the composition of social elites, the higher will be the valorization of the attributes associated with masculinity. So, the greater the male proportion in the composition of the elites of a society, most favored is the distribution of opportunities and rewards to men over women.

26 FITZSIMONS, Annette, Gender as a Verb: Gender Segregation at Work, Aldershot, Ashgate, Great Britain, 2002, pp. 21-22. Nevertheless, HEIDI HARTMANN, explaining men's interest in maintaining the patriarchal system, states that "under patriarchy women give service to men" and addresses the duplicity of the interests involved: the men would have an interest in maintaining the inferiority of women in work and to continue to enjoy the personal service women provided within the family.
The sexual division of labor, in turn, recreates itself through micro-processes within the family. When men are the main extratexitual power, the remaining tasks (child care and homework) become a specialty of women and this type of work does not translate itself into access to money or other property. In addition, when women work, many of them do not acquire resources that can be exchanged for others outside the family, so the men are the ones who usually allow access to desired goods (though not imperatively necessary) to family members, creating a debt to their wives. To balance the exchange, the women give their husbands services such as care of family needs, personal and home. Thus, the greater the sexual division of labor, the higher is the micro-power of husbands over their wives. Moreover, the greater access to micro-power resources of husbands for their wives, the more they show deference and obedience to the requirements of those.

For the voluntary basis of unequal gender system, JANET SALTZMAN suggests the sexual social definitions, the process of sexualization and the sexual differentiation.

Within the sexual social definitions we have the sexual ideology, the sexual norms and the sex stereotypes.

The sexual ideology explains and demonstrates that men and women are fundamentally different, and therefore that society is organized in accordance with those differences, which explains the different responsibilities, rewards, constraints. It forms the basis of the other two: the sexual norms, which specify particular behaviors for men and women, and the sex stereotypes, which are beliefs concerning sexual differentiation. The sexual ideology is more stable and resistant to change, because normally it is integrated into broader systems of belief (religious, cultural).

Societal definitions of sex are no more than ideological representations that structure the society and guide the way of acting of its members. The cultural images about gender are part of our vision of the world, although we do not think it consciously. His greatest power is, indeed, in its invisibility, which leads to the fallacious conclusion that certain characteristics are natural and immutable. Even when questioned (on the analysis of discriminatory behavior), the implicit assumptions that underpin are often intact, able to generate other discriminatory conduct.

It is expected, for example, that women enjoy and spend more time in caring for their children than men. Studies carried out by MONICA BERNAT showed that men who qualify themselves as good fathers spend, indeed, so much time with their children as women who only qualify themselves as all right mothers. These results are consequence of the idea that "may be enough for a parent to sit and talk with your child once a week, while the woman is expected to assume this task every day".

The segregation of women is justified by an ideology which is deeply rooted. Ideological representation is marked with the sieve of naturalness and immutability. The victim of ideological representation itself internalized that ideology through the socialization process, so everything looks fair. Women feel invested in a devoir de présence auprès de leurs

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enfants, self-conditioning themselves. This naturalization of social inequalities is the most effective way to reproduce the bases upon which the society is based.

Thus, the sexual definitions sociologically justify and legitimize the sexual division of labor, unequal opportunities and rewards in jobs other than domestic, as well as male predominance in the positions of the elite.

There are even studies showing that employers make irrational decisions about management competence and commitment clinging to gender bias. In theory, the proper functioning of a free market should eliminate discrimination based on gender, since the management criteria should despise arbitrary criteria. However, studies have shown for example, that managers systematically confuse face time with commitment, despite it’s proven that people with more limited schedules generally remain deeply committed to a high quality work and to the need of meeting the customer satisfaction (Lotte Baily, USA).  

Investigations involving men managers, students of management and directors of university departments of psychology have revealed that the same curricula were lowest scored for women competitors. In some cases was even given a lower grade at the same school article or artwork, when presented by a woman. College students evaluate more positively male teachers than female teachers and superiors are more likely to hire and promote men than women also qualified for the job.

The association between ‘leadership’ and ‘masculinity’ is so strong that the idea of female leaders is seen as incongruous. When a woman applies for a position of leadership does not fit the prototype of the evaluator, so their credentials for employment will be considered with great skepticism.


Idem, p. 90-91.
Sometimes employers themselves are complicit in the assumption of the social role assigned to women by adopting an understanding attitude with her maternal responsibilities and acting based upon a benevolent stereotyping: for example, not considering them for a job that involves travel extensively.

The process of sexualization (acceptance of sexual ideology as a model of proper femininity and masculinity behavior in accordance with the norms by gender and belief in the reality expressed by sexual stereotypes) starts early. Children typify a wide range of tasks according to sex and express a preference for those that are related to their sex. So when men and women carry out different types of work, they provide models of what children can and can not do when adults. From birth children learn gradually to become “un membre compétent de sa culture.”

Another factor is the voluntary sexual differentiation, a phenomenon that leads women to choose tasks that the tradition of female qualifies as a means to express and enhance their sexual identity (theory of everyday life).

Synthesizing, it seems that the sexual division of labor is the essential phenomenon of macro level to provide the superior male power resources at both micro and macro. At the micro level, men use their superior power of resources to keep the sexual division of labor and the power of definition to strengthen and legitimize the sex social definitions, which in turn are created and disseminated by the men's elite in the medium and macro levels. The sexual division of labor and sexual social definitions leads to sexual differentiation. In turn, the sexually differentiated femininity makes women to behave in ways that mitigate the need for men to use the power of resources to maintain the status quo that the gender system gives them. In this way, the sexual division of labor and higher male power are perpetuated and legitimized themselves.

What is the key to the revolution of the «genders system»?

The model of stability presented by SALTZMAN indicates the four factors that should be shifted to move towards equality: 1) the sexual division of labor; 2) the superior male power of resources; 3) the sexual social definitions; and 4) the sexual differentiation, as it emerges from the process of sexualization.

34 “The growth in women’s employment also has an important impact on the future labor supply decisions of their daughters: in countries where labor market participation of women is low, empirical evidence shows that women’s employment decisions are positively affected by the employment decisions of their mothers - DEL BOCA ET AL, 2000, apud PASQUA, S., in AAVV [ed. BOERCI, T., DEL BOCA, D. y PISSARIDES, C.], Women at work – An economic perspective, Oxford University Press, New York, 2005, p. 203).


36 Similar reasoning is developed by DEBORAH RHODE: “A vast body of social science research (…) makes clear that family and the role allocations have been major barriers to women’s vocational advancement. By the same token, gender subordination in the marketplace encourages analogous patterns in the home. Studies of power relationsgips in white, nonwhite, professional and blue-collar families consistently suggest that the greater the disparity in economic resources between husbands and wives, the greater the husband’s dominance status also foster an unequal distribution of domestic burdens, which further constrains occupational opportunities” – RHODE, Deborah L., Justice..., op. cit., p. 126.
All of them are interlinked, influencing each other. The question is which of them will be the key factor, the spark, of the change.

To start this selection, we can consider that more easily the sexual social definitions and the sexual differentiation modify with changes in the sexual division of labor and in the higher male power resources than the reverse. To wait for the natural amendment of those is a long way. Moreover, the cognitive dissonance theory argues that, before a reality that contradicts their attitudes or beliefs, people tend to reduce the uncomfortable feeling of dissonance caused by the contradiction, by changing their perceptions, attitudes and beliefs. From this perspective, belief systems are developed largely post facto, to justify and explain behavior, not as a priori explanation of this conduct. So, hopefully, the introduction of changes in the sexual division of labor and in the male superior power of resources will lead to modifications in the sexual social settings.

The research carried out by Hertz (1986) on marital partners who have absorbent careers supports this view. This scholar found that members of a pair developed an ideology of equality within the family and home as a consequence of the fact that the two careers were also absorbent, explicitly documenting the absence of a “feminist ideology” preexisting.

According to what has been said, as substantial numbers of women and men start to behave against the guidelines of the current sexual social definitions, those settings will begin to change to justify the new reality.

The male superior power of resources is sustained by the sexual division of labor, so it presumably will decrease with the introduction of egalitarian measures in terms of sexual division of labor. Indeed, that power is growing with the fact that women remain as primarily responsible for housework and family care, which in turn plays the occupational segregation of women.

In short, the sexual division of labor and the male superior power of resources are the key factors for the system to change towards gender equality, and the male superior power of resources will change with the changes at sexual division of work, which brings us to the final conclusion that the ignition of the change lies in the sexual division of labor, domestic and extradomestic.

If women want to be able to compete on an equal footing with men for other jobs that manage resources, it is necessary that at home men and women have the same responsibility for all duties and spend with them more or less the same amount of time and effort. In fact, one could think that to consider women responsible for family life would not be a problem since they got protected in employment against it with the granting of a set of rights (leaves, part time work, flexible schedule…). However, the assignment of such rights to women, recreate the ideological representations of gender that we want to tackle and can have a boomerang effect. At the time of hire, the employer will be influenced by the idea that hiring a woman is

37 Similarly, Le Pors, Anicet and Milewski, Françoise, Piloter…, op. cit., p. 33: “Les comparaisons internationales montrent que l’insertion des femmes dans l’emploi, à tous les stades de la carrière, est n partie fonction de l’organization sociale de prise en échange de l’apetite enfance et de l’organisation scolaire (durée quotidienne et vacances scolaires)".
to hire someone to whom the law grants a lot of rights, someone who does not comply. Result: he will hire a man!

So the solution is not to assign women more rights, but to place women in a situation of true equality with men. To do so is crucial to allow both (men and women) to reconcile family and professional life. The more the two sexes are seen as equal in social and family, the less will be the discrimination based on that fact.

How can the law help to achieve the equality of opportunities?

Once the division of work (domestic and extra-domestic) between the sexes is the key factor for the transformation of the actual system of sexes, the labor law seems to be an adequate tool to reach that goal.

The target is to encourage the equal division of work between men and women. For that we should:

i) Verify if the existing legal equal treatments for men and women don’t actually origin a disparate impact (due to the different equality of opportunities experimented by them); if that happens, verify if the legal treatment is an adequate and proportional means to achieve a legitimate aim; if it doesn’t, the equal legal treatment should be taken as discriminatory and, hence, be replaced by a dual treatment for both sexes, in order to correct the unequal opportunities and promote the effective equality;

ii) Reduce the protection of women when it is originated by gender stereotyping and is having a boomerang effect38; exs: the obligatory period of parental leave for women should only be the strictly necessary to their recuperation; beyond that, the law should allow its share with the father because both sexes are able to take care of the child; so, whenever the law amplified the period of the obligatory women’s parental leave period, benefitting the gender stereotype, a reduction of that period would minimize the boomerang effect and promote gender equality;

iii) Introduce temporary measures that benefit the division of labor between the sexes.

These measures [mentioned in iii)] are known as positive or affirmative action. Some think about them as an imposition of substantial equality; others take them as discriminatory measures themselves. Its basic philosophy is this: if society does not walk by herself (or walk-by-step too slow) to equality, appropriate measures to reverse the trend of social

38 Studies performed in France, in 2005, concluded: “[L.]incitation suppose à la fois des mesures relevant de la politique familiale (conditions d’octroi des prestations) et des mesures régulant de temps de travail et son aménagement (heures supplémentaires, par exemple), en sorte de ne pas encourager les hommes à allonger leurs horaires pour gagner plus, et les femmes à les raccourcir pour avoir du temps pour les enfants et la famille” – AAVV, Les inégalités…, op. cit., p. 158.
inequality must be introduced, which can pass through giving preferential treatment to one sex, with a set of reverse or positive discrimination.

The emergence of this type of legal action occurred in 1935, in the US National Labor Relations Act. Back then, through affirmative action, employers found guilty of discriminating against union workers were forced to compensate them by placing them in the situation that they would be if discrimination had not occurred39.

In the European Union, these measures - called positive action - are now referred in the paragraph 4 of Article 157 of the Treaty on the Functioning of the European Union (accepts that Member States provide "specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers")40, as well as in the Article 3 of the Directive 2006/54/EC [“Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life”].

Therefore, the positive action measures happen to be preferential treatment of a disadvantaged group in terms of a particular factor - in this case, sex - to promote equal opportunities - in casu, between men and women41.

39 In 1868, after the Civil War, the 14 Amendment to the U.S. Constitution of 1787 was introduced, containing the so-called Equal Protection Clause, under which no person can be denied the equal protection of law. Hence the Supreme Court and American doctrine withdrew a demand for equality in the content standards and the principle of prohibition of discrimination by public authorities, but allowed unequal treatment of individuals since it promoted equality. The Supreme Court offered resistance, however, application of 14. Amendment to the discrimination based on gender, arguing that the Equal Protection Clause was intended to cases of racial discrimination. In 1964, through the Title VII of the Civil Rights Act, sex was introduced as a prohibited discriminatory factor for access or disruption of employment. The development of this standard gave rise to the Equal Employment Opportunity Commission (EEOC) and federal agency designed to monitor compliance with the anti-discrimination provisions of Title VII and to promote among employers and unions the adoption of voluntary affirmative action programs targeted for equality opportunities in the labor market. In 1978 Congress passed the Pregnancy Discrimination Act which amended Title VII of the Civil Rights Act so that the discriminatory treatments by reason of pregnancy were considered discrimination based on sex. The U.S. commissions on Civil Rights, in the Statement on Affirmative Action (available in <http://www.usccr.gov/aaction/state77.pdf>, last accessed on 1/22/2010) in 1977 defined affirmative action as "any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensatory for past or present discrimination or discrimination to prevent recurring in the future." In 1991 the new Civil Rights Act introduced important changes with regard to anti-discriminatory law in the U.S.. This law confirmed the affirmative action as an appropriate remedy to combat discrimination in conditions of under-representation of minority women or considered. Through the Glass Ceiling Act, also of 1991 a Commission with the task of appraising the under-representation (particularly at the level of posts of responsibility) was established Paradoxically in the 1996 Constitution of the State of California banned preferential treatment, then later option in the states of Washington (1998) and Florida (2000) - MARTÍN VIDA, María Ángeles, «Evolución del principio de igualdad en Estados Unidos. Nacimiento y desarrollo de las medidas de acción afirmativa en derecho estadounidense», Revista Española de Derecho Constitucional, 68, año 23, mayo/agosto 2003, p. 153 and following.

40 In Declaration No. 28 of the Treaty of Amsterdam it was stated that by adopting measures referred in paragraph 4 of article 119 of the Treaty (currently, the 157) Member States should first aim to improve the situation of women in professional life.

41 In a broader definition that includes measures of mere awareness and encouragement, MARTÍN VIDA defines positive action measures as “todas aquellas medidas, diversas en sus manifestaciones, que tienen como destinatarios directos a personas que están o han estado discriminadas o que se hallan en una situación de desventaja estructural como consecuencia de su pertenencia a un cierto colectivo, pertenencia determinada por
Such measures should only be maintained as long as necessary to fulfill the purpose that justified their creation, because from the moment they fulfill that purpose and still remain, they turn into discriminatory treatment against the opposite sex to the protected. Preferential treatment is justified only to remedy inequities\textsuperscript{42}.

Its temporary nature, coupled with its reason being, distinguishes the positive action of those perennial differential treatment designed to compensate members harmed by the effect of sex biological differences, like the ability to become pregnant, generate, give birth and breastfeeding. This type of differentiation, although sharing with positive action measures its ultimate goal – the establishment of equal opportunities between men and women - is intended to compensate an unalterable reality, while those measures are intended to compensate inequalities that one wants to see eradicated. The firsts benefit to compensate; the second offset to overcome\textsuperscript{43}.

In the USA, the implementation of positive action measures has been allowed: 1) by public programs protected by the constitutional right to equal protection (\textit{Equal Protection Clause}), 2) under the Federal Anti-Discrimination Statute – \textit{Title VII of the Civil Rights Act}.

In order to be legitimated, a positive action measure under the \textit{Equal Protection Clause} should pass through the \textit{Mid-level or Intermediate Scrutiny Test}, forcing the state to prove the existence of an important objective (important or substantial interest) to justify the difference in treatment and to the demonstration that the disparate treatment is substantially linked to the achievement of that goal\textsuperscript{44}.

In turn, \textit{Title VII of the Civil Rights Act} allows courts to order affirmative action plans to compensate discrimination detected by them\textsuperscript{45}. The Supreme Court has developed a tripartite

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\item As \textsc{Bernard Teyssie} says “\textit{D\textendash}érrogation au principe d’égalité, elle doit cesser dès que cessent les motifs de son adoption. (…) Dès lors qu’ont disparu les écarts substantiels qui avaient justifié leur adoption, ces mesures doivent prendre fin, cédant la place à la seule application des dispositifs ordinaires tendant à assurer l’égalité de traitement des travailleurs masculins et féminins, voire à ceux attachés à la promotion de l’égalité de chances” - cfr. \textsc{Teyssie, Bernard}, \textit{Droit Européen du Travail}, troisième édition, LexisNevis, Paris, 2006, p. 262.
\item \textsc{Cfr. Fabregat Monfort, Gemma}, \textit{Las medidas de acción positiva – La posibilidad de una nueva tutela antidiscriminatoria}, tirant lo blanch, Valencia, 2009, p. 13, footnote 12.
\item \textsc{MARTÍN VIDA}, María Ángeles, «Evolución…», \textit{op. cit.}, pp. 156-157. Nevertheless, Rehnquist Court, in sentencing \textit{Craig v. Boren} (1976) and \textit{Michael M. v Superior Court} (1981) ruled in favor of applying the \textit{Rational Basis Review Test} instead of the \textit{Intermediate Test} because only women (not men) carry back a prior history of discrimination whose effects are intended to be corrected.
\item “If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable” – available in
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analysis for judge the legality of a program adopted under Title VII: 1) the affirmative action must intend to remedy traditional patterns of discrimination, 2) not unduly harm the rights of those who aren’t benefited by the program, 3) the program must be temporary, merely to remedy the problem detected. For example, in Johnson v Transportation Agency were detected five job categories where women were underrepresented in comparison to the labor market; hence it was determined the goal of equal representation through the inclusion of factor sex as a recruiting factor (‘one’, not ‘the’).46

At European level, the ECJ has already pronounced himself on the adoption of positive action measures - Judgements Kalanke47, Marschall48, Badeck49, Abrahamsson and Anderson50. The ECJ seems to consider that the implementation of positive action measures is legitimated by a situation of inequality of opportunity between men and women. This is the criterion of appropriateness of their implementation. A different issue is the appropriateness and proportionality of the measures to achieve that target. The measures taken, besides having to be appropriated to that end, cannot exceed it or threaten the substantive content of other legally protected rights: the purpose of giving validity to the emergence of a positive action measure is exceeded when it promotes a strict equality of outcomes (rather than just promote equal opportunities which may ultimately trigger or not an equality of results); the substantial content of other rights is affected when its essential core is compromised.

Nevertheless, the positive action measures have known several objections.

A set of objections is connected with the fact that often these measures, while trying to ensure equality, actually serve to renew social stereotypes, segregating their beneficiaries. This happens especially when they take the form of preferential criteria for access to a job. The beneficiaries are harmed by the stigma of incompetence associated with the person believed to have been selected on the basis of competence detached. Members not selected tend to feel they were victims of injustice, which usually leads to resentment. Moreover, those who know they were chosen preferably can question their own competence51.

In fact the state should be cautious in using these measures and seek to establish targets rather than quotas, as well as opt for a margin of proactive decision-making52. This warning is valid

for all fields of action of positive action, not just those that provide criteria for preferential access to employment.

It's really important to make a joint consideration of equality, individual freedom and other rights or interests that might come out injured with such measures, to assess the appropriate level of intensity or magnitude of positive action.

Certainly we believe to be legitimate state to intervene with measures promoting greater involvement of men at housework. We do not understand, however, that these measures may assume the nature of charges that leave no alternative to the individual, in other words, that amounts to a dispossession of the freedom of personal choice and self-organizing family. A margin of self-organization must be left to individuals and families, in order to allow them to choose the best concrete way to protect their individual/family interests. Only they can evaluate the best way to pursue those goals. Taking that margin of liberty apart could, in fact, jeopardize the family’s interest, specially the children’s ones, what can not be accepted.

So, the aim is to develop a balanced model, midway between the substantive model (which "imposes" equality) and the symmetric model (that is averse to corrective measures of inequalities) - the equal opportunities model, as a model catalyst of material equality but regarding the importance of individualism. The aim is to equalize the starting point for men and women without detracting from the importance of the right to individual freedom.

We think rather that the State may create strong incentives for the reversal of traditional sexual division of labor, by compensating those who choose to challenge this model and join a new, more egalitarian one. Concrete measures could then consist either in the preferential treatment of women in the labor market or in preferential treatment of men who boldly embrace the work in the household.

Thus, the law can help societies to achieve the equality between the sexes through positive action measures that:

- encourage men to go home and assume familiar responsibilities; it’s urgent that the standards change; the experience of parenthood has to acquire the status of a normal pattern and be assimilated within the labor market.

53 We follow BROWNE when he says that society expects much of its members but that expectation, by itself, does not guarantee the outcome, so mechanisms that force the expectations have to be built up sanctions on those who fail in the undertaking have to be imposed. However, continues the author, a free society is limited in its ability to force the expectations about who stays at home with a sick child – BROWNE, Kingsley R, Biology at work – Rethinking Sexual Equality, Rutgers University Press, New Brunswick, New Jersey and London, 2002, p. 135.


55 “Mothering should be thought of as an ethical practice, as embodying an ideal of goodness. As an idealized notion, motherhood should not be confined to women but be a societal aspiration for all members of the community” – FINEMAN, apud LAUFER-UKELES, Pamela, «Selective recognition of gender difference in the law: revaluing the caretaker role», Harvard Journal of Law and Gender, vol. 31.1, Winter 2008, pp. 36-37.

56 VINCENT DUINDAN conducted a study with 182 parents who took care of children in the Netherlands, where men usually worked full time. Only 2-5% of parents worked part-time to take care of their children. Although many women are wage workers, a substantial number left their job when became mothers and most of them had part-time jobs, often within hours per week. Already the parents who took care of their children and their mates
specifiquement à la femme en raison de ses charges domestiques, mais d’une organisation plus efficace de l’avie de couple et en société”. We should hence consider measures to encourage men to overcome the barriers placed upon it, for example increasing the parental leaves that can be taken by men and benefitting economically those who actually use them; or reducing the time of parental leave if it isn’t shared by the progenitors (and could be);

- encourage women to take the studies they need to be promoted and encourage both sexes to get into the areas where they are least represented, for example providing them the right to use some work time to go to classes (more time if they choose to study an area where they are underrepresented) and benefiting economically the employers who reach predetermined ‘equality standards’.

had a similar investment in paid work: they both worked part time (approximately 30 hours per week). These men and women were highly educated and had a vision of emancipated division of chores. Moreover, set against the idea that men who play ‘women's work’ lose status and masculinity, and that household chores are heavy and expensive, the men felt that being a caring father was gratifying, particularly in three aspects: 1) led to a direct relationship with the children, that was much deeper and more fulfilling than a relationship mediated (86% of parents said they like their relationship with their children, speaking of ‘tenderness’, of ‘being a witness’ and ‘sharing important things’; 2) led to a more complex life by continuing the two types of work (32% of parents indicated that being a caring father had made their lives richer and more complete); 3) for 20% led to a relationship with their partners. Over 80% of these parents had their careers as ‘important’ or ‘very important’. However, if they had to choose between being employed or be a 100% men home, 28.3% would opt for the latter. Most men in the group (67%) said that there have been obstacles when they tried to achieve paternity, almost all associated with the development of part-time work, flexible working hours and the resistance of employers, superiors, and (less often) colleagues who have noted their disloyalty and lack of availability. Some were faced with a superior who strongly advised them to give up the idea of working part time. One of them was even forced to take a month vacation to think about it! – DUINDAN, Vincent, «Men in Household: Caring Fathers», Gender, Power and the Household, Macmillan Press, London, 1999, pp. 43-57. In turn, in the USA were identified over than 20 cases where the courts ruled in favor of plaintiffs who tried to exceed the ceiling of motherhood. These cases, based on federal norms, state public policy and constitutional rights, gave rise to approximately 10 viable legal theories. The decisions of these cases demonstrated the reality that men, like women, are affected by the barrier of parenthood when applying for parental leave or take on the traditionally female role of child care – WILLIAMS, Joan C. and SEGAL, Nancy, «Beyond…», op. cit., pp. 78-79.

58 “Unless it becomes acceptable for men to feel hurt, for men to leave roles that foster aggression, for men to complain about the effect of gender role stereotypes, and for men to participate move fully in realms traditionally occupied by women, feminism has little chance of moving forward or expanding its audience. Feminist legal theorists need to explore constructs of masculinity towards the end of promoting practices and politics of masculinity that comport with feminist objectives” – LEVIT, Nancy, The Gender ..., op. cit., p. See also MILEWSKI, François, “Femmes…”, op. cit., pp. 54-55: “Certes, la loi précise: «l’un des deux parents». Est-ce suffisant? Faut-il contraindre les Peres à prendre un congé, en en faisant une condition de l’accès? Établir des congés non transférables, des quotas de Peres?” and PÉRIVIER, Hélène, «Emploi des mères et garde des jeunes enfants en Europe», Revue de l’OFCE que conclui a sua análise afirmando que “les congés parentaux doivent être aménages de façon à ce que leur recours soit plus également réparti entre les femmes et les hommes (…) De nos jours, les contraintes professionnelles façonnent encore le comportement des Peres vis-à-vis de la prise en charge des enfants, alors que les contraintes familiales déterminent encore l’emploi des mères: rééquilibrer ces tendances est un enjeu majeur par une société moderne”.

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